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CHOICE OF COURT CONVENTION (HCCC) AND ARBITRATION

International arbitration and transnational litigation are two competing dispute settlement mechanisms (DSMs). At present, it seems that international arbitration has the upper hand, being “the most popular method for resolving international business disputes”.¹ Yet, this lineup may eventually change in the future, since international arbitration has been exposed to increasing criticism due to some of its inherent disadvantages.² It is particularly denounced for its high costs.³ Due to extravagances of its newest, investment arbitration branch there is a growing disenchantment and disillusionment among its followers. The scene is set for the demise of arbitration from the pedestal of the favorite DSM. Nonetheless, in order for its major competitor to take its place, some infrastructural changes are in order. One of them is putting in place a reliable instrument that will ensure the enforceability of judgments across the continents. The Hague Conference on Private International Law has offered such an instrument in 2005 with the enactment of the Hague Choice of Court Convention (“the HCCC”).⁴ It will be discussed to what extent will the adoption of the Convention “redress the current imbalance in favor of international commercial arbitration as the preferred dispute resolution method for cross-border business transactions.”⁵

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The HCCC entered into force on 1 October 2015 between Mexico and the European Union. Thanks to wide membership of the European Union, it already applies in 29 States. The ratification by the European Union will probably inspire some other States to follow suit. This paper will examine the relationship between arbitration and litigation in

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1) R. Garnett, *The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?* *Transnational Dispute Management*, vol. 8, issue 2, 2011, 11. PWC, Queen Mary Survey, *Corporate Choices in International Arbitration*, Industry choices, 2013, 4 <https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>

2) *Ibidem*, 2.

3) PWC, 4.

4) *Convention of 30 June 2005 on Choice of Court Agreements* <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98>

5) R. Garnett, 11.

the context of the HCCC. It will first comment upon the relationship between this convention and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Then it will consider the potential of the HCCC to level the playing field in the area of dispute resolution. Another topic of concern is the effect of the newcomer on the market, the HCCC upon the complex mechanism of international justice. Is the HCCC going to be the source of improved legal certainty or rather, a source of greater uncertainty? Such greater uncertainty might arise from the fact that the relationship between arbitration and litigation is not clearly defined or fully resolved in the HCCC.

The Hague and the New York Conventions

The Hague Convention has an ambivalent stance towards the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (“the NYC”). On the one hand, by its wording, as mentioned in the explanatory report, the HCCC pays a tribute to the NYC.⁶ The NYC was indeed “the model which the drafters of the HCCC hoped to emulate”.⁷

It is very much built on the foundations of the NYC, and is considered to be its litigation analogue or equivalent.⁸

“In general, the Member States viewed this proposed Convention as achieving for such agreements and the resulting judgments what the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards accomplishes for agreements to arbitrate and the resulting awards.”⁹

“1. **The Aim**.....The hope is that the Convention will do for choice of court agreements what the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 has done for arbitration agreements.”¹⁰

147.”case law under the New York Convention could furnish a

6) UNTS Vol. 330, p. 3. The NYC entered into force on 7 June 1959 and is in force in 156 States.

7) R. Garnett, 11.

8) L.E. Teitz *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, *Transnational Dispute Management*, vol. 3, issue 5, 2006, 548, citing Peter Trooboff, *Foreign Judgments*; *International Law*, *National Law Journal* 13 (Oct. 17, 2005).

9) T.C. Hartley, M. Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements Explanatory Report*, 17 <<http://www.hcch.net/upload/expl37e.pdf>>.

10) *Ibidem*, 21.

valuable guide to the interpretation of the Convention.”¹¹

On the other hand, there is no doubt that the HCCC and the NYC are competing international instruments. This results firstly from the subject-matter scopes of application of both conventions. The exclusion of non commercial-claims, such as family law matters, tort claims, wills and successions, etc. from the scope of application of the HCCC makes it cover the same commercial claims covered by the NYC. Second, the HCCC supporters hope that this Convention might succeed in making litigation „a viable alternative“ to arbitration;¹² that it will enable transaction lawyers to make a “more balanced choice”.¹³ The idea behind it is that the difficulties of enforcement of foreign judgments are preventing the State courts from being “a viable alternative“, ¹⁴ a worthy competitor. This expression is repeated in the Conclusion of the ABA document recommending the ratification of the HCCC by the United States:

“The Convention is also a means of dispute resolution, providing *a viable alternative to arbitration*”.¹⁵[emphases added]

The European Commission also supports the Convention on the 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*”.¹⁶ [emphases added]

Potential of the HCCC to Level the Playing Field

Admittedly, the idea that better international enforcement of judgments could propel the use of litigation as an alternative DSM in international contracts has some merit. It is generally accepted that one of the top advantages of international arbitration, as opposed to transnational litigation, is the ease and certainty of enforcement of foreign arbitral awards. This fundamental advantage can be relatively quickly

11) Ibidem, 47.

12) L.E.Teiz, 548.

13) R.A. Brand, Arbitration or Litigation? Choice of Forum After the 2005 Hague Convention on Choice of Court Agreements, *Transnational Dispute Management*, Vol. 7 issue 1, 2010, 2.

14) Ibidem.

15) American Bar Association House of Delegates August 7-8, 2006 *Recommendation*. <http://apps.americanbar.org/intlaw/policy/investment/hcca0806.pdf>

16) *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, paragraph 1.

removed by wide ratification of the HCCC. Still, is that all that is needed to create “a level playing field for choice of court and arbitration agreements”?¹⁷ Will this by itself provide equal power on the dispute resolution market for international arbitration and State court litigation? Australian author Richard Garnett is skeptical about these claims, and mentions two other advantages of arbitration that will be hard to compete with: neutrality¹⁸ and procedural flexibility.¹⁹ In all truth, even with the HCCC in place, it is not going to be easy to persuade a transaction lawyer from Austria or Germany, for example, to enter into a choice of court agreement in favor of Bosnian, or Serbian courts, because he or she might be apprehensive that the Bosnian or Serbian court might be biased. The Bosnian or Serbian lawyer, on the other hand, might sense the same apprehension regarding the jurisdiction of the München or Viennese state court. It will remain much easier to persuade both sides to arbitrate in Paris, for example, than to concede to the national court jurisdiction of the other party. As for *procedural flexibility*, it is often observed that arbitration rules are not as strict as court rules.²⁰ Arbitrators have much more discretion than judges. There is also greater possibility for the lawyers to influence the composition of their own tribunal. Procedural flexibility of arbitration also allows the parties to rely on their own, domestic counsel, while they would have to engage e.g. Austrian or German counsel if they were to agree upon jurisdiction of an Austrian or German court.

Most importantly, success of litigation on the dispute resolution market is not guaranteed due to the existence and wide use of non-negotiated contracts. There are nowadays significant areas of international trade and investment where arbitration does not happen spontaneously, on the basis of true choice of the parties or their counsel, or on consideration of merits of one or another DSM, but arrives as a result of the use of standard clauses. This means that decision-makers making such choices are removed from particular countries from which the parties come, and may be hard to convince. The best known examples that come to mind are FIDIC general conditions, World Bank infrastructure contracts, athletes' contracts, GAFTA and FOSFA contracts, etc.

17) R.A. Brand, 12.

18) PWC, 7.

19) R. Garnett, 12-13.

20) However, more recently, concerns were voiced over the “judicialisation” of arbitration, the increased formality of proceedings and their similarity with litigation, along with the associated costs and delays in proceedings. PWC, 5.

For example FIDIC's general conditions of contract are widely used in construction industry.²¹ FIDIC has several books for different contracts, the most widely used being the Red book. All FIDIC books contain a very similar multi-tiered dispute resolution clause (numbered 20) which provides for the ICC arbitration as the last step, unless otherwise specified. Approximately 14.3% of ICC arbitrations around the world are based on FIDIC clause 20.²² It is, of course, open to the parties to agree to a different arbitration, or to substitute the provision for a choice of court clause. However, the express presence of the ICC route creates a strong presumption in its favor. This clause is rarely changed by the transaction lawyers. Additionally, there is FIDIC's involvement with the World Bank and also with "a loose association of other international banks referred to collectively as the Multilateral Development Banks (MDBs)."²³ The World Bank issued its first Standard Bidding Documents for Works (SDBs) in 1995.²⁴ The SDBs incorporated the 4th edition of the FIDIC Red Book, but then set out a list of amendments, some of which were mandatory and others only recommended. This document exerted considerable influence upon the procurement of international infrastructure projects of the kind funded by IBRD in developing economies.²⁵ FIDIC then took a number of provisions previously only "recommended" in the SDB and actually made them part of its 1999 Rainbow suite, including the new Red book.²⁶ Finally, in 2010 the MDB harmonised version of the Red Book appeared.²⁷ The MDB version of the Red Book provides for UNCITRAL arbitration, and if not agreed, ICC arbitration for international infrastructure projects. Again, the parties' lawyers formally have freedom to replace the arbitration clause with a choice of court clause, but since the Banks are financing the projects, they often do not actually have enough maneuvering space to exert such a change. To conclude on this topic: "any suggestion that the Hague Convention will lead to the quick displacement of interna-

21) The first edition of the Red book appeared in 1957. It was based on English general conditions of contract. J. Glover, FIDIC an overview: the latest developments, comparisons, claims and a look into the future, Fenwick Elliott, www.fenwickelliott.co.uk

22) E. Baker, B. Mellors, S. Chalmers, A. Lavers, *FIDIC Contracts: Law and Practice*, CRC Press, 2013, 8.

23) *Ibidem*, 10.

24) *Ibidem*.

25) *Ibidem*.

26) *Ibidem*.

27) F. Gillon, FIDIC: Red Book (1999) and MDB Harmonised Edition (Pink Book) compared, Fenwick Elliott.

tional arbitration by litigation seems farfetched.”²⁸

Nevertheless, its potential to change the distribution of power on the DSM should not be underestimated. It will enable immediate change in those fields that are not predetermined by non-negotiated standard clauses, and in those cases where one of the parties has enough bargaining power to impose its own national courts. For that reason, the convention’s effects upon the mechanism of international justice should be seriously considered. In the following section, some reflection on the topic of how does the HCCC affect potential occurrences of parallel arbitration and litigation will be offered. How does the convention deal with arbitral awards and judgments rendered on the same subject matter? A term will be borrowed from a colleague who calls these jurisdictional conflicts complex, because, they involve not only two jurisdictions, but also two different DSMs.

The Hague Convention and Complex Conflicts of Jurisdiction

It is important to note that the HCCC makes a sweeping exclusion of arbitration from its scope of application (although arbitral matters may well be the subject of adjudication). It excludes arbitration, without defining some important areas where the two DSMs may collide. Such collision may arise from:

1. “double choices” – i.e. contracts providing for both arbitration and choice of court clauses – and relationship between judicial proceeding initiated under the choice of court agreement, valid under the convention and an arbitration proceeding initiated upon a valid arbitration agreement; or
2. transformation/merger of an arbitral award into a judgment.

Double and triple choices

In 2002 the International Chamber of Commerce (ICC) carried out an empirical research which showed that it is a common practice between parties to conclude both a choice of court agreement and an arbitration agreement in the same contract.²⁹ As a matter of fact, the author experienced this in her own arbitral practice. For example, in a contract between an Italian and a Serbian company, the following provisions were found:

28) R. Garnett, 14.

29) A. Schulz, The Future Convention on Exclusive Choice of Court Agreements and Arbitration, *Transnational Dispute Management*, vol. 3, issue 5, 2006, 5.

Article 5

All disputes that may arise out of this contract shall be resolved by the court in Torino, applying Italian law.

Article 7

In case of dispute the International Court of Arbitration of the International Chamber of Commerce in Paris shall have jurisdiction. The place of arbitration shall be Belgrade, and the language of arbitration Serbian.

A “double choice” is so common that it made its way to 22nd Vis Moot Problem in 2014, wherein the contract contained the following provisions:

Art 20: Arbitration

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said Rules. The seat of arbitration shall be Vindobona, Danubia, and the language of the arbitration will be English. The contract, including this clause, shall be governed by the law of Danubia.

Art 21: Provisional measures

The courts at the place of business of the party against which provisional measures are sought shall have exclusive jurisdiction to grant such measures.³⁰

The “double”, or even “triple choices” are also common in bilateral investment treaties (“BITs”). For example, the BIT between Slovenia and Bosnia contains the following dispute resolution clause:

Article 8

Settlement of disputes between an investor and a Contracting Party

1. Any dispute which may arise between one Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party shall be settled amicably through negotiations.

2. If such dispute cannot be settled within three (3) months from the date of a written request for settlement, the investor concerned may submit the dispute to:

30) 22nd Vis Moot. <https://vismoot.pace.edu/site/previous-moots/22nd-vis-moot>.

a) The competent court or administrative tribunal of the Contracting Party in the territory of which the investment has been made; or

b) An ad-hoc tribunal which, unless otherwise agreed upon by the parties to the dispute, shall be established under the Arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL); or

c) The International Centre for the Settlement of Investment Disputes (ICSID) through conciliation or arbitration, established under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the “ICSID Convention”), opened for signature in Washington D.C., on March 18, 1965.

Preferably, only one of these routes will be used, so that no conflict will occur. Actually, it may also happen that one party resorts to one, and the other party to the other DSM, or even that one and the same party resorts to both. There are indeed many factual possibilities of conflict. They will be divided into those that occur at the jurisdiction stage, followed by those that occur at the recognition stage.

Conflicts at the stage of jurisdiction

When the dispute comes before the chosen court of the Contracting State, and in the first example above that would be the Italian court, the court is seized of the action and it must decide whether to accept jurisdiction on the basis of the choice of court clause covered by the HCCC, or to decline jurisdiction and refer the parties to arbitration (in this case the Belgrade ICC administered arbitration). For the purposes of this hypothetical, it can be assumed that Serbia is a Contracting Party not only of the NYC but also of the HCCC. The Italian court will need to look into the provision of the HCCC to establish whether it is given clear instructions on what to do. It should be pointed out that the contract clause – Article 5 – providing for the jurisdiction of court in Torino, may be defined as an exclusive choice of court agreement under Article 3 of the HCCC.

Exclusive choice of court agreements

For the purposes of this Convention –

a) “exclusive choice of court agreement” means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the

courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;

b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;

Apparently, the presence of the arbitration clause in the same contract does not affect the exclusive nature of the choice of court clause. Pursuant to Article 5(2) the court seized that has jurisdiction has a duty to exercise that jurisdiction:

Article 5(2)

A court that has jurisdiction under paragraph 1 [the chosen court] shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.

But, as strange as this might seem, the exclusiveness of the choice of court agreement does not represent an obstacle to dismissal in favor of arbitration. This is affirmed by the author that made the first effort to explain the relationship between the new Convention and arbitration, the definition of an 'exclusive' choice of court agreement under the [...] Hague Convention [...] does not contain any reference to arbitration; the important thing is only that it implies a choice of one or more courts to the exclusion of any other *State courts*.³¹ [brackets and emphases added]

“Thus the mere fact that a choice of court agreement under the Hague Convention is exclusive, does not yet say anything about its relationship with a possible agreement to arbitrate. Therefore a closer look at the possibility of parallel proceedings is necessary.

Article 5(2) of the HCCC provides that the chosen court *must not* decline jurisdiction on the ground that the dispute should be decided in a court of another State. It does not provide the same prohibition on the ground that the dispute should be decided by arbitrators in another State. So, Article 5(2) does not prevent the Italian court from staying or dismissing the proceedings on the basis of a valid arbitration agreement.³² It is actually Article 2(4) HCCC – the so-called “arbitration exception” – that implicitly allows the chosen court to stay or dismiss the

31) A. Schulz, 14.

32) Ibidem, 4.

proceeding because of a valid arbitration agreement.³³

Arbitration exclusion – Art. 2(4)

This Convention shall not apply to arbitration and related proceedings.

This allows States to comply with their obligations under the NYC Convention (Article II), to respect valid arbitration agreements.³⁴ Therefore, if the Italian court wants to refer the parties to arbitration, it is to rely on the arbitration exception in Article 2(4) of the HCCC and on Article II of the NYC, or the equivalent provision in its national arbitration law. The appropriateness of such course of action is confirmed by the text of the Explanatory Report:

- Paragraph 4 [of Article 2 of the HCCC] excludes arbitration and proceedings relating thereto.
- This should be interpreted widely and covers any proceedings in which the court gives assistance to the arbitral process – for example:
 - deciding whether an arbitration agreement is valid or not;
 - *ordering parties to proceed to arbitration or to discontinue arbitration proceedings;*
 - revoking, amending, recognizing or enforcing arbitral awards;
 - appointing or dismissing arbitrators;
 - fixing the place of arbitration;
 - or extending the time-limit for making awards. [brackets and emphasis added]

If the court decides that both the jurisdiction clause and the arbitration clause are valid, the further course will depend on its interpretation of the “will of the parties”.³⁵ So, the Italian court may decide that the arbitration clause takes precedence, and refer the parties to arbitration. Conversely, and I would say more likely, the Italian court may decide that it has jurisdiction because the choice of court clause is valid, too, and while the parties had an option between the two DSMs the claimant validly opted for the courts. If the respondent initiates arbitration in Belgrade, the arbitrators may also assess that they have jurisdiction

33) Ibidem.

34) Ibidem.

35) A. Schulz, 5.

pursuant to the arbitration clause. What ensues are two parallel proceedings that are going on – a litigation in Italy and an arbitration in Belgrade.

There is no *lis pendens* rule in the NYC that would prevent this from happening, whereas the *lis pendens* rule in the HCCC – Article 6 – is limited to avoiding parallel litigation:

Obligations of a court not chosen

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless –

- a) the agreement is null and void under the law of the State of the chosen court;
- b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;
- c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;
- d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
- e) the chosen court has decided not to hear the case.

This rule does not address the situation of a parallel arbitration clause that applies to the contract that also includes a choice of court clause. It does not prevent the Italian court from continuing the proceedings although the arbitration is pending in Serbia. Likewise, the same provision would not prevent the Serbian court from referring the parties to arbitration, as the arbitration exclusion (Article 2(4) HCCC) hypothetically applies in that court, too. Any judicial proceedings related to the ICC arbitration, possibly initiated in the Serbian court would be beyond the scope of the HCCC.

Thus, as the two proceedings may continue in parallel, it could eventually occur that there are two conflicting decisions – one by the Italian court and the other, by the arbitrators in Serbia. Supposing that the Italian party prevails in the Italian judgment, and that the Serbian party prevails in the ICC award, there will be a real incentive for each of the parties to enforce the judgment/award against the other. As will be shown, it might be important for the final outcome, which of these de-

cisions has been rendered first.

Conflicts at the stage of recognition and enforcement

One possibility is that the Italian court rendered the judgment earlier. Some months later, the arbitral award is rendered, too. The successful party starts the proceedings to enforce the award in Italy. The Italian court must apply the NYC, Article V:

1. Recognition and enforcement of the award may be refused [...] if that party [against whom it is invoked] furnishes [...] proof that:

(a) [it was] under some incapacity, or the [arbitration] agreement is not valid [...]; or

(b) [it was] not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award [...] contains decisions on matters beyond the scope of the submission to arbitration; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or [...] with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended [...].

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to *the public policy of that country*. [emphasis added]

The purpose of the New York Convention is to limit the grounds on which an arbitral award may be denied enforcement. Notably, Article V does not mention the existence of a previous national (Italian) judgment, as a ground for non-recognition. Hence, in the presence of a conflicting earlier domestic judgment, the Italian court would have to resort to NYC public policy exception to resist enforcement of the ICC arbitral award.³⁶ Public policy would supposedly be triggered by the ex-

36) V. Lazić, The Commission's Proposal to Amend the Arbitration Exception in the ECJ

istence of an earlier judgment in the same dispute which represents a *res judicata* within the national legal system. The principle of *res judicata* could be understood as one of those “fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned.”³⁷ Most probably the inconsistent award would not be enforced in the state where the previous inconsistent judgment was rendered.³⁸

Notwithstanding wide agreement on the need to protect the finality of judgments, such a stance would not be uncontroversial. Some authors opine that the public policy exception under Article V(2)(b) of the NYC should be narrowly construed and should not be triggered simply by the existence of a prior inconsistent judgment in the State of enforcement.³⁹ It also must be acknowledged that the *res judicata* exception appears in many national and international recognition and enforcement documents side by side with public policy, which would indicate that it is distinct from public policy.⁴⁰ Be that as it may, the interpretation of public policy in each national jurisdiction regarding the existence of an inconsistent judgment is a matter for its courts, and entails considerable uncertainty and unpredictability regarding the final outcome.

Conversely, if the winning party from the Italian court proceedings would want to enforce the HCCC judgment in Serbia, it would have to apply to a court. The question is whether the Serbian court would refuse enforcement of a HCCC judgment on the ground that there is an inconsistent arbitral award in the domestic legal system. The HCCC does provide in Article 9(f) and 9(g) for *res judicata* as a ground of refusal:

Recognition or enforcement may be refused if – [...]

f) the judgment is inconsistent with a judgment given in the re-

Jurisdiction Regulation: How ‘Much Ado about Nothing’ Can End Up in a ‘Comedy of Errors’ and in Anti-suit injunctions Brussels-style, *Journal of International Arbitration*, Vol. 29 Issue 1, 2012 23.

37) ILA Resolution 2/2002, International Law Association Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards <http://www.ila-hq.org/download.cfm/docid/032880d5-46ce-4cb0-912a0b91832e11af>, 1(d)(1).

38) P. Jaroslavsky, Damages for the breach of an arbitration agreement: is it a viable remedy?, 44 https://www.academia.edu/17174787/Damages_for_the_breach_of_an_arbitration_agreement_is_it_a_viable_remedy.

39) D. Speller, G. Born, Damages for Breach of an Agreement to Arbitrate – A useful weapon in a post *Wes Tankers World*? *Kluwer Arbitration Blog*, 4 September 2009, 1.

40) A. Schulz, 68.

quested State in a dispute between the same parties; or

g) the judgment is inconsistent with an *earlier judgment* given in another State between the same parties on the same cause of action, provided that *the earlier judgment* fulfils the conditions necessary for its recognition in the requested State. [emphasis added]

Pursuant to the cited provision, recognition or enforcement of the HCCC judgment may be refused if that judgment is inconsistent with a judgment given in the requested state in a dispute between the same parties on the same cause of action, which clearly refers to the definition of *res judicata*. Yet it is doubtful that the term “judgment” encompasses arbitral awards. Article 4 of the HCCC defines the term “judgment” more restrictively: while it includes “any decision on the merits given by a court” it does not include “an arbitral award”

(1) In this Convention, “judgment” means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

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As pointed out by C. Roodth [referring to similar provisions of the Brussels I Regulation] the truth is “that arbitral proceedings are not proceedings pending in a “court” of a Member State, and arbitral awards are not “judgments”.”

- Accordingly, the Serbian court in the case described above, would have three available courses of action before it:
- to enforce the judgment pursuant to the HCCC although it conflicts in substance with the domestic award;
- to conclude that the matter falls out the scope of the HCCC (because there is a domestic award in the same matter), so to refuse enforcement on the ground that the Hague Convention does not apply [Article 2(4)]; or
- to conclude that recognition would be **manifestly incompatible with the public policy** (because there is a domestic award which is *res judicata*) and rely on Article 9(e) of the HCCC.⁴¹

41) HCCC, Article 9(e): recognition or enforcement would be manifestly incompatible with the *public policy of the requested State*, [...].

This second course of action would be hard to justify in the author's view, because, after all, the decision of the Italian court was given in a commercial matter (it was a contractual case), and the issue of validity of the arbitration agreement, if it was ever raised before the Italian court, was decided only as a preliminary issue. So, if it must be done, the better approach would be to refuse enforcement on the ground of public policy (the third course of action), although this approach could lead to some diversity. As pointed out by some authors, there is no uniform answer to the question when an arbitral award acquired *res judicata* effect – whether when the award is made, when it is communicated to the parties, or when it can no longer be challenged. This is left to national arbitration laws.⁴²

As a result, both the Italian court and the Serbian court would probably refuse enforcement on the basis of their own public policies. The outcome would be that neither the judgment, nor the arbitral award would have a cross-border effect. One might say that this is a logical consequence of inserting inconsistent clauses into the contract. Nevertheless, as stated in the beginning, this happens fairly often in practice, so the question is whether such an outcome should have been envisaged in the conventions and perhaps prevented. Admittedly, the same result could have occurred even without the HCCC, as the situation of a conflicting judgment and award could have arisen anyway if the Italian court interpreted the parties will in the way suggested here (i.e. that pursuant to the DSM in their contract, the parties could choose litigation or arbitration). It is still regrettable that Article 9 of the HCCC did not include an inconsistent award as an additional ground for refusal of recognition of a convention judgment. Contrary to some opinions, the inclusion of this term would not have compromised the “arbitration exception” from article 2(4).

Probably the main reason why this term was not included was the effort to keep the HCCC rules in line with the current EU/EFTA rules on jurisdiction and judgments, as contained in the Brussels I Regulation and the Lugano Convention.⁴³ Considerable consistency has been preserved and there is substantial similarity in the wording of these texts. For instance, the Brussels I/Lugano texts also mention the existence of

42) Ch. Roodt, *Border Skirmishes between Courts and Arbitral Tribunals in the EU: Finality in Conflicts of Competence*, in A. Bonomi, G.P. Romano, *Yearbook of Private International Law*, 2011, 137.

43) R. Garnett, 14.

irreconcilable “judgments”, but not “awards” as a an obstacle to enforcement of a member state judgment.⁴⁴ Both texts also contain an identical “arbitration exception”.⁴⁵

Discussing the issue in connection with the Brussels Convention, Schlosser in his 1979 Report concedes that differences in interpretation of the “arbitration exception” that were at that time noted between the UK and the original member states of the EEC may “lead to a different result in practice only in one particular instance”, which is described by him as follows:

If a national court adjudicates on the subject matter of a dispute, because it overlooked arbitration agreement or considered it inapplicable, can recognition and enforcement of that judgment be refused in another State of the Community on the ground that the arbitration agreement was after all valid and that therefore pursuant to Article 1, second paragraph, point (4), the judgment falls outside the scope of the 1968 Convention?⁴⁶

Schlosser basically concludes that there are two opposing views on whether the court of the requested State is free to determine the classification of the matter under “arbitration exception”, i.e. whether the matter belongs to arbitration

In support of the view that this would be the correct course, it is argued that since a court in the State addressed is free, contrary to the view of the court in the State of origin, to regard a dispute as [...] as falling outside the scope of civil law, and therefore as being outside the scope of the 1968 Convention, it must in the same way be free to take the opposite view to that taken by the court of origin and to reject the applicability of the 1968 Convention because arbitration is involved.

Against this, it is contended that the literal meaning of the word ‘arbitration’ itself implies that it cannot extend to every dispute affected by an arbitration agreement; that ‘arbitration’ refers only to arbitration proceedings. Proceedings before national courts would therefore be affected by Article 1, second paragraph, point (4) of the 1968 Convention only if they dealt with arbitration as a main issue and did not have to

44) Brussels I Regulation, Article 45, Lugano Convention 2007, Article 34.

45) Brussels I Regulation, Article 1(2)(4), Lugano Convention 2007, Article 1(2)(d).

46) P.F. Schlosser, SCHLOSSER REPORT 1979, No C 59 / 72 REPORT ON THE 1968 BRUSSELS CONVENTION, para. 62. <http://www.dutchcivillaw.com/legislation/schlosser001.htm>.

consider the validity of an arbitration agreement merely as a matter incidental to an examination of the competence of the court of origin to assume jurisdiction. It has been contended that the court in the State addressed can no longer re-open the issue of classification; if the court of the State of origin, in assuming jurisdiction, has taken a certain view as to the applicability of the 1968 Convention, this becomes binding on the court in the State addressed.

The references to the 1968 Convention could easily be replaced with references to the HCCC, leading to the conclusion that there could be diverging views among Contracting States as to whether the requested court would be bound by the classification of the dispute by the court of origin as falling within the scope of the HCCC, and whether it could apply the arbitration exception in cases where there is an earlier domestic arbitral award.

By transposing the text of the European instruments into the HCCC, the drafters have also transposed the well known divergences of opinion as to the proper interpretation of the scope of the arbitration exception. Whereas there is considerable agreement that an earlier foreign award recognized in the requested State pursuant to an international instrument such as the NYC, will prevent the recognition of a Member State judgment, there is no such agreement on the preventive effect of the earlier domestic arbitral award.⁴⁷ This distinction is explained by the purpose of the arbitration exclusion in the Brussels and Lugano Conventions and the Brussels Regulation, which is not to interfere with existing international instruments on arbitration.⁴⁸ Such purpose is also acknowledged in the Explanatory Report to the HCCC, commenting upon Article 2(4):

The purpose of this provision is to ensure that the present Convention does not interfere with existing instruments on arbitration.⁴⁹

In this context, domestic awards were simply overlooked or not considered sufficiently important. Needless to say, divergences of interpretation can be much more damaging to the HCCC than to the European

47) A. Shulz, 24, citing P.F. Schlosser, *Conflits entre jugement judiciaire et arbitrage*, *Revue de l'arbitrage* 1981, No 22 on Articles 34-36 of the Brussels I Regulation and others. Z. C. Righizzi, 'Mutual Trust' and 'Arbitration Exception' in the European Judicial Area: The *West Tankers* Judgment of the ECJ, in A. Bonomi, P. Volken, *Yearbook of Private International Law*, Volume 11 (2009), 447.

48) A. Shulz, 24, footnote 106.

49) Explanatory Report, para. 84.

instruments. While the European Union and EFTA have a Court of Justice/EFTA Court to settle any issues of interpretation, the HCCC will lack such tribunal to decide on the uniform interpretation when consensus is hard to reach.⁵⁰

One more point should be underlined. In many countries treaties ratified by the State will take precedence over the rules of national statutes. Confronted with the HCCC judgment, a national court accustomed to giving priority to international treaty law might be prompted to recognize a convention judgment that conflicts with a domestic award, notwithstanding *res judicata* and public policy concerns outlined above. This will have a chilling effect on the development of domestic arbitration in those countries, because it will undermine the trust of commercial people in the effectiveness of domestic arbitration clauses.

These examples show also that the time of giving the judgment and the arbitral award becomes a decisive factor. A race to the judgment or arbitral award is prompted by the prospects for enforcement: whichever will gain the status of *res judicata* status first might be enforceable in both countries under the relevant convention. Thus, if the recognition of an Italian judgment was sought in Serbia before the arbitrators rendered their award, there would be no ground on which the Serbian court could deny recognition of a HCCC judgment. It could not do so due to the fact that arbitration was pending, because there is no statutory or conventional ground recognizing *lis pendens* in arbitration. Similarly, if the arbitrators were faster, the Italian court would have to recognize the award pursuant to the NYC, although the HCCC litigation based on the choice of court clause was still pending in Italy (unless of course *lis pendens* was also included under the broadly defined public policy).

There are already some examples that confirm these problems in the European Union caselaw based on similar provisions of the Brussels I Regulation (*The Wadi Sudr* [2010], *West Tankers Inc v Allianz SpA* [2011] EWHC 829 (Comm.), and *Sovarex SA v. Romero Alvarez SA* [2011]EWHC 1661 (Comm)). In *Sovarex v. Alvarez*,⁵¹ for example, Sovarex obtained an award in its favor in England in January 2010 and tried to enforce it (to merge it into a judgment) in England. Enforcement was resisted by Alvarez who relied on the judgment rendered by the Spanish court in September 2010, which was enforceable pursuant to the Brussels I Regulation, disclaiming the existence of the contract on

50) L.E.Teiz, 546.

51) *Sovarex SA v. Romero Alvarez SA* [2011]EWHC 1661 (Comm).

which the award was based. The English court allowed enforcement of the award, relying among other things on the advanced stage of the English proceedings. It must be concluded that in case of complex conflicts the HCCC/New York enforcement regime is “vulnerable to abusive tactics.”⁵²

Recognition in a third state

At the stage of recognition and enforcement, a third country might be involved as well, especially if the parties keep some assets there. How would a third country resolve the conflict between an arbitral award and a judgment rendered by the chosen court in the same dispute? Supposing that the third country is Switzerland and that it is also a party to the HCCC, the Swiss court would have to decide whether it would enforce the Italian judgment pursuant to the HCCC, or the Serbian (ICC) award pursuant to the NYC, or maybe both?

The relationship of the HCCC with the NYC is regulated in Art. 26 of the HCCC:

Relationship with other international instruments

(1) This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

(2) This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, in cases where none of the parties is resident in a Contracting State that is not a Party to the treaty.

It seems that this rather opaque provision would enable the court of the Contracting State, in this case Switzerland, to give precedence to the NYC. The NYC prevails over the HCCC under paragraph two. That paragraph should apparently be read as not affecting the application by a Contracting State (Switzerland) of a treaty (NYC), whether concluded before or after this Convention (HCCC), in cases where none of the parties (i.e. neither Serbian nor the Italian party) is resident in a Contracting State (Serbia or Italy) that is not a Party to the treaty (NYC). Article 26 would enable Switzerland as the Contracting State to comply with its obligation under the NYC to recognize and enforce a foreign arbitral award.⁵³ The same conclusion would be valid if the award was

52) C. Roodt, 121.

53) A. Shultz, 4.

enforceable pursuant to the ICSID Convention.

Like the previous examples, the timing of the decisions might be decisive for the outcome of the Swiss court's deliberation. In case either the award or the judgment is given while the other proceeding is still pending, the Swiss court might be obliged to recognize and enforce the earlier decision. Double choices thus remain the source of considerable uncertainty even after the ratification of the HCCC. And, to be honest, this is the simplest form of a complex conflict. A more elaborate one may arise in investment disputes, where the choice of court clause in a contract, might overlap with an arbitration clause in a BIT. Another hypothetical will demonstrate the potential for conflicting decisions in such a case: A Xanadu investor initiates an ICSID arbitration against Serbia, on the complaint that the municipal authorities of Novi Sad, Serbia terminated a PPP contract on supply of water and sanitation services. The ensuing arbitral award establishes that the termination of the contract was a breach of the FET under the BIT. As a result, Serbia is liable to pay to the investor the amount of \$1M. At the same time, the municipal authorities of Novi Sad initiate an action before the Commercial Court in Novi Sad for breach of contract on the basis of the choice of court clause contained in the PPP contract with the Xanadu investor. According to the Judgment of the Serbian court the termination of the contract was lawful under Serbian law, and the investor is liable to pay to the municipality the amount of \$1.2M. An enforcement action is initiated in London where both the Xanadu investor and Serbia keep some assets. The ensuing ICSID award is enforceable pursuant to the ICSID Convention, while the Serbian judgment is enforceable pursuant to the HCCC. The parties in the proceedings were not the same, and the subject matter was not the same, either; thus there is no room for referring to *res judicata* i.e. to public policy. Outcome: both the award and the judgment will have to be enforced in London, unless a broader notion of *res judicata* was adopted.⁵⁴

Although in this case there would formally be no conflict, essentially England would have to enforce two colliding and contradictory deci-

54) According to C. Roodt: *"The cause of action cannot be revealed by simply observing surface differences of the rules and outcomes in the legal systems concerned....A common category may lurk behind rules that are different on the surface. To seek performance of an international sale of goods contract on the one hand, and to find that the contract was invalid, could disclose the same cause of action....When the facts and the rule of law relied on as the basis of the action have the same ends in view, the cause of action could be the same."*

sions.⁵⁵ Will such occurrences be very rare? The author submits that the likelihood of conflicts of this kind is substantial, because legal battles nowadays tend to be fought with multiple legal remedies – both national and international, both in court and in arbitration. In investment disputes, it is often the case that an investor initiates a contractual action before the national court in parallel with the ICSID arbitration. It has become a routine matter for ICSID tribunals to reject the pleas of inadmissibility on the basis that there is no identity of the parties and of the causes of action.

Transformations of awards into judgments

Another situation of potential conflict is when the arbitration award is transformed into a judgment of a State court. This may be done in those legal systems that allow “entry of a judgment upon an arbitral award“. For instance on 21 April 2016, the New York Court rendered an order to enter the ICSID award in the case *Micula v. Romania* as a New York judgment.⁵⁶ One of the questions posed in connection with such practice is as follows:

If the arbitration award becomes completely absorbed by the enforcement order of the court, as according to the Anglo-American ‘doctrine of merger’, should enforcement under the Judgments Regulation be permitted....A judgment which not merely declares an arbitration award enforceable, but also contains an independent condemnation judgment, might stand a better chance to be enforced as a ‘judgment’ in the sense of Article [8] of the [HCCC]. [brackets and insertions by the author].

As already pointed out, the Explanatory Report interprets the “arbitration exception” as encompassing various matters including:

- *revoking, amending, recognizing or enforcing arbitral awards*;⁵⁷

Awards are usually entered as judgments for the purposes of being recognized and enforced. Hence, although this was not expressly stated, any judgment entered upon an arbitral award shall not be enforceable

55) “Treaty claims, characterised by ICSID tribunals as being governed by public international law, would most likely not fall within the scope of the future Hague Convention on Exclusive Choice of Court Agreements because they are not ‘civil or commercial’ in nature. Concerning treaty claims, there should therefore be no conflict between ICSID arbitration and proceedings governed by the future Hague Convention.” A. Schulz, 15.

56) *Ioan Micula v Government of Romania* - US District Court for the Southern District of New York - 15MISC107 - Order and Judgment - 21 April 2015, TDM Journal, 2015.

57) Explanatory Report, para. 84.

pursuant to the HCCC because it will be covered by the “arbitration exception“.

Conclusion

To sum up, the HCCC is intended to deal only with conflicts among Contracting State courts, but the outcome of the court’s judgment, may well determine the destiny of the proceedings before the arbitral tribunal. “This is not a conflict purely between courts.”⁵⁸ THE HCCC does not offer a full answer to the question how to deal with complex conflicts among courts and arbitral tribunals. For this reason, it might bring some collateral uncertainty in the field of administration of international justice. Such uncertainty may occur due to different national interpretations of the will of the parties, and the total absence of provisions in the HCCC regulating the relationship between choice of court and arbitration agreements, pending litigation and arbitration, and between judgments and awards. The “arbitration exception” from the HCCC is not an adequate tool to resolve all the issues that may arise in practice. The area that may be hit particularly hard by ratification of the HCCC by a State is its domestic arbitration.

58) C. Roodth, 125.

ABSTRACT

This paper is about the relationship between the Hague Choice of Court Convention and Arbitration. In the first part the paper discusses the relationship of the HCCC and the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. In the second part it examines the potential of the HCCC to create the level playing field on the dispute resolution market. In the third part it focuses on complex conflicts of jurisdiction between courts and arbitrators arising from the use of multiple remedies. The provisions of the HCCC are tested in light of double and triple choice of forum clauses occurring in practice at the stage of jurisdiction and at the stage of recognition and enforcement. The question of mergers of awards into judgments and their treatment under the HCCC is also briefly discussed. The paper concludes with the assessment that the HCCC does not offer a full answer to the question how to deal with complex conflicts among courts and arbitral tribunals. For this reason, it might bring some collateral uncertainty in the field of administration of international justice. The area that may be hit particularly hard by ratification of the HCCC by a State is its domestic arbitration.

Keywords: Litigation; Choice of Court; Arbitration; Hague Convention.

HAŠKA KONVENCIJA O SPORAZUMIMA O IZBORU SUDA I ARBITRAŽA

SAŽETAK

Ovaj rad govori o odnosu između Haške konvencije o sporazumima o izboru suda (HCCC) i arbitraži. U prvom dijelu rada raspravljamo odnos HCCC i Njujorške konvencije o priznanju i izvršenju stranih arbitražnih odluka. U drugom dijelu se istražuje potencijal HCCC za stvaranje određenog nivoa konkurentnosti o rješavanju sporova u vezi s tržištem. U trećem dijelu se fokusiramo na kompleksne sukobe nadležnosti između sudova i arbitara koje proizlaze iz upotrebe višestrukih pravnih lijekova. Odredbe HCCC su ispitane u svjetlu dvostrukog i trostrukog izbora foruma koje se javljaju u praksi u fazi odlučivanja o nadležnosti te u fazi priznanja i izvršenja. Pitanje pre-takanja arbitražnih odluka u presude i njihov tretman pod HCCC je također kratko objašnjeno. Rad zaključuje s ocjenom da HCCC ne nudi potpuni odgovor na pitanje kako se nositi s kompleksnim sukobi-ma među sudovima i arbitražnim tribunalima. Zbog ovog razloga, to bi moglo donijeti kolateralnu neizvjesnost na polju uspostavljanja međun- arodne pravde. Područje koje bi naročito teško moglo biti pogođeno ratifikacijom HCCC od strane države je njena domaća arbitraža.

Ključne riječi: parnica, izbor suda, arbitraža, Haška konvencija.