International Litigation in Asia:
Will the Hague Choice of Court Convention Make Any Difference?

Asia is characterised by divergent legal traditions and systems. How much difference the Hague Convention on Choice of Court Agreements will make on the cross-border litigation scene in Asia depends on: (1) how different the Convention scheme is from those of individual Asian countries; (2) how many and which of these countries actually adopt the Convention; (3) what issues are left out of the scope of the Convention; and (4) the degree of harmony there will likely to be in the interpretation and application of the Convention. These issues are explored from the perspective of Singapore law, in particular the considerations which are relevant to the question whether or not Singapore will adopt the Convention.

Introduction

1. The problems of international litigation are three-fold: (a) which court should hear the case; (b) what law should be applied to resolve the dispute, and (c) the effect of the resulting judgment in other countries. All civilised countries have developed principles of private international law (or international civil procedure) to deal with problems arising from conflicting rules from different municipal legal systems. The main failing of private international law is that it is essentially a domestic law subject, and thus differences between private international law systems is itself a source of difficulty. Harmonisation is often put forward as the solution.

2. One recent harmonisation effort which is of potential significance is the Hague Convention on Choice of Court Agreements 2005 ("Hague Convention"). It aims to foster international trade through judicial co-operation by the mutual enforcement of choice of court agreements and the recognition and enforcement of the resulting judgment. It hopes to create a regime in international litigation which will replicate the success of international commercial arbitration, to provide commercial parties with greater choices of dispute resolution mechanisms. Presently, many commercial parties prefer arbitration to litigation for two reasons. The first is the wide enforceability of the resulting award under the New York Convention. The second is the confidentiality of proceedings. There used to be a third advantage of speed and cost, but this particular advantage is diminishing if not it has not already vanished. If it turns out to be successful, the Hague Convention will provide the same advantage of wide enforceability. What will remain of the key advantages of arbitration will be confidentiality of proceedings.

3. Asia is well-known for its diversity of cultures and languages. This diversity is also reflected in the legal systems and dispute resolution cultures. From the point of view of facilitating international trade, Asia needs to preserve diversity of choices of dispute resolution mechanisms. Parties should be able to choose litigation, arbitration or mediation, or a combination of these, in accordance with their own cultural preferences. The main objective of the Hague Convention in this context is to make litigation a more viable choice for dispute resolution. Will the Convention make any difference to the current situation in Asia? I cannot speak for any other country than Singapore, and I use that as a platform to discuss the potential impact of the Hague Convention.

Difference between the Convention and the existing domestic law

4. One key factor that will be considered by governments in deciding whether to adopt the Hague Convention will be what changes the Convention will effect within its own country, ie, to what extent will the proposed rules depart from the existing rules. The greater the differences, the more reasons the country may need to see to adopt the Convention.

5. In this context, the Hague Convention is deceptively similar to the common law that applies in Singapore, both in terms of the assumption of jurisdiction as well as in the recognition and enforcement of foreign judgments. Under Singapore law, jurisdiction over a defendant for the purpose of an *in personam* claim (ie, an action determining personal rights and liabilities in contrast to rights in things) can be established by service of process on the defendant. Process may be served within the territory if the defendant is present to be served, or if the defendant has agreed to a mode of service within the territory. Process may be served outside the territory if leave of court is obtained. Leave may be obtained in many situations where the defendant or the subject matter of the dispute is connected in certain specified ways with Singapore. One key provision is that leave may be obtained if the defendant had agreed to submit to the jurisdiction of the Singapore court. This will be the case where the agreement between the claimant and the defendant contains a choice of Singapore court agreement, whether it is exclusive or non-exclusive.

6. The common law distinguishes between the concept of existence and the exercise of jurisdiction. The issue of exercise of jurisdiction has led to much litigation in itself, and the formulation of a complex *forum non conveniens* doctrine of judicial discretion. Where there is an exclusive choice of court agreement, however, the *forum non conveniens* doctrine is not applicable. What applies instead is a more limited discretion. The starting point is that the exclusive choice of court clause, provided that it is valid and it covers the dispute in question, will be given effect to unless it is unreasonable in the circumstances to do so. There is still some degree of judicial discretion, but it is not simply about the balancing the factors of costs and convenience as in the case of *forum non conveniens*. So the result is that in most cases, the Singapore would not exercise its jurisdiction if there is an exclusive choice of foreign court clause. In practically all cases, the Singapore court will exercise its jurisdiction if there is an exclusive choice of Singapore court agreement.

7. Essentially the same result is obtained under the Hague Convention. However, there are three key differences from the common law. First, while the validity of the choice of law clause in the common law is seen as a contractual issue governed by the law governing the choice of court agreement (which, in the absence of express choice and contrary indications, is usually taken to be the law governing the main agreement), under the Hague Convention, the issue is governed by the law to be applied by the chosen court. Secondly, where the common law applies to the interpretation of the choice of court clause, whether it is exclusive is a matter of interpretation of the contract with no presumption either way, while the Hague Convention presumes that a choice of court clause is exclusive unless shown otherwise. Thirdly, while under the common law, an exclusive choice of Singapore court agreement would not deprive the Singapore court of its discretion to stay proceedings, there is no discretion under the Hague Convention. Situations where the Singapore court would not exercise jurisdiction where it is the exclusively chosen court would be rare. There is no reported case where this has occurred, but in England the discretion has been exercised in complex litigation involving multiple parties not all of whom were bound by the exclusive choice of English court clause.

8. There is a fourth latent distinction in the situation where there is an exclusive choice of foreign court agreement. Whether and how the Convention approach will be different from

the common law approach remains to be seen, because there is a question of how the courts will interpret the provisions of the Convention on this point. On the whole, it is more likely than not that the Convention conditions for taking jurisdiction in spite of an exclusive choice of foreign court agreement will be stricter than under the common law.

9. So on the whole, the main changes to Singapore law on the jurisdiction front if the Hague Convention would be (a) the strengthening of the enforcement of contracting parties' choice of court agreements; (b) the restriction of judicial discretion in such cases; (c) the presumption of exclusivity in choice of court agreement; and (d) testing the validity of the choice of court clause by the law that will be applied by the chosen court.

10. The Hague Convention is also superficially similar to the common law where foreign judgments are concerned. A foreign in personam judgment (pronouncing on the rights and liabilities of the parties as opposed to the status of a thing) may be recognised in Singapore if it comes from a foreign tribunal which is a court of law with competent jurisdiction in civil proceedings over the subject matter of the dispute and over the party sought to be bound, the judgment is final and conclusive on the merits of the decision, and the foreign tribunal has international jurisdiction over the party sought to be bound. Essentially, international jurisdiction means that the party sought to be bound must be present, or perhaps resident, in the foreign territory at the time the foreign proceedings were commenced, or if that party had submitted or agreed to submit to the jurisdiction of the foreign court. Agreement to submit includes both exclusive as well as non-exclusive choice of court agreements. International jurisdiction is determined by Singapore law; this means that whether the parties have submitted to the foreign court is an anterior question to be determined by Singapore private international law before the foreign judgment can have effect in Singapore. Defences to recognition and enforcement includes breach of natural justice, fraud, and contravention of the fundamental public policy of Singapore.

11. In addition, a foreign judgment may be enforced if, but only if, it is for a fixed or ascertainable sum of money. Foreign judgments may simply be pleaded and produced evidence in court to be recognised. To be enforced, the claimant must sue on the foreign judgment because in common law theory the foreign judgment creates a debt which the claimant must then enforce in the usual way. The Reciprocal Enforcement of Commonwealth Judgments Act and the Reciprocal Enforcement of Foreign Judgments Act allow for judgments from gazetted countries to be registered and enforced in the same way as Singapore judgments (thereby bypassing the need to commence a fresh legal suit). The statutory requirements for registration are similar to the common law requirements for the recognition of foreign judgments. Few countries have been gazetted so far; gazetting depends on bilateral state-to-state agreements.

12. Thus, where parties have agreed to the choice of a foreign court in relation to a dispute, a judgment from that court can be recognised in Singapore, and it can also be enforced if it is for a fixed or ascertainable sum of money.

13. The result is very similar to the effect of the Hague Convention. The main changes that the Hague Convention will have on Singapore law where foreign judgments are concerned are: (a) a Convention judgment may be enforceable even if it is not for a sum of money (eg, order for specific relief); and (b) a Convention judgment can be binding on the issue of the validity and scope of the choice of court clause upon which it bases its own jurisdiction; and (c) Convention judgments will be directly enforceable in Singapore.

14. In summary, while the Hague Convention scheme is broadly similar to the common law approach, there are some differences. However, the changes will not be radical. The net result will be stronger enforcement of choice of court agreements and stronger effect to be given to the resulting judgment than under the common law. There is a corresponding loss of flexibility in dealing with jurisdiction and judgments in such cases.

15. The Convention may well also have effect beyond its strict legal scope. A contract may contain a choice of court clause which is presumed to be exclusive for the purpose of the Convention, but which may not be exclusive if the common law approach is applied. It is not clear what its status would be for purposes which are outside the scope of the Convention. One argument is that this clause would be exclusive for Convention purposes but non-exclusive for non-Convention purposes (eg, for interlocutory measures, and for injunctive and other contractual relief). An opposing argument is that once the Convention bites on the choice of court clause, the meaning of the clause is defined by the Convention, even if some effects of the clause are not regulated by the Convention. This means that the Convention may have further side-effects on the common law in areas outside its scope.

16. Whether these changes are a reason for against adopting the Convention is a different question. While party autonomy is an important feature of the common law view of private international law, flexibility is also an important hallmark of the common law. Party autonomy is not an unqualified value, and there remains some concern about the use of dominant bargaining power which does not amount to the vitiation of the choice of court agreement as a matter of law. Thus, this factor by itself is not likely to tip the balance for the decision-makers to adopt the Convention.

Difference the Convention makes to the effect of judgments in other countries

17. From the political and pragmatic perspective, the most important change that the Hague Convention can bring about is the effect of a Singapore judgment in other countries. At present, where the Singapore judgment is the result of a choice of court agreement (whether exclusive or non-exclusive), the judgment is likely to be recognised in most common law countries (because the agreement to submit amounts to international jurisdiction). It may be recognised or enforced in some civil law countries which adopt a reciprocity test. It may not be recognised in some countries at all. It is likely to be enforceable in another common law country provided that it is for a fixed or ascertainable sum of money.

18. The Hague Convention has the potential of widening the effect of Singapore judgments in foreign countries, and this may well be the most persuasive argument from the political perspective. However, the weight of this factor is essentially an economic one. Singapore's eight major trading partners are: China, European Union, Hong Kong, Indonesia, Japan, Malaysia, South Korea and the United States. EU and US have signed the Hague Convention. Singapore's incentive to sign will likely depend on the likelihood of the other of these countries joining the regime. Another economic factor is the growth of intra-ASEAN trade and the ambition of ASEAN economic integration; this may provide some impetus within ASEAN to harmonise dispute resolution rules, and the Hague Convention may be viewed as a convenient vehicle.

The Scope of the Convention

19. How much impact the Hague Convention will have depends on the scope of the Convention. It applies to civil and commercial matters and to international contracts. The main target would be cross-border commercial contracts. Significantly, international carriage of goods contracts are excluded. This is a complex area governed by competing international conventions which can affect the jurisdiction of the court; it is also an area where party autonomy is restricted by legislative transposition of parties to contracts. There is scope for exclusions of further areas of law; but the Convention will be less useful if more areas are excluded.

Interpretation of the Convention

20. There is certainly a risk that the Convention may be interpreted in dissimilar ways by courts in different countries. Unlike the European Union which has the European Court of Justice as the final arbiter of the meaning and effect of the European regulations, there is no such body in this case. However, it is likely that courts will cross-refer to decisions of other Contracting states as a matter of international comity, though they cannot be bound by these decisions and must ultimately come to their own conclusions. Practical steps can be taken to promote harmonisation, like the setting up of internationally accessible databases and perhaps regular academic and judicial conferences.

Conclusion

21. The Hague Convention position is not radically different from the common law. The changes it will bring to common law countries are not likely to be radical. The strengthening of the regime to give effect to party choice of court, and more importantly the enforcement of the resulting judgment, will give commercial parties greater certainty in their transaction planning and smoothen the course of international trade. At the same time, there are likely to be concerns based primarily on national issues. These include the costs involved in re-educating the legal profession about the new legal regime, the complexity of maintaining dual regimes for choice of court clauses (because of the scope of the Hague Convention), possible diversity of interpretation of the Convention, loss of flexibility in the court's powers, and the risk of abuse of dominant bargaining positions.

22. In March 2013, the Law Reform Committee of the Singapore Academy of Law, recommended a wait and see approach towards the Hague Convention. One major reason for Committee taking this position was that the practical benefits of the Convention will not materialise until more of Singapore's major trading partners become party to the Convention. On the other hand, from Singapore's perspective, early adoption of the Convention would be consistent with its aim to be a regional hub for international commercial litigation. On 25 August 2013, the Chief Justice of Singapore, Mr Sundaresh Menon, gave a speech to delegates of the ASEAN Law Association forum in Singapore, where he called upon the 10 member states to look into signing the Hague Convention, as a ready-made platform for ASEAN to harmonise its laws in the area of dispute resolution. It seems likely that Singapore will sign the Convention sooner rather than later.

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[The author has dealt with the issues from the Singapore perspective in greater detail in the Report of the Law Reform Committee on the Hague Convention on Choice of Court

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