Conclusions of the Working Group meeting on enforcement of judgments

DRAWN UP BY THE PERMANENT BUREAU

Preliminary Document No 19 of November 1992

Introduction

1 For the meeting of the Special Commission on general affairs and policy of the Hague Conference on private international law held from 1-4 June 1992, the United States delegation proposed that the Conference undertake work on a convention dealing with the recognition and enforcement of foreign judgments. The proposal was received with interest. After considerable discussion, the Special Commission decided that the matter should be considered by a small Working Group.[1] The Group met at The Hague from 29-31 October 1992 and comprised the following experts:

Mr A. Boggiano (Argentina)
Mr Li Haopei (China)
Mr Zhang Kening (China)
Mr A. Amer (Egypt)
Mr G. Möller (Finland) (chair)
M. J. Lemontey (France)
Mr T. Bán (Hungary)
Mr J. A. C. Watherston (United Kingdom)
Mr P. M. Beaton (United Kingdom)
Mr P. H. Pfund (United States)
Mr A. T. von Mehren (United States)
Mr P. D. Trooboff (United States)
Mr G. Parra-Aranguren (Venezuela).

2 The Working Group was charged with preparing a report dealing with the following issues: is the topic an appropriate one for the Conference to take up? If so, what are the advantages of an approach in the form of a convention dealing only with recognition and enforcement (a so-called *convention simple,* 'single' convention) as compared with one in the form of a convention that addresses not only recognition and enforcement but also the assumption of jurisdiction to adjudicate (a so-called *convention double,* 'double' convention)? Or, as the United States had proposed to the Special Commission, and explained in more detail in a paper submitted to the Working Group, would a mixed form, incorporating elements of both single and double conventions, be preferable?

[1] See *Conclusions of the Special Commission of June 1992 on general affairs and policy of the Conference,* drawn up by the Permanent Bureau, Preliminary Document No 18, for the attention of the Seventeenth Session, *supra,* p. 253. See also *Some reflections of the Permanent Bureau on a general convention on enforcement of judgments,* Preliminary Document No 17, for the attention of the Special Commission of June 1992, *supra,* p. 231.

Nature of a possible convention

3 The Group unanimously recognized the desirability of attempting to negotiate multilaterally through the Hague Conference a convention on recognition and enforcement of judgments. With rapidly expanding commercial contacts worldwide, the legal uncertainty, delays and costs caused by the absence of a general enforcement of judgments convention are likely to interfere increasingly with the needs of trade and business. The Group also recognized that a 'single' convention, such as the *Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, would fall short of meeting present needs. Such a convention addresses directly onlyrecognition and enforcement of foreign decisions; it does not affect the assumption of jurisdiction by the original court, or at most indirectly: judgments that do not rest on a jurisdictional basis accepted by the convention are not entitled to recognition and enforcement under the convention. The Group expressed a preference for an approach in the direction of a 'double' convention, such as the (revised) *Brussels Convention* of *27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* and the parallel *Lugano Convention of 16 September 1988.* A double convention regulates both the assumption of jurisdiction to adjudicate and the recognition and enforcement of judgments. It sets out the bases on which jurisdiction may be assumed; in its complete form, as is the case with the Brussels and Lugano Conventions, the bases for assumption of jurisdiction set out in a double convention are *exclusive*: the courts of States Parties to the convention can exercise jurisdiction in matters within the convention *only* if a convention basis is present.

4 An instrument of the double convention type, in the view of the Group, offers distinct advantages over a single convention. In particular, such a convention:

– provides more information and predictability to both parties in that it sets out grounds of jurisdiction that are accepted in each State Party to the convention, as well as grounds that are not accepted, thus making it in many cases unnecessary to review the laws of each country;

– avoids the confusion to which a single convention may give rise due to the fact that its indirect grounds of jurisdiction are sometimes wrongly understood to limit the original forum's assumption of jurisdiction to those bases;

– facilitates, both in time and expense, the recognition and enforcement of judgments, because it relies to a greater extent than a single convention on the findings made by the original court.

5 While favouring the model of the double convention, the Group felt that a complete double convention of the Brussels/Lugano type, appropriate as it may be in a regional framework, would be overly ambitious in the context of the broad Hague Conference membership. The Group especially thought that it would be attempting too much in a worldwide context:

– to require the court of origin to assume jurisdiction only on the grounds specified in the convention; and

– to require the court requested to enforce the judgment to do so without examination of the grounds of jurisdiction on which the original court had based its judgment – even if it were an 'exorbitant' ground of jurisdiction.[2]

The Group, therefore, expressed a preference for a convention which would offer some of the advantages of a double convention, while at the same time having a greater degree of flexibility than that available with a convention of the Brussels/Lugano type.

6 The idea is then that this convention would:

– like a double convention, contain a list of grounds upon which the court of origin would, at least in principle (the question of *forum non conveniens* being reserved, see No 12 *infra*), be *required* to assume jurisdiction, the 'white list';

– like a double convention, contain a list of grounds on which States Parties are *required not* to assume jurisdiction ('exorbitant' grounds of jurisdiction), the 'black list';

– unlike the complete double convention, allow the court of origin to assume jurisdiction on grounds neither approved by the convention in the 'white list' nor disapproved in the 'black list' (the 'grey area'); in other words, the 'white list' would *not* be an *exhaustive* list of grounds of jurisdiction.

Under this system, the State where recognition is sought would:

– be *required* to enforce a judgment when jurisdiction of the original court was based on one or more jurisdictional grounds from the 'white list';

– be *required* to refuse recognition and enforcement, if the court addressed *determined* that the judgment presented was exclusively based on a jurisdictional ground from the 'black list';

– be *free* to enforce, or not to enforce, a judgment based on a jurisdictional ground within the 'grey area'.

Contrary to the Brussels/Lugano Convention, the court addressed would be *allowed* to review the grounds upon which the jurisdiction was based or could have been based (*i.e.* the legal grounds, without re-examining the findings of fact upon which the original court had based its jurisdiction).

Scope of a possible convention

7 There was a consensus among the Group that the substantive scope of a future convention on jurisdiction and enforcement should extend to civil and commercial matters, in particular – but not necessarily limited to – money judgments. It was admitted that the term 'civil and/or commercial matters' would need clarification. Questions of personal status (family or genetic relationships) should in principle be excluded. The question of whether sensitive matters such as antitrust or competition law should or should not be included would require further study (see No 11 *infra*).

Grounds of jurisdiction that might be admitted

8 The Group next considered the possible grounds of jurisdiction to be included in the 'white list'. There was consensus that the following grounds deserved careful consideration:

a the habitual residence and/or domicile of the defendant, or if the defendant is not a natural person, its seat (headquarters) and/or place of incorporation and/or principal place of business;

b the location of a business establishment or branch office in connection with proceedings arising from business transacted by such establishment or branch office;

c the location of immovable property in the State of origin, where the action had as its primary object the determination of rights *in rem* (*e.g.* ownership, *usufruit*, mortgage);

d special forum for maintenance; the Group was inclined *not* to favour inclusion of a forum such as Article 5(2) of Brussels/Lugano.[3] Of course, this would leave open the question of whether matters related to maintenance (including judgments for arrears in payment of maintenance) should or should not be included in the scope of the convention (this problem was also discussed, but no final conclusion was reached on this point);

e place of the tort; it was felt on the one hand that, limiting this ground of jurisdiction to the case where the author of the injury or damage was present in the territory where these facts occurred,[4] would probably be too narrow an approach. On the other hand, to admit that both the courts of the country where the damage or injury occurred and of the country where the harmful event was sustained had jurisdiction[5] might be too broad in the context of a worldwide convention;

f choice of court ('prorogation'); this should not have the limitations of the 1971 Hague Convention.[6] Article 17 of Brussels/Lugano could possibly serve as a model;

g appearance by the defendant without contesting jurisdiction; some form of the limitations of Article 10(6) (indirect ground) of the 1971 Hague Convention might be needed;

h counterclaims (*cf.* Article 6(3) Brussels/Lugano); the other grounds of Article 6 (plurality of defendants; actions on a warranty or guarantee; actions in contractual matters combined with actions *in rem*) were considered not to be appropriate in a worldwide convention;

[2] This is, with a few exceptions, the rule of the Brussels and the Lugano Conventions – see Article 28 of both Conventions.

[3] In short: the court of the place of domicile or habitual residence of the maintenance creditor, or, if the matter is ancillary to proceedings concerning personal status, the court dealing with those proceedings.

[4] As Article 10(4) (indirect ground of jurisdiction) of the 1971 Hague Convention does.

[5] As the Court of Justice of the European Communities, case 21/76, 30 November 1976, *Bier B.V.* v. *Mines de Potasse d'Alsace* (1976) ECR p. 1735, interpreted Article 5(3) of the Brussels Convention.

[6] Article 10(5) (indirect ground) '... unless the law of the State addressed would not permit such an agreement [on choice of court] because of the subject-matter of the dispute'.

i contracts; no final conclusion was reached as to whether to include a separate ground of jurisdiction for contracts in the 'white list' and, if so, whether that ground should be based on the place of the conclusion or of the execution of the contract. However, there was a consensus that if a special ground were to be included, there should be a critical examination of the desirability of having a multiplicity of courts for the different obligations resulting from the contract as in Article 5(1) of Brussels/Lugano as interpreted by the Court of Justice of the European Communities;[7]

j the domicile or place of establishment of trusts; there was general support for inclusion of this ground, but no agreement as to its precise form;

k possibly: the habitual residence of the consumer in some consumer contracts or the place where the work is carried out in some individual employment contracts;

l other grounds of jurisdiction: *e.g.* seat of a company or association in matters concerning the existence or dissolution of those bodies; place of registration of patents and trademarks, etc. (*cf.* Article 16 Brussels/Lugano).

9 Some of the grounds of jurisdiction to be admitted might have an *exclusive* character (*e.g.* grounds *c*, *f* or *j supra*; *c* and *j* prevailing over *f*). This would mean that, where a party sought to seize a court of a State Party to the convention other than a court having exclusive jurisdiction under the convention, the court would have to decline jurisdiction (in other words: in that case it could not assume jurisdiction on any ground be it in the white list or in the 'grey area').

Grounds of jurisdiction that might be excluded

10 There was consensus that the following grounds of jurisdiction deserve careful consideration for inclusion in the 'black list':

a the presence of property of the defendant as a ground of *in personam* jurisdiction; there was no consensus on the extent to which any exception should be made;[8]

b nationality of the plaintiff;

c the habitual residence/domicile of the plaintiff, except in special cases included among the grounds of jurisdiction that might be admitted;

d 'doing business' as a ground of general jurisdiction; this ground appears, as an indirect ground of jurisdiction which should lead to refusal of recognition and enforcement, in Article 4 *d* of the Supplementary Protocol to the 1971 Hague Convention; it does not appear on the list of excluded grounds of jurisdiction of Article 3 of Brussels/Lugano, but this is because 'doing business' has never been an accepted ground of jurisdiction in any EC or EFTA State. There was not a full consensus on whether this ground should be included among those to be excluded by the future convention;

e service of writ upon the defendant during his temporary presence; this ground appears in Article 4 *e* of the Supplementary Protocol; it also appears as an excluded ground of jurisdiction as to persons domiciled in a State Party, in Article 3 of Brussels/Lugano. There was not a full consensus on whether this ground should be included among those to be excluded by the future convention;

f unilateral specification of the forum by the plaintiff especially in consumer contracts (notably in an invoice), *i.e.* without express acceptance by the defendant;

g others.

Special problem areas

11 It was recognized that there were certain areas which present special problems, *e.g.*:

- anti-trust law/competition law;
- environmental law;
- products liability;
- damages in relation to the foregoing areas and others, *e.g.* torts generally – types and quantums.

These areas may give rise to problems at the stage of assumption of jurisdiction and/or of recognition and enforcement. An extensive discussion took place concerning possible solutions, including recent developments in case law in some Member States,[9] but no final conclusions were reached.

Forum non conveniens

12 It was recognized that further study was needed concerning the desirability of allowing courts of a State Party to the new convention to decline jurisdiction in certain cases where the action was not sufficiently connected to that State. Under Brussels/Lugano, there is, in principle, no room for this practice.

Specification of grounds of jurisdiction

13 The suggestion was made that, under the new convention, the plaintiff might ask the court of origin to specify in its judgment the grounds upon which the court has assumed jurisdiction, or might have assumed jurisdiction.

Lis pendens

14 It was agreed that this issue would take on a special importance in the context of a new convention, in view of the fact that the list of admitted jurisdictional grounds

[7] See, *inter alia*, CJEC, 6 October 1976, case 12/76, *Tessili* v. *Dunlop* (1976) ECR p. 1473; 6 October 1976, case 14/76, *De Bloos* v. *Bouyer* (1976) ECR p. 1497; 26 May 1982, case 133/82, *Ivenel* v. *Schwab* (1982) ECR p. 1891; 15 January 1987, case 266/85, *Shenavai* v. *Kreischer* (1987) ECR p. 239.

[8] *E.g.* where the action is brought to assert possessory rights in that property, or arises from another issue relating to such a property, or the property constitutes the security for a debt which is the subject matter of the action (*cf.* Article 4 *a* (indirect ground of jurisdiction) of the Supplementary Protocol to the 1971 Hague Convention).

[9] *E.g.* Bundesgerichtshof of Germany, 4 June 1992, Case No IX ZR 149/91, refusing enforcement of exemplary damages for reasons of public policy but allowing enforcement of order to pay compensation for pain and suffering even though German courts in similar cases would not have awarded more than one tenth of this sum.

would not be exhaustive. Article 21 of Brussels/Lugano[10] could possibly serve as a model but the issue in general would need further study.

Provisional and protective measures

15 Provisional and protective measures available under the laws of a State Party, in particular injunctions, present special problems which need to be further examined.

Recognition and enforcement

16 The provisions on recognition should be drafted so as to facilitate recognition to the greatest feasible extent. In this connection, some of the mechanisms of Article 26 of Brussels/Lugano[11] were considered as a possible solution.

As to the grounds for refusal of recognition and enforcement, the following were thought to deserve careful consideration:

a public policy;

b the principle of Articles 27(2) of Brussels/Lugano and Article 6 of the 1971 Hague Convention (no enforcement of a decision rendered by default, unless the defendant received notice of the proceedings in sufficient time to enable him to arrange for his defense), the actual wording needing further examination;

c Article 27(3) and (5) (irreconcilable judgments) of Brussels/Lugano.

Authentic instruments

17 It was agreed that the question of the enforcement of authentic instruments was a matter which could appropriately be considered in the context of a convention such as was being discussed, on the basis that a number of the experts indicated that their jurisdictions recognized authentic instruments, and they were matters which were already dealt with in the Brussels/Lugano Conventions.

Bilateralization

18 The Group agreed that it was premature at this stage to discuss the important question of whether the convention would enter into force among all ratifying States, or only between those States that agree that it should enter into force between them.[12]

Conclusion

The Group unanimously agreed on the desirability of attempting to negotiate through the Hague Conference a new general convention on jurisdiction and recognition and enforcement of judgments. It held very extensive discussions on issues that would arise in the case of such negotiations, including issues not mentioned *supra*, and considered a number of possible solutions. The Group also agreed that negotiating a convention along the lines sketched above, although not an easy matter, seemed to be technically feasible.

[10] Article 21 of both the Brussels Convention and the Lugano Convention reads as follows:
'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.'

[11] Article 26 of both the Brussels Convention and the Lugano Convention reads as follows:
'A judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required.
Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Section 2 and 3 of this Title, apply for a decision that the judgment be recognized.
If the outcome of proceedings in a court of a Contracting State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.'

[12] See Preliminary Document No 17, Nos 23/24.