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FROM ARBITRATION TO ADJUDICATION: NAVIGATING THE LEGAL LABYRINTH OF THE HAGUE CHOICE OF COURT CONVENTION.

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"*The [Hague Choice of Court] Convention seeks to transpose the New York Convention's legal regime, which was designed specifically for international arbitration, to the very different context of forum selection clauses and national court judgments*."

(Gary Born).

Relevant law: Hague Convention Article 9

As Gary Born points out that the (Hague Choice of Court) Convention has transposed the legal regime of the New York Convention, which was designed specifically for the International Arbitration, to a very different context of forum selection and national court judgements. His statement appears to be a misapprehension of the main objective of the convention. This review critically examines G. Born's statement and provide a balanced and constructed opinion on the same.

One might consider it an invalid approach to compare both the conventions because the negotiators were aware of the key differences between both the conventions. They knew that the exclusive choice of courts and the judgements based upon them were contrary to the International Arbitration Procedures and enforcement of their awards. This very difference resulted them to draft this convention.

João Ribeiro-Bidaoui, in her article dated July 21, 2021, titled, *"Hailing the HCCH (Hague) 2005 Choice of Court Convention, A Response to Gary Born*," has also argued;

".....Not only is this a fundamental misconception of the genesis and purpose of the Convention, one that invalidates the very basis of Born's indictment, but it also applies an incorrect standard when comparing the Convention to the New York Convention. First, the negotiators were well aware of the differences between, on the one hand, exclusive choice of court agreements and judgments based upon them, and, on the other, international arbitration clauses and the judicial recognition and enforcement of their resulting awards. This is why

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they drafted an instrument specifically tailored to choice of court agreements and the court judgments that are issued pursuant to this.[1)] *Second, the proper standard for a realistic and fair appreciation of the Convention is the kaleidoscopic treatment of choice of court agreements, and the uncertainty and unpredictability that judgments based upon such agreements face in the absence of a global legal regime." [Paragraph 2].*

Some of the key issues addressed over Born's statement are;

• ***Both the Hague Choice of Court Convention and the New York Convention have an important role to play in enhancing the integrity and competence of Judicial Authorities.***

Born points out that the judicial authorities are not very developed and has alleged them to be corrupted. But over the past few decades there has been a significant development in the working of the judicial bodies. There increased efficiency in working ad handing with cases cannot be unseen. There has been recruitment of many efficient and hardworking judges.

If one takes the example of Brexit, the convention has proven to be the accountable for the development of judicial cooperation. Its role has been evident in the development of transnational system of International Commercial Courts. *One of the interpretations of Article 9 of this Convention states that the Special Commission has the power to issue Authoritative Recommendations and advice on uniform interpretation of the Convention, including sharing of good practises and facilitation of judicial dialogue.* [Article by Joao Riberio – Bidaoui, July 21, 2021]

The (Hague Choice of Court) Convention has increased the rule of law which has consequently increased the judicial cooperation and developed judiciary. The HCCH gives power to states to ensures that the judgement passed by courts meets the International Standards. This Convention provides more rule of law at the International Level.

•***Party Autonomy***

Party Autonomy enables parties and arbitrators to dispense with technical formalities and procedures of National Court proceedings and instead follow procedures as per the case basis. This Doctrine gives the parties the freedom to choose the law that shall govern their contract and disputes arising in that contract.

If one speaks of the difference between the two conventions pertaining to party autonomy, one must consider that the HCCH gives the chosen court, under Article 5(1), Article 9(a), the power

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to review the decision of choice of court. Meanwhile, the New York Convention has no such provision for the Courts to review the same. It cannot go unseen that here HCCH provides the Court the privilege to review the choice of courts which the New York Convention does not provide.

In an article by *Trevor Hartley, Professor emeritus at the London School of Economics*, titled, *"Is the 2005 Hague Choice-of-Court Convention Really a Threat to Justice and Fair Play? A Reply to Gary Born", has mentioned;*

"....In any event, if parties think that their rights will be better protected under an arbitration agreement than under a choice-of-court agreement, there is nothing to stop them from opting for the former. To deprive them

of that choice by denouncing the Hague Convention would not enhance party autonomy: it would seriously limit it." [Paragraph 4]

• ***Procedural Fairness***

One can say that Born had pointed out the fairness and biasness of the intentions of judicial bodies in many of his articles, but it cannot be unseen that over the time the Judiciary has shown significant development making the authorities more efficient in delivering fair and just decisions. Under ***Article 9(e) of the Convention*** the concern has been duly addressed.

João Ribeiro-Bidaoui, in her article dated July 21, 2021, titled, *"Hailing the HCCH (Hague) 2005 Choice of Court Convention, A Response to Gary Born"* has also mentioned that,

".....Moreover, contrary to Born's assertion in ***Part III*** *of his series, the fact that the Convention avoids this overlap does not in any way mean that enforcing courts need to "dilute" the procedural fairness in Article V(1)(b) of the New York Convention, or the procedural fairness standard in the U.S. Supreme Court decision* ***Hilton v Guyot****. It is not envisaged that either of those mechanisms would allow for a "broad scale attack"[5] on a foreign legal system, but appropriate allegations of procedural unfairness can be considered under those provisions. In that respect, Article 9(e) of the Convention offers a comparable protection in its field." [Paragraph 15]*

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Conclusion:

In conclusion, it can be said that the main purpose of the Convention was to make an effective choice and to provide accuracy and fairness to the parties. The Convention can be seen beneficiary within the spheres of Transnational Litigation.