

Kluwer Arbitration Blog

The Judgments Convention: A Game Changer in the Field of International Commercial Disputes?

Chintan Nirala, Kathleen Mpofo · Wednesday, November 13th, 2019 · Young ICCA

The Hague Conference on Private International Law (HCCH) started the Judgments Project in 1992 which focused on two facets of cross-border litigation: international jurisdiction of courts and recognition and enforcement of their judgements abroad. The project has produced two conventions: The 2005 Choice of Courts Convention and the 2019 Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters (the “Convention”).

This post will provide an analysis of the Convention, looking at practical issues such as its goals, entry into force, key provisions and what its conclusion could possibly mean for the future of international commercial dispute resolution.

Goals and Entry into Force

The aim of the Convention is to achieve a uniform set of core rules on recognition and enforcement of foreign judgements in civil or commercial matters. It will provide greater predictability and certainty in relation to the ‘global circulation’ of foreign judgements.

However, the Convention has not yet entered into force. At present, Uruguay is the only signatory to the Convention. In order to enter into force, at least one more state would have to deposit its instrument of ratification, acceptance, approval or accession to the Convention.

Key Provisions

The Convention has four chapters.

Chapter I (Articles 1-3) deals with the substantive scope and definitions. The Convention only applies to the recognition and enforcement of judgements relating to *civil or commercial matters* and will not extend to revenue, customs or administrative matters. Article 2 provides a list of excluded subject matters including matters related to intellectual property, privileges and immunities, privacy, law enforcement activities and arbitration and related proceedings. For the Convention to be excluded on these bases, the subject matter should be the object of the proceedings and not arise simply by way of defence or as a preliminary question.

Article 3 provides the definition of ‘judgement’. The definition has two main elements – (i) Court and (ii) Decision on Merits. However, the Convention remains silent on the definition of both these terms.

Chapter 2 (Articles 4-15) focuses on establishing the bases for recognition and enforcement, grounds for refusal and other procedural issues associated with recognition and enforcement.

Article 5 provides the requirements for determining the eligibility of a judgement for recognition and enforcement. The requirements are based on various ways of establishing jurisdiction namely the connection between the state of origin and the defendant; jurisdiction based on express consent; and a connection between the claim and the state of origin. Article 6 sets out the exclusive bases for eligibility for matters dealing with rights *in rem* in immovable property *i.e.* in order to be an eligible judgement for enforcement, the property in question must be situated in the state where the judgement was given.

Article 7 sets out the grounds for refusal of enforcement. It is a closed list of grounds that brings about certainty to the procedure around recognition and enforcement. Recognition and enforcement “may” be denied on grounds dealing with procedural fairness such as proper service of documents, fraud, public policy, the existence of inconsistent or conflicting judgements in the state where recognition is sought and where the same dispute between the same parties is still pending before the courts of the state where recognition is sought.

Other provisions to note include provisions on refusal of a judgement on the basis that the judgement awards punitive damages (Article 10); recognition and enforcement of judicial settlements (Article 11); documents that need to be produced (Article 12); and that the Convention does not take precedence over national law, *i.e.* it does not prevent enforcement under national laws (Article 15).

Chapter 3 (Articles 16-23) contains provisions that allow states to make declarations as to the operation of the Convention. A declaration can be made that the Convention will not apply to matters where the state or government agency is a party or to specific matters of special interest, such as environmental damage, labour contracts or consumer contracts.

Chapter 4 (Articles 24-32) makes provision for the application of the Convention in states having non-unified legal systems and in Regional Economic Organisations. It further clarifies that a state may notify that the Convention shall not have the effect of establishing relations with another contracting state.

Limitations of the Convention

Firstly, compared to the relatively simple and short procedure in the [New York Convention \(NYC\)](#), the proceedings under the Judgements Convention are lengthy. The obligation for enforcement involves the fulfilment of three positive conditions:

- The judgement falls within the scope of application
- It is eligible for recognition and enforcement
- There are no grounds for refusal of recognition or enforcement.

In addition to this, the provisions made for instances when judgements are under appeal or review, though necessary, have the effect of lengthening the enforcement procedure.

Secondly, when the matter is on appeal or review or where the time limit for seeking ordinary review has not expired, the court addressed has three options. It may (i) grant recognition or enforcement; (ii) postpone its decision; or (iii) refuse recognition or enforcement. When making such a determination the court might conduct a *prima facie* assessment of the chances of success of the review procedure, if it is in a position to form a view on the issue. Although the assessment is subjected to a *caveat* – ‘if it is in a position to form a view’, such assessment may be controversial due to its outbound reach in assessing another country’s sovereign courts’ functioning.

Thirdly, the requested state’s court is not bound by the decision of the court of the state of origin regarding excluded subject matters and in determining, for the purposes of Article 5, 6 or 7, the judgements eligible for enforcement. As such, the requested state’s court may end up reviewing the decisions of the court of the state of origin as they relate to these issues (not on merits but application of law).

Fourthly, the provisions on *lis pendens* only apply in parallel proceedings in the requested state therefore proceedings between the same parties on the same subject matter, may still take place in other contracting states causing the risk of conflicting judgements.

Can the Judgements Convention potentially perform the same function for court judgements as is done by the NYC for arbitral awards?

In theory, yes. The Judgements Convention creates a framework through which foreign judgements can be enforced. Like the NYC, it sets out the procedure for enforcement and provides a closed list of instances in which recognition and enforcement may be refused.

The Secretary General of the HCCH described the Convention as a “*game changer for cross-border dispute settlement and an apex stone for global efforts to improve real and effective access to justice.*” The ability of the Convention to achieve game changer status is reliant on two factors, mainly:

- Whether it will be widely accepted and ratified by a significant number of states; and
- Whether parties will increasingly use litigation to settle international commercial disputes.

Regarding the first factor, what needs to be seen in practice is whether or not states ratify the Convention. The fewer the states to ratify it, the less likely it is that it will be able to achieve the same level of success as the NYC. One of the main reasons the NYC has been so successful is because a majority of states have ratified it and so it applies in numerous jurisdictions. In the absence of similar support by states for the Convention, it will not have the same effect as the NYC.

Regarding the second factor, at present the preferred method of settling international commercial disputes is through arbitration. The Convention addresses enforcement, which is only one of the numerous reasons people choose arbitration over litigation. There are other reasons why arbitration could still be the preferred method of dispute resolution including confidentiality, finality, party autonomy and flexibility with regard to the rules, procedure and seat of arbitration.

Despite this, the Convention has come at a time where there is increased activity in the way of improving national court systems to attract more international commercial litigation. This has resulted in the proliferation of international commercial courts. These are national judicial bodies established in several jurisdictions (*e.g.* the China International Commercial Court and the Netherlands Commercial Court) which are designed to specifically meet the needs of international commercial disputes. They address some of the drawbacks of arbitration including lack of transparency, inconsistencies in awards and lack of precedence. However, one of the main disadvantages of these international commercial courts is the difficulty in enforcing foreign judgements. As the Convention aims to remove that very disadvantage, it will be interesting to see whether this results in a growing number of commercial disputes before these international commercial courts.

Conclusion

While possessing some limitations, it will be interesting to see whether the Convention will support a shift from arbitration to litigation in resolving international commercial disputes or whether it will remain a failed attempt.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



This entry was posted on Wednesday, November 13th, 2019 at 6:28 am and is filed under [Court Proceedings](#), [Hague Judgements Convention](#), [New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.