

Session 106

International Jurisdiction and Enforcement of Judgments: The Hague

Convention Report

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Draft Hague Convention on Jurisdiction and the Recognition
and Enforcement of Foreign Civil Judgments

The United States is engaged in an effort with over 40 other countries, including all our major trading partners, to negotiate a convention on jurisdiction and the recognition and enforcement of foreign civil judgments. The negotiations are underway at the Hague Conference on Private International Law in the Netherlands, with the next round scheduled for October 1999, and the final round scheduled for October 2000. Attached is a copy of the provisional draft text of the convention. It is also available on-line at www.hcch.net/e/events/events.html.

Why a Worldwide Judgments Convention?

Although the growth of international commerce, trade, and communications is accelerating, and the world continues to shrink, we are as far as we have ever been from an effective international regime for coordinating and enforcing the work of national courts in resolving transnational legal disputes. If not addressed, this widening gap between the global marketplace and the isolated national court systems will slow progress and inhibit growth in trade.

There is no effective, functioning legal framework for the recognition and enforcement of foreign court judgments outside of the Brussels and Lugano Conventions in Western Europe. This is true even among North Atlantic countries that share well developed legal systems and fair and reliable courts. By contrast, the highly effective universal framework for arbitral dispute settlement under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has transformed international commerce. Foreign arbitral awards may now be enforced in over 120 state parties to the New York Convention, and most major international contracts are concluded with a binding arbitration clause. The current negotiations at the Hague seek to answer the question whether such a transformation is possible for foreign civil judgments.

There is an opportunity to take a huge step toward an international regime for enforcing foreign court judgments at the Hague. If successful, the convention would establish a regime governing jurisdiction to sue defendants (in tort and contract) from party states, and would ensure predictability in the enforcement of the resulting judgments.

A successful judgments convention is extremely important to the United States. Whereas the United States is not currently a party to any bilateral or multilateral agreement on the reciprocal enforcement of civil judgments, U.S. courts are perceived as the most open in the world to the recognition and enforcement of foreign civil judgments. The ability of U.S. judgment holders to enforce their judgments abroad, however, is much more problematic. Even in those countries that will, in principle, enforce foreign judgments in the absence of a treaty, the reach of long-arm jurisdiction, excessive jury awards, and punitive damages are sometimes considered reasons not to enforce U.S. judgments.

Current Prospects for the Negotiations

The negotiations in the Hague are facing serious obstacles -- beginning with rules of jurisdiction. The Western Europeans adopted a rigid set of jurisdictional rules as part of the Brussels/Lugano enforcement system, but such an approach poses special difficulties for the United States.

Because the Due Process Clause puts unspecified limits on the extension of jurisdiction over defendants without a substantial link to the forum, the United States is unable to accept certain grounds of jurisdiction as they are applied in Europe under the Brussels and Lugano Conventions. For example, we cannot, consistent with the Constitution, accept tort jurisdiction based solely on the place of the injury, or contract jurisdiction based solely on place of performance stated in the contract.

At the same time, civil law attorneys (and their clients) are profoundly uncomfortable with jurisdiction based on doing business or minimum contacts, which they find vague and unpredictable. They feel strongly that certain aspects of U.S. jurisdictional practice must be restricted under the Convention. Although this divide has been partially bridged by agreement to permit some grounds of jurisdiction under national law to continue outside the Convention, critical

choices and hard negotiations remain. The succeeding rounds of negotiations will focus on questions such as: how broad to make jurisdiction required under the Convention, whether and how to define exclusive forums for some types of actions, what types of jurisdiction should be prohibited, and how wide should be the remaining areas of jurisdiction that would be outside the Convention.

Apart from jurisdiction, hard negotiations remain over such issues as: concurrent filings in more than one national court (called *lis pendens*); *forum non conveniens*; provisional and protective measures; punitive, non-compensatory and "excessive" damages; government litigation; and a lack of fairness or impartiality in the judgment court.

The Need for Private Sector Input

It is critical that practicing attorneys in all of the national jurisdictions take an interest in the outcome of the negotiations. The Department of State will be holding a meeting of the Study Group on Judgments of the Secretary of State's Advisory Committee on Private International Law on September 10, 1999 in Washington to discuss the U.S. approach to the next round of negotiations. This meeting will be announced in the Federal Register and open to the public.

Comments on the current provisional draft text of the Convention are welcome. Comments, requests to be placed on the Judgments mailing list, or any other inquiries should be sent to: Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, 2430 E St., NW, South Bldg., Suite 203, Washington, DC 20037-2860; by fax to 202-776-8482; or by email to < pildb@his.com >, attention Rosalia Gonzales.

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HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

**Preliminary draft Convention on jurisdiction
and the effects of judgments in civil and commercial matters****Adopted provisionally by the Special Commission on 18 June 1999¹**

CHAPTER I – SCOPE OF THE CONVENTION

Article 1 Substantive scope

1 This Convention applies to civil and commercial matters [before courts of Contracting States]. It shall not extend in particular to revenue, customs or administrative matters.

2 The Convention does not apply to –

- a) the status and legal capacity of natural persons;
- b) maintenance obligations;
- c) matrimonial property regimes and other rights and obligations arising out of marriage;
- d) wills and succession;
- e) insolvency, composition or analogous proceedings;
- f) social security;
- g) arbitration and proceedings related thereto.

3 A dispute is not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any other person acting for the State is a party thereto.

Article 2 Geographic scope

[to be considered]

¹ The Special Commission will meet in October 1999 to give its final approval to the preliminary draft Convention.

CHAPTER II – JURISDICTION

Article 3 Defendant's forum

Subject to the provisions of this Convention, a defendant may be sued –

- in the case of a natural person, in the courts of the [Contracting State] [place] where that person is habitually resident;
- in any other case, in the courts of the [Contracting State] [place] –
 - a) where it has its statutory seat,
 - b) under whose law it was incorporated or formed,
 - c) where it has its central administration, or
 - d) where it has its principal place of business.

Article 4 Choice of court

1 If the parties have agreed that a court or courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction unless the parties have agreed otherwise. Where such an agreement designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction.

2 Such agreement shall be valid as to form, if it was entered into or confirmed –

- a) in writing;
- b) by any other means of communication which renders information accessible so as to be usable for subsequent reference;
- c) in accordance with a usage which is regularly observed by the parties;
- d) in accordance with a usage of which the parties were or ought to have been aware and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.

3 Agreements conferring jurisdiction [and similar clauses in trust instruments] shall be without effect if they conflict with the provisions of Article 7 or 8, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 13.

Article 5 Appearance by the defendant

1 Subject to Article 13, a court has jurisdiction if the defendant proceeds on the merits without contesting jurisdiction.

2 The defendant has the right to contest jurisdiction not later than at the time of the first defence on the merits.

Article 6 Contracts

A plaintiff may bring an action in contract in a Contracting State –

- a) in matters relating to the supply of goods, in the courts for the place where the goods were supplied in whole or in part;
- b) in matters relating to the provision of services, in the courts for the place where the services were provided in whole or in part;
- c) in matters relating both to the supply of goods and the provision of services, in the courts for the place where performance of the principal obligation took place in whole or in part.

Article 7 Contracts concluded by consumers

1 A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the court for the place where it is habitually resident in a Contracting State, if

- a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and
- b) the consumer has taken the steps necessary for the conclusion of the contract in that State.

2 A claim against the consumer may only be brought by a person who entered into the contract in the course of its trade or profession before the court for the place of habitual residence of the consumer.

3 The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of forum –

- a) if such agreement is entered into after the dispute has arisen, or
- b) to the extent only that it allows the consumer to bring proceedings in another court.

Article 8 Employment contracts

[to be discussed]

Article 9 Branches

The plaintiff may bring an action in the courts for the place in a Contracting State where a branch, agency or any other establishment of the defendant is situated, provided that the dispute relates directly to the activity of that branch, agency or establishment.

Article 10 Torts or delicts

- 1 The plaintiff may bring an action in tort or delict in the courts of the Contracting State
 - a) in which the act or omission that caused injury occurred; or
 - b) in which the injury arose, unless the defendant establishes that the [defendant] [person claimed to be responsible] could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.
- 2 The plaintiff may also bring an action in accordance with paragraph 1 when the act or omission, or the injury is threatened.
- 3 If an action is brought in the courts of a Contracting State only on the basis that the injury arose or is threatened there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the [plaintiff] [injured party] has its habitual residence or seat in that State.

Article 11 Jurisdiction based on activities

[deleted]

Article 12 Trusts

- 1 In proceedings concerning the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, the courts of a Contracting State designated in the trust instrument for this purpose shall have exclusive jurisdiction.
- 2 In the absence of such designation, proceedings may be brought before the courts of the Contracting State, ...²

Article 12 bis Maritime jurisdiction

[to be discussed]

² Three variants were considered by the Special Commission without a final decision being taken.

Variant 1: with which the trust has the closest connection (criteria yet to be determined).

Variant 2: in which the principal place of administration is situated, or, if such place cannot be determined, the Contracting State with which the trust has the closest connection (criteria yet to be determined).

Variant 3: whose domestic law governs the trust.

Article 13 Exclusive jurisdiction

1 In proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated have exclusive jurisdiction, unless in proceedings which have as their object tenancies of immovable property, the tenant is habitually resident or has its seat in a different State.

2 In proceedings which have as their object the validity, nullity, or dissolution of a legal person, or the validity or nullity of the decisions of its organs, the courts of a Contracting State in which the legal person has its seat have exclusive jurisdiction. In order to determine that seat, the court seised shall apply the law of the State under whose law the legal person was incorporated or formed.

3 In proceedings which have as their object the validity or nullity of entries in public registers, the courts of the Contracting State in which the register is kept have exclusive jurisdiction.

4 In proceedings which have as their object the registration, validity or nullity of patents, trade marks, designs or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or, under the terms of an international convention, is deemed to have taken place, have exclusive jurisdiction.

Article 14 Provisional and protective measures

1 A court having jurisdiction under Articles 3 to 13 to determine the merits of the case has jurisdiction to order any provisional or protective measures.

2 A court of the place where property is located has jurisdiction to order provisional or protective measures in respect of that property.

3 A court of a Contracting State not having jurisdiction under paragraphs 1 or 2 may order provisional or protective measures, provided that

- a) their enforcement is limited to the territory of that State, and
- b) their [sole] purpose is to protect on an interim basis a claim on the merits which is pending or to be brought by the requesting party.

Article 15 Multiplicity of defendants

[to be considered]

Article 16 Counter-claims

[to be considered]

Article 17 Warranty and intervention

[to be considered]

Article 18 Related actions

[to be considered]

Article 19 Jurisdiction based on national law

Subject to Articles 4, 5, 7, 8, 13 and [14], the Convention does not prevent the application by Contracting States of rules of jurisdiction under national law, provided that this is not prohibited under Article 20.

Article 20 Prohibited grounds of jurisdiction

1 The application of a rule of jurisdiction provided for under the national law of a Contracting State is prohibited if there is no substantial connection between that State and the dispute.

2 In accordance with the preceding paragraph, jurisdiction shall not be exercised by the courts of a Contracting State, in particular, on the basis solely of one or more of the following –

- a) the presence or the seizure in that State of property belonging to the defendant;
- b) the nationality of the plaintiff;
- c) the nationality of the defendant;
- d) the domicile, habitual or temporary residence or presence of the plaintiff in that State;
- e) the carrying on of commercial or other activities by the defendant in that State;
- f) the service of a writ upon the defendant in that State;
- g) the unilateral designation of the forum by the plaintiff;
- h) proceedings in that State for declaration of enforceability or registration or for the enforcement of a decision;
- i) the temporary residence or presence of the defendant in that State;
- j) the signing in that State of the contract from which the dispute arises.

3 Nothing in paragraph 2 shall prevent the courts of a Contracting State from exercising jurisdiction in respect of a dispute which is directly related to –

- a) property of the defendant which is situated or seized in that State;
- b) the carrying on of commercial or other activities by the defendant in that State;
- c) proceedings in that State for declaration of enforceability or registration or for the enforcement of a decision.

[4 Nothing in this Article shall prevent a party from bringing an action under national law based on a violation of human rights [to be defined].]

Article 21 Margin of manoeuvre of States

[became Article 19]

Article 22 Authority of the court seised

[to be considered]

Article 23 Lis pendens

1 When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action [and requests for relief], the court second seised shall suspend the proceedings if the court first seised has jurisdiction and is expected to render a decision capable of being recognized [under this Convention] in the State of the court second seised [, unless the latter has exclusive jurisdiction under Article 4 or 13].

2 The court second seised shall decline jurisdiction as soon as it is presented with a decision rendered by the court first seised that complies with the requirements for recognition or enforcement [under this Convention].

[3 Upon application of a party, the court second seised may continue to hear the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered a decision on the merits within a reasonable time.]

[4 The provisions of the preceding paragraphs apply to the court second seised in a Contracting State even in a case where the jurisdiction of that court is based on the national law of that State under the provisions of Article 19.]

[5 For the purpose of this Article, a court shall be deemed to be seised –

- a) when the document instituting the proceedings or an equivalent document is lodged with the court, or
- b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant.

[As the case may be, the universal time is applicable.]

[6 This article shall not apply if –

- a) in the action in the court first seised the plaintiff seeks a determination that it has no obligation to the defendant, or]
- b) [the court first seised] [either court], on application by a party, determines that the court second seised is clearly more appropriate to resolve the dispute taking into account the requirements of Article 24, the procedural status of the proceedings in the court first seised and any ruling that court has issued in response to a request to decline jurisdiction.]

Article 24 Exceptional circumstances for declining jurisdiction

1 In exceptional circumstances, when the jurisdiction of the court is not founded on [Article 3 other than place of incorporation,] an exclusive choice of court agreement valid under Article 4 [or exclusive jurisdiction under Article 13] [or Articles 7 and 8], a court of a Contracting State seised of a claim may, on application by a party not later than at the time of the first defence on the merits, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another [Contracting] State has jurisdiction and is clearly more appropriate to resolve the dispute.

2 The court shall take into account, in particular –

- a) the inconvenience to the parties in view of their habitual residence or seat;
- b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;
- c) applicable limitation periods;
- d) the possibility of obtaining recognition and enforcement of any decision on the merits.

3 In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence or seat of the parties.

4 If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to lodge security sufficient to satisfy any decision of the other court on the merits.

5 When the court has suspended its proceedings under paragraph 1,

- a) it shall decline to exercise jurisdiction if the court of the other [Contracting] State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court, or
- b) it shall proceed to adjudicate the case if the court of the other [Contracting] State decides not to exercise jurisdiction.

CHAPTER III – RECOGNITION AND ENFORCEMENT

Article 25 Definition of “judgment”

For the purposes of this Chapter, “judgment” means –

- a) any decision given by a court of a Contracting State, whatever it may be called, including a decree or order, as well as the determination of costs or expenses by an officer of the court;
- b) decisions ordering provisional or protective measures in accordance with Article 14, paragraph 1.

Article 25 bis Judgments based on Article 19

This Chapter shall not apply to judgments based on a ground of jurisdiction provided for by national law in accordance with Article 19.

Article 26 General rule

Subject to Article 27 *bis*, a judgment rendered in a Contracting State on the basis of a ground of jurisdiction provided for in Articles 3 to 14 –

- a) shall be recognised in the State addressed if it has the effect of *res judicata* in the State of origin;
- b) shall be enforced in the State addressed provided that it is enforceable in the State of origin.

However, recognition or enforcement may be postponed if the judgment is the subject of review in the State of origin or if the time limit for seeking a review has not expired.

Article 26 bis Judgments not to be recognised or enforced

A judgment based on a ground of jurisdiction which conflicts with Articles 4, 5, 7, 8 or 13, or whose application is prohibited by virtue of Article 20, shall not be recognised or enforced.

Article 27 Verification of jurisdiction

- 1 The court addressed shall verify [*ex officio*] the jurisdiction of the court of origin.
- 2 In verifying the jurisdiction of the court of origin, the court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.
- [3 Recognition and enforcement of a judgment may not be refused on the ground that the court addressed determines that the court of origin should have declined jurisdiction in accordance with Article 24.]

Article 27 bis Grounds for refusal of recognition or enforcement

- 1 Recognition or enforcement of a judgment may be refused if –
 - a) proceedings between the same parties and having the same subject matter are pending before a court of the State addressed and those proceedings were the first to be instituted in accordance with Article 23;
 - b) the judgment is irreconcilable with a judgment rendered [between the same parties], either in the State addressed, or in another State, provided that in the latter case the judgment is [capable of being] recognised or enforced in the State addressed;
 - c) the judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed, including the right of each party to be heard by an impartial and independent court;
 - d) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence;
 - e) the judgment was obtained by fraud in connection with a matter of procedure;
 - f) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.
- 2 Without prejudice to such review as is necessary for the purpose of application of the provisions of this Chapter, there shall be no review of the merits of the judgment rendered by the court of origin.

Article 28 Judgments rendered by default

[deleted]

*Article 29 Documents to be produced*³

- 1 The party seeking recognition or applying for enforcement shall produce –
 - a) a complete and certified copy of the judgment;
 - [b) if the judgment was rendered by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;]
 - c) all documents required to establish that the judgment is *res judicata* in the State of origin or, as the case may be, is enforceable in that State;
 - d) if the court addressed so requires, a translation of the documents referred to above, made by a person qualified to do so.
- 2 No legalisation or similar formality may be required.
- 3 If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require the production of any other necessary documents.

Article 30 Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the State addressed so far as the Convention does not provide otherwise. The court addressed shall act expeditiously.

Article 31 Costs of proceedings

No security, bond or deposit, however described, to guarantee the payment of costs or expenses shall be required by reason only that the applicant is a national of, or has its habitual residence or seat in another Contracting State.

Article 31 bis Legal aid

Persons habitually resident in a Contracting State shall be entitled, in proceedings for recognition or enforcement, to legal aid under the same conditions as apply to persons habitually resident in the requested State.

³ The Special Commission could consider the possibility of drafting a transmittal form to be placed in an Annex to the Convention.

Article 32 Damages

1 In so far as a judgment awards non-compensatory, including exemplary or punitive, damages, it shall be recognised at least to the extent that similar or comparable damages could have been awarded in the State addressed.

2 a) Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, recognition may be limited to a lesser amount.

b) In no event shall the court addressed recognise the judgment in an amount less than that which could have been awarded in the State addressed in the same circumstances, including those existing in the State of origin.

3 In applying paragraph 1 or 2, 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.

Article 33 Severability

If the judgment contains elements which are severable, one or more of them may be separately recognised, declared enforceable or registered for enforcement.

Article 34 Authentic instruments

[to be considered]

Article 35 Settlements

[to be considered]

Article 36 Relation with other conventions

[to be considered]

Article 37 Uniform interpretation

[to be considered]

Article 38 Federal clause

[to be considered]

Article 39 Acceptance of adherence

[to be considered]