DOCTRINE

COURAGE OR CAUTION? A CRITICAL OVERVIEW OF THE HAGUE PRELIMINARY DRAFT ON JUDGMENTS

Andrea BONOMI*

I. Introduction
II. The Chances of Success for the Renewed Project
III. The General Architecture of the Draft
  A. The Scope of Application
    1. Material Scope
    2. Geographical Scope
  B. Non-Exclusivity of the Future Convention
  C. General Provisions on Recognition and Enforcement
  D. Conditions for Recognition and Enforcement, in Particular the Grounds for Denial
  E. Procedure
IV. The Bases for Recognition
  A. Jurisdiction Based on Habitual Residence
    1. Habitual Residence Instead of Domicile
    2. Habitual Residence of the Person "against Whom Recognition or Enforcement is Sought"
  B. Jurisdiction Based on (Express or Tacit) Consent
    1. Express Consent
    2. Implicit Consent Based on Appearance
    3. Recognition or Enforcement against the Claimant or the Cross-Claimant
  C. Judgments in Contractual Matters
    1. Place of Performance
      a) Place of Performance of the Obligation in Question
      b) Determination of the Place of Performance
    2. A Purposeful and Substantial Connection
    3. Criticism
  D. Consumer and Employment Contracts
  E. Judgments in Tortious Matters
    1. Non-Contractual Obligations Relating to Death, Physical Harm, Damage or Loss of Tangible Property

* Professor at the University of Lausanne.

Yearbook of Private International Law, Volume 17 (2015/2016), pp. 1-31

Printed in Germany

2. Infringements of IP Rights
F. Exclusive Jurisdiction
V. Punitive Damages Awards
VI. The Lack of Provisions against Parallel Proceedings
VII. Concluding Remarks

I. Introduction

From 1st to 9th June 2016, a Special Commission of The Hague Conference of Private International Law was convened in The Hague to prepare a draft convention on the recognition and enforcement of judgments in civil and commercial matters. A preliminary draft convention (hereinafter "the Draft"), largely based on a previous draft text elaborated by a Working Group in November 2015,[1] has since been posted on the website of The Hague Conference.[2] Thus, almost twenty years after the failure of the first attempt to set up a global instrument on recognition and enforcement of civil decisions, the Hague Judgments Project is again well underway.

The Draft is only a preliminary draft and will be further discussed at a second meeting of the Special Commission, to be held in February 2017. This notwithstanding, it is nevertheless important to briefly present the proposed rules in order to launch a discussion among scholars that will certainly be very animated in the next months.

The remarks below shall focus particularly on the relationship between Europe and the US. Although the future convention is to have global effect, nobody will contest that the creation of a bridge across the Atlantic is of particular importance, and that the US and the European Union shall play a central role in the negotiation process. It is therefore crucial to measure the advantages and drawbacks of the project in view of the European and American expectations and interests.

[1] On the basis of the "Conclusions and Recommendations of the Experts' Group on Possible Future Work on Cross-Border Litigation in Civil and Commercial Matters" (Work. Doc. No 2E of April 2012), a Working Group met between 2013 and 2015 and drafted a preliminary text ("Report of the fifth meeting of the Working Group on the Judgments Project and proposed draft text resulting from the meeting", Prel. Doc. No 7A of November 2015). All documents relating to the Judgments Project mentioned in this article are available on the website of The Hague Conference at the address <https://www.hcch.net/en/projects/legislative-projects/judgments>.

[2] "2016 Preliminary Draft Convention".

II. The Chances of Success for the Renewed Project

After the glaring failure of the 1999 and 2001 Drafts,[3] the first question that crosses everybody's mind is whether the new attempt has a real opportunity to succeed. Much like the negotiators at The Hague, this author remains optimistic and believes that the odds are now in favour of the project. This prognosis relies in particular on two grounds.

First, the new project is far less ambitious and, therefore, more realistic than the previous one. Drawing from experience, the Experts' Group, followed by the Council on General Affairs and Policy of the Conference,[4] has quickly realised that an agreement on a "double convention" regulating both the courts' jurisdiction and the recognition and enforcement of judgments based on the Brussels and Lugano model was extremely unlikely to succeed. The main ground for the 2001 failure had been the European attempt to prohibit the use of certain jurisdictional grounds, such as the "doing-business jurisdiction", that were – at least at that time – widely used and entirely acceptable from the US perspective. Regulating international jurisdiction as a premise for a smoother circulation of judgments has proved to be a very successful recipe in the European context, but is not workable on a global scale, at least in the present circumstances, because it entails a too far-reaching intrusion into each national law conception of jurisdictional fairness.

We only need to glance at Europe and the US to see that their jurisdictional systems reflect very different philosophies. While the jurisdictional analysis by the US Supreme Court, based on the due process principle and on the crucial notions of "minimum contacts" and "purposeful availment", clearly focus exclusively on the protection of the defendant, the Brussels Convention and its progeny try to combine this same concern with other important goals, such as access to justice and a sound administration of justice. Such divergences are deeply rooted in the respective legal traditions, and the attempt to wipe them out by way of a treaty-imposed unification is still bound to raise very emotional reactions.

---

[3] "Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters", adopted by the Special Commission on 30 October 1999 (Prel. Doc. No 11 of August 2000). The 2001 Interim Text, on which no consensus was reached at the Diplomatic Conference, is included in the "Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6 – 20 June 2001."

[4] In its "Conclusions and Recommendations" (note 1), the Experts' Group stated that "[t]he possibility remains open at this stage of making further provision in relation to matters of jurisdiction (including parallel proceedings). The desirability and feasibility of providing for such matters requires further study, and should be the subject of further discussion." The Council on General Affairs and Policy of the Conference endorsed the recommendation of the Working Group that "matters relating to direct jurisdiction (including exorbitant grounds and *lis pendens* / declining jurisdiction) should be put for consideration to the Experts' Group of the Judgments Project with a view to preparing an additional instrument." In our opinion, if a convention on recognition and enforcement is actually adopted, the chances that issues of direct jurisdiction and *lis pendens* might successfully be addressed in an additional instrument are very slim.

For these reasons, the Special Commission (and before it the Experts' Group and the Working Group, which previously worked on the project) has resolutely opted for a more traditional "simple convention." In such an instrument, judicial jurisdiction is only regulated as a condition for recognition and enforcement, i.e., as "indirect jurisdiction." This approach ensures that the courts of the Contracting States will continue to apply their national jurisdictional rules, even when these are perceived as unreasonable by other countries, the only sanction being then that their own judgments will have no effect abroad. In such a context, plaintiffs will have to decide whether they wish to bring proceedings on such "unreasonable" jurisdictional grounds, knowing that, if they do so, they will be unable to take advantage of the future convention.

The other ground for optimism in the success of the revived project lies in the fact that recent developments in US case law have significantly reduced the traditional gap between the two Atlantic shores, and thus paved the way for an international agreement. This is, of course, a reference to the well-known *Goodyear* and *Daimler* cases:[5] in these decisions, the US Supreme Court put an end to the widespread use of the "doing-business" jurisdiction, which had found its authority in some rather vague dicta in the seminal *International Shoe* decision of 1945.[6] As mentioned above, "doing business" was, over the years, one of the main sources of disagreement with respect to jurisdiction between the US and Europe. According to the new case law, general jurisdiction over a corporate defendant can only be asserted in a State where the company is "essentially at home;" as the Supreme Court suggested, this is effectively only the case at the place of incorporation and at the company's principal place of business. This very closely resembles the restrictive stance to general jurisdiction which is normally taken in Europe, in particular by the Brussels Regulation.[7] These developments facilitate the task of the negotiators at The Hague, and it is not surprising that the Draft does not even need to mention the "doing-business" jurisdiction.

Under these new circumstances, one might even wonder whether the European Union is really still interested in a global convention with the US. As a matter of fact, recognition and enforcement of foreign decisions in the US is already relatively easy nowadays. In the absence of a federal statute,[8] the existing state regulations are very often based on one of two Uniform Acts, the 1962 Uniform Foreign Money-Judgments Recognition Act and the 2005 Uniform

[5] *Goodyear Tires v. Brown*, 131 S. Ct. 2846 (2011); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). For a discussion of these cases see, among many others, L.J. SILBERMAN, The End of Another Era: Reflections on Daimler and its Implications for Judicial Jurisdiction in the United States, 19 Lewis & Clark L. Rev. 675 (2015).

[6] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[7] Under the Brussels Regulation, general jurisdiction can only be asserted at the defendant's domicile (Article 4). For corporations and other legal persons, the domicile is deemed to be situated either at the registered seat, or at the central administration, or at the principal place of business (Article 63(1)).

[8] So far, the 2005 ALI Proposal for a Federal Statute on the Recognition and Enforcement of Foreign Judgments has not been successful.

Foreign-Country Money Judgments Recognition Act.[9] These texts both take a very open stance towards recognition and enforcement. The same is also true of the traditional, "comity"-based common law principles applicable in the remaining states that have not adopted the uniform acts, and to those judgments that are not covered by them.[10]

Nevertheless, the personal jurisdiction of the foreign court ("indirect" jurisdiction) – which is under all applicable rules a condition for recognition and enforcement – is assessed under US jurisdictional standards, i.e. due process, "minimum contacts" and "purposeful availment."[11] This is a constant source of uncertainty and litigation, which an international convention would attempt to prevent.

Also, it goes without saying that both Europeans and Americans are not only interested in the mutual recognition and enforcement of their judgments, but also in the effects of such judgments in many other foreign jurisdictions, some of which still have very restrictive recognition rules and practices (this is the case for China and Russia, among others). A global instrument would be extremely helpful in this respect.

III. The General Architecture of the Draft

The structure of the Draft is quite traditional and does not present any surprises as such. Many general provisions reflect the solutions adopted by previous Hague Conventions on recognition and enforcement, and many of them are in conformity with the recognition systems that are currently applied in most recognition-friendly countries. Therefore, this section will skim through the Draft without going into too much detail. The following sections will then focus on the most important and controversial issues.

A. The Scope of Application

1. Material Scope

Articles 1(1) and 2 define the material scope of application of the future convention. Using a well-known technique – adopted notably in several EU Regulations, but also in the 2005 Choice of Court Convention (Articles 1 and 2) – they do so by

[9] The 1962 Act has been enacted by more than thirty states and the 2005 Act by around fifteen states. See D.P. STEWART, Recognition and Enforcement of Foreign Judgments in the United States, 12 YPIL 179 (2010), at 182-184; R.A. BRAND, Recognition and Enforcement of Foreign Judgments, Federal Judicial Center International Litigation Guide, April 2012.

[10] The common law principles on recognition have their historical roots in the seminal decision *Hilton v. Guyot*, 159 U.S. 113 (1895).

[11] D.P. STEWART (note 9), at 186.

first positively defining in Article 1(1) which judgments are to be covered: in this respect, the reference to judgments "in civil and commercial matters" is clearly modelled on the Brussels Regulation and on the Choice of Court Convention. Then, the same Article 1(1) goes on to exclude revenue, customs, and administrative matters: these expressions are also borrowed from the same precedents.

Article 2 then lists several matters that are specifically excluded from the material scope. Most of them mirror the "laundry-list" included in Article 1(2) of the Brussels Regulation (status and capacity of natural persons, maintenance obligations, other family matters, wills and succession, insolvency). Some exclusions, however, go further and address matters that would normally be included in the category of civil and commercial matters, such as the carriage of passengers and goods, marine pollution and other maritime law claims, and liability claims for nuclear damages. These exclusions, which were already provided in Article 2 of the Choice of Court Convention, are mainly motivated by the existence of other specific international instruments in the relevant areas.

For the same reason, arbitration and arbitration-related proceedings, which are governed by the 1958 New York Convention, are also excluded from the material scope of the future instrument (Article 2(3)). Prior experiences with the comparable exclusion provided by the Brussels Regulation will certainly help in defining its exact boundaries.[12]

The exclusion of defamation is based on completely different grounds: it is well known that this is a very sensitive area because of the strong US policy favouring freedom of expression under the First Amendment of the Constitution. Since the approval of the 2010 Speech Act,[13] foreign libel decisions face a very high hurdle to be recognised in the US.[14] Because of the exclusion of such judgments from its material scope, the future instrument will not change anything in this regard.

The broad definition of "judgments" included in Article 3(1)(b) also serves to specify the material scope of the convention. While all judgments on the merits should be covered – including non-monetary judgments, default judgments and determinations of procedural costs or expenses – the Draft is not intended to apply to interim measures. Although such exclusion may be understandable in light of the disparities existing here between the various national systems, it is nevertheless disappointing since they have great practical importance.[15] On the other hand, the recognition of judicial settlements – i.e., settlements approved by, or concluded before a court – is ensured by Article 10.

---

[12] See Recital 13 of the current Brussels Regulation.

[13] 28 U.S.C. §§ 4101-4105.

[14] In particular, under title 28 U.S.C. § 4102(a)(1), recognition and enforcement are possible only if the court addressed "determines that (A) the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in the case as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located […]." See L.E. LITTLE, Internet Defamation, Freedom of Expression, and the Lessons of Private International Law, 14 YPIL 181 (2012/2013), at 196 *et seq*.

[15] Note that the 1999 Draft was applicable to interim measures ordered by the court having jurisdiction to determine on the merits (Article 13).

2. Geographical Scope

Article 1(2) makes clear that the future convention will only apply to the recognition and enforcement of judgments in one Contracting State of a judgment given in another Contracting State. As with all existing conventions and regulations in the area of recognition and enforcement, the new instrument will be based on reciprocity and will thus only apply *inter partes*.

B. Non-Exclusivity of the Future Convention

Instead of following the order of the Draft, it is best to immediately point out the principle of non-exclusivity, as enshrined in Article 16. According to this provision, the future convention will not prevent the recognition and enforcement of judgments under national law.

This reflects a classic approach followed in most international instruments for the recognition and enforcement of foreign judgments: since the goal of such instruments is to facilitate the transnational circulation of decisions, they normally do not prevent the application of national rules, whenever these better serve that objective.

Even though this principle is widely accepted, it is nevertheless important that the Draft includes express language, as do other well-known international instruments – the most cited example doubtless being Article VII of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[16] This prevents possible misunderstandings on the exclusive or non-exclusive application of the instrument, such as those generated, for instance, by the 1970 Hague Evidence Convention.[17] Moreover, seen from a European perspective, we know that the future convention – if ratified by the European Union – will become part of EU law. As such, and in the absence of a provision like Article 16, it might therefore be interpreted by the ECJ (or by the national courts) as pre-empting national recognition rules of the single Member States.

The explicit statement of non-exclusivity is particularly important because this principle will probably be very relevant in practice. As a matter of fact, the future instrument might prove on several points (and in particular with regard to indirect jurisdiction) to be less recognition-friendly than the law of some Contracting States.[18]

---

[16] Pursuant to Article VII of the New York Convention, "[t]he provisions of the present convention shall not […] deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

[17] Contrary to most European Contracting States, US courts consider that the Hague Evidence Convention does not exclude the application of national procedural rules: see *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522 (1987).

[18] The Draft does not include a provision such as Article 5(1)(k) of the Working Group's draft of November 2015, pursuant to which recognition and enforcement would also be possible if the court of origin "would have had jurisdiction in accordance with the

C. General Provisions on Recognition and Enforcement

Several general principles on recognition and enforcement, mostly drawn from the Choice of Court Convention, are contained in the Draft: some of them in Article 4, others in the final provisions (Articles 14 to 16).

Most of these are by now well-established in the law of many recognition-friendly countries:

– recognition or enforcement may be refused only on specific grounds outlined in the convention (Article 4(1));

– there will be no revision of the foreign judgment on the merits (Article 4(2));

– recognition is only possible if the judgment has effect in the State of origin, and enforcement only if it is enforceable in that State (Article 4(3));

– a judgment recognised or enforceable will be given the same effect it has in the State of origin (Article 14, first sentence);

– recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of only that part is applied for, or when only a part of the judgment is capable of being recognised or enforced under the convention (Article 15).

Only the following points require further expansion:

a) Similar to the Brussels Regulation, but contrary to what is provided for in several national recognition systems, the Draft does not require a judgment to be final. This means that even a judgment that is still subject to review in the country of origin is capable of recognition or enforcement, provided respectively that it has effects and is enforceable in that country.

However, when the judgment is still subject to review, or when the time limit for seeking ordinary review has not expired, the court addressed in the State *ad quem* can discretionally opt to take one of three possible decisions (Article 4(3)):

– it can immediately grant recognition or enforcement, and by doing so it can make enforcement conditional on the provision of such security as it shall determine;

– it can postpone recognition or enforcement until the final judgment;[19]

– it can refuse recognition or enforcement; obviously, such a refusal does not prevent a subsequent application for recognition or enforcement once the judgment has become final.

national law of the requested State." Nevertheless, Article 16 will probably have the same effect.

[19] This possibility is also granted in the US by the 1962 and 2005 Uniform Recognition Acts (§ 6 respectively § 8) and in Europe by Article 38(a) of the Brussels Regulation.

This wide range of possible options will allow the courts of the Contracting States to choose the solution that best fits the particular case. However, national practices will also have an impact: thus, it is likely that courts in the EU Member States will be more easily prepared to grant immediate recognition or enforcement under a security provision, because this possibility is already provided for within the Brussels systems, while the courts in other less recognition-friendly countries will probably more easily opt for a refusal or a stay of proceedings. This might result in some disparities in the application of the future instrument.

b) Another interesting provision is that of Article 14, second sentence,[20] although its practical impact will probably be quite limited. If the relief provided for in the foreign judgment is not available under the law of the requested State, that relief should, "to the extent possible, be adapted to relief with effects equivalent, but not going beyond," those provided by the law of the State of origin. To a certain extent, this entails a limited derogation from the prohibition of a *révision au fond*: when a simple "extension of the effects" (*Wirkungserstreckung*) of the foreign judgment to the requested country is not feasible, the relief provided in the judgment will have to be slightly modified and "adapted" to the extent necessary for recognition to be effective. This might be useful, for instance, for certain kinds of injunctive relief available in common law jurisdictions, but ignored in the civil law systems, or, vice-versa, for an order of "astreintes" as practiced by French courts, which does not have an exact equivalent in other countries.

D. Conditions for Recognition and Enforcement, in Particular the Grounds for Denial

Articles 5 to 7 which determine the (positive and negative) conditions for recognition and enforcement are the core of the Draft. In the next section, we will have a closer look at the bases for recognition provided by Articles 5 and 6. The grounds for denial, as listed in Article 7, shall not be covered in any great depth.

To begin with, two general remarks. First, the list of Article 7 is exhaustive, as clearly stated in Article 4(1), subject only to Article 9 (the provision concerning punitive damages, which will be analysed separately). Second, all the listed grounds are discretional and non-mandatory ("[r]ecognition or enforcement may be refused […]"): although different from many national systems and from the Brussels Regulation, this solution is perfectly in line with most international conventions concerning recognition and enforcement of foreign judgments or foreign awards.

Unsurprisingly, the grounds for denial include:

– insufficient notice (Article 7(1)(a));

– the manifest incompatibility of the judgment with the public policy of the requested State (Article 7(1)(c)), which includes fundamental principles of

[20] This provision is clearly modelled on Article 54 of the Brussels Regulation and on similar provisions included in other EU regulations.

both substantive and procedural law ("fundamental principles of procedural fairness");

– the fact that the judgment was obtained in breach of a forum-selection agreement or a forum-selection designation in a trust instrument (Article 7(1)(d));

– inconsistency with a judgment given between the same parties, either in the requested State or in a third State (Article 7(1)(e-f)); in the latter case, the third-country judgment must have been given earlier and, obviously, be capable of recognition in the requested State.

These grounds for refusal correspond almost word for word to those provided in the Brussels Regulation (present Article 45). The only differences concern the definition of insufficient notice: this covers not only the case when the defendant did not receive service of process "in sufficient time and in such a way" as to enable him to defend himself (as also provided in the Brussels Regulation), but also a notice given in a way that is "incompatible with the fundamental principles of the requested State concerning service of process."[21]

The Draft also allows a denial of recognition or enforcement in two other cases that are not provided under the Brussels system.

a) First, recognition and enforcement can be denied when the foreign judgment was obtained by fraud (Article 7(1)(b)). This rule is found in several national systems and international conventions, although its exact meaning may vary. In the US, courts have recognized that only "extrinsic" fraud is a ground for denial, i.e., a fraud that deprives a defendant of an adequate opportunity to present his case.[22] That being so, it would appear that these situations already fall under the public policy exception, in particular its "procedural" facet (lack of procedural fairness).

The public policy exception also covers corruption and, more generally, the lack of independence or impartiality of the foreign court. This is generally accepted with respect to arbitral awards, and there is no reason why it should be different for State courts. The same also applies for situations of "systemic" lack of due process, a situation that (understandably) is not yet referred to in the Draft, while being specifically contemplated as a mandatory ground of denial by both the 1962 and 2005 US Uniform Recognition Acts.[23] US case law confirms that courts are very reluctant in invoking such grounds, unless they can rely on very clear and unmistakable governmental reports.[24] That being so, public policy may very well be used for the same purpose. If a more effective mechanism is desired, it would probably be better to include in the future convention a safeguard clause allowing each Contracting State to "suspend" the application of the treaty in relation to those

[21] This provision is modelled on Article 9(c) of the 2005 Choice of Court Convention.

[22] D.P. STEWART (note 9), at 188; R.A. BRAND (note 9), at 20-21.

[23] § 4(A)(1) of the 1962 Act; § 4(b)(1) of the 2005 Act.

[24] See R.A. BRAND (note 9), at 13 *et seq.*; D.P. STEWART (note 9), at 185-186.

countries that do not guarantee an impartial judicial system and the observance of the rule of law.[25]

b) Second, refusal is also possible under the Draft when proceedings between the same parties on the same subject matter are already pending before a court of the requested State (Article 7(2)). Although the new Draft, contrary to the one of 1999,[26] does not specifically address parallel proceedings, it contemplates them as a possible ground for denial.

However, Article 7(2) sets two additional conditions. First, the proceedings in the requested State can hinder recognition only if they were instituted *before* those that have led to the foreign judgment. A similar rule is included in a number of national and international recognition systems.[27] In such circumstances, if a *lis pendens* rule was applied in the State of origin, the foreign judgment is deemed to have not even been rendered: the refusal is therefore entirely justified. By contrast, if the proceedings in the requested State had been initiated after those in the State of origin, a denial of recognition would unjustly reward one of the parties' abusive attempts to elude the effects of the foreign judgment.

The second condition is that the dispute was closely connected with the requested State. Without this requirement, recognition or enforcement of a judgment could be prevented by proceedings initiated by one of the parties in an unreasonable forum, lacking any significant connection with the dispute. This requirement makes sense in the framework of an instrument that does not address "direct" jurisdiction and leaves in this regard full discretion to the Contracting States. However, its practical application leaves to be seen. At least in the civil law jurisdictions that are not acquainted with the *forum non conveniens* doctrine, it does not seem very likely that the courts – which have been seized first and have jurisdiction to hear the case under their national rules – will be prepared to give priority to a foreign judgment on the ground that the dispute is not closely connected to the forum.

E. Procedure

With respect to the recognition and enforcement procedure, the basic principle is that the law of the requested State is applicable, unless the convention provides otherwise (Article 12 (1)).

Contrary to the 2007 Child Support Convention (Article 23), no attempt has been made to introduce a uniform procedure for recognition and enforcement. This prudent approach is reasonable, in that it prevents a too far-reaching interference

[25] Such a mechanism might operate in combination with some restriction to the "openness" of the future convention, as mentioned in the Explanatory Note to the Working Group's draft, Prel. Doc. No 2 of April 2016 (at No 243). Among the various suggested options, the present author favours an "opt-out approach," pursuant to which the convention would only enter into force between the acceding State and those Contracting States which have not raised an objection.

[26] A *lis pendens* rule was included in Article 21 of the 1999 Draft.

[27] For instance, see Article 27(2)(c) of the Swiss PIL Act, Article 64(1)(f) of the Italian PIL Act, or Article 22(c) of the 2007 Hague Child Support Convention.

with the national systems in an area – that of civil and commercial matters – where speedy and streamlined enforcement procedures, although important, are less crucial than in the child-support context.

The Draft, in essence, merely contains rules on the documents to be produced by the party seeking recognition or enforcement (Article 11) and on the cost of proceedings (Article 13). These are standard provisions that do not deserve any particular comment.

Much more interesting is the provision of Article 12(2), which states that recognition or enforcement shall not be refused on the ground that they should be sought in another State. The practical effect of this is to dispense with any particular requirement of personal jurisdiction to hear a recognition or enforcement action, contrary to the approach followed by courts in some US states.[28] Under the future instrument, the court seized for recognition or enforcement will not be allowed to decline its jurisdiction, and thus challenge the choice of the requesting party to seek recognition or enforcement in the forum State.

IV. The Bases for Recognition

The bases for recognition and enforcement are listed in Article 5. This provision is probably the most important of the Draft. The main jurisdictional grounds provided therein shall be briefly reviewed below.

A. Jurisdiction Based on Habitual Residence

Pursuant to Article 5(1)(a), a judgment is eligible for recognition and enforcement if the person against whom such recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings.

This is one of the few "general" recognition bases included in the Draft. As such, it is meant to apply to all kind of judgments within the scope of application of the future convention, the only exception being those rendered in violation of an exclusive jurisdiction rule under Article 6.

Being the expression of the widely-accepted principle *actor sequitur forum rei*, this provision mirrors jurisdictional grounds that are accepted in most national legal systems and international instruments. However, it does present some original features.

[28] See R.A. BRAND (note 9), at 10. However, the courts in some US jurisdictions (notably New York) have held that the debtor does not need to be subject to personal jurisdiction in the enforcement State.

1. Habitual Residence Instead of Domicile

A first particularity is that – contrary to similar provisions currently applicable both in Europe and in the US[29] – Article 5(1)(a) does not refer to a party's domicile, but to his/her habitual residence. This solution rests on the often voiced concern that the notion of domicile could be interpreted in different ways in the single Contracting States based on traditional local understandings. The same concern has led to the surge in popularity of habitual residence in the Hague Conventions as well as in most European Regulations. While habitual residence has widely pre-empted domicile in the family and succession law areas, the shift is still not complete in civil and commercial matters. In Europe, the Brussels Regulation is still based on the notion of domicile, contrary to most other private international law regulations, and the same is also true in the national jurisdictional systems of several European States. Similarly, in the US, jurisdiction over natural persons still rests on the defendant's domicile and not on his habitual residence, although some commentators have suggested, in the aftermath of the *Daimler* case, that this connection should perhaps become the prevailing jurisdictional basis.[30]

It is also interesting to highlight that, according to the Draft, corporations and other legal persons also have a "habitual residence." Of course, this use of the notion of habitual residence is not completely novel: in Europe, we find it in the Rome I and Rome II Regulations.[31] And in the US, this notion seems to be in line with the "essentially at home" metaphor used by the Supreme Court in the *Goodyear* and *Daimler* cases – language that undoubtedly reminds the notion of habitual residence.

The habitual residence of a natural person is not defined in the Draft, and this reflects the practice followed both in the Hague Conventions and in several European Regulations. The general understanding is that a person has his/her habitual residence in the place where the main centre of his/her interests is situated.[32] By contrast, the Draft provides for a definition of a legal person's habitual residence (Article 3(2)). This definition, which is drawn from the Choice of Court Convention (Article 4(2)), very closely resembles that included in current Article 63 of the Brussels Regulation, with the only, slight difference that – besides the statutory seat, the central administration and the principal place of business – it also refers to the country "under whose law the person was incorporated or formed." The place of incorporation is expressly referred to in the *Goodyear* and

[29] In Europe, the equivalent is obviously Article 4(1) of the Brussels Regulation. For the US, see § 5(a) of the 2005 Uniform Recognition Act and § 5(a) of the 1962 Uniform Recognition Act.

[30] J.T. PERRY, Rethinking Personal Jurisdiction after Bauman and Walden, 19 Lewis & Clark L. Rev. 607 (2015), at 613.

[31] See Rome I Regulation (No 593/2008), Article 19; Rome II Regulation (No 864/2007), Article 23.

[32] However, it might be helpful to include some indications (at least in the Report) to avoid misunderstandings. Note, for instance, that in the Explanatory Note drafted by the Permanent Bureau (note 25), it is stated (at No 76) that it is possible for natural persons to have more than one habitual residence, which does not correspond to the approach set out in the EU regulations.

Daimler decisions as one of the places where the company is "essentially at home," in accordance with the new paradigm for general jurisdiction. Of course, this place will almost always coincide with the place of the registered seat, if there is one.

The separate reference to both the central administration *and* the principal place of business makes clear that the latter does not always fall together with the corporation's headquarters. This is a significant indication, also in light of the current US debate where, in the aftermath of *Daimler*, it has been warned that courts might construe the notion of "principal place of business" in the sense of the so-called "nerve center theory", as adopted some years ago by the Supreme Court for the purpose of "diversity" jurisdiction.[33] As rightly pointed out by some commentators,[34] it would be unfortunate if the same restrictive reading were followed for the purpose of personal jurisdiction, because this would make it excessively difficult to sue a corporation in a State other than that from where it is directed. If the future convention is ratified by the US, its language could perhaps help preventing this unwanted interpretation.

Of course, this should also not lead to revive the notion of "doing-business" jurisdiction, as it was widely used (and sharply criticized) in the pre-*Goodyear* and *Daimler* era. "Doing business" in a State is not the same as having the "principal place of business" there: the threshold for a court to render a decision capable of recognition or enforcement under the future convention should be distinctly higher.

Similarly, the simple fact that the defendant has a branch, agency, establishment, i.e. a "place of business" in the forum State will not be sufficient to assert general jurisdiction. Following the approach of the Brussels Regulation (Article 7(5)), the Draft allows in Article 5(1)(d) the recognition or enforcement of a judgment given at the place of a defendant's branch, agency, or other establishment, but only if "the claim on which the judgment is based arose out of the activities of that branch, agency, or other establishment." As this condition makes clear, this is not a rule of general jurisdiction, but only one of specific jurisdiction.

2. Habitual Residence of the Person "against Whom Recognition or Enforcement is Sought"

Another peculiar feature of the proposed Article 5(1)(a), is that it refers not to the habitual residence "of the defendant," but to "the person against whom recognition or enforcement is sought." This terminology makes sense because, as we know, the Draft does not deal with (direct) jurisdiction but only provides for bases of recognition and enforcement. Obviously, recognition and enforcement of a judgment can be sought not only against the original defendant, but against everyone who has become a party in the foreign proceedings (including cases of joinder, intervention, impleader, interpleader, subrogation, and succession).[35]

However, to avoid misunderstandings one should be aware that some of the cases, in which recognition or enforcement is sought against a person other than

[33] *Hertz Corp. v. Friend*, 599 U.S. 77 (2010).

[34] J.T. PERRY (note 30), at 611.

[35] See the Explanatory Note (note 25), No 81.

the defendant, are already covered by other provisions of the Draft. Thus, on one side, Article 5(1)(c) provides that a judgment is entitled to recognition or enforcement "if the person against whom recognition or enforcement is sought is the person that brought the claim on which the judgment is based," i.e., the original plaintiff. This provision is broader than Article 5(1)(a), since there is no requirement that the judgment was rendered in the country of the plaintiff's habitual residence: this makes sense, because by filing the action the plaintiff implicitly (and sometimes even expressly) consents to the court's jurisdiction. This obviously applies to all co-plaintiffs (even when they decide to intervene in the action and when they assert cross-claims against each other) as well as to defendants that bring third-party claims (also known in the US as "impleader"). The same rule should also apply to a defendant that brought a counterclaim against the plaintiff, at least when he wasn't indirectly forced to do so by risk of waiving his rights ("compulsory counterclaim", see Article 5(1)(n)(ii)).

Although the Draft does not say anything about it, one may wonder whether the particular language used is also meant to deal with the specific jurisdictional problems raised by class actions.[36] In these kinds of actions, there are normally no particular problems in asserting jurisdiction over the defendant: the general rules apply. The same is also true of the named class representatives and those class members who individually decide to intervene in the action: they must be treated as ordinary plaintiffs. Much more problematic is jurisdiction over the "absent" class members, i.e., those who did not directly participate in the proceedings, but may nevertheless be bound by the judgment (or by a judicial settlement). Of course, the question is not so important for enforcement purposes, because enforcement is virtually never sought against the absent class members. By contrast, the issue of the judgment's recognition becomes relevant when absent class members decide to file an independent action against the defendant in a different country. Are they bound by the judgment (or by the settlement)? This depends, *inter alia*, on the court's jurisdiction. Now, if the expression "person against whom recognition is sought" is also meant to cover absent class members, recognition would be possible at least against those persons who had their habitual residence in the State of origin at the time of the claim. Of course, this would not rule out other possible objections against recognition, as those deriving from the violation of the public policy principle of *res judicata* relativity.

B. Jurisdiction Based on Consent

1. Express Consent

Article 5(1)(e) provides a ground of recognition based on the defendant's explicit consent to jurisdiction. Like habitual residence jurisdiction, consent also has a general scope, i.e., it applies to all judgments covered by the Draft with only some limited exceptions resulting, on one hand, from the consumers' and employees'

[36] The Draft does not refer to judgments rendered in class action proceedings. According to the Explanatory Note (note 25, at No 53), these judgments were covered by the Working Group's draft of November 2015.

protection (Article 5(2)) and, on the other, from the rules on exclusive jurisdiction (Article 6).

This provision is intended to cover situations where a party (normally the defendant) expressly consents to a particular jurisdiction before the court or through an exchange of documents made during the course of proceedings. By contrast, it is not intended to apply to a choice-of-court agreement, which entails anticipated consent to the selected court's jurisdiction.[37] In this author's opinion, this restrictive approach is not entirely convincing. Although specifically regulated by the 2005 Hague Choice of Court Convention, forum-selection agreements should not be ignored by the new future instrument, and for several reasons. First, because under the future convention, an exclusive choice-of-court agreement can be invoked as a ground of refusal against a judgment given by a non-selected court (see Article 7(1)(d) of the Draft); that being so, the convention should also ensure that judgments by the selected court are actually recognised and enforced. Of course, this result is guaranteed by the Choice of Court Convention, but this instrument is in force in only a limited number of countries:[38] while this will hopefully change in the future, it cannot be ruled out that some countries may wish to adhere to the future judgment convention without becoming a party to the 2005 instrument. Second, it should be stressed that, while the 2005 Convention ensures the circulation of judgments rendered on the grounds of an *exclusive* choice-of-court agreement, *non-exclusive* court-selection agreements – whose validity is generally less controversial – should also be regarded as good bases for recognition and enforcement.

2. Implicit Consent Based on Appearance

Implicit consent is governed by Article 5(1)(f) of the Draft, a provision that remains drafted inside brackets. According to this proposed rule, a foreign judgment is entitled to recognition and enforcement if the defendant entered an appearance before the court of origin "without contesting jurisdiction at the first opportunity to do so." This mirrors a widely-accepted jurisdictional ground (see in particular Article 26 of the Brussels Regulation) that should also find its way into the future convention. This author therefore recommends that the brackets around this provision be deleted.

Contrary to what has been held by some US courts,[39] the defendant can avoid tacit acceptance by contesting the court's jurisdiction "at the first opportunity to do so." If he did so, he can then proceed to defend on the merits without being deemed to have waived the right to resist recognition or enforcement. The fact that

[37] See the Explanatory Note (note 25), Nos 87-88.

[38] Besides the Member State of the European Union, the Convention is currently in force only in Mexico and Singapore.

[39] In several cases, New York state and federal courts have considered that, by choosing to defend on the merits, defendants had waived their jurisdictional objections: see *CIBC Mellon Trust Co. v. Mora Hotel Corp.*, 100 N.Y.2d 215, 792 N.E.2d 155 (2003); R.A. BRAND (note 8), at 18 *et seq*.

the foreign court dismissed the jurisdictional objection does not change this result, because its decision is not based on the recognition grounds under the convention, but on the foreign national jurisdictional rules.

The Draft adds, however, a qualification that is absent from most national or international systems: according to the proposed language, uncontested appearance entails consent only "if the defendant would have had an arguable case that there was no jurisdiction or that jurisdiction should not be exercised under the law of the State of origin." The rationale of this condition is clear: uncontested appearance should not be regarded as implied consent to jurisdiction when the defendant did not have good grounds to contest the foreign court's jurisdiction. At first sight, this seems to make sense.

At a closer look, however, the described mechanism is not convincing. It is important to recall that the choice for a "simple" convention necessarily implies that "direct" jurisdiction will continue to be governed by each country's national law. Now, whenever a national jurisdictional ground is satisfied (even though it differs from the admissible bases for recognition under the convention), the defendant has no "arguable case" to contest it; therefore, under the proposed rule, his appearance cannot amount to tacit acceptance of the foreign court's jurisdiction. It follows that a defendant's appearance can entail acceptance only when the national jurisdictional grounds are not satisfied. Such result is ironic: why should the defendant's passive attitude be able to cure a court's lack of jurisdiction when (and only when) the jurisdictional rules of the country of origin are not respected, but not when they are satisfied?

Of course, it is true that in the absence of an "arguable case" against the court's jurisdiction, the defendant cannot be required to raise a formal defence which is devoid of any success possibility. Nevertheless, nothing prevents him from making a reservation against the court's jurisdiction in order to preserve his right to contest recognition or enforcement of the future judgment abroad. It is worth noting that this possibility exists even though it is not specifically provided by the procedural law of the country of origin: no national procedural law prevents the defendant from including in his defence arguments on the chances of recognition of the future judgment. In any case, the right to make such a reservation will ensue directly from the future convention once it is in force in the State of origin. In conclusion, it is advised that the last "if" sentence be deleted, together with the brackets surrounding the provision.

3. Recognition or Enforcement against the Claimant or the Cross-Claimant

As previously mentioned, implicit consent is also the rationale for the recognition basis of Article 5(1)(c), which allows recognition and enforcement of the judgment against the plaintiff without any further requirement. The plaintiff's implicit consent also acts in favour of a counterclaimant, but only if the counterclaim arose out of the same transaction or the same occurrence as the original claim (Article 5(1)(n)).

On the other hand, if the judgment on the counterclaim were to rule against the counterclaimant, its recognition could rely on the counterclaimant's implied

consent, but only when he freely decided to assert his claim as a counterclaim instead of bringing a separate suit ("permissive counterclaim"). By contrast, no consent can be presumed when the law of the country of origin required the counterclaim to be filed in order to avoid preclusion ("compulsory counterclaim", Article 5(1)(n)(ii)).[40]

C. Judgments in Contractual Matters

Article 5(1)(g) provides for a specific basis for recognition and enforcement of a judgment ruling on a contractual obligation. Pursuant to this provision, such judgment is entitled to recognition or enforcement if it was given in the State in which "performance of that obligation took place or should have taken place under the parties' agreement, or, in the absence of an agreed place of performance, under the law applicable to the contract." Even when this condition is satisfied, recognition or enforcement can still be denied if "the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection" to that State.

This provision is an interesting attempt to find a compromise between the diverging jurisdictional philosophies in Europe and in the US. While the Brussels Regulation, through its rules on specific jurisdiction based on proximity and predictability, tries to promote a sound administration of justice, US courts are primarily committed to the defendant's protection under a strict understanding of due process requirements. The Draft tries to conciliate these goals by combining two distinct conditions.

1. Place of Performance

The first condition, based on the place of performance of the contractual obligation, obviously echoes the European rules of specific jurisdiction in contractual matters (Article 7(1) of the Brussels Regulation). However, the proposed rule only partially corresponds to those included since 2001 in the Brussels Regulation, and more closely resembles the original Brussels Convention, as interpreted by the ECJ.

a) Place of Performance of the Obligation in Question

The most obvious difference with the Brussels Regulation is that the relevant obligation is not the "characteristic" obligation (as it is the case for sales of goods and provisions of services under Article 7(1)(b) of the current Brussels system), but "the obligation on which the judgment has ruled."

The meaning of this language seems to point to no other than the "disputed obligation" or the "obligation in question", as it is called in Europe since

[40] For example, see Rule 13(a) of the US Federal Rules of Civil Procedure.

the 1976 *De Bloos* decision[41] (which is of course still relevant today under Article 7(1)(a) of the Brussels Regulation, but only for contracts other than those for the sale of goods or the provision of services). This means that under the future convention, the determination of place of performance will depend on which party has brought the claim (e.g. the place of delivery if the claim was brought by the buyer, the place of payment if it was brought by the seller). It also means that, even in contracts for the sale of goods or the provision of services, the place of payment may be relevant for jurisdictional purposes.

Due to this difference, it is possible that a foreign judgment will be entitled to recognition or enforcement under the future convention, even though rendered by a court that – if subject to the Brussels Regulation – would lack jurisdiction. Such enlargement of the range of judgments potentially eligible for recognition or enforcement is not particularly problematic. It is not uncommon today in national recognition systems that "indirect" jurisdiction rules stretch further than those on "direct" jurisdiction: this is a reasonable expression of pro-recognition bias. What's more, nobody could consider that the jurisdictional grounds such as those embodied in the original Brussels Convention are unreasonable. And finally, one should remember that a wider notion of place of performance will benefit not only third countries' judgments, but will also facilitate the recognition in third countries of a Member State's judgment rendered on national jurisdictional grounds broader than those of the Brussels Regulation.[42]

Much more problematic is the opposite situation. i.e., when a judgment rendered by a Member State court that would have had jurisdiction under the Brussels Regulation's standards will not be capable of recognition or enforcement under the future Hague instrument. This will happen whenever the courts at the place of performance of the characteristic obligation (i.e., at the place of delivery of goods or at the place of performance of services) rules on a distinct obligation under the contract (typically, on the payment obligation). Note that this can happen either when the court's jurisdiction was actually governed by the Brussels Regulation[43] or, even more frequently, when the court's jurisdiction was based on national rules equal to those of the Regulation.[44] In such cases, the future convention will not be of any assistance: the judgment's recognition or enforcement could only rely, if ever, on the national rules of the requested State (Article 16 of the Draft).

[41] ECJ, Case 14/76, *De Bloos*, ECR [1976] 1497.

[42] As we well know, national jurisdiction rules are applicable under Article 6(1) of the Brussels Regulation when the defendant is domiciled in a non-Member State.

[43] E.g. enforcement of a judgment rendered by a French court against an English defendant on the debtor's assets in the US.

[44] E.g. enforcement of a judgment rendered by an Italian court against a US defendant on the debtor's assets in the US (under Article 3(2) of the Italian PIL statute, jurisdiction over a defendant domiciled in a non-Member State is governed by the rule of the Brussels system).

b) Determination of the Place of Performance

A further divergence from the Brussels Regulation is that according to the Draft the place of performance should be determined – in the case of non-performance and in the absence of an agreed place of performance – by reference to the law applicable to the contract (*lex contractus*). This mirrors the well-known *Tessili* case law of the ECJ[45] – which once again is still relevant under the current Brussels Regulation for contracts governed by Article 7(1)(a), but not for the sales of goods and provisions of services under Article 7(1)(b).

This solution might raise quite complicated issues. First, the applicable law is not always easy to determine for the court and it is unfortunate that recognition or enforcement should depend on it. Moreover, contrary to the situation in Europe since the entry into force of the Rome Convention (then followed by the Rome I Regulation), the choice-of-law rules (and therefore the *lex contractus*) might not be the same in the State of origin, on one hand, and in the requested State, on the other. It may be the case, therefore, that recognition or enforcement is denied because the requested court holds – contrary to the court of origin – that the place of performance was not situated in the country of origin.

Seen from the European perspective, the reference to the *lex contractus* might also lead to some disparities with the current Brussels regime. Thus, if a dispute arises out of a contract for sale at distance governed by the Vienna Sales Convention, the future judgment convention will probably point to the courts of the place where the goods were handed over to the first carrier,[46] while the Brussels Regulation would confer jurisdiction to the courts at the place of the goods' final delivery.[47] It is possible, therefore, that a judgment rendered by the court having jurisdiction under the Regulation will not be capable of recognition or enforcement under the future convention.

2. A Purposeful and Substantial Connection

Under the proposed Article 5(1)(g), recognition and enforcement of a judgment rendered at the place of performance is nevertheless excluded, if "the defendant's activity in relation with the transaction clearly did not constitute a purposeful and substantial connection to that State."

This second condition obviously echoes the US jurisdictional approach: according to the well-established case-law of the US Supreme Court, jurisdiction can be predicated only when the defendant "purposefully availed" himself of the privilege of conducting activities within the forum State, in other words, when the defendant purposefully established minimum contacts with that State.[48] This

[45] ECJ, Case 12/76, *Tessili*, ECR [1976] 1473; ECJ, Case C-288/92, *Custom Made*, ECR [1994] I-2913; ECJ, Case C-440/97, *Groupe Concorde*, ECR [1999] I-6307.

[46] See Article 31(a) of the Vienna Sales Convention. See also the Explanatory Note (note 25), No 95.

[47] ECJ, Case C-381/01, *Car Trim*, ECR [2010] I-1255.

[48] The "purposeful availment" requirement was first set out by the Supreme Court in the 1958 decision *Hanson v. Denckla*, 357 U.S. 235, as a refinement of the *International*

requirement applies to all kind of disputes, including those arising out of a contractual relationship. Certainly, the language of the Draft ("a purposeful and substantial connection") is slightly different to the terminology that is commonly used in the US, the likely purpose being to make this condition easier to understand and to apply for other States' courts. This notwithstanding, the US paternity of this condition cannot be concealed.

Contrary to the European approach, the focus here is not on the "proximity" between the dispute and the court, but on the connections between the defendant's activities and the forum State. With respect to contractual disputes, US courts have clarified that "purposeful availment" can result from a wide range of contacts. As the Supreme Court put it in the *Burger King* case, probably the most significant among its scarce selection of decisions concerning personal jurisdiction in contractual matters,

> "parties negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing, must be evaluated in determining whether the defendant has purposefully established minimum contacts with the forum."[49]

This language has been repeated in a long line of lower courts decisions. This rich case-law shows that a great variety of elements are taken into consideration for the purpose of establishing jurisdiction in a contractual dispute, including not only performance but also all circumstances that led to the conclusion of the contract (such as the place of pre-contractual negotiations, that where the contract was actually entered into, and the fact that the defendant "deliberately reached out" beyond his State in order to enter into a contractual relationship with his counterparty).[50]

What will be the effect of the "purposeful and substantial connection" requirement in relation to judgments rendered at the place of performance, as defined above? Seen from the US perspective, such judgments will probably satisfy in several cases the "purposeful and substantial connection" test. This will more easily be the case when the performance entails a plurality of acts to be performed in the forum State, and the defendant actually accomplished at least some of these acts there (or expressly agreed to do so). However, there might also be cases where the fact that performance has taken (or should take) place in the forum State is not sufficient. As mentioned, "purposeful availment" – at least in the US conception of the term – is the result of a multitude of significant contacts and is only rarely satisfied by one single factor, important as it may be. Thus, US courts will likely more often than not consider that the second condition under Article 5(1)(g) is not satisfied, when performance in the forum State consists of one single act (e.g. the delivery of the goods), unless the defendant created other purposeful

---

Shoe's "minimum contacts" test. The rationale behind it is that the contacts between the defendant and the forum should not be "random, fortuitous, or attenuated", nor be a result "of the unilateral activity of another party or a third person," but be created from purposeful actions of the defendant himself.

[49] *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985).

[50] H. VAN LITH, *International Jurisdiction and Commercial Litigation, Uniform Rules for Contractual Disputes*, The Hague 2009, at 278 *et seq*.

contacts with that State. *A fortiori*, in the absence of other contacts, a purposeful connection will probably be considered to be lacking when the place of performance does not result from actual acts accomplished by the defendant, nor from the express contractual terms, but only from subsidiary rules of the *lex contractus*. In these and other cases, recognition or enforcement might be refused under the future convention, even if the judgment was rendered at the place of performance.

In any case, contrary to one of the intended goals of the future instrument,[51] predictability is not guaranteed.[52]

3. Criticism

While being an interesting attempt to reach a compromise between two different jurisdictional philosophies, the likely effects of the proposed rule will probably be disappointing, at least in regard to the mutual recognition of judgments between the US and Europe.

With respect to European judgments rendered at the place of performance, the suggested provision does not guarantee that they will be recognised and enforced in the US. As mentioned above, the notion of place of performance does not always correspond to the one embodied in the Brussels Regulation. And even when it is the case, the judgment may not meet the "purposeful and substantial connection" test. This does not seem to represent any kind of real progress, if compared with the national rules on recognition and enforcement that are currently applicable in the US.

Furthermore, by focussing on the place of performance, the Draft rules out other potential connections that in the US perspective could satisfy the "purposeful availment" test. Of course, judgments based on such contacts will still be able to benefit from the US national recognition rules, but this obviously does not represent any improvement with respect to the present state of the law.

In the opposite situation, recognition and enforcement in Europe will also be limited to US judgments rendered at the place of performance, thus excluding other jurisdictional bases that might satisfy the US standards. This might well correspond to the European policy, but once again it does not represent any real improvement if compared to the present state of the law. On the other hand, European courts will have to apply the "purposeful and substantial connection" test, which does not correspond to their tradition and might result in quite disparate results.

It is still uncertain as to whether in the present stage of the negotiations Article 5(1)(g) is still open to improvement. If this is the case, more promising results might well be achieved by attempting to spell out some jurisdictional bases that – while formulated in traditional and predictable European terms – could satisfy the US "purposeful availment" paradigm. Thus, the fact that the defendant

[51] See the Explanatory Note (note 25), No 64.

[52] The unpredictability of the purposeful availment test is very often criticized by US commentators: see e.g. H.S. NOYES, The Persistent Problem of Purposeful Availment, 45 Conn. L. Rev. 41 (2012-2013).

has expressly agreed in a negotiated contractual term to perform his contractual obligations in the forum State could probably be accepted as a sufficient connection, even by US standards: if so, the uncertainties of the "purposeful and significant connection" test could be avoided in this case. Other circumstances could also be regarded as acceptable recognition bases both from a US and a European perspective: for example, the fact that the defendant "reached out" to the other party, or clearly "targeted" the forum State, or accepted involvement in lengthy and substantial pre-contractual negotiations in that State. Negotiation could thus perhaps lead to a list of jurisdictional bases (a "laundry list") that could satisfy both US and European expectations.[53] Of course, this list of grounds could always be complemented by an open clause based on the "purposeful availment" test.

D. Consumer and Employment Contracts

In partial derogation from the recognition bases discussed above, the Draft contains some special rules for consumer and employment contracts.[54] According to Article 5(2), if recognition or enforcement is sought against a consumer or an employee in matters related to such contracts, the recognition basis of Article 5(1)(e) (express consent) applies only if consent was given before the court, while that of Article 5(1)(g) (place of performance) does not apply at all.

The first rule is similar (although not identical) to those embodied in Articles 19 and 23 of the current Brussels Regulation, two provisions that rule out choice-of-court agreements entered into before the dispute by a consumer or an employee, respectively.[55] On this point, the Draft clearly diverges from the US case law that largely allows forum-selection agreements even though concluded by weak parties.[56] The second part of the provision also corresponds in its outcome to the Brussels system, where the special jurisdiction at the place of performance is traditionally reserved to B2B disputes but inapplicable to consumer contracts, in order to prevent the strongest party from indirectly influencing the courts' jurisdiction by selecting the place of performance.

The approach consisting in having protective jurisdictional rules for weak parties clearly reflects the European philosophy (and that of several other systems, like for instance some South-American countries), but sharply differs from the US

[53] This approach has also been followed, with some success, in the 2007 Child Support Convention (see e.g. Article 17(1)(d), which is an attempt to formulate a concrete rule in order to reconcile the European and the US diverging positions).

[54] Such contracts are excluded from the scope of the 2005 Choice of Court Convention (Article 2(1)(a-b)).

[55] The Draft is even more protective than the Brussels Regulation because, by only referring to consent given "before court", it rules out all kinds of extrajudicial jurisdictional agreement, even though entered into after the dispute.

[56] See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). This and other decisions relating to choice-of-court agreements find an equivalent in well-established case law upholding mandatory arbitration agreements even though they are entered into by employees or consumers: the seminal decisions are *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991) and *AT&T Mobility LLC v. Concepción*, 563 U.S. 333 (2011).

approach, where the general jurisdictional test, based on "minimum contacts" and "purposeful availment", is indistinctly applicable to businesses and individuals. This probably explains why the rules included in the Draft only partially resemble those of the Brussels Regulation.

The first difference is that the provisions of Article 5(2) only apply when recognition or enforcement are sought *against* a consumer or an employee, but not in the opposite situation. When the weak party is seeking recognition or enforcement of a favourable judgment, the general rules are applicable. This means that such a judgment can be recognized if it was rendered in the home State of the trader/employer (Article 5(1)(a)), or at the place of performance of the contractual obligation (Article 5(1)(g)), or if the trader/employer has expressly or tacitly consented to jurisdiction (Article 5(1)(e-f)). Of course, if the judgment is in favour of the consumer or the employee, there is no reason to exclude the ordinary recognition bases. All these jurisdictional bases are not particularly "friendly" to the weak party: the first and third one for obvious reasons; the second one, because it focuses on the place of performance of the disputed obligation, which can easily be manipulated by the strongest contractual party.

By contrast, and this is a second, important divergence from the European rules, recognition and enforcement is not granted under the Draft to judgments obtained by a consumer or an employee in his country of domicile, which is the standard jurisdictional rule under the Brussels system. Since the Recast, this jurisdictional ground has also been available when the defendant (trader or employer) is domiciled in a non-Member State.[57] This recent reinforcement of the weak parties' protection will lose much of its interest if the judgments rendered on such jurisdictional premises are not capable of recognition and enforcement outside the EU under the future Hague instrument.

With respect to consumers, this is ironic because the jurisdictional rules applicable to these disputes under the Brussels Regulation are those which, within the EU system, probably most closely resemble the US jurisdictional approach. As we well know, the courts at the consumer's domicile are granted jurisdiction under Article 17(1)(c) of the Regulation only if the trader directed his activities to the consumer's country: this "targeting" requirement, which only applies in this particular area (as opposed, for instance, to tortious claims), is very similar to the US "purposeful availment" paradigm. That being so, the inclusion of such a recognition basis into the future convention would probably be quite easily accepted on the other shore of the Atlantic: with any luck, the Draft will still be able to be amended in this sense.

E. Judgments in Tortious Matters

The Draft Convention also includes several jurisdictional bases for judgments relating to various kinds of torts.

[57] Articles 18(1) and 21(2) of the current Brussels Regulation: this was one of the few 2012 modifications to the Regulation's jurisdictional rules.

1. Non-Contractual Obligations Relating to Death, Physical Harm, Damage or Loss of Tangible Property

The first and most general rule, Article 5(1)(j), states that judgments based on non-contractual obligations relating to death, physical injury, damage or loss of tangible property is entitled to recognition and enforcement "if the act or omission directly causing such harm occurred in the State of origin, irrespective of where the harm occurred."

This provision reflects a jurisdictional ground that is widely accepted, both in Europe and in the US, as well as in many other countries. Remarkably, this provision does not include any additional condition based on the defendant's "purposeful and substantial connection" with the State of origin: this seems to indicate that, in the view of the US delegation and in line with the existing case law, the defendant's harmful conduct meets as such the US "purposeful availment" standard.

By contrast, the provision clearly states that the place of the harmful event, i.e. the place of the damage, does not constitute a sufficient recognition basis. While in contrast with the broad jurisdictional approach of the Brussels Regulation and of several European countries, this is in line with US case law. Although the exact reach of the US courts' jurisdiction in tortious cases is still not exactly determined and, in some respects, highly controversial, it is quite clear that the place of the harmful event does not satisfy in itself the "purposeful availment" standard. This plainly follows from several, well-known decisions by the US Supreme Court in product liability cases, such as *World-wide Volkswagen*, *Asahi*, and *McIntyre*.[58] In these decisions, the jurisdiction of the US courts at the place of the harm was constantly denied. Even though the Supreme Court was often divided on the outcome and/or grounds of these decisions,[59] none of the judges ever suggested that the place of the harmful event could be as such a good ground for jurisdiction. As was also mentioned with respect to contractual disputes, this reveals the divergent philosophy that inspires European and US jurisdictional systems: while the Brussels Regulation favours a sound administration of justice by promoting proximity and predictability, US courts are primarily concerned with the defendant's protection.

---

[58] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987); *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

[59] In *Asahi* (motorcycle accident in California allegedly caused by a defective tyre valve manufactured by a Japanese company and assembled with the tyre by a Taiwanese company) the court was split on the question of whether the so-called "stream-of-commerce" doctrine was actually sufficient to establish minimum contacts with the forum. In *McIntyre* (personal injury caused in New Jersey by a machine manufactured by an English company that "ended up" in New Jersey), while the majority agreed that there was no good basis for the New Jersey court's jurisdiction in the particular case, only four judges actually discarded the stream-of-commerce doctrine as such, while two others only rejected jurisdiction on the specific facts of the case: see A.N. STEINMAN, The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicastro, 63, S. C. L. Rev. 481 (2012).

Though entirely consistent with US jurisdictional theory, Article 5(1)(j) will not allow for recognition and enforcement of European decisions rendered at the place of the harmful event, even if they only rule on local damages.[60] In this respect, the Draft better conforms to US interests. Of course, it cannot be excluded that, in a particular case, the defendant's contacts with the State of the harmful event will be regarded, even by US courts, as a sufficient jurisdictional basis. Indeed, if this is the case, a foreign judgment rendered at the place of the event will obviously be recognised and enforced in the US based on the national recognition rules. This is already the case today and the future convention will not see any change made.

By excluding recognition of judgments rendered at the place of the harm, the Draft invites victims to bring their claims either at the defendant's home or at the place of the harmful conduct. However, problems may arise when these places are located in the US, because such liability claims might be dismissed on *forum non conveniens* grounds. In the last few decades, at least since its seminal *Piper* decision,[61] the US Supreme Court has endorsed an extensive use of the *forum non conveniens* doctrine as a mean to dismiss liability cases brought before US courts by foreign plaintiffs and based on harm caused abroad, and this remains the case even when the defendants are US corporations acting in the US.[62] This problem is not addressed by the Draft: as all issues of direct jurisdiction, *forum non conveniens* will not be regulated by the future convention and will therefore continue to be the exclusive prerogative of each Contracting State's courts.[63] If the future convention rules out the place of the event as a recognition basis, as required by the US jurisdictional approach, it should, in this author's view, at least try to put some limits on the US courts ability to dismiss a claim on *forum non conveniens* grounds based on the fact that the place of the harm was abroad.

2. Infringements of IP Rights

Articles 5(1)(k) and 5(1)(l) apply to judgments ruling on infringements of intellectual property rights. The first of these provisions concerns patents, trademarks, designs, and other similar rights required to be deposited or registered, while the latter applies to copyrights and other intellectual property rights not required to be

[60] This limitation is based on the so-called "mosaic" approach, adopted by the ECJ since the *Shevill* case: ECJ, Case C-68/93, *Shevill*, ECR [1995] I-415.

[61] *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

[62] The *Piper* court established that a foreign plaintiff's choice of forum is entitled to less deference than that of a home plaintiff. It follows that the defendant's burden to obtain a *forum non conveniens* dismissal is lower in these cases: see the criticism by M. DAVIES, Time to Change the Federal Forum Non Conveniens Analysis, 77 Tul. L. Rev. 309 (2002-2003), at 368 *et seq*. The fact that decisions rendered at the foreign place of the harm will not be recognised under the future convention will not always preclude the use of *forum non conveniens* by US courts, because those decisions might still be recognised under national rules.

[63] By contrast, see the rather restrictive *forum non conveniens* rule that was included in Article 22 of the 1999 Draft.

deposited or registered. In both cases, a judgment is entitled to recognition and enforcement if it was rendered in the State where the right was protected: this is the country of the place of registration in the case of a registered right, and the country of origin of the right in the case of a non-registered right.

In the European conception, these places correspond to the place of the harmful event, as the ECJ has clarified in several recent decisions concerning infringements of IP rights via the Internet.[64] However, contrary to the Brussels Regulation, and also contrary to the aforementioned Article 5(1)(j), the suggested provisions of the Draft do not refer to the place of the harmful conduct: decisions rendered at that place will not be capable of recognition under the future convention.

F. Exclusive Jurisdiction

Article 6 provides a number of rules on exclusive jurisdiction that closely resemble some of those included in Article 24 of the Brussels Regulation. A judgment ruling on one of the matters covered by this provision (validity or registration of patents, trademarks, and other deposited or registered IP rights, rights *in rem* in immovable property, tenancy of immovable property for a period of more than 6 months) will be capable of recognition or enforcement "if and only if" it is rendered by the courts of the State designated in the convention.

V. Punitive Damages Awards

Seen from the particular perspective of the relationship between the US and Europe, Article 9 of the Draft deserves particular attention. According to this Article, recognition and enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for the actual loss or harm suffered.

This provision – which is drawn from Article 11 of the Choice of Court Convention – obviously reflects the traditional hostility to punitive damages in jurisdictions outside the US, and in particular in civil law countries.[65] However, the provision tempers the rejection in two ways.

First, Article 9(1) makes clear that recognition or enforcement denial is possible only "to the extent that" the foreign judgment awards non-compensatory damages. In other words, the court in the requested State cannot reject the foreign judgment as a whole on the ground that (among other points) it includes a non-compensatory damages award. In the absence of other refusal grounds, the other

[64] ECJ, Case C-523/10, *Wintersteiger*; ECJ, Case C-170/12, *Pinkney*; ECJ, Case C-441/13, *Pez Hejduk*.

[65] Specific provisions against punitive damages are included in various national PIL codifications: e.g. Articles 135(2) and 137(2) of the Swiss PIL Act and Article 40(3) of the German EGBGB.

parts and effects of the judgment must be recognised or enforced: this may apply, for instance, to a declaration of liability, to a (positive or negative) injunction and, obviously, to the award of compensatory damages.[66]

Strictly speaking, this might already be deduced from the rule on severability of Article 15 of the Draft, which requires recognition and enforcement of the severable part of a judgment when "it is capable of being recognised or enforced." Nevertheless, Article 15 only applies to a "severable part" of a judgment, while a punitive damages award is not always clearly severable from the compensatory damages award included in the same judgment. Arguably, Article 9(1) goes further than Article 15, requiring from the court of the requested State that the line be drawn between the two kinds of damages, even when this distinction does not clearly emerge from the foreign judgment itself.

A second qualification results from Article 9(2) that obliges the petitioned court to take into account "whether and to what extent the damages awarded serve to compensate costs and expenses relating to the proceedings."[67] One of the arguments often advanced in the US to justify punitive damages is that they serve to counterbalance the effects of the so-called "American rule", pursuant to which a party – though winning the case – cannot normally claim compensation for the procedural expenses and attorneys' fees. This considered, it makes sense (at least in theory) that the court is required, before refusing recognition or enforcement of the punitive damages award, to verify whether and to what extent that award serves in reality to compensate procedural costs.

That being said, the practical operation of this rule might prove problematic at least with respect to attorneys' fees. Typically, such fees are liquidated in the US on the basis of a contingency fee agreement that entitles the attorney to get a percentage (30-40%) of the awarded amount, including of course punitive damages. It remains unclear as to how the court is supposed to take this into account under Article 9(2). Obviously, it cannot enforce the part of the punitive damages award that is designed to pay the attorneys, while rejecting the enforcement of the remainder… This question should be clarified.

Notwithstanding the silence of Article 9(2), the rationale of this provision should also apply when a punitive damages award in reality "hides" other "compensatory" functions. Besides their punitive goal, these awards often also aim at indemnifying the victim for certain kinds of harm that cannot be compensated under the applicable law, or that are particularly difficult to prove or to liquidate (typically, pain and suffering, moral and psychological harm). In many countries, the fundamental principle of full compensation has led the courts to widely enlarge the range of the damages that are capable of judicial compensation. Such principle would ultimately be betrayed if a punitive damages award that (on top of this) has the function of compensating these new kinds of harm is denied recognition. This idea can implicitly be deduced from the definition of exemplary or punitive damages that results from Article 9(1) ("damages […] that do not compensate a party for the actual loss or harm suffered"). For the sake of clarity, however, it might be better to spell this out in a provision similar to Article 9(2).

[66] See also the similar rule included in Article 33(1) of the 1999 Draft.

[67] A similar rule was included in Article 33(3) of the 1999 Draft.

In this author's opinion, Article 9 could also be improved by granting the court the power to mitigate a punitive damages award. As it is currently drafted, Article 9 only contemplates two alternative solutions: the obligation to enforce if, and to the extent that, the judgment awards compensatory damages, or the right to deny if, and to the extent that, the judgment awards punitive damages. Recent decisions by European courts show, however that, at least in certain countries, public policy precludes the recognition and enforcement of a punitive damages award only if the awarded amount is excessive. To a certain extent, this resembles the position of the US Supreme Court, according to which punitive damages are contrary to the "substantial" due process-principle only when they are "grossly excessive".[68] This considered, the recognition and enforcement of such judgments could be promoted if the court addressed could opt for an intermediate solution between full recognition and denial, consisting in reducing the size of the award.[69] Of course, such a rule would entail a limited derogation from the prohibition of *révision au fond*, but it would probably not be the only one (Article 14 on the "equivalent effect" also derogates from that principle). In any case, principles are not always written in stone…

VI. The Lack of Provisions Against Parallel Proceedings

Contrary to its 1999 antecedent,[70] the new Draft does not include any rules on *lis pendens* and parallel proceedings. At first glance, this might seem justified, because the Draft does not address (direct) jurisdiction. However, if one considers that pending proceedings and irreconcilable decisions represent very serious obstacles to the recognition and enforcement of foreign judgments (as it also clearly results from the Draft),[71] the inclusion of some mechanism capable of preventing or at least reducing parallel proceedings would certainly be desirable.

This would be particularly important in the relationship between Europe and the US in order to correct the current imbalance resulting from the diverging approaches on the two Atlantic shores. In Europe, the Brussels Regulation contains, since the 2012 Recast, both a *lis pendens* rule and a rule on related actions designed to tackle parallel proceedings even when they are pending before the courts of a non-Member State (Articles 33 and 34). Albeit not mandatory, these provisions allow the court to stay proceedings, thus preventing irreconcilable decisions. By contrast, US courts do not dispose of an equivalent tool. *Lis pendens*

[68] *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003).

[69] Such a possibility was provided by Article 33(1)(a) of the 1999 Draft, but only "[w]here the debtor […] satisfies the court addressed that [..] grossly excessive damages have been awarded."

[70] See Article 21 of the 1999 Draft.

[71] See Article 7(1)(e-f) and Article 7(2).

rules do not apply in international situations. The rare attempts to develop a doctrine of "international abstention," similar to the doctrine of abstention that is sometimes applicable in domestic situations, have not been successful.[72] As a consequence, parallel proceedings can only be prevented when the condition for a *forum non conveniens* dismissal are satisfied.

This situation is often criticized by US scholars,[73] and several proposals have been made for the adoption of an international *lis pendens* rule, some of which are not so different from Article 33 of the Brussels Regulation.[74] Also, the *lis pendens* rule that was included in the 1999 Draft did not raise particularly fundamental objections from US commentators. Why should a new attempt not be made in the framework of the current project?[75]

VII. Concluding Remarks

Burnt by the bitter failure of the original project, the negotiators of the new Draft are displaying great prudence and realism. This commendable attitude certainly enhances the chances of success for the current project. In particular, this author wholeheartedly approves of the decision to opt for a "simple" convention, limited to recognition and enforcement of judgments and without rules on direct jurisdiction.

However, excessive caution can also be counterproductive. A future convention is expected to bring about some substantial improvements in the recognition and enforcement of judgments, and not simply repeat or codify the *status quo*. Regretfully, after a first quick review of the proposed rules, it is difficult to clearly assess what progress the future convention would make in promoting the circulation of judgments between Europe and the US.

Many provisions of the Draft plainly correspond to current rules or practices on both sides of the Atlantic. This is the case for most general provisions on

---

[72] In *Royal and Sun Alliance Ins. Co. Of Canada v. Century Int'l Arms, Inc*., 466 F.3d 88, for instance, the US Court of Appeals for the Second Circuit took a very restrictive stance with respect to international abstention, holding that US federal courts are, as in domestic cases (see *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), under a "virtually unflagging obligation" to exercise their jurisdiction. See A.L. PARRISH, Duplicative Foreign Litigation, 78 Geo. Wash. L. Rev. 237 (2009-2010), at 247 *et seq*.

[73] See *inter alia* A.L. PARRISH (note 72); N. JANSEN CALAMITA, Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings, 27 U. Pa. J. Int'l Econ. L. 601 (2006).

[74] See in particular § 11 of the 2005 ALI Proposal for a Federal Statute on the Recognition and Enforcement of Foreign Judgments.

[75] In this author's view, a *lis pendens* rule should be included in the convention on recognition and enforcement. As previously mentioned, it is not very realistic to believe that such question could successfully be addressed in an additional instrument, as recommended by the Council on General Affairs and Policy of the Conference (see note 4).

recognition and enforcement, and for most grounds for refusal. Many recognition bases, in particular those based on habitual residence and consent, also mirror rules that are widely accepted in both Europe and in the US, with only some minor differences or clarifications.

Several provisions fall short of what is already possible today under national law. Thus, the special recognition basis in contractual matters does not allow recognition in the US of judgments that – while satisfying the "purposeful availment" standard – are not rendered at the place of performance. Conversely, in European countries, it might hinder recognition of judgments rendered in a foreign place of performance if the defendant's activities do not reveal a "purposeful and substantial connection" with the forum State. Also, the Draft does not cover judgments in tort that might be rendered by a US court at the place of the harm should the purposeful availment test be satisfied, although their recognition is also possible under the national rules of most European States.

In addition, the Draft does not substantially improve the circulation of judgments between Europe and the US when the current rules or practices hinder it. Thus, judgments rendered in defamation cases are excluded from the material scope of the future instrument. Judgments rendered in Europe by the court at the place of the harmful event will not be capable of recognition in the US under the convention. Conversely, European courts will still be able to refuse US punitive damages awards without having the possibility to reduce them.

Balancing the pros and cons, it would also seem that, contrary to the very "pro-European" 1999 Draft, the new text is more favourable to the US than to the European Union. To appreciate this, one should consider that the current US recognition system is already quite open. With respect to the few problematic areas, the Draft seems to bring only limited improvement. The exclusion of defamation awards, the provision of a "purposeful availment" requirement for judgments in contractual matters, the non-recognition of judgments rendered at the place of domicile of consumers and employees and of judgments in tort rendered at the place of the harm, the absence of any attempt to restrict the extensive use of *forum non conveniens* by the US courts, as well as the lack of rules on international *lis pendens* or related actions: all these points are disappointing from a European perspective. By contrast, as seen from the US perspective, the future convention will entail at least the very relevant advantage of unifying the recognition and enforcement rules in all EU Member States, some of which currently have a very restrictive system.

A prudent and slightly imbalanced convention is perhaps – after the 2001 failure – the price to pay in order to convince the US to first sign a judgment convention and then ratify it, which is not always easier as shown by the experience with the 2005 Choice of Court Convention. Also, one shouldn't lose sight that our criticisms are essentially based on the relationship between Europe and the US. By contrast, the Draft already entails, as it stands, very clear progress for the recognition and enforcement of judgments in the many jurisdictions that presently have restrictive rules or practices.

Nevertheless, this author remains optimistic that the Draft will still be open to improvement and that the future convention will contribute to the establishment of a more effective cross-border dispute-resolution framework.