

WORK. DOC. No 2 E

Distribution: 17 April 2012

CONCLUSIONS AND RECOMMENDATIONS OF THE EXPERT GROUP ON POSSIBLE FUTURE WORK ON CROSS-BORDER LITIGATION IN CIVIL AND COMMERCIAL MATTERS

THE HAGUE, 12-14 APRIL 2012

document submitted by the Permanent Bureau

1 Desirability of resuming work on cross-border litigation in civil and commercial matters

- (a) The widespread acceptance of the Choice of Court Convention is a key focus of the Conference's work in this area. The discussions of the group proceeded on the basis that the Convention is expected to be widely accepted.
- (b) Further work on cross-border litigation is desirable, provided that it meets real, practical needs which are not met by existing instruments and institutional frameworks.
- (c) Cross-border commercial activity is facilitated by mutual confidence and trust, which is enhanced by the effective resolution of disputes.
- (d) Certain types of dispute among participants in cross-border commercial activity fall outside existing instruments on arbitration and litigation, including the Choice of Court Convention.¹
- (e) More generally, the just and efficient resolution of disputes in the cross-border context is enhanced by predictable access to competent courts and the effective recognition and enforcement of judgments.
- (f) Further work is essential to identify gaps in the existing framework for resolution of cross-border disputes that are of particular practical significance, in order to inform and focus future work.

¹ For example, claims between parties not in a direct contractual relationship, claims concerning intangible property such as confidential information, and claims to recover misappropriated funds and other assets.

2 Convention or other instrument?

Work should be undertaken towards a binding instrument, which is the preferred outcome. If it becomes apparent that a binding instrument is not achievable, then the Council may wish to consider the desirability of other options.

3 Topics to be addressed in a future instrument

- (a) A future instrument should make provision for the recognition and enforcement of judgments.
- (b) A useful basis for this work will be found in the recognition and enforcement provisions of the Interim Text, the Choice of Court Convention, the Child Support Convention, and other existing instruments.
- (c) This work should seek to develop mechanisms for recognition and enforcement that are as simple and effective as possible.
- (d) It is anticipated that such an instrument would provide for jurisdictional filters for recognition and enforcement.²
- (e) An open-minded approach should be adopted as to which jurisdictional filters would apply, and how they would be structured. This can be informed by the Hague Conference's previous work in this area, and by other existing instruments.
- (f) Provisions on jurisdictional filters will encourage proceedings to be brought in a court that exercises jurisdiction consistent with those filters, because it will enable subsequent recognition and enforcement abroad of the resulting judgment.
- (g) There are other matters that could enhance the attractiveness and effectiveness of such an instrument, for example, co-operation in facilitating the circulation of judgments, and judicial communication. There should be further discussion of the potential for inclusion of such matters in a future instrument.
- (h) The possibility remains open at this stage of making further provision in relation to matters of jurisdiction (including parallel proceedings). The desirability and feasibility of providing for such matters requires further study, and should be the subject of further discussion.

4 Recommendations in relation to working method

- (a) It is envisaged that a working group would be established to guide further study and to prepare proposals for consideration at meetings of a Special Commission. Participants would attend as representatives of Members. The group may wish to establish a smaller drafting committee to assist with the preparation of texts for discussion by the working group. Special groups may also be established to address specialist topics that may arise.
- (b) In working towards a future instrument, it will be important to begin by working on an agreed core of essential provisions.

² The term "jurisdictional filters" refers to jurisdictional criteria for recognition and enforcement of judgments, also sometimes referred to as "indirect grounds of jurisdiction".

- (c) Consistent with paragraph (b), the initial task of the working group would be to prepare proposals for consideration by the Special Commission in relation to provisions for inclusion in a future instrument relating to recognition and enforcement of judgments, including jurisdictional filters.
- (d) As noted above, the desirability and feasibility of including further topics in this or another future instrument requires further study and discussion. It is recommended that a further meeting of an expert group be convened to consider and make recommendations on these matters.
- (e) It would be helpful for the working group and expert group to receive one or more notes prepared by the Permanent Bureau that:
 - i) Describe and comment on the provisions on recognition and enforcement found in existing instruments referred to above, as the basis for work on this topic;
 - ii) Outline options for jurisdictional filters; and
 - iii) Provide background information to assist in discussion of possible further topics.
- (f) The Permanent Bureau will report regularly to the Council on progress on this work, which will maintain oversight of the work.