

# CCBE POSITION PAPER ON THE JUDGMENTS PROJECT CONCERNING JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

29/11/2013

## **I. Introduction**

1. The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 12 further associate and observer countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.
2. The European Private Law Committee of the CCBE has actively followed developments concerning the Judgments Project on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of the Hague Conference on Private International Law.
3. The CCBE is supportive in principle of the work to agree an international approach in this field of private international law. This would be beneficial as it would provide greater legal certainty to parties in the case of international disputes. The continuation of the project would also follow the recent agreement of the European Parliament and Member States on the recast of the Brussels I Regulation on jurisdiction and recognition and enforcement of judgments in civil and commercial matters.<sup>1</sup> The EU would therefore be well-placed to provide valuable input into these international negotiations. Increased legal certainty internationally might also encourage a broader range of litigants to elect to use EU courts to resolve disputes.
4. The CCBE believes that there are a number of important practical issues that should be taken into account as the discussions continue. These are set out in this paper and include the very important matter of the safeguards applicable to the recognition and enforcement of judgments. The CCBE believes that it is very important that legal practitioners are consulted and involved as negotiations progress to give input based on their practical experience. The CCBE welcomes the recent initiative of the Hague Conference to involve it in the work of the Conference.
5. In formulating this paper, the CCBE has had particular regard to the *process paper on the continuation of the Judgments Project*, published in August 2013.<sup>2</sup> The CCBE understands that the scope of the project has not yet been determined. In principle, the CCBE would favour a wide approach that considers whether progress can be made both in the fields of (i)

<sup>1</sup> Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:En:PDF>

<sup>2</sup> Process paper on the continuation of the Judgments Project, prepared by the Permanent Bureau of the Hague Conference (August 2013) - [http://www.hcch.net/upload/wop/jdqm2013processpaper\\_e.pdf](http://www.hcch.net/upload/wop/jdqm2013processpaper_e.pdf)

recognition and enforcement of judgments, including "jurisdictional filters", and (ii) matters of jurisdiction, including parallel proceedings.<sup>3</sup>

## **II. Background and current understanding of discussions**

6. Legal practitioners are aware that the Judgments Project has a long history.<sup>4</sup> Following initial work that began in 1992, the focus was narrowed down to choice of court agreements leading to the adoption of the Hague Convention in that field in 2005.<sup>5</sup> The Choice of Court Convention envisages the courts in Convention states recognising and enforcing judgments given by the courts in other Convention states pursuant to exclusive choice of court agreements (with some exclusions, e.g. consumer contracts).<sup>6</sup>
7. Our understanding of the current work is that *"the Hague Conference on Private International Law [is] mandated to assess the possible merits of resuming the Judgments Project (i.e., beyond the Choice of Court Convention)"*.<sup>7</sup> A meeting of the Hague Conference's working group also confirmed the intention that a future instrument concerning recognition and enforcement is intended to sit alongside this Convention, which would be used as a starting point for the negotiations.<sup>8</sup> Based on this understanding, we therefore comment on the Convention's provisions in the course of this paper in relation to a possible future instrument.

## **III. Why an instrument is needed at international-level**

8. As far as the CCBE is aware and as stated above, legal practitioners involved in cross-border work are generally supportive of the progression of the Judgments Project, both in relation to the fields of (i) recognition and enforcement of judgments, including "jurisdictional filters", and (ii) matters of jurisdiction, including parallel proceedings. Nevertheless, practitioners are cautious to ensure that the content of any future convention is suitable and contains sufficient safeguards.
9. Legal practitioners have commented that progress towards a global approach to enforcement would give parties greater certainty and confidence that any judgment obtained from an EU court would be enforced by non-EU states. This would provide a further incentive for parties to negotiate jurisdiction clauses in favour of EU courts. Given the increase in cross-border trade globally, commercial parties will increasingly have to look to enforce their judgments against their counterparties' assets outside the EU. The lack of enforceability in non-EU states is a significant problem as a successful litigant before an EU court may have no effective remedy if the judgment debtor's assets are located in a jurisdiction which does not recognise judgments from EU courts (e.g. the People's Republic of China).
10. Where enforceability of EU judgments is a concern, commercial parties may be forced to discount litigation in the EU as an option for resolving their dispute and have their options limited to another form of dispute resolution. Some practitioners take the view that there would be value from a public policy perspective in parties to a dispute having a genuine choice of dispute resolution forums (courts, arbitral tribunals, etc.), including the option of litigating publicly in EU courts.
11. There are however significant concerns regarding the potential impact of the recognition requirements that could be imposed on EU courts as the result of a new convention. Such an

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<sup>3</sup> *Ibid*, page 2.

<sup>4</sup> A detailed chronology of the Hague Conference's previous work on the Judgments Project, together with relevant documents is available - [http://www.hcch.net/index\\_en.php?act=text.display&tid=149](http://www.hcch.net/index_en.php?act=text.display&tid=149)

<sup>5</sup> Hague Convention on Choice of Court Agreements, concluded 30 June 2005: <http://www.hcch.net/upload/conventions/txt37en.pdf>

<sup>6</sup> We understand that the European Commission is bringing forward its proposal to implement the Hague Choice of Court Convention later this year (see page 13): [http://ec.europa.eu/atwork/pdf/forward\\_programming\\_2013.pdf](http://ec.europa.eu/atwork/pdf/forward_programming_2013.pdf)

<sup>7</sup> Hague Conference website, Judgments Projects page: [http://www.hcch.net/index\\_en.php?act=text.display&tid=149](http://www.hcch.net/index_en.php?act=text.display&tid=149)

<sup>8</sup> Report on ongoing work in international litigation (March 2013), see Annex i on the First Meeting of the Working Group on the Judgments Project (February 2013) - <http://www.hcch.net/upload/wop/genaff2013pd03e.pdf#report2>

agreement could require EU courts to recognise and enforce judgments issued by third state courts following proceedings that might, as an example, not have resulted from proceedings or a process acceptable to EU courts with their generally high standards of justice and procedural safeguards. The CCBE would therefore recommend that in-depth consideration of the safeguards and grounds for refusal of the recognition and enforcement of judgments should take place, involving interested stakeholders such as lawyers. We make some initial comments below.

#### **IV. Comment on possible form of instrument**

12. Our understanding is that a range of models for the future convention are possible:

- a 'simple' model which "...involves selecting those areas which, at a minimum, might achieve consensus. It is notable that previous discussions on the Judgments Project evidenced a 'broad consensus' with regards to the chapter on recognition and enforcement while consensus relating to the grounds of jurisdiction proved more difficult to achieve".<sup>9 10</sup>
- a 'reinforced simple' model which "... would include the main characteristics of the simple model (i.e., it would deal only with the recognition and enforcement of judgments and not directly regulate jurisdiction), but this could be complemented by additional provisions that regulate the circulation of judgments either at the jurisdiction stage or at the recognition and enforcement stage".<sup>11</sup>
- a 'double' model which would contain "... provisions on both direct jurisdiction and the recognition and enforcement of judgments".

13. The CCBE would in principle favour work taking place both in relation to recognition and enforcement and also jurisdiction matters because progress in both fields at international-level could improve the resolution of cross-border disputes. However, the CCBE would also like to emphasise the importance of achieving tangible progress during the negotiations which have already lasted many years. There may be a risk that in being too ambitious nothing is achieved.

#### **V. Work on recognition and enforcement**

14. Prior to meetings of the working group in February 2013, the Permanent Bureau prepared detailed papers concerning the recognition and enforcement<sup>12</sup> and jurisdiction<sup>13</sup> aspects of further work. For recognition and enforcement, the CCBE understands that key areas for consideration include: matters relating to scope; whether a new instrument should only apply to judgments issued by courts; the kind of judgments to be covered (e.g. 'non-money judgments', 'judgments awarding non-compensatory damages', 'judgments rendered in class actions', etc.); grounds for refusal; regulation of procedural issues; jurisdictional filters; and exchange of information.

<sup>9</sup> Ongoing work on international litigation and possible continuation of the Judgments Project (March 2012), para 24 onwards - <http://www.hcch.net/upload/wop/gap12pd05e.pdf>

<sup>10</sup> "[I]f a simple model is preferred, it seems likely that it will also need to include provisions to allow the court addressed to query whether the court of origin was justified in exercising jurisdiction. Indeed, all major instruments based on the simple model provide for the verification of jurisdiction, whether against a list of indirect jurisdictional grounds [also referred to as 'jurisdictional filters'] set out in the instrument, or against jurisdictional grounds accepted by the law of the State addressed." *Ibid*, para 26.

<sup>11</sup> *Ibid*, para 28.

<sup>12</sup> Annotated checklist of items to be discussed by the Working Group on recognition and enforcement of judgments (January 2013) - <http://www.hcch.net/upload/hidden/2013/jdgm2013note01en.pdf>

<sup>13</sup> Issues paper on matters of jurisdiction (including parallel proceedings) (January 2013) - <http://www.hcch.net/upload/hidden/2013/jdgm2013note02en.pdf>

## Scope

15. We understand from the report of the working group meeting in February 2013<sup>14</sup> that it is intended that *"...the future instrument would provide for recognition and enforcement in one Contracting State of judgments rendered in another Contracting State in civil and commercial matters"* and the working group would consider possible exclusions to scope using Article 2 of the Choice of Court Convention as a starting point. The CCBE regards this as a sensible approach.

## Categories of judgment

16. We understand that it is envisaged that, with regards to categories of judgment: *"[t]he instrument would provide for recognition and enforcement of non-money judgments (with certain exceptions, and certain specific issues that require careful analysis)"; "the instrument would not provide for recognition and enforcement of provisional and protective measures, but the possibility of their inclusion should be discussed at a later stage"; "the instrument would provide for recognition and enforcement of default judgments"; and "the instrument would provide for enforcement of judicial settlements".* (We understand 'judicial settlements' to mean that such settlement has been approved by a court.)
17. Again, at this preliminary stage, the CCBE regards the above as an appropriate approach provided that sufficient safeguards are in place.

## Grounds for refusal

18. Article 8 of the Choice of Court Convention requires Convention states to recognise and enforce judgments issued by other Convention states' judgments. Article 9 then sets out the following safeguards:

*"Recognition or enforcement may be refused if –*

*(a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;*

*(b) a party lacked the capacity to conclude the agreement under the law of the requested State;*

*(c) 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;*

*(d) the judgment was obtained by fraud in connection with a matter of procedure;*

*(e) 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;*

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

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<sup>14</sup> Report on ongoing work in international litigation (March 2013), see Annex i on the First Meeting of the Working Group on the Judgments Project (February 2013) - <http://www.hcch.net/upload/wop/genaff2013pd03e.pdf#report2>

*(g) 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."*

19. As regards paragraph (c(i)), the CCBE wishes to clarify that it understands this to mean that the defendant must have actually received the notification in order to be able to arrange for his defence. Moreover, in addition to the categories above, the CCBE suggests that a new paragraph (e(i)) is added to the existing categories to include within the grounds of refusal a case in which *"the judgment includes an award for punitive damages or exemplary damages"*.
20. At this stage, and without a concrete understanding of the final scope of any future convention, the CCBE takes a preliminary view that, with the addition of the abovementioned category, the grounds listed should all be included in any future instrument.

#### *Jurisdictional filters*<sup>15</sup>

21. The CCBE understands that the jurisdictional filters that are under consideration include:<sup>16</sup>

*"the defendant's home forum";*

*"the defendant's branch or other establishment";*

*"the place where the defendant has carried out regular commercial activity to which the claim relates";*

*"the place where a contract was performed (and certain other potentially relevant connecting factors in contract cases)";*

*"in tort claims, the forum where both the harmful act or omission occurred and physical injury / damage occurs (noting the desirability of relaxing these criteria to enable a wider range of tort judgments to be covered)";*

*"internal trust matters, having regard to Article 11 of the Interim Text";*<sup>17</sup>

*"in claims relating to rights in rem in immovable property and / or tenancies of immovable property, the forum in which the property is situated".*

22. The CCBE believes that *"the defendant's branch or other establishment"* should be removed as a freestanding filter from the above list. This is because the branch or establishment may have no connection to the dispute. Instead, the subsequent category could be re-worded to read *"the place where the defendant has carried out regular commercial activity, or where a branch of the defendant is located, to which the claim relates"*.
23. With regards to the category concerning *"the place where the contract was performed"*, the CCBE believes that the wording in brackets - *"(and certain other potentially relevant connecting factors in contract cases)"* - is too broad and should be removed.
24. The CCBE would like to request that, in relation to *'tort claims'*, the wording is amended to read: *"in tort claims, the forum where either the harmful act or omission occurred and physical injury / damage occurs (noting the desirability of relaxing these criteria to enable a wider range of tort judgments to be covered)"*.
25. With regards to *"internal trust matters"*, the CCBE is not able to support the proposed jurisdictional filter without further information.

## **VI. Work on jurisdiction**

<sup>15</sup> The criteria, from a jurisdictional perspective, for recognition and enforcement of judgments.

<sup>16</sup> For further detail, please see report on ongoing work in international litigation (March 2013), Annex i on the First Meeting of the Working Group on the Judgments Project (February 2013) - <http://www.hcch.net/upload/wop/genaff2013pd03e.pdf#report2>.

<sup>17</sup> We have not seen a copy of the 'Interim Text'.

26. For jurisdiction, we understand that key areas for consideration include:

*"(a) required grounds of jurisdiction. It is not expected that the list of required grounds of jurisdiction would be comprehensive;*

*(b) additional grounds of jurisdiction under national law, which would be permitted subject only to any specific prohibitions;*

*(c) prohibited grounds of jurisdiction;*

*(d) proceedings in more than one Contracting State." <sup>18</sup>*

27. The CCBE wishes to highlight the importance of the *lis pendens* provisions in any future convention. We therefore suggest that (d) should read as follows: *"proceedings in more than one Contracting State, including which jurisdiction has precedence and what this entails."*

28. The CCBE understands this work to be at a much earlier stage of development than that relating to recognition and enforcement addressed above and will be pleased to provide further comments from a practical perspective.

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<sup>18</sup> Report on ongoing work in international litigation (March 2013), see Annex ii on the Second Meeting of the Experts' Group on the Judgments Project (21-23 February 2013): <http://www.hcch.net/upload/wop/genaff2013pd03e.pdf#report2>