The 2019 Hague Judgments Convention: its conclusion and the road ahead

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THE 2019 HAGUE JUDGMENTS CONVENTION: THE ROAD AHEAD

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1. INTRODUCTION

1. In The Hague and far beyond, the conclusion of the Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters (hereafter, "the Hague Judgments Convention") in July 2019 was welcomed with a long deep sigh of satisfaction. The successful conclusion of this Convention under the auspices of the Hague Conference on Private International Law (hereafter, "the HCCH") undoubtedly marks a crucial milestone in the area of international dispute settlement in civil and commercial matters. In this contribution, I describe the circumstances leading up to the conclusion of the Hague Judgments Convention, as well as the Convention´s most salient features. I also recommend some actions for the Convention to become truly effective. Indeed, the "road ahead" towards an operational international standard of practical relevance is the next challenge for the private international law global community.

2. THE LONG AND WINDING ROAD TO ITS CONCLUSION

2. During the negotiations, the work leading to this Convention was often compared to climbing the Everest mountain… Possibly a valid comparison, if only because, once the top is reached, hikers rapidly forget the time and efforts they spent in the attempt. A short historical overview may be helpful for context.[1]

[1] For more detailed overviews of the Convention's provenance, see among others, H. van Loon, "Towards a global Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters", *NIPR (Nederlands Internationaal*

3. Since 1992, the HCCH intermittently worked on the negotiation of a Convention on international jurisdiction rules and the recognition and enforcement of foreign judgments. A more modest proposal of the United States, focusing on the latter, led to the inclusion of the broader topic on the HCCH agenda. The extension to international jurisdiction appeared justified to delegations, in particular those of the European continent, that since the conclusion of the 1968 Judgments Convention in the content of the then European Economic Community, considered jurisdiction rules and rules on recognition and enforcement as two indivisible sides of the same coin. Despite the very valuable work generated between 1992 and 2001, the Diplomatic Conference that should had led to the completion of this Convention was unsuccessful. However, a shift to a much more defined type of disputes, those arising out of choice of court agreements, resulted in the completion of the Hague Convention on Choice of Court Agreements in Civil and Commercial Matters in June 2005. Fifteen years later, the Convention has attracted a modest, yet promising, number of ratifications. Most importantly, this Convention is a first tangible output of the HCCH Judgments Project.[2]

4. Roughly a decade ago, there were some signs that time might have come for a new "product" of the Judgments Project. Indeed, the Permanent Bureau sought the views of the HCCH Members about resuming work on this Project in early 2010.[3] A year later, the HCCH Council on General Affairs and Policy agreed that an Experts' Group should be established to assess the possible merits of resuming the Judgments Project.[4] This Experts' Group recommended the continuation of work on two different tracks: as a priority, work towards a future Convention making provision for the recognition and enforcement of judgments should proceed. The

Privaatrecht) 2020, Vol. 1, 4-18 and L.E. Teitz, "Another Hague Judgments Convention? Bucking the Past to Provide for the Future", *Duke Journal of Comparative & International Law* 2019, Vol. 29, 491-511.

[2] On this Convention, see the status on the HCCH website, as well as the bibliography kept by the HCCH Permanent Bureau (Secretariat) available on the HCCH website at < www.hcch.net > under "Choice-of-court" then "Bibliography".

[3] See, in particular, Preliminary Document No. 14 of February 2010 on "The Continuation of the Judgments Project, available on the HCCH website under "Council" and then "Archive" and "Meeting of April 2010".

[4] See the HCCH Council's Conclusions and Recommendations of March 2011, para. 11, available on the HCCH website at < www.hcch.net > under "Judgments" then "Recent Developments".

second track, which referred to work on direct jurisdiction rules (including parallel proceedings), was deferred in time.

5. The first track led to the completion of the 2019 Judgments Convention thanks to intense preparatory work over a number of years: no less than five meetings of the Judgments Working Group (a relatively reduced group of around forty experts representing a selection of HCCH Members) and four meetings of the Judgments Special Commission (the HCCH Organ that is set up to prepare draft Conventions according to Art. 8 of the HCCH Statute). All of this was orchestrated by the HCCH Council, which mandated further work and gave strategic directions on an annual basis. An important milestone was the completion of the Special Commission's mandate during its fourth and final meeting in The Hague in May 2018. It was then time to elevate the discussions to the framework of the Diplomatic Session (as stipulated by Art. 4 of the HCCH Statute). The negotiations at the Diplomatic Session were fruitful and led to the conclusion of a new Hague Convention on recognition and enforcement of foreign judgments (in short, the Judgments Convention) in July 2019. For a project that started in 1992, it is no wonder that the conclusion of the new Convention in the area of recognition and enforcement of civil and commercial judgments almost three decades later was met with unreserved enthusiasm by HCCH insiders![5]

6. But it is not "done"… The Jurisdiction Project, as part of the Judgments Project, was resumed in 2019 in order to facilitate the discussions of the Experts' Group. This Experts' Group met for the third time in February 2020 (it is recalled that work on jurisdiction was discontinued in 2011 to focus on the recognition and enforcement track of the Judgments Project). Based on the Experts' Group recommendations, the HCCH Council mandated further work for the Permanent Bureau (HCCH Secretariat) "on how parallel proceedings, and, in particular, issues pertaining to related actions or

[5] See the exultant News Item on the HCCH website titled "It's done: the 2019 HCCH Judgments Convention has been adopted!", available on the HCCH website at < www.hcch.net > under "News" then "See all news".

claims, are addressed in different jurisdictions".[6] There appears to be a willingness to progress swiftly as the HCCH Council expects two meetings of the Experts' Group to take place in a timeframe of 12 months. Obviously this mandate came just before the world came to a temporary standstill as a result of the COVID-19 sanitary crisis…

3. The Significance of the 2019 Judgments Convention

7. Future developments aside, it is undeniable that the conclusion of the 2019 Judgments Convention is a major development in contemporary private international law. Since its adoption, the 2019 Judgments Convention has been the object of a detailed scrutiny and, as expected, diverging views have been expressed about its (limited) scope of application, about the operation of its rules on recognition and enforcement, about its particular rule on the establishment of relations pursuant to the Convention or about possible declarations by future Contracting States. Such essential characteristics of the new treaty are further examined in separate contributions of this Issue and elsewhere.[7] What follows does not attempt to describe the Convention but, rather, sketches a general impression of its significance for international cooperation in civil and commercial matters.

8. As I see it, there are three essential factors that underscore the importance of the mere adoption of this Convention.

9. Firstly, for the HCCH itself and its Members, the adoption of this Convention reaffirms the ability of the HCCH as an apt forum for the conclusion of commonly accepted international standards on recognition and enforcement of foreign judgments. The extraordinary duration of the Judgments Project, the previous unsuccessful attempt of the Diplomatic Session in 2001 and the lapse

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[6] See the HCCH Council's Conclusions and Recommendations of March 2020, para. 13, available on the HCCH website at < www.hcch.net > under "Governance" then "Council on General Affairs and Policy".

[7] The main guidance will be the Convention's Explanatory Report, which is being completed by Rapporteurs F. Garcimartín and G. Saumier at the time of writing. In this contribution, I refer to the Draft Explanatory report of September 2019 kindly made available by the Permanent Bureau. The Permanent Bureau also keeps a non-exhaustive bibliography on the 2019 Judgments Convention on the HCCH website at < www.hcch.net > under "Judgments" then "Bibliography".

of time (2007-2019) without new HCCH Conventions inevitably cast doubts on the treaty-making capacity of the Organisation. Not reaching its long sought-after objective, especially in a year that other "sister" international organizations concluded international treaties in the area of civil and commercial matters,[8] would have meant a serious drawback for the HCCH. But it was indeed "done"!

10. Secondly, the entry into force of the Convention may ensure a stronger position for courts in international dispute resolution, in times where commercial law practitioners may welcome a realistic alternative to arbitration. Whether the pendulum may swing back towards court litigation remains however to be seen. International mediation in civil and commercial matters may prevail in dispute settlement strategies, given the increasing focus on mediation as preferred dispute resolution method in diverse areas of civil and commercial law and also thanks to the entry into force of the Singapore Convention on Mediation in September 2020.[9] In any event, the 2019 Judgments Convention is on the radar of the dispute settlement sections of big law firms and influential practitioners.[10] If these influential stakeholders of the private sector follow suit and repeatedly call for ratification, the lapse of time between the Convention's conclusion and entry into force may be reasonably short. While the 2005 Choice of Court Convention took ten years to enter into force, some optimistic commentators estimate that the 2019 Judgments Convention could enter into force in 2022.

11. Thirdly, there is reported work about the ratification of the Convention in several jurisdictions: Uruguay and Ukraine signed the

[8] In an earlier presentation at the Annual University of Edinburgh Forum Conveniens Lecture, I referred to 2019 as a "good year for multilateral work in times of decaying multilateralism". In the area of private international law broadly speaking, 2019 also witnessed the conclusion of the Singapore Convention on Mediation by UNCITRAL and the Pretoria MAC Protocol to the Cape Town Convention on International Interests in Mobile Equipment by UNIDROIT.

[9] See the Status of the Singapore Convention on Mediation, available on the UNCITRAL website at < www.uncitral.org > under "Texts and Status" then "International Commercial Mediation".

[10] The active participation of judges and practitioners (through "umbrella organisations" such as the International Bar Association, the International Chamber of Commerce, the International Law Association or the International Association of Judges) as Observers during the negotiations of the 2019 Judgments Convention is significant in this regard. In the current phase between the conclusion and the entry into force of the Convention, these law professionals should encourage the authorities in charge of ratification by reporting on the prospective relevance of the Convention for their respective practices. Note in this regard that the 2019 Judgments Convention is an "open" Convention to all States and may thus also be acceded to by the more than 100 States that are not HCCH Members yet.

Convention on 2 July 2019 and 4 March 2020, respectively and may well be the two first States to ratify the Convention. As the Convention, in accordance with Art. 28(1), only requires two Contracting States for its entry into force, it is reasonable to expect a speedy entry into force within foreseeable time. Furthermore, impact assessment work is ongoing in several jurisdictions, such as the European Union or Brazil, so the Judgments Convention will hopefully reach a critical mass of Contracting States (40+?) in the next decade. For a Convention that aspires to establish minimum international standards for the global circulation of judgments in civil and commercial matters for the benefit of "rule-based multilateral trade and investment, and mobility",[11] a significant number of Contracting States is essential …

4. THE HAGUE JUDGMENTS CONVENTION – SOME KEY FEATURES

12. Having underscored the significance of the 2019 Judgments Convention in itself, this section will highlight some of the salient features of its future operation, when compared to other schemes on recognition and enforcement of foreign judgments in regional schemes nowadays applicable in South East Europe.[12] Reference is made, in particular, to (1) the articulation of the Convention within the existing sources on recognition and enforcement of foreign judgments; (2) the relevance of jurisdictional requirements and (3) the grounds for refusal of recognition and enforcement.

13. As a general remark, one should note that many features of existing recognition and enforcement schemes have found their way into the 2019 Judgments Convention. There are indeed rules that stem from other HCCH Conventions on recognition and enforcement (such as the 1971 Enforcement Convention or the relevant chapters of the 2005 Choice of Court Convention and the

[11] Preamble of the 2019 Judgments Convention.

[12] See also I. Rumenov, "Implications of the new 2019 Hague Convention on recognition and enforcement of foreign judgments on the national legal systems of countries in East Southern Europe", University of Osijek Faculty of Law Journal, 2019, Vol. 3, 385-404 and other contributions in this Issue.

2007 Child Support Convention), as well as certain similarities with the "Brussels *acquis*",[13] which have been examined elsewhere.[14]

4.1. ARTICULATION OF RECOGNITION AND ENFORCEMENT SCHEMES

14. Once the 2019 Judgments Convention enters into force, the issue of its articulation with other national or regional schemes applicable in that jurisdiction is of primary importance. National schemes generally apply *without prejudice of* international Conventions.[15] On the other hand, for EU Member States, the primacy of EU law results in a clear-cut demarcation between EU and national rules on recognition and enforcement. Specifically, when a case falls under the scope of the Brussels I Recast Regulation or other EU Regulations, recognition and enforcement cannot be left to national law. The mandatory application of EU rules on recognition and enforcement is uncontested and sets aside the application of national law.

15. How is then the articulation of the 2019 Judgments Convention with other international instruments, and with rules of national law? For the former, the 2019 Judgments Convention gives way to the application of existing international instruments by providing in its Article 23 that the Convention "shall not affect" those other existing international instruments. In the same vein, the primacy of the EU instruments over the 2019 Judgments Convention is ensured by

[13] The "Brussels acquis" refers to the Brussels I Recast Regulation and to its predecessors, i.e., Council Regulation (EC) No 44/2001 of 22 December on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention).

[14] See, for instance, M. Pertegás, "Brussels I Recast and the Hague Judgments Project", *in* G. Van Calster and *Jura Falconis* (eds.), *European private international law at 50*, Antwerp, Intersentia, 2018, 67-82 (written before the conclusion of the Convention) and M. Wilderspin and L. Vysoka, "The 2019 Hague Judgments Convention through European lenses", *NIPR* 2020, 34-49.

[15] See, for instance, the articulation rule set out in Article 2 of the Belgian Code of Private International Law or Article 2 of the Spanish Law on International Judicial Cooperation.

Article 23(4) for the intra-EU circulation of judgments. Finally, for international treaties or EU (or other REIO) instruments adopted *after* 2 July 2019, the 2019 Judgments Convention maintains a "give-way rule" in favour of such posterior instruments provided one condition is met, which is the safeguard of the exclusive position that Article 6 of the Convention confers to judgments on rights in rem in immovable property.[16] The interplay among international instruments based on Article 23 runs parallel with the articulation rules of the 2005 Choice of Court Convention, except for the specific addition for judgments on rights in rem in immovable property.

16. The relationship between the 2019 Judgments Convention and national law is worth noting: Article 15 of the Convention makes clear that national law is not subordinated to the Convention or, in other words, the Convention does not take precedence over national law. In fact, the recognition or enforcement of judgments under national law remains on a par with the application of the Convention, except for the prevalence of Article 6 (on the very specific issue of rights in rem in immovable property). For judgments on any other matters, the Convention does not prevent the application of the national scheme on recognition and enforcement of the requested State (Article 15). This deference to national law is however based on the premise that the application of national rules works *favor recognitionis*: national law may be invoked in situations where recognition and enforcement would not be possible under the Convention. Even a "cherry-pick" approach, based on both the Convention and national law, is allowed. For instance, it is possible to invoke national provisions that provide less stringent jurisdictional requirements than the ones established by Article 5 of the Convention (see below 4.2). In such cases, by operation of Article 15, the fact that none of the jurisdictional requirements of Article 5 of the Convention is met does not stand in the way to a possible recognition and enforcement. In the same vein, either the

[16] The extraordinary scheme for the circulation of judgments on rights *in rem* in inmovable property complicates the operation of a Convention that seeks simple and predictable rules. For further detail, see A. Bonomi and C. Mariottini, "A game changer in interational litigation? Roadmap to the 2019 Hague Judgments Convention", Yearbook of Private International Law 2018&2019, Vol. 20, 537-567, at p. 548 and 559.

grounds for refusal set out by Article 7 of the Convention (see below 4.3) or those applicable under national law, whichever are less stringent, apply.[17]

4.2 THE JURISDICTIONAL REQUIREMENTS

17. The 2019 Judgments Convention is, other than what the Judgments Project once aspired to achieve, a *traité simple* dealing only with the recognition and enforcement of judgments. The Convention does not regulate international (direct) jurisdiction, and does not purport to amend States' national law on international jurisdiction. However, this is not to say that international jurisdiction is not important under this Convention…

18. In fact, the Convention sets out jurisdictional requirements which operate as pre-requisites for recognition and enforcement. These requirements (also referred to as indirect jurisdiction or jurisdictional filters) assess whether there was a sufficient connection between the claim and the State of origin to justify the eligibility of the judgment for circulation. The jurisdictional requirements under the Convention are set out by Article 6 (only for judgments that ruled on rights in rem in immovable property) and Article 5 (for all other judgments).

[17] See the Draft Explanatory Report by Rapporteurs F. Garcimartín and G. Saumier, *op. cit.* supra nr. 7, paras. 367-369. According to A. Bonomi, there is a risk that national recognition and enforcement schemes may evolve in the direction of more restrictive Convention standards. It is however difficult to foresee such trend because the general goal of this Convention and other international instruments in this area is not a "race to the bottom" but rather the facilitation of recognition and enforcement of foreign judgments. See A. Bonomi, "New challenges in the recognition and enforcement of judgments", *in* F. Ferrari and D. Fernández Arroyo (eds.), *Private International Law. Contemporary Challenges and Continuing Relevance,* Elgar, Cheltenham, 2019, 390-410, at p. 409.

4.3 Grounds for Denial of Recognition and Enforcement

19. Meeting the jurisdictional requirements is however not enough to obtain recognition and enforcement under the Convention.

20. Indeed, Article 7 gives discretion to the requested court by allowing (not imposing) the denial of recognition and enforcement if one of the exhaustive grounds contained in that Article is satisfied. A first important element to note is thus that there is no obligation for the requested court to refuse recognition and enforcement in situations falling under Article 7.

21. The six grounds for denial of recognition and enforcement are (a) insufficient notice of process; (b) judgment obtained by fraud; (c) manifest incompatibility with public policy; (d) conflicting choice of court agreement; (e and f) a prior conflicting judgment.

22. The most frequently invoked defence in recognition and enforcement cases is the incompatibility with the public policy of the requested State. While recourse to this defence is indeed common to other recognition and enforcement schemes, it remains to be seen how the formulation of this defence in Article 7(1)(c) of the Judgments Convention will influence its application.

23. Interestingly, this provision seeks to achieve a difficult balance between a high threshold of "manifest incompatibility" with the public policy of the requested State, on the one hand, and an explicit reference to situations covered by public policy including "fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State", on the other hand.

24. Prior HCCH Conventions and other international recognition and enforcement schemes systematically refer to the first limb, that is, the "*manifest* incompatibility" that is required to justify a refusal of recognition and enforcement of a foreign judgment. Based on such precedents, courts may have sufficient guidance about the type of situations in which the contravention is sufficiently serious to trigger the application of Article 7 (1) (c). Similarly, the expression "fundamental principles of procedural fairness" has a parallel

provision in the 2005 Choice of Court Convention (Article 9 (1) (c)), which may ensure a consistent interpretation. The final phrase on "situations involving infringements of security or sovereignty", however, has no precedent in HCCH Conventions on recognition and enforcement. This novelty may provide an additional line of defence to recognition and enforcement using a broad interpretation of the concepts of "security" and "sovereignty". It is nonetheless hoped that courts refrain from such an expansive interpretation. In this regard, the draft Explanatory Report helpfully states that, despite this novel wording, the scope of the public policy exception under the Judgments Convention should not be broader than the scope of the corresponding provision of the Choice of Court Convention.[18]

25. The three factors described above (i.e., the Convention´s articulation with other recognition and enforcement schemes; the jurisdictional requirements and the application of the grounds for refusal) constitute, as I see it, the main factors of the Convention's recognition and enforcement scheme. Their application by the courts in future Contracting States will eventually determine the practical effects of the Convention. However, to get to the stage where the Convention effectively impacts the recognition and enforcement practice of a significant number of jurisdictions, short-term efforts should focus on awareness raising and implementing actions. Such efforts should be undertaken by the private international law community at large to ensure a speedy entry into force and a rapid growth of the number of Contracting States. The last section of this paper makes some suggestions in this regard.

5 THE ROAD AHEAD – THE ENTRY INTO FORCE AS A PRIORITY

26. Ensuring a new international treaty's entry into force requires a well-orchestrated effort from several actors.[19] Above all, the

[18] See the Draft Explanatory Report by Rapporteurs F. Garcimartín and G. Saumier, *op. cit.* supra nr. 7, para. 264.

[19] As R. Brand points out, the best efforts might not be sufficient when "politics get in the way of improvement of the law": R. Brand, "New challenges in the recognition and enforcement of judgments", *in* F. Ferrari and D. Fernández

HCCH takes a primary role in designing and coordinating such efforts. In particular, it is recommended that the HCCH designs a promotional strategy that takes differentiated recognition and enforcement policies of the HCCH Members into consideration (*infra*, 5.1). Beyond the official circles, I would encourage the legal academic and professional communities to recommend the Convention's ratification and, where possible, they should assist the implementing authorities at the domestic or regional level. I refer below to the reasons why initiatives such as this 16th Regional Conference are an optimal example of how influential this indirect work can be (*infra*, 5.2).

5.1 Differentiated Promotional Strategies

27. Domestic work towards the ratification of the Judgments Convention may be driven by quite diverse factors in different jurisdictions. Some jurisdictions have traditionally displayed a restrictive approach to recognition and enforcement of (certain types of) foreign judgments. They may be hesitant to join an international scheme that may drastically change their recognition and enforcement policy. On the other hand, other jurisdictions praised for their liberal recognition and enforcement rules, may not see much benefit from the Convention for incoming judgments. They may well appreciate the common standards and foreseeability that the Convention sets out for their outgoing judgments in need of recognition and enforcement in traditionally restrictive jurisdictions.

28. The Convention may be called a success if it is able to gain traction in jurisdictions with very diverse approaches to recognition and enforcement of foreign judgments. For instance, for jurisdictions that are praised for the attractiveness and reliability of their commercial courts (e.g. either traditional or recently established hubs for international commercial litigation), the greatest asset of the Judgments Convention may well be the ability of ensuring the portability of their judgments. Such States or regions should be offered reliable evidence that the Convention scheme offers a less

Arroyo (eds.), *Private International Law. Contemporary Challenges and Continuing Relevance*, Elgar, Cheltenham, 2019, 360-389, at p. 389.

restrictive system than the ones currently applicable to their judgments abroad (e.g. by States blocking recognition and enforcement in the absence of a treaty). For other States, a particular feature of the Convention and its interaction with domestic rules on recognition and enforcement may be the key factor. For instance, in jurisdictions where no clear rules for the enforcement of non-monetary judgments exist (e.g. many common law jurisdictions), the Convention may provide a welcome innovation, as the Convention covers both monetary and non-monetary judgments, default judgments and cost orders (Art. 2). Other examples could be provided based on the great diversity of recognition and enforcement schemes around the world.

29. Comparative studies that could empirically demonstrate the changes that the Convention potentially brings forward, compared to the *status quo* of a given jurisdiction, may be instrumental in demonstrating the Convention's future usefulness and practicality.

5.2 Support of Other Stakeholders

30. The Convention should eventually meet the needs of professionals in the area of international commercial litigation. However, lawyers, judges and other law professionals may not have the natural inclination, in their busy daily practices, to turn their attention to an international treaty that has not entered into force yet.

31. In such circumstances, it is primarily for private international scholars to bridge this gap by raising awareness about the conclusion of the Convention, analysing its provisions and assessing its relevance for the recognition and enforcement field. The several commentaries recently published or under preparation about the 2019 Judgments Convention form a solid basis in this regard. However, ratification processes take place beyond these academic circles and, as I see it, there is also need for a multi-stakeholder debate among Ministry officials, academics and professionals in the area of international commercial litigation. As a first step, academics should reach out to the official authorities tasked with the study and implementation of the Convention and, provided their assistance is welcomed, advance the study and consideration of the Convention.

There sometimes appear to be a disconnect about in-depth studies produced by and for the academic community and the needs of officials in Ministries tasked with the study and ratification of international treaties. Joint projects in the assessment and/or implementation process may effectively speed up the process of assessing the benefits and drawbacks of the Convention's prospective operation against the respective domestic approach to recognition and enforcement of foreign judgments.

32. Initiatives such as the one that gathered us in Tirana in November 2019, led by the University of Tirana, with the support of the Albanian Ministry of Justice and with participation of international experts from the region and beyond, set the right example and deserve follow-up. Also the support of the German Foundation for International Cooperation deserves a specific mention, as it underscores the significance of judicial cooperation in civil and commercial matters from the perspective of international cooperation.