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EXPLANATORY NOTE PROVIDING BACKGROUND ON THE PROPOSED DRAFT TEXT AND IDENTIFYING OUTSTANDING ISSUES

drawn up by the Permanent Bureau

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NOTE EXPLICATIVE ÉTABLISSANT LE CONTEXTE DU PROJET DE TEXTE ET RÉPERTORIANT LES QUESTIONS EN SUSPENS

établie par le Bureau Permanent

Preliminary Document No 2 of April 2016 for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments

Document préliminaire No 2 d'avril 2016 à l'attention de la Commission spéciale de juin 2016 sur la reconnaissance et l'exécution des jugements étrangers

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A. INTRODUCTION

I. Introductory remarks

1. The Council on General Affairs and Policy of the Hague Conference (Council) at its March 2016 meeting tasked the Permanent Bureau with the preparation of a note for the attention of the Special Commission, providing background to the Proposed Draft Text and identifying outstanding issues.[1] By providing context and background on the discussions held within the Working Group of the Judgments Project (the Working Group) and illustrations on certain key provisions, this "Explanatory Note" aims to enable all the participants of the Special Commission to adequately prepare for and address such issues. Accordingly, this Explanatory Note also endeavours to outline the issues identified by the Working Group as being for the attention of the Special Commission.

2. After concisely outlining the objectives of the proposed instrument (Part A-II), Part B of this Explanatory Note lays down, following the structure of the Proposed Draft Text prepared by the Working Group, the objectives, relevant precedents and planned operation (including illustrations) regarding the 15 articles submitted by the Working Group. Finally, in Part C, the Explanatory Note addresses the issues that were debated and identified by the Working Group as being for further discussion by the Special Commission.

3. The current mandate of the Special Commission should be understood in the broad context of the Judgments Project, which refers to the work undertaken by the Hague Conference on Private International Law since 1992 on two key aspects of private international law in cross-border litigation in civil and commercial matters: the international jurisdiction of courts and the recognition and enforcement of judgments abroad. The Judgments Project initially focused on developing a broad convention dealing with both these issues. In this context, two draft instruments were drawn up: the 1999 preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (1999 preliminary draft Convention), and the 2001 Interim Text.

4. In an effort to develop a consensus-based convention, the Judgments Project was subsequently scaled down to focus on international cases involving choice of court agreements. This led to the conclusion of the *Convention of 30 June 2005 on Choice of Court Agreements* (2005 Choice of Court Convention). The 2005 Choice of Court Convention is aimed at ensuring the effectiveness of choice of court agreements in civil and commercial matters. It entered into force on 1 October 2015.[2]

5. After having recalled "the valuable work which has been done in the course of the Judgments Project and noted that this could possibly provide a basis for further work",[3] in 2011 the Council "concluded that a small expert group should be set up to explore the background of the Judgments Project and recent developments with the aim to assess the possible merits of resuming the Judgments Project".[4]

6. In welcoming, in 2012, the exploratory work conducted by the Experts' Group and its conclusions that further work on cross-border litigation was desirable,[5] the Council "acknowledged that the desirability and feasibility of making provisions in relation to matters of jurisdiction (including parallel proceedings) in this or another future instrument" required further study and discussion.[6] Therefore, it invited the Experts' Group to reconvene in order to consider and make recommendations on matters of jurisdiction. The Experts' Group met for

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[1] See the Conclusions & Recommendations ("C&Rs") adopted by the Council on General Affairs and Policy of 15 to 17 March 2016, para. 12.

[2] The 2005 Choice of Court Convention is currently in force between the European Union (except Denmark) and Mexico, and it has also been signed by the United States in 2009, Singapore in 2015, and Ukraine in 2016. The status table of the Convention is available on the website of the Hague Conference at < www.hcch.net > under "Choice of Court Section".

[3] C&Rs adopted by the Council of 7 to 9 April 2010, p. 3.

[4] C&Rs adopted by the Council of 5 to 7 April 2011, para. 15.

[5] See, respectively, C&Rs adopted by the Council of 17 to 20 April 2012, para. 16, and Conclusions & Recommendations of the Experts' Group on Possible Future Work on Cross-border Litigation in Civil and Commercial Matters (Work. Doc. No 2 of April 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference).

[6] C&Rs adopted by the Council of 17 to 20 April 2012, para. 18.

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the second time in 2013: while progress was made in the discussions, the Experts' Group was not yet in a position to make recommendations to the Council.[7]

7. In 2012 the Council also "acknowledged that in working towards a future instrument, it will be important to begin by working on an agreed core of essential provisions".[8] Consistent with that acknowledgment, the Council established a Working Group whose initial task was to "prepare proposals for consideration by a Special Commission in relation to provisions for inclusion in a future instrument relating to recognition and enforcement of judgments, including jurisdictional filters".[9] In order to enable the Working Group to complete its work, in March 2015 the Council gave the Working Group mandate that "it could address matters within the mandate of the Experts' Group and make appropriate recommendations".[10] Between 2012 and 2015 the Working Group met five times, and in November 2015 it completed its work on a Proposed Draft Text.[11]

8. In 2016 the Council welcomed the completion by the Working Group of a Proposed Draft Text. The Council decided to set up a Special Commission to prepare a draft Convention and instructed the Secretary General to convene the first meeting in June 2016 (a second meeting has been tentatively scheduled for February 2017). The Council also endorsed the recommendation of the Working Group that matters relating to direct jurisdiction (including exorbitant grounds and *lis pendens* / declining jurisdiction) should be put for consideration to the Experts' Group with a view to preparing an additional instrument. The Experts' Group will be convened soon after the Special Commission has drawn up a draft Convention.[12]

II. The objectives of the proposed instrument

9. At the Special Commission meeting, delegations will be encouraged to express their views on what the objectives of the future Convention should be and, in particular, on the needs that the future Convention should meet to provide internationally acceptable and effective provisions on the recognition and enforcement of judgments. The Working Group proceeded on the basis that the future Convention is intended to pursue two goals:

- to enhance access to justice;
- to facilitate cross-border trade and investment, by reducing costs and risks associated with cross-border dealings.

10. The future Convention will advance these goals in a number of ways. First, and most importantly, it will ensure that judgments to which it applies will be recognised and enforced in all Contracting States, thereby enhancing the practical effectiveness of those judgments and ensuring that the successful party can obtain meaningful relief. Access to justice is frustrated if a wronged party obtains a judgment, but that judgment cannot be enforced in practice because the other party and / or his or her assets are in another country where the judgment is not readily enforceable.

11. Secondly, it will reduce the need for duplicative proceedings in two or more Contracting States: a judgment determining the claim in one Contracting State will be effective in other Contracting States, without the need to relitigate the merits of the claim.

12. Thirdly, it will reduce the costs and timeframes associated with obtaining recognition and enforcement of judgments: access to practical justice will be faster and at lower cost.

13. Fourthly, it will improve the predictability of the law: individuals and businesses in Contracting States will be able to ascertain more readily the circumstances in which judgments will circulate among those States.

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[7] "Ongoing work on international litigation", Prel. Doc. No 3 of March 2013 for the attention of the Council of April 2013 on General Affairs and Policy of the Conference, Annex 2.
[8] C&Rs adopted by the Council of 17 to 20 April 2012, para. 17.
[9] *Ibid*.
[10] C&Rs adopted by the Council of 24 to 26 March 2015, para. 4.
[11] "Report of the Fifth Meeting of the Working Group on the Judgments Project (26-31 October 2015) and Proposed Draft Text Resulting from the Meeting", Prel. Doc. No 7A of November 2015 for the attention of the Council of March 2016 on General Affairs and Policy of the Conference. The reports of the Working Group's meetings, along with the other documentation and information concerning the developments of the Judgments Project from 2010 to date, are available on the Hague Conference website < www.hcch.net > under "Judgments" then "Recent developments (2010 onwards)".
[12] C&Rs adopted by the Council of 15 to 17 March 2016, paras 11-14.

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14. Fifthly, it will enable claimants to make choices that are more informed about where to bring proceedings, taking into account their ability to enforce the resulting judgment in other Contracting States.

15. In a globalised and interconnected world, with ever-increasing movement across borders of people, information and assets, the practical importance of achieving these objectives is plain.

16. The 2005 Choice of Court Convention pursued the same objectives by enabling parties to agree on the court that would hear a claim, and providing for the recognition and enforcement of a judgment given by the chosen court. However, in many cases there is no choice of court agreement between the parties to a dispute. The future Convention seeks to extend the benefits of enhanced access to justice, and reduced costs and risks of cross-border dealings, to a broader range of cases.

B. GENERAL APPROACH

17. In drafting the Proposed Draft Text, the aforementioned objectives served as effective pointers for the work conducted thus far.

18. The Working Group proceeded on the basis that the future Convention should contain an efficient system for the recognition and enforcement of foreign judgments in civil and commercial matters, one that will provide for circulation of judgments in circumstances that the Working Group considered uncontroversial. The Proposed Draft Text thus provides for recognition and enforcement of judgments from other Contracting States that meet the requirements set out in a list of bases for recognition and enforcement (Art. 5) and sets out the only grounds on which recognition and enforcement of such judgments may be refused. Furthermore, in order to facilitate the circulation of judgments, the Proposed Draft Text does not prevent recognition and enforcement of judgments in a Contracting State under national law or under other treaties (Art. 15), subject to one provision relating to exclusive bases for recognition and enforcement (Art. 6).

19. In this regard, the future Convention will be a complementary Convention to the 2005 Choice of Court Convention. Chapter I of that Convention in relation to scope and definitions provided a useful starting point for consideration of the corresponding topics in the future Convention, bearing in mind the need for modifications to reflect the different scope of the future Convention. Chapter III of the 2005 Choice of Court Convention, which provides for recognition and enforcement of judgments, provided the blueprint for the corresponding provisions of the future Convention. The general approach adopted by the Working Group was that the solution adopted in the 2005 Choice of Court Convention would be followed in the drafting of the Proposed Draft Text unless there was a compelling reason to depart from that solution.

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CHAPTER I – SCOPE AND DEFINITIONS

Article 1

Scope

1. This Convention shall apply to the recognition and enforcement of judgments relating to civil or commercial matters. It shall not extend in particular to revenue, customs or other administrative matters.

2. This Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given in another Contracting State.

Purpose

20. Article 1 defines the scope of the future Convention. In doing so, this provision enables individuals and businesses to more readily ascertain the circumstances in which judgments will circulate among Contracting States.

Sources

21. Paragraph 1 of this provision is modelled on Article 1 of the 1999 preliminary draft Convention and Article 1(1) of the 2005 Choice of Court Convention.

Comments

22. The scope of the Proposed Draft Text is limited to "civil or commercial matters".[13] Regardless of the nature of the court that gave the decision, decisions on civil matters are considered to fall in the scope of the Proposed Draft Text.[14]

23. As concerns revenue, customs or other administrative matters, the Working Group expressed preference for an explicit exclusion. Accordingly, unlike the 2005 Choice of Court Convention, the Proposed Draft Text expressly provides that it "shall not extend in particular to revenue, customs or other administrative matters". There was less need for such a clarification in the choice of court context, as it would be most unusual for there to be a choice of court agreement that applied to a dispute relating to those matters.

[13] The term "civil *or* commercial matters", which has appeared in past Hague Conventions, is functionally equivalent to the term "civil *and* commercial matters". See also the Hartley / Dogauchi Report, para. 49 (for the full title of this Report and other references, please see the glossary drawn up for the Judgments Project, available on the Hague Conference website < www.hcch.net > under "Special Commission on the Judgments Project").

[14] It should be noted that the scope of the Proposed Draft Text is defined in terms of "matters", not "courts". See para. 49 *infra* for further elaboration. Consequently, the characterisation of the matter as civil and commercial should depend on the nature of the claim and not necessarily on the character of the court in which the action was brought, be it civil, commercial, penal or administrative. On this point see also the "Preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, adopted by the Special Commission and Report by Peter Nygh and Fausto Pocar", Prel. Doc. No 11 of August 2000 for the attention of the Nineteenth Session of June 2001, in *Proceedings of the Twentieth Session (2005)*, Tome II, *Judgments*, Cambridge – Antwerp – Portland, Intersentia, 2013, p. 191. See the Nygh / Pocar Report, esp. para. 27.

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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.

Purpose

24. Article 2 makes clear that not all “civil and commercial matters”, a concept borrowed from other Hague Conference Conventions including the 2005 Choice of Court Convention, should fall within the scope of the future Convention.

25. The provisional demarcation of included and excluded matters reflects a realistic approach taken by the Working Group, which attempts to maximise the future Convention’s reach, but which also takes into account the fact that the future Convention will be most useful if it is widely accepted.

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Sources

26. This provision is modelled on Article 2 of the 2005 Choice of Court Convention. It also reflects the area in which the Working Group found commonality with respect to the exclusions from scope.

Comments

27. The Special Commission shall consider whether to retain or remove any of the present exclusions under the Proposed Draft Text. Further, the Special Commission may wish to keep in mind the possibility of including a declaration mechanism for issues that are already excluded from the scope of the Proposed Draft Text or for issues that are currently within the scope.[15]

28. The following paragraphs provide further comments on the matters referred to in Article 2(1).

29. *Status and legal capacity of natural persons*: it was suggested that these matters, which include proceedings for divorce, annulment of marriage or the parentage of children, be excluded from the scope of the Proposed Draft Text on the grounds that they go beyond the "civil and commercial" realm, and often involve public registers and national interests. Moreover, they are subject to specific Hague Conventions.[16] This provision is drawn from Article 2(2)(a) of the 2005 Choice of Court Convention.

30. *Maintenance obligations*: maintenance obligations have been excluded from the scope of the Proposed Draft Text on the ground that they are subject to specific Hague Conventions.[17] This provision is drawn from Article 2(2)(b) of the 2005 Choice of Court Convention. However, as with many other scope matters, the interplay between the 2007 Child Support Convention and the future Convention should be the subject of further consideration by the Special Commission.

31. *Other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships*: these matters have been excluded from the scope of the Proposed Draft Text on the ground that they arise out of a very specific context, *i.e.*, the family relationship.[18] However, it is noted that this suggested exclusion would not, for example, include a dispute about the payment of the price for a car sold by one spouse to the other. This provision is drawn from Article 2(2)(c) of the 2005 Choice of Court Convention.

32. *Wills and successions*: wills and successions are excluded from the scope of the Proposed Draft Text. While in some jurisdictions these matters are commonly construed as falling out of the scope of civil and commercial matters, this is not always the case for other jurisdictions (*e.g.*, common law jurisdictions). This is an area where the Hague Conference has been active in the past.[19] The use of the word "wills" clarifies that matters concerning the form and material

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[15] See also *infra*, Part C, paras 229-234.

[16] See: *Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*; *Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*; *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*; *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*; *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (1996 Child Protection Convention); *Convention of 13 January 2000 on the International Protection of Adults* (2000 Protection of adults Convention). The full text of the Conventions is available on the Hague Conference website at < www.hcch.net > under "Instruments".

[17] See, in particular: the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (2007 Child Support Convention). See also the preceding instruments: *Convention of 24 October 1956 on the law applicable to maintenance obligations towards children*; *Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children*; *Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*; *Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*; and *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (2007 Maintenance Obligations Protocol). The full text of the Conventions is available at < www.hcch.net > under "Instruments".

[18] In this respect, see the *Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*. The full text of this Convention is available at < www.hcch.net > under "Instruments".

[19] See: *Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions*; *Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons*; *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons* (not yet in force).

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validity of dispositions upon death are excluded from the Proposed Draft Text.[20] This provision is drawn from Article 2(2)(d) of the 2005 Choice of Court Convention.

33. *Insolvency, composition and analogous matters*: the Proposed Draft Text, drawing from Article 2(2)(e) of the 2005 Choice of Court Convention, excludes such matters. In the framework of the 2005 Choice of Court Convention, this exclusion is construed narrowly; in fact, proceedings are only excluded from the scope of the 2005 Choice of Court Convention if they directly concern insolvency. This includes, for instance, questions concerning the administration of the bankrupt estate or the ranking of different creditors. With regard to Article 2(1)(e) of the Proposed Draft Text, the Special Commission may wish to utilise a comparably narrow interpretation. Assume that A (resident in State X) and B (resident in State Y) enter into a contract, under which B owes A a sum of money. A is then declared bankrupt as a result of proceedings in State X. The person appointed to administer A's bankrupt estate brings an action alleging breach of contract in State Y and the court of State Y which, recognises the appointment under the insolvency law of State X, renders a judgment for the appointed person. The ensuing judgment does not fall in the exclusion under Article 2(1)(e) of the Proposed Draft Text. Consequently, it is eligible for recognition and enforcement in other Contracting States.[21] When further discussing the exclusion of insolvency, composition and analogous matters, the Special Commission may wish to consider the current activity of UNCITRAL's Working Group V to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-related judgments.[22]

34. *Carriage of passengers and goods*: this exclusion, which is drawn from Article 2(2)(f) of the 2005 Choice of Court Convention, relates to contracts for the national and international carriage of passengers or goods by sea, land and air, or any combination of the three. The international carriage of persons or goods is subject to a number of other conventions, which also include provisions on recognition and enforcement. It is important to further consider whether there are gaps that the future Convention should cover and whether any overlaps are best dealt with by an appropriate disconnection clause(s) rather than by exclusion from scope.[23]

Marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage: Article 1(2)(h) of the 2001 Interim Text excluded "admiralty or maritime matters" from its scope because of the highly specialised nature of the subject, which features a complex body of admiralty and maritime law that has developed over many centuries.[24] On the grounds that the application of choice of court agreements to maritime matters would cause problems for some States, Article 2(2)(g) of the 2005 Choice of Court Convention excludes from the scope of the Convention some maritime matters, namely: marine pollution; limitation of liability for maritime claims; general average; emergency towage; and emergency salvage.[25] Other maritime (shipping) matters, for example, marine insurance,

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[20] See the Nygh / Pocar Report, paras 36-37.

[21] For further illustration, see the Hartley / Dogauchi Report, para. 57.

[22] More information is available at < http://www.uncitral.org/uncitral/en/index.html > under "Working Group V: Insolvency Law".

[23] In this respect, the Special Commission may wish to consider that some specialised commercial courts consider contracts for carriage of goods and / or passengers as a commercial matter. For existing international instruments on carriage of goods and / or passengers including provisions on jurisdiction, recognition and enforcement see: the *1956 Convention on the Contract for the international carriage of goods by road (CMR)*; the *1973 Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR);* the *Protocol of 2002 to the 1974 Athens Convention relating to the carriage of passengers and their luggage by sea*; *2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (not yet in force). For further information on the Contracting Parties of these Conventions and on the provisions on recognition and enforcement of judgments laid down therein, see Annex I.

[24] Nygh / Pocar Report, para. 36.

[25] Hartley / Dogauchi Report, para. 59. For existing international instruments on maritime claims including provisions on jurisdiction, recognition and enforcement see: the *1969 International Convention on Civil Liability for Oil Pollution Damage (CLC)* and the *Protocol of 1992;* the *1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND 1992)* and the *International Oil Pollution Compensation Supplementary Fund (FUND 2003);* the *2001 International Convention on Civil Liability for Bunker Oil Pollution Damage;* the *1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS).* For further information on the Contracting Parties of these Conventions and on the provisions on recognition and enforcement of judgments laid down therein, see Annex II.

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non-emergency towage and salvage, shipbuilding, ship mortgages and liens, are included in the scope of the 2005 Choice of Court Convention.[26] Although the Proposed Draft Text contains an exclusion along the lines of the 2005 Choice of Court Convention formulation, the Working Group recommends that the Special Commission gives particular consideration to whether some of these exclusions (especially emergency towage and salvage) can be omitted.

35. *Liability for nuclear damage*: liability for nuclear damage is the subject of various international conventions, which provide that the State where the nuclear accident takes place has exclusive jurisdiction over actions for damages for liability resulting from the accident.[27] Since those conventions generally provide for exclusive jurisdiction, it may be logical to leave these matters outside the scope of the future Convention. Moreover, in light of the fact that some States with nuclear power plants may not be parties to any of the nuclear liability conventions, it is likely that such States would be reluctant to allow decisions rendered in another Contracting State on their nuclear liability to circulate in other Contracting States. Accordingly, this matter has been excluded from the scope of the Proposed Draft Text. This provision is drawn from Article 2(2)(i) of the 2005 Choice of Court Convention.[28]

36. *The validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs*: the validity, nullity or dissolution of legal persons and the validity of their decisions were excluded from the scope of the Proposed Draft Text because the "personhood" of a legal person is a highly regulated matter which varies substantially across jurisdictions. This provision is drawn from Article 2(2)(m) of the 2005 Choice of Court Convention.[29]

37. *The validity of entries in public registers*: drawn from Article 2(2)(p) of the 2005 Choice of Court Convention, the validity of entries in public registries was excluded on the ground that in some legal systems these matters might not be regarded as a civil or commercial matter.[30] It is worth remembering in this regard that Article 12(3) of the 1999 preliminary draft Convention[31] read as follows: "In proceedings which have as their object the validity or nullity of entries in public registers, the courts of the Contracting State in which the register is kept have exclusive jurisdiction."

38. *Defamation*: defamation is a sensitive matter that touches upon freedom of expression and may have constitutional implications. The Working Group therefore suggested its exclusion. The Special Commission may wish to consider whether some neighbouring areas of the law, such as data protection and the protection of personality rights should also fall under the excluded matters.[32]

39. *Matters arising as preliminary questions*: this provision is drawn from Article 2(3) of the 2005 Choice of Court Convention and clarifies that a judgment is not excluded from the scope of the Proposed Draft Text if one of the matters referred to in paragraph 2 arises as a preliminary question, *i.e.*, where the proceeding has some other matter (that is not excluded) as its main object. However, the ruling on the preliminary question is not itself subject to recognition or enforcement under the future Convention (see *infra*, Art. 8 of the Proposed Draft Text and accompanying commentary).[33]

40. Paragraphs 3 and 4 of Article 2 have in common that they refer to different forms of dispute resolution and suggest their exclusion from the scope of the Proposed Draft Text.

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[26] Hartley / Dogauchi Report, para. 59.

[27] See: the *1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy*, and its 2004 amendment; the *1963 Convention Supplementary to the Paris Convention*, and its 2004 amendment; the *1963 Vienna Convention on Civil Liability for Nuclear Damage*, and its 1997 amendment; the *1997 Convention on Supplementary Compensation for Nuclear Damage*; the *1988 Joint Protocol relating to the Application of the Vienna Convention and the Paris Convention*.

[28] Hartley / Dogauchi Report, para. 64.

[29] *Id.*, para. 70.

[30] *Id.*, para. 82.

[31] Prel. Doc. No 11 of August 2000 (*op. cit.* note 14).

[32] Art. 2(2)(j) of the 2005 Choice of Court Convention excludes from the scope of the Convention "claims for personal injury brought by or on behalf of natural persons". As observed in the Hartley / Dogauchi Report (see para. 65), "personal injury" includes nervous shock (even if not accompanied by physical injury) – for example, from witnessing the death of a member of one's family – but not humiliation or hurt feelings – for example, for an invasion of privacy or for defamation.

[33] While the Working Group did not see it as part of its mandate, it nevertheless flagged that it may be useful for the Explanatory Report of the future Convention to note that Art. 2(2) of the Proposed Draft Text refers only to para. 1, and not to paras 3 and 4 because of the different nature of these exclusions from scope.

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41. *Arbitration and related proceedings*: drawn from Article 2(4) of the 2005 Choice of Court Convention, the Proposed Draft Text excludes arbitration and related proceedings from its scope of application. The purpose of this provision is to ensure that the Proposed Draft Text does not interfere with existing international instruments and national law on arbitration.[34] The Hartley / Dogauchi Report indicates that under the 2005 Choice of Court Convention, this exclusion should be interpreted widely and would cover any proceedings in which the court gives assistance to the arbitral process. Such proceedings include, for example, deciding whether an arbitration agreement is valid or not; ordering parties to proceed to arbitration or to discontinue arbitration proceedings; revoking, amending, recognising or enforcing arbitral awards; appointing or dismissing arbitrators; fixing the place of arbitration; or extending the time-limit for making awards.[35]

42. *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*: Article 2(4) provides that the Proposed Draft Text should neither apply to agreements to refer a dispute to binding determination by a person or body other than a court, nor to binding determinations that ensue from proceedings pursuant to such an agreement. The Special Commission may wish to consider whether further consideration of drafting is needed in particular in relation to the use of the term "binding". The Special Commission may wish to further consider the situation that arises when the outcome of such proceedings is recorded in a "judicial settlement" (a transaction judiciaire as contemplated in Art. 13 of the 2005 Choice of Court Convention or Art. 10 of the Proposed Draft Text, *infra*).[36]

43. *Government*: Article 2(5) provides that a judgment is not excluded from the scope of the Proposed Draft Text 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. The judgment will fall outside the scope of the Proposed Draft Text, however, if it is rendered on a matter which is not civil or commercial.[37] This provision is drawn from Article 2(5) of the 2005 Choice of Court Convention.[38]

44. *State immunities and privileges*: Article 2(6) provides that nothing in the Proposed Draft Text affects the privileges and immunities of States, or of international organisations, in respect of themselves or their property. This provision is intended to make clear that Article 2(5) may not be interpreted to affect State immunities and privileges. This provision is drawn from Article 2(6) of the 2005 Choice of Court Convention.[39]

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[34] Such as the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958 New York Convention). To date (April 2016), this Convention has 156 Contracting States.
[35] See the Hartley / Dogauchi Report, para. 84.
[36] See the Report of February 2016 of UNCITRAL's Working Group II and references to the risk of overlap or conflict with a future UNCITRAL instrument on the enforceability of settlement agreements resulting from conciliation at < http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html >.
[37] See also the Hartley / Dogauchi Report, para. 85.
[38] *Id.*, paras 85-86.
[39] *Id.*, para. 87.

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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.

Purpose

45. Article 3 defines certain terms employed in the Proposed Draft Text in order to provide clarification in respect of these terms. This aims to enhance the uniform interpretation and application of the future Convention, to the benefit of predictability of the law and legal certainty.

Sources

46. This provision is modelled on Article 4 of the 2005 Choice of Court Convention.

Comments

47. *"Defendant"*: "defendant" is defined in Article 3(1)(a) as a person against whom the claim or counterclaim was brought in the State of origin. Therefore in the context of a counterclaim, the term refers to the original plaintiff. In the context of a third party claim, it would refer to the third party against whom that claim is made.

48. *"Judgment"*: with respect to Article 3(1)(b), the Special Commission may wish to consider whether the future Convention should cover only judgments rendered by a court or whether it should also cover decisions by other authorities, including administrative bodies. Overall, in the Working Group there was consensus that the Proposed Draft Text should focus on court judgments and that a good reason is needed to depart from Article 4(1) of the 2005 Choice of Court Convention.[40] Moreover, the Special Commission may wish to take into consideration whether to address the ongoing changes in the anatomy of courts (see, *e.g.*, the establishment of the Dubai International Financial Centre Courts, the Abu Dhabi Global Market Courts, the upcoming Astana International Finance Centre Courts, and other specialised commercial courts, like the Netherlands Commercial Court) and how the future Convention should relate to them. The Permanent Bureau is currently conducting research on the characterisation of such institutions as "courts" in the context of the 2005 Choice of Court Convention and, should the Special Commission wish, could prepare a research note on this matter for the purposes of the future Convention.

[40] *Id.*, note 146.

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49. The Special Commission may also wish to consider whether the following categories of judgments should be encompassed in the definition of "judgment": default judgments; judgments regarding provisional and protective measures (including anti-suit injunctions); non-money judgments; and judgments rendered in proceedings for collective redress (class actions).

50. *Default judgments*: default judgments are encompassed in the scope of the Proposed Draft Text, subject to the specific procedures in Articles 4(2) and 11(1)(b). The procedure in Article 4(2) aims to promote judicial expediency (see *infra*, para. 60) while Article 11(1)(b) aims to promote the right of defence and due process (see *infra*, para. 192).

51. *Judgments regarding provisional and protective measures*: the Working Group was conscious about the difficulties of including judgments regarding provisional and protective measures within the scope of the Proposed Draft Text. Hence, although their importance was acknowledged, it was proposed that these judgments be excluded. In this regard, the Special Commission may wish to take note that provisional and protective measures were included in the 1999 preliminary draft Convention.[41] That choice reflected the decision to allow recognition and enforcement under the 1999 preliminary draft Convention of provisional and protective measures ordered by a court that has jurisdiction over the merits under the Convention, but to exclude the recognition and enforcement of measures ordered by a court that lacks such jurisdiction.[42]

52. *Non-money judgments*: non-money judgments are enforceable under the 2005 Choice of Court Convention; they are also common in the arbitration context, where arbitrators order specific relief enforceable under the 1958 New York Convention. Such judgments include: orders for the transfer and delivery of property; and orders declaring the rights and liabilities of the parties. The enforcement of certain non-money judgments may give rise to difficulties, in particular where the given form of relief is unknown in the requested State. In some States, particularly in common law States, only judgments for a debt or definite sum of money are covered by applicable national, bilateral or regional recognition and enforcement schemes.[43] But the same restriction does not generally apply to enforcement of arbitral awards in those States, and the effective resolution of disputes, especially in a commercial context, often requires more than the simple payment of a sum of money. Thus non-money judgments have been included in the scope of the Proposed Draft Text. However, appropriate safeguards and restrictions have been considered: issues that arise where the form of relief granted in the court of origin is not known to or not available in the requested State (this also covers the situation where the relief is known but there are issues in giving it full effect) have been considered at Article 13 of the Proposed Draft Text (see *infra*).

53. *Judgments rendered in proceedings for collective redress (class actions)*: the question of whether class actions fall within the scope of the Proposed Draft Text was raised by the Working Group. This is a new and rapidly-changing area of law for many jurisdictions. As things stand, these judgments are covered by the Proposed Draft Text. Should the Special Commission retain this category of judgments within the scope, it may be necessary to develop or adjust certain rules (see, *e.g.*, Art. 5(1)(a)(i) of the Proposed Draft Text). For instance, the Special Commission may wish to consider how actions brought by professional associations should be treated. It should be noted that there is no specific provision relating to class actions in the 2005 Choice of Court Convention or in any other Hague instrument on recognition and enforcement. If desired, the research that the Permanent Bureau has conducted to date on these developments could form the basis for a research note for the attention of the Special Commission.

54. *Habitual residence*: Article 3(2) of the Proposed Draft Text (which is drawn from Art. 4(2) of the 2005 Choice of Court Convention) chooses the wording "entity or person other than a natural person" instead of "legal person" so as to include not only legal persons, but also associations of natural or legal persons that do not have separate legal personality. Partnerships and other unincorporated associations are captured in this drafting. As regards the habitual residence of "an entity or person other than a natural person", paragraph 2

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[41] See Arts 13 and 23(b) of the 1999 preliminary draft Convention.

[42] See the Nygh / Pocar Report, para. 299. In this context, see also the "Helsinki Principles on Provisional and Protective Measures in International Litigation", in *RabelsZ*, Bd 62, H. 1 (January 1998), pp. 128-130.

[43] However, see Art. 13 *Commonwealth Model Foreign Judgments Bill - A Bill for An Act to make fresh provision as to the recognition and enforcement of foreign judgments*, esp. para. 1 - *Registration of a non-monetary judgment*, whereby "the judgment creditor may apply to the court for leave to register a foreign judgment which is a non-monetary judgment".

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indicates four places that may or may not be the same. The criteria laid down at paragraph 2 of this provision operate as alternatives; there is no hierarchy between them. Where a company separates the elements of place of its statutory seat, incorporation, central administration, and principal place of business, the company must deal with the consequences of its decision. One of the main consequences is that that company can be sued in any of those States and that the judgment can be recognised by the Contracting States if rendered by the courts of any of these States (assuming they are Contracting States as well). The Working Group departed from the text of the 2005 Choice of Court Convention by inserting the word "habitually" before "resident" but kept exactly the same definition of the connecting factor for non-natural persons.[44]

[44] Habitual residence is a criterion commonly found in Conventions adopted in the framework of the Hague Conference: see, *e.g.*, the 1996 Child Protection Convention; the 2000 Protection of adults Convention; the 2007 Child Support Convention; the 2007 Maintenance Obligations Protocol.

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CHAPTER II – RECOGNITION AND ENFORCEMENT

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. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.

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. Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment. In such cases, the court addressed may also make enforcement conditional on the provision of such security as it shall determine.

Purpose

55. Article 4 expresses the general objective of the future Convention, *i.e.*, that judgments from one Contracting State should in principle be recognised and enforced in other Contracting States. The provision also lays down general provisions with respect to the mechanisms and conditions for recognition and enforcement. Namely, it proscribes review on the merits, and addresses the question of the effectiveness and enforceability of the judgment.

Sources

56. This provision is modelled on Article 8 of the 2005 Choice of Court Convention.

Comments

57. The general objective of the future Convention, that in principle foreign judgments should be recognised and enforced between Contracting States, is expressed in this provision. This positive approach to recognition and enforcement of judgments from Contracting States is important for all Contracting States and groundbreaking for those States where it is at present not possible to recognise and enforce foreign judgments in the absence of an international agreement.

58. Article 4(1) grants discretion to the requested State by specifying that "[r]ecognition or enforcement *may* be refused only on the grounds specified in this Convention" [emphasis added]. Thus, even where one of the grounds of refusal is applicable, the law of the requested State may nevertheless provide for recognition and enforcement of the judgment.

59. Article 4(2) provides that the court addressed shall be bound by the findings of fact on which the original court based its jurisdiction, unless the judgment was given by default. This provision is drawn from the one in Article 8(2) of the 2005 Choice of Court Convention.[45] The

[45] See the Hartley / Dogauchi Report, paras 165-166. Similar provisions are found in Art. 6 of the *Convention of 1 February 1971on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (1971 Enforcement of Judgments Convention), Art. 9 of the *Convention of 2 October 1973 on the Recognition*

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wording of paragraph 2 is based upon Article 9 of the 1971 Enforcement of Judgments Convention.[46] The purpose of the provision is to prevent the person against whom recognition and enforcement is sought from delaying enforcement by raising once again issues that were, or could have been, raised in the original proceedings. The provision only binds the court addressed to the findings of fact on which the conclusion as to jurisdiction is based; it is for the court addressed to determine what conclusions of law should follow from such findings.[47]

60. For default judgments, the binding effect of a finding on jurisdictional facts does not apply because a heavier burden rests upon the applicant for recognition or enforcement of such judgments. The applicant has to establish in accordance with Article 7(1)(a) that due notice of the commencement of the proceedings was given to the defendant. The Special Commission may wish to consider, as recommended by Nygh / Pocar in 2000, giving an autonomous definition to "default judgment", in light of the considerable differences in national law and practice of either the law of the court of origin or of the court addressed. These experts suggested a reference to "proceedings in which the defendant did not have the opportunity of defending himself before the court of origin. A defendant who appeared only to contest the jurisdiction of the original court, lost on that issue and thereafter withdrew from the proceedings on the merits, cannot dispute the findings of jurisdictional facts on which the assumption of jurisdiction was based. Otherwise the very purpose of the provision would be defeated".[48]

61. Article 4(3) provides that a judgment will only be recognised if it has effect in the State of origin, and will only be enforced if it is enforceable in the State of origin. Having effect means that the judgment is legally valid and operative. If it does not have effect, it will not constitute a valid determination of the parties' rights and obligations. Thus, if the judgment does not have effect in the State of origin, it should not be recognised under the Convention in any other Contracting State. Moreover, if it ceases to have effect in the State of origin, the judgment should not thereafter be recognised under the Convention in other Contracting States. Likewise, if the judgment is not enforceable in the State of origin, it should not be enforced elsewhere under the Convention.[49] This provision is drawn from Article 8(3) of the 2005 Choice of Court Convention.

62. Article 4(4), which is modelled on Article 8(4) of the 2005 Choice of Court Convention, provides that recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. This means that the court addressed may postpone or refuse recognition or enforcement if, and as long as, the judgment might be set aside or amended by another court in the State of origin. It is not, however, obliged to do this. Some courts might prefer to enforce the judgment. If it is subsequently set aside in the State of origin, the court addressed will rescind the enforcement.[50] Article 4(4) gives the court addressed the option of either suspending the enforcement process or refusing to enforce the judgment. If the court addressed chooses the latter option, a new application for enforcement once the situation in the State of origin is clarified is possible.[51] The Proposed Draft Text also specifies that the person seeking recognition and enforcement may be required to provide security to ensure that the person against whom recognition and enforcement is sought is not prejudiced.[52]

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and Enforcement of Decisions Relating to Maintenance Obligations, Art. 25 of the 1996 Child Protection Convention, and Art. 24 of the 2000 Protection of adults Convention.

[46] The full text of the Convention is available at < www.hcch.net > under "Instruments".

[47] Nygh / Pocar Report, para. 321.

[48] *Id.*, para. 322.

[49] See the Hartley / Dogauchi Report, paras 170-172.

[50] *Id.*, para. 173.

[51] *Id.*, paras 173-174.

[52] While this aspect was not addressed in the 2005 Choice of Court Convention, it was however taken into consideration in the Hartley / Dogauchi Report, para. 173.

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Article 5

Bases for recognition and enforcement

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

a) i) the person who was the party in the proceedings in the court of origin and is the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin,

or

ii) the person against whom recognition or enforcement is sought is not the person who was the party in the proceedings in the court of origin but is the successor to the obligations of the judgment, and the person who was the party in the proceedings in the State of origin was habitually resident there at the time that person became a party to those proceedings;

b) the person against whom recognition or enforcement is sought was the person that brought the claim on which the judgment is based or is the successor to that person;

c) the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment;

d) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;

e) the judgment ruled on a contractual obligation and it was given in the State in which performance of that obligation took place or should take place under the parties' agreement or 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;

f) 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;

g) the judgment ruled on an infringement of a patent, trademark, design 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;

h) the judgment ruled on the validity or infringement of copyright or related rights and the right arose under the law of the State of origin;

i) 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;

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(ii) the State whose law is expressly or impliedly designated in the trust instrument as the law governing the trust; 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;

j) the judgment ruled on a counterclaim that arose out of the transaction or occurrence on which the original claim was based. However, the judgment on a counterclaim need not be recognised and enforced under this Convention if the law of the State of origin required the counterclaim to be brought under penalty of preclusion to the extent that the counterclaim claimant was unsuccessful on the counterclaim;

k) the court of origin would have had jurisdiction in accordance with the law of the requested State concerning recognition and enforcement of foreign judgments.

2. If recognition or enforcement is sought against a consumer in matters relating to a consumer contract, or against an employee in matters relating to an individual contract of employment –

a) paragraph 1(d) applies only if the consent was given before the court;

b) paragraph 1(e) does not apply.

Purpose

63. Article 5 lays down the bases for recognition and enforcement of judgments under the Proposed Draft Text. Bases for recognition and enforcement, also known as jurisdictional filters or "indirect grounds of jurisdiction", are a fundamental part of the architecture of the Proposed Draft Text. The Working Group took the view that Article 5 was to be drafted in a way that looks for areas of commonality in the bases for recognition and enforcement. The goal was to identify the circumstances in which the person against whom recognition or enforcement was sought could not reasonably claim that the proceeding should have been heard in some other court: for example, where the court of origin was in their "home State", or where they chose to bring the claim before that court. This approach was thought to be preferable to laying down jurisdictional filters that are as broad as possible, which would hardly garner general acceptance.

64. Recognition and enforcement are accorded to a decision made in another Contracting State provided that one or more of the prescribed filters is satisfied. The actual basis on which the court of origin exercised its jurisdiction is not relevant to this inquiry.

65. This provision improves the predictability of the law and legal certainty, by enabling individuals and businesses in Contracting States to more readily ascertain the circumstances in which judgments will circulate among those States.

Sources

66. The provision in Article 5 is the result of the consensus reached within the Working Group, on the basis of proposals made by the experts. A similar structure was adopted under Article 20(1) of the 2007 Child Support Convention.

Comments

67. Jurisdictional filters will likely have a two-fold, indirect normative effect. On the one hand, in the short term they will influence the choice of parties about where to bring an action because the parties can expect that the resulting judgment will be capable of recognition and enforcement in other Contracting States. On the other hand, they will assist the parties in making an informed decision about whether they need to appear and defend proceedings elsewhere. They provide important information about whether the result of the proceeding will circulate multilaterally.

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68. The Special Commission may wish to consider the extent to which the future Convention will require the party seeking recognition and enforcement to prove that one of the jurisdictional filters under Article 5 is satisfied.[53]

69. Article 5 of the Proposed Draft Text sets out a plurality of jurisdictional filters that operate on an equal footing. Accordingly, a judgment rendered in a Contracting State against a plurality of defendants is eligible for recognition and enforcement in other Contracting States against one or more co-defendants but not others depending on whether any of the jurisdictional filters under Article 5(1) are satisfied with respect to each defendant.

70. Assume that A brings in State X an action alleging breach of contract and seeking compensation against B (who is habitually resident in State X and owns assets in State Y) and C. Assume also that C is habitually resident in State Z and has no connections with State X, but is brought to court in State X on the ground that the national rules on jurisdiction of State X allow a plaintiff to file a legal claim against two or more defendants before its courts (*e.g.*, provided that one of them is domiciled in its territory and that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings). Assume that a judgment is rendered against B and C. Under Article 5(1)(a)(i) the judgment is eligible for recognition against B in any of the Contracting States (*e.g.*, State Y) because B had his or her habitual residence in the State of the court of origin at the time it became a party to the proceedings. However, the judgment is not eligible for recognition in any of the Contracting States against C, unless one of the other jurisdictional filters laid down in Article 5 is satisfied.

Article 5(1)(a)

Purpose

71. Article 5(1)(a) is concerned with enforcement against a person (or their successor) of a judgment in a State in which that person was habitually resident at the time that person became a party to the proceedings in the court of origin. Sub-paragraph (i) provides for the situation in which recognition or enforcement is sought against that person, and sub-paragraph (ii) provides for the situation where recognition or enforcement is sought against the successor to that person's obligations under the judgment.

72. The provision focuses on the habitual residence of the person against whom recognition and enforcement is sought at the time when proceedings were instituted against them. The underlying, and generally uncontroversial, policy of this provision is that the party who was sued in a court of the State where he or she is habitually resident, *i.e.*, "at home", may not object on jurisdiction grounds to the recognition or enforcement of the ensuing judgment. This reflects the commonly accepted principle of *actor sequitur forum rei*.

Comments

73. Article 5(1)(a)(i) avoids employing the term "defendant" and, rather, uses the wording: "the person against whom recognition or enforcement is sought" to include any party: the plaintiff, a third party, or any other person joined in the proceeding.

74. Assume that a claim is brought in State X by A (habitually resident in State Y) against B (who is habitually resident in State X, and owns assets both in State X and State Y) alleging breach of contract. A judgment is rendered against B. Under Article 5(1)(a)(i) the judgment rendered in State X is eligible for recognition in State Y because B was habitually resident in the State of origin when it became a party in the proceedings in the court of origin.

75. Assume that an insurance claim is brought by A (injured in a traffic accident) against B (insurer) in State X where B has its statutory seat (see Art. 3(2)(a) of the Proposed Draft Text). B files a third party complaint against C (driver) alleging that C's willful negligence while driving caused the accident. At the time the third party complaint is filed against C, C is habitually

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[53] See the Nygh / Pocar Report, para. 320, which states that: "If the debtor appears in the proceedings for recognition or enforcement, the court addressed can normally expect that the debtor will raise any issue relating to lack of jurisdiction. However, even if the judgment debtor were to appear in the enforcement proceedings and fail to raise an objection to the jurisdiction of the original court, the court addressed may decide on its own motion that the original court lacked jurisdiction. If there is no appearance by or on behalf of the debtor, the court addressed cannot rely merely upon the absence of the judgment debtor as an implied concession that the original court had jurisdiction. Some material must be before the court addressed, such as the findings of the court of origin in contested proceedings or other evidence as to the relevant jurisdictional facts supplied by the applicant for recognition or enforcement from which it can be satisfied that the court of origin had jurisdiction."

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resident in State Y. A judgment is rendered against both B and C. Under Article 5(1)(a)(i), the judgment is eligible for recognition against B in any of the Contracting States because B had its statutory seat in the State of the court of origin at the time it became a party to the proceedings. However, under Article 5(1)(a)(i), the judgment is not eligible for recognition against C because C was not habitually resident in the State of origin at the time the third party complaint was filed against him.

76. The Working Group chose "habitual residence" rather than "residence" to underscore the need for more than mere fleeting presence. Article 3(2) of the Proposed Draft Text confers an autonomous definition of the term "habitually resident" with respect to an entity or person other than a natural person.[54] For a natural person, the term "habitually resident" relates to a particular set of facts that must be assessed on a case-by-case basis. The Special Commission may wish to note that it is possible for natural persons to have more than one or no "habitual residence". It is intended that a finding in the State of origin that a person is habitually resident there is not a "finding of fact" binding on the requested State for the purposes of Article 4(2).

77. Assume that A brings a claim against B for breach of contract in State X, where B is habitually resident. The court renders a judgment ordering B to pay damages. However, B passes away after the judgment is rendered but before A seeks the recognition and enforcement of the judgment in another Contracting State. Under Article 5(1)(a)(ii), the judgment is eligible for recognition against B's successors (heirs) regardless of whether they were habitually resident in State X at the time the court of that State was seised, because B (the person who was the party in the proceedings in the State of origin) was habitually resident there at the time he became a party to those proceedings. The same principle applies in the case of multiple successions.

78. Assume that A brings a product liability claim against B in State Y, under whose laws B is incorporated (see Art. 3(2)(b) of the Proposed Draft Text). A judgment is rendered against B. Before recognition and enforcement of the judgment is sought, B is acquired by C, a company whose legal seat is in State Z. In the acquisition agreement, it is expressly agreed that C assumes B's liabilities. Under Article 5(1)(a)(ii) the judgment is eligible for recognition against C, because B (the person who was the party in the proceedings in the State of origin) was habitually resident there at the time he became a party to those proceedings and C has contractually agreed to succeed to B's debts and liabilities.

Article 5(1)(b)

Purpose

79. Article 5(1)(b) provides that a judgment is eligible for recognition and enforcement if the person against whom recognition and enforcement is sought was the person who brought the claim on which the judgment is based or is a successor to that person.

80. The underlying, and generally uncontroversial, policy of this provision is that the plaintiff (or his or her successor), having chosen the place where the proceedings took place may not object on jurisdictional grounds to the recognition or enforcement of the ensuing judgment. It is commonly perceived as a fundamental rule of fairness that the plaintiff (or his or her successor) may not object on jurisdictional grounds to the recognition and enforcement of the judgment because the plaintiff brought his or her claim before that court hoping that the other party would be bound by the judgment.

Comments

81. With a view to comprising in its scope cases of joinder, intervention, impleading, interpleading, subrogation, and succession in title, Article 5(1)(b) avoids employing the term "defendant" and, rather, uses the wording: "the person against whom recognition or enforcement is sought".

82. Assume that a claim is brought by A against B in State X alleging breach of contract. Assume also that the claim has no connections with State X other than the fact that a court of State X is seised with the claim. B, however, does not object to jurisdiction and a judgment is rendered on the merits against A, including a determination on costs. Under Article 5(1)(b), the judgment rendered in State X is eligible for recognition and enforcement against A (or his successor) because A is the person who brought the claim.

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[54] See *supra*, para. 55 and the corresponding note.

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Article 5(1)(c)

Purpose

83. Article 5(1)(c) provides that a judgment is eligible for recognition and enforcement if the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment. This provision supplements the rule contained in Article 5(1)(a)(i).

84. The basic principle underlying this provision is that a party which seeks to gain from commercial activities in a particular State should be subject to the jurisdiction of that State in respect of claims arising out of those activities, notwithstanding the formal means employed for conducting those commercial activities.[55]

Comments

85. In this context, the Special Commission may wish to consider whether the terms "branch", "agency", or "establishment" need to be defined in the text of the future Convention or its Explanatory Report.

Article 5(1)(d)

Purpose

86. Article 5(1)(d) provides that a judgment is eligible for recognition and enforcement if the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given. This provision is based on the uncontroversial notion that a defendant who has given express consent in the course of the proceedings to the jurisdiction of the court of origin cannot legitimately object on jurisdictional grounds to the recognition and enforcement of the ensuing judgment.

Comments

87. The fundamental element in Article 5(1)(d) is that an express consent to the jurisdiction is given in the course of proceedings. This does not mandate that the consent be necessarily given before the court. For instance, the case where court documents are exchanged between the parties but not before the judge satisfies the requirement that consent be given "in the course of proceedings". However, a defendant that objects to the jurisdiction of the court and subsequently loses on the jurisdiction issue(s), but has nonetheless advanced an argument on the merits, will not have expressly consented to the jurisdiction of the court.

88. On the other hand, Article 5(1)(d) does not cover click wrap contracts: in click wrap contracts, consent is given prior to the proceedings.

89. Assume that, while purchasing a software license online, A, the user, is presented with a message on his or her computer screen, requiring that A manifest his or her assent to the terms of the license agreement by clicking on an icon. The said terms include a jurisdiction clause in favour of the courts of State X. A manifests his or her assent by clicking on the icon. The assent given by the user by clicking on the icon does not meet the requirements of Article 5(1)(d).

Article 5(1)(e)

Purpose

90. This provision enables claimants to make an informed choice about where to bring proceedings over a contractual obligation, taking into account their ability to enforce the resulting judgment in the other Contracting States.

91. This provision is based on the uncontroversial notion that a judgment rendered on a contractual matter by the court in the place where performance of that obligation took place or should take place under the parties' agreement or under the law applicable to the contract is eligible for recognition and enforcement, to the extent that this ground of indirect jurisdiction reflects a purposeful and substantial connection to the State of origin.

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[55] See Nygh / Pocar Report, para. 130.

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Comments

92. Article 5(1)(e) refers to three essential aspects: (a) a contractual obligation; (b) place of performance of that obligation under the parties' agreement or under the law applicable to the contract; and (c) clear lack of purposeful and substantial connection of the defendant's activities in relation to the transaction to that State.

93. Assume that A (buyer) and B (seller) enter into a contract for the sale of goods. Assume also that A and B agree that the place of performance under their contract will be State X. However, B fails to deliver the goods, causing damages to A. Subsequently, A sues B in the courts of State X (where performance *should take place* under the parties' agreement) for damages. Under Article 5(1)(e) the ensuing judgment is eligible for recognition and enforcement in other Contracting States.

94. Assume that A (seller) and B (buyer) enter into a contract for the sale of goods. Assume also that A and B agree that the place of delivery under their contract will be State X. B makes the payment of the purchase price, however A delivers goods of lesser quality than contracted. Consequently, B sues A in the courts of State X (where performance *took place* under the parties' agreement). Under Article 5(1)(e) the ensuing judgment is eligible for recognition and enforcement in other Contracting States.

95. Assume that A (buyer) and B (seller) enter into a contract for the sale of goods. In their contract, the parties do not agree on the place of performance. Assume also that, under the substantive rules of the law that governs the contract, the place of performance of the obligation to deliver the goods is determined pursuant to Article 31(a) of the CISG, which provides that, unless otherwise agreed by the parties, the obligation of the seller to deliver the goods consists in handing them over to the first carrier. Assuming that B (the seller) hands over the goods to the first carrier in State Y and that B subsequently sues A in the court of State Y for the payment of the purchase price, under Article 5(1)(e) the ensuing judgment is eligible for recognition and enforcement in other Contracting States.

96. It is noted that, in the above-mentioned examples, further consideration has to be given as to whether the defendant's activities in relation to the transaction constitute a purposeful and substantial connection to the State where performance has or should have taken place. The Working Group agreed that the use of the wording "purposeful" may need further explanation and discussion by the Special Commission.[56]

97. The Special Commission may wish to invite comments from experts in the fields of the Internet and online context.

Article 5(1)(f)

Purpose

98. Article 5(1)(f) provides that a judgment is eligible for recognition and enforcement if it 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.

99. The relevant connection for recognition and enforcement under Article 5(1)(f) is the place where the act or omission directly causing harm occurred. The Working Group proceeded on the basis that a judgment rendered on a non-contractual obligation by the court in the State in which the act or omission directly causing such harm occurred should be eligible for recognition and enforcement, regardless of where the harm occurred.[57]

100. The restriction of the scope of this provision to non-contractual obligations arising solely from death, physical injury, damage to or loss of tangible property, excluding claims for mental / psychological injury and claims for pure economic loss, was intended to prevent it from operating in more controversial areas of non-contractual obligation, and thus to enable broad acceptance of this provision.

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[56] It is noted that, under the U.S. Supreme Court due process analysis of specific *in personam* jurisdiction over an out-of-State defendant, "'purposeful availment' ensures that a defendant will not be hauled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the unilateral activity of another party or a third person". See *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citations omitted).

[57] The Working Group considered whether there was also a sufficient connection with the State in which the harm occurred, perhaps subject to certain further requirements, but did not include such a provision in the Proposed Draft Text.

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Comments

101. This provision consists of three elements: (i) it applies to non-contractual obligations that arise only from death, physical injury, damage to or loss of tangible property; (ii) it applies to acts and omissions; (iii) it applies to acts and omissions that directly cause harm. By employing the term "harm" as opposed to the expression "harmful act" or "tort", the Proposed Draft Text exempts the interpreter from inquiring into the harmfulness of the conduct. Moreover, with the objective of ensuring that preparatory actions are excluded from the scope of the provision, the Proposed Draft Text adopts the term "act" as opposed to "activities" (for an illustration, see *infra*, para. 107).

102. Assume that a skiing accident occurs in a ski resort in State X where A, habitually resident in State Y, runs over B, habitually resident in State Z, with his or her snowboard. Assume that B suffers major injuries as a result of the accident and that he or she and his or her relatives bring actions in State X (where the accident occurred) for the mental / psychological pain suffered therefrom. The ensuing judgments are not eligible for recognition and enforcement in other Contracting States under Article 5(1)(f) because the scope of the provision is limited to death, physical injury, damage to or loss of tangible property and it does not encompass mental / psychological pain.

103. Assume that, in the same set of facts illustrated above, B brings an action in State X for the compensation of the damages that arise as a result of the physical injuries B suffers. The ensuing judgment is eligible for recognition and enforcement in other Contracting States under Article 5(1)(f) because non-contractual obligations arising from physical injuries fall in the scope of the provision and the court of origin is a court of the State where the act or omission directly causing the harm occurred (*i.e.*, it is the place of the act which gave rise to liability in tort). The Special Commission may wish to consider whether the future Convention should offer any guidelines for deciding the place where an act or omission occurs. In particular, the Special Commission may wish to consider that the place where the act or omission occurs may be difficult to determine in the online context.

104. Assume that, two weeks after the accident and as a result of the same set of facts illustrated above, B suffers further physical damages in State Z (where B is habitually resident) and brings there an action for the compensation of those damages. The ensuing judgment is not eligible for recognition and enforcement in other Contracting States under Article 5(1)(f) because the court of origin is not a court of the State where the act or omission directly causing the harm occurred (*i.e.*, it is not the place of the act which gave rise to liability in tort).

105. Assume that, in the same set of facts illustrated above and in the same action brought by B in State X, A files a third party complaint against the physician (habitually resident in State Z, but licensed to practice in State X) who attended to B in State X, alleging that the physician omitted to perform standard medical procedures on B and that such omission contributed to the damages suffered by B. Assume that the court of State X renders a judgment against the physician for negligence. The ensuing judgment against the physician is eligible for recognition and enforcement in other Contracting States under Article 5(1)(f) because the scope of the provision covers omissions.

106. With respect to the fact that the Proposed Draft Text adopts the term "act" as opposed to "activities", assume that a civil liability action is brought in State X by A in the framework of a criminal proceeding against B, seeking compensation for the physical damages suffered as a result of a shooting perpetrated by B in State X. Assume also that the record reflects that the weapons used by B in the shooting spree were purchased in State Y. The ensuing judgment is eligible for recognition and enforcement in other Contracting States under Article 5(1)(f) because the court of origin is a court of the State where the act directly causing the harm (*i.e.*, the shooting) occurred. Assume, on the other hand, that a similar action was brought in State Y. The ensuing judgment would not be eligible for recognition and enforcement in other Contracting States under Article 5(1)(f) because the court of origin is not a court of the State where the act directly causing the harm occurred (*i.e.*, it is not a court of the place of the act which gave rise to liability in tort) and, rather, it is a court of the State where B performed the preparatory actions that led up to the act which gave rise to liability in tort.

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Article 5(1)(g)

Purpose

107. This provision is based on the widely accepted notion that a judgment is eligible for recognition and enforcement if it is rendered on an infringement of a patent, trademark, design or other similar right required to be deposited or registered, by a court in the State in which the deposit or registration of the right concerned has taken place.

Comments

108. Article 5(1)(g) provides that a judgment is eligible for recognition and enforcement if it ruled on an infringement of a patent, trademark, design or other similar right required to be deposited or registered and it was given by a court of the State in which deposit or registration of the right concerned has taken place. The scope of this provision is limited to the infringement of a patent, trademark, design or other similar right. Claims addressing the registration or validity of such rights fall in the scope of Article 6 of the Proposed Draft Text, which provides for an exclusive basis for recognition and enforcement. While a judgment regarding the infringement of a patent, trademark, design or other similar right may circulate under the Proposed Draft Text if it complies with any of the jurisdictional filters laid down therein, a judgment on the validity of such rights may only circulate under the Proposed Draft Text provided that it complies with the provision laid down in Article 6 of the Proposed Draft Text.

109. Assume that A brings a claim against B in State X, alleging infringement of a patent issued in State X. The ensuing judgment is eligible for recognition and enforcement under Article 5(1)(g) because the court of origin is a court of the State in which deposit or registration of the right concerned has taken place.

110. Assume that A brings a claim against B in State X, where B is habitually resident, alleging infringement of a patent issued in State Y. No question as to the validity of the patent is raised. The ensuing judgment is not eligible for recognition and enforcement under Article 5(1)(g) because the court of origin is not a court of the State in which the deposit or registration of the right concerned has taken place. However, it is eligible for recognition and enforcement under Article 5(1)(a)(i) because B, against whom recognition and enforcement is sought, was habitually resident in State X (the State of origin) at the time B became a party to the proceedings.

111. Assume that during the course of the infringement proceeding, B claims by way of defence that the patent is invalid. Since the judgment on the validity of the patent (preliminary question) is raised before a court other than that indicated in Article 6 of the Proposed Draft Text, under Article 8(1) such judgment will not be eligible for recognition and enforcement, and may merely have relevance to the dispute at hand between the parties for that particular litigation. Further, the judgment on the infringement claim, which was adjudicated on the basis of the preliminary validity ruling may not be recognised or enforced under Article 8(2) (see also *infra*, paras 179-180).

Article 5(1)(h)

Purpose

112. This provision is based on the generally uncontroversial notion that a judgment is eligible for recognition and enforcement if it is rendered on the validity or infringement of the copyright or related rights, and the right arose under the law of the State of origin.

Comments

113. Article 5(1)(h) provides that a judgment is eligible for recognition and enforcement if the judgment ruled on the validity or infringement of the copyright or related rights and the right arose under the law of the State of origin.

114. Assume that A brings a claim against B in State X, alleging infringement of a copyright that arose under the law of State X. The ensuing judgment is eligible for recognition and enforcement under Article 5(1)(h) because the court of origin is a court of the State under whose law the right arose. The same conclusion applies to a judgment on the invalidity of the copyright given by a court of the State under whose law the right arose.

115. Assume that A brings a claim against B in State X, where B is habitually resident, alleging infringement of a copyright that arose under the law of State Y. The ensuing judgment is not

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eligible for recognition and enforcement under Article 5(1)(h) because the court of origin is not a court of the State under whose law the right arose. However, it is eligible for recognition and enforcement under Article 5(1)(a)(i) because B, against whom recognition and enforcement is sought, was habitually resident in State X (the State of origin) at the time B became a party to the proceedings. Assume that during the course of the infringement proceeding, B contests the validity of the copyright (preliminary question). Since the validity of copyright does not fall within the scope of Article 6, the ensuing judgment on the infringement action would be eligible for recognition and enforcement even if it is based on a ruling on the preliminary question of the validity of the copyright.

Article 5(1)(i)

Purpose

116. Article 5(1)(i) proceeds on the basis that a judgment is eligible for recognition and enforcement if it concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and the State of origin is either: designated in the deed of trust as a State in which disputes about such matters are to be determined; the State whose law is expressly or impliedly designated in the deed of trust as the law governing the trust; or, again, the State expressly or impliedly designated in the deed of trust as the State in which the principal place of administration of the trust is situated. The parties to the deed (the settlor, and in some cases the trustees) cannot reasonably object to such matters being determined by the identified courts. Nor can beneficiaries claiming under the trust – they cannot reasonably seek to take the benefit of their entitlements under the deed without also accepting the provisions bearing (expressly or impliedly) on resolution of disputes in relation to those entitlements.

Comments

117. The 2005 Choice of Court Convention does not apply to most trust proceedings. Many trust instruments are unilateral instruments to which the settlor alone is a party. Many trust instruments have the settlor and the (initial) trustees as parties. However, it is common for trustees to hold office who are not parties to the instrument, and it is very unusual for beneficiaries to be parties to the instrument. Thus, a trust instrument would not normally meet the definition of a choice of court agreement for the purposes of the 2005 Choice of Court Convention.

118. In addition to the court designated in the trust instrument and the courts of the State whose law governs the trust, the Proposed Draft Text points to the principal place of administration of the trust designated in the trust instrument as a jurisdictional filter.

119. Assume that a trustee invests trust assets in a way not permitted by his express or statutory powers of investment. The beneficiaries bring a claim against him in the courts of State X, which is designated in the deed of trust as the State in which disputes about such matters are to be determined. Under Article 5(1)(i) *sub* (i), the ensuing judgment is eligible for recognition and enforcement in other Contracting States.

120. Assume that a trustee distributes trust assets to a beneficiary who is not entitled to them under the terms of the trust document. The beneficiaries bring a claim against the trustee in the courts of State X, which is the State whose law is expressly or impliedly designated in the deed of trust as the law which governs the trust. Under Article 5(1)(i) *sub* (ii), the ensuing judgment is eligible for recognition and enforcement in other Contracting States.

121. Assume that a trustee breaches its duty not to profit from the trust (*e.g.*, by selling one of his own assets to the trust). The settlor and the beneficiaries bring a claim against him in the courts of State X, which is designated in the deed of trust as the State in which the principal place of administration of the trust is situated. Under Article 5(1)(i) *sub* (iii), the ensuing judgment is eligible for recognition and enforcement in other Contracting States.

122. The Special Commission should consider whether the scope of Article 5(1)(i) should be expressly limited to internal matters only (between the settlor, the trustees and the beneficiaries) or whether it should also extend to disputes that involve third parties, for example a third party challenge to the validity of the trust.

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Article 5(1)(j)

Purpose

123. Article 5(1)(j) provides that a judgment is eligible for recognition and enforcement if it ruled on a counterclaim that arose out of the transaction or occurrence on which the original claim was based. However, the counterclaim need not be recognised under the Proposed Draft Text if the law of the State of origin required the counterclaim to be brought under penalty of preclusion to the extent that the counterclaim claimant was unsuccessful on the counterclaim.

124. This provision proceeds on the basis that a plaintiff who brings a claim before the courts of State X cannot reasonably object to the recognition and enforcement of a judgment on a counterclaim arising out of the same subject-matter. Moreover, a defendant who chooses to bring a counterclaim in the court in which they were sued cannot in general reasonably object to recognition and enforcement of the resulting judgment, by analogy with Article 5(1)(b).

125. However, there is a qualification to the latter scenario, where the defendant did not have a genuine choice whether to bring the counterclaim in that court. If the defendant is required to pursue a counterclaim, because if it does not do so it will be precluded from later pursuing it in a separate proceeding, and if the counterclaim is unsuccessful, the judgment on the counterclaim need not be recognised and enforced under the Proposed Draft Text.

Comments

126. The Special Commission may wish to consider whether it is desirable that the provision at Article 5(1)(j) also applies to the counterclaimant's successor (similar to the provision at Art. 5(1)(b)).

127. Assume that A files a lawsuit seeking payment of delivered cakes against B, and B files a counterclaim for damages caused by the belated delivery. B becomes the counterclaim-claimant and A the counterclaim-respondent. Assume that B is unsuccessful on his or her counterclaim. Under Article 5(1)(j) that judgment is eligible for recognition and enforcement in the other Contacting States. In fact, B's procedural position is similar to the plaintiff's position under Article 5(1)(b) of the Proposed Draft Text (see *supra*, paras 80-83).

128. Assume that A sues B for breach of contract in State X, and B makes a counterclaim against A for fraudulently inducing it to sign the contract in the first place. Assume that a judgment on B's counterclaim is rendered against B. To the extent that B was compelled to raise its counterclaim because B would otherwise be precluded from pursuing it in separate proceedings, that judgment need not be recognised and enforced in other Contacting States pursuant to Article 5(1)(j). In fact, B's procedural position is not similar to the plaintiff's position pursuant to Article 5(1)(b) of the Proposed Draft Text (see *supra*, paras 80-83).

Article 5(1)(k)

Purpose

129. Article 5(1)(k) provides that a judgment is eligible for recognition and enforcement if "the court of origin would have had jurisdiction in accordance with the law of the requested State concerning recognition and enforcement of foreign judgments".

130. Accordingly, regardless of the fact that none of the jurisdictional filters laid down at Article 5(1)(a)-(j) are satisfied, the judgment is eligible for recognition and enforcement in the requested State if, under the indirect grounds of jurisdiction laid down in the law of the requested State, the "court of origin would have had jurisdiction".

131. This rule is in line with the requested State's own standards on indirect jurisdiction. Accordingly, a judgment falling within Article 5(1)(k) will be eligible for recognition and enforcement in accordance with the provisions of the Proposed Draft Text.

132. Where Article 5(1)(k) applies, it is mandatory for the court addressed to consider the recognition and enforcement of the judgment according to Articles 6 to 14 of the Proposed Draft Text. This provision does not overlap with that in Article 15: in the event that a judgment from a Contracting State does not satisfy any of the jurisdictional filters laid down in Article 5(1)(a)-(k) it may still be recognised under national law pursuant to Article 15 (see *infra*, commentary to Art. 15, paras 215-218).

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Comments

133. The Special Commission may wish to consider how this limb would operate if the law of the requested State provides for recognition and enforcement of certain judgments without reference to the question of indirect jurisdiction.

134. Assume that a traffic accident occurs in State X. Subsequently, one of the victims suffers physical injuries in State Y resulting from the traffic accident in State X, and brings a claim for damages against the driver in State Y. The ensuing judgment would not be eligible for recognition and enforcement under Article 5(1)(f): see *supra*, paragraphs 99 to 107. However, under Article 5(1)(k), the judgment would be eligible for recognition and enforcement in other Contracting States whose national laws would recognise and enforce a judgment on the ground, *e.g.*, that it was rendered by a court of the State where the harm occurred (as opposed to a court of the State in which the act which gave rise to liability in tort occurred: see, *supra*, the commentary to Art. 5(1)(f)).

Article 5(2)

Purpose

135. The provision in Article 5(2) resulted from the Working Group's assessment of the extent to which the recognition and enforcement of judgments on consumer and employment matters is uncontroversial, and thus appropriate for including in the future Convention.[58] One possibility would be to exclude such judgments from the scope of the future Convention, as was done under the 2005 Choice of Court Convention. However, that approach would deny consumers and employees the benefit of the enhanced access to justice that the future Convention is designed to provide.

136. This provision proceeds on the basis that:

a. it is desirable to provide for recognition and enforcement of judgments *in favour* of consumers and employees. In this respect, there is no reason to limit the application of the jurisdictional filters.

b. On the other hand, when judgments are rendered *against* consumers or employees, the application of the jurisdictional filters has been modified to reflect and accommodate the concerns of some States with respect to the protection of consumers and employees. Most of the filters remain applicable. But taking into account the special provision that is made for claims concerning these matters in certain jurisdictions, the Proposed Draft Text creates specific exceptions with regard to the recognition and enforcement of judgments rendered *against* consumers or employees.

137. This provision does not affect any rules of direct jurisdiction that a State may have in relation to consumer and employment contracts. Article 5(2) does not impose a requirement for the Contracting States to change their direct jurisdictional rules.

Comments

138. Article 5(2) provides that if recognition or enforcement is sought against a consumer in matters relating to a consumer contract, or against an employee in matters relating to an individual contract of employment: (a) paragraph 1(d) applies only if the consent was given before the court; and (b) paragraph 1(e) does not apply.

139. Article 5(2)(a) creates an exception to Article 5(1)(d) by providing that a judgment is eligible for recognition and enforcement against a consumer in matters relating to a consumer contract, or against an employee in matters relating to an individual contract of employment, if the consumer or the employee expressly consented to the jurisdiction of the court of origin and the consent was given before the court . The requirement that express consent be given "before the court" mandates that the consent be expressed as a part of the proceedings: it has to happen within the court framework. Unlike the case of Article 5(1)(d), under Article 5(2)(a) the situation where briefs are exchanged between the parties but not before the judge does not fulfil the requirement of "consent given before the court".

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[58] Unlike the Proposed Draft Text, which encompasses consumer and employment contracts in its scope, the 2005 Choice of Court Convention excludes these contracts from its scope. See, respectively, paras (a) and (b) of Art. 2(1) of the 2005 Choice of Court Convention.

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140. Article 5(2)(b) sets out an exception to Article 5(1)(e) which provides that "a judgment is eligible for recognition and enforcement if it ruled on a contractual obligation and it was given in the State in which performance of that obligation took place or should take place under the parties' agreement or 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".

141. Assume that A (seller) sues B (consumer) for the payment of the purchase price before a court of a Contracting State. Assume also that a judgment is rendered against the consumer. The recognition and enforcement of such judgment in another Contracting State is subject to the limitations provided in Article 5(2) of the Proposed Draft Text:

- under Article 5(2)(a) such judgment is eligible for recognition and enforcement in other Contracting States if the consumer expressly consented to the jurisdiction of the court of origin and the consent was given before the court;
- under Article 5(2)(b) such judgment is eligible for recognition and enforcement in other Contracting States if (i) the court of origin was the court of the place where the consumer had his or her habitual residence at the time he or she became a party to those proceedings (see Art. 5(1)(a)(i)), or (ii) the court of origin would have had jurisdiction in accordance with the law of the requested State concerning recognition and enforcement of foreign judgments, as provided at Article 5(1)(k).

142. Assume that, in the context of a consumer credit sale, A (consumer) brings a claim before a court of a Contracting State against B (seller) alleging illegal late fee charges and improper finance charges. Assume also that B makes a counterclaim against A alleging that A failed to make several payments. Assume that a judgment is given against A on B's counterclaim. While this is a judgment rendered *against* a consumer, it does not fall in the scope of Article 5(2), which addresses the case where there was consent to the jurisdiction of the court of origin (in which case, Art. 5(2)(a) applies) and excludes the application of Article 5(1)(e). Accordingly, under Article 5(1)(j) the judgment is eligible for recognition and enforcement because it ruled on a counterclaim that arose out of the transaction or occurrence on which the original claim was based (see *supra*, paras 124-129).

143. Assume that A (consumer) brings an action to rescind a contract before a court of a Contracting State against B (seller) alleging that B engaged in misleading or deceptive conduct in relation to statutory rights and obligations (*e.g.*, B stated that it will not issue a refund under any circumstances). Assume also that a judgment is rendered in favour of A. Article 5(2) of the Proposed Draft Text has no relevance to the recognition and enforcement of such judgment in another Contracting State, because it is a judgment rendered in favour of the consumer. The judgment is eligible for recognition and enforcement provided that it complies with any of the jurisdictional filters laid down in Article 5(1).

144. Assume that A (employer) brings an action before a court of a Contracting State against B (employee) alleging breach of confidentiality. Assume also that a judgment is rendered in favour of A. The recognition and enforcement of such judgment in another Contracting State is subject to the limitations provided in Article 5(2) of the Proposed Draft Text:

- under Article 5(2)(a) such judgment is eligible for recognition and enforcement in other Contracting States if the employee expressly consented to the jurisdiction of the court of origin and the consent was given before the court;
- under Article 5(2)(b) such judgment is eligible for recognition and enforcement in other Contracting States if (i) the court of origin was the court of the place where the employee had his or her habitual residence at the time he or she became a party to those proceedings (see Art. 5(1)(a)(i)), or (ii) the court of origin would have had jurisdiction in accordance with the law of the requested State concerning recognition and enforcement of foreign judgments, as provided at Article 5(1)(k).

145. Assume that, subsequent to being terminated, A (former employee) brings a claim before a court of a Contracting State against B (former employer) claiming wages and unpaid overtime. Assume also that B makes a counterclaim against A alleging that A breached his or her duty to maintain confidentiality and infringed the prohibition provided in the employment contract against solicitation of clients or co-workers for a period of six months after the termination of the employment contract. Assume that a judgment is given against A on B's counterclaim. This is a judgment rendered *against* an employee. However, Article 5(2) does not affect the recognition or enforcement of the judgment: the judgment is eligible for

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recognition and enforcement under Article 5(1)(j) because it ruled on a counterclaim that arose out of the transaction or occurrence on which the original claim was based (see *supra*, paras 124-129). The employer is not relying on Article 5(1)(d) or (e), so Article 5(2) is not relevant.

146. Assume that A (employee) brings an action against B (employer) for compensation of personal injury suffered while at work before a court of a Contracting State. Assume also that a judgment is rendered in favour of A. Article 5(2) of the Proposed Draft Text is irrelevant because it is a judgment rendered in favour of the employee. Thus, the judgment is eligible for recognition and enforcement provided it complies with one of the other jurisdictional filters laid down in Article 5(1).

147. With respect to Article 5(2) and consumer contracts, the Special Commission may wish to consider that: (i) the definition of the term "consumer" may require further discussion;[59] and (ii) further discussion may also be needed on whether any distinction should be drawn between business-to-consumer and consumer-to-consumer dealings.[60]

148. With respect to employment contracts, the Special Commission may also wish to consider whether Article 5(2) should apply only to individual contracts of employment or also to collective contracts of employment.[61]

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[59] See Art. 2(1)(a) of the 2005 Choice of Court Convention, which defines a consumer as a "natural person acting for personal, family or household purposes".

[60] The exclusion in the 2005 Choice of Court Convention covers an agreement between a consumer and a non-consumer, as well as one between two consumers. However, see the Hartley / Dogauchi Report at note 74 where it specifies that "some agreements to which a natural person is a party are not excluded by Art. 2(1) *a)* – for example, commercial agreements where one party is a sole trader (an individual acting in the course of his business). Where the agreement is concluded by a legal person, it is not necessary for it to be acting in the course of business. Art. 2(1) *a)* would not exclude a choice of court agreement concluded by a government department or a charity".

[61] The Hartley / Dogauchi Report, para. 51, identifies an individual contract of employment as a contract between an employer and an individual employee, and a collective contract of employment as a contract between an employer or a group of employers and a group of employees or an organisation such as a trade union (labour union) representing them.

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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, 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;

b) a judgment that ruled on rights *in rem* in immovable property or tenancies of immovable property for a period of more than six months shall be recognised and enforced if and only if the property is situated in the State of origin.

Purpose

149. Article 6 lays down exclusive bases for recognition and enforcement of judgments that ruled on (i) the registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered, or (ii) rights *in rem* or long-term tenancies. The "exclusivity" of these bases implies that "notwithstanding Article 5" these judgments may only be recognised if they have been rendered by the courts indicated under Article 6(a) and (b).

150. By providing exclusive bases for recognition and enforcement, the courts of a given State are generally construed as the only courts whose judgments rendered on these matters are eligible for recognition and enforcement in other Contracting States. This Article, unlike the other provisions of the Proposed Draft Text, restricts national law providing for recognition and enforcement of judgments. For this reason it is identified as the only limit on Article 15, discussed below.

Sources

151. This provision was developed by the Working Group. It was informed by provisions of the 2001 Interim Text relating to non-enforcement of judgments given in contravention of the exclusive jurisdiction of a Contracting State.

Comments

152. The wording "if and only if" – which appears both in Article 6(a) and (b) – carries both a positive and negative connotation. The provision entails a positive duty to recognise judgments coming from the courts of the place of registration / place where the property is situated. It also establishes a negative duty, *i.e.*, the duty to refrain from recognition of judgments coming from other States than those just mentioned. Article 15 of the Proposed Draft Text ("Subject to Article 6…") shows that Article 6 is intended to also prohibit recognition and enforcement of judgments under national law on the subject-matters covered by Article 6.

153. Article 6(a) mirrors a widely accepted notion that the State of registration or deposit of registered intellectual property rights should exclusively deal with issues of validity or registration of such rights. This provision deals not only with patents, trademarks and designs, but also extends to cover "similar rights", provided that they are deposited or registered. An example of such a right is a plant variety right.

154. The expression "deposit or registration has been applied for, has taken place" takes into account regulations which make the grant of such rights subject to the results of an examination. Thus, a judgment which ruled on registration or validity of, for example a patent, will circulate if and only if it was rendered by a court of the State where an application to the competent authorities was filed.

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155. This provision also takes into account the registered rights that are derived from international or regional instruments which aim either at facilitating international registration (such as the Madrid Agreement concerning international registration of marks)[62] or at granting a unitary right (such as the EU Trade Mark Regulation)[63]. The former do not create supranational rights but instead facilitate the granting of a bundle of rights for the territory of the respective States. Accordingly, each of these States will be considered the State of origin for the application of this provision. For unitary rights, there is a single deposit or registration so that the "real" place of deposit or registration is not the key factor for the operation of the provision. The expression "is deemed to have been applied for or to have taken place under the terms of an international or regional instrument" is therefore introduced to refer to the State where the unitary rights have effects.

156. Article 6(b) mirrors a widely understood notion that the correct forum to deal with issues of rights *in rem* is the place where the immovable property is situated. Rights *in rem* relate to proceedings concerning the ownership of immovable property (also called "real property" or "real estate"). The term only refers to proceedings which have as their object a right *in rem* – claims whose object is a personal right, and are merely related to some form of immovable property, are not included. For example, a claim for damages for breach of contract for the sale of land is not an action *in rem*. The action must be based on real rather than personal rights, and must be enforceable as a right "as against the world".[64] Rights *in rem* in immovable property fall within the scope of the 1971 Enforcement of Judgments Convention and other regional instruments. During past negotiations on the Judgments Project, there was in principle agreement among experts to deal specifically with immovable property, and the 1999 preliminary draft Convention included a ground of exclusive jurisdiction in the courts of the State in which the property is situated. However, difficulties emerged in defining the actions to which it would apply. A similar provision was included in the 2001 Interim Text, although at the Nineteenth Session a proposal was made to exclude the matter altogether. Article 2(2)(l) of the 2005 Choice of Court Convention excludes from the scope of the Convention proceedings which have as their object rights *in rem* in immovable property, and tenancies of immovable property. This can be explained by a continued view in many States that exclusive jurisdiction over these matters lies with the courts of the State in which the property in situated (*i.e.*, that parties cannot contract out of this jurisdiction through a choice of court agreement). In the Proposed Draft Text circulation to judgments on rights *in rem* in immovable property and tenancies of immovable property is ensured through appropriately formulated and exclusive bases for recognition and enforcement.

157. The Proposed Draft Text applies to tenancies of immovable property for a period of more than six months ("long-term tenancies") the same regime that applies to rights *in rem*. It should be noted in that regard that the Working Group considered a drafting proposal that removed long-term tenancies from Article 6(b) and proposed instead a new basis for recognition and enforcement of judgments in respect of such tenancies under Article 5.[65] The Special Commission may wish to consider this alternative approach.

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[62] Concluded on 14 April 1891, revised in Brussels on 14 December 1900, in Washington on 2 June 1911, in The Hague on 6 November 1925, in London on 2 June 1934, in Nice on 15 June 1957, and in Stockholm on 14 July 1967, and as amended on 28 September 1979.

[63] Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, OJ L 078/1 of 24.3.2009, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs), OJ L 341/21 of 24 December 2015.

[64] See the Nygh / Pocar Report, para. 164.

[65] The proposal on long-term tenancies of immovable property reads as follows:

Article 5

Bases for recognition and enforcement

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

……

d *bis*) the judgment ruled on tenancies of immovable property, and the property is situated in the State of the court of origin;

Article 6

Exclusive bases for recognition and enforcement

Notwithstanding Article 5 –

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158. The Special Commission may wish to consider whether other matters should be subject to exclusive jurisdiction (*e.g.*, the validity of entries in public registers, which is presently excluded from the scope of the Proposed Draft Text at Art. 2(1)(j)).

Article 7

Refusal of recognition or 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; or

(ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

b) the judgment was obtained by fraud in connection with a matter of procedure;

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

d) the proceedings in the court of origin were contrary to an agreement or a designation in a trust instrument under which the dispute in question was to be determined in a court other than the court of origin;

e) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or

f) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfills the conditions necessary for its recognition in the requested State.

2. 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.

.....

b) a judgment that ruled on rights in rem in immovable property shall be recognised and enforced if and only if it was given by a court of the State in which the property is situated;

c) a judgment that ruled on tenancies of immovable property for a period of more than six months shall not be recognised and enforced if it was given by a court of the State in which the property is not situated and the courts of the State in which the property is situated have exclusive [direct] jurisdiction under its national law.

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Purpose

159. While Article 5 lays down the bases for recognition and enforcement, Article 7 sets out grounds for refusal of recognition and enforcement. This provision does not require that the recognition and enforcement of judgments is refused (or postponed: see para. 2) in other Contracting States because it is a discretionary provision.

Sources

160. Article 7 of the Proposed Draft Text is modelled on Article 9 of the 2005 Choice of Court Convention.

Comments

161. By indicating that "recognition or enforcement *may* be refused if…" [emphasis added] the Proposed Draft Text makes it clear that the court addressed is not obliged to refuse recognition and enforcement even if one of the provisions of Article 7 is satisfied. The national law of the requested State may provide for recognition or enforcement in these circumstances, or give a discretion to the court addressed to do so, or remove the discretion not to refuse recognition or enforcement of judgments on one or all of the Article 7 provisions.

162. Article 7(1)(a) provides that recognition or enforcement may be refused by the court of the requested State if the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim, (i) was either 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, or (ii) was notified to the defendant in the requested State in a manner which however is incompatible with fundamental principles of the requested State concerning service of documents. The ground of refusal set out in sub-paragraph (a) permits non-recognition if the defendant was not properly notified.[66] Two rules are involved: the first, laid down in sub-paragraph (a)(i), is concerned with the interests of the defendant; the second, laid down in sub-paragraph (a)(ii), is concerned with the interests of the State of notification.[67] This provision is drawn from Article 9(c)(i)-(ii) of the 2005 Choice of Court Convention.

163. Sub-paragraph (a)(i) considers whether the defendant was properly notified.[68] It states that the court addressed may refuse to recognise or enforce the judgment if the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him or her to arrange for his defence. However, this rule does not apply if the defendant entered an appearance and presented his case without contesting notification, even if he or she had insufficient time to prepare his case properly. This is to stop the defendant raising issues at the enforcement stage that he or she could have raised in the original proceedings. In such a situation, the obvious remedy would be for the defendant to seek an adjournment. If he or she fails to do this, he or she should not be entitled to put forward the lack of proper notification as a ground for non-recognition of the judgment. This rule does not apply if it was not possible to contest notification in the court of origin.[69]

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[66] The concept of "notification" as used in Art. 7(a) is of a general, factual nature. It is not a technical, legal concept. See also the Hartley / Dogauchi Report, para. 183.

[67] Art. 7(a) is concerned solely with whether or not the *court addressed* may refuse to recognise or enforce the judgment. The court of origin will apply its own procedural law, including international conventions on the service of documents which are in force for the State in question and are applicable on the facts of the case, such as the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (1965 Service Convention). These rules, which primarily deal with the transmission of documents to be served (as opposed to the actual service of process) and which generally require service to be effected in conformity with the law of the State in which it takes place, are not affected by Art. 7(a). However, except to the limited extent provided in Art. 7(a)(ii), the court addressed may not refuse to recognise or enforce the judgment on the ground that service did not comply with the law of the State in which it took place, with the law of the State of origin or with international conventions on the service of documents. See also the Hartley / Dogauchi Report, para. 184 and note therein.

[68] See Minutes of the Twentieth Session, Commission II (in *Proceedings of the Twentieth Session*, Tome III, *Choice of Court*): Minutes No 9, p. 622, para. 98, Minutes No 11, p. 637, para. 27 and Minutes No 24, p. 733, para. 28.

[69] See the Hartley / Dogauchi Report, para. 186 and note therein.

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164. Many States, including most common law countries, have no objection to the service of a foreign writ on their territory without any participation of their authorities. They see it simply as a matter of conveying information. Thus if a foreign lawyer wants to serve a foreign writ in England, he can fly to London, reach the defendant's home, and deliver it to him or her. However, some countries consider the service of a writ to be a sovereign act (official act) and they consider that it infringes their sovereignty for a foreign writ to be served on their territory without their prior permission. Permission would normally be given through an international agreement laying down the procedure to be followed.[70] Such States would be unwilling to recognise a foreign judgment if the writ was served in a way that they regarded as an infringement of their sovereignty. Sub-paragraph (a)(ii) takes account of this point of view by providing that the court addressed may refuse to recognise or enforce the judgment if the writ was notified to the defendant in the requested State in a manner that was incompatible with fundamental principles of that State concerning service of documents. Unlike the other grounds of non-recognition, sub-paragraph (a)(ii) applies only where recognition or enforcement is sought in the State in which service took place.[71]

165. Article 7(1)(b) sets out the ground of refusal that the judgment was obtained by fraud in connection with a matter of procedure. Fraud is deliberate dishonesty or deliberate wrongdoing. Examples would be where the plaintiff deliberately serves the writ, or causes it to be served, on the wrong address; where the requesting party (typically the plaintiff) deliberately gives the party to be notified (typically the defendant) incorrect information as to the time and place of the hearing; or where either party seeks to corrupt a judge, juror or witness, or deliberately conceals key evidence.[72] While in some legal systems procedural fraud may be considered as falling in the scope of the public policy provision, this is not true for all legal systems: hence, it was deemed appropriate to include this provision (as was the case for the 2005 Choice of Court Convention, under Art. 9) as a form of "clarification".

166. Article 7(1)(c) provides that recognition or enforcement may be refused if it would be manifestly incompatible with the public policy of the requested State to do so, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State. This provision is drawn from Article 9(e) of the 2005 Choice of Court Convention. The second part of the provision is intended to focus attention on serious procedural failings.[73] The Working Group discussed whether the second part of the provision (addressing the judgment's incompatibility with fundamental principles of procedural fairness of the requested State) should be omitted, as it lays down a very general standard that may be subject to different understandings. However, this part of the provision was carefully drafted to accommodate those States that have a relatively narrow concept of public policy (and treat procedural fairness and natural justice as distinct from public policy) and want to make sure that there is some language about procedural fairness. An additional reason for the emphasis on procedural fairness is to acknowledge that in some States fundamental principles of procedural fairness (also known as due process of law, natural justice or the right to a fair trial) are constitutionally mandated.[74]

167. As indicated in the Hartley / Dogauchi Report with respect to the mirroring provisions in the 2005 Choice of Court Convention,[75] there is considerable overlap among the exceptions laid down at sub-paragraphs (a) to (c) of Article 7(1) of the Proposed Draft Text since they all relate, partly or wholly, to procedural fairness. Thus, for example, if, owing to the plaintiff's fraud, the writ was not served on the defendant and he or she was unaware of the proceedings, the exceptions set out in sub-paragraphs (a) to (c) would all be potentially applicable.

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[70] The 1965 Service Convention is the most important example. In this respect, see also the Practical Handbook on the Operation of the Service Convention, Hague Conference on Private International Law, 2016.
[71] See also the Hartley / Dogauchi Report, para. 187.
[72] *Id.*, para. 188.
[73] The second part is not intended to limit the first part: public policy as understood in the Convention is not limited to procedural matters. However, the issues at stake must be of fundamental importance to the requested State. See the Hartley / Dogauchi Report, at note 229.
[74] *Id.*, paras 189-190. In this respect see, *e.g.*, Art. 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights); Fifth and Fourteenth Amendments to the United States Constitution; the Brazilian Constitution of 1988, at Art. 5, sec. LIV; the Constitution of the Philippines of 1987, at Art. III, sec. 1. Many other States have similar provisions.
[75] See Art. 9 (a)-(c) of the 2005 Choice of Court Convention and the Hartley / Dogauchi Report, para. 190.

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168. Article 7(1)(d) provides that recognition or enforcement may be refused if the proceedings in the court of origin were contrary to an agreement or a designation in a trust instrument under which the dispute in question was to be determined in a court other than the court of origin. This provision applies where the proceedings have been brought in breach of a choice of court clause, or contrary to a designation in a trust instrument. It does not include the situation where parties went to a different court where they were allowed to do so on the grounds of a non-exclusive choice of court agreement / designation, or where there was an implicit agreement to waive an exclusive provision. The Special Commission should consider whether, and if so how, asymmetric choice of court provisions will fall within the scope of this Article.[76]

169. Article 7(1)(e)-(f) is modelled on Article 9(f)-(g) of the 2005 Choice of Court Convention. It concerns the situation in which there is a conflict between the judgment for which recognition and enforcement is sought under the Proposed Draft Text and another judgment given between the same parties. Sub-paragraphs (e) and (f) are satisfied where the two judgments are inconsistent. However, there is a difference in the way that sub-paragraphs (e) and (f) operate.[77] Sub-paragraph (e) is concerned with the case where the inconsistent judgment was granted by a court in the requested State. In such a situation, that judgment may prevail, irrespective of whether it was given first: the court addressed is permitted to give preference to a judgment from a court in its own State, even if that judgment was given after the conflicting judgment which was rendered by the court of origin. For this provision to be satisfied, the parties must be the same, but it is not necessary for the cause of action to be the same.[78] Sub-paragraph (f) is concerned with the situation in which both judgments were given by foreign courts. Here, the judgment given may be refused recognition and enforcement only if the following requirements are satisfied: first, the judgment must have been given after the conflicting judgment; secondly, the parties must be the same;[79] thirdly, the cause of action must be the same; and, fourthly, the conflicting judgment must fulfil the conditions necessary for its recognition in the requested State.

170. Article 7(2) addresses the issue of parallel litigation and recognition and enforcement. It 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[80] are pending in the requested State, and the court of the requested State was seised before the court of origin, provided the criteria prescribed under sub-paragraph (a) or (b) are met, and provided that the proceedings pending in the State requested were not contrary to a jurisdiction clause in favour of the court of origin. Under this provision, the court addressed may opt to postpone recognition and enforcement of the judgment, such that the issue of whether to recognise and enforce the judgment will be decided after completion of the domestic proceedings.

171. This provision was drafted to harmonise – to the extent possible – the different treatment given to the issue of parallel proceedings and recognition and enforcement of a foreign judgment. In fact, legal regimes which address the *lis pendens* issue fall broadly into two categories. While some legal regimes give a preference towards pending domestic proceedings

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[76] An asymmetric choice of court agreement is drafted to be exclusive as regards proceedings brought by one party but not as regards proceedings brought by the other party. Asymmetric choice of court agreements are not exclusive choice of court agreements for the purposes of the 2005 Choice of Court Convention (although they may be subject to the rules of the 2005 Choice of Court Convention on recognition and enforcement if the States in question have made declarations under Art. 22 of said Convention). See the Hartley / Dogauchi Report, paras 105-106.

[77] See the Hartley / Dogauchi Report, para. 192.

[78] *Id.*, para. 193.

[79] This also applies under sub-para. (e). The requirement that the parties must be the same will be satisfied if the parties bound by the judgments are the same even if the parties to the proceedings are different, for example where one judgment is against a particular person and the other judgment is against the successor to that person. See the Hartley / Dogauchi Report, at note 231.

[80] Most legal regimes require the same identity of *causa* in the pending domestic proceedings and the proceedings which gave rise to the foreign judgment. This Latin term is used here to globally refer to various concepts, including “same cause of action”, “same subject matter”, “same facts”, “same purpose”, “same claim”, “same reasons”, “same legal grounds”, “same issue”, “same object”, “same demand”, and “same transaction or occurrence”. In general, “same cause of action”, “same subject matter” and “same facts” are the terms which are most frequently used.

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over the recognition and enforcement of a foreign judgment,[81] others provide a preference towards recognising the foreign judgment over the pending domestic proceedings.[82] The possibility to refuse or postpone recognition and enforcement of a judgment is subject to a series of requirements regarding: the jurisdiction of the court of origin (*sub* (a)) and, in the alternative, the "purpose" of the proceedings commenced in the foreign State (*sub* (b)); and the compliance with an exclusive jurisdiction clause in favour of the court of origin.

172. Under sub-paragraph (a), the court seised in the requested State must satisfy one of the bases for recognition and enforcement laid down at Article 5 or, in the alternative, a close connection must exist between the dispute and the requested State. This latter requirement increases the level of protection for the proceedings commenced before the court of the requested State: even where such court would not satisfy one of the jurisdictional filters at Article 5, as long as a close connection exists between the dispute and the requested State, the court addressed may refuse or postpone the recognition and enforcement of the judgment for which recognition or enforcement is sought. For example, in a tort case, where there are pending proceedings in the court of the requested State, and that court had exercised jurisdiction on the basis of the place of damage, such proceedings will fall within the scope of Article 7(2)(a) since there exists a close connection between the dispute and the requested State. Consequently, the court addressed may refuse or postpone recognition or enforcement of the foreign judgment.

173. In alternative, sub-paragraph (b) requires that the proceedings before the court of origin were commenced "for the purpose of frustrating the effectiveness of the pending proceedings".[83] An illustration of such a particular circumstance may be a negative declaratory proceeding being brought at the State of origin of the judgment shortly after proceedings were filed in the forum (which is now the requested State), and those later proceedings were only meant to take resources away from the party or otherwise delay proceedings.

174. The Working Group did not specifically address the situation where a court of the requested State exercises jurisdiction under Article 6 of the Proposed Draft Text. In more general terms, however, the Working Group noted that further work on the drafting of Articles 4 to 7 may have an impact on the way such provisions interrelate. It therefore observed that further examination of the way Articles 4 to 7 are expressed should ensure that their inter-relationship is clearly conveyed.

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[81] *E.g.*, Belgium, Bulgaria, Canada (Quebec, Saskatchewan), China (Macau), Costa Rica, Germany, Italy, The former Yugoslav Republic of Macedonia, Mexico, Montenegro, the Russian Federation, Serbia, Spain and Switzerland.

[82] *E.g.*, Australia, Brazil, Canada (other common law provinces), China (Hong Kong), India, New Zealand, Singapore, the United Kingdom (England and Wales) and the United States of America.

[83] The wording "frustrating the effectiveness of the proceedings" takes inspiration from § 5b of the 2005 American Law Institute (ALI) Project issued as "Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute".

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Article 8

Preliminary questions

1. Where a matter excluded under Article 2, paragraph 1, or a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled arose as a preliminary question, the ruling on that question shall not be recognised or enforced under this Convention.

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 on a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled.

Purpose

175. Often a court has to rule on various questions of fact or law as preliminary matters before it can rule on the claim. Article 8 addresses the treatment of rulings on preliminary matters under the future Convention.

Sources

176. Article 8 of the Proposed Draft Text is modelled on Article 10(1)-(2) of the 2005 Choice of Court Convention.

Comments

177. As provided at Article 2(2) of the Proposed Draft Text, judgments are not excluded from the scope of the Proposed Draft Text where a matter excluded under Article 2(1) or subject to exclusive bases of recognition and enforcement under Article 6 arises merely as a preliminary question and not as an object of the judgment.[84] In particular, the mere fact that a matter excluded under Article 2(1) or falling under Article 6 arises by way of defence does not exclude the ensuing judgment from the Proposed Draft Text, if that matter is not an object of the judgment.[85] Article 2(2) lays down the important principle that proceedings on a matter within the scope of the Proposed Draft Text do not cease to be covered by it just because the court has to give a preliminary ruling on one of the excluded matters or on a matter subject to an exclusive basis for recognition and enforcement. Nevertheless, Article 8(1) makes clear that the rulings on preliminary questions on matters excluded at Article 2(1) of the Proposed Draft Text are not entitled to recognition and enforcement under the Proposed Draft Text. As concerns preliminary rulings on a matter referred to in Article 6, Article 8(1) makes clear that (i) if such ruling is rendered by a court referred to in Article 6, it is entitled to recognition and enforcement under the Proposed Draft Text; (ii) if such ruling is rendered by a court other than the one referred to in Article 6, it is not entitled to recognition and enforcement under the Proposed Draft Text.

178. Article 8(2) is not concerned with the non-recognition of rulings on preliminary questions, but with the non-recognition of certain judgments or parts thereof which are based on such rulings. What this provision does is to lay down another ground of non-recognition, in addition to those set out in Article 7. Article 8(2) permits (but does not require) the court addressed to refuse to recognise or enforce the judgment itself, to the extent that it was based on the ruling on the preliminary question.

179. Assume that A sues B in State X for the infringement of its patent, which is registered in State Y. As a defence, B claims that the patent is invalid. Since the infringement claim can only be adjudicated on the basis that the patent is valid, the court hearing the infringement claim will have to decide the issue of validity as a preliminary question. The judgment on the validity of the patent, which is a ruling on a preliminary question, is not eligible for recognition and enforcement under the future Convention (see Art. 8(1) *supra*, paras 176-178) and would merely have relevance to the dispute at hand between the parties for that particular litigation.

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[84] See *supra*, para. 40.
[85] *Ibid.*

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Nevertheless, pursuant to Article 8(2), the court addressed may still refuse to recognise and enforce the judgment on the infringement proceedings if, and to the extent that, the judgment was based on the ruling on the validity of a patent by the court in State X, *i.e.*, other than the State where the patent is registered.

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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.

Purpose

180. Article 9 allows the court addressed to refuse recognition or enforcement of a judgment if, and to the extent that, the award of damages does not compensate the plaintiff for actual loss or harm suffered. Some States may be reluctant to recognise judgments awarding damages that go beyond the actual loss of the plaintiff. However, this concern cannot always be addressed by means of the public policy exception since some jurisdictions adopt a limited concept of public policy. Therefore, to accommodate these concerns, Article 9 provides that 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.[86]

Sources

181. This provision is drawn from Article 11 of the 2005 Choice of Court Convention and should be read in the light of the statement on its meaning recorded in the Hartley / Dogauchi Report.[87]

Comments

182. This provision refers to exemplary and punitive damages: both terms refer to damages that are intended to punish the defendant and to deter him or her and others from doing something similar in the future. They may be contrasted with compensatory damages, which are intended to compensate the plaintiff for the loss he or she has suffered, that is to say, to put him or her in the position in which he or she would have been if the wrongful act had not occurred.[88]

[86] See the Hartley / Dogauchi Report, para. 205.
[87] *Id.*, paras 203-204.
[88] *Id.*, para. 205.

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Article 10

Judicial settlements (transactions judiciaires)

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State has approved, or which have been concluded before that court in the course of proceedings, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.

Purpose

183. Article 10 ensures that judicial settlements are covered by the Proposed Draft Text insofar as they constitute a functional equivalent to judgments. This provision enhances the effectiveness of judicial settlements and ensures that meaningful relief is obtained.

Sources

184. This provision is modelled on Article 12 of the 2005 Choice of Court Convention.

Comments

185. Article 10 provides that settlements which (1) in the course of proceedings, are approved by, or concluded before, a court of a Contracting State, (2) satisfy the requirements of the Proposed Draft Text, and (3) are enforceable in the same manner as a judgment in that State, shall be enforced in other Contracting States in the same manner as a judgment.

186. Judicial settlements (a translation of the French "*transactions judiciaires*") are unknown in the common law world. Judicial settlements are contracts concluded before a judge by which the parties put an end to litigation, usually by making mutual concessions: parties submit their agreement to the judge who records it in an official document. Judicial settlements differ from a consent order in that the latter are judgments issued by a judge based on an agreement between the parties to a lawsuit to settle the matter, aimed at ending the litigation with a judgment. Unlike judicial settlements, consent orders that are enforceable would circulate under the Proposed Draft Text in the same way as other judgments. A judicial settlement is also different from an out-of-court settlement, since it is made before a judge, puts an end to the proceedings and is usually enforceable in the same manner as a judgment.[89]

187. Article 10 does not provide for the recognition of judicial settlements, but only for their enforcement. However, the Special Commission may wish to examine the desirability of extending this provision to recognition (and not only enforcement) of judicial settlements to cases such as the one illustrated below. Assume that A and B conclude a contract. Subsequently, A sues B for 1000 Euros, a sum which he claims is due under the contract. The parties then enter into a judicial settlement under which B agrees to pay A 800 Euros, State X being a State where this may be done. If B fails to pay, A may bring proceedings to enforce the settlement in State Y, another Contracting State. Such proceedings will be covered by Article 10 of the Proposed Draft Text. Assume, however, that B pays the money in compliance with the settlement without any need for enforcement proceedings. If A nevertheless brings a new action for the remaining 200 Euros before the courts of State Y, under the current drafting of Article 10, B cannot ask the court to recognise the settlement under the Proposed Draft Text as a procedural defence to the claim (which would make the claim inadmissible in some legal systems). In its current drafting, the Proposed Draft Text does not provide for this possibility, mainly because the effects of settlements are so different in different legal systems. However, the Proposed Draft Text does not preclude a court from treating the settlement as a contractual defence to the claim on the merits.[90]

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[89] *Id.*, paras 206-207.
[90] *Id.*, para. 209.

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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.

Purpose

188. To enhance legal certainty and reduce costs associated with recognition and enforcement, Article 11 lays down some requirements with regard to the documents to be produced for the purpose of seeking recognition and enforcement of judgments under the future Convention.

Sources

189. This provision is modelled on Article 13 of the 2005 Choice of Court Convention.

Comments

190. Article 11(1) lists the documents to be produced by the party seeking recognition or enforcement of a judgment under the Proposed Draft Text. Although there may be no special procedure for recognition under the national law of the requested State, the party requesting recognition or enforcement must produce the documents required by Article 11.[91]

191. Article 11(1)(a) requires the production of a complete and certified copy of the judgment. This refers to the whole judgment (including, where applicable, the court's reasoning) and not just to the final order (*dispositif*). Article 11(1)(b) requires documentary evidence that the defendant was notified, but this applies only in the case of a default judgment. In other cases, it is assumed that the defendant was notified unless he or she produces evidence to the contrary. The law of the requested State determines the consequences of failure to produce the required documents. Excessive formalism should, however, be avoided: if the person against whom recognition and enforcement is sought was not prejudiced, the person seeking recognition and enforcement should be allowed to rectify omissions.[92]

192. Article 11(2) provides that the court addressed may require the production of further documents to the extent that it is necessary to verify that the requirements of Chapter II of

[91] *Id.*, para. 210.
[92] *Id.*, para. 211.

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the Proposed Draft Text have been satisfied. This makes clear that the list in Article 11(1) is not exhaustive. Unnecessary burdens on the parties should, however, be avoided.[93]

193. Article 11(3) allows a person seeking recognition or enforcement of a judgment under the Convention to use a form recommended and published by the Hague Conference on Private International Law. The Special Commission may wish to consider whether it agrees with the development of such a form. Under the 2005 Choice of Court Convention, this form is provided: however, its use is not obligatory. Information contained in it may be relied on by the court addressed in the absence of challenge. Even if there is no challenge, however, the information is not conclusive: the court addressed can decide the matter in the light of all the evidence before it.[94]

194. Article 11(4) provides that if the documents referred to in Article 11 are not in an official language of the requested State, they must be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise. States may, therefore, provide in their implementing legislation or in their law of procedure that a translation is not necessary at all, or that an informal translation is sufficient, even if it is not certified.[95]

195. The Proposed Draft Text limits its provisions on procedure to a minimum. The Special Commission may wish to consider whether it is worth looking more closely into enforcement requirements and, if so, further consideration can be given to the more detailed approach under the 2007 Child Support Convention, namely Article 25.[96] Increasing the level of detail in the documentation may increase the level of efficiency in the recognition and enforcement process.

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[93] *Id.*, para. 212.
[94] *Id.*, para. 213.
[95] *Id.*, para. 214.
[96] See also the Borrás / Degeling Report, paras 526-545.

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Article 12

Procedure

1. The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.

2. The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

Purpose

196. With the aim of increasing legal certainty, Article 12 regulates certain aspects of the procedure for seeking recognition and enforcement of judgments under the future Convention. In particular it prevents the situation where the requested State can refuse to grant recognition or enforcement under the future Convention because it does not regard itself as a suitable forum in which recognition or enforcement of the judgment should be sought.

Sources

197. Article 12(1) of the Proposed Draft Text is drawn from Article 14 of the 2005 Choice of Court Convention.

198. Article 12(2) is new and was developed by the Working Group.

Comments

199. Similar to what was noted with respect to Article 11, as concerns Article 12 the Special Commission may wish to consider whether there is value in looking more closely into enforcement requirements and procedure.

200. Article 12(1) of the Proposed Draft Text provides that the procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment are governed by the law of the requested State unless the Proposed Draft Text provides otherwise. Where the law of the requested State makes no provision for any special procedure for the recognition (as distinct from enforcement) of a foreign judgment, a judgment will be recognised automatically by operation of law, based on Article 4 of the Proposed Draft Text. National procedural law cannot dictate the grounds on which recognition or enforcement may be refused. These are governed exclusively by the Convention: see Article 4(1), second sentence.[97]

201. In all proceedings covered by Article 12, the court addressed must act expeditiously. This means that the court must use the most expeditious procedure available to it. Contracting States should consider ways in which provision can be made to ensure that unnecessary delays are avoided.[98] The second sentence of Article 12(1) was retained because it operates as a trade-off for the first sentence, which allows autonomy for internal procedures but also provides some effective time-frame from which to act.

202. Article 12(2) addresses the core concern identified by precluding procedural rules that give a reason to decline recognition and enforcement on the basis that recognition and enforcement should be sought in another State. It prohibits *forum non conveniens* and any jurisdiction rules from operating at the recognition and enforcement stage in relation to judgments under the future Convention.

203. With respect to the issue of limitation and prescription periods with regard to the enforcement of a judgment (an issue which was not dealt with in the 2005 Choice of Court Convention), the Special Commission may wish to consider whether the issue of the ability of

[97] See the Hartley / Dogauchi Report, para. 215.
[98] *Id.*, para. 216.

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the requested State to apply its national law in relation to limitation and prescription periods should be addressed. In this context, the Special Commission may wish to draw inspiration from Article 32(5) of the 2007 Child Support Convention, which applies the longer of the periods provided by the law of the State requested and by the State of origin.[99] Also, the Special Commission may wish to consider including some form of non-discrimination provision, requiring the requested State to apply limitation / prescription periods to Convention judgments that are no less favourable than those applied to domestic judgments.[100]

[99] See also the Borrás / Degeling Report, paras 578-579.
[100] See Art. 33 of the 2007 Child Support Convention for inspiration. On this issue, see also *infra*, para. 221.

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Article 13

Equivalent effects

A judgment recognised or enforceable under this Convention shall be given the same effect it has in the State of origin. If the judgment provides for relief that is not available under the law of the requested State, that relief shall, to the extent possible, be adapted to relief with effects equivalent to, but not going beyond, its effects under the law of the State of origin.

Purpose

204. Article 13 states that, in the event that the law of the requested State does not know the relief granted by the court of origin, it shall provide relief that has equivalent effects (as opposed to relief that is merely "formally" equivalent), and give effect to the judgment to the fullest extent permissible under its national law. Thus, the provision: (i) states that the court addressed is not required to provide relief that is not available under its national law; (ii) imposes an obligation on the court addressed to adapt the relief to a measure known in the court addressed; and (iii) imposes an obligation on the court addressed not to go beyond the effects of the relief under the law of the State of origin. This provision enhances the practical effectiveness of judgments and aims at ensuring that the successful party receives meaningful relief.

Sources

205. This provision was developed by the Working Group.[101]

Comments

206. Two types of situations can trigger Article 13. First, where the requested State does not know the relief granted in the court of origin. For example, further to a patent infringement case where a party does not comply with the terms of the court order, that party may be sanctioned with a recurring penalty payment payable to the court. Assuming this penalty payment must be enforced abroad, where the party has his or her assets, but the national law of the requested State does not contain a similar coercive measure, the objective pursued by that measure must be attained by the court addressed by having recourse to its national law to ensure that the prohibition is complied with in an equivalent manner.[102]

207. Secondly, where the requested State knows a relief which is "formally", but not "substantively" equivalent. In this regard, the Special Commission may wish to consider the example of a freezing order (also referred to as asset preservation order) although it is noted that freezing orders are actually excluded from the scope of the Proposed Draft Text (see Art. 3(1)(b)). Depending on the jurisdiction, a freezing order that enjoins the defendant from disposing of his or her assets can have *in personam* or *in rem* effects. Where recognition of a freezing order from a State that characterises freezing orders as having *in rem* effects is sought in a State which only grants freezing orders *in personam* effects, the court addressed, in enforcing the freezing order but only with *in personam* effects, would satisfy Article 13. On the other hand, where the court of origin issues a freezing order with only *in personam* effects and recognition of this order is sought in a State whose national law grants freezing orders *in rem* effects, should the court addressed enforce the freezing order with *in rem* effects pursuant to national law, this would go beyond the effects granted under the law of the State of origin and would not be in compliance with Article 13.

208. The Special Commission may also wish to consider other types of relief that are not common to all jurisdictions (*e.g.*, specific performance and restitution).

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[101] There is no corresponding provision in the 2005 Choice of Court Convention. However, this provision is drawn from Art. 66 of the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM(2010) 748 final. The provision in its original wording was not adopted; however, a similar provision is found at Art. 54 of 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 (recast), OJ L 351/1 of 20.12.2012.

[102] Consider the judgment of the Court of Justice of the European Union, *DHL Express*, C-235/09, EU:C:2011:238, para. 56.

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Article 14

Severability

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.

Purpose

209. Article 14 aims to increase the predictability of the law and encourages reliance on a judgment in cases when the judgment as a whole may not be capable of recognition or enforcement. In such cases, the provision operates so that a severable part of a judgment would be recognised and enforced or, where only part of a judgment is capable of being recognised or enforced under the Proposed Draft Text, that part of the judgment would be recognised and enforced under the future Convention.

Sources

210. This provision is drawn from Article 15 of the 2005 Choice of Court Convention.

Comments

211. Article 14 provides for the recognition and enforcement of a severable part of a judgment where this is applied for, or where only part of the judgment is capable of being recognised or enforced under the Proposed Draft Text. For example, if an award of punitive damages is not enforced by reason of Article 9, the remainder of the award must be enforced if it satisfies the requirements for recognition and enforcement under the Proposed Draft Text.

212. In order to be severable, the part in question must be capable of standing alone: this would normally depend on whether enforcing only that part of the judgment would significantly change the obligations of the parties.[103]

213. In so far as this depends on a rule of law, the law of the court addressed must be applied.[104]

[103] See also the Hartley / Dogauchi Report, para. 217.
[104] *Ibid.*

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Article 15

Recognition or enforcement under national law

Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.

Purpose

214. In the event that a judgment is not capable of recognition or enforcement under the Proposed Draft Text, pursuant to Article 15 the court of the requested State may still decide to enforce a judgment under its national law provided that Article 6 of the Proposed Draft Text is respected. With this provision, the Proposed Draft Text aims to expand the possibility for a judgment to be recognised and enforced when the judgment falls beyond the limits laid down in the Proposed Draft Text itself, subject to the national law of the requested State.

Sources

215. This provision was developed by the Working Group.

Comments

216. Fall-back reference to the national law of the States involved is necessary because it means that the Proposed Draft Text's requirements on recognition and enforcement of judgments are a minimum standard that will not displace the ability of the national laws in place in the State where recognition is sought to go further unless they conflict with the requirements of Article 6. If, for instance, one of the grounds for refusal under Article 7 is met, but the ground of refusal is interpreted more liberally under national law, the court of the requested State may still recognise and enforce the judgment.

217. If the Special Commission decides to continue to include long-term tenancies in Article 6, it is suggested that careful consideration be given to the exact terms of the cross-reference to Article 6 in this provision.

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C. OUTSTANDING MATTERS

218. In line with the mandate of the Council,[105] the Permanent Bureau wishes to bring to the attention of the Special Commission some matters that were discussed and identified by the Working Group as items that are best left to the consideration of the Special Commission or Diplomatic Session. In addition, the Permanent Bureau submits some preliminary observations on the general and final clauses of the future Convention, respectively outlined in the last section of this Explanatory Note.

I. MATTERS IDENTIFIED BY THE WORKING GROUP AS ITEMS FOR FURTHER DISCUSSION

Proposal in relation to decisions to recognise rendered in the Contracting State holding residence jurisdiction

219. Regarding decisions to recognise or enforce judgments that are rendered in the Contracting State which holds habitual residence jurisdiction, the Special Commission may wish to consider the following text:

> If a court holding jurisdiction in the State of origin on a ground other than those specified in Article 5(1) has given a judgment and a competent court in the Contracting State holding habitual residence jurisdiction has decided to recognise or enforce this judgment, the court of any other Contracting State where recognition and enforcement is sought shall not object to such request on a ground based on the provisions of Article 5(1).

Non-discrimination

220. With respect to non-discrimination, the Special Commission may wish to consider the following text, either as an additional part of Article 4 of the Proposed Draft Text or as a separate provision:

> A judgment which is declared enforceable under this Convention shall be enforced as if it were given by a court of the requested State.
>
> The requested State shall provide at least the same range of enforcement methods for judgments enforceable under the Convention as are available in domestic cases.[106]

Costs / fees enforcement

221. The Special Commission may also wish to consider whether provisions relating to the costs of enforcement are desirable, either as an additional part of Article 4 of the Proposed Draft Text or as a separate provision.[107] Particularly, the Special Commission may want to address situations involving securities:

> No security, bond or deposit, however, described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given in another Contracting State on the ground that he is a foreign national or that he is not domiciled or resident in the State in which enforcement is sought.

Enforcement measures

222. With respect to enforcement measures, the Special Commission may wish to consider the following text as an additional aspect of Article 4 of the Proposed Draft Text, or as a separate provision:[108]

> Contracting States shall make available in internal law effective measures to enforce decisions under this Convention

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[105] Conclusions & Recommendations adopted by the Council of 15 to 17 March 2016, para. 12.
[106] See, *e.g.*, Art. 33 of the 2007 Child Support Convention.
[107] See, *e.g.*, Art. 14 of the *Convention of 25 October 1980 on International Access to Justice*.
[108] See, *e.g.*, Art. 34 of the 2007 Child Support Convention. See also see Art. 31 of the 1999 preliminary draft Convention.

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Authentic instruments

223. The Special Commission may wish to consider whether authentic instruments should be included within the scope of the future Convention.[109] Reference could be made in this respect to Article 35 of the 1999 preliminary draft Convention,[110] which provided:

> Article 35
>
> *Authentic instruments*
>
> 1 Each Contracting State may declare that it will enforce, subject to reciprocity, authentic instruments formally drawn up or registered and enforceable in another Contracting State.
>
> 2 The authentic instrument must have been authenticated by a public authority or a delegate of a public authority and the authentication must relate to both the signature and the content of the document.
>
> [3 The provisions concerning recognition and enforcement provided for in this Chapter shall apply as appropriate.]

II. SOME OBSERVATIONS ON GENERAL AND FINAL CLAUSES

224. In this last section, the Permanent Bureau wishes to draw the attention of the Special Commission to some issues that may have to be considered at a later stage, even if there is limited opportunity to consider such matters during the June 2016 meeting of the Special Commission. The following clauses that address such matters are drawn from corresponding clauses of Conventions that were recently concluded by the Hague Conference.

Transitional provisions

225. Transitional provisions regulate the time at which a Convention would come into operation and effect. The Special Commission may wish to consider including such a provision in the future Convention along the following lines:[111]

> Article [ ]
>
> *Transitional Provisions*
>
> This Convention shall apply to the recognition and enforcement of judgments given after its entry into force for the State of origin and the requested State / This Convention shall apply where recognition and enforcement of a judgments is sought after the entry into force of the Convention for the State of origin and the requested State.

No legalisation

226. The Special Commission may wish to consider including a provision to exempt documents from requiring authentication or certification, such as legalisation or other analogous

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[109] The International Union of Latin Notaries (UINL) has announced that a proposal to this effect will be submitted to the Special Commission.

[110] With respect to this provision, the Nygh / Pocar Report noted that "The inclusion of authentic instruments in the Preliminary Draft Convention raised a number of problems within the Special Commission. As the concept of an authentic instrument is not familiar to all legal systems, delegations were reluctant to adopt a common provision which might have caused difficulties of implementation, also bearing in mind that the conditions governing recognition of these instruments cannot be according to paragraph 1 of Article 35, the same for all judgments. Despite these problems, the practical value for credit and business transactions of having a sum receivable recorded by means of an authentic instrument which can subsequently be enforced, and the fact that even if these instruments are unfamiliar to a particular legal system this does not necessarily prevent them from being recognised and enforced through that system, resulted in the inclusion of a clause on this subject, albeit with some limitations. In fact, according to paragraph 1 of Article 35, the Convention does not apply directly to the recognition and enforcement of authentic instruments received in other Contracting States. Whether it will apply depends on a declaration by each Contracting State that it will enforce them, subject to reciprocity." Nygh / Pocar Report, paras 375-378.

[111] See, for comparison, Art. 16 of the 2005 Choice of Court Convention and Art. 56(1)(b) of the 2007 Child Support Convention.

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formalities. Article 18 of the 2005 Choice of Court Convention may be drawn upon for inspiration:

> All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality, including an Apostille.

227. The Special Commission may also wish to take into consideration the following formulation used in Article 41 of the 2007 Child Support Convention:

> No legalisation or similar formality may be required in the context of this Convention.

Declarations

228. The Special Commission may wish to consider including a declaration or reservation mechanism (similar to Arts 21 and 22 of the 2005 Choice of Court Convention). Particularly, such mechanisms may be considered as an alternative to exclusions from scope, or as a means of extending scope in relation to certain matters.[112]

229. In contemplating this matter, it would likely be helpful to bear in mind the characteristics of, and differences between, declarations and reservations. A reservation is defined in Article 2(1)(d) of the 1969 Vienna Convention on the Law of the Treaties (VCLT) as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State". Declarations, on the other hand, are undefined in the VCLT. Further, a key difference between interpretative declarations and reservations is whether they have the effect of varying or excluding the application of the terms of the treaty. While a reservation does in fact vary or exclude the application of the term in question, a declaration serves only to clarify the State's understanding or interpretation of the term.[113] Another difference between declarations and reservations relates to when the unilateral statement has to be made. Reservations have to be made "when signing, ratifying, accepting, approving or acceding to a treaty".[114] Contrastingly, treaties often provide that declarations can be made at any time after the signing / ratification / acceptance / approval of, or accession to, a treaty.[115]

230. These characteristics and definitions are instructive when examining previous provisions concerning declarations and reservations, for the purposes of determining an appropriate mechanism that could be included in the future Convention. Articles 19 to 22 of the 2005 Choice of Court Convention, for instance, are expressly denoted as "declarations". However, declarations that can be made pursuant to these Articles could bear similarities with reservations. This is because such declarations, in substance, have the effect of varying or excluding the application of the terms of the Convention under certain circumstances.[116] However, such "declarations" could be made by a State even *after* signing or ratifying the Convention, as Article 32 of the 2005 Choice of Court Convention denotes that "[d]eclarations referred to in Articles 19, 20, 21, 22 and 26 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter…". This choice provides States with maximum flexibility with regard to varying the application of certain terms of the Convention.

231. In contrast, the 2007 Child Support Convention draws a more standard distinction between reservations and declarations. It provides that reservations may only be made "not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 61" (Art. 62), while declarations "may be made upon signature,

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[112] See also "Note on reservations and options in the Hague Conventions", Prel. Doc. C of 1976 in *Actes et documents (1976)*, Tome I, *Miscellaneous Matters*, The Hague, Imprimerie Nationale, 1978, pp. 102-104.

[113] In the 1966 Commentary to draft Art. 2 of the Law of Treaties (whose text is mirrored in Art. 2 VCLT), it was explained that the need to define reservations arose "from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere classification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted". "Draft Articles on the Law of Treaties with commentaries", in *Yearbook of the International Law Commission*, 1966, Vol. II, *sub* Art. 2.

[114] Art. 19 VCLT.

[115] See, *e.g.*, Art. 32 of the 2005 Choice of Court Convention.

[116] See Minutes No 23 of the Twentieth Session, Commission II (in *Proceedings of the Twentieth Session*, Tome III, *Choice of Court*), paras 1-31, in particular paras 29-31. See also the Hartley / Dogauchi Report, paras 318-319.

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ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time" (Art. 63).

232. Previous Hague Conventions have also expressly stated that no reservations may be made.[117] Contrastingly, the 2005 Choice of Court Convention is silent on the issue of reservations.

233. Given the above, the Special Commission may eventually have to consider the appropriate approach of the future Convention. Important factors will include: which matters could be subject to declarations; which matters (if any) could be subject to reservations; at which time relevant declarations or reservations should be made; and whether subsequent modifications of declarations should be allowed.

Uniform interpretation

234. Uniform interpretation of a Convention requires terms and concepts in the text of the Convention to be interpreted in the context of the international nature of the instrument, rather than by reference to the meaning that might traditionally be attached to them by a particular domestic law.[118] The Special Commission may wish to consider including the following provision, which is drawn from Article 23 of the 2005 Choice of Court Convention:

Article [ ]

Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Review of operation of the Convention

235. Instruments recently drawn up in the framework of the Hague Conference request a periodic review of their respective operation. For older instruments, such review can be conducted at the request of the Council on General Affairs and Policy. The Special Commission may wish to consider including the following provision, which is drawn from Article 24 of the 2005 Choice of Court Convention:

Article [ ]

Review of operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for –

a) review of the operation of this Convention, including any declarations; and

b) consideration of whether any amendments to this Convention are desirable.

Non-unified legal systems

236. With respect to non-unified legal systems, the Special Commission may wish to consider including the following provision, which is drawn from Article 25 of the 2005 Choice of Court Convention:

Article [ ]

Non-unified legal systems

(1) In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention -

a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;

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[117] See, *e.g.*, Art. 21 of the *Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* (2006 Securities Convention) and Art. 27 of the 2007 Maintenance Obligations Protocol.

[118] See also Arts 31-33 VCLT.

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b) any reference to residence in a State shall be construed as referring, where appropriate, to residence in the relevant territorial unit;

c) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;

d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.

(2) Notwithstanding the preceding paragraph, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

(3) A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

(4) This Article shall not apply to a Regional Economic Integration Organisation.

Relationship with other international instruments

237. The Special Commission may wish to consider the relationship of the future Convention and other international instruments, in order to avoid conflicts of instruments.

238. The Permanent Bureau has been monitoring relevant developments in this regard, pursuant to the request of the Working Group. Particularly, the Permanent Bureau has been monitoring the project on "Enforcement of settlement agreements resulting from international commercial conciliation" which is being conducted by UNCITRAL's Working Group II and the project on "Cross-border recognition and enforcement of insolvency-related judgements" which is being conducted by UNCITRAL's Working Group V.[119] The Permanent Bureau will be in a position to produce Information Documents on the status of these respective projects closer to the meeting's date. In addition, as Observer to the Special Commission, UNCITRAL may be invited to share information on the recent developments and state of affairs of these projects during the meeting.

239. Furthermore, the Working Group has advised that the Special Commission may wish to consider the Resolution of the *Institut de Droit International* (IDI) on "Universal Jurisdiction with regard to Reparation for International Crimes". Article 6 of the Resolution recommends that "in the course of the preparation of an instrument on jurisdiction and enforcement of judgments in civil and commercial matters, in particular by the Hague Conference on Private International Law, the rights of victims as set out in these Articles be taken into account".[120] IDI has been invited to participate in the Special Commission as Observer and may wish to elaborate further on this matter.

240. Specific subject matter areas may call for particular consideration when determining the co-ordination between the future Convention and existing or future international instruments. For instance, the Special Commission may wish to examine the relationship between regional and international instruments relating to intellectual property rights (see paras 78-84 and 112-114) and the future Convention. The Special Commission may wish to invite the intellectual property community for specific comments on this matter.[121]

241. With regard to the relationship of the future Convention and other international instruments, the Special Commission may wish to use Article 26 of the 2005 Choice of Court Convention as a reference:[122]

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[119] More information on these projects is available at < http://www.uncitral.org/uncitral/en/index.html. >

[120] The text of the Resolution may be retrieved at < http://www.justitiaetpace.org/idiE/resolutionsE/2015_Tallinn_01_en.pdf >.

[121] It is noted that in 2001 a meeting was held in Geneva to discuss the application of the provisions of the 1999 preliminary draft Convention on disputes relating to intellectual property. See Report of the Experts Meeting on the Intellectual Property Aspects of the Future Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters – Geneva, 1 February 2001, in *Proceedings of the Twentieth Session*, Tome II, *Judgments*, pp. 337-339.

[122] See also Prel. Doc. No 24 of December 2003, in *Proceedings of the Twentieth Session*, Tome III, *Choice of Court*, p. 148.

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Article [ ]

Relationship with other international instruments

(1) This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

(2) This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, in cases where none of the parties is resident[123] in a Contracting State that is not a Party to the treaty.

(3) This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention entered into force for that Contracting State, if applying this Convention would be inconsistent with the obligations of that Contracting State to any non-Contracting State. This paragraph shall also apply to treaties that revise or replace a treaty concluded before this Convention entered into force for that Contracting State, except to the extent that the revision or replacement creates new inconsistencies with this Convention.

(4) This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.

(5) This Convention shall not affect the application by a Contracting State of a treaty which, in relation to a specific matter, governs jurisdiction or the recognition or enforcement of judgments, even if concluded after this Convention and even if all States concerned are Parties to this Convention. This paragraph shall apply only if the Contracting State has made a declaration in respect of the treaty under this paragraph. In the case of such a declaration, other Contracting States shall not be obliged to apply this Convention to that specific matter to the extent of any inconsistency, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the Contracting State that made the declaration.

(6) This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention -

a) where none of the parties is resident[124] in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;

b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

242. In order to complete a draft Convention in due time, the Special Commission may wish to consider the inclusion of relevant Final Clauses.

243. One issue to be addressed in the Final Clauses is the "openness" of the Convention, *i.e.*, whether the Convention is open to all States or not. In this regard, the Special Commission may wish to take into account that the Conventions drawn up in the framework of the Hague Conference have always been open to the signature of at least all Members of the Conference at the time of the relevant Diplomatic Session. The restrictions, if any, only apply to non-Members at the time the Convention is drawn up. With regard to specific restricting or optional systems, a Convention may opt in favour of:

- a *veto approach*, where the Convention enters into force in a particular State if no Contracting State objects to that State's accession to the Convention;[125]
- an acceptance of accession (*opt-in approach*), where the Convention enters into force between an acceding State and a Contracting State only if the Contracting State declares acceptance of the accession;[126]

[123] The Special Commission may wish to consider aligning this term with terminology used in other articles of the Proposed Draft Text.
[124] The Special Commission may wish to consider aligning this term with terminology used in other articles of the Proposed Draft Text.
[125] See Arts 27 and 29 of the 1971 Enforcement of Judgments Convention; Art. 28 of the 1965 Service Convention.
[126] See Arts 37 and 39 of the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (1970 Evidence Convention).

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- an objection to accession (*opt-out approach*), where the Convention will only enter into force between the acceding State and those Contracting States which have not raised an objection to the accession of that State;[127]
- universal openness (*universal approach*), where there are no restrictions for a particular State joining the Convention.[128]

244. The Special Commission may wish to consider that the Working Group referred to the possible inclusion of a bilateralisation provision along the lines of the 2001 Interim Text, Article 42, Option A, which reads as follows:

Ratification and accession

1. This Convention shall become effective between any two Contracting States on the date of entry into force provided that the two States have each deposited a declaration confirming the entry into force between the two States of treaty relations under this Convention.

2. At the time of deposit of its instrument of ratification or accession, or at any time thereafter, each State shall deposit with the depository a copy of its declarations concerning all Contracting States with which the State will enter into treaty relations under the Convention. A Contracting State may withdraw or modify a declaration at any time.

3. The depository shall circulate all declarations received to all Contracting States and to the Members of the Hague Conference.

4. The Hague Conference on Private International Law shall regularly publish information reporting on the declarations that have been deposited pursuant to this Article.

245. Furthermore, the Special Commission may wish to consider including in the draft Convention the following provisions, which are drawn from the Final Clauses of the 2005 Choice of Court Convention:

Article [ ]

Signature, ratification, acceptance, approval or accession

(1) This Convention [ ].[129]

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States.

(4) Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article [ ]

Declarations with respect to non-unified legal systems

(1) If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

(2) A declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

(3) If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.

(4) This Article shall not apply to a Regional Economic Integration Organisation.

246. This provision is drawn from Article 28 of the 2005 Choice of Court Convention, and is also reflected in Article 61 of the 2007 Child Support Convention.

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[127] See Art. 58 of the 2007 Child Support Convention; Art. 12 of the *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (1961 Apostille Convention).
[128] See Art. 27 of the 2005 Choice of Court Convention; Art. 17 of the 2006 Securities Convention.
[129] See *supra*, para. 244, on the issue of "openness".

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Article [ ]

Regional Economic Integration Organisations

(1) A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

(2) The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

(3) For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 30 that its Member States will not be Parties to this Convention.

(4) Any reference to a “Contracting State” or “State” in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation that is a Party to it.

Article [ ]

Accession by a Regional Economic Integration Organisation without its Member States

(1) At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

(2) In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a “Contracting State” or “State” in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article [ ]

Entry into force

(1) This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article [ ].

(2) Thereafter this Convention shall enter into force -

a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

b) for a territorial unit to which this Convention has been extended in accordance with Article [ ], on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article [ ]

Declarations

(1) Declarations referred to in Articles [ ] may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

(2) Declarations, modifications and withdrawals shall be notified to the depositary.

(3) A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

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(4) A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.

(5) A declaration under Articles [ ] shall not apply to exclusive choice of court agreements concluded before it takes effect.

Article [ ]

Denunciation

(1) This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

(2) The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article [ ]

Notifications by the depositary

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles [ ] of the following -

a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles [ ];

b) the date on which this Convention enters into force in accordance with Article [ ];

c) the notifications, declarations, modifications and withdrawals of declarations referred to in Articles [ ];

d) the denunciations referred to in Article [ ].

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A N N E X E S

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Annex I

No	Convention / instrument	Status of the Convention / instrument		Subject matter of the Convention / instrument	Provisions on recognition and enforcement
		In force?	No of State Parties		
1	Protocol of 2002 to the 1974 Athens Convention relating to the carriage of passengers and their luggage by sea	✓	23	Carriage of passengers and their luggage by sea	Art. 17*bis*
2	1973 Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR)	✓	9	Contract for the carriage of passengers, and, where appropriate, of their luggage in vehicles by road when the contract provides that the carriage shall take place in the territory of more than one State and that the place of departure or the place of destination, or both these places, shall be situated on the territory of a Contracting State	Art. 21(3)
3	1956 Convention on the Contract for the international carriage of goods by road (CMR)	✓	55	Contracts for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different States, of which at least one is a contracting State	Art. 31(3)
4	2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea	✗		International carriage of goods by sea	Art. 73

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Annex II

No	Convention / instrument	Status of the Convention / instrument		Subject matter of the Convention / instrument	Provisions on recognition and enforcement
		In force?	No of State Parties		
1	1969 International Convention on Civil Liability for Oil Pollution Damage (CLC)	✓	35	Carriage of persistent oil by sea in tankers	Art. X
2	Protocol of 1992 to amend CLC	✓	134	Carriage of persistent oil by sea in tankers	Art. X
3	International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND 1971)	✗		Compensation fund for pollution damage from carriage of persistent oil by sea in tankers	Art. 8
4	Protocol of 1992 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND 1992)	✓	114	Compensation fund for pollution damage from carriage of persistent oil by sea in tankers. This Protocol amends FUND 1971.	Art. 8 of FUND 1971 is retained.
5	International Oil Pollution Compensation Supplementary Fund (FUND 2003)[1]	✓		International Supplementary Fund for compensation for pollution damage	Art. 8
6	2001 International Convention on Civil Liability for Bunker Oil Pollution Damage	✓	78	Pollution damage from bunker oil	Art. 10
7	1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS)	✗	14	Damage from carriage of hazardous and noxious substances by sea	Art. 40

[1] In force since 3 March 2005. FUND 2003 is optional and participation is open to all States Parties to FUND 1992.