



Doshisha University

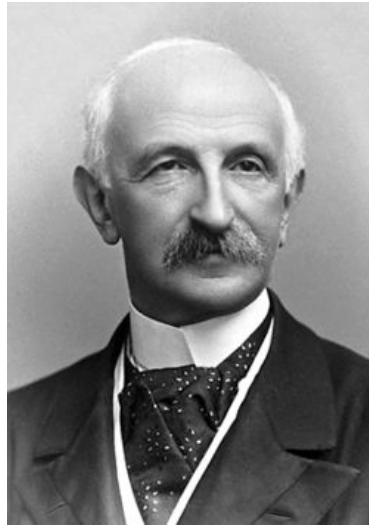


“Recent Developments regarding the Hague Judgments Project”

“International Symposium on Private International Law in Asia, at Doshisha University, Kyoto, Japan, December 2015”

Marta Pertegás
First Secretary

A long time aspiration...



“Truly fortunate is the nation, which sets itself the goal of finding the means to improve [...] all in its current legislation that still hampers trade, [...] and does so with the intent [...] of seeing accepted the principle of mutual recognition of judgments, [...]”

Tobias Asser, 1862

History of the Judgments Project

- The HCCH has been working towards a **global instrument on foreign judgments** since decadesW
- Initially, with the Judgments Project, a broad instrument covering both *jurisdiction* **and** *recognition / enforcement* was intended
- Unfortunately **consensus was unable to be reached**
- However, this initial project did produce the **2005 Choice of Court Convention**, which has now entered into force in 28 States.



Recent Developments

- The Judgments Project **resumed** (in its current form) **in 2012**
- An Experts' Group was tasked with **advising on the feasibility of jurisdiction rules** (including parallel proceedings)
- A Working Group was established, whose focus has been on the **recognition and enforcement of foreign judgments**
- Following its recent fifth meeting, the Working Group produced a ***Proposed Draft Text***, which would be submitted to the Council in 2016, for consideration by a Special Commission.



Proposed Draft Text




(status as of Dec 2015)

Proposed Draft Text: Broad Scope of Application

Includes:

- Civil and commercial matters
- Consumer and employment related judgments

Excludes (among others):

- Status and legal capacity of natural persons
 - Maintenance obligations
 - Other family law matters
 - Defamation
 - Carriage of passengers and goods
 - Certain maritime claims
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Recognition and enforcement under the Proposed Draft Text

R&E under the Convention, without any review of the merits
(Art. 4)

Bases for R&E
(Art. 5)

e.g. Defendant expressly consented to the jurisdiction of the court of origin

Exclusive bases

(registration or validity of patents, trademarks, designs; immovable property) (Art. 6)

Refusal of R&E
(Art. 7)

Proceedings in court of origin were in contradiction of a jurisdictional agreement

Traditional grounds of refusal
(defective service, fraud, public policy and procedural fairness, inconsistent judgments)



Comparing the Proposed Draft Text with Japanese rules

Article 118 (Code of Civil Procedure): Effect of **final and binding judgment** rendered by foreign court

A final and binding judgment rendered by a foreign court shall be effective only where it meets all of the following requirements:

- (i) The **jurisdiction** of the foreign court is recognised under laws or regulations or conventions or treaties
- (ii) The defeated defendant has received a **service** (excluding a service by publication or any other service similar thereto) of a summons or order necessary for the commencement of the suit, or has appeared without receiving such service
- (iii) The content of the judgment and the court proceedings are not contrary to **public policy** in Japan
- (iv) A **mutual guarantee** exists

*Similar requirements apply for enforcement of a foreign judgment (Article 24 of the Civil Enforcement Act)



Comparing the Proposed Draft Text with Japanese rules

- “Final and binding judgment” (Art. 118)
- 28 April 1998, Supreme Court of Japan
 - An order for payment of expenses, made by a Hong Kong Court, is a “final and binding judgment”
- Definition of “judgment” under the Proposed Draft Text
 - “judgment” means any decision on the merits given by a court, whatever it may be called, including... a determination of costs or expenses by the court...
 - An interim measure of protection is not a judgment.

Comparing the Proposed Draft Text with Japanese Private International Law

- Under the Proposed Draft Text: acceptable “bases for recognition and enforcement”
 - For instance, voluntary submission / express consent is an accepted ground of jurisdiction (Article 5(1) (d)).
 - Similar to:
 - 13 November 1967, Tokyo District Court
 - This litigation was for the enforcement of a judgment rendered by the Zurich Court. The court held that the Zurich Court had jurisdiction as the Japanese defendant had **voluntarily submitted** to the court.

Comparing the Proposed Draft Text with Japanese rules

- Under Article 5(1)(e) of the Proposed Draft Text, a judgment is eligible for recognition and enforcement if
 - (e) the judgment ruled on a **contractual obligation** and it was given in the State in which **performance of that obligation took place or should take place under the parties' agreement or under the law applicable to the contract**, unless the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;
- Place of performance is an adequate basis of jurisdiction, unless there is a lack of “purposeful and substantial connection”

Comparing the Proposed Draft Text with Japanese rules

- 2 May 1972, Tokyo District Court
 - Enforcement of a French judgment was sought, but the Tokyo District Court held that the place of performance of the obligation as designated by the chosen law **cannot** be the connecting factor for international jurisdiction.
 - (However, other precedents show that the place of performance of the obligation **can** sometimes be the basis of jurisdiction of the court of origin: see 22 September 1993, Kobe District Court; 14 January 1994, Tokyo District Court)

Comparing the Proposed Draft Text with Japanese rules

- The Proposed Draft Text provides that recognition and enforcement of the foreign judgment *may* be refused if...
 - (a) the document which instituted the proceedings or an equivalent document, including a statement of 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;



Comparing the Proposed Draft Text with Japanese rules

- “The defeated defendant has received service... of a summons or order necessary for the commencement of the suit, or has appeared without receiving such service” (Art. 118)
- 8 December 1997, Tokyo District Court Hachioji Branch
 - Documents must have appeared to be **reasonably** understandable as the official summons or order from a foreign court by a Japanese person who has ordinal judgment ability
 - Translation must be attached to the documents, and the sending of documents must meet the procedural requirements for judicial assistance.

Comparing the Proposed Draft Text with Japanese rules

- In the Proposed Draft Text, recognition or enforcement of a judgment may be refused
 - if 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 (Art. 7(1)(c)); and
 - **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 (Art. 9)

Comparing the Proposed Draft Text with Japanese rules

- Similarly, “The content of the judgment and the court proceedings are not contrary to public policy in Japan” (Art. 118)
- 11 June 1997, Supreme Court of Japan
 - Enforcement of a Californian judgment was sought. The Supreme Court held that the part of the judgment which ordered **punitive damages** is **contrary to public policy**, because the purpose of the Japanese compensation system for tort claims is to order damages which would place the victim in the position it was in before the tort, and not to punish the perpetrator nor prevent similar acts from occurring in future.

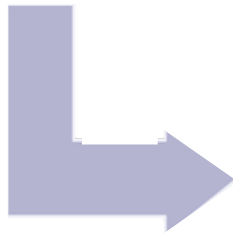
In a nutshell

Japanese law	Proposed Draft Text
The jurisdiction of the foreign court is recognised under laws or regulations or conventions or treaties	Jurisdictional filters under Art. 5 and Art. 6
The defeated defendant has received a service ... of a summons or order necessary for the commencement of the suit, or has appeared without receiving such service	Defective service is a ground for refusal under Art. 7
Content of the judgment and the court proceedings are not contrary to public policy in Japan	Manifest incompatibility with public policy of requested State is a ground for refusal under Art. 7
Mutual guarantee exists	"Presumed reciprocity" between Contracting States

Timeline of Future Work

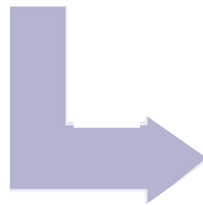
Working Group

- Completion of Proposed Draft Text
- Report to be submitted to Council and discussed in March 2016



Special Commission

- To be convened by the Council
- First meeting possibly in June 2016



Diplomatic Conference

Experts' Group on jurisdiction?

- Subject to Council's approval, the Experts' Group "should meet soon after the Special Commission has drawn up a draft Convention".

Marta Pertegás

mp@hcch.nl



www.hcch.net