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INTERNATIONAL BAR ASSOCIATION

LITIGATION COMMITTEE

**REPORT TO THE HCCH SPECIAL COMMISSION ON THE RECOGNITION
AND ENFORCEMENT OF FOREIGN JUDGMENTS**



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INTRODUCTION

The IBA Litigation Committee ("Litigation Committee") was pleased to be invited to observe the proceedings at the meeting of the Special Commission on the Recognition and Enforcement of Judgments (the "Judgments Project") which took place in June 2016.

The Litigation Committee represents 2397 lawyers in 113 jurisdictions and its stated aim, in common with the IBA as a whole, is to work towards the progress and development of international law.

The Litigation Committee wishes to **support the Judgments Project** in its ambition to simplify the mutual recognition and enforcement of Judgments internationally.

We hope that the current negotiations lead to the adoption of a draft Convention which addresses **the needs of practitioners, including: predictability, practicability and consistency.**

Ratification of the draft Convention is ultimately a matter for the States themselves. The Litigation Committee represents many jurisdictions but in this report the Litigation Committee purposely leaves aside jurisdictional particularities as well as wider policy issues, focussing instead on a practical review of the revised draft provisions circulated after the last meeting of the Judgments Project.

In order for the Judgments Project to have a far reaching effect, lawyers must be convinced that using the Convention will benefit their clients. Practitioners will only use the Convention if it upholds the rule of law and is likely to result in fair, predictable outcomes. It must also be simpler (and therefore more cost effective) to use than existing processes for the recognition and enforcement of Judgments (according to local rules or pre-existing international treaties, for example).

It is in this respect that IBA members have a significant amount to add, drawing upon their own practical experience of cross border enforcement across a variety of disciplines and jurisdictions.

In order to inform this report, we have surveyed all members of the Litigation Committee to establish areas of most common interest or concern. The Survey responses are at **Appendix 1** to this report and are referred to in the submissions on the draft Convention text where relevant.

The submissions on the draft Convention text have been prepared by the contributors to the report listed on page 2, each of whom regularly conduct

international litigation and who, between them, are based in 10 different jurisdictions. The drafting suggestions set out in this report reflect the practical experience of members of the Litigation Committee which spans both civil and common law systems.

We have submitted this report to the Judgments Project in advance of the next meeting in February 2017 so that it may be considered by the Delegates and the Drafting Committee. Representatives of the IBA Litigation Committee will also be present at that meeting to expand upon this report and (where necessary) clarify the submissions set out below.

ISSUES AND PROPOSALS

Executive summary

In line with its general aim to support its members as litigation practitioners, the Litigation Committee has reviewed the Judgments Project to ensure that it addresses **the needs of practitioners to have a predictable, practicable and consistent instrument**.

The present report does not aim to provide a systematic review of each provision, but rather focuses on specific issues and concerns that some provisions of the Judgment Projects have generated among members of the Litigation committee as practitioners who have direct experience in handling cases and issues of recognition and enforcement of foreign judgments in their domestic jurisdictions.

In particular, we identify the need to:

- Ensure consistency with other instruments (see comments on Art. 2);
- Clarify the wording of certain provisions (see comments on Art. 3, 4, 5(1)(f), 5(1)(g), 5(1)(m), 5(1)(n), 5(1)(o), 5(1)(k)/6, 7(1), 7(2) and 8),
- Replace certain concepts by more predictable notions (e.g. “domicile” instead of “habitual residence”, cf. Art. 3 and 5) or clarify certain notions such as “actual loss” or “harm suffered” (see comments on Art. 9);
- Consider providing definitions which are autonomous to the Convention for concepts such as “domicile”/“habitual residence” (see comments on Art. 3), “ordinary review” (see comments on Art. 4), “express consent” (see comments on Art. 5(1)(e), “in the course of the proceedings” (see comments on Art. 5(1)(e)) “immovable property” and “rights in rem” (see comments on Art. 5(1)(h) and 6);
- Ensure full integration of IP matters within the existing international legal framework (see comments on Art. 3 and 5(1)(k) and (l));
- Avoid the compulsory inclusion of complex judgments such as judgments in class and collective actions (see comments on Art. 5(1)(j));
- Provide some flexibility to Judges in Requested States to recognise and enforce only part of a Judgment (in contrast to “all or nothing” provisions) such as in relation to damages awarded (see comments on Art. 9);
- Recommend the use of a voluntary standard form setting out clearly the information and documents to be provided to the Courts of a Requested State in support of an application for recognition and enforcement (see comments on Art. 11).



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ARTICLE 2

Article 2 – Exclusions from scope

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

- a) the status and legal capacity of natural persons;
- b) maintenance obligations;
- c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
- d) wills and succession;
- e) insolvency, composition and analogous matters;
- f) the carriage of passengers and goods;
- g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;
- h) liability for nuclear damage;
- i) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
- j) the validity of entries in public registers;
- k) defamation.

2. Notwithstanding paragraph 1, a judgment is not excluded from the scope of this Convention where a matter excluded under that paragraph arose merely as a preliminary question in the proceedings in which it was given, and not as an object of the proceedings. In particular, the mere fact that a matter excluded under paragraph 1 arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.

3. This Convention shall not apply to arbitration and related proceedings.

4. This Convention shall not apply to agreements to refer a dispute to binding determination by a person or body other than a court, or to proceedings pursuant to such an agreement.

5. A judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings.

6. Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.



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Key issue

- Extent of exclusions from scope of application of the Convention.

Comments

More than 65% of respondents to the IBA Litigation Survey agreed to the proposed exclusions. However, almost 65% disagreed with the exclusion of the carriage of passengers and goods (Art. 2(1)(f)) and almost 50% disagreed with the exclusion of the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs (Art. 2(1)(i)) and that of defamation (Art. 2(1)(k)).

1. We share the opinion of the Surveyed persons and consider that the **carriage of passengers and goods** should not be excluded from the scope of the Convention. The rationale for the exclusion is to avoid possible conflict(s) with other existing conventions relevant to this issue, such as the 1974 Athens Convention for the Carriage of Passengers and their Luggage by Sea or the 1973 Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR), which contain provisions on recognition and enforcement. However, only relatively few States are parties to these specific conventions whereas the Convention aims to be a global instrument. As a result, we think that a disconnection clause would be more appropriate (if at all) as it will ensure that the possibly more general rules of the Convention do not contradict the provisions of prior specific conventions entered into by particular States.

2. The exclusion of the **validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs**, is drawn from Article 2(2)(m) of The Hague 2005 Choice of Court Convention (Preliminary Document No 2 of April 2016 for the attention of the Special Commission of June 2016, para. 37). The rationale set out in the Explanatory Notes namely that the exclusion is justified "*because the "personhood" of a legal person is a highly regulated matter which varies substantially across jurisdictions*" (Preliminary Document No 2 of April 2016 for the attention of the Special Commission of June 2016, para. 37), is unconvincing. This matter is indeed highly regulated, usually by the law of the place of incorporation / seat, whose courts usually have exclusive jurisdiction over disputes related to the validity of the constitution, the nullity or the dissolution of companies or other legal persons (Art. 24(2) of the EU Regulation No 1215/2012; Art. 22(2) LC). This close connection was precisely the underlying reason to exclude this matter from The Hague 2005 Choice of Court Convention, where "*it was considered undesirable that such matters, which often involve the rights of third parties, should be removed from the jurisdiction of the courts that would*



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otherwise have jurisdiction over them, especially since that jurisdiction is often exclusive.” (Hartley / Dogauchi Report, para. 70). If the exclusive jurisdiction of the courts of the seat of legal persons was considered worth protecting because of its efficiency, the judgments issued by these courts should be able to circulate and as a result should be included in the scope of the Convention.

3. Finally, **defamation** cases are excluded because it “*is a sensitive matter that touches upon freedom of expression and may have constitutional implications*” (Preliminary Document No 2 of April 2016 for the attention of the Special Commission of June 2016, para. 39). We share the views of the working group as what is considered defamatory in one State may be considered trivial in another because of cultural differences. As a result, including defamation cases in the scope of the Convention could lead to recognizing and enforcing foreign judgments clashing with the local sensibilities of the state of the court addressed, but not amounting to a violation of public policy. This is undesirable.

Proposals:

- Judgments relating to the “carriage of passenger and goods” should not be excluded. A possible disconnection clause should rather be envisaged to mitigate risks of overlapping / contradictions with other existing international conventions.
- Judgments relating to the “validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs” should not be excluded.



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ARTICLES 3(1)(b) AND 3(2)

Article 3 – Definitions

1. In this Convention,

- a) “defendant” means a person against whom the claim or counterclaim was brought in the State of origin;
- b) “judgment” means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

2. An entity or person other than a natural person shall be considered to be habitually resident in the State –

- a) where it has its statutory seat;
- b) under whose law it was incorporated or formed;
- c) where it has its central administration; or
- d) where it has its principal place of business.

Key issues

- The scope of subparagraph (1)(b) should be further clarified;
- Subparagraph (1)(b) requires further clarification in relation to IP matters, in particular:
 - The Comptroller-General of Patents, Designs and Trade Marks is an officer of the UK Intellectual Property Office. He/she has power to determine questions of infringement and validity of patents registered in the UK, and questions of validity of designs and trademarks registered in the UK;
 - The European Union Intellectual Property Office has power to determine questions of validity of European Union Trade Marks and Community Designs. The draft Convention may unintentionally exclude such decisions;
- Uncertainty regarding the use and definition of the “habitually resident” criterion.

Comments

1. A large majority of the respondents to the IBA Litigation Survey considered that only final judgments (as opposed to interim measures of protection) on the merits should be enforceable under the Convention and the **definition of “judgment”** limited accordingly. Only a minority considered that judgments rendered in proceedings for collective redress should be enforceable under the Convention.

Common law practitioners raised the point that in their jurisdictions, a default judgment is given subsequent to a mere application to Court and an administrative process – the Court simply looks at whether the claim has been acknowledged / defended within specified timescales and, if not, default judgment is given. Typically, this process does not involve the case being given any judicial consideration, so there is no “decision on the merits.” According to the working group, default judgments are encompassed in the scope of the Proposed Draft Text (Preliminary Document No 2 of April 2016 for the attention of the Special Commission of June 2016, para. 51). One should therefore clarify whether common law “default judgments” (where no judicial consideration is given and which are as a result not judgments “on the merits”) fall within the scope of the Convention in general and of Art. 3(1)(b) in particular. The mechanism set forth under Art. 4(2) – allowing the court addressed to second guess facts stated in a default judgment – suggests that they do. If they indeed do, it should also be stated clearly that they may be enforced pursuant to the Convention without any prior additional “validation proceedings” (where a Judge is invited to review the merits of the case before giving “default judgment”).

We consider that the safeguards in Article 7(1)(a)(i) and (ii) regarding notification of the proceedings to the defendant sufficiently protect defendants, in the event that they do not enter an appearance in the Court of Origin and judgment is entered against them in their absence (see comments on Article 7(1)(a) below).

2. Subparagraph 1(b) raises several issues in respect of IP matters. The Convention lacks any definition of a court. It also seeks to exclude administrative decisions (Art. 1(1) and Art. 2(1)(j)). However, other national IP Offices have similar powers to a court. They are not courts but administrative bodies. For example, the relevant UK statutes distinguish between the court and the Comptroller. The Comptroller can determine a patent infringement dispute if the parties agree he/she should do so (which would be excluded by Art. 2(4)).

Whether this is an issue so far as concerns revocation of patents, trademarks and designs depends on the answer to the question of whether the validity of such registered rights is within scope (see comments on Art.6(a) below).



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3. Art. 5(1)(a) of the Convention refers to the “**habitual residence**” rather than to the “domicile” as a requirement for the recognition and enforcement of foreign judgments. This notion is bound to have a substantial impact on the application of the Convention as it is one of the most commonly applied requirements to grant recognition and enforcement. Besides, this requirement applies not only to companies (legal entities) but also to individuals (natural persons).

Art. 3(2) of the Convention defines “habitual residence” for an “entity or person other than a natural person”, but provides no guidance to identify the “habitual residence” of an individual (natural person). Moreover, the criteria listed in Art. 3(2) to ascertain the habitual residence of such “entity or person other than a natural person” (e.g. statutory seat, law of incorporation) cannot apply, even by analogy, to individuals (natural persons).

"Habitual residence" is a concept which appears in many Hague Conventions, notably regarding the custody of children. We are not aware of the term being given a precise definition in any of these other Conventions, which we assume is a policy decision.

As a result, many jurisdictions have developed their own interpretation of "habitual residence" in order to give effect to other Hague Conventions and we are aware that there is significant inconsistency, between jurisdictions, in how the meaning is applied.

In the UK, for example, the Courts have consistently held that the term is a "question of fact" which is determined in each, individual case. Specifically, a person must have taken up residence in a country and shown "*a certain commitment*" to that country. In terms of the length of time in a country necessary to establish "residence", in the UK it has been held that just four weeks could suffice where a family had relocated to Australia¹.

While a degree of flexibility in the definition is clearly helpful in the context of child abduction / custody cases, the draft Convention on the Recognition and Enforcement of Foreign Judgments expressly does not relate to family law matters (Article 2(1)(c)).

Accordingly, we are concerned that the current level of flexibility in the definition, when applied in a commercial, consumer or employment context, would result in a very uncertain application of Article 5(1)(a), which could vary significantly from State to State.

¹ *Re F (A Minor) (Child Abduction)* [1992] 1 F.L.R. 548

In this context most jurisdictions refer to a person's legal domicile, rather than "habitual residence" (as does the LC or the Recast Brussels Regulation 1215/2012). As a result, there is great uncertainty as to what "habitually resident" means for an individual (natural person). Is it the place where he/she spends most of the time each year? Is it the place where he/she has the center of his personal interests? Is it a mix of both? Is it neither? Can it be a different place from his/her legal domicile? If so, is the legal domicile a relevant criterion to determine the place where a natural person is "habitually resident" or should it be disregarded altogether?

These uncertainties must be removed to avoid future disputes. We would recommend the use of domicile as a criterion and to provide an autonomous definition in the Convention. Alternatively, we recommend that a clear definition of "habitually resident" must be set out in this Article. Given the potentially wider effect of a specific definition (which could, by analogy, apply to the term "habitually resident" in other Hague Conventions – potentially undesirably) we further suggest that any defined term relating to residence or domicile is expressed only to apply to the Convention on the Recognition and Enforcement of Foreign Judgments.

Proposals

- Clarify whether "default judgments" given without proper judicial consideration (common law system) are encompassed in the definition of an enforceable "judgment".
 - If they do, confirm that they may be enforced without the need for prior judicial validation process.
 - If they do not, express it clearly.
- In relation to IP matters:
 - Provide a definition of "court" which encompasses decisions that are judicial in character and are made under statutory authority. Note this issue is addressed in the Recast Brussels Regulation 1215/2012, which may provide suitable language.
 - Resolve the scope question as to validity of patents, designs and trademarks.
 - Carve out statutory bodies from the Art. 2(4) exclusion.
- Use the criterion of "domicile" instead of "habitual residence" and provide an autonomous definition of this term in the Convention. Alternatively, give a specific definition of "habitual residence" for natural persons, expressed to apply only to this Convention on the Recognition and Enforcement of Foreign Judgments.

ARTICLE 4

Article 4 – General provisions

1. A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

2. Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin.

3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

4. If a judgment referred to in paragraph 3 is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired, the court addressed may –

- a) grant recognition or enforcement, which enforcement may be conditional on the provision of such security as it shall determine;
- b) postpone the recognition or enforcement; or
- c) refuse the recognition or enforcement.

A refusal under sub-paragraph c) does not prevent a subsequent application for recognition or enforcement of the judgment” (emphasis added on commented provisions).

Key issues

- Article 4.3: Ambiguity of the term “has effect”;
- Article 4.4: Definition of the notion of “ordinary review”;
- Article 4.4.c: Different meanings of the term “refusal” in Articles 4 and 7.

Comments

1. The use of the wording “has effect” in Article 4.3, has, in our opinion, no precise legal meaning and might, therefore, be a source of confusion between



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future Members of the Convention. We understand the reference to this term since, under some legal systems, a judgment might be binding and have effect without being enforceable. In our view, this type of judgment should not be excluded from the scope of the Convention. However, the words “has effect” might not be the most appropriate - we suggest using “legally binding” instead. This wording will have a more powerful meaning than “has effect”, but should still allow judgments which are legally binding but not yet enforceable to be recognised under the Convention.

2. Our second comment relates to the use of the terms “review” and “ordinary review” in Article 4.4. We note that these two different terms are used when it comes to giving the judge of the requested State the right to grant, grant upon a security, postpone or refuse the recognition and enforcement of a foreign judgment. As things stand, whereas *any* review of the foreign judgment that is in progress in the State of Origin may entitle a judge in the Requested State to choose one of the above-mentioned options, only the non-expiration of the time limit for seeking an *ordinary* review in the State of Origin would allow the judge in the Requested State to do the same. It is true that, in some legal systems, part or all of extraordinary reviews are not subject to any time limits or restrictions; so if “*ordinary* review” had not been retained in the second part of the sentence, this would potentially have allowed the judge of the Requested State to use one of the four above-mentioned options on any occasion. We therefore agree that the distinction between a “*review*” and “*ordinary review*” in this clause should be maintained and the draft provision should not be modified. We would however recommend that the notion of what constitutes an “ordinary review” be defined under the Draft Convention (for instance in its Article 3 which includes a list of applicable definitions).

3. Our third and last comment refers to the use of the term “refusal” in Articles 4 and 7. This was subject to much discussion between experts at the meeting of the Judgments Project in June 2016. As set out in the Minutes of the meeting in June 2016 (see paragraph 34), the refusal of recognition and enforcement mentioned in these two articles is of a different nature. As expressed in the Minutes, we agree that the refusal referred to in Article 4 should not be construed as a definitive refusal since it does not preclude, as mentioned in the last sentence of Article 4.4, filing a subsequent application for recognition and enforcement after the State of Origin has ruled on the appeal (i.e. which gives rise to the refusal of recognition and enforcement). We also share the views expressed in the Minutes, paragraph 34 *et seq.*, that the refusal in Article 7 is a definitive refusal since it deals with the reasons on the merits which entitle a requested State to refuse recognition and enforcement (e.g. fraud or public policy).



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We note that at the meeting in June, some experts were of the opinion that the term “refusal” should not be used to describe two different, but related, concepts in the Draft Convention and suggested that in Article 4 the term should be replaced with “dismissal”. On the other hand, and as outlined by an EU expert (Minutes, paragraph 40), the term “refusal” is already used with both meanings in the 2005 Choice of Court Convention and this duplication might, thus, not be an issue. We agree that use of the word “dismissal”, instead of “refusal”, in Article 4.4 is not a complete solution: whilst it would certainly make it possible to distinguish between the consequences of a refusal under Article 4.4 and those of a refusal under Article 7, it might also raise some uncertainty regarding the consequences of a “dismissal” itself. As noted by some experts from the United States and Israel (Minutes, paragraphs 36 and 39), in different jurisdictions a dismissal might be intended as with or without prejudice. Consequently, the above-mentioned position expressed by an EU expert seems preferable, as long as it is clear (as it is in the last sentence of Article 4.4) that a refusal under subparagraph (c) does not prevent a subsequent application.

Therefore, we agree that the use of the word “*refusal*” in the Draft Convention should correspond with the wording of Art. 8(4) of the 2005 Choice of Court Convention.

Proposals:

- Article 4.3: Clarification of the term “has effect”, it might be replaced by “legally binding”;
- Article 4.4: Definition of the term “ordinary review” in Article 3 of the Draft Convention;
- Article 4.4.c: We agree that the word “refusal” should not be replaced by the term “dismissal”.



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ARTICLE 5(1)(e)

Article 5 – Bases for recognition and enforcement

1. A judgment is eligible for recognition and enforcement if one of the following requirements is met -

(. . .)

[e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given];
2. If recognition or enforcement is sought against a natural person acting primarily for personal, family or household purposes (a consumer) in matters relating to a consumer contract, or against an employee in matters relating to the employee's contract of employment –
 - a) sub-paragraph 1(e) applies only if the consent was given before the court;

Key issues

- What constitutes “express consent”?
- What is “in the course of the proceedings”?
- The consumer/employee exception aims to protect weaker parties from inadvertently “consenting” to jurisdiction in a state.
- In some States, collective employment contracts exist, and collective employment contracts do not raise the same concerns about disparities in bargaining power that individual employment contracts or consumer contracts do. The exception was rewritten to apply only to individual employment contracts.

Comments:

Article 5, Section 1(e)

Article 5(1)(e) stands for the proposition that when a defendant has expressly agreed that a court of origin has jurisdiction over it, the defendant should not later



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challenge that court's jurisdiction when the opposing party seeks to enforce the judgment of the court of origin against the defendant in a Contracting State.

Although the provision itself seems straightforward, consistent application in different states may require clarification. Attorneys from different States disagree as to the meaning of "express consent." Some believe appearance before a court without contesting the court's jurisdiction to be "express consent," but others disagree. *Compare, e.g.*, IBA Hague Judgments Convention Survey Question 12, # 4-7; *with Minutes 4*, paras. 32, 36, 40.

Adding a definition of "express consent" to Article 3 would resolve this disagreement. The proposed definition defines "express consent" narrowly. This allows for the Convention to separately address situations of tacit assent, adding appropriate caveats. For example, proposed Article 5, Section 1(f) addresses a situation that lawyers from some legal traditions would consider to be "tacit assent," and it allows for tacit assent to provide a basis for recognition of judgments *when certain conditions are met* (e.g. the defendant had an opportunity to challenge jurisdiction, and the defendant had a viable argument that jurisdiction was lacking under the law of the state of origin).

Similarly, defining "in the course of the proceedings" would reduce confusion and provide courts with consistent, bright-line rules for applying the provision.² The limitation of Article 5, Section 1(e) to express consent given "in the course of the proceedings" aims to ensure that express consent to jurisdiction was knowing and voluntary. At the time the defendant gives consent, the defendant should have notice of the claims to be litigated in the court of origin and therefore knowledge of the consequences of consenting to that court's jurisdiction over those claims. Conversely, Section 1(e)'s limitation to consent given "in the course of the proceedings" prevents a situation where a soon-to-be plaintiff bullies or tricks a party that it intends to sue into giving "express consent" (e.g. through a clickwrap agreement) before commencing proceedings against the party.

The Judgments Project Working Group has proposed two possible definitions of the time period during which express consent should give rise to recognition of a judgment. First, because a defendant receives legal notice of claims against it at the moment the defendant *is served*, the first definition suggests using the moment of service as the beginning of the time period. However, one member of the Working Group noted that in some countries, defendants may have actual knowledge of court proceedings against them before service of process because their court agents can notify them of proceedings that have been filed, even before service occurs.

² Although both terms appear only in Article 5, defining them in that Article would make the list of jurisdictional filters confusing. Thus, the definitions should be added to Article 3.



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Thus, the second definition suggests defining the moment of *filing* as the beginning of the time period. During the June 2016 Meeting of the Judgments Project, several delegates questioned the interaction of Article 5, Section 1(e), particularly the limitation that express consent occur “in the course of the proceedings,” with the 2005 Choice of Court Convention. See Minutes 4, paras. 29, 34. Those initially drafting the provision had “concluded that non-exclusive choice of court agreements were already the subject of a declaration mechanism in the 2005 Choice of Court Convention,” and accordingly decided not to include agreements made before “the course of the proceedings” as a jurisdictional filter in this Convention. See *id.* para. 29. At the Meeting, however, one delegate questioned whether there were any “gaps” between the Conventions. *Id.* para. 34.

A “gap” does exist between the Conventions. Suppose the following scenario:

Two parties reach a non-exclusive choice of court agreement in which they designate several courts for settlement of disputes between them. One of the designated courts is in State A, which is not a Contracting State to the 2005 Choice of Court Convention but is a Contracting State to the Convention on the Recognition and Enforcement of Judgments. Later, one of the parties commences proceedings in State A and obtains a judgment against its opponent. The party then seeks to enforce the judgment in State B, which is a Contracting State to both Conventions.

The choice of court agreement does not trigger Article 5, Section 1(e) of the Convention on the Recognition and Enforcement of Judgments, because the parties’ mutual “express consent” to jurisdiction in the courts named in the agreement did not occur “in the course of the proceedings.” Supposing none of the other jurisdictional filters in Article 5 of the Convention on the Recognition and Enforcement of Judgments applies, State B will not enforce the judgment under that Convention. The judgment will be unenforceable, too, under the 2005 Choice of Court Convention because the judgment was rendered in a state that is not a Contracting State to that Convention.

However, if the parties, during the course of the proceedings in the court of origin, exchanged correspondence *reaffirming* their agreement that jurisdiction was proper in State A, that *reaffirmation* would constitute “express consent” “in the course of the proceedings”, thus triggering Article 5, Section 1(e), and rendering the judgment from State A enforceable in State B pursuant to the Convention on the Recognition and Enforcement of Judgments.



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The “gap” described above could be closed by removing the phrase “in the course of the proceedings” from Article 5, Section 1(e) (and omitting the proposed definition of “in the course of the proceedings” in Article 3). This change would allow express consent given *at any time* to qualify as “express consent” for the purposes of Article 5, Section 1(e). Thus, in the scenario above, the judgment of State A would be enforceable in State B because the choice of court agreement, in which both parties expressly consented to jurisdiction in State A, would meet the requirements of Section 1(e) with the phrase “in the course of the proceedings” removed. This modification, however, could raise significant concerns about unsophisticated or weak parties inadvertently giving “express consent” to be sued in a jurisdiction before litigation commences, for example, through a clickwrap contract. Although Section 2(a) protects consumers and employees from giving accidental “express consent,” other parties with little bargaining power might be at risk. For this reason, we do not recommend closing the “gap” described above by removing the phrase “in the course of the proceedings” from Section 1(e).

The hypothetical above also demonstrates that, if a Requested State is a Contracting State to both the 2005 Choice of Court Convention and the Convention on the Recognition and Enforcement of Judgments, a foreign judgment may be enforceable in that State pursuant to one or both Conventions. A “conflict” between the conventions need not be resolved: If either Convention—or both—provides a basis for enforcement of the foreign judgment in a Requested State, it will be enforceable. Thus, no “give-way” provision is needed. Cf. Minutes 4, paras. 34.

In sum, Article 5, Section 1(e) requires some clarification for consistent application, but it should be included. Definitions of “express consent” and “in the course of the proceedings” should be added to Article 3.

Article 5(2)(a)

Article 5, Section 2(a) provides an exception to Section 1(e) intended to protect parties with less bargaining power (consumers and individual employees) and ensure that their “express consent” to jurisdiction of a court is knowing and voluntary. Specifically, this provision prevents a stronger party, perhaps a corporate entity, from pressuring or tricking the weaker party into giving “consent” in correspondence that takes place outside the presence of the court. This provision could gain even more importance if the phrase “in the course of the proceedings” is removed as discussed above.

Article 5, Section 2(a) protects consumers and employees by adding an additional requirement for their consent to be considered “express consent” for the purposes of Section 1(e): their “express consent” must be before the court.



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Consumers' and employees' express consent could be either verbal (e.g. a representation by their attorney to the judge in the courtroom) or written (e.g. a motion or other writing addressed to the court), but in either case, the consent must be *before the court*. For parties other than employees and consumers, consent might be expressed in a communication between only the parties (e.g. a letter or phone call between the parties' attorneys).

There was significant discussion at the June 2016 Meeting of the Judgments Project regarding the applicability of this provision to collective employment contracts, which are recognized in some States. See Minutes 5, paras 75, 79, 94—95; Minutes 6, paras 5-17. As worded, the exception in Article 5, Section 2(a) encompasses both individual and collective employment contracts when an employer seeks enforcement of an employment contract against "an employee in matters relating to the employee's contract of employment." The provision does not, however, encompass other types of disputes which might exist with respect to collective labour agreements. Minutes 5, para 94.

Article 5, Section 2(a) as currently written appropriately protects similarly-situated individual employees (whatever the form of their employment contracts) from unknowingly or involuntarily giving "express consent" outside the presence of the court. It also appropriately excludes from that protection other disputes about collective labour agreements, which do not give rise to the same concerns about imbalanced bargaining power between parties. Thus, Section 2(a) should be included as currently drafted.

Proposals

- Add the following definitions to Article 3:

1.(c) "express consent to . . . jurisdiction" means a verbal or written statement affirmatively agreeing that the court has jurisdiction, whether given before the court or in communications between the parties. Consent implied from a party's tacit acceptance, inaction, or actions consistent with consent (such as entering an appearance in the court and failing to contest jurisdiction) is not "express consent."

(d) "in the course of the proceedings" means during the time between service of documents initiating proceedings and the rendering of a judgment as defined in part (b) above.

- Alternative definition:

(d) "in the course of the proceedings" means during the time between the filing of the case and the rendering of a judgment as defined in part (b) above.

ARTICLE 5(1)(f)

Article 5 – Bases for recognition and enforcement

3. A judgment is eligible for recognition and enforcement if one of the following requirements is met -

(. . .)

[f) the defendant entered an appearance before the court of origin without contesting jurisdiction at the first opportunity to do so, if the defendant would have had an arguable case that there was no jurisdiction or that jurisdiction should not be exercised under the law of the State of origin;]

Key issues

- This provision aims to prevent a defendant from effectively reserving an opportunity to re-litigate a case by strategically withholding a jurisdictional challenge during proceedings in the court of origin.
- The provision should only operate when the failure to challenge jurisdiction was the fault of the defendant. In the court of origin, the defendant must have had *both* (1) a procedural opportunity to raise the jurisdictional challenge and (2) a viable substantive claim, under the law of the state of origin, that jurisdiction was lacking.
- There is some concern that the provision may have little function in States where voluntary appearance before a court constitutes submission to jurisdiction.
- “Jurisdiction” refers to both subject-matter and personal jurisdiction of the court.

Comments

Article 5, Section 1(f) seeks to prevent the following situation: a defendant fully litigates a dispute in a court of origin, raising defences to the merits of the case. Although the defendant has opportunity to do so, the defendant does not contest the court’s jurisdiction. The court ultimately renders judgment in the plaintiff’s favour, and the plaintiff seeks to enforce the judgment in a Contracting State. Dissatisfied with the outcome in the court of origin, the defendant raises—for the



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first time—the argument that the court of origin lacked jurisdiction and attempts to re-litigate the dispute in a new forum. See Minutes 4, paras 31, 40. This possibility incentivizes a defendant to strategically withhold a jurisdictional argument in the court of origin, thereby effectively reserving an opportunity to re-litigate the case in another court. See *id.*

Several policy considerations support inclusion of Article 5, Section 1(f). First, the draft provision incentivises the defendant to raise any jurisdictional arguments at the first opportunity, preventing waste of judicial and party resources on litigation in a court that is later found to lack jurisdiction. The court of origin is also arguably better situated to determine jurisdiction, since doing so may include evaluation of a party's ties to the State of origin, and evidence of those ties is likely to be located in that State. Finally, without Section 1(f), a defendant's withholding of a jurisdictional challenge in the court of origin would create for the defendant a unilateral opportunity for a "do over." If both parties have a full and fair opportunity to litigate their dispute in the court of origin, one party should not be allowed to later invalidate those proceedings on jurisdictional grounds it did not originally raise.

Eighty-four percent of IBA members Surveyed agreed that "the defendant's failure to contest jurisdiction in the State of Origin at the first opportunity to do so . . . should lead to recognition of the judgment." The Hague Judgments Convention Survey Question 13. Appearance alone, however, probably does not, and should not, equate to "express consent" that would allow for recognition of the judgment pursuant to Article 5, Section 1(e). See Minutes 4, paras 32, 36, 40, *but see* Hague Judgments Convention Survey Question 12, # 4-7 (some respondents suggesting that this should constitute express consent). Thus, Article 5, Section 1(f) separately addresses the scenario.

Article 5, Section 1(f) deters the deliberate withholding of a jurisdictional challenge in the court of origin, but it does not bind a defendant who raises a jurisdictional challenge in the court of origin, loses its jurisdictional argument, and then proceeds to defend the case on the merits. Rather, Section 1(f) operates as a waiver: By entering an appearance in the court of origin, failing to raise available challenges to jurisdiction, and raising defences on the merits, the defendant waives any argument that the court lacks jurisdiction. Alternatively, the provision may be considered judicially-implied consent to jurisdiction: The requested court infers from (1) the defendant's entry of appearance in the court of origin and (2) tacit acceptance of jurisdiction when jurisdiction could be challenged that (3) the defendant consented to jurisdiction of the court of origin.

Article 5, Section 1(f) applies only when the defendant had an opportunity to challenge jurisdiction but did not do so. If, under the law of the State of origin, there was no substantive basis for challenging jurisdiction or no procedural



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opportunity to raise the argument, Section 1(f) will not operate as a basis for enforcement in another court. The concern addressed by Section 1(f)—strategic withholding of a jurisdictional challenge—is not implicated when the defendant cannot challenge jurisdiction in the court of origin. Thus, Section 1(f) is tailored to the problem it was designed to resolve. The proposed change below clarifies that the “arguable case” for lack of jurisdiction must be “under the law of the State of origin” by moving the latter modifying phrase closer to the phrase it modifies. Additionally, it is important to note that an arguable case that the court has “no jurisdiction” refers to an argument that (1) the court lacks subject matter jurisdiction over the claims in the case and/or (2) the court lacks personal jurisdiction over the defendant.

Considerable discussion occurred in the June 2016 Meeting of the Judgments Project regarding the effect of Article 5, Section 1(f) in States where voluntary appearance before a court constitutes submission to jurisdiction. See Minutes 4, paras 32, 43, 44, 46. Many such States have a doctrine of *forum non conveniens*, which may counsel that jurisdiction *should not* be exercised in some cases in which the defendant has, under the law of the State, submitted to jurisdiction by voluntary appearance. See *id.* para. 43.

Article 5, Section 1(f) still effectuates its purpose in such states. If a defendant’s appearance in a State of origin constitutes submission to jurisdiction under that State’s law, and the defendant has an “arguable case . . . that jurisdiction *should not* be exercised” due to *forum non conveniens* or another similar doctrine under that State’s law, but the defendant does not raise its *forum non conveniens* argument, it will effectively waive the argument pursuant to Section 1(f). Conversely, Section 1(f) does not apply if a defendant appears in a State to defend a case, and the defendant has *no arguable case*, under the law of the State of origin, “that there was no jurisdiction or that jurisdiction should not be exercised.” If a defendant’s appearance in a State of origin constitutes submission to jurisdiction under that State’s law and the State does *not* have a *forum non conveniens* or similar doctrine, the defendant probably has no “arguable case” that jurisdiction should not be exercised. If the defendant has no “arguable case” that jurisdiction should not be exercised, Section 1(f) will not operate as a basis for later recognition and enforcement of the judgment in a Contracting State.

Several delegates in the June 2016 Meeting of the Judgments Project expressed the opinion that consent to jurisdiction should not be found when a defendant unsuccessfully objects to jurisdiction and continues to defend the case on the merits. *Id.* paras 36 (Israel), 40 (France). The text of Article 5, Section 1(f) appropriately does not apply in this situation because Section 1(f) provides a basis for enforcement only when the defendant “appears before the court of origin *without* contesting jurisdiction at the first opportunity to do so.” If a

defendant appears before a court after unsuccessfully contesting jurisdiction, Section 1(f) does not apply.

Thus, the provision, particularly with the clarification below, addresses the problem that it was designed to resolve, and it is not overbroad. Article 5, Section 1(f) should be included in the Convention on the Recognition and Enforcement of Judgments.

Proposals

- This provision should be amended as follows:

*“the defendant entered an appearance before the court of origin without contesting jurisdiction at the first opportunity to do so, if the defendant would have had an arguable case, **under the law of the State of origin**, that there was no jurisdiction or that jurisdiction should not be exercised **under the law of the State of origin**,”.*



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ARTICLE 5(1)(g)

Article 5(1)(g) – Bases for recognition and enforcement

4. A judgment is eligible for recognition and enforcement if one of the following requirements is met -

(. . .)

g. the judgment ruled on a contractual obligation and it was given in the State in which performance of that obligation took place or should have taken place under the parties' agreement, or, in the absence of an agreed place of performance, under the law applicable to the contract, unless the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State[.]

Key issues

- Meaning of “purposeful” in the phrase “purposeful and substantial connection”
- Meaning of “substantial” in the phrase “purposeful and substantial connection”

Comments

While the vast majority of Survey respondents (over 80%) agreed that the general “hierarchy of criteria” in Article 5(1)(g) works (Question 14), a much narrower majority (approximately 53%) thought “the concept of ‘purposeful and substantial connection to the State’ is sufficiently well understood to be applied consistently by courts in [their] jurisdiction” (Question 16). And of the approximately 47% who responded that this concept is not sufficiently well understood in their jurisdiction, the vast majority (nearly 86%) felt that “a specific definition” should be included in the draft Judgments Convention (Question 17).

Under Article 5(1)(g) as presently formulated, the “purposeful and substantial connection” requirement operates as a limitation on the eligibility for recognition and enforcement of judgments rendered in the State in which performance of a contractual obligation took place or should have taken place. As is evident from Report of Meeting No 4 (meeting of Thursday 2 June 2016 – afternoon session), the “purposeful and substantial connection” formulation will seem familiar to many American lawyers but may be largely unknown to courts and lawyers in



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other jurisdictions. As an expert from the United States explained, the U.S. Supreme Court has held as a matter of due process under the U.S. Constitution that “in cases involving contracts, the defendant’s contacts must be purposeful and substantial in relation to the State in which he/she had been sued.” *Ibid.* para. 107; see also April 2016 Explanatory Note Providing Background on the Proposed Draft Text and Identifying Outstanding Issues, at footnote 56. However, experts from the European Union noted that further clarification was needed (*ibid.* paras. 62 and 88) and an expert from Australia “expressed that ‘purposeful and substantial connection’ poses difficulties for Australia” (*ibid.* para. 111).

The background of the “purposeful” and “substantial” connection requirement in U.S. law may assist in the interpretation of these terms in Article 5(1)(g). The rule in the United States is that “[f]or a State to exercise jurisdiction consistent with due process, the *defendant’s* suit-related conduct must create a substantial connection with the forum State.” *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (emphasis added). The “constitutional touchstone [is] whether the defendant *purposefully* established ‘minimum contacts’ in the forum State.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (emphasis added). This “purposefulness” requirement precludes the exercise of “jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person.” *Ibid.* at 475 (internal quotations and citations omitted). “Foreseeability of causing *injury* in another State ... is not a sufficient benchmark for exercising personal jurisdiction. Instead, the foreseeability that is critical to due process analysis ... is that the defendant’s conduct and connection with the forum State are such that he should *reasonably anticipate* being haled into court there.” *Ibid.* at 474 (internal quotations and citations omitted, second emphasis added).

While the modifier “purposeful” focuses on the *quality* of contacts necessary to support jurisdiction, the additional modifier “substantial” focuses on the required *quantity* of contacts. The United States Supreme Court has not established a standard for what qualifies as “substantial,” and given the inherently open-ended nature of the term, it is difficult to see how a comprehensive, abstract definition could be achieved. However, the text of Article 5(1)(g) suggests that in close cases, courts should err on the side of recognition and enforcement unless the required “purposeful and substantial connection” is “clearly” lacking.



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Proposals

- Article 5(1)(g) should be redrafted as follows:

1. *A judgment is eligible for recognition and enforcement if one of the following requirements is met -*

(. . .)

- g. the judgment ruled on a contractual obligation and it was given in the State in which performance of that obligation took place or should have taken place under the parties' agreement, or, in the absence of an agreed place of performance, under the law applicable to the contract, unless the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State[.] In this paragraph, "purposeful" means of such a character that the defendant reasonably should have anticipated being subject to jurisdiction in that State;*



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ARTICLES 5(1)(h) & 6(b) AND (c)

Articles
Article 5 – Bases for recognition and enforcement
1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –
h) the judgment ruled on a tenancy of immovable property and it was given in the State in which the property is situated;
Article 6 – Exclusive bases for recognition and enforcement
Notwithstanding Article 5 –
c) a judgment that ruled on rights in rem in immovable property shall be recognised and enforced if and only if the property is situated in the State of Origin;
d) a judgment that ruled on a tenancy of immovable property for a period of more than six months shall not be recognised and enforced if the property is not situated in the State of origin and the courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State.

Key issues
<ul style="list-style-type: none">• Some lack of clarity in meaning and formulation

Comments

The concepts of "immovable property" and "rights in rem": it is recommended that these concepts are interpreted in an autonomous way. The Explanatory Report should define those concepts as much as possible. It seems advisable to take the case law of the EU Court of Justice into account with regard to the same concepts in art. 24(1) of the Brussels I Regulation (recast).

In common with other international treaties, we agree with the principle that matters relating to rights "*in rem*" in immovable property (as opposed to rights "*in personam*") should be decided according to the law of the country in which the property is situated.

Tenancies of immovable property (Article 5(1)(h))

In our view, Article 5, as drafted (specifically the words "...A judgment is eligible for recognition and enforcement if one of the following requirements is met..."), means that a judgment ruling on a tenancy of immovable property which is not given in the State in which the property is situated (and therefore not caught by Article 5(1)(h)) may still be eligible for recognition and enforcement if one of the other jurisdictional filters of Article 5 applies.

Article 6(c) limits this to some extent by providing that a judgment that ruled on a tenancy of immovable property for a period of over 6 months shall only be recognised and enforced if the property is situated in the State of origin. Defendants who face a judgment against them relating to a tenancy of under 6 months, however, are not afforded this protection.

We see from the Explanatory Notes (paragraph 157) that Article 6(c) is only intended to apply to "*long term tenancies*." Typically, for example in the UK, tenants with a lease of under 6 months are afforded less protection in terms of security of tenure.

It is not immediately clear to us, however, why the distinction between short and long term tenancies is made in Article 6(c). Indeed, in our experience short term tenancies are often far less likely to have been properly documented. The common or civil law applicable to the tenancy therefore assumes even greater significance and in our view these matters should be reserved to the courts where the property is situated.

Given the significant differences in the application of property law between countries, in our view the protection in 6(c) should also be expressly afforded to defendants facing judgments that relate to "short term" tenancies of under 6 months.

Proposals
<ul style="list-style-type: none"> Autonomous definitions of the words "<i>immovable property</i>" and "<i>rights in rem</i>"; Article 6(c) should be extended to include tenancies of 6 months or less.

ARTICLE 5(1)(j)

Article 5 – Bases for recognition and enforcement

1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –

(...)

j) the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred;

Key issues

- Recognition and enforcement of judgments in class and collective actions.

Comments

This comment relates to the question whether or not the Judgments Convention should apply to judgments rendered in class action and other collective redress proceedings (these collective action judgments hereinafter: "CA Judgments"). The explanatory memorandum states that the Judgment Convention does cover CA Judgments but also correctly points out that this is a rapidly changing area of law in many jurisdictions and that additional rules may be necessary.

Collective action regimes vary over jurisdictions. Some have a long standing law and practice (USA, Canada, Australia), some have more recent regimes and some have none. In some jurisdictions the regime is based on an opt-out system, other have an opt-in system. There are also systems in which a CA Judgment does not bind the individual members of the class at all, but merely serves as a precedent or as a form of declaratory relief. Some have a regime that is limited to certain areas of law, such as consumer law or anti-trust, others have generic regimes. Some systems work with a lead plaintiff, others with a foundation or organization acting for the benefit of the class and in some other countries only some specific bodies appointed or licensed by the government can bring collective claims. As a consequence, CA Judgments originating from various countries differ far more widely as to their nature and scope, including in terms of res judicata effect, than classic bilateral judgments between party A and party B.

It should also be noted that collective actions are a sensitive area in terms of policy making. In many jurisdictions, there is great hesitation to introduce collective redress mechanisms since law makers and business fear entrepreneurial lawyering and a US-style class action environment which, especially in civil law jurisdictions in Europe, is often perceived as being unfair for defendants.

The above means that the private international law issues relating to collective actions are not only extremely complex from a technical and legal perspective, but are also highly politically charged. This makes quite difficult to come up with a regime which is not only well balanced and based on proper analysis, but which is also uncontroversial from a policy point of view.

Therefore, it may be advisable not to extend the scope of the Judgment Convention to CA Judgments for the time being and to reserve this for future implementation. As an alternative, a regime of opt-in declarations under the Judgment Convention for countries that are sufficiently comfortable with the mutual recognition and enforcement of CA Judgments could be contemplated. If then more than one jurisdiction opts in, the Judgment Convention also applies to the mutual recognition and enforcement of CA Judgments between them. It should be noted, however, that an opt-in system will need to be more finely tuned, since it does not solve the issue of various approaches quite different in terms of scope of national collective redress systems. For instance: if Country A has a generic system and Country B a system limited to consumer actions, by both opting in, Country B would import the generic system. The same issue arises if in Country A there is an opt out system and in Country B an opt in system. This may perhaps be solved if by both Countries A and B opting in, the mutual recognition would be limited to the common denominators of both systems.

The above mentioned issues are less problematic if the CA judgment relates to a court approval of a collective settlement (see also Art. 10). Court approved collective settlements may therefore be brought under the scope of the Judgments Convention and is therefore enforceable also as to class members which we not individually involved in the litigation, provided, however, that proper notice of the court approved settlement was given and absent class members had an opportunity to opt out from it.

Proposals

- Exclude class/collective redress judgments from the scope of the Judgments Convention;
- Alternatively, make the application of the Judgments Convention optional for



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class/collective redress judgments with a special set of rules for countries opting for the mutual recognition and enforcement of these types of judgments.

- Court approved collective settlements can fall under the scope of art. 10 of the Judgments Convention, provided there is proper notice and an opt-out possibility.



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ARTICLE 5(1)(k) and (l)

Article 5 – Bases for recognition and enforcement

1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –

(...)

k) the judgment ruled on an infringement of a patent, trademark, design, [plant breeders' right,] or other similar right required to be [deposited or] registered and it was given by a court in the State in which the [deposit or] registration of the right concerned has taken place, or is deemed to have taken place under the terms of an international or regional instrument;

l) the judgment ruled on the validity, [ownership, subsistence] or infringement of copyright or related rights [or other intellectual property rights not required to be [deposited or] registered] and the right arose under the law of the State of origin;

Key issues

- **Patents:** The Agreement on a Unified Patent Court will shortly introduce a scheme which does not accord with the geographic connection between the court and the State in which the patent is registered or has effect;
- **Trade Marks:** A European Union Trade Mark (formerly a Community Trade Mark) is registered at the European Union Intellectual Property Office, located in Spain, so the required geographic connection between the court and the State in which the patent is registered or has effect will not be met;
- **Designs:** A Community Design is registered at the European Union Intellectual Property Office, located in Spain, so the requirement of a geographic connection between the court and the State in which the patent is registered or has effect will not be met;
- **Permanent Injunctions:** The rights covered by this paragraph are territorial in nature, and thus an injunction upon an act infringing such rights, should be enforceable only in the States where the same right is protected.

Comments

1. Patents

For European patents (“Eps”) and for the new European Patent with Unitary Effect (hereafter “Unitary Patent”) the Agreement on a Unified Patent Court, which is shortly to be ratified, breaks the geographic connection between the court and the State in which the patent is registered or has effect. This is because an infringement decision of a divisional court of the Unified Patent Court in any one State participating in the Agreement has effect in all the States where the European patent or Unitary Patent has effect.

The Unitary Patent has effect in all the participating States, but is registered at the European Patent Office (“EPO”) rather than in any participating State. An EP may be validated in one or more of the participating States (where it is registered), but most EPs are validated in only a few participating States.

The jurisdiction rules of the Unified Patent Court (at Art. 33 of the Agreement) provide that an EP may be litigated in a divisional court where the patent does not have effect but where the defendant has its principal place of business, or in a regional court located in a State where the patent does not have effect.

Further, an infringement claim in the Unified Patent Court may be referred to a branch of the Central Division in the UK, France or Germany, or may be appealed to the Court of Appeal in Luxembourg.

It follows that there is no certain identity between the State of origin of the judgment and the State where the patent is registered or has effect (which might offer an alternative approach).

Arguably the limitation to the State of registration is not strictly necessary to preserve territoriality because judgments on patents are always territorial in nature (save very occasionally in respect of interim relief, but judgments for interim measures are already excluded).

2. European Union Trade Marks (EUTM)

Although an EUTM is treated like a national trade mark in certain respects that is done expressly and not by virtue of any deeming provision. It is questionable whether an EUTM can be said to be deemed to have been registered in Member States of the EU.

An EUTM has effect in all Member States of the EU, so this could be used as an alternative test for inclusion. Alternatively, the limitation could be abandoned generally as suggested above.

3. Community Designs

The situation is the same as for EUTMs.

4. Injunctions

The rights covered by this paragraph are territorial in nature, and thus an injunction forbidding an act which would be an infringement upon such rights, should be enforceable only in the States where the same right is protected. A right to the same invention, trademark, design, or new plant in another State is not a same right for the purpose of this clause.

For example, if ABC has registered patents for an invention in country D and country E, but not country F, then an injunction rendered by a court in country D should not be enforced in country E and country F, as there the patent right registered in country D is only protectable in country D; in order to forbid unauthorized exploration of the same invention in country E, ABC needs to rely on its patent right registered in Country E.

We therefore suggest limiting this paragraph to “monetary judgments” only. In case of an international or regional instrument providing that a court of a State or a tribunal under an international cooperation mechanism shall have jurisdiction to grant injunctions which could be enforceable in other States, the applicant can resort to that instrument.

Proposals
<ul style="list-style-type: none"> Patents: make an addition expressly for the Unified Patent Court (when any member state to the Unified Patent Court Agreement is a contracting state of this Convention), or more generally for any court established under an international agreement. This could be combined with the change from registration to effect as the general test, as proposed for trademarks and designs below Or, alternatively, define a “court” as the judicial authority in the state of origin under the constitution of that state or a judicial authority organized under an international or regional instrument which is granted jurisdiction over certain matters by the state. Trademarks: substitute effect for registration: "...and it was given by a court



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in a State in which the **right has effect.**" Alternatively substitute the test used in the draft convention for unregistered rights (Art. 5(1)(l): "**...and such right arose under the law of the State of origin**".

- **Designs:** *ditto*
- **Judgments:** Limit this paragraph to "monetary judgments" or, revise Article 13 (Equivalent effects) as follows: "A judgment recognised or enforceable under this Convention, **except for an injunction in relation to a territorial right, including but not limited to the rights under Art.5(1)(i)**, shall be given the same effect it has in the State of origin."

ARTICLE 5(1)(m)

Article 5 – Bases for recognition and enforcement

A judgment is eligible for recognition and enforcement if one of the following requirements is met:

(m) the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and the State of origin is:

- (i) designated in the trust instrument as a State in which disputes about such matters are to be determined;
- (ii) the State whose law is expressly or impliedly designated in the trust instrument as the law governing the aspect of the trust that is the subject of the litigation that gave rise to the judgment; or
- (iii) the State expressly or impliedly designated in the trust instrument as the state in which the principal place of administration of the trust is situated.

This sub-paragraph only applies to judgments between persons bound by the terms of a trust regarding internal aspects of that trust.

Key issues

- *"the judgment concerns the validity, construction, effects, administration or variation of a trust created **voluntarily** and evidenced in writing"*

There is need for clarification as to whether it is correct that this sub-paragraph only applies to trusts created "voluntarily". By way of example, it is common in UK divorces for the court to order one or both of the parties to create a trust for children of the marriage and remoter issue. This is not a trust created voluntarily but operates like any other trust during its lifetime.

- *"and the State of origin is (i) **designated in the trust instrument** as a State in which disputes about such matters are to be determined"*

Sub-paragraphs 5(1)(m) (ii) and (iii) in relation to governing law and place of administration include the words "expressly or impliedly designated". This wording might be extended to 5(1)(m)(i) following arguments such as those heard in the case of *Crociani v Crociani* [2014] UKPC 40.

- *"This sub-paragraph only applies to judgments between persons **bound by the terms of a trust** regarding internal aspects of that trust."*

The final sentence may not be clear or wide enough to include all "internal", non-third party claimants who might be required to enforce a judgment in relation to internal affairs of the trust. Ideally this final sentence would make it clear that the sub-paragraph applies to any beneficiary of the trust, and other non-third party persons might include former trustees, trustees de son tort, or purportedly excluded beneficiaries.

Comments

1. There is need for clarification as to whether it is correct that the following sub-paragraph *"the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing"* only applies to trusts created "voluntarily".

It is common in UK divorce litigation for one or both of the parties to a divorce to be ordered by the court to create a trust for the children of the marriage and remoter issue. If required to create a trust under a court order in a divorce, this is not a voluntarily created trust. Following its creation, the trust continues as any other trust and may, for instance, continue for many years as a discretionary trust. The working group should be sure that they intend for this sort of trust to be excluded from the scope of this sub-paragraph by the inclusion of the requirement that the trust is created voluntarily.

2. Sub-paragraphs 5(1)(m) (ii) and (iii) in relation to governing law and place of administration include the words "expressly or impliedly designated" while sub-paragraph 5(1)(m)(i) does not.

The Privy Council decision in the Jersey case of *Crociani v Crociani* [2014] UKPC 40 shows that it is not always clear which State is designated in the trust instrument as the State in which disputes are to be determined. This decision suggests that the words "forum for administration" (common in many trusts to designate the jurisdiction for determining disputes) might not always relate to the jurisdiction in which disputes are to be determined. To deal with situations where the court of a contacting State might determine that it (or some other) jurisdiction is the correct place for determination of disputes despite the trust deed stating an alternative forum for administration, it would seem safest to include the words "expressly or impliedly designated" to cover *Crociani* type situations.

3. The final sentence of sub-paragraph 5(m) may not be clear or wide enough to include all "internal", non-third party claimants who might be required to enforce a

judgment in relation to internal affairs of the trust. It is clear that the aim of the final sentence in this clause is to prevent hostile third parties (for instance creditors, or claimants against the trustees as legal owners of trust assets such as in relation to property or environmental liability claims) from relying on this sub-paragraph. The logic of this is clear and is also reinforced by the exclusion of insolvency matters at Article 2(1)(e).

While the settlor is a party to the trust (and therefore clearly is bound by the terms of the trust), and trustees in accepting trusteeship accept that they are bound by the terms of the trust, it might be worthwhile clarifying that this sub-paragraph applies to beneficiaries. Beneficiaries are able to benefit in accordance with the terms of the trust only, but trust practitioners might not automatically say that they are "bound" by the terms of the trust. This could be clarified by stating that the persons bound by the terms of the trust include, but are not limited to, the settlor, trustees, beneficiaries and protectors etc.

Feasibly, there are other types of "internal" claimants who might be required to enforce a trust judgment in the manner anticipated by the draft convention. In particular, "internal" claimants who might not be "bound" by the terms of the trust include trustees de son tort (e.g. where a trustee has been acting but was invalidly appointed), former trustees (who may have been expressly released and therefore are no longer bound), or beneficiaries purportedly excluded from the trust who have received a judgment confirming an interpretation of the trust deed that includes them in the class of beneficiaries. All of the above might wish to enforce a judgment that arguably should be within the scope of the sub-paragraph. It is impractical (and potentially dangerous) to include excluded beneficiaries, but former trustees and trustees de son tort (who are "trustees") could be included.

Proposals

- Article 5(1)(m) should be amended/specified as follows:

A judgment is eligible for recognition and enforcement if one of the following requirements is met:

(m) the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and the State of origin is:

- [expressly or impliedly] designated in the trust instrument as a State in which disputes about such matters are to be determined;*
- the State whose law is expressly or impliedly designated in the trust instrument as the law governing the aspect of the trust that is*



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- (iii) *the subject of the litigation that gave rise to the judgment; or the State expressly or impliedly designated in the trust instrument as the state in which the principal place of administration of the trust is situated.*

This sub-paragraph only applies to judgments between persons bound by the terms of a trust [(including but not limited to the settlor, trustees, former trustees, protector, former protector or beneficiaries)] regarding internal aspects of that trust.



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ARTICLE 5(1)(n)

Article 5 – Bases for recognition and enforcement

1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –

(...)

(n) the judgment ruled on a counterclaim –

(i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim;

(ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion.

Key issues

- The bipolar structure assessing a judgment to the extent it was in favour or against a counterclaimant may create confusion;
- There is a risk of imbalance between jurisdictions providing for preclusion and other jurisdictions;
- With the current proposal counterclaimants would be able to benefit from a limitation of recognition and enforcement even if it was perfectly reasonable for them to file such counterclaim, if considerations of preclusion did not have any coercive effect and a counterclaim was brought willingly.

Comments

As clarified in working materials on the Convention (in particular the report of Meeting No 5 of 3 June 2016) the structure of the provision differentiating between judgments on a counterclaim on the basis if such claim was brought to avoid preclusion shall take regard of a broad understanding of a principle of estoppel in particular under US-American law and to lesser extent under other common law jurisdictions. On the one hand, a counterclaimant bringing a counterclaim out of its free will shall have the benefit of recognition and enforcement under the Convention, since there is also no need to protect the counterdefendant, who chose to file a claim at the same forum first as the original



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claimant. On the other hand, there seems to be a notion that in case the counterclaimant is "forced" to bring a counterclaim under the threat of preclusion at least the Convention shall not reinforce a negative outcome of these proceedings for the counterclaimant.

There are several issues with the provision, which may cause complications with its application. First of all, the bipolar structure assessing a judgment to the extent it was in favour or against a counterclaimant is not as natural, as it might seem on first sight. It is not uncommon that a judgment will only in part grant a claim and dismiss another part of the same claim. In an extreme case this might lead to a judgment providing in the same document for payment on the merits, but a decision on payment of costs against the counterclaimant e.g. because the claim was overinflated. Under the current wording of the provision this might lead to the counterclaimant being able to enforce the beneficial part of such judgment under the Convention while being protected at the same time from a non-beneficial part of the same judgment, even if those parts were interconnected in the reasoning of the court of origin.

Secondly, there might be an imbalance between jurisdictions providing for preclusion and other jurisdictions. Considering that counterclaims aim at concentrating disputes at one venue, it is not at all intuitive that exactly those jurisdictions, which try to enforce this concentration most harshly by applying the penalty of preclusion for not bringing such counterclaim, are penalised that any judgment against a counterclaimant in those jurisdictions will not be enforceable under the Convention, requiring further legal action.

This is directly related to a third issue that counterclaimants are able to benefit from a limitation of recognition and enforcement even if it was perfectly reasonable for them to file such counterclaim, if considerations of preclusion did not have any coercive effect and a counterclaim was brought willingly.

These issues seem to be connected to the current structure of the provision. While the aim to protect a defendant and counterclaimant from being forced to bring a claim at an exorbitant venue is fully legitimate, the structure and wording of the provision after the latest revision might cause complications in this regard and seems over-protective to some extent.

It has to be considered which effects Article 5 (1)(n)(ii) has exactly, when denying eligibility for recognition and enforcement of a judgment against a counterclaimant if the law of the State of origin required the counterclaim to be filed in order to avoid preclusion. The apparent effect is that enforcement of any award against the counterclaimant (mostly costs, which are enforceable by virtue of Article 3(1)(b) will not be granted by the requested State. As important is the effect on (non-)recognition of the negative part of such judgment. Not granting

eligibility for enforcement and recognition excludes this judgment as ground for refusal for a later judgment according to Article 7(1)(f). Only in this fashion it is possibly for a counterclaimant to bring the same claim in another Member State of the Convention and enforce it throughout the territory of the Convention (save for the Member State of the original counterclaim; see Article 7(1)(e).

It follows that the provision in its current form may have far reaching effect in cases of potential counterclaims which might cause duplication of proceedings and conflicting decisions. In our opinion it might therefore be favourable to restrict the refusal of eligibility for recognition and enforcement to such circumstances where a counterclaimant is indeed forced to bring its counterclaim at an exorbitant forum, while excluding all cases where such protection is not necessary. Since the Convention positively defines allowed fora in the preceding provisions of Article 5(1), it seems as the most fitting approach to refer to these provisions in our proposed amendment. Furthermore, a counterclaimant shall not benefit one-sidedly under the Convention, if a judgment contains positive and negative parts.

Proposals

- Article 5(1)(n) should be amended/specified as follows:

1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –

(...)

(n) the judgment ruled on a counterclaim ~~(i) to the extent that it was in favour of the counterclaimant~~, provided that the counterclaim arose out of the same transaction or occurrence as the claim; ~~(ii) to the extent that it was against the counterclaimant, unless~~

~~[However, if] the law of the State of origin required the counterclaim to be filed in order to avoid preclusion[, a judgment on such counterclaim shall not be enforced or recognised to the extent it was rendered against the counterclaimant, unless~~

~~(i) the court of origin in relation to the counterclaimant would also fulfil the requirements of any of the sub-paragraphs 1 a) to d), or g) to m), or~~

~~(ii) the counterclaimant has already relied on any other part of the judgment in recognition and enforcement in a Member State other than the State of origin.]~~

ARTICLE 5(1)(o)

Article 5 – Bases for recognition and enforcement

1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –

(...)

o) the judgment revised or overturned a previous judgment that was eligible for recognition and enforcement in accordance with this Convention and was given by a court of the State that gave such previous judgment.

Key issues

- The current proposal does not regulate sufficiently the review of recognition or a declaration of enforceability in the event of a revised judgment.
- Systematically, a provision separate from the heads of jurisdiction might be required.

Comments

The provision of Article 5 (1)(o) was introduced on a motion put forward by Brazil in meeting No 6 on 3 June 2016 based on a working document No 16 of the Russian Federation. It was considered that a situation might arise, where there is a new revision judgment by the court of origin after the original judgment has been declared enforceable or has already been enforced. Without this provision there would be no head of jurisdiction to cover such revision judgment. Only in cases where revision would take place before the declaration of enforceability it would have to be taken into account by the designated court according to Article 4(3).

The provision is in principle useful if interpreted in the light of this aim. Systematically, there might however be better options for regulation. Starting from the assumption that the original judgment has already been declared enforceable or has already been enforced, the recognition of the revision judgment alone would not be a sufficient remedy for the former debtor. Enforcement of the revision judgment itself would often times fail if it was merely to repeal the original judgment for the lack of an enforceable operative ruling, apart from a potential decision on reimbursement of costs.

Furthermore, if taken very strictly any revision judgment would be in conflict with the original repealed judgment by virtue of Article 7(1)(f), which gives priority to the earlier judgment. The provision does contain a safeguard requiring that the earlier judgment fulfils the conditions necessary for its recognition in the requested State. It can be argued that this is not the case anymore if the original judgment was repealed by virtue of Article 4(3). The complication lies in the fact that in the main field of application the declaration of enforceability has already taken place in the requested State. Actually, the situation would therefore ask for a contrarius actus of the original declaration of enforceability, which is however not covered by the Convention.

A full regulation of the situation in question would therefore not ask for a head of jurisdiction, but a set of rules for the revision of a declaration of enforceability. The subject matter regarding revision judgments seems to be considerably distinct from the other ordinary heads of jurisdiction.

Should it be feasible, it would therefore be preferred to introduce a separate Article on this issue in the context of the procedural rules. As a minimum variant – upholding the regulation within the heads of jurisdiction – it would be useful to clarify that the decision on revision or repeal shall be taken by a competent court.

Proposals

- **Variant A:** (replacing Art. 5(1)(o))

(new) Article 10a – Review of recognition and enforcement

1. A judgment revising or overturning a previous judgment, which was eligible for recognition and enforcement in accordance with this Convention, shall take precedence over such previous judgment contrary to Article 7(1)(f) and shall be recognized and enforced according to the rules of this Convention, if this judgment was taken by the court which gave the previous judgment or another court of the State that gave such previous judgment, which was competent in such matters indiscriminately for national or foreign entities.

2. If such decision is taken after the previous judgment has already been recognized or declared enforceable in a requested State according to this Convention, the court of the requested State upon application of the debtor shall set aside any such recognition of declaration of enforceability according to its national rules.

- **Variant B:**



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1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –

(...)

o) the judgment revised or overturned a previous judgment that was eligible for recognition and enforcement in accordance with this Convention and was given by *[the court which gave the previous judgment or another]* court of the State that gave such previous judgment*[, which is competent in such matters indiscriminately for national or foreign entities]*.

ARTICLE 6(a) & 8(2) AND (3)

Article 6 – Exclusive bases for recognition and enforcement

Notwithstanding Article 5 –

- a) a judgment that ruled on the registration or validity of patents, trademarks, designs,[, plant breeders' rights,] or other similar rights required to be [deposited or] registered shall be recognised and enforced if and only if the State of origin is the State in which [deposit or] registration has been applied for, has taken place, or is deemed to have been applied for or to have taken place under the terms of an international or regional instrument;

Article 8(2) and (3) – Preliminary questions

2. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded under Article 2, paragraph 1 or 3, or on a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled.

3. However, in the case of a ruling on the validity of a right referred to in Article 6, paragraph a), recognition or enforcement of a judgment may be refused or postponed under the preceding paragraph only where –

- a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State referred to in Article 6, paragraph a); or
b) proceedings concerning the validity of that right are pending in that State.

A refusal under sub-paragraph b) does not prevent a subsequent application for recognition or enforcement of the judgment.

Key issues

- Query whether this is consistent with Article 2(1)(j) (excludes decisions on the validity of entries in public registers).
- The position concerning decisions on validity is confusing as currently drafted.

Comments

1. Article 6 provides additional bases for inclusion to those in Article 5, but is characterised as an exception (Notwithstanding...). The effect is to add judgments on registration or validity of registered IP rights to the list of eligible judgments, subject to the same geographic requirement. This would be much clearer if Article 5(1)(k) were amended rather than adding it here as an apparent "exception".

For the avoidance of doubt Article 2(1)(j) needs to be excluded, since judgments on validity concern register entries. The same issues with regard to the geographical test will arise for validity decisions as for infringement decisions (see comments on Article 5(1)(k)).

2. Article 8(2) is unnecessary and introduces uncertainty. The restrictions it contains are already inherent in the scheme and text elsewhere in the Convention, and by using the term "may" it seems to be suggested that refusal may be discretionary.

Article 8(3) appears to undo the geographical test in Article 5(1)(k) and lets in judgments on validity from courts outside the State of registration provided they are consistent with any judgments on the same issue within the State of registration and there are no validity proceedings in hand in the State of registration. That effect is hard to discern and should be more plainly stated. The need for this provision is unclear to this contributor.

There is perhaps a question as to whether the Convention is to provide for enforcement of decisions on validity of registered rights. The general scheme seems to provide against that, but the later drafting suggests this has been added. A decision on validity can confirm the subsistence of the right as originally granted, or can establish the subsistence of a right of lesser scope, or can revoke the right altogether. They may therefore negate an earlier judgment on infringement and so need to be recognised in the Convention. However, it is perhaps unlikely that a successful applicant for revocation will need to have the decision enforced outside the State(s) in which the right has effect. It may be that the safeguard at Article 5(1)(o) (which would need rewording to take account of the status of the EPO, which administers and determines opposition proceedings) is sufficient. If so it may not be necessary to include decisions on validity for enforcement under the Convention.

Proposals

- Amend Article 5(1)(k) rather than adding an apparent "exception" in Article 6;



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- Reconsider Article 8(2).

ARTICLE 7(1)

Article 7 – Refusal of recognition and enforcement

1. Recognition or enforcement may be refused if –
 - a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim –
 - (i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested;
 - (...)
 - b) the judgment was obtained by fraud;
 - c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, [...].

Key issues

- Ability to refuse recognition and enforcement if defendant was “unable to arrange defence” [art. 7(1)(a)(i)].
- Other Article 7(1) grounds for refusal, including Judgments obtained by fraud or as a result of corruption.

Comments

1. First of all, we believe that it would be appropriate to include the term “*wholly or partially*” in Article 7(1). Therefore, we suggest that said provision be drafted as follows:

“1. *Recognition or enforcement may be refused - wholly or partially – if...*”

In our view, the addition of the term “*wholly or partially*” would enable the court of the requested State to refuse the enforcement of only those parts of the judgment



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which are considered incompatible with public policy (e.g. a foreign judgment may be perfectly acceptable as to the contents establishing the liability and the damages awarded, but the punitive damages also awarded in the same judgment may be considered incompatible with the public policy of the requested State).

2. With respect to Article 7(1)(a) subparagraph (i), the vast majority of the IBA Litigation Survey respondents (82.76%) agreed that service “*in sufficient time and in such a way as to enable him to arrange for his defence*” is a sufficient ground to allow recognition or enforcement of a judgment (Question 19). Furthermore, of the approximately 7% who responded that this concept is not a sufficient ground to allow recognition or enforcement, nearly 11% of the respondents felt that such service should be effected formally. Moreover, the respondents suggested that it would be appropriate to add the term “reasonable” in the referred provision, as well as to include a reference to the domestic law or the law of origin with regards to the serving of documents and also to include new ways of formal service (electronically or by publications).

In this regard, under Article 7(1)(a)(i) as formulated in the 2016 preliminary draft Convention, the ground for refusing the recognition and enforcement if the defendant was not properly notified is based on the interests of the defendant (as it is laid down in the Explanatory Note). Furthermore, in the Reports of Meeting Nos. 6 and 7 there were no proposals to change this provision.

From our point of view, the wording “*in such a way as to enable him to arrange for his defence*” contained in the referred provision is consistent with the relevant EU Regulations. In particular, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, together with the repealed Brussels I Regulation and Convention on Choice of Court Agreements adopted the same wording to address this issue. However, it would be appropriate to include another ground for refusing the recognition and enforcement of the judgment if the defendant could not have contested the claim due to *force majeure* causes or due to exceptional circumstances outside his/her responsibility.

In addition, since Article 7(1) contains a discretionary provision (“*recognition or enforcement may be refused*”), we believe that, in any case, the court of the requested State will have to analyse the evidence in order to determine whether the defendant has proved that he/she was unable to arrange for his/her defence. In our view, this analysis should be made on a case-by-case basis. Moreover, we consider that the defendant will have to make an additional effort to prove that he/she was not properly notified. Therefore, we suggest that Article 7 (1)(a)(i) be drafted as follows:



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“1. Recognition or enforcement may be refused if (a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim (i) was not notified to the defendant in sufficient time and in such a way as to enable him to reasonably arrange for his defence”.

Besides, the purpose of the term “reasonably” is to provide the court with more means to assess the evidence. Otherwise, the term “*in sufficient time and in such a way as to enable him to arrange for his defence*” could be interpreted by the court in a broad way and, thus, the defendant could take advantage of such broad interpretation and, as a consequence, the claim for recognition and enforcement could be dismissed.

In view of the foregoing, we are of the opinion that the abovementioned drafting of Article 7(1)(a)(i) would provide courts with more resources for applying the provision.

Further, regarding Article 7(1)(a)(i) *in fine*, we would like to emphasize that this rule does not apply if it was not possible to contest notification in the court of origin. In this sense, please note that, for instance, Spanish Procedural Law does not contain a provision where the defendant may contest notifications that have not been made in sufficient time.

3. Regarding Article 7(1)(b), during the June 2016 Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments, several experts questioned the preliminary drafting of Article 7(1)(b) and they stressed that refusal of recognition or enforcement must be possible even if the fraud is not in relation to a matter of procedure. Therefore, several proposals sought to delete the phrase “*in connection with a matter of procedure*” (these proposals were supported by many experts during the meeting). Among others, an expert from the EU was of the view that the grounds of refusal should also cover questions of substantive fraud and that this could be implicitly covered by the public policy exception or by express reference in Article 7(1)(b). This expert suggested including the phrase “*including but not limited to a matter of procedure*”.

The language of Article 7(1)(b) allows the requested State to refuse the recognition or enforcement of the judgment even if the non-fraudulent party still wants the judgment to be recognized or enforced. In this sense, we suggest an additional wording for Article 7(1)(b) such as the following: “*in assessing if the judgment was obtained by fraud, the requested State may take into account the non-fraudulent party’s will to request the recognition or enforcement of the judgment*”.

Moreover, in our opinion it would be appropriate to include the wording “*and/or as a result of corruption*” in Article 7(1)(b), due to the fact that “fraud” and “corruption” refer to different legal terms and cover different circumstances in which the recognition and enforcement of a judgment may be refused.

4. Finally, we have taken due note that the experts discussed the opportunity to delete the term “manifestly” in the sentence “manifestly incompatible with the public policy of the requested State” of Article 7(1)(c). We understand that it was decided to keep this term in order to correspond with the 2005 Choice of Court Convention even if it narrows the instances under which the requested State could refuse the recognition and enforcement of a foreign judgment due to incompatibility with its public policy. Additionally, the EU Regulation 1215/2012 refers to the same notion of “manifestly incompatible”. Nevertheless, it applies to European States pursuant to a principle of mutual trust; this is the reason why the standard of incompatibility to be met is high. To the contrary, Member States to the Convention might have very different systems and not be familiar with this notion of “manifestly incompatible”. Moreover, keeping this term could introduce a discrepancy between the refusal for fraud (which is considered as part of public policy in some legal systems) and the refusal for incompatibility to other public policy matters. This is significant since whereas first scenario is not subject to any standard, the latter refusal will not be applied if the “manifestly incompatible” standard is not met. Therefore, we recommend to delete the term “manifestly” so for a requested State not to be compelled to recognize and enforce a foreign judgment which is incompatible with its fundamental principles.

Proposals

- Include the wording “*wholly or partially*” in Article 7(1).
- Include the wording “*was not notified to the defendant in sufficient time and in such a way as to enable him to reasonably arrange for his defence*” in Article 7(1)(a)(i)
- Include the wording “*if the defendant could not have contested the claim due to force majeure causes or due to exceptional circumstances outside its responsibility*” in article 7(1) as an additional ground for refusing the recognition and enforcement.
- Maintain the phrase “(b) *the judgment was obtained by fraud*” in article 7(1)(b) or include the phrase “*including but not limited to a matter of procedure*”.
- Include the wording “*in assessing if the judgment was obtained by fraud, the requested State may take into account the non-fraudulent party’s will to*



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request the recognition or enforcement of the judgment” in Article 7(1)(b).

- Include the wording “*and/or as a result of corruption*” in Article 7(1)(b).
- Deletion of the term “manifestly” in the sentence “*manifestly incompatible with the public policy of the requested State*” of Article 7(1)(c)



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ARTICLE 7(2)

Article 7 – Refusal of recognition and enforcement

2. Recognition or enforcement may be refused or postponed if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –

- a) the court of the requested State was seized before the court of origin; and
- b) there is a close connection between the dispute and the requested State.

A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

Key issues

- Whether this provision (and any other relevant provisions) effectively prevent “torpedo” actions.

Comments

In accordance with Question 3 of the IBA Litigation Survey, approximately 13% of the participants agreed that when enforcing a judgment given in their own jurisdictions in another jurisdiction, “torpedo” actions are one of the most common difficulties that arise in practice.

In this regard, Article 7(2) addresses the issue of parallel litigation and recognition and enforcement. As it is set in the Preliminary Document no. 2 for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments (the “Explanatory Note”), this provision permits (but does not require) a Contracting State to refuse or postpone recognition and enforcement of a judgment if proceedings between the same parties with the same subject matter are pending in the requested State provided that: “(a) the court of the requested State was seized before the court of origin; and (b) there is a close connection between the dispute and the requested State.”

However, the previous wording of Article 7(2) included in the Explanatory Note expressly established that:



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“Recognition or enforcement may be refused or postponed if proceedings between the same parties and having the same subject matter are pending before a court of the requested State, where the court of the requested State was seised before the court of origin, and

- a) The court of the requested State satisfies one of the bases for recognition and enforcement under Article 5, or there exists a close connection between the dispute and the requested State; or*
- b) The proceedings before the court of origin were brought for the purpose of frustrating the effectiveness of the pending proceedings;*

and the pending proceedings were not contrary to an agreement or designation in a trust instrument under which the dispute in question was to be determined in a court other than the court of origin.”

As it can be noted, the actual wording of Article 7(2) has removed the possibility of refusing or postponing the recognition or enforcement of a judgment if the proceedings before the court of origin were brought for the purpose of frustrating the effectiveness of the pending proceedings (former Article 7(2)(b)). In this regard, even though the Reports of Meetings do not specify the reasons for removing this provision from Article 7(2), it is clear that it was closely linked with the concept of “*torpedo*” actions. We are of the opinion that said wording entailed some practical difficulties due to the fact that it required the courts to determine the real purpose or intention of the legal proceedings initiated before the court of origin.

Furthermore, the “*torpedo*” actions are closely connected with the concept of “*abuse of process*” and its ultimate aim is to unfairly delay or block the initiation of legal proceedings. In Europe there has been an extensive debate on how to prevent this delaying tactics within the relevant EU regulations. However, it has not been possible to overcome this issue and to give an effective solution to this problem.

From our point of view, the actual wording of Article 7(2) does not effectively prevent “*torpedo*” actions from being initiated. In fact, contrary to former Article 7(2) which provided for two alternative requirements (“*or*”) in order to refuse the recognition or enforcement of a judgment, the updated version of such provision requires that both requirements be jointly met (“*and*”). In this respect, we consider that the actual wording of Article 7(2) could lead to some practical difficulties in its application, due to the fact that all the requirements must be jointly met. Therefore, we suggest the following wording for Article 7(2):

“Recognition or enforcement may be refused or postponed where the court of the requested State was seised before the court of origin:

- a) *if proceedings between the same parties on the same subject matter are pending before a court of the requested State; or*
- b) *if there is a close connection between the dispute and the requested State.”*

Moreover, we consider that it would be appropriate to address the issue of the “*torpedo*” actions in the same manner as it has been tackled in Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Therefore, we suggest including the wording “*and the court of origin has not established its competence in accordance with a valid agreement between the parties on the competence of this court*” to Article 7(2). In this regard, it should be noted that, within the European Union, this has proven to be an effective remedy against frivolous “*torpedo*” actions which disregard contractual obligations.

Nevertheless, we are aware that the issue of the “*torpedo*” actions has been discussed in depth for many years and the law-making bodies have not reached a unanimous solution to prevent these actions. In this regard, some scholars have suggested including the concept of “*abuse of process*” which could refer to situations contrary to good faith aimed at causing harm and illegal situations.

In addition, Article 7(2) subparagraph (b) requires that a close connection between the dispute and the requested State exists. We believe that by requiring such “close connection” this provision is effectively preventing “*torpedo*” actions, due to the fact that it could not be possible to bring an action without any legal basis for the sole purpose of delaying the proceedings, because the provision requires some kind of connection between the dispute and the requested State.

However, the concept of “close connection” is abstract and uncertain. For this reason, in our opinion, and given the inherently open-ended nature of the term, it would be appropriate to expressly clarify what is meant by “close connection” in order to narrow the circumstances in which “*torpedo*” actions could be unfairly initiated. Furthermore, we consider that it would be helpful to consider the position that the European Legislator adopted in Regulation (EC) no. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), to introduce a “close connection” test.

Proposals

- We suggest the following wording for Article 7(2):

Recognition or enforcement may be refused or postponed where the court



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of the requested State was seised before the court of origin and the court of origin has not established its competence in accordance with a valid agreement between the parties on the competence of this court:

- a) if proceedings between the same parties on the same subject matter are pending before a court of the requested State; or*
- b) if there is a close connection between the dispute and the requested State. A close connection between the dispute and the requested State might refer, among others, to the place of performance of the contract which gives rise to the dispute, to the law applicable to the dispute, or to the place where the events which give rise to the dispute occur.”*



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ARTICLE 9

Article 9 – Damages

1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.
2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Key issues:

- What is “actual loss”?
- What if the exemplary or punitive damages are mandated by statute, such as double or treble damages?
- Is the intended concept “actual loss or harm” or “actual loss” and “harm suffered”? If the second, is there a difference between “actual loss” and “harm suffered”? If so, what is that distinction?
- Does the court enjoy “discretion” permitting it to reduce the amount of damages awarded to the “actual loss or harm suffered”, or is it all or nothing?
- How are liquidated damages treated? Does this provision intend to protect litigants exclusively against payment of amounts to which they did not consent or does it intend to protect litigants against payment of any amount above their “actual loss or harm”, even though they consented to (liquidated damages clauses or “penal clauses”)?
- Damages are generally separate items from court costs, which are determined by rule or statute, and a damages award may also include pre judgment interest if so provided by contract or statute, which is not reflected here.



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Comments

Notably, in response to Question 4 of the IBA Litigation Survey, 73% of respondents said in arguing to prevent a foreign judgment they believe erroneously or inappropriately obtained, they rely on argument that enforcement of judgment would be against public policy.

In the United States, there is no consistency in the use of certain terms, such as what is encompassed within “actual damages” or “direct damages.” Generally speaking, direct damages are those which flow naturally or ordinarily from the contract breach. These may also be termed actual damages. Consequential damages occur from the intervention of special circumstances that are not ordinarily predictable. However, there is inconsistency across jurisdictions as to what fits into these categories, such as in treatment of lost profits and other terms. Reference to “harm suffered” could encompass consequential damages. There is a vagueness.

Second, in some cases exemplary or punitive damages (they are essentially the same, and use of two separate words may trigger litigable issues) are mandated by statute, and as such, are part of legislatively mandated damages. There is no distinction in the Article for this. Per the minutes, an expert from Israel made a comparable point and addressed this issue in its Working Document No. 25, which I do not have. An expert from the U.S. made a comparable point in the intellectual property area, where statutory damages are not necessarily the actual damages but avoid proofs.

In the United States, and in the context of restrictive covenants in employment law, some states have authority to “blue pencil” or edit a restrictive covenant, finding that while a 5-year limit may violate public policy, a 2 years’ limit is reasonable, and the court may do that. Other courts take the position they either allow it or strike it in its entirety. It is not clear here what the parameters of the court’s discretion are. Should the court addressed have entire discretion, the risk is high that it would engage in a quasi-review of the merits. Conversely, should the court addressed have no discretion, it could lead to absurd results where a judgment cannot be enforced at all merely because damages awarded in the same are considered to be (slightly) above the “actual loss or harm suffered”.

The article does not address liquidated damages. Liquidated damages provisions are used in contracts to set a dispositive number on damages when damages are not easily calculable. Ironically, there must be some rational basis for the number or it will not be enforced. It is used to avoid having to prove actual damages upon breach. The number must be reasonable in terms of what damages would be appropriate, even if not discernible at the time of the contract. It is meant to compensate, not punish, and if a court finds the number to be a penalty, it will not



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be enforced. It is a function as well of the expectation of the non-breaching party. While they may not be exact, they cannot be purely arbitrary, either. It is not clear that a liquidated damages provision, while not being punitive or exemplary, would fall under “actual damages” or “harm suffered” since it is a reflection of agreement of the parties, and not actual proofs.

Finally, the article does not address pre-judgment interests. Article 1(b) defines judgment to include awarded costs, but does not use the word “interest,” and “interest” does not appear in the draft convention.

The explanatory notes do not add anything to the above issues.

Proposal

- Article 9 should refer to “actual loss or harm suffered as those terms are treated in the particular jurisdiction where the judgment is rendered”.
- Article 9 should address how pre-judgment interest and costs are treated.
- Article 9 should make clear that the court’s discretion can include ability to decrease (or increase) award on public policy and is not intended as an “all or nothing” provision.
- Article 9 should clearly state that judgments awarding liquidated and/or statutory damages must be recognized and enforced as long as they are not intended to punish the defendant, but rather to provide a fair estimate of an appropriate level of compensation.



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ARTICLE 11

Article 11 – Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce –
 - a) a complete and certified copy of the judgment;
 - b) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
 - c) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;
 - d) in the case referred to in Article 10, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.
2. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require any necessary documents.
3. An application for recognition or enforcement may be accompanied by a document relating to the judgment, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by The Hague Conference on Private International Law.
4. If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Key issues

- Lack of a standard form that courts could complete and submit with a request for recognition / enforcement thus facilitating the formalities required.

Comments

The ambivalent approach of lawyers to formalities is particularly striking when observing the results of the IBA Litigation Survey whereby 71% of the

participants answered that complying with formal requirements such as documents required (see Question 3), translation, certified copies was the most recurring practical difficulty in enforcement proceedings. Conversely, more than 80% of the participants opined that there should be a specific form (annexed to the convention) to complete when applying to a court for enforcement (see Question 23).

In other words: a large majority of the participants consider that a specific form would be beneficial, but simultaneously want to avoid overly rigorous formalities.

The best means to reach these goals would be the widespread use of a succinct specific form attached to the Convention, however not mandatory.

Using a specific form increases the trust of the court addressed in the enforceable character of the foreign judgment as it allows the court addressed to rely on a document issued by the court of origin (as a rule independent and unbiased) rather than on material gathered and/or produced by the applicant (as a rule biased).

Using a specific form also alleviates the burden of proof borne by the applicant as he/she may rely on the form rather than having to address these points in detail in a brief.

Besides, the ambition of The Hague Convention is to become a global instrument applicable worldwide. As a result, the Convention will require States of different cultures with different legal and judicial systems to cooperate with a view to enforcing foreign judgments. The lack of knowledge of the judicial system of the State of origin by the court address can precisely be (at least partly) made up for by the use of a specific form, which will be known and familiar to the court addressed.

Moreover, filling in a specific form should be a simple, inexpensive and expeditious task, which will as a result not delay the whole enforcement process.

Finally, to avoid the possible downsides of this formality, one should keep it optional instead of making it a mandatory attachment to an application for recognition and enforcement.

The main areas where the use of a specific form is particularly helpful are those heavily depending on the law of origin such as:

- Evidence of proper service of document which instituted the proceedings; and
- Evidence that the judgment is enforceable in the state of origin.

As regards the possible content of the specific form, one can draw inspiration from Annex V to the Council Regulation (EC) No 44/2001 of 22 December 2000 and to the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007.³ Annex V reads:

Certificate referred to in Articles 54 and 58 of the Regulation on judgments and court settlements

1. Member State of origin

2. Court or competent authority issuing the certificate

2.1. Name

2.2. Address

2.3. Tel./fax/e-mail

3. Court which delivered the judgment/approved the court settlement ()*

3.1. Type of court

3.2. Place of court

4. Judgment/court settlement ()*

4.1. Date

4.2. Reference number

4.3. The parties to the judgment/court settlement ()*

4.3.1. Name(s) of plaintiff(s)

4.3.2. Name(s) of defendant(s)

4.3.3. Name(s) of other party(ies), if any

³ Annex I to the Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters should not be relied on as it is overly comprehensive for this purpose as it was established to make up for giving up the need of an exequatur.



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4.4. *Date of service of the document instituting the proceedings where judgment was given in default of appearance*

4.5. *Text of the judgment/court settlement (*) as annexed to this certificate*

5. *Names of parties to whom legal aid has been granted*

The judgment/court settlement () is enforceable in the Member State of origin (Articles 38 and 58 of the Regulation) against:*

Name:

Done at, date

Signature and/or stamp

() Delete as appropriate.*

Proposal

- Introduce the use of a voluntary standard form to evidence the main characteristics of the judgment to be enforced based on Annex V to the Council Regulation (EC) No 44/2001 of 22 December 2000 and to the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007



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Appendix 1

IBA Questionnaire Responses