

Second Meeting of the Working Group on the Judgments Project (24-28 February 2014)

WORKING GROUP RECORD OF DISCUSSIONS

1. INTRODUCTION

This document sets out the proposals of the Working Group in relation to provisions to be included in a future instrument on recognition and enforcement of judgments. The Working Group has proceeded on the basis that the future instrument is expected to be a convention. The proposals set out below represent provisional views, recognising that this report is a work in progress that will need to be the subject of further study and discussion by the Working Group in order to enable a proposal to be submitted to a Special Commission.

2. OBJECTIVES AND STRUCTURE OF THE FUTURE CONVENTION

Objectives

The objectives of the future instrument are:

- To enhance access to justice through the recognition and enforcement of judgments given by courts which the parties could reasonably have expected to determine their rights and obligations in the circumstances of the particular case
- To facilitate trade and investment, by reducing uncertainty and costs associated with cross-border dealings and the resolution of cross-border disputes.

The Group discussed the more specific implications of these objectives for its work on a future instrument on recognition and enforcement of judgments.

Openness of the future Convention

The question of openness was discussed and various options were considered. The issue is linked to other issues such as substantive scope and grounds for refusal. For the purposes of the Working Group's discussions, the working assumption is that the future Convention will be open to all States. The question of openness is a political one for consideration at a later stage.

3. JUDGMENTS TO WHICH THE FUTURE CONVENTION WOULD APPLY

Types of judgments

Judgments of courts

The Working Group decided to proceed on the basis that the provision in the future instrument will be modelled on Article 4(1) of the Choice of Court Convention, as follows:

- (1) In this Convention, "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.

The Group noted that the possibility of the inclusion of decisions of quasi-judicial bodies requires further consideration and should be discussed at a later stage, on the basis of concrete examples.

Default judgments

The Working Group decided to proceed on the basis that the instrument should provide for recognition and enforcement of default judgments.

Provisional and protective measures

The Working Group decided to proceed on the basis that the future Convention will not provide for the recognition and enforcement of provisional and protective measures, but the possibility of their inclusion should be discussed at a later stage.

Consideration should be given to a provision facilitating reference to provisional and protective measures granted by a court whose judgment on the merits would be recognised/enforced, and encouraging other courts to grant such measures in support of that court *e.g.*, by providing for such measures to be taken into account by the court addressed.

Non-money judgments

The Working Group decided to proceed on the basis that non-money judgments will be recognised/enforced under the instrument, although the issue will need to be revisited in light of the discussion on substantive scope.

Substantive Scope

The Working Group decided to proceed on the basis that the draft provision on scope will be modelled on Article 1(1) of the Choice of Court Convention, with the addition of an express exclusion of revenue, customs and other administrative matters. The draft provision reads as follows:

- (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.

The Working Group noted that the application of the future instrument to awards of compensation made by criminal courts will need to be discussed at a later stage.

The Working Group decided to proceed on the basis that the provision on scope in the future instrument will be modelled on Article 1(2) of the Choice of Court Convention, as follows:

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

Consumer matters

The Working Group decided to proceed on the basis that Article 2(1) *a*) should remain in square brackets. The Group noted that there was substantial support within the Group for seeking to apply the convention to consumer matters, but the implications of this will need to be carefully studied.

Employment matters

The Working Group decided to proceed on the basis that Article 2(1) *b*) should remain in square brackets. The Group noted that there was substantial support within the Group for seeking to apply the convention to individual employment matters, but the implications of this will need to be carefully studied.

The draft text on consumer and employment matters is therefore as follows:

- (1) This Convention shall not apply to judgments –
 - a) [relating to contracts to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party;]
 - b) [relating to contracts of employment, including collective agreements.]

Matters that fall outside scope

The Working Group decided to proceed on the basis that the square brackets should be removed from the paragraphs relating to “maintenance obligations”, “liability for nuclear damage” and “defamation”. The Group decided to proceed on the basis that “anti-trust (competition) matters” should not be excluded from scope, in so far as they are civil or commercial matters.

The draft text on the matters that fall outside scope is therefore as follows:

- (2) 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) [anti-trust (competition) matters];~~
 - i) liability for nuclear damage;
 - ~~j) claims for personal injury brought by or on behalf of natural persons;~~
 - ~~k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship;~~
 - ~~l) rights *in rem* in immovable property, and tenancies of immovable property;~~
 - m) [the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;]
 - n) [the validity of intellectual property rights other than copyright and related rights;]
 - o) [infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;]
 - p) [the validity of entries in public registers;]
 - q) defamation

The Working Group noted that:

- the possibility of including “maintenance obligations” within scope may need further consideration, having regard to the interaction with the 2007 Maintenance Convention; and
- the need for the exclusion of “emergency towage and salvage” in paragraph (g) was questioned, and requires further study.

- (3) Notwithstanding paragraph 2, 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 2 arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.
- (4) This Convention shall not apply to arbitration and related proceedings.
- (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.

The Working Group noted that it will be necessary to review the drafting of paragraphs 5 and 6, to ensure that different approaches to immunity are accommodated.

The Working Group also noted the possibility of using a declaration or reservation mechanism (similar to that in Arts 21 and 22 of the Choice of Court Convention) as an alternative to exclusions from scope, or to extend scope, in respect of certain matters.

Criteria for recognition and enforcement

The Working Group thanked the delegations from the United States of America and Switzerland for their innovative and thought provoking discussion papers. Other delegations outlined their rules on recognition and enforcement and the Working Group took particularly into consideration the Canadian “real and substantial connection” test for the recognition and enforcement of foreign judgments.

The Working Group addressed the criteria for recognition and enforcement of judgments at a conceptual level, as set out in attachment one. It will be necessary to draft provisions to give effect to the criteria discussed by the Working Group.

4. RECOGNITION AND ENFORCEMENT SCHEME

Recognition and enforcement conditions

The Working Group decided to proceed on the basis that the draft rule on recognition and enforcement conditions would mirror Article 8(1) of the Choice of Court Convention as follows:

- (1) A judgment of a court of a Contracting State to which this Convention applies shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

The Working Group noted that this provision is not intended to limit recognition and enforcement in the State addressed under national law or under other treaties. The possibility of the Convention providing for such limits was raised, and remains open for discussion at a later stage.

The Working Group decided to proceed on the basis that the draft rule on absence of review on the merits would mirror Article 8(2) of the Choice of Court Convention, as follows:

- (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.

The Working Group decided to proceed on the basis that the draft provisions on the effectiveness/enforceability of the judgment in the State of origin would mirror Article 8(3) and (4) of the Choice of Court Convention, as follows:

- (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.

The Working Group noted that issues of prescription/limitation in the State addressed require further consideration, taking into account the provisions on procedure (see Articles 8(3) and 14 of the Choice of Court Convention).

Grounds for refusal

Proper notice

The Working Group decided to proceed on the basis that the draft provision on proper notice will mirror Article 9 c) of the Choice of Court Convention.

Procedural fraud

The Working Group decided to proceed on the basis that the draft provision on procedural fraud will mirror Article 9 d) of the Choice of Court Convention.

Public policy and procedural fairness

The Working Group decided to proceed on the basis that the draft provision on public policy and procedural fairness will mirror Article 9 e) of the Choice of Court Convention.

The Group noted that there will be a need for further elaboration of the reference to “fundamental principles of procedural fairness” in the Explanatory Report to this Convention.

Inconsistent Judgments

The Working Group decided to proceed on the basis that the draft provision on inconsistent judgments will mirror Article 9 f) and g) of the Choice of Court Convention.

Parallel Proceedings

The Working Group noted that the inclusion of parallel proceedings as a ground for refusal in the future Convention may need to be considered at a later stage.

Exclusive Jurisdiction

The Working Group noted that it will be necessary to address the implications for recognition and enforcement of exclusive jurisdiction.

The Working Group noted that it will be necessary to address the implications for recognition and enforcement of an exclusive choice of court agreement.

The draft text on this topic, reflecting the approach described above, is as follows:

Recognition or enforcement may be refused if –

- a) the document which instituted the proceedings or an equivalent document, including 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 judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
- e) 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 fulfils the conditions necessary for its recognition in the requested State.

Procedure

The Working Group decided to proceed on the basis that the draft provision on procedure would mirror Article 14 of the Choice of Court Convention, as follows:

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.

The Group noted that issues for further work include:

- a) whether the instrument should address questions of personal jurisdiction and forum non conveniens in the enforcement context, with reference to the research paper provided by the Permanent Bureau;
- b) adaptation of relief, for example where the form of relief awarded in the State of origin is not available in the State addressed;
- c) costs of recognition and enforcement;
- d) non-discrimination (see, *e.g.*, Article 33 of the Child Support Convention);
- e) international cooperation to facilitate recognition and enforcement, with reference to the paper provided by the Permanent Bureau on cross-border communication.

The Working Group noted the need to further consider the manner in which partial or full performance/satisfaction of the obligations imposed by the judgment would be taken into account in the recognition/enforcement process.

Severability

The Working Group agreed to proceed on the basis that the draft provision on severability would mirror Article 15 of the Choice of Court Convention, as follows:

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.

The Group noted the relationship of severability with the issue of adaptation of relief.

Documents to be produced

The Working Group decided to proceed on the basis that the draft provision on documents to be produced would be modelled on Article 13 of the Choice of Court Convention (other than paragraph (1)(b)), as follows:

- (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 [...], 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, 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.

The Working Group noted the need to consider whether the use of the form under paragraph 3 could satisfy some of the requirements under paragraph 1.

Judicial settlements

The Working Group decided to proceed on the basis that the provision in the future instrument will be modelled on Article 12 of the Choice of Court Convention, as follows:

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.

The possibility of extending this article to recognition of judicial settlements (*transactions judiciaires*) was raised. This may require further discussion, taking into account paragraphs 208-209 of the Explanatory Report to the Choice of Court Convention.

Judgments awarding non-compensatory damages

The Working Group decided to proceed on the basis that the provision on non-compensatory damages in the future instrument will be modelled on Article 11 of the Choice of Court Convention, as follows:

- (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.

Preliminary questions

The Working Group decided to proceed on the basis that the provision on preliminary questions in the future instrument will be modelled on Article 10 of Choice of Court Convention, as follows:

- (1) Where a matter excluded under Article [..], paragraph [..], or under Article [..], 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 [..], paragraph [..].
- (3) However, in the case of a ruling on the validity of an intellectual property right other than copyright or a related right, recognition or enforcement of a judgment may be refused or postponed under the preceding paragraph only where –
 - a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State under the law of which the intellectual property right arose; or
 - b) proceedings concerning the validity of the intellectual property right are pending in that State.
- (4) 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 pursuant to a declaration made by the requested State under Article [..].

The Working Group noted the need to revisit the whole of this article, and in particular paragraph 3, once the Group has discussed the issue of scope.

Mechanisms to facilitate cross-border communication

The Working Group noted the need for further discussion about mechanisms for cooperation between States to facilitate the operation of the convention, in particular provision of relevant information. Examples of information that might be helpful include where to apply for recognition and enforcement, and costs associated with the recognition and enforcement process.

5. FUTURE WORK

The draft text developed by the Working Group as the basis for its future work is set out for ease of reference in attachment two.

The timetable for future work is set out in the Working Group's Draft Report to the Council.