

2000

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Recommended Citation

Lau, Edward C.Y. (2000) "Update on the Hague Convention on the Recognition & Enforcement of Foreign Judgments," *Annual Survey of International & Comparative Law*: Vol. 6: Iss. 1, Article 3.

Available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol6/iss1/3>

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UPDATE ON THE HAGUE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

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*This comment is based on remarks at the
Eighth Regional Meeting of the
American Society of International Law, at
Golden Gate University School of Law,
on March 19, 2000.*

I. INTRODUCTION

For the last four years, the Hague Conference on Private International Law has held special commission meetings in preparation of a proposed new treaty (“Hague Convention”) that would establish international rules among signatory countries to govern rules of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters. This is the most important treaty ever attempted by the 47 nation members of the Hague Conference.

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There is a great need for this treaty due to the growth of global business and trade. In the last decade, many countries have made the transition from a "rule of man" to a "rule of law," and from a controlled economy to a free market economy. The centerpiece of the new free market economy has been the creation of new export markets. With the increase in global commerce has also come an increase in global disputes and claims. The Hague Convention is intended to create a standard by which countries involved in global commerce can resolve these conflicts in an appropriate forum whose judgments will be recognized and enforced by courts of other signatory countries. This would hopefully foster more global business transactions by assuring parties that there is a predictable legal system for resolving global disputes and enforcing judgments throughout the world.

This Convention is important to businesses and consumers alike. Most businesses view the world as their marketplace. Foreign products and services can be found in every country. Consumer products criss-cross virtually all borders every day. Every country has its own unique contributions to the global free market economy. Consumer products are increasingly produced abroad due to competitive costs. Consumers, on the other hand, are often the victims of products and services that are procured from abroad in which judgments for injuries are not collectible. While the U.S. has been generous about recognition of foreign judgements, the U.S. has not enjoyed reciprocity with most countries on U.S. judgments. The purpose of this article is to provide an overview of key provisions of the draft Treaty. (E-commerce has been specifically excluded temporarily but will be considered separately in early 2000 with a special group of experts). The proposed treaty is not self-executing. Implementing legislation is still needed and it has been decided in the U. S. to submit the proposed implementing legislation as part of the ratification process.

II. APPLICATION OF HAGUE CONVENTION (ARTICLE 1.2)

The proposed Hague Convention would apply where there is national diversity of residency between the parties and/or where foreign enforcement of a judgment is desired, i.e. when one or more of the defendants to a lawsuit is a foreign defendant and/or recognition and enforcement is desired in another signatory country. The Convention is not intended to disturb domestic laws of jurisdiction, recognition, and enforcement when all the defendants are local and recognition and enforcement is desired domestically. The convention will apply to most

civil and commercial matters except for family law, wills and succession, insolvency and admiralty/maritime matters.

The delegations have adopted an approach consisting of three categories of jurisdiction: “Required Bases” (Articles 3-16), “Permitted Bases” (Article 17), and “Prohibited Bases” (Article 18). The Required bases are those jurisdictional bases under which a judgment is required to be recognized and enforced by another signatory country. Suits based on Prohibited bases of jurisdiction are not allowed and shall be dismissed for lack of jurisdiction if jurisdiction is based solely on the prohibited bases.

The Permitted bases may be enforced in the original forum court but this is not insured elsewhere. The Permitted bases is essentially the usage of a country’s domestic law involving a foreign party where it is not on the “Required” or “Prohibited” bases of jurisdiction. The Permitted Bases allow each country to maintain their traditional bases of jurisdiction, with no requirement for enforcement abroad. The major tension is between what goes into the Required list and what goes into the Permitted list, i.e., if the Required list is small, and almost everything else is in the Permitted list, then the ability to enforce judgments abroad is severely limited, thus limiting the benefits which the Hague Convention offers.

III. BASES OF JURISDICTION

A. REQUIRED BASES OF JURISDICTION (ARTICLES 3-16)

Although the terms “general” and “special” jurisdiction are not explicitly used in the draft provisions, these two notions underlie the draft Convention’s jurisdictional structure and shall be used for illustrative purposes in this discussion.

1. General Jurisdiction: Defendant’s Forum (Article 3)

a. Any claim can be brought against a natural person in the country where that person is “habitually resident.”

b. Any claim can be brought against an artificial person (e.g. corporation, LLC, Trust, etc.), where it has its seat (Article 3.2a), place of incorporation (Article 3.2b), place of central administration (Article 3.2c), or its principal place of business (Article 3.2d). In essence, one would always be able to sue a defendant in the defendant’s home forum.

2. Special Jurisdiction (Articles 4-16)

In a regional context (e.g., the European Union), suing a defendant in his home forum might not be so burdensome because the distances between countries within a region are relatively small, and therefore the cost and difficulty of transporting evidence, witnesses, and parties to the defendant's home forum might not be so onerous. Moreover, the legal systems and the socio-economic conditions are also more likely to be similar to regional neighbors. However, in a global context, great inequities can result where the countries have very different legal systems and socio-economic systems. For this reason, "special" jurisdictional bases are provided in the Convention to allow for filing of a lawsuit in places other than the defendant's home forum for the protection of the consumer.

3. Agreement Stipulating to a Particular Court (Article 4)

Where there is an agreement stipulating to a "choice-of-court," that choice-of-court will have exclusive jurisdiction (Article 4.1). The agreement can be in writing (Article 4.2a); it can be oral and confirmed in writing (Article 4.2.b); or it can be implied in accordance with a regular pattern and practice of the particular trade or commerce underlying the contract (Article 4.2d). Article 4 operates under the presumption that the parties themselves can consent to the exclusive jurisdiction of a chosen court where the court has the authority to adjudicate the case under local law. The Convention recognizes this even when the chosen court is a non-signatory State. However, certain types of agreements designating a choice-of-court may be invalid as a matter of public policy (Article 4.3).

4. Arbitration Exclusion (Article 1.2g)

The United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as the "New York Convention") provides for the enforcement of foreign arbitration awards. Therefore, the Hague Convention purposely excludes a provision for matters covered by arbitration, as over 120 countries are signatories to the New York Convention.

5. Appearance by Defendant (Article 5)

A court will be deemed to have jurisdiction over a defendant if he appears in court to defend on the merits. This implied consent to

jurisdiction by appearance is recognized by most countries. The defendant also has the right to contest jurisdiction no later than at the time the answer to the complaint is due.

6. Contracts (Article 6)

Besides bringing a contract action in the defendant's home forum (Article 3) and possibly in a forum where a branch is located if the contract is related to the activities of the branch (see Article 9), special jurisdictional bases are provided for contract claims under Article 6, where goods were supplied or actual services were performed in whole or in part.

7. Contracts with Consumers (Article 7)

Where consumers may be at a disadvantage in contract negotiations with companies (e.g., the contracts may be overreaching and/or coercive), special jurisdiction is given to consumers to sue in their country of habitual residence if the contract relates to defendant's trade or services that were solicited in plaintiff's habitual residence. The parties can also stipulate to a special place of jurisdiction only if this is done after the dispute has arisen (Article 7.3) except in consumer or employment contracts.

8. Employment Contracts (Article 8)

Employment-related lawsuits can be brought where work is habitually carried out; in the courts of the last country where work was done; or if work was done habitually in multiple places, where the business is or was situated (Article 8.1.a). Employers can sue employees at the employee's place of habitual residence or where he habitually carries out his work (Article 8.1.b).

9. Branches (Article 9)

The draft Provisions allow special jurisdiction where defendant has a "physical presence" in the form of a branch, agency, or other establishment provided the action/claim relates to the activity of that branch or agency (Left in brackets and still undecided are cases where there is no branch, agency or establishment but where there is "commercial" activity and promotion to make it reasonable to exercise jurisdiction as if defendant is "constructively" present and the claim arose from those commercial activities (Article 9). This is important

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where there is a presence not in the form of agents and branches but by foreign entities who send marketing specialists to other countries to promote their products, display products at trade shows, solicit potential buyers and advertise their products on TV, radio newspapers, publications, etc. These representatives perform the some services that would be expected of a branch but without the formalities of a legal branch. That is the reason why the activities basis of a production is so important. It allows for jurisdiction based business activities rather than the existence of a registered branch. The “activities” basis of jurisdiction is considered a pivotal issue if the treaty is to be ratified in the U.S. due to the long traditional recognition of long-arm statutes).

10. Torts (Article 10)

In addition to the defendant’s home forum (Article 3), a tort claim can be brought in the place where the tortious act or omission occurred, or where the injury was sustained provided that the defendant could “reasonably foresee” that the act — including activity through commercial channels — could cause or threaten such an injury (Article 10.1).

The drafting committee struggled with the notion of “foreseeability,” which is a somewhat vague term. There is also some controversy as to whether jurisdiction should be limited only to the injury occurring in that country unless that is the place of plaintiff’s habitual residency (Article 10.3). This could lead to a multiplicity of lawsuits to apportion the damages in each country where there is any injury. Also suits for antitrust or anticompetition claims are excluded and would not have advantage of recognition and enforcement under the convention. Resolutions to these controversies must still be considered and are pivotal issues to U.S. ratification.

11. Trusts (Article 11)

Special Jurisdiction is allowed where the trust was created, at the principal place of trust administration, where the closest connection to the object of the suit is, or where there is a stipulation to courts of particular jurisdiction at the place of stipulated jurisdiction (Article 11.2).

12. Exclusive Jurisdiction (Article 12)

Exclusive jurisdiction is provided in the courts of the country where real or immovable property or its tenancies are located (Article 12.1) or in

matters involving the status of artificial persons (corporations, etc.), where the artificial person has its seat (Article 12.2). In matters that involve public registries (including patents and intellectual property rights), special jurisdiction lies where such registry is located (Article 12.3 and 12.4).

13. Provisional and Protective Measures (Article 13)

Special Jurisdiction is given in provisional and protective measures (e.g., preliminary injunctions, temporary restraining orders, attachment liens, etc.) which would prevent the defendant from taking any action to injure the plaintiff's rights (e.g., preventing defendant from moving assets out of the forum). Jurisdiction for these provisional/protective measures can be seized where a proceeding on the merits can be seized (Article 13.1), or where the property is located that is the subject of these provisional/protective measures (Article 13.2).

14. Multiple Defendants (Article 14)

Where there is at least one defendant that creates general jurisdiction in that forum, all other related defendants can be brought in regardless of their home forum so long as the claims against these defendants have a substantial nexus to the forum.

15. Counter Claims (Article 15)

A forum country with jurisdiction under this Convention shall also have jurisdiction to determine counter-claims arising out of the same transaction.

16. Third Party Claims (Article 16)

Joinder of third parties is permitted where the initial plaintiff and defendants are properly before the Court in accordance with this treaty. There must be a substantial nexus between the third party and the claim alleged.

17. Permitted Bases of Jurisdiction (Article 17)

Where jurisdiction is not premised on General Jurisdiction (Article 3) or Special Jurisdiction (articles 4-16), AND where jurisdiction is not prohibited under Article 18, then the national law of the place of suit will apply. This is the "permitted basis" of jurisdiction. Judgments on this

ground of jurisdiction do not have the benefit of mandatory recognition and enforcement under this convention. However, if jurisdiction against a defendant is premised solely on an Article 18 “prohibited basis” of jurisdiction, not only is enforcement not allowed in another signatory country, but such foreign defendant may not even be sued or joined as a co-defendant in the suit. Thus, jurisdiction based solely on a prohibited basis is disallowed even where the defendant otherwise has assets in the local jurisdiction and enforcement under the Convention (i.e. in another signatory country) is not needed. This is one area where there is a reduction of benefits over existing laws.

B. PROHIBITED BASES OF JURISDICTION (ARTICLE 18)

As discussed earlier, general jurisdiction over a defendant will always be assumed in the defendant’s home forum as defined in Article 3. Article 18 prohibits jurisdiction when there is a lack of substantial connection between the country where suit is filed and the dispute. It gives the following individually or in combination as examples: (i) the presence of property in the State except where suit is directly related to that property (Article 18.1.a) (in rem jurisdiction); (ii) the nationality of either the defendant or plaintiff with respect to a country (Article 18.1.b & c); (iii) the domicile of the plaintiff in the country (Article 18.1.d); (iv) commercial or other activities by defendant within a country except where the dispute is directly related to these activities (Article 18.1.e) (long-arm statutes); (v) service of a writ upon the defendant within the country, except for certain human rights violations (Article 18.1.f and 18.3); (vi) unilateral specification of the forum by the plaintiff (Article 18.1.g); and (vii) the declaration of enforceability or registration of a judgment except for the enforcement of that judgment (Article 18.1.h). Special jurisdiction cannot be conferred for the above prohibited bases, unless provided for in the Convention under Articles 3-16. Thus, Article 18 not only rejects recognition and enforcement but it prohibits the assertion of jurisdiction.

Attorneys must carefully scrutinize the likelihood of some traditional bases of jurisdiction being prohibited by Article 18. For example, in the U.S. “commercial activity” by a defendant that is systematic and continuous in the forum country, notwithstanding a lack of actual physical presence, can confer jurisdiction based on long arm statutes. This is the U.S. “minimum contacts” standard of *International Shoe*.¹

1. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Such commercial activity can be conducted by independent distributors/middlemen, by mail, or by the Internet. This includes sales through trade shows, trade missions, business visits, etc., even though there is no subsidiary, branch, or agency that is physically present (See 2.02.e). This “commercial activities” basis of jurisdiction is still not yet settled. However, in most cases, special jurisdiction based on Article 3 to 16 will also be present. We are still evaluating actual case examples where this might become a loophole where the activities basis of jurisdiction covers certain types of commercial and tort jurisdiction that is not covered in the current “place of performance” or “place of injury” standard that is now contemplated.

Additionally, in the U.S., jurisdiction over a defendant can be seised if he is found in the U.S. and personally served with a complaint/writ (“tag” jurisdiction). Tag jurisdiction will not be allowed under Article 18.2.f, except for certain human rights litigation (Article 18.3). The reasoning behind the human rights exception is that disabling tag jurisdiction under the Hague Convention would put it into conflict with an emerging practice of civil suits against egregious human rights violations. The contours of this exception are still unsettled. Tag jurisdiction is unique to common law countries and not followed by civil law countries. There are few countries recognizing foreign judgments based on this form of jurisdiction. However, this treaty would not affect Tag jurisdiction in domestic law. Thus, a foreign manufacturer injuring someone in the U.S. faces jurisdiction in the U.S. and in a California Court even if there is a branch in New York.

C. OTHER ASPECTS OF JURISDICTION

1. Lis Pendens (Article 21)

When there is concurrent jurisdiction in multiple signatory countries, and a court is asked to seise jurisdiction when another court already has a pending suit on the same subject matter in another country, then Article 21 applies. There is jurisdictional priority based on a “first-to-file” rule (Lis Pendens). Specifically, the second court to seise jurisdiction will suspend its proceedings (Article 21.1), and when the first court renders a judgment, the second court will then dismiss the case (Article 21.1.1). If the first court fails to proceed on the case within a reasonable time (Article 21.3), the second court may then proceed with the case. However, if the nature of the action in the first court is a negative declaratory relief action, then the first court will suspend the action in favor of the second court seised under the other provisions of this

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paragraph (Article 21.6). *Lis Pendens* is generally recognized only in civil law countries. Except as provided in Article 27, this treaty generally allows plaintiffs to make an enforceable choice of a convenient forum.

2. Declining Jurisdiction (Article 22) - *Forum Non Conveniens*

Article 22 provides the criteria for a court, at its option, to suspend/decline jurisdiction (“*forum non conveniens*”) in “exceptional” circumstances. The presumption is that *Lis Pendens* will normally be the rule. Read in conjunction with Article 21 (*Lis Pendens*), this provision provides detailed guidance to litigants on when the first court to seize jurisdiction can suspend/decline jurisdiction in favor of another court. A set of “convenience” and “efficiency” criteria are listed which are to be evaluated with respect to the current forum and potential alternative forums. These criteria include: (i) inconvenience to the parties in view of their habitual residences (Article 22.2.b); (ii) nature and location of the evidence including witnesses (Article 22.2.b); (iii) applicable statutes of limitation or prescription periods (Article 22.2.c); and (iv) the likelihood of obtaining recognition and enforcement of any decision on the merits (Article 22.2.d). Since *forum non conveniens* is recognized only by the common law countries, Article 21 and 22 represent an attempt to introduce both the *forum non conveniens* and the *lis pendens* to all convention countries and will continue to be controversial and considered by many to be another pivotal issue.

IV. RECOGNITION AND ENFORCEMENT

A. GENERAL RULE (ARTICLE 23)

The general rule is that the enforcing country will recognize and enforce a final judgment of the original foreign court if jurisdiction is properly seized under Articles 3-16.

B. GROUNDS FOR REFUSAL OF RECOGNITION AND ENFORCEMENT (ARTICLE 28)

Signatory countries may refuse recognition and enforcement if: (i) the same matter is pending before the country of enforcement (Article 28.1.a); (ii) the judgment is inconsistent with another judgment in the country of enforcement or from another signatory country (Article 28.1.b); (iii) recognizing the decision would be manifestly incompatible with the fundamental principles of procedure in the enforcing court

including the right of each party to be heard by an impartial and independent court (Article 28.1.c); (iv) the judgment was obtained by fraud (Article 28.1.e); or (v) the enforcement would be incompatible with the public policy of the enforcing court (Article 28.1.f). Additionally, if the enforcing court decides to review the validity of the jurisdiction of the origin court, then the enforcing court will still be bound by the findings-of-fact of the origin court. (Article 27.2). There shall be no review of the merits by the enforcing court (Article 27.3).

Article 28.1.f is the traditional “public policy exception.” Some are concerned that unless the public policy exception is more restricted in its application, that it might be a potential “loophole” for abuse. Others argue that similar public policy exceptions in other international conventions (e.g., New York Convention, Brussels Convention, and Lugano Convention) have not been abused in practice, and therefore any concern here is more in theory than in practice. The U.S. also wants a public policy exception for its own protection.

C. COST OF PROCEEDINGS (ARTICLE 31)

No security, bond or deposit shall be required to guarantee payment of costs and expenses on account of defendant being a national or habitual resident of another signatory State (Article 31).

D. NON-COMPENSATORY DAMAGES (ARTICLE 33.1)

According to Article 33.1 of the draft Provisions, non-compensatory damages (e.g. punitive, exemplary, multiple, etc.) should be recognized in the enforcing court at least to the extent that similar or comparable damages could have been recognized and awarded in the enforcing country.

E. COMPENSATORY DAMAGES (ARTICLE 33.2)

Article 33.2 of the draft Provisions allows the enforcing court to reduce “grossly excessive” damages to a lesser amount (Article 33.2.a), but in no event in an amount less than what the enforcing court could have awarded in the same circumstances in its domestic cases (Article 32.3.b). “Grossly excessive” takes into account the circumstances existing in both the country of the original judgment and the enforcing jurisdiction.

There is consideration of a definition of the term “grossly excessive” damages and a more objective standard to justify a reduction in damages

based on both the origin country's standards as well as the enforcing country's standards. This article should be watched to be sure it does not provide a potential loophole to disable the Hague Convention. Specifically, the enforcing court could recognize a foreign judgment, but if the award is reduced by the enforcing court, the award could be so small so as to not make it worthwhile to have recognition enforced, especially if the applicant must absorb high legal costs and expenses.

Thus, the entire issue of reviewability of compensatory damages is troublesome. This is clearly another pivotal issue. If reviewability by the enforcing court is allowed to go unchecked, the utility of the Hague Convention in terms of the predictability and ease of enforcement of foreign judgments is circumvented—leaving a weak and useless Convention. The fear of excessive compensatory damages continues to be a concern to foreign countries, especially those without a jury system, but at the same time compensatory damages should be based on where the injured party lives and not on the social-economic standards of the enforcing jurisdiction. Several groups have suggested that damages should be reviewable by the enforcing court but the standard should be based on the damage standards where the plaintiff is habitually resident which is generally in the place of the origin court where judgment is first rendered.

F. SETTLEMENTS (ARTICLE 36)

Mutual settlements ratified by the initiating court shall be enforceable in the enforcing signatory country.

G. COORDINATION WITH OTHER TREATIES (ARTICLE 37)

This treaty does not affect other international treaties that both the country of origin and the country of enforcement have already adopted. Those treaties shall remain in force, but to the extent that this treaty covers items not covered by other treaties or where a country has not adopted the other treaties, then this Convention will apply. There are three variations of wording proposed (see Annex Article 37, Proposals 1-3). There are distinct substantive variations that need to be reviewed. Such treaties as the Warsaw Convention and the Montreal Accords, for example, will continue to be recognized on aviation matters and to the extent Warsaw does not (such as in domestic disasters or defective assembly, etc.), then this Convention will apply.

V. CONCLUDING REMARKS

The final Convention will reflect the majority sentiments of 47 countries. The process of achieving this majority will naturally involve compromise by all countries involved. No country can expect the Convention to be a carbon copy of its own laws and legal system. Through compromise, everyone will gain net benefits from having predictable rules for the enforcement of foreign judgments.

It is important that international law attorneys track the evolution and progress of the new Hague Convention. The full text of the most current draft Provisions can be found at the website <<http://www.LauNet.Com/Hague/index.htm>>.

