

CCBE Position Paper on the Judgments Project concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (No. 2)

18/03/2016

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 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.

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.

The comments set out in this paper are based on the HCCH „Report of the Fifth Meeting of the Working Group of the Judgments Project (26-31 October 2015)” and the proposed Draft Text resulting from this meeting (“Prel.Doc. No 7A). This text largely reflects the ideas and concerns expressed by the CCBE in the “CCBE [Position](#) Paper on the Judgments Project concerning Jurisdiction and the Recognition and Enforcement of Judgments in civil and commercial matters (No. 1)” dated November 29, 2013. In view of the various amendments that have been made since then to the proposed future text of the Convention, the CCBE wishes to make the following comments:

1) Scope of application

According to Art. 1, the Convention shall apply to the recognition and enforcement of judgments relating to civil or commercial matters. According to the CCBE, the exclusion of revenue and customs is appropriate, as well as the exclusion of administrative matters. The word “other” used in the English version in the expression “other administrative matters” should be deleted.

As stated in its previous position paper, the CCBE considers that the inclusion / exclusion of certain decisions is an appropriate approach¹:

- “Provisional and protective measures”: At the present stage, such measures do not fall under the judgment definition contained in Art. 3 para. 1 of the draft („An interim measure of protection is not a judgment”): only judgments as such shall be recognized and executed (see Art. 1). The CCBE would welcome the inclusion of provisional decisions in the scope of application of the convention, provided certain conditions are fulfilled: provisional measures should only be included if the defendant has been summoned to appear and had an effective possibility to defend his rights.

Furthermore, in order to ensure sufficient protection, the provisional measures to be included may be listed exhaustively. As an example, we would welcome the inclusion of:

- the seizure of moveable assets
- the freezing of bank accounts

¹ Reference is made to the “Report on the Second Meeting of the Working Group on the Judgments Project” of February 2014 (<http://www.hcch.net/upload/hidden/2013/jdgm2014report.pdf>), p. 1

- “Default judgments” shall be subject to specific provisions (Art. 4 para. 2, Art. 11 para. 1 lit. b), but on the principle they are subject to the provisions of the proposed Convention, as they are not expressly excluded (Art. 1 f.).
- “Judicial settlements” shall be an equivalent to judgments under specific conditions (Art. 9).

This categorisation is in line with the CCBE position paper.

2) Exclusions from scope

The CCBE welcomes the removal of consumers’ contracts and employments contracts from the exclusions.

The CCBE notices that the exclusions are not strictly the same as in the Convention on choice of courts agreements from 30 June 2005 but agrees with the differences in the scope of application arising therefrom.

The addition of Art. 2.4 (exclusion of “agreements to refer a dispute to binding determination by a person or body other than a court”) is welcomed, as well as the exclusion relating to arbitration and related proceedings.

3) Definitions

For the judgments definition, see 1). The addition of persons against whom counterclaims have been brought into the “defendant” definition is welcomed by the CCBE.

4) General provisions

The CCBE suggests that the English text for “produit ses effets” in Art. 4.3 (“has effect”) is replaced by “is effective”.

5) Bases for recognition and enforcement

The new draft gives a very different approach from the previous text on this issue: whereas most conditions to be fulfilled for recognition were previously foreseen as additional grounds for refusal in Art. 5.3 (“jurisdictional filters”), they are now drafted as basic conditions for recognition and enforcement in Art. 5.1.

The CCBE welcomes this approach as it seems simpler and allows a better understanding of these provisions.

This new approach maintains a kind of indirect jurisdictional rules into the proposed Convention, which the CCBE had recommended.

The CCBE is also pleased to note that some of its recommendations in this respect have generally been followed. It nevertheless wishes to make the following additional remarks:

1. a) The habitual residence of the party against whom recognition or enforcement is sought might be the most usual case and is to be welcomed. So does the addition of a)ii) about the case where the person against whom recognition or enforcement is sought is its successor. The CCBE recommends adding the term “legal” before “successor”.
- b) Where the person against whom recognition (or enforcement) is sought was the claimant in the initial proceedings, enforcement will in most cases be sought for the counterclaim. This is in line with the addition of counterclaims into Art. 3. However, this addition must not lead to the recognition of judgments based solely on claimant’s jurisdiction. The CCBE does not see such danger with the current wording but asks that special attention is given to this provision in case of re-drafting.
- c) No comments.

d) Where consumers or employees are concerned, judgments where the defendant expressly consented to the jurisdiction of the court of origin may only be included if it is ensured that the defendant has been instructed about the consequences of such consent. The CCBE considers that Art. 5.2.a) is not sufficient for a proper protection of consumers and employees.

e) **Contractual obligations:** the CCBE believes that the current wording may give rise to multiple difficulties, quite well known within in the EU under Art. 5.1. of the Brussels Regulation (EU 44/2001, now replaced by Art. 7.1 of EU 1215/2012). The determination of the “place of performance” of the obligation ruled upon by the judgment “under the parties’ agreement or under the law applicable to the contract” (which is still to be determined by the judge of the State where recognition is sought as per his own rules of International Private law) may be a difficult issue, giving rise to satellite litigation. So does the question whether “the defendant’s activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State”. Given that there is no Supreme Court ruling on such matters, Courts of Contracting States may reach different interpretations of such wording. The CCBE suggests simplifying this provision. At the very least, in relation to the agreement on the place of performance, reverting to the previous drafting of Art. 5.3 f) may be a solution:

[This agreement should derive from the provisions of the contract.]

For the most common contracts as sales and services contracts, the solution set forth in Art. 7.1 of the Brussels I bis Regulation may be a source of inspiration. *[“For the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:*

— in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

— in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided”].

Besides, the CCBE agrees with the deletion of the exception regarding obligations consisting in the payment of money previously included at the end of Art. 5.3 f) (“This shall not apply if the contractual obligation consists of a payment of money, unless such payment constituted the main obligation of the contract”).

6) Exclusive bases

The provisions of Art. 6 a) for patent, designs, trademarks and similar rights are welcomed by the CCBE.

In Art. 6 b), regarding tenancies of immovable property, the CCBE doubts whether the recognition of only such judgments rendered in the state of location of the property make sense – independently from the minimum period of 6 months, which is also questionable. In cases where the initial tenant of the immovable property moved to another state, there is no reason why a claim should not be brought in his new state of residence and the judgment should not be recognised and enforced in other contracting states. This is even more important as the effect of Art. 6 is reinforced by the new Art. 15.

7) Grounds for refusal

The CCBE had expressed the wish that all grounds for refusal contained in Art. 9 of The Hague Convention on Choice of Courts Agreements concluded on 30.06.2005 shall be taken over in the proposed Convention.

Art. 7.1 of the proposed Convention contains a list of such refusal grounds, reflecting the criteria expressed by the CCBE.

However, all grounds for refusal give only a possibility, not a duty to refuse recognition or enforcement. For the sake of security and foreseeability, the CCBE would suggest making most of the refusal grounds mandatory.

Under Art. 7.1.d), the CCBE would suggest adding “unless the agreement was null and void under the law of the State of the chosen court” in order to be in line with Art. 9 lit. a of the Convention on Choice of courts agreements.

The additions made in Art. 7.2 regarding pending proceedings before courts of the requested State are to be welcomed on the principle, but the current wording makes its application quite uneasy. The CCBE suggests a simplification.

Regarding “punitive damages” and „exemplary damages“ addressed under Art. 9, the CCBE had suggested to add an additional ground for refusal. This has been done under Art. 8 para. 1, which foresees a special ground for refusal if the damages attributed to a party do not compensate a real loss suffered by the party.

Para. 2 states: “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.”). This might allow the recognition of decisions awarding damages higher than the actual harm suffered, when the surplus is meant to indemnify the party for the costs of the process.

The CCBE points out that the indeterminate character of the exception may allow misuse and the reintroduction of some kind of punitive damages. The text should therefore be more restrictive.

8) Preliminary questions

Art. 8 provides for answers to two kinds of questions:

- How to deal with rulings on preliminary questions on matters excluded under Article 2 (1) or on matters for which Article 6 provides for exclusive jurisdiction, if the court is not the one referred to in Art. 6; then the “ruling on that question” shall not be recognized or enforced under the Convention.
- How to deal with judgments which were “based on a ruling” on matters excluded under Art. 2 (1) or on a matter referred to in Art. 6 if the court is another than the one referred to in Art. 6; the recognition or enforcement “may be refused”.

For the sake of clarity, the CCBE would suggest that the refusal ground mentioned in Art. 8 (2) is inserted into Art. 6.

The issues of preliminary questions addressed under Art. 8 (1) should remain ruled in a separate provision.

However, the CCBE observes that in some cases, depending on the structure of decisions in some Contracting States, there might be difficulties to decide whether the issue at stake was ruled as a “preliminary question” or whether the judgment was “based on a ruling” on such matters (whereby “rulings” are not defined in the Convention draft). Given the fact that both cases are ruled in a different way, there should be a definition helping to distinguish them.

9) Documents to be produced

Art. 11 enumerates the documents necessary in order to obtain recognition or enforcement. One of them is the certified translation of the decision, which is welcomed by the CCBE.

10) Equivalent effects

The CCBE also wishes to express its support for the addition of a possibility to adapt the relief provided by the judgment when this relief is not available in the requested State.