Chapter

The Hague Convention of 2019 on Foreign Judgments: Operation and Refusals

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Abstract

This chapter is intended to focus on the practical operation of The Hague Conference on Private International Law Convention of 2019 on Recognition and Enforcement of Foreign Judgments that intends to enhance international juridical cooperation through the facilitation of recognition and enforcement of foreign judgments, establishing good litigation planning parameters and simplifying judgments circulation among Contracting States. The text addresses the structure and logical operation of the convention, including grounds for refusal. The 2019 Convention was not in force at the time this article was prepared; thus, direct case law was not available. The text runs a speculative exercise, suggesting model assessment of the 2019 Convention provisions from the view of a practitioner.

Keywords: international, foreign, judgment, recognition, enforcement, convention

1. Introduction

The Convention on Recognition and Enforcement of Foreign Judgments (the "Convention") was adopted by the Member States of The Hague Conference on Private International Law (the "HCCH") at the end of its Twenty Second Diplomatic Session, on July 2, 2019. Coronating 8 years' work of governmental and expert delegates, the Convention is intended to be an international treaty-driven framework "to promote effective access to justice for all and to facilitate rule-based multilateral trade and investment, and mobility, through judicial cooperation, providing for greater predictability and certainty in relation to the global circulation of foreign judgments" [1].

Convention's goal is to offer private persons connected through transnational relationships a predictable system of foreign judgments' recognition and enforcement, granting to it widespread effectiveness not dependent on complex and non-standardized procedures. Although simplicity was a major driver to construe the Convention, its operation in actual cases demands careful step-by-step gait, advancing through the thresholds sequence provided by its rules.

This chapter is intended to present those steps through rules' thresholds and the issues that should be addressed to surpass the hurdles in the path to have a foreign judgment able to be recognized and enforced by a Contracting State to the

Convention. Little reference to specialized literature will be presented, due to the novelty of the Convention; the author's personal experience as an expert advisor for the Brazilian Delegation and chair of certain discussion groups to the HCCH's works through the adoption of the Convention, and his academic work on the subject, are the sources applied. The explanatory report from Professors Francisco Garcimartín and Geneviève Saumier provided by the HCCH [2] is the main source of information.

The model situation applied to the foregoing commentaries depicts one person entitled to a credit awarded by a judgment delivered by a judicial court in one country, found with the need to enforce it in a different country for the purpose of recovering one's credit from the debtor.

At the time of this article's preparation, the Convention was not yet in force.

This exercise is not intended to exhaust the interpretation possibilities to the Convention, but to serve as a guide evidencing practical steps for its enforcement.

2. Contracting states and treaty relations

From the beginning, the Convention expressly states in Article 1.2 that it applies "to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State" [1]. Although the relationships addressed by the convention are modeled between private parties, involving private persons, and subject to dispute resolution through State judicial services, the territorial reference used to define the applicability of the Convention is where the judgment was rendered (the "State of origin") and where recognition and enforcement is sought (the "requested State"). The concept inferred from that may be depicted as a Contracting State's commitment to apply its sovereign power to recognize and enforce a foreign judgment that comes from some certain other States, the ones that are also Contracting States to the Convention, in a specialized facilitated manner.

Previous paragraph's last sentence shall not be taken as true in its entirety. Not all Contracting States to the Convention will develop treaty relations established through the Convention's rules upon accession: there is an exception to that effect, depending on the interests of Contracting States to reject the automatic and general establishment of treaty relations by the accession of a new State, and that new State may also prevent establishment of treaty relations to existing Contracting States. Article 29 of the Convention provides that it will "not have effect between two Contracting States only if either of them has notified the depositary regarding the other [...] that the ratification, acceptance, approval or accession of" the other "State shall not have the effect of establishing relations between the two States pursuant to" the Convention.

Refusal to establish treaty relations goes deeply into international politics, resulting in raising friction between the Contracting States involved or, on the other hand, allowing for another opportunity to call the other Contracting State to negotiate yet another issue in the international table of relationships. It is relevant to note that the opportunity to refuse establishment of treaty relations appears only at the time of a new Contracting State accession. As long as the time frame to produce the refusal of Article 29 reaches its term of 12 months after notification of accession, the only means to end treaty relations is through denunciation of the whole of the Convention (Article 31), but this act would end treaty relations with all other Contracting Parties.

HCCH's previous conventions also hold systems to add extra steps for the establishment of treaty relations between acceding States and Contracting States, such as the "positive" treaty relations establishment clause provided in Article 38 of the

1980 Child Abduction Convention [3], models sometimes being intuitively blamed to institute unsurmountable hurdles to the general accession of States around the world. The Convention's novelty is that instead of demanding positive extra steps to establish treaty relations with each other Contracting State, it offers the opportunity to refuse that situation, transferring the political burden to the one State that does not want to connect to the others.

As a final remark to this topic, the "Convention must have effect between the requested State and the State of origin at the date proceedings are instituted in the State of origin" [2], meaning that accession or other changes to the Contracting States to the Convention after the initiation of proceedings do not affect the expectation of recognition and enforcement. The upside is that eventual termination of treaty relations between two Contracting States do not affect the commitment to recognize and enforce a certain judgment granted by a Court of one of them in the other if proceedings are instituted before the termination of the treaty relations albeit that situation extinguishes future State's obligations. The downside, however, is that establishment of treaty relations after initiation of proceedings will not enable the Conventions' facilitated recognition and enforcement system [2].

Being in force the Convention between the State of origin of the judgment and the requested State is the first test to be applied to a practical situation.

3. Scope: civil or commercial matters

The general scope of the Convention is defined in Article 1, referring "civil or commercial matters" as the main substantive matters dealt with. The claim and, consequently, the judgment rendered shall contain substantive provision that would be compared to provisions on the substantive scope of the Convention [2]. Along the HCCH's preparatory works for the Convention, the issue of understanding the extension of "civil or commercial matters" was addressed through active discussion and an informative paper prepared by the Permanent Bureau [4]. The general understanding is that the expression holds an autonomous interpretation, derived mainly from the HCCH's previous conventions. The Brazilian Delegation presented a proposal [5] for the Twenty Second Diplomatic Session suggesting amendments to the Garcimartín-Saumier Report [2], sustaining that the main interpretative issue would be to focus on situations where there is no exercise of a State's sovereign power; the suggestion was incorporated to the report in paragraph 35.

A first limit introduced by the expression "civil or commercial matters" is that "criminal or penal matters" are clearly excluded from scope [2], but the participation of a State to a certain relationship does not exclude the Conventions' rules. A direct provision on that is present in Article 2.4, leading to the understating that "civil or commercial matters" refer to the subject matter of a judgment and not to the parties involved in the dispute ascertained by the decision granted. Thus, where a State acts in a particular situation as a private person, like when it is buying paper or electricity services for its offices' operational purposes, the judgment rendered can be submitted to the Convention's rules, pursuing Article 2.4. If "neither party is exercising public powers, the Convention applies" [2]; the statement encompasses the powers exercised by sovereign entities along relationships where those powers define its nature.

Following these ideas, the Convention expressly excludes "revenue, customs, or administrative matters" (Article 1.1, second statement) from its scope, evidencing that the treaty is informed by model relationships involving private parties that

engage to it mostly by voluntary means. A "contractual," so to speak, model of relationships is prominent, added by the "tort" model of relationships in a few provisions, like the one in Article 5.1.j of the Convention.

The "civil or commercial matters" test is the second tier of assessment for a certain judgment to circulate under the Convention's facilitated system.

4. Judgment and the obligation to recognize and enforce

The Convention provides for a definition of judgment, pursuant Article 3.1.b. A decision rendered by a Contracting State's Court on the merits of a judicial proceeding is the prominent object referred to as "judgment" subject to recognition and enforcement. Interim measures are expressly excluded. The judgment is required to have "effect in the State of origin" and there be enforceable to circulate under the facilitated system for recognition and enforcement (Article 4.3).

Arbitral awards fall out of the Convention's scope, since "arbitration and related proceedings" are expressly excluded (Article 2.3). The exclusion's rationale derives from the understanding that the Convention, although regarding the success of the New York Convention on Arbitral Awards [6], shall be "prevented from interfering with arbitration and international conventions on" the subject [2]. Other kinds of alternative dispute resolution outcomes can fall within the Convention's scope through the "judicial settlement" provision from Article 11, as long as they "are enforceable in the same manner as a judgment in the State of origin". There is a possibility of overlapping provisions with the "Singapore Convention on Mediation" [7].

It became clear along the negotiations and from the final text that the Convention holds as its main driver the exercise of State of origin's sovereign power through a judicial final decision on the merits called judgment, and the comity to create an environment for mutual confidence and facilitation for generating effects of that judgment within all Contracting States' cooperative sovereign influence.

The Convention's core provision, the one that generates requested State's obligation to recognize and enforce, is announced in Article 4.1, prevented any "review on the merits other than "necessary for the application" of the Convention (Article 4.2).

5. Exclusions from scope

The Convention provides for an extensive list of matters to be considered out of scope (Article 2.1). Derived from the similar list adopted for the 2005 HCCH Convention on Choice of Court Agreements' Article 2.1 and Article 2.2 [8], it collects situations that, although adjustable to the concept of "civil or commercial matters", do not enable the requested State's obligation to recognize and enforce a judgment on those matters.

Four main groups of matters may be identified in that list: 1) family and succession; 2) matters related to public registration; 3) exercise of State's sovereign powers connected matters; and 4) some other specialized matters.

On family and succession group, the exclusions of (a), (b), (c), and (d) limbs to Article 2.1 could be joined. The grouping rationale is that those kinds of relationships do not fit the "contractual" or "tort" model and that those matters are subject to other HCCH conventions. Those relationships and consequent subject matters to judgments encompass situations where one or all parties involved need to be specially protected

by State power due to the nature of the situation. Considering that the Convention's general framework is based on voluntary or accidental relationships, involving self-determined persons capable of full negotiation on money issues, the exclusion leaves room to less protective intervention from States and its Judges over the relevant issues.

Public registration may encompass (i), (j), and (m) limbs to Article 2.1. Those provisions are related to situations where a private person demands for rights derived from specialized granting or registration under State's authority, thus connecting the issue to State's sovereignty. Public services that provide for legal ascertainment or granting through certain formal acts shall not be subject to the Convention's provisions, due to the model relationship over those situations getting closer to the sovereign State v. private person relationship. The (m) limb exclusion of "intellectual property" is tricky and was subject to intense work and discussion. The exclusion is not absolute: contractual matters involving intellectual property may fall within the scope of the Convention, if granting or registration of that right is not the determination of the judgment subject to recognition and enforcement, pursuant Article 2.2 provision on "preliminary questions" [2].

Exercise of State's sovereign powers group rejoin (n), (o), (p), and (q) limbs to Article 2.1. Although the labeling here attributed to the group may suggest the prevalence of the State's sovereign power, the actual concern on those exclusions from scope is to specify sovereign State's protection, enhancing provisions in Article 2.5 to cases derived from actual experiences in recent years. Those limbs need to be read with eyes to various situations where private persons, individually or grouped, intent to collect damages from a sovereign State due to certain situations where the traditional concept of "acta iure imperii" has been challenged. The issue on "anti-trust (competition) matters" out of limb (p) is also tricky. Judgments on anti-trust matters may be regarded through the eyes of State control over market competition, thus connecting to the general principle to exclude from scope situations where sovereign State's powers play relevant role. Political discussion on the issue, raised only along the Twentieth Second Diplomatic Session, is how to balance the need to favor international circulation of a judgment rendered against an anti-trust infringement as a general acknowledged good solution and the exclusion of the sovereign State's power situation. Other predominantly private situations may arise, also. The outcome of discussions is registered in the actual text that along the general exclusion grants an exception challenging the general "administrative matters" exclusion out of Article 1.1. Being it a specific provision, it shall be interpreted as granting an express exception to the general exclusion from scope, thus prevailing in favor of those judgments for recognition and enforcement facilitated system.

Other specialized matters are listed in (e), (f), (g), (h), (k), and (l) limbs to Article 2.1. Limb (e) excludes insolvency solution judgments, traditionally an issue that expresses State intervention over private person operations on the benefit of its creditors and society. The particularities to those cases, that may result in dissolution of a company, falls in the gray zone between full private and sovereign powers realms, and the complexity associated with them led to the political decision to exclude, something inherited from the Choice of Court Convention [8]. Limbs (f), (g), and (h), also inherited from the Choice of Curt Convention [8] with amendments, exclude from Convention's scope some issues that are subject to regulation by other international instruments, outside HCCH mandate. Those tort issues fall within specialized rules and limitations for liability, composing each of them a microsystem full of particularities; the Convention' framers did not dare to mess with them. "Defamation" (k) and "privacy" (l) exclusions, also liability cases, were intensively

discussed. The issues were raised in the later stages of the Special Commission work and reached final format only after long debate in the Twenty-Second Diplomatic Session. There was an intent to keep some parts of those tort cases within the facilitated system for circulation of foreign judgments, but the full exclusion prevailed.

Article 2.2 provides for an enhancement of the scope, limiting the exclusions effect. Only if the main provision of a judgment falls within a certain exclusion clause, that judgment would not be able to circulate under the Convention. If those special matters are present at the proceedings and even were relevant part of the findings, the judgment rendered can circulate if its final provision is not directly within the exclusions list Preliminary questions listed as exclusions do not prevent the facilitated system of recognition and enforcement.

On a more complex step, it is relevant to check on declarations that Contracting States to the Convention may rise, establishing other restrictions as exclusions from scope that would operate in relation to that Contracting State. The provision in Article 18 allows for specific declarations and requires them to be "no broader than necessary and that the specific matter excluded is clearly and precisely defined". The HCCH Secretariat keeps updated public information on those declarations, but the official depositary of the documents is the Ministry of Foreign Affairs of the Kingdom of the Netherlands, pursuant to Article 24.

States interests are protected from the enforcement of the Convention through Article 2.4 and Article 2.5, by stating that they are not excluded if a State "was a party to the proceedings", but it shall not "affect privileges and immunities of States or of international organizations, in respect of themselves and of their property". The restriction for recognition and enforcement of a judgment relating to a State must be read with the declaration provided by Article 19, under which a Contracting State can declare "it shall not apply" the "Convention to judgments arising from proceedings to which" a State "is a party". Again, a precise assessment of the updated HCCH's information on declarations is recommended.

The third tier of assessment for the Convention's enforcement demands a good understanding of the subject matter resolved and the rights granted by the judgment and seeking for updated information on the particularities of the declarations that Contracting States can express on controlling the limits to which they agree to establish treaty relations.

6. Bases for recognition and enforcement

Passed the three initial hurdles, the practitioner faces the connecting factors list that enable the requested State's obligation to recognize and enforce. The rationale is that once at least one basis for recognition and enforcement is acknowledged by the requested State, it raises an assumption that the State of origin's Court has provided jurisdiction in a fair and legitimate way, thus enabling the propagation of effects to other Contracting States.

Articles 5 and 6 compound need to be read as a list of contact factors constituting indirect jurisdictional bases (jurisdictional filters), a legal technology not well known in Brazil, a country largely open to admit foreign judgments. The way that the list is composed attempts to merge civil law and common law traditions in a statute that could be generally understood, but most civil law lawyers will regard at it with some indulgence on precision or specificity, while common law lawyers will delve into thorough examination of every and each detail. The Convention framers' initiative

to merge the traditions shall be followed by practitioners' "uniform interpretation" efforts, regarding the Convention's "international character" and the need "to promote uniformity in its application" (Article 20).

An indirect jurisdictional basis operates as a requested State's test on the fairness of jurisdictional operation in the State of origin, for purposes of accepting the judgment there derived for recognition and enforcement within its sovereign influence. The Convention's mechanism lists harmonized contents to that test, thus providing a standard floor for facilitated circulation of judgments [9].

Article 5 is written along three paragraphs, being the first one the list of requirements from what at least one shall be met. Articles 5.2, 5.3, and 6 present limitations to the list of indirect jurisdictional bases that apply to certain specialized situations.

The list provided by Articles 5 and 6 allows for classification in three different initial categories, based on the nature of the legal situations they address, here listed from the exceptions to the remaining general situations: 1) consumers and employees situations (Article 5.2); 2) immovable property rights (Articles 5.1.j, 5.3, and 6); and 3) general remaining situations. If the judgment is rendered in favor of consumer or employee, the Convention allows for the full list of jurisdictional filters to apply. When the judgment is rendered against the consumer or employee, Convention's rules limit the jurisdictional filters that enable facilitated circulation, thus establishing an instrumental protection "consistent with the protection accorded to consumers or employees within the contractual sphere by many legal systems, whether in domestic or private international law" [2]. The selected jurisdictional filters that apply under those circumstances are the ones that favor consumer or employee defense along proceedings in the State of origin. Immovable property situations follow the rationale that such cases shall be better resolved by the Court of the State where the property is located, "for reasons of proximity" [2] but not discarding the fundamental relevance of a State's sovereign power to control its territory. Those situations, although some exceptions apply, mainly the contractual issues connected with immovable property, will enable the Convention's obligation to the requested State "if the property is situated in the State of origin" (Article 6), excluding other indirect jurisdictional basis. The remaining situations are issues that do not fall within those two first specialized subjects.

Similar to the exclusions of scope, the indirect jurisdictional basis can be grouped through "three traditional categories of connections to the State of origin: connections between the State of origin and the defendant, connections established by consent, and connections between the claim and the State of origin" [2].

On the defendant contacts group, encompassing limbs (a), (b), (c), (d), and (l) to Article 5.1, indirect jurisdictional bases round situations derived from the model of fairness of the judgment rendered by a Court situated at the debtor's habitual residence. Consent group rejoins limbs (e), (f), and (m) to Article 5.1, with the special limiting provision from Article 5.2 where consumer or employee situations are relevant [9].

The group for "connections between the claim and the State of origin" must be understood on a territorial reading basis, deriving the fairness of jurisdictional exercise from the physical contact of the Court authorities with the relevant location. Article 5.1 limbs (g), (h), (i), and (k), Article 5.3, and Article 6 provisions list the requirements that refer the location of the objects or relevant facts to generate sufficient contact with Courts to enable the Convention's rules. Both Article 5.3 and Article 6 shall be read as excluding all the other requirements listed in Article 5; in those situations, only those specialized requirements operate.

Article 6 also provides for a negative obligation by Contracting States: despite the general provision in favor of recognition and enforcement under more receptive national law (Article 15), "a judgment that ruled on rights in rem in immovable property shall be recognized and enforced if and only if the property is situated in the State of origin". This particular provision of Article 6 was sustained along works by the Brazilian Delegation, coming to a very intense debate along the Twenty-Second Diplomatic Session resolved through negotiation and rhetoric along the meeting. Several Delegations wanted to transfer the provision to Article 5 in a model similar to current Article 5.3, but the disconnection, the negative obligation to Contracting States, created by the conjunction of Articles 6 and 15, prevailed.

Facing the fourth tier of assessment, the practitioner shall find within the judgments reasoning or connected documents the indication of what basis legitimated State of origin's jurisdiction and try to find it listed in Articles 5 and 6 provisions. Being successful in that conjunction, the practitioner will find the requested State's obligation to recognize and enforce the judgment.

7. Refusal clauses

Established the requested State's obligation to recognize and enforce the judgment, after surpassing the previous tiers, the practitioner may find a reasonable expectation of initiative's success. There are a few reasons for refusal, however, provided by Article 7, that grants the requested State the ability to refuse recognition or enforcement under its own law but limited to the declared hypotheses there listed. The issues that allow for refusal are derived from the general public policy protection clause and certain issues related to the fairness of proceedings.

Incompatibility of the judgment "with the public policy of the requested State" (Article 7.1.c) attempts to prevent the enhancement of the application of the discretionary public policy protection clause, thus limiting the easy way that some jurisdictions follow to refuse recognition and enforcement without precise reasoning, an effect sometimes seen in Brazilian experience. Although the limiting intention is present from the text, some clarification of public policy concept pushes to the fields of incompatibility "with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty".

Procedural failures are listed as permissions to refuse under limb (a) and the "fundamental principles" of limb (c), as judgments obtained by fraud, are also a permission to refuse (limb (b)). Being the judgment originated from a Contracting State, other than the one indicated in an agreement or designated in a trust allows the requested State to refuse recognition and enforcement based on the rationale to enforce such choices of court.

"Res judicata" and "lis pendens" refusal principles are established by provisions from limbs (e) and (f) to Article 5.1 and Article 5.2. Under those provisions, the requested State's and other Contracting State's jurisdictional authority previously established may be protected.

This final fifth tier of the Convention's hurdles to the practitioner demands the assessment of national law, the source from which every permission to hinder the requested State's obligation to recognize and enforce passes through the harmonized framework intended to erect by the treaty. Being them restrictions to the general obligation to recognize and enforce, those refusal clauses shall be interpreted in a restrictive manner.

8. Conclusion

Convention's objective is to provide for a harmonized facilitated system for recognition and enforcement of foreign judgments. Achieving that goal is not easy, due to the different views of potential Contracting States on how open their jurisdiction shall be to foreign judgments. As a floor to the recognition and enforcement, the Convention sets a minimum expected from the group of countries that dare to cooperate with eyes to the benefit of private people, establishing a standard of trust among them.

This exercise shall not be understood as a definitive guide to the operation of the convention, but rather a proposed step-by-step method to prevent refusal of a judgment based on not compliance to the details. Practitioners' discretion is recommended to the precise definitions and contents, and also a full reading of the Convention itself and the Garcimartín-Saumier Report is a must.

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