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How will it work in relation to e-commerce?

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The Hague Conference's "Judgments Project" 2.0 — how will it work in relation to e-commerce?

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Introduction

The Hague Conference on Private International Law (Hague Conference) has been working to harmonise and improve the application of the rules of private international law for more than 100 years. Some of the recent successes include the Hague Convention on Choice of Court Agreements (the Convention), concluded on 30 June 2005, and the Hague Principles on Choice of Law in International Commercial Contracts, approved on 19 March 2015.

In 1992, work on a new and ambitious convention was initiated at the Hague Conference. However, due to a range of factors, not least its wide scope, the great ambitions of the Judgments Project (as it was referred to) proved impossible at the time. When the work on the Judgments Project was first initiated, little regard was given for the special needs created by the internet. However, it soon became apparent that the internet raised several complex issues that made the finalising of the Judgments Project more difficult. At the same time, the widespread use of the internet amplified the importance and necessity of international instruments like the previously proposed Convention.

In recognition of the importance of the project, the Hague Conference has now resumed work on the Judgments Project. A report issued by the Council on General Affairs and Policy of the Conference in April 2011 breathed new life into the project.[1] This marked the start of renewed efforts driving the Judgments Project forward. The outcome of this work is found in the report of the fifth meeting of the working group on the Judgments Project (26–31 October 2015) with a proposed draft text resulting from the meeting.[2]

The Convention is a significant initiative with the potential to provide real benefits. The structure and approach adopted, as well as of the goals pursued are generally sound. However, as can be expected, some additional work is needed.

In this brief article, I will analyse some of the key features of the proposed draft text with particular emphasis on how the text will work in the context of the internet and e-commerce.

The over-all purpose

The Convention is aimed at meeting real, practical needs which are not met by existing instruments and institutional frameworks. It will enhance access to justice and facilitate trade and investment. The over-all purpose of the new proposal is made clear in Art 4, which clearly is the most important part of the proposal:[3]

> A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

There can be no doubt that there is a need for improved procedures for the recognition and enforcement of foreign judgments, and the increase in cross-border interaction sparked by the internet is an important reason for that need. At the same time, we must not lose sight of the fact that enforcement difficulties paradoxically are important for the functioning of the internet — just imagine if every law of every country in the world was enforced against any content you post online. Would we, for example, wish for the restrictive laws of the world's dictatorships to be enforced globally? What would be left online? Not much.

Thus the reality is that, while the goals of the proposed Judgments Project are commendable as such, it is crucial that appropriate restrictions are placed on the situations in which foreign judgments are recognised and enforced under the Convention.

The scope of the proposed Convention

Article 1 of the Proposed Draft Text emphasises that the Convention applies between Contracting States and that it is focused on the recognition and enforcement of judgments relating to civil or commercial matters. Under Art 2, several areas, including the carriage of passengers and goods, arbitration and defamation, are excluded from the scope of the Convention. Importantly, while the February 2015 preliminary text specifically pointed out that:[4]

> [f]urther consideration is needed of the proposals made to include specific provisions for recognition and enforcement of certain consumer and employment judgments.

The October 2015 proposed draft text includes both consumer contracts and employment contracts.[5]

Of particular relevance, Art 2(1)(k) excludes defamation from the scope of the Convention. While such an exclusion has both advantages (eg, avoiding having to tackle a particularly controversial area) and disadvantages (eg, a missed opportunity to tackle a particularly controversial area), it is difficult to see why judgments rendered in defamation disputes are excluded if judgments rendered, for example, in data privacy disputes are not.

In other words, if there is a commitment to excluding defamation, it is necessary to carefully consider whether to also exclude other areas of law — such as data privacy and breach of confidence — that share fundamental characteristics with defamation. In particular, data privacy is emerging as an area of huge importance, and (not least given that Art 2(5) caters for the enforcement of judgments in dispute to which governmental agencies are parties) the status of data privacy judgments must be carefully considered, both in the context of Art 2(1)(k) and in the context of Art 1(1) referring to "civil or commercial matters".[6]

In this context, mention may be made of the approach taken in the EU's Rome II Regulation, in which "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation" are excluded.[7] This wording may perhaps be "too European" for an international convention, and the exclusion has been controversial and may not be maintained long-term.[8] However, as an approach to delineating the excluded areas, it may be better suited than simply making reference to defamation, unless of course there are specific reasons for excluding defamation while still including closely related areas.

The grounds for jurisdiction that result in a duty to recognise and enforce

Article 5 outlines the grounds for jurisdiction that result in a duty on other Contracting States to recognise and enforce the judgment of the original court. Most of these grounds are both predictable and generally sensible. For example, a judgment is eligible for recognition and enforcement if the person who was the party in the proceedings in the court of origin and is the person against whom recognition or enforcement is sought was habitually resident in the state of origin at the time that person became a party to the proceedings in the court of origin.

Others, not surprisingly, will benefit from detailed consideration when applied in the internet and e-commerce setting. Article 5(1)(c) provides that:[9]

> A judgment is eligible for recognition and enforcement if … the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment;

However, in the context of e-commerce, the question of what level of activity is required for the conclusion that the defendant maintains an "establishment" in the state of origin needs careful consideration and it should not be assumed that different states will apply the same test for this.[10]

Another provision that needs special consideration from an e-commerce perspective is Art 5(1)(e). That Article makes clear that:[11]

> A judgment is eligible for recognition and enforcement if … 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;

However, ascertaining where the performance of certain e-commerce obligations take place or should take place is notoriously difficult and can only be done by reference to legal fictions. For example, where does the performance take place where a person who lives in State A part of the year, but who spends part of the year in State B and works in and spends a lot of time in State C, subscribes to an online streaming service? In light of this type of difficulty, the wisdom of placing reliance on such a concept is questionable unless more guidance is provided.

The particular position of consumer contracts

The proposed text contains special rules for consumer contracts. However, the term "consumer" is not defined. This may cause complications as not all countries define that term in the same manner. For example, under the Australian Consumer Law, the special protection afforded to consumers extends to certain business-to-business (B2B) contracts where the business essentially is in the same position as a consumer would be in the contractual situation in question. Thus, as I have stressed in the context of the 2005 Hague Convention,[12] given Australia's comparatively broad definition of consumers, there is a mismatch between what is dealt with as consumers under Australian law and what is likely to be treated as

consumers under the Convention. It would be inappropriate for the Convention to result in a narrower consumer protection in Australia.

At any rate, the special rules protecting consumers state that, where recognition or enforcement is sought against a consumer in matters relating to a consumer contract, reliance on jurisdiction based on the defendant's consent (as provided for under Art 5(1)(d)) applies only if the consent was given before the court, and jurisdiction may not be based on the location of actual or anticipated performance (as provided for under Art 1(e)). The end result of this is that, as far as consumers are concerned, the main jurisdictional basis upon which judgments may be recognised and enforced under the Convention is jurisdiction based on the consumer's habitual residence. This thinking is in line with that of the EU's Brussels I bis Regulation[13] which ensures that consumers, in certain situations, only may be brought before the courts of their home state. However, two differences ought to be emphasised. First, the approach taken in the proposed Convention text applies to all consumer contracts, and second, unlike the Brussels I bis Regulation, the proposed convention text does not give the consumer the right to always pursue the other contractual party in the consumer's home state.

The particular position of intellectual property judgments

Judgments relating to intellectual property disputes enjoy a special status under the proposed convention. Article 5(1)(g) and (h) deal with the jurisdictional grounds for intellectual property disputes. Such a judgment is eligible for recognition and enforcement if:[14]

> g) the judgment ruled on an infringement of a patent, trademark, design or other similar right required to be deposited or registered and it was given by a court in the State in which the deposit or registration of the right concerned has taken place;
> h) the judgment ruled on the validity or infringement of copyright or related rights and the right arose under the law of the State of origin;

In addition, Art 6 adds that:[15]

> Notwithstanding Article 5 —
> a) a judgment that ruled on the registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered shall be recognised and enforced if and only if the State of origin is the State in which deposit or registration has been applied for, has taken place, or is deemed to have been applied for or to have taken place under the terms of an international or regional instrument;

As is illustrated by the work of the International Law Association's Committee on Intellectual Property and Private International Law,[16] it is doubtful that Art 5(1)(g) and (h) adequately address the complexities of that area. Pursuing this topic further here would, however, take us too far afield.

The need to consider "scope of jurisdiction"

Article 9 looks to the nature of damages awarded by the original court, and caters for the refusal to recognise and enforce judgments to the extent the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered. This is appropriate. However, similar concerns may arise in relation to other types of remedies. For example, there is a tendency at the moment for courts to be saying that the only way one can comply with an order to remove access to internet content in their country is to remove the content globally. Where that approach is taken, there should be the option to refuse to recognise and enforce the judgment.

This connects to a bigger issue that the proposed Convention usefully could take account of — a matter I have referred to as "scope of jurisdiction".[17] Scope of jurisdiction relates to the appropriate geographical scope of orders rendered by a court that has personal jurisdiction and subject-matter jurisdiction. Whether or not a court ought to recognise and enforce a foreign judgment depends, in part, on whether the court rendering the judgment has made a ruling with an appropriate geographical scope. This is a question that only will grow in importance, not least in the internet context, and should not be overlooked in a forward-looking document such as the proposed Convention.

Translation — a serious barrier to recognition and enforcement

Article 11(4) states that if the documents that need to be produced by the party seeking recognition and enforcement (including, eg, a complete and certified copy of the judgment) are not in an official language of the requested state, they shall be accompanied by a certified translation into an official language, unless the law of the requested state provides otherwise.

The translation requirement outlined in Art 11(4) will effectively work as a cost-based barrier to the recognition and enforcement of judgments in some situations; that is, if the costs of the translation exceed the potential gain from having the judgment enforced, people will not pursue enforcement. This barrier may well be intentional and, in any case, may be difficult to avoid; but its implications should be expressly acknowledged.

Concluding remarks

The Judgments Project 2.0 is a timely and generally well-considered initiative, and the Hague Conference

deserves to be congratulated for resurrecting this ambitious project with its huge potential for improving cross-border recognition and enforcement. The draft text produced is a great starting point, and the fact that it needs further refinement cannot be seen as a flaw; it is a both natural and necessary feature of a draft text addressing a complex area.

In moving forward towards a final text, it would be useful to subject the draft text to a careful and detailed "Impact of Internet Technology Assessment" — a detailed study of how well the provisions of the draft text work when applied in internet-related scenarios.

In any case, there can be no doubt that the Judgments Project brings attention to an important area of tremendous practical importance — an area to which lawyers perhaps devote insufficient attention. Thus, lawyers are well advised to monitor the Judgments Project's developments.

Tips for lawyers:

- The actual enforcement of any orders sought must be at the forefront from the start of litigations.
- Especially online, most disputes have an international dimension. This can work to your advantage if you understand the international system, or it can be seen as a risk if you do not.
- The work of international bodies such as the Hague Conference on Private International Law ought to be monitored constantly.
- In fact, given the impact the proposed Convention will have, the Australian legal community is well advised to take an active interest in how the Convention develops.

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Footnotes

1. The Hague Conference on Private International Law, *Council on General Affairs and Policy of the Conference, Conclusions and Recommendations of the Council on General Affairs,* (2011), www.hcch.net.
2. The Hague Conference on Private International Law, *Report of the Fifth Meeting of the Working Group on the Judgments Project (26–31 October 2015) and Proposed Draft Text Resulting from the Meeting,* (2015), www.hcch.net.
3. Above n 2, at ii.
4. The Hague Conference on Private International Law, *Report of the Fourth Meeting of the Working Group on the Judgments Project (3–6 February 2015) and Preliminary Draft Text Resulting from the Meeting,* (2015), www.hcch.net.
5. Above n 2, at 4.
6. For a discussion of data privacy and private international law specifically, see eg, M Brkan "Data Protection and European Private International Law: Observing a Bull in a China Shop" (2015) 5(4) *International Data Privacy Law* 257–78.
7. Official Journal of the European Union, *European Parliament resolution of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) (2009/2170(INI))* (2012). See http://eur-lex.europa.eu
8. See eg, D Svantesson "The Rome II Regulation and choice of law in Internet-based violations of privacy and personality rights — on the wrong track, but in the right direction?" (2011, published 2014) 16 *Austrian Review of International and European Law* 275–97.
9. Above n 2, at iii.
10. See eg, the discussion in the recent EU *Weltimmo* case Case C-230/14.
11. Above n 2, at iii.
12. D Svantesson "The Choice of Courts Convention — How will it work in relation to the Internet and e-commerce?" (2009) 5(3) *Journal of Private International Law* 517–35.
13. Official Journal of the European Union *Council Regulation (EC) No. 1215/2012, 12 Dec. 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)* (2015).
14. Above n 2, at iii.
15. Above n 2, at iv.
16. International Law Association, *Intellectual Property and Private International Law,* (2008), www.ila-hq.org.
17. D Svantesson "Jurisdiction in 3D — 'scope of (remedial) jurisdiction' as a third dimension of jurisdiction" (forthcoming April 2016) *Journal of Private International Law*.