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Adoption of the Hague Convention on the recognition and enforcement of foreign judgments: Towards a facilitated movement of judgments in a post-Brexit era?

On July 2, 2019, the Hague Conference on Private International Law announced the adoption of a new convention on the recognition and enforcement of foreign judgments in civil or commercial matters.

This convention, considered as far back as 1992 with the first works on jurisdiction and movement of judgments, aims at being "*a true gamechanger in international dispute resolution*" that will allow the movement of judgments in civil and commercial matters while "*providing better, more effective, and cheaper justice for individuals and businesses alike*".

If it succeeds, i.e. if it is ratified by a large number of countries, this convention will regulate the worldwide movement of judgments in commercial matters, thereby facilitating the resolution of the difficulties resulting from Brexit.

Focus on the main features of the Convention

The core objective of the convention on the recognition and enforcement of foreign judgments in civil or commercial matters (the "Convention") is to facilitate the movement of judgments between Contracting States.

In this respect, the Convention clearly states that "*a judgment given by a court of a Contracting State (State of origin) shall be recognized and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter*".

In short, under the Convention:

- a judgment can be recognized and enforced by the requested State only if it is enforceable and has effect in the State of origin;
- recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. This potential refusal does not prevent a subsequent application for recognition or enforcement of the judgment;
- review of the merits of the foreign judgment by the requested State is, as a matter of principle, forbidden.

In line with the current provisions of the Brussels I and Brussels I recast Regulations and the Convention on the recognition and enforcement of foreign arbitral awards (New York, 1958), recognition can be refused in particular if it would be incompatible with the public policy of the requested State, if the judgment has been obtained by fraud or in case of breach of the principle of adversarial proceedings.

The Convention is also quite simple insofar as the direct jurisdiction of the courts is not addressed. It merely covers indirect jurisdiction from the point of view of recognition and the possibility for a foreign judgment to benefit from the legal regime it establishes.

It should be noted that its scope of application is still quite limited, however, since although it appears similar to that of the Brussels I and Brussels I recast Regulations, there are many exclusions. In addition to the traditional exclusions relating, for example, to matters falling within the field of State prerogatives, the Convention gives Contracting States the possibility to exclude certain matters by means of a declaration or to specify that it will not apply to decisions involving the State or one of its branches.

In this respect, it must be specified that under the Convention the term “judgment” means any decision on the merits given by a court, including those relating to the determination of costs or expenses of the proceedings. Interim measures of protection are not considered as judgments (Article 3 of the Convention).

What future for the Hague Convention of July 2, 2019?

While the content and spirit of the Convention are quite classic, its interest lies mainly in the context in which it was adopted.

Indeed, at a time when the various multilateral agreements are viewed with suspicion and the United Kingdom is preparing for Brexit, this new Convention could be of particular interest for the movement of judgments between the United Kingdom and the European Union.

As such, it is hoped that the Convention will provide an alternative to the recognition and enforcement in a post-Brexit era where the movement of judgments between the United Kingdom and the European Union will become more complex as the Brussels I and Brussels I recast Regulations and the Lugano Convention will no longer apply.

That being said, it is conceivable that the Convention will not probably be a perfect substitute for the Brussels I and Brussels I recast Regulations since:

- it will only apply if it is already in force at the time proceedings are initiated;
- to date, only Uruguay has ratified the Convention, and while both the European Union and the United Kingdom have indicated their intention to become a party to it soon, the ratification process will necessarily take several additional months. Once ratification has been completed, it will take another 12 months before it takes effect;
- it only deals with recognition and enforcement;
- an exequatur procedure is planned.

On the other hand, there are risks of competition between the Convention and the Hague Convention on choice of court agreements dated June 30, 2005. Indeed, each of these two Conventions provides for a mechanism for recognition and enforcement, although with somewhat different criteria.

Yet, the Explanatory Report to the Convention specifies that "*the procedure under one instrument could be more favorable than the procedure under the other instrument. The applicant seeking recognition and enforcement would then be entitled to use the more favorable process for recognition and enforcement*".

At this stage, the key question is to know which other States will ratify the Convention in order to trigger its entry into force, it being recalled that any State may notify another State of its refusal to have the Convention produce effects in their relationships.