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SUIVI DU PROJET SUR LES JUGEMENTS

établi par le Bureau Permanent

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CONTINUATION OF THE JUDGMENTS PROJECT

drawn up by the Permanent Bureau

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Introduction

1. The purpose of this Note is to facilitate a preliminary discussion at the next meeting of the Council on General Affairs and Policy of the Conference from 7 to 9 April 2010, on the possibility of continuing the work on judgments in civil and commercial matters. Prior work in the past decade resulted in the *Hague Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter "the Choice of Court Convention"), the first major building block for a global legal framework dealing with court judgments in civil and commercial matters. Obviously, this Convention does not deal with questions of jurisdiction and recognition and enforcement of judgments arising when the parties have *not* made an (exclusive) choice of court agreement for the purpose of deciding disputes which have arisen or may arise in connection with a particular relationship. The Council may wish to consider whether there is a need for an additional global legal instrument for such questions.

2. In view of the variety of jurisdictional practices and approaches to recognition and enforcement, litigants involved in international cases would undoubtedly welcome the enhanced legal certainty which a complement to the Choice of Court Convention would provide in respect of cross-border effects of a judgment and / or the jurisdictional grounds for access to (foreign) courts. Yet a new attempt by the Hague Conference to address any of those questions requires the recollection of past experiences, as well as the assessment of what is needed and achievable in the coming years.

Background

3. A number of Hague Conventions drawn up since 1951 deal with questions of jurisdiction or recognition and enforcement in special fields, *e.g.*, the recognition of divorce decrees,[1] jurisdiction relating to the wrongful removal of children,[2] enforcement of orders for payment of costs and expenses of proceedings,[3] recognition of orders relating to the adoption of children,[4] jurisdiction and recognition and enforcement of orders concerning the protection of children[5] and concerning vulnerable adults,[6] and of decisions concerning child support and other forms of family maintenance,[7] etc.

4. The *Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (hereinafter "the 1971 Convention"), completed by a Supplementary Protocol of the same date, deals with judgments in civil and commercial matters generally. It excludes questions of family law including succession, many of which are covered by other Hague Conventions, bankruptcy, social security and arbitration, among others. It deals with recognition and enforcement of judgments only ("C*onvention simple"*) and therefore does not directly regulate the

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[1] *Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations.*
[2] *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*
[3] *Hague Convention of 25 October 1980 on International Access to Justice; Hague Convention of 1 March 1954 on civil procedure.*
[4] *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.*
[5] *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.*
[6] *Hague Convention of 13 January 2000 on the International Protection of Adults.*
[7] *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance; Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations; Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children.*

assumption of jurisdiction by the original court (unlike a "C*onvention double"*).[8] The Supplementary Protocol requires the Contracting States to refuse recognition and enforcement of judgments based on certain "exorbitant" grounds of jurisdiction, rendered against persons located in a Contracting State. The Convention and its Protocol have remained inoperative, however, due to the fact that the Contracting States[9] have not concluded the Supplementary Agreements provided by Article 21 of the Convention, a necessary condition for the recognition and enforcement of judgments between States Parties. This is probably due not to any intrinsic qualities of the Convention, but mainly to (1) its unusual, complex form: Convention, Protocol, and Bilateral Supplementary Agreements and (2) the success of regional instruments, in particular the Brussels and Lugano Conventions.[10]

5. From 1996-2001, the Hague Conference conducted negotiations on a Convention that would deal both with the assumption of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, leaning towards existing double instruments such as the Brussels Convention of 1968 (now converted into the Brussels I Regulation) and the Lugano Convention. These efforts resulted, first, in a Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, completed by a Preliminary Document drawn up by Peter Nygh and Fausto Pocar.[11] This text excluded matters of family law, insolvency, social security, arbitration and maritime matters. While the "Interim Text",[12] subsequently adopted during the first part of the Nineteenth Session in 2001, left a number of issues unresolved failing consensus,[13] it does contain some interesting provisions on which agreement was achievable, and which could be the basis for future work (*e.g.,* Arts 21 on *lis pendens*, and 22 on Exceptional Circumstances for Declining Jurisdiction).

6. Following further work, the Conference decided in 2003 that the negotiations should focus only on issues of jurisdiction relating to choice of court agreements and the recognition and enforcement of judgments rendered by the agreed court. The negotiations resulted in the Choice of Court Convention, completed by the Explanatory Report drawn up by Trevor Hartley and Masato Dogauchi. The Convention excludes consumer and employment contracts. It found an elaborated solution for intellectual property cases and for the issue of the relationship with other Conventions.

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[8] See Ch. N. Fragistas, Explanatory Report on the 1971 Hague Judgments Convention, in *Actes et documents de la Session extraordinaire (1966), Exécution des Jugements*, The Hague, Imprimerie Nationale, 1969, pp. 360-388, in which reference is also made to the work of the Hague Conference on judgments prior to 1951, see, in particular, *Actes et documents de la Cinquième session (1925)*, p. 192, and *Actes et documents de la Sixième session (1928)*, pp. 392-394.

[9] Cyprus, Kuwait, the Netherlands and Portugal.

[10] See "Some Reflections of the Permanent Bureau on a general convention on enforcement of judgments", Prel. Doc. No 17 of May 1992 for the attention of the Special Commission of June 1992, in *Proceedings of the Seventeenth Session (1993),* Tome I*, Miscellaneous matters,* The Hague, SDU, 1995, pp. 230-239, No 3.

[11] P. Nygh and F. Pocar, "Report on the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters", Prel. Doc. No 11 of August 2000 for the attention of the Nineteenth Session of June 2001, available on the website of the Hague Conference at < www.hcch.net >, under "Conventions", "Convention No 37" then "Preliminary Documents".

[12] Interim Text – Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6 – 20 June 2001, prepared by the Permanent Bureau and the Co-reporters, available on the website of the Hague Conference at < www.hcch.net >, *ibid*.

[13] For an analysis of several areas in respect of which a lack of consensus created obstacles to progress, including: the Internet and e-commerce; activity-based jurisdiction, consumer and employment contracts, intellectual property rights, the relationship with other double Conventions, in particular the European instruments, as well as the question of bilateralisation (*i.e.,* whether treaty relations under the multilateral instrument should be subject to a requirement of reciprocal acceptance between the States parties), see "Some reflections on the present state of negotiations on the judgments project in the context of the future work programme of the Conference", Prel. Doc. No 16 of February 2002 for the attention of the Special Commission of April 2002 on General Affairs and Policy of the Conference, in *Proceedings of the Nineteenth Session (2002),* Tome I, *Miscellaneous matters,* The Hague, SDU, 2008, pp. 428-435.

7. The Choice of Court Convention was acceded to by Mexico in 2007, and signed both by the United States and the European Community in 2009. While the Convention is yet to enter into force, there is significant interest at present from various States with regard to the benefits the Choice of Court Convention affords. In addition, the Convention has been the basis for the provisions to give effect to exclusive choice of court agreements in the two identical Trans-Tasman Proceedings Bills, which are currently being examined by the Parliaments of Australia[14] and New Zealand.[15] The Convention also had an impact on the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region pursuant to Choice of Court Agreements between Parties Concerned made between the Supreme People's Court of the People's Republic of China and the Government of the Hong Kong Special Administrative Region.[16]

8. The Choice of Court Convention offers the world community a much needed instrument for court judgments parallel to what the *United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards* accomplishes for arbitral awards based on arbitral agreements. It puts an end to the anomaly that businesses have at their disposal a global instrument that ensures the recognition and enforcement of (privately arranged) arbitral awards but not of judgments rendered by courts on the basis of an agreement by the parties. Whichever developments follow next, the ongoing efforts to secure widespread ratification of the Choice of Court Convention should be encouraged and consolidated. The Permanent Bureau continues its work to ensure that the Choice of Court Convention is widely ratified, and to provide assistance on implementation to interested States.

Need and Options for further work beyond the Choice of Court Convention

9. As pointed out *supra* (No 2), it is acknowledged that future work in this area should be based on past experiences and the identification of what is needed and feasible at this time. It is hoped that the options presented below provide a preliminary basis for this assessment.

1. Continuing with a convention dealing both with primary grounds of jurisdiction and recognition and enforcement of judgments.

10. One option would be to continue the work along the lines of the Choice of Court Convention, *i.e.,* completing it by a binding instrument (either in the form of a Protocol or of a self-standing Convention) on certain "core" primary grounds of jurisdiction around which consensus might be achieved. In fact, this possibility was already examined by the informal Working Group that met from 2002 – 2003 under the chairmanship of Professor Allan Philip (Denmark) on the basis of a reflection paper drawn up by the Permanent Bureau.[17] This paper discussed the consequences of adding to choice of court agreements several of the other primary grounds of jurisdiction identified as "core" by the Nineteenth Session (submission by the defendant, the defendant's forum, counter-claims, trusts,

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[14] See < http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=;group=;holdingType=;id=;orderBy=priority,title;page=0;query=Id%3A%22legislation%2Fbillhome%2Fr4268%22;querytype=;rec=0;resCount= > (last consulted on 10 February 2010).

[15] See < http://www.legislation.govt.nz/bill/government/2009/0105/6.0/DLM2576223.html > (last consulted on 10 February 2010).

[16] See < http://www.legislation.gov.hk/intracountry/eng/pdf/mainlandrej20060719e.pdf > (last consulted on 10 February 2010).

[17] See A. Schulz, "Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters", Prel. Doc. No 19 of August 2002 for the attention of the meeting of the Informal Working Group of October 2002, available on the website of the Hague Conference at < www.hcch.net >, under "Conventions", "Convention No 37" then "Preliminary Documents".

branches, and physical torts).[18] However, in response to the most pressing needs of the international business community, the informal Working Group recommended restricting the work to exclusive choice of court agreements.

11. The Conference decided to follow this advice, and to limit the negotiations to choice of court agreements. Therefore, the option of an instrument dealing with assumption of jurisdiction on the basis of additional specific jurisdiction grounds (*i.e.*, submission by the defendant, the defendant's forum, counter-claims, trusts, branches, and physical torts), and the recognition and enforcement of the resulting judgments, was not further examined, and is still open.[19] The question remains whether an instrument which would be limited to these "core" grounds of jurisdiction would arouse sufficient interest to justify and motivate a new round of negotiations. An alternative approach would be to identify specific categories of disputes (*e.g.,* contracts, torts, immovable property, intellectual property, etc.) for which a complete set of acceptable grounds of jurisdiction would be developed. Whichever approach would be followed, the issue of parallel proceedings (*lis pendens*) might be tackled. Interesting examples of proposed international standards are available.[20]

2. Continuing with a convention on recognition and enforcement of judgments

12. It might be considered whether, in the light both of the Conference's experience and the rapidly evolving context of globalisation, a strong case could be made at this stage for a global instrument focussing on the recognition and enforcement of judgments. Negotiating such a Convention for the world would still be a challenge, but definitely less complicated than a Convention directly affecting the Contracting States' powers to regulate the grounds upon which their courts may assume jurisdiction. While the instrument would probably still need to address, with precision, which are *tolerable* grounds of jurisdiction *only for the purpose of recognition and enforcement of the foreign judgment* (indirect grounds of jurisdiction - *cf*. Arts 10 and 11 of the 1971 Convention) and the circumstances under which the jurisdiction of the court of the State of origin need not be recognized (*cf*. Art. 12 of the 1971 Convention), it is obvious that this would be more feasible than reaching consensus on direct grounds of jurisdiction.

13. A global Convention focussing on recognition and enforcement of judgments, would be a major further step towards a global litigation regime, complementing the Choice of Court Convention, given the current wide variety of requirements for recognition and enforcement of judgments in civil and commercial matters. These requirements vary from very liberal systems, via systems requiring reciprocity, in different kinds and degrees, systems which provide for the recognition and enforcement of certain types of judgements only, to systems that refuse recognition and enforcement in the absence of treaty arrangements.

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[18] *Ibidem*, p. 6. The concept of "physical torts" (in French: "*dommages matériels*") was used in order to distinguish the infringement of intellectual property rights, the so-called "speech torts" (*e.g.,* defamation, libel, slander) and pure economic loss from torts involving damage to the person or to tangible property.

[19] The 2002 Reflection Paper (*op. cit.* note 17) identified a number of challenges with regard to such "core" primary grounds of jurisdiction.

[20] See, for instance, Arts 21 and 22 of the preliminary draft Hague Convention of October 1999, Prel. Doc. No 11 of August 2000 (*op. cit.* note 11) and Arts 21 and 22 of the Interim Text (*op. cit.* note 12). Similarly, Art. 4.1 of the ILA Resolution No 1/2000, also known as the *Leuven/London Principles on declining and referring jurisdiction in civil and commercial matters*, available at the following address < http://www.ila-hq.org > (last consulted on 10 February 2010) and Art. 2.6 of the ALI/UNIDROIT Principles of Transnational Civil Procedure, available at the following address: < http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf > (last consulted on 10 February 2010). Compare with Art. 20 of the 1971 Convention.

14. Two recently negotiated Hague Conference Conventions (the Choice of Court Convention and the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*, hereinafter "the 2007 Child Support Convention") contain innovative schemes for recognition and enforcement. [21] These and other recent precedents could inspire the reflection on the feasibility of a new global Convention.

15. It would seem that a global Convention defining *positively* for the purposes of recognition and enforcement the circumstances under which the court of origin would be considered to have jurisdiction, would by itself in due course provide an important incentive to litigate in courts whose judgements would, under the Convention, qualify for recognition and enforcement. Consequently, a *negative* list,[22] which obliges Contracting States to refuse the recognition and enforcement of judgments based on certain grounds of jurisdiction considered to be "exorbitant", would be less necessary. As regards the idea of bilateralisation, underlying the 1971 Convention, the need for this was already questioned in the Permanent Bureau's Note of 1992, where it was argued that the techniques of permitting refusal of recognition or enforcement of foreign judgments were now "so well advanced that it should be possible to negotiate a convention system which would leave control over foreign judgments to the judiciary [and not to the administration]",[23] as would be the case under a system of bilateralisation.

16. In addition, a future instrument on recognition and enforcement might be complemented by rules on the basis of which courts *should* or *could* dismiss the proceedings (at the jurisdiction stage) when parallel proceedings are pending abroad *provided* the decision to be rendered is capable of being recognised and enforced under the Convention grounds.

3. Continuing with a model agreement

17. Back in 2002, the above-mentioned informal Working Group (*supra* para. No 10), faced with the practical impossibility for lack of time of exploring in more detail the possibility of adding grounds of jurisdiction to choice of court agreements, suggested that these other grounds of jurisdiction might be dealt with in a non-binding model agreement. This possibility was not further explored by the Conference, but the idea was not new. It had also been considered in the context of the negotiations on the 1971 Convention, but was then rejected because it was considered more complicated and less likely to lead to a homogeneous network of treaties than the (bilateralised) uniform Convention system.[24] It would seem that a model agreement is an option to be considered only if it is not possible to proceed along the lines of a binding instrument.

Conclusion

18. In the light of growing global interdependence, there is, in addition to regional developments (in the Asia Pacific, European or Latin American regions, among others), a need for further cooperation on litigation in civil and commercial matters. The stage has been reached to consider applying the experience accumulated within the Hague Conference in the context of the negotiations on the Choice of Court Convention to areas of court litigation not covered by this Convention. As a first step, it is appropriate to assess whether a multilateral approach is feasible and whether it would bring added advantages with respect to existing instruments.

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[21] *Cf.* Chapter III of the Choice of Court Convention and Arts 20(3), 23 and 24 of the 2007 Child Support Convention.

[22] As provided for by the Supplementary Protocol to the 1971 Convention, which obliges Contracting States to refuse the recognition and enforcement of judgments based on certain grounds of jurisdiction considered to be "exorbitant".

[23] *Op. cit.* note 10, No 24.

[24] See Fragistas Explanatory Report (*op. cit.* note 8), pp. 362-363.

19. This Note briefly discusses the possibility of resuming the Judgments Project along the lines of a Convention dealing with jurisdiction and recognition and enforcement of judgments in civil and commercial matters, a Convention focussing on recognition and enforcement of judgments, or a model agreement. As a first step, consideration might be given to convening a group of experts, possibly after the entry into force of the Choice of Court Convention at the international plane, to advise on the areas where it might be feasible to resume work on judgments, and where consensus might be possible. In the light of the analysis and recommendations of the group, the Council might then, at its next or one of its next meetings, take a decision on the ongoing construction of a global framework to deal with litigation on civil and commercial matters. As regards the necessary resources, the preparation and support of the work conducted by the Expert Group would require the continued direction by, and involvement (including the drafting skills) of a senior lawyer and the assistance of a junior lawyer working full-time on international litigation.