AFFAIRES GÉNÉRALES ET POLITIQUE
GENERAL AFFAIRS AND POLICY

Doc. prél. No 3
Prel. Doc. No 3

mars / March 2013

HccH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

TRAVAIL EN COURS EN MATIÈRE DE CONTENTIEUX INTERNATIONAL

établi par le Bureau Permanent

* * *

ONGOING WORK ON INTERNATIONAL LITIGATION

prepared by the Permanent Bureau

Document préliminaire No 3 de mars 2013 à l'attention
du Conseil d'avril 2013 sur les affaires générales et la politique de la Conférence

Preliminary Document No 3 of March 2013 for the attention
of the Council of April 2013 on General Affairs and Policy of the Conference

Permanent Bureau | *Bureau Permanent*
6, Scheveningseweg 2517 KT The Hague | *La Haye* The Netherlands | *Pays-Bas*
telephone | *téléphone* +31 (70) 363 3303 fax | *télécopieur* +31 (70) 360 4867
e-mail | *courriel* secretariat@hcch.net website | *site internet* http://www.hcch.net

TRAVAIL EN COURS EN MATIÈRE DE CONTENTIEUX INTERNATIONAL

établi par le Bureau Permanent

* * *

ONGOING WORK ON INTERNATIONAL LITIGATION

prepared by the Permanent Bureau

Introduction

1. This document reports on the ongoing work of the Hague Conference on Private International Law in the area of international litigation. This work is framed by two recent decisions of the Council on General Affairs and Policy of the Conference. At its meeting in 2011, Council confirmed that promotion and implementation activities should be continued on the *Convention of 30 June 2005 on Choice of Court Agreements* to ensure its timely entry into force. In parallel, Council concluded that a small Experts' Group should be set up to explore the background of the Hague Judgments Project[1] and recent developments.

2. At its 2012 meeting, Council concluded that a working group should be established whose initial task would be to prepare a proposal in relation to provisions for inclusion in a future instrument relating to the recognition and enforcement of foreign judgments. Furthermore, Council requested that additional work be undertaken by the Experts' Group on the desirability and feasibility of making provisions in relation to matters of jurisdiction (including parallel proceedings) in this or another instrument.

3. This Report provides Council with an update on the status of the 2005 Convention and of recent developments related to international forum selection with a view to further stimulate the entry into force of the Convention. A summary is also provided of the work conducted since the Council of 2012 on the continuation of the Judgments Project.

1. Status of the *Convention of 30 June 2005 on Choice of Court Agreements*

4. The Permanent Bureau continues its efforts to promote the entry into force of the Choice of Court Convention and has welcomed the clear indications that several States and regions are actively moving towards joining the Convention.[2]

5. The Choice of Court Convention was acceded to by Mexico in 2007 and both the European Union and the United States of America signed the Convention in 2009 but still need to ratify it. However, this past year progress has been made on both sides of the Atlantic bringing the United States and the European Union closer to ratifying the Convention. In December 2012, the European Union adopted a "Recast" of the Brussels I Regulation.[3] The Recast Regulation now aligns its choice of court provisions with the key operational provisions of the Choice of Court Convention, providing a clear signal that a ratification proposal will be submitted by the European Commission soon.[4] In the United States, in preparation for ratifying the Convention, the State Department has been

[1] See the Hague Conference website < www.hcch.net > under "Specialised Sections" then "Judgments Project".
[2] See 2012 Hague Conference Annual Report, under "International Legal Co-operation and Litigation". Further to the promotional activities outlined in the Annual Report the Permanent Bureau presented on the Choice of Court Convention at a recent event from 26 to 28 February 2013 in Tbilisi, Georgia, titled "Fostering Co-operation through Hague Conventions" and at a Dutch-Russian Seminar on Legal Cooperation "Better Justice, Better Business" held in The Hague on 6 March 2013. Further information on these recent events is available through the Hague Conference website < www.hcch.net > under "News and Events" then "2013".
[3] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* 2001, L12, p. 1. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1, available on the European Union website at < http://europa.eu > under "Find legislation".
[4] See communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Delivering an Area of Freedom, Security and Justice for Europe's Citizens, Action Plan Implementing the Stockholm Programme (COM (2010) 171 final), p. 28.

working towards draft federal implementing legislation, an unofficial draft of which was circulated for consideration at an open meeting in January 2013 of the US Department of State Advisory Committee on Private International Law ("ACPIL"). These and other recent activities in the United States demonstrate the desire of the United States legal community in seeing the Convention enter into force.[5]

6. Movement towards joining the Convention is taking place in Ukraine. In 2011, the Ministry of Justice of Ukraine conducted a public consultation with representatives of concerned agencies, academic and educational institutions and lawyers on the feasibility of signing the Convention.[6] In June 2012, the Ministry of Justice published a report outlining the prospects and implications for Ukraine of joining the Convention, which concluded by endorsing its signing and outlining the notable benefits of the Convention for Ukraine.[7]

7. The Permanent Bureau has also received new expressions of interest from a number of States, including Paraguay, the Russian Federation, Turkey and Serbia, and has been able to follow up this interest with government officials, judges, academics and legal practitioners on a number of occasions.

8. On a broader international level, the implementation of the Convention continues to receive strong support from the international business community. In November 2012, the International Chamber of Commerce (ICC) "reaffirmed its support for the Hague Choice of Court Convention and urge[d] governments to bring it into force without further delay".[8] The ICC stated that the Convention is a necessary tool for effective cross-border dispute resolution as it provides increased certainty in international commercial transactions and reduces the workload of courts and party costs.

9. Indeed, an analysis of recent case law and doctrinal commentary on choice of court agreements under national law reveals the potential benefit that the Convention will have, once it enters into force, to cross-border dispute resolution.

10. Firstly, the Choice of Court Convention will ensure that the chosen court has exclusive jurisdiction to hear the case. This rule is in contrast to the law in some States where a chosen court may refuse to assert jurisdiction where the court is not otherwise able to assume jurisdiction under its national law. For instance, in India, a court will not accept jurisdiction based on a choice of court agreement where jurisdiction does not otherwise exist under the Indian Code of Civil Procedure.[9] This principle was confirmed in

---

[5] The most recent meeting of the ACPIL, in October 2012, featured the Choice of Court Convention on the programme. Several articles have recently been published in favour of the Convention's ratification, such as S. Burbank, "A Tea Party at The Hague", 2013, *Southwestern Journal of International Law*, Vol. 18 (forthcoming). C. Edsall, "Implementing the Hague Convention on Choice of Court Agreements in the United States: an opportunity to clarify recognition and enforcement practice", 2010, *Yale Law Journal*, Vol. 120, Issue 2, 397. G.S. Lipe, and T.J. Tyler, "The Hague Convention on Choice of Court Agreements: creating room for choice in international cases", 2010 *Houston Journal of International Law,* Vol. 33, Issue 1, 1. See, for a comprehensive bibliography on the Choice of Court Convention, the Hague Conference website < www.hcch.net > under "Conventions" then "No 37" and "Bibliography".

[6] In 2011, the Ministry of Justice of Ukraine posted the Convention on its website in order to engage the legal community in discussion about prospects of joining the Convention. Following this, a roundtable discussion was held with representatives of concerned agencies, academic and educational institutions and lawyers.

[7] M. Snizhko, "Prospects and implications of Ukraine signing the Convention on Choice of Court Agreements", Ministry of Justice of Ukraine Explanation, 12 June 2012, available at < http://zakon4.rada.gov.ua/laws/show/n0021323-12 > (in Ukrainian).

[8] "ICC calls on governments to facilitate cross-border litigation", *ICC Commission on Commercial Law and Practice*, Paris, (29 November 2012) available at < http://www.iccwbo.org/News/Articles/2012/ICC-calls-on-governments-to-facilitate-cross-border-litigation/ >.

[9] It should be noted that this principle does not apply when the parties agree to submit to the exclusive or non-exclusive jurisdiction of a foreign court.

a recent decision of the High Court of Delhi.[10] If India were to join the Convention, Article 5 would operate so as to allow the courts in India to exercise jurisdiction regardless of the grounds of jurisdiction set out in the Code of Civil Procedure. At the same time, it should be noted that Article 19 of the Convention would enable India to declare that its courts may refuse to hear cases where there is no connection between the State and the parties or dispute.

11. In Australia, a court has the discretion not to enforce a choice of court agreement designating an Australian court. Although this has not in fact occurred in any case, it remains a possibility, and this uncertainty would be eliminated by the Convention.[11]

12. Secondly, the Convention will set up common standards among Contracting States as to the obligations for a court other than the court designated in a choice of court agreement. In a 2012 decision, the Federal Court of Justice of Germany declined to enforce a choice of court agreement contained in an agency contract, which designated a court in the US state of Virginia, on the basis that allowing proceedings to continue in Virginia would deprive the agent of mandatory indemnity and compensatory provisions under European Union law.[12] If the Choice of Court Convention had been in force as between Germany and the United States of America, Article 6 of the Convention would have required the German court to stay the proceedings before it in favour of the chosen court unless the court determined that one of the exceptions under Article 6 applied.

13. The Convention's entry into force may even contribute to the approximation of legal approaches within a Contracting State with non-unified legal systems. In Canada, for instance, a divergence has been identified in the approaches taken by the courts regarding the enforcement of choice of court clauses under civil and common law jurisdictions. The Civil Code of Quebec contains a rule, such that the court not chosen must not hear the matter unless the defendant submits to the Quebec court or the clause is deemed contractually invalid.[13] In contrast, provinces of the common law tradition take a more discretionary approach, permitting the non-chosen court to hear the case if it considers there to be "strong cause" to do so. One commentator has noted that the "strong cause" test is prone to being confused with the *forum non conveniens* rule, leading to wider discretion amongst the courts when deciding whether to enforce choice of court agreements, resulting in less effect being given to those agreements.[14] If the Choice of Court Convention were in force in Canada, there would be a harmonised approach amongst the provinces as to the jurisdiction of non-chosen courts where a choice of court agreement exists between parties in international cases.

---

[10] *Piramal Healthcare Limited v. DiaSorin S.p.A*, 26 August 2010, CS(OS) No 275/2010. Following a decision of the Supreme Court of India in *Modi Entertainment Network & Anr v. W.S.G. Cricket Pte. Ltd*, 21 January 2003, Appeal (civil) 422 of 2003. While these cases concerned choice of court clauses designating foreign courts, this well established principle was referred to in both cases.

[11] R. Garnett, "The Hague Choice of Court Convention: *Magnum Opus* or much ado about nothing?", *Journal of Private International Law*, 2009, Vol. 5, Issue 1, 165.

[12] *Bundesgerichtshof*, 5 September 2012, case number, VII ZR 25/12, available at < http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2012-9-5&nr=61762&pos=11&anz=12 > (in German).

[13] Art. 3148, Civil Code of Quebec. This position was cemented in the 2005 Supreme Court decision of *GreCon Dimiter v. J.R. Normand* 2005 SCC 46, [2005] 2 SCR 401 [GreCon]. See G. Saumier and J. Bagg, "Forum Selection Clauses before Canadian Courts – A Tale of Two (or Three?) Solitudes", *UBC Law Review* (2013 forthcoming), 10, available at < http://www.heydary.com/resources/litigation/SSRN-id2049533.pdf >.

[14] While the Ontario Court of Appeal dealt with the overlap between the strong cause test and *forum non conveniens* in the decision of *Momentous Ca. v. Canadian American Association of Professional Baseball* 2010 ONCA 722, on appeal the Supreme Court of Canada confirmed the decision in *Mononteous* but did not make any ruling as to the criteria that should be applied for the strong cause test. G. Saumier and J. Bagg, *ibid*, 15.

14. Thirdly, the entry into force of the Convention will reinforce the effectiveness of dispute resolution planning and avoid unnecessary duplication of proceedings. A recent case in Finland[15] illustrates the shortcomings where there is no international framework to ensure the effectiveness of choice of court agreements. The case concerned a surety contract containing a choice of court agreement designating courts in the US state of California as the chosen forum. A judgment was rendered by the chosen court and enforcement was sought in Finland. The judgment creditor brought fresh proceedings before the Finnish court, as Finnish law – like the law of a number of Nordic and other States – requires an international binding agreement for the recognition and enforcement of judgments and no such agreement exists between Finland and the United States of America. At first instance, the court assumed jurisdiction but dismissed the claim on the basis that the surety contract was invalid.[16] On final appeal, the Supreme Court of Finland held that although the choice of court agreement could oust the jurisdiction of the Finnish Court, as the defendant had expressly accepted the jurisdiction of the Finnish court, the jurisdictional clause no longer had such an effect. Accordingly, the proceedings continued before the Supreme Court with the court ultimately deciding in favour of the judgment creditor, and awarding the same amount of damages as the foreign judgment. If the Choice of Court Convention were in force as between Finland and the United States, there would have been no need to duplicate proceedings before the Finnish courts. In particular, Article 8 would have provided the basis to recognise and enforce the US judgment without fresh proceedings. Moreover, Article 9 *a)* would have alleviated the need to re-examine the validity of the choice of court agreement. Finally, Article 3 *d)* would have authorised the Finnish Court to treat the choice of court clause as independent of the rest of the surety agreement, allowing it to be held valid even if the surety agreement was found to be invalid.

2. Continuation of the Judgments Project

15. In accordance with the 2011 Council mandate, an Experts' Group was established to study the merits of resuming the Judgments Project. The meeting of the Experts' Group took place from 12 to 14 April 2012, prior to the 2012 Council meeting.

16. At the 2012 Council meeting, the work of the Experts' Group was welcomed and Council determined that the Experts' Group should reconvene to conduct further work on the desirability and feasibility of making provisions in relation to matters of jurisdiction (including parallel proceedings) either in a future instrument relating to recognition and enforcement of judgments, or in another future instrument. Council further concluded that a Working Group should be established with the task of preparing proposals in relation to provisions for inclusion in a future instrument relating to recognition and enforcement of judgments, including jurisdictional filters.

17. In preparation for the meetings of the Working Group and the Experts' Group, the Permanent Bureau was requested to prepare two notes: Note 1, which contained an annotated checklist of issues to be discussed by the Working Group on recognition and enforcement of judgments, and Note 2, an issues paper on matters of jurisdiction (including parallel proceedings).

18. The Permanent Bureau continues to maximise resources both human and financial allocated to the Judgments Project in order to facilitate the continuing development of

[15] Supreme Court of Finland, 4 October 2011, case number 74, available at < http://www.kko.fi/56141.htm > (in Finnish).
[16] On appeal, the Court of appeal upheld the validity of the dispute resolution clause and found that it precluded the Finnish court from assuming jurisdiction, even jurisdiction to hear proceeding to enforce an existing foreign judgment.

that Project. In this regard, the Permanent Bureau acknowledges the significant contribution made by the Government of Australia to the Judgments Project, which resulted in the hiring of a Legal Assistant from Australia, Ms Cara North, for a period of 12 months (from January to December 2013).

19. From 18 to 23 February 2013, the Working Group and the Experts' Group met at the premises of the Permanent Bureau. The meetings of both the Working Group and the Experts' Group were suspended until October 2013 for the purpose of reaching a more informed assessment of the issues involved. The draft report of the Working Group meeting and the draft report of the Experts' Group meeting appear as Annex 1 and 2 to this document.

A N N E X E S

First Meeting of the Working Group on the Judgments Project (18-20 February 2013)

HCCH
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ

Report

From 18 to 20 February 2013, the **Working Group on the Judgments Project** (the Working Group) met at the premises of the Permanent Bureau of the Hague Conference on Private International Law for the first time. The Working Group, which was composed of 26 participants from 18 Members,[1] elected Mr David Goddard as Chair.

The purpose of the meeting was to commence the task conferred by the Council on General Affairs and Policy of the Conference, at its meeting of April 2012, to prepare proposals "in relation to provisions for inclusion in a future instrument relating to recognition and enforcement of judgments, including jurisdictional filters".[2] As contemplated by the Council, the Working Group began by working on a core of essential provisions, while acknowledging the potential for discussing proposals to expand the scope of the provisions at future meetings.

This report records the provisional views on the basis of which the Working Group proceeded.

RELATIONSHIP WITH THE CHOICE OF COURT CONVENTION

The Working Group proceeded on the basis that the future instrument is expected to be a Convention, which will sit alongside the *Hague Convention of 30 June 2005 on Choice of Court Agreements* (Choice of Court Convention). In view of the complementary nature of these two instruments, the Working Group determined that the starting point for preparing proposals for inclusion in the future instrument should be the corresponding provisions of the Choice of Court Convention, where relevant.

SUBSTANTIVE SCOPE

The Working Group proceeded on the basis 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.

The Working Group proceeded on the basis that Article 2 of the Choice of Court Convention provides a starting point for considering possible exclusions from scope, and highlighted a number of specific matters for further discussion, including consumer and employment matters, defamation proceedings, and a number of specific matters listed in Article 2(2) of the Convention. The Working Group also flagged the possibility of using a

[1] The participating Members were Argentina, Australia, Belarus, Brazil, China (People's Republic of), Costa Rica, Cyprus, the European Union, France, Germany, Japan, Mexico, New Zealand, the Russian Federation, South Africa, Switzerland, the United Kingdom and the United States of America.

[2] Report of the Council on General Affairs and Policy of the Conference of 17 to 20 April 2012, Prel. Doc. No 1 of July 2012 for the attention of the Council of April 2013 on General Affairs and Policy of the Conference, Conclusion and Recommendation No 17. The Council also invited the Experts' Group to reconvene in order to consider and make recommendations on the desirability and feasibility of making provisions in relation to matters of jurisdiction (including parallel proceedings) in this or another future instrument.

declaration or reservation mechanism (similar to that in Arts 21 and 22 of the Choice of Court Convention) as an alternative to exclusions from scope, or to extend scope, in respect of certain matters.

CATEGORIES OF JUDGMENT TO BE INCLUDED

The Working Group considered that the future instrument should apply to decisions rendered by courts, with the possibility of including the decisions of quasi-judicial bodies to be discussed at a later stage. The Working Group made useful progress in discussing certain specific categories of judgments for inclusion in the instrument. In particular, the Working Group proceeded on the basis that:

- The 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;
- the instrument would provide for enforcement of judicial settlements.

RECOGNITION AND ENFORCEMENT PROCESS

The Working Group proceeded on the basis that the provisions of the future instrument in relation to the recognition and enforcement process would take as their starting point the relevant provisions of Chapter III of the Choice of Court Convention, including Articles 8, 9 *c)–g)*, 13, 14 and 15, and that Article 11 of the Choice of Court Convention should be taken as the starting point for addressing judgments awarding non-compensatory damages.

JURISDICTIONAL FILTERS

The Working Group proceeded on the basis that jurisdictional filters should be included in the future instrument. Discussion of potential filters focused on the following topics:

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

The Working Group noted the need for further work on the circumstances in which submission may result in recognition and enforcement of a judgment (including relevant forms of submission).

The Working Group noted that additional jurisdictional filters may be desirable, depending on the position reached in relation to substantive scope.

The Working Group also noted the need to consider including provisions that would enable the court addressed to refuse recognition or enforcement of a judgment rendered by another court in circumstances where the State of the court addressed considers that it has exclusive jurisdiction (*e.g.*, on certain matters relating to immovable property).

FUTURE WORK

The Working Group suspended its meeting until October for the purpose of reaching a more informed assessment of the issues involved. The reconvened meeting is tentatively scheduled for the week commencing 14 October 2013.

To assist with future discussions, the Working Group requested the Permanent Bureau to prepare a research paper on each of the following topics:

- personal jurisdiction and *forum non conveniens* in the enforcement context; and
- judgments rendered in proceedings for collective redress (including class actions).

20 February 2013

Second Meeting of the Experts' Group on the Judgments Project (21-23 February 2013)

HCCH
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ

Report

From 21 to 23 February 2013, the **Experts' Group on the Judgments Project** (the Experts' Group) met at the premises of the Permanent Bureau of the Hague Conference on Private International Law for the second time under the chairmanship of Mr David Goddard.[1]

The purpose of the meeting was to consider the desirability and feasibility of making provisions in relation to matters of jurisdiction (including parallel proceedings) in a future instrument relating to recognition and enforcement of judgments, or in another future instrument, in accordance with the decision taken in April 2012 by the Council on General Affairs and Policy of the Conference.[2]

CURRENT PROGRESS AND FUTURE WORK

The Experts' Group had a constructive preliminary discussion about these matters, and the possible content and scope of provisions addressing them.[3]

The Group's provisional view was that an instrument concerning jurisdiction would be expected to address some or all of the following issues:

(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.

Progress was made in the discussions, however the Experts' Group was not yet in a position to make recommendations to Council. A range of views was expressed about the process going forward for the work of the Experts' Group.

The Experts' Group suspended its meeting until October for the purpose of reaching a more informed assessment of the issues involved.

23 February 2013

[1] The participating Members were Argentina, Australia, Belarus, Brazil, China (People's Republic of), Costa Rica, Cyprus, the European Union, France, Germany, Japan, Mexico, New Zealand, the Russian Federation, South Africa, Switzerland, the United Kingdom and the United States of America.
[2] Report of the Council on General Affairs and Policy of the Conference of 17 to 20 April 2012, Prel. Doc. No 1 of July 2012 for the attention of the Council of April 2013 on General Affairs and Policy of the Conference, Conclusion and Recommendation No 18.
[3] The discussion was informed by the Permanent Bureau's Background Note, certain provisions of the Interim Text, Note No 2 of January 2013 and discussion papers prepared by participants.