

## CCBE remarks on the EU's possible accession to the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters of the Hague Conference on Private International Law

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*The Council of Bars and Law Societies of Europe (the CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.*

### **Generic remarks – more benefits than disadvantages**

In the context of the European Commission's public consultation on the EU's possible accession to the HCCH 2019 Judgments Convention<sup>1</sup>, the CCBE would like to further clarify certain points raised in the response to this consultation.

To start, it can be noted that the CCBE was already involved in the development of the Judgments Project by providing its input to the Hague Conference on Private International Law in this regard.<sup>2</sup> The CCBE was – already at that time – supportive of the work to agree an international approach in this field of private international law, and « the HCCH Judgments project » was also supported by the legal practitioners in general. One of the main reasons for support was the greater legal certainty that such a convention could provide to parties in international disputes. Moreover, it was highlighted that increased legal certainty at international level could also encourage a broader range of litigants to elect the courts of EU Member States to resolve disputes.

The same reasoning also applies to the recent discussion about the EU's possible accession to the 2019 Judgments Convention.

Legal certainty on the future recognition and enforcement of an EU judgment in civil or commercial matters in a third-country is not only very important, but crucial, in deciding whether or not to start court litigation against a party from outside the European Union. This issue can be considered even more important in the current situation of Brexit and when it comes to the future relations between the United Kingdom and the EU. In addition to the positive impact that the EU's accession to the Judgments Convention would have on **legal certainty**, other possible benefits can be mentioned. For example, having uniform applicable rules tends to **reduce litigation costs and the length of proceedings** – although only to a certain extent, since there are many other influencing factors. Therefore, the EU's accession to the Judgments Convention would not only **enhance access to justice** for EU citizens and businesses, but also **encourage international trade and transactions**.

<sup>1</sup> [Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters of the Hague Conference on Private International Law](#)

<sup>2</sup> For more details, see: the [CCBE's position](#) of 29 November 2013 and the [position](#) of 18 March 2016.

The CCBE is in principle supportive of the EU's accession to the Judgments Convention considering that its potential benefits would outweigh its possible disadvantages. However, there are some serious concerns that need to be raised.

### Concerns about safeguards – new monitoring tools needed

Articles 5 and 6 of the Judgments Convention establish the bases for recognition and enforcement, whereas Article 7 lists the grounds on the basis of which a recognition or enforcement may be refused.

In this regard, it can be noted that Article 7 (1) (a) explicitly mentions that recognition or enforcement may be refused if (a) *“the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim: (i) was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence, unless the defendant entered an appearance and presented their case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or (ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents”*. Moreover, according to subparagraphs (1) (b) and (c), recognition or enforcement may be refused if the judgment was obtained by fraud or if recognition or enforcement *“would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State”*. As to the latter, the explanatory report of the Judgments Convention<sup>3</sup> clarifies that its overlapping with sub-paragraphs (a) and (b) aims to ensure that adequate procedural protection is provided to parties regardless of the way in which recognition and enforcement proceedings are dealt with in the requested State. Although the concept of public policy should be interpreted strictly, this provision enables a requested State to refuse to recognise or enforce a judgment which *“would constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in question or of a right recognised as being fundamental within that legal order”*.<sup>4</sup>

The grounds for refusal listed in Article 7, especially 7.1 a), b) and c), are essential in order to ensure that the rights of defence are observed. However, they may not be sufficient when it comes to infringements of fair trial as a whole in some specific states, or to corruption in the justice system. Judgments coming from such states should then not be recognised at all. The fact that these judgments are rendered without any consistent protection of the rights of defence or in violation of fair trial principles would possibly not be detected by the judge in charge of the exequatur procedure: the defendant would have immense difficulties to prove such violation, and it may hardly fall into the global refusal ground of “fraud”.

Mutual trust in foreign justice systems is not given at this stage for all states in the world. Thus, Article 29 contains provisions on the establishment of relations between two Contracting States pursuant the Convention. Its paragraphs (2) and (3) enable a Contracting State to notify the depositary that the ratification, acceptance, approval, or accession of another State shall **not** have the effect of establishing relations between the two States concerned. Such a notification must be done within 12 months after the date of the notification by the depositary referred to in Article 32(a) and can be withdrawn at any time (Article 29 (4)).

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<sup>3</sup> Judgments Convention: [Revised Draft Explanatory Report](#), pp. 64-65. In this regard, attention should be paid on the consistency of the Explanatory Report and the final version of the Judgments Convention. For the time being, it can be noted that this is not exactly the case with the [Revised Draft Explanatory Report](#).

<sup>4</sup> Ibid. Reference is made to the Explanatory Report by Professor Fausto Pocar to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007, OJ 2009/C 319/01.

Considering the above-mentioned observations, utmost vigilance should be given both to the appropriate use of the possibility of excluding a specific Contracting State on the basis of Article 29 (2) (3) as well as the proper application, on case by case basis, of Article 7 and, in particular subparagraphs (1) (a), (b) and (c).

The CCBE advises that before ratification, the EU:

- **makes very strong verifications on each possible Contracting State** (for example, on the basis of existing tools such as the [CEPEJ's reports](#) on the efficiency and the quality of justice of European judicial systems, the World Justice Project's [Rule of Law Indexes](#) and the [Global Competitiveness Reports](#) of the World Economic Forum);
- **does not hesitate to make corresponding notifications according to Article 29 paragraphs (2) and (3) within the specific time frame indicated.**

Moreover, despite Articles 5, 6 and in particular, Article 7 as well as the fact that the application of the Judgments Convention does not mean the abolishment of the exequatur procedure, the safeguards in the Convention should be further strengthened in order to be considered sufficient. For example, effective **monitoring tools should be created** in order to examine the situation in other Contracting States, especially when it comes to the respect of procedural rights and the rule of law. Such tools could be created and further developed on the basis of existing reporting tools, such as the above-mentioned ones (CEPEJ's reports on the efficiency and the quality of justice of European judicial systems, the World Justice Project's Rule of Law Indexes and the Global Competitiveness Reports of the World Economic Forum). **New tools should also be provided for defendants** to help them prove that their defense rights or the fair trial principles, as the case may be, have not been respected by a Contracting State.

Furthermore, **the possibility to make declarations** under Article 18 (*Declarations with respect to specific matters*) and Article 19 (*Declarations with respect to judgments pertaining to a State*) should also be thoroughly considered in the context of the EU's possible accession to the Judgments Convention, and used to the relevant extent.

As a reminder, the ECJ considers that proceedings in which a State is a party make use of "*special powers that go beyond those arising from the ordinary legal rules applicable to relationships between private individuals*" and cannot be said to fall within the scope of 'civil and commercial matters' in the meaning of the Brussels I bis Regulation (see, e.g. a recent ECJ judgment dated 16.07.2020, case C-73/19<sup>5</sup>). This would, from our point of view, justify making a declaration according to Article 19 at least.

Declarations about excluding matters relating to consumer and employment contracts should probably also be made under Article 18 of the Judgments Convention. Such declarations could be justified considering the high-level protection of the weaker party in both context (i.e. consumers as well as employees) in the European Union that should be ensured, and which may be not the case in other Contracting States. On the other hand, this mechanism would work in both ways, meaning that judgments from the EU would not be enforced more easily in other Contracting States either. Consequently, such declarations are to be used carefully.

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<sup>5</sup> [Judgment of the Court \(First Chamber\) of 16 July 2020, \*Belgische Staat and Directeur-Generaal van de Algemene Directie Controle en Bemiddeling van de FOD Economie, K.M.O., Middenstand en Energie v Movic BV and Others\*, Case C-73/19.](#)

### **Final remarks**

As explained in the generic remarks, the CCBE recognises the positive impacts that the EU's accession to the Judgements Convention would have on legal certainty, litigation costs and the length of proceedings as well as on international trade and transactions as such. At the same time, the CCBE asks the European Commission – when assessing the costs and benefits of the potential EU accession – to pay attention to and carefully consider the above-mentioned concerns related to the respect of fundamental rights and the rule of law.

The CCBE remains at the Commission's disposal and is happy to provide any further assistance during the assessment process if necessary.