
Intergovernmental Group of Experts on Competition Law and Policy

18th SESSION

10-12 July 2019

Room XVII, Palais des Nations, Geneva

**Contribution of the Hague Conference on Private International Law (HCCH)
to the work of the Eighteenth Session of the Intergovernmental Group of
Experts on Competition Law and Policy, UNCTAD**

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**Contribution of the Hague Conference on Private International Law (HCCH)
to the work of the Eighteenth Session of the Intergovernmental Group of Experts on
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1. Competition law related matters have been considered within the remit of the HCCH's work. The HCCH *Convention of 30 June 2005 on Choice of Court Agreements*¹ (2005 Choice of Court Convention) explicitly excludes anti-trust (competition) matters from its operation. On the other hand, newly adopted HCCH *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*² (2019 Judgments Convention) includes certain anti-trust (competition) matters within its scope, subject to limitations. Please see below for more details.

A. 2005 Choice of Court Convention

2. The 2005 Choice of Court Convention aims to ensure the effectiveness of choice of court agreements (also known as "forum selection clauses" or "jurisdiction clauses") between parties to international transactions and to facilitate the recognition and enforcement of the ensuing judgments. There are three basic rules in the Convention: the chosen court must hear the case; the non-chosen court should not hear the case; and the judgments given by the chosen court should be recognised and enforced in other Contracting States.

3. The Convention explicitly excludes anti-trust (competition) matters from its scope of operation,³ for the reason that anti-trust (competition) matters were seen to be nationally sensitive, and it was not considered desirable for the Convention, which operates based on the agreement of the parties, to apply to matters where the public interest is potentially involved.

4. The phrases "anti-trust" and "competition" are both used in the 2005 Choice of Court Convention, because different terms are used in different States and legal systems for rules of similar substantive content. For example, the standard term in the United States is "anti-trust law", while in Europe it is "competition law". Importantly, the term "anti-trust (competition)" is not taken to encompass laws concerning "unfair competition" such as the French concept of *concurrance déloyale*.⁴

5. Anti-trust (competition) matters can form the subject of private-law proceedings, and an action can arise from a contractual relationship or in tort claims for damages for breach of anti-trust (competition) law. Such actions are excluded from the 2005 Choice of Court Convention, even though they are brought under a choice of court agreement and they are between private parties.⁵

6. When anti-trust (competition) matters are raised as a preliminary question, the main claim, *e.g.*, based on a contractual dispute, is not outside the scope of the Convention even though anti-trust (competition) matters are excluded from the Convention.

B. 2019 Judgments Convention

7. The 2019 Judgments Convention aims to facilitate the recognition and enforcement of judgments among Contracting States. After four Special Commission meetings, State-level negotiation, this Convention was further negotiated at the 22nd Diplomatic Session, took place from 18 June to 2 July

¹ Information on the 2005 Choice of Court Convention is available on the HCCH website < www.hcch.net > under "Choice of Court".

² Information on the 2019 Judgments Convention is available on the HCCH website < www.hcch.net > under "Judgments".

³ Art. 2(1)(h) of the 2005 Choice of Court Convention.

⁴ T. Hartley & M. Dogauchi, "Explanatory Report on the 2005 Hague Choice of Court Convention", in *Proceedings of the Twentieth Session* (2005), Tome III, *Choice of Court Agreements*, Antwerp – Oxford – Portland, Intersentia, 2010 ("Hartley/Dogauchi Report"), para. 60.

⁵ *Id.*, para. 62.

2019, in The Hague, and was concluded and adopted on 2 July 2019. On this day, Uruguay signed the Convention. The text of the new Convention can be found [here](#).

8. Delegations at the Diplomatic Session approached the discussion of anti-trust (competition) matters largely from two conflicting perspectives. Some delegations supported complete exclusion of such matters under Article 2(1) of the Convention, arguing that even with regard to private claims, there is a strong element of public interest involved in this field and that it would be challenging to clearly distinguish between public and private enforcement of anti-trust (competition) related rules. In addition, these delegations were concerned about potential extraterritorial effects, as anti-trust (competition) rules are jurisdiction-specific. Other delegations, however, favored full inclusion of anti-trust (competition) matters, insisting that anti-trust (competition) laws share the same objectives and common characteristics at a global level and pointing out that the Convention, which deals with civil or commercial matters, would only cover private enforcement actions.

9. Numerous informal working group meetings were held on this issue before and over the course of the Diplomatic Session, and in the end, a compromise was reached. The plenary agreed on a partial exclusion of anti-trust (competition) matters, including only a clearly delineated set of conducts and practices widely accepted as anti-competitive in jurisdictions across the world and adding a territorial restriction to the inclusion of such judgments. The new text of the exclusion, Article 2(1)(p) of the Convention, reads as follows:

“Article 2

Exclusions from Scope

1. *This Convention shall not apply to the following matters –*

[...]

(p) anti-trust (competition) matters, except where the judgment is based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the State of origin;”

10. This new formulation seeks to include within the scope of the Convention the violations of anti-trust (competition) law on which there is global consensus (the so-called “hard-core cartels”). The wording is inspired by the 1998 OECD Recommendation,⁶ with “concerted practice” referring to cooperative actions among undertakings that do not reach the stage of concluding a formal agreement. This list is meant to be exhaustive, and judgments concerning any other categories of anti-trust (competition) law that do not appear on the list are not within the scope of the Convention.

11. The perceived risk of extraterritorial effects has been addressed in the final phrase of the exclusion: “*where such conduct and its effect both occurred in the State of origin.*” Once the court addressed has determined that a judgment concerns one of the listed anti-competitive behaviors, it must then find that the case decided by that judgment has a significant link to the State of origin (the State where the judgment is given) in order to include it in the scope of the Convention. According to Article 2(1)(p) of the new Convention, both the “conduct” (referring to the anti-competitive agreement or concerted practice) and the “effect” (referring to the impact on the market) must have taken place in the State of origin.

12. For the operation of the Convention in relation to anti-trust (competition) matters, if a judgment concerns one of the listed behaviors in Article 2(1)(p), and it satisfies the territorial connection with the State of origin, then it is within scope. If this judgment is recognisable and enforceable in the State of origin, the court addressed would then proceed to Article 5(1) to determine whether the judgment

⁶ Recommendation of the OECD Council concerning effective action against hard-core cartels, of 25 March 1998.

meets one of the necessary jurisdictional bases to be therefore eligible for recognition and enforcement.

c. Conclusion

13. The HCCH work does involve anti-trust (competition) matters. The 2005 Choice of Court Convention explicitly excludes them from the range of matters for which it empowers parties to engage exclusively the jurisdiction of a court, and circulate its ensuing judgment, by virtue of their choice of court agreement. The 2019 Judgments Convention allows anti-trust (competition) matters to circulate provided they satisfy the conditions set out in the Article 2(1)(p) exception.

The Hague, July 2019