THE EFFECTIVENESS OF THE HAGUE CONVENTION ON
CHOICE OF COURT AGREEMENTS IN MAKING
INTERNATIONAL COMMERCIAL CROSS-BORDER
LITIGATION EASIER – A CRITICAL ANALYSIS

LLM RESEARCH PAPER

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A Critical Analysis of the Hague Convention on Choice of Court Agreements

Abstract

The purpose of this paper is to critically analyse the effectiveness of the Hague Convention on Choice of Court Agreements in making international commercial cross-border litigation easier. Transnational litigation is so complicated that an international litigant feels like a trapped insect in a spider’s web. Now that there is a global Convention in this area, it would be useful to determine how successful the new instrument is in protecting and freeing the international litigants from the transnational litigation’s web of complexities. Interestingly, the Hague Convention mainly applies its rules to exclusive choice of court clauses or agreements only. This paper argues that the exclusive choice of court agreement feature of the Hague Convention will resolve the problem of parallel proceedings and make international litigation a bit more predictable, certain and cheaper. Apart from these benefits, it is not likely to make an international litigant’s life easier in any significant manner. It is argued that the Hague Convention’s success is impeded by its narrow scope of applicability to exclusive choice of court agreements only, a wide variety of exclusions from the scope of the Convention, a lack of provision for parties with no choice of court agreements, a convoluted declarations system, a lack of protection for small and medium-sized enterprises entering into standard form contracts online as business-consumers, inadequate provision for issues arising out of judicial corruption and no provision for civil procedure rules. The paper ends with a few recommendations, which if adopted, would enhance the effectiveness of the Hague Convention considerably. It concludes that international litigation, being the default dispute resolution mechanism, needs to be worked upon and improved, possibly through a broader and better global Convention.

Word length

The text of this paper (including substantive footnotes and excluding abstract, table of contents, normal footnotes and bibliography) comprises approximately 13,435 words.

Subjects and Topics

I Introduction

International trade has increased rapidly in the last century due to advancement in telecommunications, transportation and the internet’s ability to facilitate international commerce.\(^1\) Increased international trade essentially means the conclusion of more international commercial contracts and therefore possibly more transnational commercial disputes. Amongst the dispute resolution mechanisms available for the resolution of international commercial cross-border disputes is international cross-border litigation, which will be the focus of this research paper.

International commercial cross-border litigation\(^2\) is the default dispute resolution mechanism used by parties when they have not agreed on an alternative dispute resolution method or dispute resolution by alternative means fail or is inappropriate.\(^3\) Transnational commercial litigation encompasses a number of intricate issues such as jurisdiction, the civil procedure rules, the taking of evidence and finally the recognition and enforcement of foreign judgments. International litigants find themselves not only “… embroiled in simultaneous contests in several theatres,”\(^4\) but paying hefty legal costs, dealing with unfamiliar civil procedure rules and invoking several procedures to get their judgments recognised and enforced.

The Hague Conference on Private International Law drafted the Hague Convention on Choice of Court Agreements 2005 (“the Hague Convention”),\(^5\) which entered into force on 1 October 2015. As it is claimed to be the first “true global convention”\(^6\) in the area of international commercial litigation, it would be useful to determine how effective the Hague Convention will be, in making international commercial cross-border litigation easier.

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\(^2\) In this paper, international commercial cross-border litigation, international commercial litigation, transnational commercial litigation, international litigation, transnational litigation, international adjudication, transnational adjudication, and cross-border litigation have been used interchangeably. They all refer to international commercial cross-border litigation.

\(^3\) Arbitration, for instance, is not the best dispute resolution mechanism for all disputes.


This paper intends to critically analyse the provisions of the Hague Convention to ascertain whether it will be successful in making transnational litigation easier.\(^7\) In doing so, it begins in Part II with a brief overview of the complexities involved in international commercial cross-border litigation, followed by a description of the attempts that have been made at making international litigation easier. Part III of the paper provides a brief history of the Hague Convention and explains the rules that make up the core of the Convention. Part IV critically analyses the Hague Convention in terms of its exclusive choice of court agreement feature, articles 19 and 21 declarations, standard form contracts, judicial corruption and the civil procedure rules. Part V outlines recommendations for enhancement of the effectiveness of the Convention. The paper concludes that while the Hague Convention reduces parallel proceedings and brings about some predictability, certainty and reduction in legal costs, it is not capable of making international commercial cross-border litigation easier in a meaningful way.

\section*{II \hspace{1em} International Commercial Cross-Border Litigation}

Before discussing the effectiveness of the Hague Convention in making international commercial cross-border litigation easier, it would be appropriate to briefly discuss the complexities involved in international commercial litigation and the various attempts that have been made by international organisations to facilitate the effective and efficient resolution of commercial cross-border disputes.

\subsection*{A \hspace{1em} The Complexities}

Apart from the well-known disadvantages of international cross-border litigation being lengthy and costly,\(^8\) there are other significant issues that make transnational litigation convoluted, dissuading prospective parties from pursuing it. These issues include forum shopping, parallel proceedings, recognition and enforcement of foreign judgments, unfamiliar civil procedure rules, judicial corruption and most importantly, most small and medium-sized enterprises (SMEs) not having choice of court clauses in their contracts. What makes the scenario worse is that these problems are not independent of each other but so interconnected that if they were mapped, they would resemble a spider’s web.

\(^7\) There is immense existing scholarly literature on the Hague Convention on Choice of Court Agreements. This research paper is not a duplication as it will look at an angle that has not been explored yet. This research paper will consider the impact of the Hague Convention on the whole process of international commercial cross-border litigation, something which has not been the sole focus of any scholarly work so far.

\(^8\) Queen Mary and PricewaterhouseCoopers “International arbitration: Corporate attitudes and practices” (2006) <www.pwc.be> at 5.
Imagine international litigation as the spider and the problems as its threads, which are so interrelated with each other that they make a web. A party pursuing international litigation is analogous to an insect entering into the spider’s web and being trapped. The interrelatedness of the problems of international cross-border litigation is discussed below in greater detail.

To begin with, forum shopping is one of the major concerns in transnational litigation. Parties tend to shop around to find the most suitable forum for the resolution of their disputes. Two commentators state that “[v]enue is worth fighting over because outcome often turns on forum.”

The problem of forum shopping is worsened by the variety of civil procedure rules that exist in the different legal systems. Bell aptly summarises the rationale behind forum shopping as follows:

“A]s a result of lack of uniformity at the levels of procedural law, substantive principle, and choice of law rules throughout the international legal system, very different results may obtain in the resolution of any given legal dispute according to the forum in which that dispute is tried.

Whilst forum shopping, the parties may find that a number of courts have jurisdiction to hear their dispute so in the bid to get the most favourable outcome, they may institute proceedings in a number of courts, resulting in the problem of parallel proceedings. Teitz states in her article that: “[i]ncreasing globalization of trade has both multiplied the number of parallel proceedings and the number of countries whose courts are facing the challenge of concurrent jurisdiction.”

The failure of the parties to get their judgments recognised and enforced in foreign courts may also lead to parallel proceedings. For instance, if a judgment obtained in New Zealand is not enforceable against the judgment debtor in Germany, that judgment is essentially of no effect and might compel the judgment creditor to institute fresh proceedings in the courts of Germany.

Furthermore, due to disuniformity in civil procedure rules in international litigation, litigants are forced to adopt unfamiliar civil procedure rules. This not only makes international litigation particularly painful but leads to forum shopping as litigants shop around to choose the forum which

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9 Black’s Law Dictionary (9th ed. 2009) defines forum shopping as “[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard”.
13 Teitz, above n 12, at 5.
has procedural rules most suitable to them. As Petrossian remarks:\(^1\)

> Even if uniformity exists in a given area of substantive law, however, forum shopping may continue to thrive. In any action, a host of procedural factors that might influence choice of forum may come into play, irrespective of the substantive law underlying the claims at issue. Like substantive law, disuniformity in procedural laws engenders forum shopping.

Another problem in transnational litigation is judicial corruption. Judicial corruption promotes forum shopping as parties shop around to choose the courts depending on their needs. While large multinationals may choose a corrupted judiciary so that they could influence the outcome with their economic resources, SMEs are more likely to choose the least corrupt court in order to obtain a fair judgment (when they do make a choice of court decision).\(^1\) Furthermore, countries are generally not willing to recognise and enforce judgments emanating from foreign corrupt judicial systems.\(^2\) Hence, judicial corruption exacerbates the problems of forum shopping and recognition and enforcement of foreign judgments.

Another factor that adds to these complexities is that unsophisticated parties such as SMEs, who make up a huge percentage of international litigants, usually do not have a choice of court clause in their contracts.\(^3\) When these parties end up in litigation, they create and exacerbate all the problems mentioned above.

The above complexities are not just hypothetical but supported by research: the 2006 Queen Mary survey of corporations involved in international trade revealed that only 11% of the businesses preferred transnational litigation.\(^4\) Their reasons for avoiding transnational litigation were unfamiliarity with the civil procedure rules and the language of the foreign court, increased costs

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\(^2\) The Global Corruption Report 2007 states that “[a] citizen's economic level, political status, and social background play a decisive role in the judicial decision-making process. In corrupt judiciaries, rich and well-connected citizens triumph over ordinary citizens, and governmental entities and business enterprises prevail over citizens.” It can be implied from these statements that SMEs would be in a similar position to citizens, especially in developing countries.

\(^3\) This is evident, for instance, in the United States Uniform Foreign Money-Judgments Recognition Act 1962 which provided that a foreign judgment that was obtained by fraud (extrinsic fraud interpreted to include judicial corruption) was not eligible for recognition in the United States: section 4b.


\(^5\) Queen Mary and PricewaterhouseCoopers, above n 8, at 5.
of litigating in a foreign forum, a lack of confidentiality in litigation proceedings, corrupt judicial systems and the difficulty in recognition and enforcement of foreign judgments.\(^{19}\)

Therefore, international litigation is indeed a spider’s web and an international litigant is in a no better position than a trapped insect in a spider’s web. It is evident that this web of problems need to be resolved to save the international litigants from being caught in it. This could only be achieved by an effective global convention.

\(B\) The Developments in International Instruments

The international organisations are continually working towards the harmonisation of legal rules for a more effective resolution of commercial cross-border disputes.\(^{20}\) This has resulted in a number of instruments which have been successful to varying degrees.

The Hague Conference on Private International Law has for instance, produced the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (the “Apostille” Convention),\(^{21}\) which facilitates the circulation of public documents executed in one State party to the Convention to be accepted and given effect in another State Party to the Convention.\(^{22}\) In 1965, it concluded the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters\(^23\) to assist the service of process on foreign defendants through a “Central Authority”. Furthermore, in 1970, it concluded the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters,\(^{24}\) to aid evidentiary discovery in foreign countries once again through a designated Central Authority.

\(^{19}\) At 5.


\(^{22}\) Stewart, above n 20, at 1122.


The International Institute for the Unification of Private Law (“UNIDROIT”), in collaboration with the American Law Institute (“ALI”), drafted the Principles of Transnational Civil Procedure in 2004 in an effort to harmonise the civil procedure rules applicable to international commercial litigation. Finally, the most recent development in this area has been the 2005 Hague Convention on Choice of Court Agreements by the Hague Conference, which is discussed below.

III The Hague Convention on Choice of Court Agreements

A History of the Hague Convention

The Hague Convention resulted from the United States’ initial proposal to the Hague Conference on Private International Law (“the Hague Conference”) in May 1992, to negotiate a multilateral convention on jurisdiction and recognition and enforcement of foreign judgments. The United States courts were quite liberal in recognising and enforcing foreign judgments, under the statutes or the principle of comity of nations. However, a judgment from a United States court did not receive the same treatment abroad, mainly due to the large damages awards. It was probably for the same reason that the United States was unsuccessful in entering into a bilateral treaty or a reciprocal agreement with another State. To level the playing field in transnational litigation, the United States made the above proposal to the Hague Conference.

It is important to note that there was a pre-existing 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. It was ratified by only

Cyprus, The Netherlands and Portugal and never became active because none of the parties deposited the bilateral agreements as required under the Convention.\(^{30}\)

The proposal by the United States was considered by a Working Group at The Hague, and then by a Special Commission who found that it would be “advantageous to draw up a convention on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters.”\(^{31}\) In June 1997, formal negotiations on a new Hague Convention began and various drafts were produced over the next few years.\(^{32}\) None of the drafts garnered complete acceptance by the States, especially the United States.\(^{33}\) However, there was consensus on the jurisdictional provisions so an informal working group was set up on 24 April 2002 to consider drafting a convention with a narrower scope.\(^{34}\) It focused on the exclusive choice of court agreements.\(^{35}\) In March 2003, a draft Choice of Court Convention was produced by the Working Group.\(^{36}\) It was discussed at a meeting of the Special Commission in April 2003 and later at the Diplomatic Conference in June 2005.\(^{37}\) It was signed on 30 June 2005 and opened for signature and ratification.\(^{38}\)

There were no signatories to the Hague Convention until 2007, when Mexico became the first country to ratify it.\(^{39}\) The United States signed the Hague Convention on 19 January 2009 but has not ratified it due to their ongoing debate about how the Convention should be implemented in the United States, whether by federal legislation or state law or a combination of both.\(^{40}\) The European Union also signed the Hague Convention in 2009 but ratified it only recently on 11 June 2015,\(^{41}\) fulfilling the requirements of the Hague Convention to enter into force.\(^{42}\) The Hague Convention

\(^{30}\) Brand and Herrup, above n 25, at 5.


\(^{32}\) For a more detailed history of the drafting process of the Hague Convention, see Brand and Herrup, above n 25, 5-10.

\(^{33}\) Brand and Herrup, above n 25, at 9.

\(^{34}\) At 9.

\(^{35}\) At 9.

\(^{36}\) At 9.

\(^{37}\) At 9.

\(^{38}\) At 10.

\(^{39}\) See “Status Table” Hague Conference on Private International Law <http://www.hcch.net/>.


\(^{41}\) Above n 35.

\(^{42}\) The Hague Convention, above n 5, art 31(1).
entered into force on 1 October 2015.\textsuperscript{43} Singapore has also signed the Convention but is yet to ratify it.\textsuperscript{44} Currently, there are 29 State Parties to the Hague Convention.\textsuperscript{45} New Zealand, Argentina, Australia, Costa Rica, Serbia, China, Russia and Tajikistan are actively considering ratifying the Hague Convention.\textsuperscript{46} Canada has even prepared uniform implementing legislation.\textsuperscript{47}

\section*{B Core Principles of the Hague Convention}

Having discussed the history of the Hague Convention, it may now be a good idea to introduce the fundamental principles of the Hague Convention. It is noteworthy that the Hague Convention is wholly based on the concept of exclusive choice of court agreements.

The Hague Convention enunciates three basic rules:

1. Article 5 provides that the court designated in an exclusive choice of court agreement has jurisdiction unless the agreement is null and void;\textsuperscript{48}
2. Article 6 requires the court not chosen by an exclusive choice of court agreement to suspend or dismiss the proceedings as it does not have jurisdiction;\textsuperscript{49} and
3. Article 8 provides that a judgment given by a court designated in an exclusive choice of court agreement shall be recognised and enforced by the courts of other contracting States.\textsuperscript{50}

A commentator states that there maybe an optional fourth rule; optional because it depends on State Parties making declarations.\textsuperscript{51} Article 22 allows a Contracting State to make a declaration that its courts will recognise and enforce judgments given by courts designated in a non-exclusive choice of court agreement.\textsuperscript{52} Basically, art 22 extends the provisions contained in art 8 to non-
exclusive choice of court agreements. Article 22 declaration is a crucial one and if all Contracting States make this declaration, the success of the Hague Convention will increase many folds.

IV Criticisms of the Hague Convention

A critical analysis of the impact of the Hague Convention on international commercial cross-border litigation is relevant and necessary because the Convention is closely linked to international commercial litigation as it applies to international cases and particularly to civil or commercial matters.53 The following analysis seeks to determine the effectiveness of the Hague Convention in making international commercial cross-border litigation easier and suggests ways in which it could be improved.

A Exclusive Choice of Court Agreement

The Hague Convention is founded on the concept of an exclusive choice of court agreement.54 An exclusive choice of court agreement is defined in art 3 as an agreement made by two or more parties in writing or in a form that could be referred to later, and chooses the courts of one Contracting State for the resolution of their dispute to the exclusion of the jurisdiction of any other courts.55

1 Benefits of the “exclusive choice of court agreement” concept

The Hague Convention, through its exclusive choice of court regime, will resolve a number of transnational litigation problems discussed above, to varying extents, thereby making international commercial cross-border litigation easier to some extent.

Under the Hague Convention, a choice of the court or courts of one Contracting State is deemed exclusive; there is no requirement to expressly exclude the jurisdiction of other courts.56 For instance, an agreement stating ‘any dispute that arises under this contract shall be resolved in the courts of New Zealand’ will be interpreted as an exclusive choice of court agreement even though it does not expressly exclude the jurisdiction of other courts. This lenient interpretation in favour

53 At art 1(1).
54 Article 1 of the Hague Convention expressly states that the Convention shall apply to exclusive choice of court agreements.
55 The Hague Convention, above n 5, art 3.
of exclusive choice of court agreements will render many carelessly drafted choice of court clauses valid under the Hague Convention, thereby benefiting the parties significantly. Australia already treads on this path but countries such as the United States and Canada have taken a different approach. They treat choice of court clauses as presumptively non-exclusive. The parties in these countries have the burden of rebutting the presumption, proving that their choice of court clause is intended to be exclusive. Hence, the Hague Convention’s favourable interpretation of the choice of court clauses as exclusive will make a positive difference in the enforcement of exclusive choice of court clauses in international cross-border litigation.

Furthermore, the Hague Convention’s exclusive choice of court agreement concept will assist in ending the parallel proceedings predicament. As the Hague Convention requires parties to choose the courts of one Contracting State to the exclusion of the others, the parties will be compelled to litigate in the chosen forum if they were to receive the benefits of the Hague Convention. Further, as the Hague Convention provides for the recognition and enforcement of judgments resulting from exclusive choice of court agreements, the judgment creditor, who has concluded an exclusive choice of court agreement, will not have to institute fresh proceedings to have the judgment enforced against the judgment debtor. Hence, the number of parallel proceedings are likely to decrease considerably.

The Hague Convention will also bring about greater certainty and predictability in transnational commercial litigation. As the courts chosen in an exclusive choice of court agreement are mandatorily required to hear the dispute, the parties to the exclusive choice of court agreement

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57 Australia is one country which does not require exclusive choice of court agreements to expressly exclude other courts. It treats ambiguous choice of court clauses as exclusive as far as probable. See the discussion in Rosehana Amin “International Jurisdiction Agreements and the Recognition and Enforcement of Judgments in Australian Litigation: Is There a Need for the Hague Convention on Choice of Court Agreements?” (2010) 17 Austl Intl L J 113, at 119. Also see FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association (1997) 41 NSWLR 117, at 126 per Giles CJ.

58 With respect to the United States, see K & V Scientific Co v Bayerische Motoren Werke Aktiengesellschaft (2002) 314 F.3d 494, where the Court held that: “where venue is specified with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified, the clause will generally not be enforced unless there is some further language indicating the parties’ intent to make venue exclusive.” Also see Steve Weiss & Co Inc v INALCO (1999) WL 386653. With respect to Canada, see Old North State Brewing Company Inc v Newland Services Inc [1999] 4 WWR 573 at 36, where the Court of Appeal said that in the absence of an express intention of parties to treat their choice of court clause as exclusive, that clause will be interpreted as non-exclusive.

59 Above n 58.


61 The Hague Convention, above n 5, art 5.
will be certain that the chosen court will hear the dispute. However, there is a little uncertainty created by art 19 of the Hague Convention, which allows Contracting States to make declaration that even if their courts are chosen in an exclusive choice of court agreement, they may decline to hear the dispute if they have no connection with the dispute or the parties.\textsuperscript{62} Thus, the Hague Convention has the potential to bring about greater certainty and predictability in international commercial litigation through its articles 5 and 6 and will succeed in doing so if the Contracting States do not make the art 19 declaration.

The exclusive choice of court feature of the Hague Convention is also likely to make international cross-border litigation cheaper for the parties. As Kerns writes that “[c]ontracts may contain an exclusive choice of court agreement … to [minimise] the costs of potential litigation over forum-related issues.”\textsuperscript{63}

\section*{2 Limitations of the “exclusive choice of court agreement” concept}

While the exclusive choice of court feature of the Hague Convention offers the above advantages and makes international commercial litigation quite lucrative, it does have its limitations, which must not be ignored.

\begin{enumerate}[label=(a),itemsep=0pt]
\item No dispute resolution clause or agreement
\end{enumerate}

One of the greatest drawbacks of the Hague Convention being premised on exclusive choice of court agreements is that it does not apply when international commercial contracts contain no dispute resolution clause or agreement. In the absence of a dispute resolution clause or agreement, the default dispute resolution mechanism is international litigation.\textsuperscript{64} This makes it vital for any successful international instrument in the field of international litigation to make provision for circumstances where there is no dispute resolution clause or agreement. Unfortunately, the Hague Convention, which is the first global convention in international litigation,\textsuperscript{65} does not cater for such circumstances.

\begin{footnotesize}
\begin{enumerate}[label=\textsuperscript{\arabic*}]
\item The Hague Convention, above n 5, art 19.
\item If countries begin to sign bilateral treaties under the new Bilateral Arbitration Treaty, then the default dispute resolution mechanism will be arbitration. In the event that this treaty is not adopted by countries, international litigation will continue to be the default dispute resolution system in international commerce.
\item Brand, above n 6, at 25.
\end{enumerate}
\end{footnotesize}
Butler and Herbert have said that anecdotal evidence and case law suggest that international commercial contracts without dispute resolution clauses are far more common than envisaged. They are likely to be more common when SMEs are one of the parties to the contracts. Although some SMEs in developed countries may be sophisticated enough to include a dispute resolution clause, there is a significant percentage in developed countries that may not be able to effectively make a choice of forum decision. In developing countries, most SMEs may not be in a position to make an effective choice of forum decision let alone exclusive choice of forum decision. Given the vulnerable position of SMEs generally and the fact that they make up a significant percentage of businesses in international trade, it is essential that an international convention in litigation caters for their needs and vulnerabilities. The Hague Convention does not provide for this significant percentage of businesses in international trade so it is crystal clear that its contribution to international commercial cross-border litigation is minuscule.

(b) Non-exclusive choice of court agreements

Another limitation of the Hague Convention being based on the exclusive choice of court agreement requirement is that it does not offer much assistance to parties who have non-exclusive choice of court agreements. The Explanatory Report itself states that “… non-exclusive agreements are quite common …” but the Hague Convention does not apply to this type of agreement, therefore sabotaging its success in making international litigation easier.

The Working Group realised this limitation of the Convention and included art 22, which allows Contracting States to make declarations that they will also recognise and enforce judgments

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66 Butler and Herbert, above n 17, at 213. Also see, Bomac Laboratories Ltd v Life Medicals [2011] NZHC 849 (HC) per Associate Judge Abbott.
67 SMEs are defined differently worldwide. While European Union defines SMEs as firms with 249 or less employees, the United States sets the boundary at 500 or less employees: Garrett Workman The Transatlantic Trade and Investment Partnership: Big Opportunities for Small Businesses (Atlantic Council, November 2014) at 3. In smaller economies such as New Zealand, these numbers are much lower. In New Zealand, a small business is with less than 20 employees, a small-medium business is one that has between 20 and 49 employees, and a medium business is one with 50 to 99 employees: Ministry of Business, Innovation and Employment, The Small Business Sector Report 2014 (Wellington, 2014) at 10.
68 Small and medium-sized enterprises make up 98% of exporters in the United States. In 2010, there were over 293,000 identified United States exporters, of which 269,269 were small or medium-sized: Exporting is Good for your Bottom Line” International Trade Administration <http://www.trade.gov/>. In Europe, this number is 81%: Garrett Workman, above n 67, at 3.
69 Hartley and Dogauchi, above n 56.
70 Hartley and Dogauchi, above n 56, at 843.
resulting from non-exclusive choice of court agreements.\(^7^1\) Article 22 only extends the scope of the Convention with respect to recognition and enforcement of judgments and not the jurisdiction of the courts.\(^7^2\)

Even with respect to recognition and enforcement of judgments, art 22 will only be successful if the Contracting States choose to make declarations to recognise and enforce judgments based on non-exclusive choice of court agreements. Further, the reciprocity requirement in art 22, which requires both the State of origin and the State of recognition to make the declaration may limit the practical utility of art 22.\(^7^3\) For instance, Mexico and Australia are both State Parties to the Hague Convention and only Mexico has made the declaration under art 22. If there was a non-exclusive choice of court agreement between a Mexican businessman and an Australia businesswoman and the Mexican businessman sought the recognition and enforcement of a Mexican court’s judgment in an Australian court, it would not be possible under the Hague Convention as Australia has not made a reciprocal declaration.

Hence, art 22 could make international commercial cross-border litigation easier provided all the Contracting States make a declaration under this article. It is suggested that the Hague Convention should provide for the recognition and enforcement of judgments arising from non-exclusive choice of court agreements as a core rule rather than an optional one.

(c) Pathological clauses or agreements

Pathological clauses or agreements are those that contain some kind of defect, which makes the interpretation and enforcement of that agreement or clause almost impossible.\(^7^4\) An example of a pathological clause is: ‘Any dispute arising out of this contract shall be resolved in the courts of California in New Zealand.’ This clause is defected as the courts of California are not situated in New Zealand. It is not clear whether the chosen forum is courts of California or of New Zealand.

The phrase “pathological clause” originated from the field of arbitration and was originally used with respect to defected arbitration agreements and clauses but its usage has evolved over time and it is now used to refer to defected choice of court clauses or agreements too.\(^7^5\)

\(^7^1\) The Hague Convention, above n 5, art 22.
\(^7^2\) Hartley and Dogauchi, above n 56, at 843.
\(^7^3\) Garnett, above n 1, at 168.
\(^7^5\) At 262.
The Hague Convention does not make any provision for pathological exclusive choice of court agreements. Article 5 of the Hague Convention stipulates that the courts of a Contracting State are not obliged to hear the dispute if the exclusive choice of court agreement is ‘null and void’ under the law of the State of the chosen court. But ‘null and void’ does not seem to cover defective agreements as the explanatory report states that the null and void provision applies to “substantive grounds of invalidity” such as duress, misrepresentation, fraud, lack of capacity and mistake.

In the absence of case law on Hague Convention, there is uncertainty about the position courts would take in case of a defective exclusive choice of court agreement. The courts should try to remedy the defect as far as possible and give effect to a pathological exclusive choice of court agreement. Adopting this approach will enhance the effectiveness of the Hague Convention in making international litigation easier.

A comparison with pathological arbitration clauses or agreements reveals that arbitral institutions have been fairly lenient in giving effect to defective arbitration clauses or agreements. Arbitration agreements containing even “manifest pathology” have been upheld. Pathological clauses in arbitration agreements are quite a common occurrence. Talks with the Singapore International Arbitration Centre have revealed that about 30-35% of arbitration cases dealt with by the Centre contain some form of pathology. This indicates that pathological exclusive choice of court agreements will not be rare. Hence, the courts should be cautious in their approach to the issue of defective exclusive choice of court clauses or agreements.

(d) Forum shopping

The final criticism with respect to exclusive choice of court agreement feature of the Hague Convention is that it will fail to prevent forum shopping to any meaningful extent as art 3(a) allows exclusive choice of court agreements to be formed after a dispute has arisen.

The parties shop around for the most suitable forum when entering into an exclusive choice of court agreement. However, if this exclusive choice of court agreement is concluded at the contract formation stage, it would prevent abusive forum shopping. Interestingly, art 3(a) states that

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76 Hartley and Dogauchi, above n 56, at 815.
77 At 815.
exclusive choice of court agreements may be drafted for the “… purpose of deciding disputes which have arisen or may arise …”\textsuperscript{80} This means that exclusive choice of court agreements may be concluded after a dispute arises. Any exclusive choice of court agreement that is drafted after the dispute has arisen will not prevent abusive forum shopping because parties will be naturally inclined to search for the most suitable forum according to their dispute.

While one commentator claims that the Hague Convention “has the potential to improve the status quo for international transactions with respect to forum shopping,”\textsuperscript{81} the author concludes that as long as the Hague Convention provides for exclusive choice of court agreements to be made after the dispute has arisen, abusive forum shopping will continue to thrive.

3 Final comments

It is inferred that the Hague Convention’s exclusive choice of court agreements feature will reduce the problem of parallel proceedings quite significantly, bring about greater predictability and certainty in international litigation and make the whole process a little cheaper for the international litigants but due to its limited applicability to exclusive choice of court agreements, which make up only a small percentage of the dispute resolution agreements in international commerce, the benefits of the Convention will be enjoyed by a few international litigants only.

B Article 19 Declaration

The art 19 declaration in the Hague Convention is venomous and will potentially diminish the effectiveness of the Hague Convention in making international commercial cross-border litigation easier. It stipulates that a Contracting State may make a declaration that:\textsuperscript{82}

\begin{quote}
… its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.
\end{quote}

By allowing the States to make this declaration, the Hague Convention deprives international litigants of a neutral forum.\textsuperscript{83} The parties to a commercial cross-border dispute are highly likely to agree on a forum that is not connected to either of them. It is ironical that when this unconnected

\textsuperscript{80} The Hague Convention, above n 5, art 3(a).
\textsuperscript{81} Woodward, above n 27, at 668.
\textsuperscript{82} The Hague Convention, above n 5, art 19.
\textsuperscript{83} See Jeffrey Talpis and Nick Krnjevic “The Hague Convention on Choice of Court Agreements of June 30, 2005: The Elephant that Gave Birth to a Mouse” (2007) 13 Sw J L & Trade Am 1, at 32.
forum may be the prefect choice for the parties, the chosen forum may find that it cannot hear the dispute because there is not sufficient connection.84 Thus, the Hague Convention fails miserably in providing the international litigants with what they need the most – a neutral forum.85

Further, at one end of the spectrum, the Hague Convention aims to make exclusive choice of court agreements effective86 while at the other end, it limits their effectiveness by giving a court power to refuse to determine disputes even if that court is chosen in an exclusive choice of court agreement. This means that even a valid, exclusive choice of court agreement is not fully enforceable under the Hague Convention, bringing the effectiveness of the Hague Convention into doubt.

In addition, the Hague Convention allows Contracting States to make a declaration that its courts ‘may’ refuse to determine disputes to which they have no connection.87 By giving the courts discretion to hear or refuse the disputes, the Hague Convention creates uncertainty for the international litigants as despite having an exclusive choice of court agreement, they will not be able to predict whether a particular court will hear their dispute.

Moreover, the art 19 declaration may become a barrier to the effective operation of art 5(2), which does not allow the court chosen in an exclusive choice of court agreement to decline jurisdiction on the ground that another forum is more appropriate.88 Because art 19 allows the Contracting States to decline jurisdiction if they do not have any connection with the parties or the dispute, it technically introduces the doctrine of forum non conveniens, something which art 5(2) expressly prohibits. This inconsistency between the two articles of the Hague Convention may not only cause confusion but decrease the value of this instrument.

84 See Brand and Herrup, above n 25, at 147. Also see Hartley and Dogauchi, above n 56, at 841 (“In practice, parties sometimes choose the courts of a State with which neither they nor the facts of the case have any connection. The reason is that neither party wants to go before the courts of the other party’s State; so they agree to choose the courts of a neutral State.”) In M/S Bremen v Zapata Off-Shore Co (1972) 407 U.S.1. 10, the first case in which the courts of United States gave recognition to an exclusive choice of court clause, the Supreme Court noted that in the context of international agreements, businesses prefer an impartial forum in which to litigate.

85 In this regard, arbitration has an advantage since neutrality is on the top of the list of benefits provided to parties to arbitral proceedings.

86 The Preamble of the Hague Convention on Choice of Court Agreements states that “…an international legal regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions…”

87 The Hague Convention, above n 5, art 19.

88 The Hague Convention, above n 5, art 5(2).
The rationale for including the art 19 declaration in the Hague Convention is to accommodate States that feel that determining disputes that have no connection with their State imposes an undue burden on their judicial systems. While the interests of the State is a relevant consideration, the scale of convenience must not tip too much towards the States. If international commercial cross-border litigation is to be made easier, the States will need to be flexible and their courts willing to hear disputes especially when they are chosen as a neutral forum in an exclusive choice of court agreement.

All the countries which have ratified the Hague Convention to date, European Union countries and Mexico and those that have signed, Singapore and the United States of America, have not made the art 19 declaration. However, this does not mean that they cannot do so in the future as art 32 of the Hague Convention allows the art 19 declaration to be made upon signature, ratification, acceptance, approval or accession or at any time thereafter. It also allows the modification or withdrawal of the declaration at any time. Therefore, the current signatories to the Convention may make this declaration at any time in the future and more so, if their judiciary system is a popular choice amongst international litigants.

It is concluded that the Hague Convention limits its effectiveness by allowing parties to make the art 19 declaration. It is suggested that the art 19 declaration should possibly be removed to make the Hague Convention more effective.

C Article 21 Declaration

The Hague Conference included the art 21 declaration to garner wide acceptance of the Hague Convention. It claims that if opt-outs through art 21 were not possible, some States would not consider ratifying the Hague Convention. The inclusion of art 21 in the Hague Convention may attract more States to ratify the Hague Convention but it could narrow the scope of the Convention so much that the Convention is reduced to “a hollow shell.”

89 Hartley and Dogauchi, above n 56, at 841.
91 The Hague Convention, above n 5, art 32.
92 At art 32.
93 Hartley and Dogauchi, above n 56, at 843.
94 Garnett, above n 1, at 176.
Article 21(1) states that:95

Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

This article allows the Contracting States to make further exclusions from the scope of an already narrow Hague Convention. The Hague Convention has already made a large number of exclusions in art 2(2), some of which include consumer contracts, family law matters, maintenance obligations, wills and succession, insolvency, carriage of passengers and goods and marine pollution. Although many of the exclusions in art 2(2) do not directly relate to international commercial contracts, the exclusion of matters such as the validity of intellectual property rights (except copyright and related rights) could affect the effective resolution of international commercial disputes. If the Contracting States use art 21 to exclude matters that relate to international commercial contracts, the Hague Convention’s success in making international commercial cross-border litigation easier will be significantly impeded.

Unlike art 19 declaration, which has not been made by any of the Contracting States so far, art 21 declaration has been actually made by the European Union. It has made a declaration under art 21 to exclude all insurance contracts subject to certain exceptions such as reinsurance contracts.96 Of the countries that have not ratified the Hague Convention yet, China, Canada and the United States are envisaging making the art 21 declaration. China is likely to make exclusions under art 21 in order to maintain features of its domestic law, especially to maintain Chinese exclusive jurisdiction over Chinese-foreign joint ventures.97 Likewise, Canada is likely to use art 21 declaration to “exclude claims arising from asbestos injuries …”98

Lastly, the United States is contemplating excluding franchise contracts and mass market agreements through art 21 declarations.99 Woodward argues that the law of a number of United States states does not currently recognise foreign choice of court clauses in franchise contracts and

95 The Hague Convention, above n 5, art 21(1).
98 Garnett, above n 1, at 179.
99 Woodward, above n 27.
mass market agreements so the art 21 declaration must be utilised to reflect the United States’ position on these two types of contracts.\textsuperscript{100} The exclusion of franchise contracts and mass market agreements from the scope of the Hague Convention may actually discourage other countries from ratifying the Hague Convention.\textsuperscript{101} A considerable amount of time was spent on this topic during the drafting and negotiation of the Convention and these agreements were included in the Convention only after consensus was reached by all the countries. A decision by the United States later to exclude these agreements through the art 21 declaration could be seen as an attempt to alter the Convention to suit their needs. Further, franchise contracts and mass market agreements are significant in international commercial contracts so their exclusion from the Hague Convention by the United States would decrease the value of the Convention substantially.\textsuperscript{102} Given the United States’ supremacy in international trade, it will make little to no difference if other Contracting States do not exclude franchise contracts and mass market agreements.\textsuperscript{103} It is the presence or absence of the United States that makes a difference in international commerce and that will decide the fate of the Hague Convention.

After noting all the art 21 declarations that have been made and may be made, “[o]ne can only hope that this transnational enthusiasm for [art] 21 declarations does not lead to the Convention’s death by a thousand exemptions.”\textsuperscript{104}

The preceding discussion shows that there is a tendency for art 21 declaration to be abused by the Contracting States to protect their interests. To ensure that art 21 declarations are not made unnecessarily, the Convention applies three principles: transparency, non-retroactivity and reciprocity.\textsuperscript{105} Transparency is ensured by art 32 of the Hague Convention, which requires Contracting States to notify the depositary of any declarations they have made and the depositary to inform the other Contracting States of the same.\textsuperscript{106} Further, according to the principle of non-retroactivity, the art 21 declarations will only be effective after three months of notification to the depositary.\textsuperscript{107} As a result, the parties will have ample time to know whether and how they are affected by the declarations. Finally, as per the principle of reciprocity, where a State has excluded a certain subject matter, the other Contracting States will not be required to enforce exclusive

\textsuperscript{100} Woodward, above n 27, at 708-709.
\textsuperscript{101} Garnett, above n 1, at 178.
\textsuperscript{102} Garnett, above n 1, at 179.
\textsuperscript{103} Garnett, above n 1, at 180.
\textsuperscript{104} Garnett, above n 1, at 179.
\textsuperscript{105} Hartley and Dogauchi, above n 56, at 843.
\textsuperscript{106} At 843.
\textsuperscript{107} At 843.
choice of court clauses relating to that subject matter, emanating from that State.\textsuperscript{108} The supporters of art 21 claim that this principle will deter Contracting States from unreasonably making declarations under art 21.

The art 21 declaration by the European Union and the scholarly literature on the possible future declarations by China, Canada and the United States indicate that the above three principles of transparency, non-retroactivity and reciprocity are ineffective in safeguarding the Hague Convention against the deadly art 21 declarations. If the rest of the countries are inspired to make this declaration to protect their own agenda, it is highly doubtful that the Hague Convention will be able to make any meaningful difference in the complexities currently faced by the international litigants. It is recommended that a voting system should be established under the Hague Convention, whereby the Contracting States vote to either accept or reject an art 21 declaration. A declaration that is accepted by majority of the Contracting States will be operational. This system will ensure that the Hague Convention does not become a hollow shell.

\section*{D Standard Form Contracts}

Standard form contracts, particularly those concluded online and containing exclusive choice of court clauses, will pose problems for SMEs under the new Hague Convention.

A standard form contract\textsuperscript{109} is “a contract that has been prepared by one party to the contract and is not subject to negotiation between the parties - that is, it is offered on a ‘take it or leave it’ basis.”\textsuperscript{110} With the advancement in internet technology and the consequent rise in e-commerce, standard form contracts are increasingly concluded online.\textsuperscript{111} A type of standard form contract used in e-commerce is ‘click-wrap agreements’, where the buyer enters into the contract by simply clicking on the ‘I Agree’ icon.\textsuperscript{112} With the rise in e-commerce, SMEs are only a click away from entering into such contracts online, which could potentially have exclusive choice of court clauses.\textsuperscript{113} Click-wrap agreements containing exclusive choice of court clauses are dangerous for

\textsuperscript{108} At 843.
\textsuperscript{109} They are sometimes referred to as “boilerplate contracts”, “contracts of adhesion”, or “take-it-or-leave-it” contracts.
\textsuperscript{111} Brian Craig \textit{Cyberlaw: The Law of the Internet and Information Technology} (Pearson Education Inc, New Jersey, 2013) at 77.
\textsuperscript{112} At 77. Another type of online standard form contract is browse-wrap agreement, where the terms and conditions for the use of the website are posted on the website as a hyperlink at the bottom of the screen. The user is not required to take any affirmative action to agree to the terms of the contract. The user is deemed to have consented as soon as he starts browsing.
\textsuperscript{113} Svantesson, above n 60, at 520. It is important to note that SMEs enter into international commercial contracts
SMEs entering into these contracts as business-consumers because they are quite unsophisticated due to limited knowledge of the legal principles and weaker bargaining power. If SMEs enter into click-wrap agreements containing exclusive choice of court clauses, and a dispute arises, SMEs will be denied access to justice as it may not be able to litigate in the chosen forum due to factors such as high legal costs, distance, and unfamiliarity with the laws of the foreign court.114 This situation will be worse under the Hague Convention which gives effect to exclusive choice of court clauses.

Unfortunately, online standard form contracts containing exclusive choice of court clauses fall within the scope of the new Hague Convention due to the broad definition of exclusive choice of court agreements in art 3. Article 3(c) of the Hague Convention requires the exclusive choice of court agreements to be entered into “in writing” or “by other means of communication which render information accessible for subsequent reference.”115 The exclusive choice of court clauses in standard form contracts will be agreed upon electronically and be available for reference later. Hence, it will fall within the ambit of the Hague Convention.

Because the exclusive choice of court clauses in click-wrap agreements fall within the scope of the Hague Convention, it is important that the Hague Convention provides protection to the parties with lesser bargaining power so that they do not feel the brunt of a non-negotiated exclusive choice of court clause. The Hague Convention protects the consumers entering into click-wrap agreements containing exclusive choice of court clauses as its provisions do not apply to consumer contracts.116 However, this protection does not extend to SMEs acting as business-consumers since they do not fall within the definition of consumer in art 2(1)(a) of the Hague Convention.117 The provisions of the Hague Convention continue to apply to SMEs acting in the capacity of business-consumers despite the fact that when small businesses buy goods for consumption rather than re-sale, their bargaining position is analogous to individual consumers.118 Kerns criticises that:119

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114 Svantesson, above n 60, at 517.
115 The Hague Convention, above n 5, art 3(c).
116 The Hague Convention, above n 5, art 2(1).
117 A consumer is defined as “a natural person acting primarily for personal, family or household purposes.” See art 2(1)(a) of the Hague Convention.
119 At 522.
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… by failing to include protections for small businesses, the [Hague] Convention creates the likely scenario that sophisticated parties could well prey on weaker, less-sophisticated players, such as a small-town lawyer who might purchase accounting software to maintain her business’ financial records rather than for household use.

The Hague Convention does not protect the SMEs who end up in international commercial litigation due to their acceptance of unfair and unreasonable exclusive choice of court clauses in standard form contracts.

It is recommended that the Hague Convention should be amended to provide protection to SMEs entering into adhesion contracts as business-consumers. One of the ways in which this could be done is by widening the definition of “consumer” to include SMEs.¹²⁰ The Australian Trade Practices Act 1974 provides a wider definition of consumer, which could be adopted by the Hague Convention. Section 4B of the Act states that a person has acquired goods as a consumer when the price of the goods does not exceed AUS$40,000 or, if the price does exceed AUS$40,000, “the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption.”¹²¹ Additionally, the person must not have acquired the goods or given an impression that the goods were acquired for re-supplying or for use in trade or commerce.¹²² It can be seen that this definition of consumer would include SMEs as business-consumers.

Alternatively, the Hague Convention could be amended to exclude from its scope all standard form contracts.¹²³ This could be done by adding this exception to the list of exclusions in art 2(2) of the Convention. In the event that amendment is not possible, the alternative solution is for Contracting States to make a declaration under art 21 of the Hague Convention.

Article 21 allows Contracting States to make further exclusions from the scope of the Hague Convention. This provides the Contracting States with an opportunity to exclude all types of standard form contracts from the scope of the Convention. However, the Explanatory Report casts doubt upon the validity of such a declaration. The Explanatory Report explains that “[t]he declaration cannot use any criterion other than subject matter.”¹²⁴ The question then is whether ‘standard form contracts’ could be classified as a subject-matter criterion. It is highly doubtful that it would be accepted as a subject-matter criterion as standard form contracts relate more to the

¹²⁰ Kerns, above n 118, at 523.
¹²¹ Trade Practices Act 1974, s 4B.
¹²² Section 4B.
¹²³ Kerns, above n 118, at 523.
¹²⁴ Hartley and Dogauchi, above n 56, at 843.
‘form’ of contract than ‘subject’ of the contract.\textsuperscript{125}

Svantesson suggests that the better option would be for Contracting States to “make a declaration excluding ‘consumer contracts’, using the definition of ‘consumer’ as found in Australian law.”\textsuperscript{126} He argues that this declaration would satisfy the subject-matter criterion as the Australian Trade Practices Act defines ‘consumer’ by reference to subject-matter criterion, rather than by reference to party-related criterion.\textsuperscript{127}

Instead of making a declaration excluding consumer contracts using the definition of consumer as found in Australian law, it would be more practical for the Hague Conference to amend the definition of consumer in the Hague Convention. The Hague Convention already excludes consumer contracts and if the definition of consumer is widened, it would practically resolve the problem for SMEs too.

\subsection*{E Judicial Corruption}

Corruption is a major issue worldwide, affecting the society in a variety of ways. There are many different kinds of corruption, one being judicial corruption, which will be discussed herein. Judicial corruption includes “any inappropriate influence on the impartiality of the judicial process by any actor within the court system.”\textsuperscript{128} The Hague Convention hypothetically addresses the issue of judicial corruption in international litigation by making it an exception to recognition and enforcement of foreign judgments but it is not likely to be effective in practice.

Judicial corruption is prevalent in societies where corruption is widespread in the public sector.\textsuperscript{129} Hence, the level of public sector corruption in a country provides a close to accurate indication of the level of judicial corruption in that country. According to Transparency International Corruption Perceptions Index 2015, the cleanest countries are Denmark and Finland with the perceived level of public sector corruption at a score of 91 and 90 respectively.\textsuperscript{130} On the other end of the scale are North Korea and Somalia with a score of only 8.\textsuperscript{131} Looking at the major economies who engage in international trade and are therefore likely to conclude more international commercial

\begin{thebibliography}{99}

\bibitem{125} Svantesson, above n 60, at 534.
\bibitem{126} At 534.
\bibitem{127} At 534.
\bibitem{129} Above n 128, at xxii.
\bibitem{131} Above n 130.
\end{thebibliography}
contracts, it is found that Germany and United Kingdom rank 10th with a score of 81, the United States ranks 16th with a score of 76, India and Brazil are in the 76th position with a score of 38 followed by China, which ranks 83rd with a low score of 37.\textsuperscript{132} It is also noteworthy that out of the 168 countries whose public sector corruption data is available, 114 countries have a score below 50,\textsuperscript{133} indicating that judicial corruption is common and a major concern for international litigants.\textsuperscript{134}

In transnational litigation, parties might end up choosing a jurisdiction where corruption is widespread. The problem arises when judgments emanating from these corrupt judicial systems are sought to be recognised and enforced overseas. Generally, the courts of foreign countries do not recognise and enforce judgments emanating from corrupt judiciaries. For instance, the Uniform Foreign Money-Judgments Recognition Act 1962 of the United States provided that a foreign judgment that was obtained by fraud was not eligible for recognition in the United States.\textsuperscript{135} Fraud has been interpreted by courts to be of two types: extrinsic and intrinsic; and extrinsic fraud includes “bribery or corruption of court officials that induces the court to grant a judgment in favour of the prevailing party …”\textsuperscript{136}

Interestingly, the Hague Convention also provides “fraud in connection with a matter of procedure”\textsuperscript{137} as a ground for refusal of recognition and enforcement of foreign judgment. The Hague Convention does not give the meaning of ‘fraud’ but the Explanatory Report defines it as “deliberate dishonesty or deliberate wrongdoing.”\textsuperscript{138} It goes on to exemplify “fraud”, stating that there is fraud “where either party seeks to corrupt a judge, juror or witness.”\textsuperscript{139} Brand and Herrup have also commented that “… the exception to recognition or enforcement found in art 9(d) is consistent with the extrinsic fraud rule applied in [the United States] courts”\textsuperscript{140} (discussed above). It is inferred that the drafters of the Hague Convention intended “fraud” to include judicial

\textsuperscript{132} Above n 130.
\textsuperscript{133} Above n 130.
\textsuperscript{134} The 2006 Queen Mary survey revealed that one of the reasons 90% of the businesses seek to avoid international commercial cross-border litigation is the lack of an impartial judiciary and in the worst cases, the system being corrupt: Queen Mary and PricewaterhouseCoopers, above n 8, at 5.
\textsuperscript{135} Section 4(b)(2).
\textsuperscript{136} Timothy G Nelson, “Down in Flames: Three U.S. Courts Decline Recognition to Judgments from Mexico, Citing Corruption” (2010) 44 Int’l Law 897, at 901. Intrinsic fraud includes “the use of perjured testimony or forged documents to obtain judgment.”
\textsuperscript{137} The Hague Convention, above n 5, art 9(d).
\textsuperscript{138} Hartley and Dogauchi, above n 56, at 831.
\textsuperscript{139} At 831.
\textsuperscript{140} Brand and Herrup, above n 25, at 116.
corruption. Consequently, the Hague Convention does not expect the Contracting States to recognise and enforce a judgment tainted with corruption but in practice, it might not work as perfectly as it sounds. The success of the art 9(d) exception will depend on how successfully the existence of corruption is proved by the parties.

1 Proving corruption

In practice, corruption will need to be proved. Neither the Hague Convention, nor its Explanatory Report stipulates which party has the burden of proving judicial corruption so this gap is likely to be filled by domestic legislation of the Contracting States. In the United States, for instance, the Proposed Federal Statute 2006 states that:141

… the party resisting recognition or enforcement [must] establish that: ... the judgment was rendered in circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to the judgment in question.

There are likely to be instances where parties will not be able to discharge the burden of proof even though there is indication that judgment was made in corrupt circumstances. When this happens, the Hague Convention could be seen as compelling the Contracting States to recognise and enforce foreign judgments tainted with corruption. There is a real likelihood that judgments requiring recognition and enforcement under the Hague Convention will be the product of judicial corruption since many countries that have ratified the Hague Convention or are contemplating doing so, are highly corrupted countries. Examples include Greece at a score of 46, Mexico at 35, Argentina at 32, Russia at 29 and Tajikistan at 26.142

At present, apart from the European Union countries, which are governed by the Brussels I Bis Regulation,143 most other countries have entered into reciprocal agreements for the recognition and enforcement of foreign judgments. New Zealand, for instance, has reciprocal agreements with countries such as Fiji, France, Papua New Guinea, Sri Lanka, India, Malaysia, Scotland, Pakistan

142 Above n 130.
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and others.\textsuperscript{144} This allows a country to choose which countries to enter into reciprocal agreements with, based on the level of judicial corruption and other factors. Upon ratifying the Hague Convention, a Contracting State will have no choice but to recognise and enforce judgments based on exclusive choice of court agreements emanating from courts of all other Contracting States. If these countries have high levels of judicial corruption (and they are likely to, as stated above), the other Contracting States will be compelled to recognise and enforce a “corrupt” foreign judgment.

It is suggested that the Hague Convention could adequately protect the Contracting States against the recognition and enforcement of corrupt foreign judgments by allowing them to make declaration that they will not recognise and enforce judgments emanating from countries high on the corruption index. In the event this is not possible, it would be a good idea for the Hague Convention to lower the standard of proof so that the party who has the burden of proving the existence of corruption can easily discharge its burden.

\section*{F\hspace{.5em} Civil Procedure Rules}

Civil procedure is “the law that governs the conduct of litigation in civil cases.”\textsuperscript{145} It provides rules on originating documents, the steps leading up to the trial, the conduct of hearings and trials, judgments, appeals and enforcement of judgments.\textsuperscript{146} Procedural rules are an important component of international litigation as they have a huge impact on the final outcome of the trial.\textsuperscript{147} However, as mentioned in Part II above, the existence of a variety of procedural rules makes international litigation particularly problematic for the parties. And, it is rather unfortunate that the latest global instrument in international litigation, the Hague Convention, failed to provide a viable solution to this problem, thus limiting its success in making international commercial cross-border litigation easier.

\subsection*{1\hspace{.5em} Comparison of the procedural rules in civil law and common law legal systems}

The disuniformity in procedural rules in international litigation does not only result from the presence of different legal systems but from differences in rules of procedure within a legal system.

\textsuperscript{144} Other countries are Australia, Western Samoa, Tuvalu, Kiribati, Solomon Islands, Tonga, Lesotho, Botswana, Cameroon, Belgium, Sarawak, Ceylon, Corsica, Swaziland, England, Hong Kong, Nigeria, Sabah, Northern Ireland, Singapore, Norfolk Island and Wales.


\textsuperscript{146} At 2.

The most notable differences within a legal system are evident in the case of the United States in the common law legal system. A comparison between the different procedural rules is made below.

Due to the civil law system being inquisitorial or judge-driven and common law being adversarial, the judge plays a more active role in the conduct of the case in civil law.\(^{148}\) For instance, in a civil law legal system, the judge is responsible for developing evidence and pronouncing the legal principles that are applicable to the case at hand whereas in a common law system, these responsibilities are borne by the advocates.\(^{149}\) Further, in civil law, evidence is received at a sequence of short hearings and deposited in the case file for determination and analysis at the final stage of the trial.\(^{150}\) On the other hand, in common law, there are preliminary stages but all the evidence is received at the final trial.\(^{151}\)

In addition, a civil law judgment from a court of first instance will be re-examined on law and facts on appeal.\(^{152}\) In contrast, a common law judgment is re-examined on errors of law only at the appellate level.\(^{153}\) Moreover, pleadings in common law are required to be reasonably particular, providing facts relating to persons, places, times and sequences of events involved in the relevant transaction.\(^{154}\) On the other hand, in civil law jurisdictions, the pleadings may be drafted more diffusely if counsel believes that that will compel the court to make the inquiries helpful to the client’s case.\(^{155}\)

As far as discovery is concerned, interestingly, there is no such thing as discovery in the civil law system.\(^{156}\) Parties can only request the court to interrogate a witness or require the opposing party to produce a document. On the contrary, in common law litigation, discovery is a significant feature. Depositions before trial are rare but documents are subject to discovery in all common law systems if they are relevant.\(^{157}\)


\(^{150}\) At 774.

\(^{151}\) At 774.

\(^{152}\) At 774.

\(^{153}\) At 774.

\(^{154}\) At 775.

\(^{155}\) Bermann, above n 148, at 17.

\(^{156}\) At 775.

\(^{157}\) At 775.
Despite the United States having a common law legal system, its procedural rules differ quite significantly from other common law countries. One notable difference is in the broad use of juries by American courts. The United States allows litigants to use juries in civil cases too, something which is not typical of a common law legal system. Another significant difference is that discovery, both pre-trial and during trial, is broader and more extensive in the United States compared to other common law countries. The flexible rules of discovery in the United States allow parties to explore possibly relevant evidence more widely. Lastly, the American legal system provides advocates greater liberty in presentation of a case compared to classic common law systems.

To illustrate the difficulties caused by differences in rules of civil procedure, say Party A from New Zealand enters into a contract for the sale of computer parts with Party B from Germany. Their contract is to be performed in the United States so they exclusively choose the courts of New York for the resolution of any dispute arising out of the contract. The delivery of the computer parts does not occur so Party A sues Party B for breach of contract, in the court of New York. Trial begins and the issue of discovery arises. Party A, who is well-versed with the common law system, where discovery is allowed, is overwhelmed by the flexible discovery rules American courts offer. However, Party B who is from a civil law system, where very limited to no discovery is allowed, would be shocked to find that he may have to reveal all the documents and evidence to the other party. Being acquainted with the civil law rules, the German party would find the American discovery rules to be unfair and harmful to his case, provoking him to change the venue.

The foregoing discussion shows that contrasting civil procedure rules make litigation a nightmare for an international litigant. Justice James Allsop commented that:

> As a working judge, who was once an advocate, I have always found that the most daunting obstacles for clients and litigants is not so much understanding substantive law, but in understanding what was happening. Too often legal procedures are mystifying.

Other commentators have also remarked that when parties are compelled to litigate in foreign courts with unfamiliar civil procedure rules, it is not only a difficulty for them but creates a risk in

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158 At 774.
159 At 774.
160 At 774.
161 At 775.
international commerce which could have adverse consequences for international trade. Hence, the differences in procedural rules have wide-ranging consequences for the international litigants as well as for international commerce and trade.

Despite the differences in procedural rules of various countries, there is scope for harmonisation because the underlying principles or ideas on which the procedural rules are based are substantially similar. For instance, there is provision for expert witness in both common law and civil law countries. The particular rules might be different but the underlying concept is the same. Other examples include the requirement of pleadings, whether they are broadly drafted or detailed; the need for evidence to establish the facts; an appeals system; and the rules of finality of judgments.

2  Is a choice of civil procedure rules really a choice?

One may be puzzled as to why the variety of procedural rules poses such a great difficulty for international litigants when they could easily make a choice of the civil procedure rules most suitable to them. However, choosing civil procedure rules is not truly within the control of the parties. Einstein and Phipps explain that:

While contractual parties are at liberty to choose the substantive ‘governing’ or ‘proper’ law of their agreements, litigants who resort to a court to obtain relief must take the court as they find it in the sense that the procedural rules of the \textit{lex fori} will always be applicable regardless of the transnational nature of the dispute.

When parties make a choice of law, it is a choice of the substantive law and does not include the procedural rules. The procedural rules applicable are determined by the chosen forum. When parties make a choice of the forum, they could consider the procedural rules appropriate for their case. But procedural rules is only one factor; there is a whole range of other important factors that the parties have to consider, such as costs, the transportation of evidence and witnesses, time and the impartiality of the forum, when making a choice of court decision. It would be almost

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164 Hazard, above n 146, at 492.
impossible for a party to be able to choose a forum which is suitable in these respects and also have their favourite civil procedure rules. It is gathered that even though parties could, in theory, choose civil procedure rules to their liking, in reality, a “true” choice of procedural rules is quite impossible given the operation of a host of other factors in a choice of court decision. The only way out of this problem then seems to be uniformisation of procedural rules.

3 Harmonisation of Transnational Civil Procedure Rules

Academics, legal practitioners and policymakers have made attempts at harmonising the procedural rules. There was partial harmonisation of procedural rules with the introduction of the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters\(^\text{168}\) in 1965, to assist the service of process on foreign defendants through a “Central Authority” and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters\(^\text{169}\) in 1970, to aid evidentiary discovery in foreign countries. In 2004, the International Institute for the Unification of Private Law ("UNIDROIT"), in collaboration with the American Law Institute ("ALI"), introduced the Principles of Transnational Civil Procedure ("the UNIDROIT/ALI Principles"), which attempts to harmonise a broader area of procedural rules. These Principles are accompanied by Rules of Transnational Civil Procedure ("the Rules").

International civil procedure has been defined to include rules on “international jurisdiction, recognition and enforcement of foreign judgments, service of process and other notifications abroad, taking of evidence abroad, international arbitration, and the like.”\(^\text{170}\) According to this definition, the Hague Convention, which deals with issues of jurisdiction and recognition and enforcement of foreign judgments, would be considered the latest attempt at harmonising procedural rules in these areas.

4 The Hague Convention on procedural rules

As the Hague Convention provides rules on jurisdiction and recognition and enforcement of foreign judgments, it might be seen as the latest attempt at harmonisation of civil procedure rules. However, the Hague Convention does not provide any procedural rules for the “in-between”, which includes all the steps from the service of the originating document to the final decision and


\(^{169}\) Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, above n 24.

appeal, if there is any. Put simply, the Hague Convention provides procedural rules for the beginning and the end but nothing for the middle, which is the most important and most problematic for international litigants. In fact, the Explanatory Report of the Hague Convention states that “[i]t was not intended that the Convention would affect the procedural law of Contracting States ...”171 and that internal procedural law of the Contracting States applies even in proceedings under the Convention.172 Some examples of procedural matters left to the domestic laws of the Contracting States include appeals,173 remedies,174 the time limits within which legal formalities must be completed175 and the capacity of the parties to bring or defend proceedings.176

5 Proposal to incorporate procedural rules in the Hague Convention

It is proposed that the Hague Convention should provide uniform procedural rules to govern the conduct of a case. It might be too ambitious to expect a single Convention to also provide for rules of procedure, but doing so would significantly increase the effectiveness of the Hague Convention in making international cross-border litigation easier. Unfamiliar civil procedure rules is a major problem faced by international litigants even before the recognition and enforcement of foreign judgments issue. If the Hague Convention is to make international litigation easier, it cannot and should not ignore the issue of disuniform and unfamiliar procedural rules.

There are two ways in which civil procedure rules could be incorporated in the Hague Convention, either by making reference to a pre-existing set of civil procedure rules or drafting Optional Protocol(s) to the Hague Convention on procedural rules. These two options will now be discussed in detail.

(a) Reference to Pre-Existing Procedural Rules

The first option is for the Hague Convention to make reference to pre-existing civil procedure rules. It would be a good idea to make reference to pre-existing procedural rules because its advantages and disadvantages have already been debated and the necessary revisions made, litigants may be already familiar with these rules and it would save time and money that would be otherwise spent in drafting new procedural rules.

171 Hartley and Dogauchi, above n 56, at [88].
172 At [88].
173 At [92].
174 At [89].
175 At [90].
176 At [91].
It is suggested that the UNIDROIT/ALI Principles and Transnational Rules of Civil Procedure (“Rules”) would provide the best set of civil procedure rules to refer to. The UNIDROIT/ALI Principles are broad and abstract principles which are supported by the Rules which are more particular and in a format that could be readily adopted and used by countries. These Rules have not been adopted by UNIDROIT/ALI like the Principles, but they are attached as the Reporter’s Note.\(^\text{177}\)

The Hague Convention could have a provision to the effect that any litigation ensuing from the choice of court agreements falling within the scope of the Hague Convention will be governed by the UNIDROIT/ALI Principles and Rules to the extent that they are compatible with the Hague Convention. In the event of any conflict between the provisions of the Hague Convention and the UNIDROIT/ALI Principles and Rules, the Hague Convention shall take precedence over the UNIDROIT/ALI Principles and Rules.

The UNIDROIT/ALI Principles are a product of 10 years of drafting, debating and re-drafting.\(^\text{178}\) They were adopted by UNIDROIT and ALI in April 2004 and May 2004 respectively.\(^\text{179}\) They seek to combine the best features of the common law and the civil law system.

The UNIDROIT/ALI Principles are the best choice for several reasons. Firstly, they are the most comprehensive set of procedural rules providing soft rules for the conduct of the whole case, unlike other international conventions which provide for certain areas of civil procedure only.\(^\text{180}\) The accompanying detailed Rules are an added advantage. Secondly, they are “… standards for adjudication of transnational commercial disputes”\(^\text{181}\) and other kinds of civil disputes. In this sense, they complement the Hague Convention well as the latter also applies to commercial and civil matters. Thirdly, they are soft law and need to be implemented by way of a statute, a set of rules or an international treaty to be legally binding.\(^\text{182}\) The Hague Convention, being an international treaty, would be perfect in implementing the UNIDROIT/ALI Principles on the international plane.

\(^\text{179}\) At 758.
\(^\text{180}\) For instance, the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters provides for service of documents only and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters provides for evidentiary discovery only.
\(^\text{181}\) Above n 178, at 758.
\(^\text{182}\) At 758.
However, the UNIDROIT/ALI Principles have been heavily criticized by some commentators and some of the criticisms are worth mentioning. The first criticism is that because the UNIDROIT/ALI Principles combine what they claim to be the best elements from both the common law and the civil law, it is a mixture of two different procedural rules, which is foreign to both the civil law and the common law litigants.\textsuperscript{183} For instance, the civil law jurists are troubled by rules allowing discovery, the examination of witnesses by lawyers, the discretionary powers of the judge and an intensive final trial.\textsuperscript{184} On the other hand, the American lawyers are bothered by lack of disclosure, lack of discovery, broad powers of the judge, the requirement of detailed pleadings and the non-use of juries.\textsuperscript{185}

It is argued that any harmonisation of procedural rules will only be possible if the players of both legal systems are willing to cooperate and compromise. Some of the provisions of the UNIDROIT/ALI Principles and Rules will be foreign to both legal systems but once they are adopted and used, international litigants will become familiar with these uniform rules. Being accustomed to transnational civil procedure rules is also beneficial as the same rules will apply in subsequent cases. Additionally, international procedural rules will make international litigants more confident about pursuing international litigation as these rules will not be peculiar to any one national civil procedure rules.\textsuperscript{186}

Another criticism of the UNIDROIT/ALI Principles is that they are not a complete set of international civil procedural rules. The commentary of the Principles states that where the Principles are silent on a particular procedural aspect, reference must be made to the national laws of the forum.\textsuperscript{187} However, as Kerameus\textsuperscript{188} mentioned and Hazard\textsuperscript{189} agreed: “international procedural unification can only be partial.”\textsuperscript{190} The author agrees that it may be impossible to have international civil procedure rules governing each and every aspect of civil procedure but what the UNIDROIT/ALI Principles and Rules have achieved will make a conspicuous difference in

\textsuperscript{183} Hazard, above n 149, at 770.
\textsuperscript{184} Antonio Gidi “Notes on Criticizing the Proposed ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure” (2001) 6 Unif L Rev n s 819, at 824.
\textsuperscript{185} At 824.
\textsuperscript{186} Allsop, above n 162.
\textsuperscript{187} Above n 178, at 758.
\textsuperscript{189} Hazard, above n 147, at 493.
\textsuperscript{190} Kerameus, above n 188, at 54.
international litigation.\textsuperscript{191} Hence, it would be a step in the right direction to refer to these Principles and Rules in the Hague Convention.

(b) Draft Optional Protocol(s) on Procedural Rules

The alternative option is to draft Optional Protocol(s) on procedural rules to the Hague Convention. There are two possible ways in which this idea could be executed.

Firstly, the Optional Protocol could be based on the UNIDROIT/ALI Principles and Rules, so instead of merely referring to them in the text of the Hague Convention, they could be revised and drafted as an Optional Protocol to the Hague Convention. The advantage of this option is that the Contracting States will not be forced to apply these procedural rules. Their application will be dependent on the Contracting States ratifying the Optional Protocol. The disadvantage of making it optional is that the Contracting States are not likely to ratify the Optional Protocol for reasons discussed in (i) above.

Secondly, two new Optional Protocols could be drafted, one for the civil law system and the other for the common law countries. The Contracting States should be required to ratify the Optional Protocol according to their legal system. The main advantage of this option is that there will be one set of uniform civil procedure rules for each legal system so the procedural rules of one legal system will not be imposed on the other. Another advantage is that judges will continue to play their traditional role in the legal system and will not have to switch to a new role when dealing with international cases, as they would have to under the UNIDROIT/ALI Principles. However, if two parties are from different legal systems, the problem of unfamiliar civil procedure rules that is currently faced by international litigants will remain. The Hague Convention could provide that in such a case, the procedural rules of the legal system of the defendant will apply.\textsuperscript{192} This option is a bit complicated but with some understanding and effort, it is a workable solution that would harmonise the procedural rules to a great extent while leaving the common law and civil law jurists in their comfort zone.

\textsuperscript{191} There are other benefits and limitations of the UNIDROIT/ALI Principles and Rules but an in-depth discussion of these is beyond the scope of this paper. For a more extensive discussion on the advantages and disadvantages of the UNIDROIT/ALI Principles and Rules, see Gidi, above n 184; Hazard, above n 147; Einstein and Phipps, above n 166; Hazard, above n 148; Konstantinos D Kerameus “Scope of Application of the ALI/UNIDROIT Principles of Transnational Civil Procedure” (2004) 9 Unif L Rev n s 847.

\textsuperscript{192} This will be in line with the Brussels I bis Regulation, which has framed its provisions to protect the interests of the defendant.
(c) Final Suggestion

Having discussed the various options, it is suggested that the best solution is to make reference to the pre-existing, UNIDROIT/ALI Principles and Rules in the Hague Convention. If it is found to be ineffective, the second option of drafting new Optional Protocols could be considered. Although it would be a costly and time-consuming affair, it has the potential to provide a long term solution to the problem of disuniform and unfamiliar procedural rules in international commercial cross-border litigation.

V Recommendations

It is evident from the above critical analysis that the Hague Convention could be improved in a variety of ways to enhance its effectiveness in making international commercial cross-border litigation easier. The author makes the following recommendations, which if adopted by the Hague Conference, would make the Hague Convention a success in international commercial litigation:

(a) The Hague Convention must seek to promote the recognition and enforcement of foreign judgments emanating from any international commercial case decided in the Contracting States. The initial aim of the Hague Convention Project was to solve the problem of recognition and enforcement of foreign judgments, just as the New York Convention\(^{193}\) did for enforcement of arbitral awards. In light of this aim of the project, it is suggested that art 22 of the Convention, which makes it optional for the Contracting States to recognise and enforce foreign judgments from non-exclusive choice of court agreements, should be made a core rule.

(b) The article 19 declaration should be removed so that there is greater certainty that the courts chosen will definitely hear the dispute; the only exception being a null and void agreement.

(c) Any declarations made under art 21 should be subject to approval by a majority of the Contracting States so that matters that are critical to international trade are not easily excluded from the already narrow scope of the Convention.

(d) The definition of consumer in the Hague Convention should be widened to that of the
Australian one (explained in IV (D) above) so that the protection accorded to consumers is
extended to business-consumers as well.

(e) The Hague Convention should make reference to the UNIDROIT/ALI Principles as the
uniform procedural rules applicable in all cases decided under the Hague Convention.

Apart from these suggestions, it is further proposed that the Hague Convention should be amended
substantially so that it does not apply to only exclusive choice of court agreements but all kinds of
choice of court agreements and even when there is no dispute resolution clause. This could be
achieved by drafting rules which reflect the following principles:

(a) Where parties have an exclusive choice of court agreement, that agreement must be
enforceable as it currently is. The rules enunciated in arts 5, 6 and 8 of the Hague
Convention will continue to apply to all exclusive choice of court agreements.

(b) Where parties have a non-exclusive choice of court agreement, that agreement must also
be given effect by the courts with only strict exceptions.\(^{194}\)

(c) Where parties do not have a dispute resolution clause or agreement, the default mechanism
applicable will be litigation. These circumstances are not as rare as it is envisaged so it is
suggested that the Hague Convention should provide rules for the unsophisticated parties
who tend to enter into international commercial contracts without a dispute resolution
clause. Unless these parties are covered by a global convention, international litigation will
continue to be a difficult process for those who suddenly find themselves in foreign courts.

Currently, each country has its own rules of jurisdiction and recognition and enforcement
of foreign judgment which apply in cases of non-exclusive choice of court clauses and the
absence of any agreements, with the exception of European Union, which is governed by
the Brussels I bis Regulations. These different rules should be uniformised and made part
of the Hague Convention.

The Brussels I bis Regulations would provide a good starting point for the Hague
Conference as they provide rules for exclusive choice of court agreements as well as
circumstances where no agreement exists. It might be difficult to adopt them in their current

\(^{194}\) It is beyond the scope of this paper to suggest the circumstances in which a non-exclusive choice of court agreement
must not be enforced by the courts.
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form, as an international convention, as countries are not likely to reach consensus on several matters. But, with a few amendments, they would make a good global convention, providing rules for almost all circumstances in international litigation. It would bring about greater certainty and trust in the process of international litigation. And most importantly, the international litigants would be more confident knowing that their dispute will be resolved according to internationally accepted rules.

Widening the scope of the Hague Convention may give rise to other problems such as parallel proceedings and forum non conveniens but they could be reduced through carefully drafted provisions. Consequently, the Hague Conference must attempt to broaden the scope of the Hague Convention and the countries should co-operate in the process to bring about a change in international litigation.

VI Concluding Remarks

In sum, the Hague Convention makes international commercial cross-border litigation easier by reducing parallel proceedings considerably, providing greater certainty and predictability through its exclusive choice of court agreement feature and reducing the legal costs of international litigation. However, it does not prevent abusive forum shopping; does not offer any assistance to parties without dispute resolution clauses and those with non-exclusive choice of court clauses, who make up a larger percentage of international litigants; it makes dispute resolution much more difficult for SMEs entering into standard form contracts as business-consumers due to the narrow definition of consumer and lastly, it does not resolve the procedural difficulties faced by international litigants. Hence, the Hague Convention does not make international litigation easier in an appreciable manner.

By providing for exclusive choice of court clauses or agreements only, the Hague Convention provides for ‘a very first world commercial contract problem’ and fails to address the needs of the unsophisticated parties like the SMEs, who account for a significant percent of international litigants.

It is also important to note that the provisions of the Hague Convention only applies to the Contracting States so a party is not likely to benefit much from the Hague Convention if the Convention is not in force in many countries. Since it has been open for signature, ratification and accession for almost 10 years now and ratified by very few countries, the future of the Hague Convention seems bleak. Unless many countries ratify the Hague Convention, the limited benefits offered by the Hague Convention will be enjoyed by only a handful.
Too often, it is easily suggested that parties should resort to arbitration in the event of an international commercial dispute as arbitration is fairer, more neutral and less complicated than litigation. It is agreed that arbitration offers these advantages over litigation but all disputes cannot be resolved by arbitration. There are “some cases that will always find their way into the courtroom …”\(^{195}\) Consequently, the importance of the Hague Convention must not be undermined and efforts must be made to improve it so that international litigation is made easier for those who have no choice but to pursue it.

Any improvement in the field of international commercial cross-border litigation will only be possible if the rules are harmonised and effective harmonisation will only result if all the countries are willing to compromise to some extent. Through co-operation, international litigation can be made easier for the international litigants.

An ideal global convention in international commercial cross-border litigation ought to provide rules of jurisdiction for all parties (whether they have exclusive choice of court clauses, non-exclusive choice of court clauses or no dispute resolution clause at all), rules for recognition and enforcement of foreign judgments emanating from any case and uniform procedural rules.

If nothing works, perhaps an international commercial court, with its own rules, could be established for the resolution of all international commercial cross-border disputes.

\(^{195}\) Einstein and Phipps, above n 166, at 817.
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