

**THE HAGUE CHOICE OF COURT CONVENTION AND  
INTERNATIONAL COMMERCIAL LITIGATION  
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The *Hague Convention on Choice of Court Agreements* is the counterpart for litigation of the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. Promulgated on June 30 2005, its further progress awaited, as is usual with the Hague Conference, on the publication of a detailed Explanatory Report. This was published in September 2007.<sup>2</sup>

The global patchwork quilt of rules and practices for recognition and enforcement of foreign judgments is, by reason of its limited scope, a significant barrier to world trade and investment. Some mitigation of these disadvantages has proven possible on a regional basis, e.g. in Europe, through the Brussels Convention of 1968, now reflected in an EU Regulation<sup>3</sup>, supplemented by the Lugano Convention open to a wider range of countries. It has never been possible to achieve a multilateral

treaty, because of the diversity of substantive and procedural laws and of legal cultures. Courts, unlike commercial arbitrators, are regarded as manifestations of national sovereignty which governments are reluctant to compromise, even in the promotion of economic growth.

The most recent attempt to negotiate a broader based Convention on the recognition and enforcement of judgments proceeded unsuccessfully for a decade and ultimately broke down. The participants could not agree on seemingly straightforward bases of jurisdiction, such as habitual residence and the place at which the tort occurred. The impasse on a range of issues – broadly between Europe and the United States – proved insurmountable. Nevertheless, consensus could be and was reached on choice of court provisions in international commercial agreements.

It is unkind to characterise the process, as one commentator has done, as: “The elephant that gave birth to a mouse”.<sup>4</sup> Although partly accurate, this characterisation understates the potential significance of the new Convention. Furthermore, as another observer has noted:

‘[C]hanging the subject from *judgments* to *agreements* was a brilliant move. By replacing the thorny and intractable questions of the original project with the more comfortable regime of contract, the negotiators managed to hide many of the difficult issues under the umbrella of consent ... Of course, the court receiving the judgment is still lending sovereign force to the judgment of the court of a different sovereign, but the intervening agreement removes much of the pressure of scrutiny from the receiving court.’<sup>5</sup>

To date the Convention has attracted one ratification and, significantly, the signature of the United States, from which nation much of the stimulus for this process came. The Convention contains express provision for ratification by regional groups. As I understand the position, it is likely that the European Union will accede. This would, in effect, extend the Lugano Convention in this particular respect to a broader group of nations. The United Kingdom is likely to become a party to the Convention through this indirect route.

In the past, an arrangement of this character could have emerged by Commonwealth nations adopting a uniform approach, as in the parallel statutes for registration of foreign money judgments<sup>6</sup> or in the parallel ratification of the *Hague Evidence Convention*.<sup>7</sup> Today, Commonwealth nations are more likely to proceed through regional arrangements such as ASEAN or the African Union.

The potential advantages of arrangements of the character contained in the Hague Choice of Court Convention, have been recognised here in Hong Kong. There are commercial parties who would very much wish to have disputes with corporations operating in the People's Republic of China heard in the courts of Hong Kong, which are regarded as displaying a higher level of independence.

Hong Kong, as a Special Administrative Region of China, has implemented a bipartite arrangement in the form of its legislation, enforced on the side of the People's Republic by a Judicial Interpretation issued by the Supreme People's Court.<sup>8</sup> This reciprocal arrangement applies to exclusive choice of court agreements which lead to a money judgment by a court of either

jurisdiction. Pursuant to the arrangement, judgments can be registered and enforced in the other jurisdiction. The difficulty of enforcing judgments of courts in the People's Republic is well-known. This may limit the commercial value of the arrangement. I note that a recent survey of relevant Chinese rules and practices suggests that there is no obstacle to Chinese signature and ratification of the Hague Choice of Court Convention, in the negotiations for which representatives of the People's Republic participated.<sup>9</sup>

### **The Commercial Imperative**

The Choice of Court Convention has the same core justification as the New York Convention on Arbitral Awards. Parties to a commercial contract have chosen a jurisdiction. The autonomy of the parties should be respected for the same reasons as such autonomy is respected by all of those numerous nations that have adopted the New York Convention.<sup>10</sup> As one commentator has noted, the only difference between an arbitration agreement and a choice of court agreement is that in one case, the parties select a private forum and, in the other case, the parties select a public forum.<sup>11</sup>

Part of the background to the development of the Hague Convention on Choice of Court Agreements was a survey conducted by the International Chamber of Commerce amongst its members on the use of choice of court clauses and arbitration clauses. This survey revealed that a complementary instrument to the New York Convention would be welcomed by the global business community.

Ratification of the Hague Choice of Court Convention can make a contribution to reducing the transaction costs and uncertainties associated with the enforcement of legal rights and obligations in international trade and investment.

One of the barriers to trade and investment, as significant as many of the tariff and non-tariff barriers that have been modified over recent decades, arises from the way the legal system impedes transnational trade and investment, by imposing additional and distinctive burdens including:

- Uncertainty about the ability to enforce legal rights;
- Additional layers of complexity;
- Additional costs of enforcement;
- Risks arising from unfamiliarity with foreign legal process;

- Risks arising from unknown and unpredictable legal exposure;
- Risks arising from judicial corruption;
- Risks arising from lower levels of professional competence, including judicial competence;
- Risks arising from inefficiencies and delays in the administration of justice.

Many of these transaction costs of international trade and investment are of a character which do not operate, or operate to a lesser degree, in the case of intra-national trade and investment. Such increased transaction costs impede mutually beneficial exchange by means of trade and investment.

The process of forum shopping, in recent years including anti-suit injunctions and anti-anti-suit injunctions, represents a transaction cost imposed only on international trade and investment and which, therefore, discourages such trade and investment.<sup>12</sup>

The essential precondition for venue disputation, i.e. legal controversy about the appropriate jurisdiction in which litigation

should occur, is the fact that all nations make claims from exorbitant or long arm jurisdiction. In civil law countries, this generally turns on citizenship or residence, and in common law countries, this generally turns on service of process. The net is cast deliberately widely in all cases, but in common law nations a discretion is created, by doctrines such as *forum non conveniens*, to restrict the broad claims to some kind of rational extent. When rules of an unnecessarily wide character are qualified by broadly expressed discretions, the prospect of disputation is inevitably increased. This is a burden on international commerce which is not imposed on domestic commerce.

The growing frequency and intensity of battles over venue indicates clearly that parties and their lawyers attribute considerable significance to where a case is decided. The choice of venue is made, at least in the first instance, by a plaintiff. This is obviously not a neutral process.

Plaintiffs have a “first mover” advantage. Properly advised, a plaintiff will take advantage of the options available. There is nothing neutral about the choice of jurisdiction by a plaintiff, subject of course to an act of self-denial on the part of the

jurisdiction first chosen or to an anti-suit injunction issued by another jurisdiction and which can be made effective against a plaintiff.<sup>13</sup> An anti-suit injunction may be commenced as the first action in order that a prospective defendant will acquire first mover advantage. Inevitably, in this battle for first mover advantage prospective plaintiffs have resorted to the pre-emptive strike of an anti-anti-suit injunction.<sup>14</sup> Such litigation has emerged in common law jurisdictions, especially the United States, England and Australia but not, it appears, in civil law nations.<sup>15</sup>

In civil law nations concepts such as *forum non conveniens*, conferring a discretion upon courts to hear and determine cases, and perhaps even more so the kind of discretion that is exercised in the course of determining anti-suit injunction litigation, is so inconsistent with their conception of the judicial role as to verge on an anathema. Their entire judicial culture is based on a denial of any such extensive judicial discretion, or at least upon a refusal to accept that it exists.

Although the differences between common law and civil law systems are breaking down, in a process of convergence upon which comparative law scholars have commented over recent

years, the civil law tradition remains comparatively inclined to proceed on the basis that the law, both substantive and procedural, is set out with perfect clarity in a code or equivalent document requiring merely its application by a judge without the judge making a policy choice or exercising a discretion. Accordingly, in lieu of anything remotely like a *forum non conveniens* principle, civil law nations prefer to mechanically apply a non-discretionary *lis alibi pendens* approach, by which one court will refuse to exercise jurisdiction if proceedings have already been instituted in another court. This results, in substance, in a rush to start litigation in a forum thought to be more favourable to the moving party.

This preference of civil law systems has become, understandably, the policy of the European Court of Justice and has significantly complicated, perhaps destroyed, the ability of English courts to restrain transparent attempts of commercial litigants to avoid justice.<sup>16</sup>

As Sir Anthony Clarke, the Master of the Rolls, pointed out:

“I have spent much of my professional life both at the Bar and as a judge dealing with cases in which parties,

usually defendants, have done their utmost to avoid having the dispute tried on the merits in England. Arguments of every kind have been deployed over the years to persuade courts that the interests of justice lie in the issues being determined elsewhere, although in very many cases the true position is that the defendant's real interest is to ensure (if at all possible) that the issues will in practice never be determined at all."<sup>17</sup>

The appellation "forum shopping" is no longer universally regarded as a term of abuse. Motivations for choosing a venue vary: some are perfectly legitimate and some offend any objective test of the purposes of the administration of civil justice. For example, in Europe, integrated as it is in these respects, a party to a commercial dispute that believes considerable delay would give it a commercial advantage have been known to institute proceedings in Italy, where they could be confident that no court will hear the matter for many years. This tactic is known in Europe as "the Italian torpedo".<sup>18</sup> The European Court of Justice has indicated that, as a matter of practical reality, no European court will be permitted to prevent such conduct as all European courts

are equal. Those of us with experience of federalism recognise the European Court of Justice doctrine of mutual trust as a full faith and credit clause.

In contrast, parties that wish commercial disputes to be resolved quickly will choose a jurisdiction that has an efficient and expeditious mode of determining such disputes. The motivation to ensure delay would be universally condemned and the motivation to ensure expedition, would be accepted as legitimate. Between such clear cases of legitimate and illegitimate motivation is a wide range of advantages and disadvantages in the litigation process about which different opinions can reasonably be held.

I refer to such matters as the scope of requirements for disclosure of documents:

- the extent of sovereign immunity offered under domestic legislation;
- variations in approach to the lifting of the corporate veil to bring home the sins of the subsidiary to a parent company or to directors personally;
- the availability of freezing orders against assets; and

- the existence of “mandatory rules” under local statutes, which provide causes of action or procedural advantages unique to a particular jurisdiction.

Many of these matters only become apparent after the prospect of litigation has arisen. Of particular commercial significance at the time that a contract is entered into is a judgment about the quality of the judges and the efficiency of the courts in different jurisdictions.

The quality of the judiciaries and delays in the courts of different nations vary considerably. Although this is difficult to discuss in international conferences, let alone in negotiations, in some nations the skill, learning and efficiency of judges is greater than in others. Indeed, in some nations the judiciary has significant problems with corruption which does not exist in others. Judges may also vary, as they do within any jurisdiction, and over time, with respect to the parochialism or international comity that they display in exercising discretions or formulating judgments within the wide range of choice that, on any view, is permissible in commercial dispute resolution.

These differences must be recognised as legitimate commercial concerns. A nation which does not perform well in these respects can, in pursuit of an enlightened self-interest, recognise that its economic welfare can be promoted by reducing this barrier to mutually beneficial trade and investment but only by accepting the right of parties to avoid its judicial system. Most nations have accepted such a right with respect to international commercial arbitration. There are real benefits in extending that acceptance to international commercial litigation.

### **The Convention**

The *Hague Convention on Choice of Court Agreements* is concerned with exclusive choice of court agreements in international civil or commercial matters. This terminology was adopted because in some jurisdictions there is a distinction between “civil” and “commercial”. There is an optional extension for the recognition and enforcement of judgments given by a court designated in a non-exclusive choice of court agreement.

The Convention applies to all international cases, as explained in Article 1(2) in the following terms:

“ ... [A] case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.”

Article 3 of the Convention defines an exclusive choice of court agreement as the designation of a court, to the exclusion of the jurisdiction of other courts, for the purpose of deciding disputes arising in a particular legal relationship. Article 3 also establishes a presumption that where a choice of court agreement designates a particular court, then that designation is deemed to be exclusive unless the parties have expressly provided otherwise.

The Convention has three principal provisions. First, the chosen court must act in every case, if the choice of court agreement is valid. That is to say the court has no discretion on *forum non conveniens* or other grounds to refuse to hear the case. Secondly, where another court, which is not the chosen court, has relevant proceedings commenced before it, it must dismiss the case, unless one of the exceptions in the Convention applies. Thirdly, and perhaps most significantly, judgment rendered by a

chosen court, that is valid according to the standards of the Convention, must be recognised and enforced in other contracting states, again unless one of the exceptions established by the Convention applies.

The Convention contains a list of exclusions encompassing: disputes about employment, consumer, family and domestic matters, bankruptcy and insolvency, transportation, anti-trust, personal injury and property damage, real property and tenancy, intellectual property rights and certain other matters.

The Convention also has a list of grounds for not exercising jurisdiction, or for non-recognition of a judgment, including:

- the choice of court agreement is null and void in the State of the chosen court (Article 5) (Article 6(a)) (Article 9(a));
- a contracting party lacked capacity in the law of the State of the chosen court (Article 6(b)) (Article 9(b));
- proceedings were commenced on improper notice (Article 9(c));
- judgment was obtained by procedural fraud (Article 9(d));
- it would be manifestly incompatible with the public policy of the requested state (Article 6(c)) (Article 9(e));

- preference should be given to an earlier inconsistent judgment from the requested state or another state (Article 9(f) and (g)) ;
- the agreement cannot reasonably be performed (Article 6(d));
- the chosen court has decided not to hear the case (Article 6(e));
- exemplary or punitive damages have been awarded (Article 11).

The central weakness of the Hague Choice of Court Convention is that it adopts, as its paradigm case, an arms length commercial arrangement between parties who are capable of some level of bargaining over the terms of contract, including the exclusive choice of court term. It assumes the existence of autonomous parties with freedom to choose. However, the narrowly defined exclusions in the Convention are such that it applies to a contract where one party is in such a dominant position as to have imposed all relevant terms, including the choice of court term, on the other party, in circumstances where there was no practical choice about entering into the agreement at all.

From my first contribution to this debate in 2006, I have been particularly concerned with the fact that, although the Convention does exempt consumer transactions, it does not exempt small businesses which are often the subject of protective legislation identical to that made available by law to consumers.<sup>19</sup> There have been other expressions of concern to similar effect.<sup>20</sup>

The Convention applies to a wide range of contractual arrangements into which individuals, small businesses and non-profit organisations will enter from time to time. Contracts by such persons with an international element have become more and more significant, primarily because of the explosion of internet commerce.

The Convention does apply to agreements that have never been the subject of any possibility of negotiation, including standard form printed contracts of a character with which the courts have long been familiar. However, of growing significance is that it applies to online purchase agreements, referred to as “click-wrap” agreements, where a purchaser is asked to click a yes or I agree button on a computer screen to assent to terms and conditions. It also applies to “shrink-wrap licences” that are

contained on or inside a software box which are only capable of being read after purchase. Such non-negotiated contracts are of increasing significance and may well contain exclusive choice of court clauses.

The problem arises primarily because of the narrow definition of a consumer transaction in the Convention. Article 2 provides:

“This Convention shall not apply to exclusive choice of court agreements –

- (a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party ...”

This is an exceptionally narrow definition, fails to exempt a wide range of small businesses, including individuals acting in the course of a business, and not-for-profit organisations. Such persons will acquire, from time to time, particularly online, goods and services in circumstances where there is no practical opportunity to decide whether or not to enter into an agreement with an exclusive choice of court clause. These are persons who are treated as “consumers” in a wide range of consumer protection legislation and whom most states would be reluctant to expose to

compulsory submission to the courts of another jurisdiction. This is a matter which requires each state to consider its policy position in this respect prior to ratification.

The formal mechanism for exclusion by a ratifying state is found in Article 21 which provides:

“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.”

There are a number of general terms in this Article which lack definition and which could very well give rise to controversy in its application. Specific statutes, which are designed to protect small businesses as well as consumers, in Australia, include the *Trade Practices Act 1974 (Cth)* and the *Insurance Contracts Act 1984*. Such statutes may be the subject of precise specification. However, the terminology of “specific matter” can be broader than a particular statute.

Despite Australia's federal system, most of the statutes which could give rise to such issues are national or uniform. The position in the United States is much more complicated. Ratification by that nation, if it occurs at all, will be subject to significant exclusions.<sup>21</sup>

The other mechanism for narrowing the effect of the Convention, in the case of a small business or non-profit organisation, is the authority provided to a court of a requested state as to whether it should refuse enforcement pursuant to Article 9 of the Convention, which relevantly provides:

“Recognition or enforcement may be refused if –

...

- (e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with the fundamental principles of procedural fairness of that State.”

The determination of what “public policy” is applicable, may very well be informed by principles of both common law and statute which turn on contracts involving inequality of bargaining power or lack of bargaining. Further, the principles of procedural fairness, in a context where it was inconceivable that a person purchasing goods or services of modest expense could possibly attend a hearing in a foreign state, could invoke the second limb of this provision.

The issues that arise in this treaty context are similar to the issues that have long arisen in conflict of laws situations with respect to the determination of what is a mandatory rule of the forum and its application. No doubt greater certainty is available if there is a reservation under Article 21.<sup>22</sup> The application of Article 9 occurs only in the course of litigation which is not desirable on such a policy laden area.

## **Conclusion**

It is the express provision in the Convention for recognition and enforcement of judgment of the chosen court which attracts to commercial litigation one of the critical advantages that

international commercial arbitration has received, by reason of the widespread adoption of the New York Convention.

There is, however, a second advantage which is not replicated. Commercial arbitration can occur in private or, if one adopts a slightly different perspective, in secret. Commercial parties are frequently reluctant to wash their dirty linen in public. This is not one of the commercial advantages that a court, subject to the principle of open justice, can deliver to a commercial party.

Although it is often said that international commercial arbitration is preferable because it is capable of delivering a quicker and cheaper dispute resolution procedure, I am not convinced that that actually occurs in practice. Indeed, users of international commercial arbitration are increasingly expressing the view that they prefer alternative mechanisms such as mediation, by reason of the costs of arbitration. Survey evidence in the United States indicates that a surprisingly low proportion of international and national commercial contracts contain arbitration clauses.<sup>23</sup> In any event, the underlying principle of the New York Convention is party autonomy. If contractual parties chose litigation rather than arbitration, that choice should be respected.

The widespread adoption of expeditious proceedings for commercial dispute resolution by courts has meant that there is often no significant difference in terms of cost and delay. There can be but, in practice, there does not seem to be. However, one cost advantage of arbitration, in comparison with international commercial litigation, which has accurately been described as a “jungle”,<sup>24</sup> arises from the proclivity of parties to engage in venue disputation to which I have referred above.

Perhaps the most important matter which will determine whether the *Hague Choice of Court Convention* succeeds, is the extent to which nation states adopt the perspective that the autonomy of commercial parties should be respected, as distinct from adopting the approach that regards any impingement on the jurisdiction of national courts as an affront to national sovereignty. In short, will the *Hague Choice of Court Convention* be widely accepted to be the equivalent for litigation of the *New York Convention on Arbitral Awards*.

To some degree this will be influenced by the understandable apprehension that national corporations will

receive a 'home-town' advantage in their national courts. The extent to which litigants from a particular nation could expect some kind of hometown advantage will vary from one nation to another and, indeed, will vary amongst different judges within a nation.<sup>25</sup>

Where there is a robust independent judiciary, which has a global perspective and which understands the significance of commercial expectations for economic welfare, a home town advantage is unlikely to exist either at all or, perhaps more often, to any significant degree. Unfortunately, the nations of whom this is least true are often the most likely to project their failings on others and reject the self-proclaimed independence of other judiciaries.

One cannot reject the possibility of a home-town advantage out of hand. There is evidence that it exists, even in United States Federal Courts.<sup>26</sup> Questions of fact and degree arise. However, where two arms length commercial parties of more or less equal bargaining power, in which I do not include government controlled corporations, do agree on an exclusive choice of court clause, it can reasonably be assumed that they are satisfied that neither

party will obtain any such advantage. Governments should respect such a choice.

As I have said, the issue is, ultimately, one of enlightened self-interest. Even nations which suspect that their courts are unlikely to be chosen – because of issues of corruption, competence or delay – should understand that it is to their economic advantage, even if not to that of their legal professions, to remove such barriers to trade with, or investment in, their own commercial corporations who are prepared to agree to submit to the jurisdiction of another court. Failure to do so is, in economic terms, a form of protection of the State's domestic legal system, which has the same kind of adverse effect on other parts of their economy as such protection usually has. Over recent decades, the benefits of globalisation have become manifest as numerous restraints on trade and investment, that had been imposed in the exercise of national sovereignty but which reduced the standards of living of the nation's citizens, have been modified.

The efficacy of this Convention depends upon its widespread ratification. Lawyers who are involved in international commercial transactions have an interest in ensuring that their domestic

decision-makers give this matter attention. Law reform, particularly of a long-term structural nature, is often overwhelmed by the transient enthusiasms and necessities of the political process. I commend this Convention to delegates as a matter worth pursuing in each of the nations from which we come. Unless the commercial legal communities promote this reform, it is unlikely to be given priority.

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- <sup>1</sup> The author has discussed these and related issues in several previous addresses. See J J Spigelman “Transaction Costs and International Litigation” (2006) 80 *Australian Law Journal* 438; J J Spigelman “International Commercial Litigation: An Asian Perspective” (2007) 35 *Australian Business Law Review* 318 also published (2007) 37 *Hong Kong Law Journal* 859; J J Spigelman “Cross-Border Insolvency: Co-operation or Conflict?” (2009) 83 *Australian Law Journal* 44. All of these addresses are accessible on the website of the Supreme Court of New South Wales at [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc), see under “Speeches”.
- <sup>2</sup> See T Hatley and M Dogauchi “Explanatory Report on the 2005 Hague Choice of Court Convention” [www.hcch.net/index\\_en.php?act=publications.details&pid=3959](http://www.hcch.net/index_en.php?act=publications.details&pid=3959). The most complete treatment of the Convention is R A Brand and P M Herrup *The 2005 Hague Convention on Choice of Court Agreements: commentary and documents* (2008) Cambridge University Press which appends the Explanatory Report. The background to the Convention is discussed in more detail in R A Brand and S R Jablonski *Forum Non Conveniens: History, Global Practice and Future under the Hague Convention on Choice of Court Agreements* (2007) Oxford University Press.
- <sup>3</sup> See Council Regulation 44/2001 OJL 12/1.
- <sup>4</sup> J Talpis & N Krnjevic “The Hague Conference on Choice of Court Agreements of June 30 2005: The elephant that gave birth to a mouse”(2006) 13 *Southwestern Journal of Law and Trade in the Americas* 1.
- <sup>5</sup> W J Woodward “Saving the Hague Choice of Court Convention” (2008) 29 *University of Pennsylvania Journal of International Law* 657 at 661-662.
- <sup>6</sup> See J J Spigelman “Transaction Costs and International Litigation” (2006) above n1 at 449.
- <sup>7</sup> See J D McClean and C A McLachlan *The Hague Convention on the Taking of Evidence Abroad: explanation documentation prepared for Commonwealth jurisdictions* (1986, reviewed ed) Commonwealth Secretariat, London.
- <sup>8</sup> See S McConnell “Legislation on the Mutual Recognition of Judgments between the Mainland People’s Republic of China and Hong Kong” (2008) 19 *Journal of Banking and Financial Law and Practice* 155.
- <sup>9</sup> See G Tu “The Hague Choice of Court Convention – A Chinese Perspective” (2007) 55 *American Journal of Comparative Law* 347.
- <sup>10</sup> See generally P Nygh *Autonomy in International Contracts* (1999) Clarendon Press.
- <sup>11</sup> J W Yackee “A Matter of Good Form: The (Downsized) Hague Judgments Convention and Conditions of Formal Validity for the Enforcement of Forum Selection Agreements” (2003) 53 *Duke Law Journal* 1179.
- <sup>12</sup> This area of disputation has attracted a growing range of specialist journal articles and books on the subject. See e.g. A S Bell *Forum Shopping and Venue in Transnational Litigation* (2003) Oxford University Press; and see particularly the references at 2, fns 8 and 9; also M Keyes *Jurisdiction in International Litigation* (2005) Federation Press.
- <sup>13</sup> See A S Bell, above, n 12, at Ch 4 (defendant strategies).
- <sup>14</sup> See A S Bell, above n 12, at [4.137]-[4.142].
- <sup>15</sup> See C Kessedjian “Dispute Resolution in a Complex International Society” (2005) 29 *Melbourne University Law Review* 765 at fn 134.

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- 16 See generally the discussion by The Right Honourable Sir Anthony Clarke, “The differing approach to commercial litigation in the European Court of Justice and the courts of England and Wales”, Institute of Advanced Legal Studies, 23 February 2006; *Erich Gasser GmbH v MISAT Srl* [2005] QB 1; *Turner v Grovit* [2005] 1 AC 101; *Owusu v Jackson (t/a Villa Holidays Bal Inn Villas)* [2005] QB 801; *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] 1 Lloyd’s Rep 67; *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA (‘The Front Comor’)* [2007] 1 Lloyd’s Rep 391; *Allianz SpA and another v West Tankers Inc* (Case C-185/07); [2009] 1 All ER (Comm) 435, [2008] 2 Lloyd’s Rep 661.
- 17 The Rt Hon Sir Anthony Clark, in his address above n16.
- 18 Widespread dissatisfaction in Europe resulted in Italy adopting a new model for Company and Commercial cases. See F Carpi “The Parties and the Judge in the New Commercial Proceedings in Italy and the Ideological Choices” (2006) 25 *Civil Justice Quarterly* 70.
- 19 See J J Spigelman (2006) “Transaction Costs and International Litigation”, above n 1, at 451.
- 20 See eg A E Kerns “The Hague Convention and Exclusive Choice of Court Agreements: An Imperfect Match” (2006) 20 *Temple International and Comparative Law Journal* 509 esp at 522; K Bruce “The Hague Convention on Choice-of-Court Agreements: Is the Public Policy Exception Helping Click-Away the Security of Non-Negotiated Agreements?” (2007) 32 *Brooklyn Journal of International Law Journal* 1103 esp at 1105, 1109, 1123-1125.
- 21 See W J Woodward “Constraining Opt-Outs: Shielding Local Law and those it Protects from Adhesive Choice of Law Clauses” (2006) 40 *Loyola of Los Angeles Law Review* 9 esp at 61-79; Bruce above n22, at 1127-1128; Kerns at 521-527.
- 22 See M Keyes, above n12, at 29-34 and 80-90.
- 23 See T Eisenberg and F P Miller “The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies” (2007) 56 *De Paul Law Review* 335.
- 24 See *Airbus Industry GIE v Patel* [1999] 1 AC 119 at 132 (Lord Goff).
- 25 For recent discussion of variations in the quality of national judiciaries see J Dammann and H Hansmann “Globalizing Commercial Litigation” (2008) 94 *Cornell Law Review* 1. See also generally E A O’Hara and L E Ribstein *The Law Market* (2009) Oxford University Press.
- 26 See U Bhattacharya, N Galpin and B Haslem “The Home Court Advantage in International Corporate Litigation” (2007) 50 *Journal of Law and Economics* 625.