The Hague Convention on Choice of Court Agreements is a significant judgment-recognition convention which strengthens the enforceability of Singapore court judgments abroad and facilitates a more conducive legal environment for cross-border business. This article explores the implications of Singapore’s signing and proposed implementation of the Hague Convention, which is viewed as the litigation equivalent of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Hague Convention on Choice of Court Agreements: Courting the Freedom of Choice

Introduction – Enforcement of Foreign Court Judgments

In a Singapore Academy of Law 2015 Study on Governing Law & Jurisdictional Choices in Cross-Border Transactions, 71 per cent of respondents picked arbitration as their preferred dispute resolution mechanism and 46 per cent indicated that enforceability was the factor which influenced their dispute resolution choice.

Clearly, cross-border enforceability is a key reason for commercial parties choosing to arbitrate their disputes. The reasons for that preference become even more apparent when one considers that a Singapore international arbitration award can be recognised and enforced in any of more than 150 state parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958. In contrast, a Singapore Court judgment may be recognised and enforced in only 11 states pursuant to Singapore’s Reciprocal Enforcement of Commonwealth Judgments Act (“RECJA”) and the Reciprocal Enforcement of Foreign Judgments Act (“REFJA”).

However, that number may soon increase more than threefold. In a speech on Friday, 22 January 2016, the Minister for Law, Mr K Shanmugam announced that Singapore will ratify and implement the Hague Convention of 30 June 2005 on Choice of Court Agreements (the “Hague Convention”), which Singapore had signed on March 2015.

The issue though is, will the Hague Convention be a game changer?

The Current Enforcement Regime in Singapore: Treaties and Uncertainties

Generally, a foreign judgment may only be recognised and enforced under the domestic laws of the enforcing state, unless that enforcing state is bound by enforcement obligations under a treaty (bilateral or multilateral).

Being subject to the domestic laws of the enforcing state can be problematic as certain jurisdictions, for example Indonesia, will not recognise and enforce the Singapore judgment. Instead, the entire matter must be re-litigated through fresh Court proceedings. This prospect must appear daunting to commercial parties.

However, where a foreign judgment is sought to be enforced in Singapore under its treaty obligations (which have the force of law by way of the RECJA and REFJA), recognition and enforcement is substantially easier. This is because the process of registering a foreign judgment is a formal one, in which the Court takes a light touch approach. As a leading textbook on civil procedure notes, the default practice is to permit registration of foreign judgments unless certain formal features are missing. The onus is then on the judgment debtor to seek to set aside the registered judgment.

The key limitation is that there are currently only 11 contracting states whose Court judgments of their superior Courts may be recognised and enforced pursuant to Singapore’s treaty obligations.
The Hague Convention: Certainty and Numbers

The Hague Convention will increase that number by another 28 states. Viewed purely in terms of numbers, the Hague Convention can only be good news to businesses which have, and which are considering engaging in trade with EU (except Denmark) and Mexican counterparties – the other contracting states to the Hague Convention. The US is only a signatory to the Hague Convention and has not ratified it.

However, the benefits of the Hague Convention go beyond the increase in the number of foreign jurisdictions in which a Singapore Court judgment may be enforced. We discuss some of these benefits.

Giving effect to choice of court agreements and foreign judgments: The Hague Convention obliges the Courts of contracting states to suspend or dismiss proceedings to which an exclusive choice of court agreement applies if it is not the designated Court under that agreement. Concurrently, where a judgment is given by a Court of a contracting state designated in an exclusive choice of court agreement, that judgment shall be recognised and enforced in other contracting states. Critically, such recognition and enforcement may only be refused on the limited grounds specified in the Hague Convention.

Enforceability of non-monetary judgments: One key difference between enforcement pursuant to the Hague Convention as opposed to the common law or RECJA/REFJA is that non-monetary judgments may be enforced under the Hague Convention. While it is common to think of commercial relationships in terms of dollars and cents, oftentimes, a party goes to Court in order to get a party to do something or refrain from doing something.

Presumption of exclusivity: Another interesting difference is that the Hague Convention provides for a presumption that the choice of court agreement which designates the Courts of a contracting state “shall be deemed to be exclusive unless the parties have expressly provided otherwise”. The Report of the Law Reform Committee on the Hague Convention (March 2013) (“LRC Report”) notes that under the common law, it is a matter of contractual interpretation as to whether a choice of court agreement is exclusive, and that there was no presumption either way.

The Hague Convention defines an exclusive choice of court agreement as one which designates “for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts”.

Enforceability of default judgment: The Hague Convention helpfully contemplates that a judgment which is obtained by default may be enforceable. However, where a judgment is obtained by default, the Courts of a contracting state are not bound by the findings of fact made by the original Court in making the judgment.

No legalisation/apostille needed: It is also very welcome that the Hague Convention expressly states that all documents forwarded or delivered under the convention are exempt from legalisation or the apostille process. This eases the legal and administrative burden as the legalisation/apostille process is not an uncomplicated one. It can also be quite time-consuming as the relevant consulates and commissions may have limited opening hours or may require extensive travel, even into a neighbouring country.

The LRC Report noted that the general scheme of the Hague Convention “is broadly similar to the common law which applies in Singapore”. However, the Hague Convention arguably offers benefits over and above those of the common law and even over RECJA and REFJA.

The Hague Convention will, therefore, change the landscape with respect to the enforcement of foreign judgments. The more difficult question though is – how will the Hague Convention impact the Court-arbitration dichotomy, given the entrenchment of the New York Convention in the legal sphere?

The New York Convention: (Greater) Certainty and Numbers?

Conceptually, the Hague Convention can be considered a New York Convention for the recognition and enforcement of foreign litigation judgments. A foreign judgment will be recognised and enforced save in limited circumstances which do not involve an (re)examination of the merits of the case. The Hague Convention explicitly does not apply to arbitration and related proceedings and a party may not seek to enforce an arbitration agreement or an arbitral award pursuant to the convention.

Nevertheless, there are substantive differences between the two conventions, especially when considered from the Singapore perspective. We discuss some of these differences below.

Exclusions where a party is a consumer or employee: The Hague Convention does not apply where one of the parties is a consumer or where it relates to an employment agreement (including collective agreements). While no
such limitations exist for arbitration under Singapore law, other jurisdictions in the New York Convention may not permit consumer arbitrations and/or employment arbitrations either, such as Turkey, Greece, Bulgaria, Italy and Switzerland.

Subject-matter exclusions: The Hague Convention only applies to "civil and commercial" matters. Excluded subject-matters include family law matters, probate, anti-trust (competition law), insolvency, international carriage of goods and personal injury matters, as well as torts relating to tangible property and intellectual property save where it involves copyright and related rights. However, depending on the jurisdiction involved, these restrictions might be comparable to or even less restrictive than in arbitration.

“International” cases: The Hague Convention only applies to “international” cases in the sense that parties cannot be both resident in the same contracting state and where the relationship of the parties and all other elements relevant to the dispute are connected to that same contracting state. Parties cannot circumvent this requirement by designating the Courts of a foreign contracting state in their choice of court agreement. Under Singapore's arbitration laws, parties may “opt-in” and have the International Arbitration Act apply even when the domestic Arbitration Act would apply instead.

Non-Enforceability of interim measures: An interim measure of protection cannot be enforced pursuant to the Hague Convention. This is similar to Singapore law to the extent that the Singapore Courts’ power to enforce a foreign arbitral award does not include an interim measure of protection issued by a foreign arbitral tribunal.

However, the Singapore Courts have the power to issue such interim measures in aid of a foreign arbitration. The Singapore Courts have granted a freezing (Mareva) injunction in aid of foreign Court proceedings, albeit in restricted circumstances. However, the implementation legislation for the Hague Convention could adopt the arbitration approach and provide that Singapore Courts have the power to grant interim measures in aid of litigation proceedings in another contracting state.

Default and Summary Judgments: one of the key strengths of Court proceedings is the ability of the Court to issue default or summary judgments. In arbitration however, no such option exists and a party might find itself having to go through the entire arbitration process including a substantive hearing even though the other party is not in attendance. Even where a dispute can be summarily disposed of on a question of law, there is no requirement for an arbitral tribunal to do so.

The Hague Convention: Courting the Freedom of Choice

In light of the similarities between the Hague Convention and the New York Convention, and the additional limitations which apply in particular to the Hague Convention, it might appear that the Hague Convention does not offer any particular benefit over that of arbitration, especially in terms of the extent of cross-border enforcement. Viewed in that light, the 28-signatory Hague Convention falls a long way behind its 156-party cousin.

However, there are reasons why parties may prefer litigation over arbitration:

1. Parties may perceive litigation to be cheaper than arbitration in certain efficient jurisdictions.

2. Parties might want the choice of an appellate process rather than the finality of an arbitral award.

3. Arbitration institutions are only slowly catching up to the courts in having powers of joinder and consolidation. Even so, given that the bedrock principle of arbitration is consent by the parties, there will always be an issue where a third party is joined to the arbitration without its consent.

4. Parties might consider the rigours and formalities of the court process to be an effective mechanism to streamline the dispute resolution process and prevent dilatory tactics from the counterparty.

This preference for litigation over arbitration appears to be borne out by the statistics. By way of a rough comparison, the Singapore International Arbitration Centre still does a fraction of the caseload that the Singapore High Court assumes. In 2014, 6924 civil originating processes were filed in the High Court while only 222 new cases were filed in the SIAC. In fact, according to one calculation, the total number of new cases filed globally across 11 major arbitration institutions (including the SIAC) amounted to 4989, which is still less than the total caseload assumed by the Singapore High Court.

Therefore, the empirical evidence indicates that litigants may wish to have their disputes heard in the Courts.

Viewed in that light, the value that the Hague Convention adds is the real freedom of choice that it provides to litigants. Parties to disputes which apply the Hague Convention would no longer be constrained to arbitration because of the deficiencies in the legislative framework to support the
recognition and enforce foreign Court judgments. Parties now have the freedom to choose between commencing Court proceedings or commencing arbitration.

Admittedly, in the initial stages, the inherent uncertainties in the application of the Hague Convention may pose a deterrent to parties contemplating commencing foreign Court proceedings. As experience on the recognition and enforceable of arbitral awards has amply demonstrated, domestic Courts can and have taken divergent views on the proper interpretation of the clauses in the New York Convention. It would be very surprising if similar issues do not arise with respect to the interpretation of the Hague Convention. However, such uncertainties are no different from those inherent to the interpretation of legal texts (including, arguably, the New York Convention), and would arguably reach a state of equilibria in due course.

Singapore: An International Hub for Dispute Resolution

As alluded to above, the Court-arbitration dichotomy cannot be seen as a zero-sum game. What matters is that the Hague Convention now provides parties with the freedom of choice; the Hague Convention Courts that freedom of choice.

At a macro socio-economic level, coming hot on the heels of the establishment of the Singapore International Mediation Centre and Singapore International Commercial Court, the Hague Convention is the latest shot across the bow in Singapore’s bid to further entrench its reputation as an international hub for dispute resolution.

The potential effect of implementing the Hague Convention is not insignificant. The 28 states, which have contracted to the Hague Convention include the EU member nations (except Denmark), which is Singapore’s third largest trading partner, and which saw an almost 40 per cent increase in trade in services between 2008 and 2013. Mexico, which was the first signatory to the Hague Convention, is also a significant trade partner of Singapore. Bilateral trade between Singapore and Mexico doubled in the last decade to US$3.83 billion in 2014, and Singapore’s total foreign direct investment into Mexico amounted to US$1.16 billion at the end of 2013.

At the ASEAN level, the Hague Convention also provides a convenient ready-made vehicle for harmonisation of dispute resolution rules within the ASEAN member states. This is particularly significant if we are to build upon the ASEAN Economic Community which was established in 2015. As the Honourable the Chief Justice Sundaresh Menon said in his 2013 Keynote Address on ASEAN Integration Through Law, the Hague Convention “is one area with significant potential for harmonisation and which would not require sieving through the web of the different substantive laws; and it holds the promise of considerably strengthening our regional infrastructure”. More recently, the Ministry of Law has announced that the Hague Convention is part of its efforts to promote the Rule of Law and in the field of international law.

It will be recalled that when the New York Convention was first signed in 1958, there were only 24 state signatories. However, that number has since grown to 156 contracting states. Like any network, its utility increases as the number of members increase. And as the network grows, it creates its own momentum. We are optimistic that the Hague Convention will go down the same path.

The implementing legislation and the relevant rules of courts have not been circulated and the legal fraternity no doubt eagerly await those.

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## Annex: Comparison between the Hague Convention and the New York Convention

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<thead>
<tr>
<th>Issue</th>
<th>Hague Convention</th>
<th>New York Convention</th>
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<tbody>
<tr>
<td>Consumer contracts</td>
<td>Excluded</td>
<td>Not excluded in Singapore. Otherwise varies by jurisdiction</td>
</tr>
<tr>
<td>Employment contracts</td>
<td>Excluded</td>
<td>Not excluded in Singapore. Otherwise varies by jurisdiction</td>
</tr>
<tr>
<td>Subject matter jurisdiction</td>
<td>List of excluded subject-matters set out at art 2(2).</td>
<td>Subject-matter arbitrability is not defined under the New York Convention.</td>
</tr>
<tr>
<td>International cases</td>
<td>Parties must not be from same contracting state and the elements of the dispute must not point to that same state. Parties cannot choose to opt-in to the Hague Convention by choosing a Court of a foreign contracting state as part of their exclusive choice of Court agreement.</td>
<td>Parties may opt-in to either the domestic or international arbitration regime in Singapore.</td>
</tr>
<tr>
<td>Interim measures</td>
<td>Non-enforceability of interim measures issued by Courts of another contracting state. Does not preclude Court of contracting state from issuing interim measure in support of foreign proceedings. However, this will be a matter of domestic law.</td>
<td>Non-enforceability of interim measures issued by tribunal seated outside of Singapore. Singapore Courts have the power to issue interim measures in aid of foreign proceedings. Otherwise varies by jurisdiction.</td>
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### Default and summary judgments

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<th>Hague Convention</th>
<th>New York Convention</th>
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<tr>
<td>Default and summary judgments can be recognised and enforced.</td>
<td>There is no default judgment or summary judgment mechanism in arbitration.</td>
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</table>

### Notes

1. United Kingdom, New Zealand, Sri Lanka, Malaysia, Windward Islands, Pakistan, Brunei Darussalam, Papua New Guinea, India (except Jammu and Kashmir), Australia and Hong Kong SAR (sole country in REFJA).


3. The UK is a contracting state to the Hague Convention as well as a designated jurisdiction under RECA

4. For convenience, a table summarising these differences is also set out in the Annex hereto.

5. See art 2(1), Hague Convention

6. See art 1(1), Hague Convention

7. See art 2(2), Hague Convention

8. See art 1(2), Hague Convention

9. Ibid.

10. See art 7, Hague Convention.

11. See s 2(1) of the International Arbitration Act (Cap 143A).

12. See s 12A(1) and (2) of the International Arbitration Act (Cap 143A).


15. The authors recognise that the Singapore High Court civil proceedings includes non-arbitrable matters such as probate, bankruptcy and insolvency, matrimonial as well as certain types of trusts disputes.


