UNICE
Union of Industrial and Employers' Confederations of Europe
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22.3/44/1 22 October 1999

THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW :

Preliminary draft convention on jurisdiction and the effects of judgments in civil and commercial matters

UNICE POSITION PAPER

I. Importance for industry in Europe

UNICE has followed the efforts of the Hague Conference to achieve a world-wide jurisdiction and enforcement convention with great interest. This topic is of eminent importance for industry in Europe.

Companies in Europe tend to avoid state courts more and more by using alternative means of dispute resolution such as arbitration and mediation. At the same time, a considerable number of disputes between commercial parties are still decided by state courts. With the globalisation of commerce, assets of a defendant company can be dispersed over various countries. A global convention would help companies enforce judgments if the debtor has insufficient assets in the state of the original forum. Defendant companies benefit from mutual recognition of judgments where the defendant prevailed in litigation and the claimant seeks to overturn the judgment in another jurisdiction. In short, a global convention would offer an important remedy against forum shopping.

II. Litigation in the USA

Whilst the ideal of a global enforcement convention is obvious, companies in Europe are faced with certain commercial and legal realities which could wipe out any benefits.

A global enforcement convention would have a direct effect on EU/US commercial relationships. It would expose assets of companies in Europe to the harsh effects of litigation in the US. It would allow US courts to extend their reach to EU companies. This would give EU companies a marked competitive disadvantage v.à.v. US companies who do not face these hazards in EU countries.

Any observer of the US will be aware of these hazards: extensive and expensive pre-trial discovery; excessive punitive damages; unpredictability of lay juries deciding highly technical disputes; cost of legal representation.

There are plenty of examples where even major companies were faced with the risk of annihilation by excessive damages awards.[*] Companies facing the prospect of drawn-out proceedings and paying

[*] Recently, "ICI faces ways of US Litigation over lead paint", The Times, 14 October 1999 (attached).

legal bills running into multi-million dollar amounts are sometimes left no option other than "settle or die", even if the claimant's case is entirely frivolous.

The litigation culture in the US has given birth to the ADR industry in that country. This has somewhat attenuated the adverse effects of litigation. Still, TV stations and newspapers continue to provide highly disturbing stories.

Industry in Europe would be fundamentally opposed to a world-wide enforcement convention unless such convention would provide unconditional, watertight, protection against export of excessive US decisions. An effective protective device could convert a potential threat into a benefit for companies in Europe. Without such protection, EU Governments and the European Commission should be encouraged to withdraw support for this enterprise.

III. Criteria for acceptability of a world-wide convention

For industry in Europe, a world-wide enforcement convention would be acceptable only if it satisfied the following conditions:

(i) It should be a *"Convention Double"*, in other words the court first addressed should decide *ex officio* that it has no jurisdiction where the convention does not give jurisdiction to that court in the case at hand. This structure has proven extremely valuable in Europe as a means of giving parties a high degree of legal predictability (the 1968 Brussels Convention). A "*Convention Single*" – which would contain jurisdiction criteria to be applied only by the court where recognition or enforcement is sought – would not offer European companies any protection against excessive jurisdiction of US courts.

(ii) It should contain a set of *unequivocal, limited* bases for international jurisdiction. "*Forum rei*" (forum of the defendant's domicile) should be the main rule, exceptions should be minimal. These exceptions should be consistent with the requirement of a real connection between the defendant – or, in well-defined instances, the facts of the case – and the forum state.

(iii) The convention should be based on *exclusivity* for international disputes i.e. disputes between parties domiciled in two Member States. The Courts of a Member State should ex officio accept jurisdiction for international disputes where the convention so permits, and decline jurisdiction *ex officio* where the convention does not offer a competent forum.

The role of internal jurisdiction law should thus be reduced to providing rules on jurisdiction in entirely non-international (internal) cases, and to allocating internal jurisdiction to a particular court within the forum state once *international* jurisdiction has been established.

(iv) *Forum non conveniens* should be available as an "ultimum remedium" in cases where the defendant is not domiciled or established in the forum state and where no relevant connection exists between the forum state and the dispute or the parties.

(v) Last, but not least: The Convention should offer an unconditional, watertight, bar on recognition and enforcement of excessive decisions, irrespective of whether they are termed "punitive" or not.

IV. Does the preliminary draft Convention satisfy these criteria?

1. "Convention Double"

Verification (ex officio) of jurisdiction is required only from the court addressed for purposes of recognition or enforcement (Article 27.1). There is no equivalent provision applying to the court first seised.

Therefore, the preliminary draft Convention is a "Convention Single" not a "Convention Double". There are a couple of exceptions:

- Article 4 dealing with choice of court: "Where such an agreement designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction unless the court or courts chosen have themselves declined jurisdiction". This jurisdiction is 'exclusive'.
- There are also "super-exclusive" jurisdictions which prevail over choice of court: consumer contracts (Article 7), employment contracts (Article 8) and the "exclusive jurisdiction" provision of Article 13 (rights *in rem*, certain issues relevant to legal persons, public registers, intellectual property rights).

The wording of these provisions of the preliminary draft Convention is inconsistent: Article 4 (choice of court) specifies that non-chosen courts shall decline jurisdiction but fails to determine if they should do so *ex officio* or at the request of a party only. Article 7 does not contain similar wording, save for the word "only" in Article 7.2 ("a claim against the consumer may only be brought"). The draft does not indicate whether "only" is written for the court first addressed or the courts of the country where recognition/enforcement is sought.

Article 13 sets out four bases for "exclusive jurisdiction" but does not attach any consequences to the word "exclusive". It does not say that any other courts "shall decline jurisdiction *ex officio"* The same uncertainty exists in Article 24 ("Forum Non Conveniens").

In summary, this is not a "Convention Double". The preliminary draft would gain substantially in terms of legal certainty if it were to contain in Chapter II (Jurisdiction) a provision along the following lines:

> *"Any Court of a Contracting State which does not have jurisdiction under the provisions of this Convention shall decline jurisdiction ex officio."*

2. *Limited exceptions to "forum rei"*

The following exceptions are currently provided for or foreseen: choice of court (Article 4), appearance by the defendant (Article 5), contracts (Article 6), contracts concluded by consumers (Article 7), employment contracts (Article 8), branches (Article 9), torts or delicts (Article 10), jurisdiction based on activities (Article 11, with a footnote "deleted"), trusts (Article 12), maritime rurisdiction (Article 12 bis) and the heads of "Exclusive Jurisdiction" (Article 13).

A number of specific comments could be made on the scope of each of these exceptions to *forum rei.* Some of the exceptions are less suitable for including in a global Convention (paragraph V, hereunder, refers). "Jurisdiction based on activities" (Article 23b) should be deleted from any future text for a Convention.

3. *Exclusivity*

Article 19 stipulates: "subject to Articles 4, 5, 7, 8, 13 and [14], the Convention does not prevent the application by Contracting States of rules of jurisdiction under national law, provided that this is not prohibited under Article 20".

The meaning of this provision, read together with Article 20, is not entirely clear. Whilst Articles 20.1 and 20.2 specify a number of prohibited "exorbitant fora", Article 20.3 allows the courts of a Contracting State to exercise jurisdiction in respect of a dispute which is directly related to, inter alia "the carrying on of commercial or other activities by the defendant in that state".

This extremely broad exception would give Contracting States the right to exercise jurisdiction on the basis of the flimsiest of connections with that State (e.g. one or more business meetings). Excessive "general jurisdiction" based on "continuous and systematic presence" in a particular State, is currently being exercised by Courts in the United States. It makes some European companies reluctant to do business in the US.

The combination of Articles 19 and 20.3 of the preliminary draft Convention would provide the United States with a justification under Public International Law for such excessive exercise of jurisdiction. It undermines the exclusive nature of the convention and the fair allocation of bases for jurisdiction it seeks to achieve. Unless amended, this would render the convention objectionable for non-US parties. If amended, it would enhance commercial relationships between the US and the rest of the world.

4. "Forum non conveniens"

This is catered for in Article 24: a Court of a Contracting State may … suspend its proceedings "if in that case it is clearly inappropriate for that Court to exercise jurisdiction and if a court of another [Contracting] State has jurisdiction and is clearly more appropriate to resolve the dispute".

This is a welcome provision provided that the words "if a court of another [Contracting] State has jurisdiction" be clarified. Is this a reference to the other Court having Jurisdiction under the Convention or jurisdiction under its national law?

5. Excessive Judgments

Article 32 contains a provision on "damages". Subject to major amendment it would offer a bar to recognition and enforcement of certain excessive damages awards handed down in particular in the USA.

Article 32.1 stipulates that "non-compensatory judgments shall" (if certain conditions have been fulfilled) "be recognised at least to the extent that similar or comparable damages could have been awarded in the State addressed".

This language seems to be intended to allow the courts in the State addressed to award damages for a lower amount than was awarded in the original judgment, applying the second Court's own criteria for awarding damages and restricting such damages to purely compensatory damages. If that is the intention, then why does the text not clearly reflect this?

As drafted, the provision could be read to imply that the courts in the State addressed are entitled to recognise "non-compensatory, including exemplary or punitive, damages", provided that the notion of non-compensatory damages is recognised in the law of the State addressed. Is this not exactly the reverse of what the apparent intention was? What was intended as a basis for non-recognition appears to translate into a basis for recognition of excessive damages. The following redraft of Article 32.1 would remove the lack of clarity:

> *"A judgment which awards non-compensatory, including exemplary or punitive, damages, shall not be recognised to the extent that compensation other than for damages actually suffered cannot be awarded in the State addressed".*

This wording would enable considerable simplification of the remaining paragraphs of Article 32. Article 32.2 (a) would become redundant because it would be a reiteration of the principle set out in Article 32.1 as redrafted.

Article 32.2 (a), incidentally, refers to "grossly excessive" damages whilst Article 32.1 uses the notion of "non-compensatory, including exemplary or punitive, damages". The words "grossly excessive" are vague and subjective. They do not lend themselves to unequivocal and consistent legal interpretation. In our view, the test should be whether the judgment awards damages actually suffered. The words "non-compensatory" in Article 32.1 are a more appropriate, though not perfect, expression thereof. Inclusion of the words "damages actually suffered", as proposed, would offer a welcome clarification.

Article 32.3 is no less confusing than the previous paragraphs of Article 32. There is no apparent reason why costs and expenses relating to the proceedings should be treated any differently from any other damages.

In conclusion, the inclusion of Article 32 is welcome but it should be amended substantially to meet the test of providing unconditional, watertight protection against export of excessive US decisions.

V. Miscellaneous

The comments set out above address a couple of general concerns raised by the preliminary draft Convention. The draft also gives rise to observations on a number of points of detail. The more substantial of these are (in random order):

(i) The *Federal Clause* (Article 8) is, as yet, non-existent. Consideration should be given to restricting the Convention to jurisdiction and recognition and enforcement of judgments of Federal Courts at least as far as the United States of America is concerned.

(ii) At the turn of the millennium, *e-commerce* is a frequent source of *choice of court*. The Conference may wish to consider developing special rules for choice of court through e-commerce in Article 4 (Choice of Court).

(iii) *Contracts*: The words "in whole or in part" under (a) and (b) of Article 6 could have the effect of bestowing jurisdiction on a court which has no relevant connection with the parties, and a marginal connection only with the transaction (e.g. contracts providing for delivery of bulk goods in five countries: would the court of each country have jurisdiction for any dispute even if totally unrelated to the delivery in that particular country?)

(iv) *Consumer Contracts and Employment Contracts (Articles 7 and 8):* These fora appear in the 1968 Brussels Convention which covers a relatively homogenous legal and economic area. However, it could be too ambitious to achieve similar fora in a world-wide convention which would encompass countries, societies and legal systems which are extremely diverse.

(v) *Branches*: Article 9 embodies substantial improvement compared to the draft prepared by the Drafting Committee (Work. Doc. No 144E). Nonetheless, the provision could still have a far-reaching effect where it is not confined to "branches" but includes an "agency or any other establishment": these notions cannot be defined with any precision. In UNICE's view, the provision should be limited to branches only.

(vi) *Torts*: Article 10 (2) and (3) introduces a novel concept in international jurisdiction law, namely jurisdiction of the Courts of the State where an "act or omission, or injury, is threatened".

This criterion is entirely subjective. It would encourage rather than discourage claimants to initiate litigation in their own Courts against foreign defendants. In UNICE's view, these provisions should be deleted.

Article 10.1 (b) enacts an exception to *forum loci delicti* based on the concept of "reasonable foreseeability". Again, this is a subjective notion which does not meet the test of unequivocal jurisdictional principles. UNICE would express a preference for a provision which restricted exception to *forum loci delicti* to cases where the parties have *agreed* to the jurisdiction of a forum other than that in which the act or omission that caused injury occurred.

(vii) Articles *yet to be drafted*: numerous provisions of the draft Convention have not yet been drafted. Therefore, any views as expressed in this position paper on the merits of the proposed instrument should be considered to be provisional comments only.

VI. Specific implications of the preliminary draft Convention for intellectual property rights

In the intellectual property area, the preliminary draft Convention would have implications which UNICE feels are severe and do not appear to have been well assessed.

Article 13 (4) of the preliminary draft Convention follows the principles established in Article 16 and elsewhere of the Brussels/Lugano Conventions concerning intellectual property rights.

Courts in the state where an intellectual property right has been registered have exclusive jurisdiction in relation to the registration, nullity or invalidation of the right, while an action for infringement of the right might be brought before a court in the state where the defendant is domiciled, or in any state where an act or omission causing the alleged injury (the infringement) occurred, or in any state where an injury arises.

Thus if goods which are alleged to infringe patent rights in several states are manufactured by a competitor in a state where there is no patent, the most powerful infringement action could be brought in the state of manufacture, even though there is no patent there. The courts in that state would assume the patents to be valid and rule on their scope when determining the infringement, unless there is a stay to allow validity to be determined in the state of registration. Moreover, suing for infringement in the state of the defendant's domicile, or elsewhere other than the state of registration, and defending validity in the state of registration will lead to delay and uncertainty.

This is not acceptable to UNICE. Infringement and validity of a given right must be dealt with in the same, expert, court. Any other arrangement leads to uneven interpretation of the right, by the separate courts dealing with infringement.

UNICE considers that, in addition to providing for infringement, Article 13 (4) of the Convention should contain a proviso to make clear that a national court may be denied exclusive jurisdiction, or indeed any jurisdiction, when the state concerned is a party to a bilateral, multilateral (regional) or international agreement concerning the litigation of intellectual property rights.

UNICE urges representatives of EU member states and the European Commission to make sure the preliminary draft Convention is amended in such a way that the exclusive jurisdiction provision on intellectual property [Article 13 (4), corresponding to Article 16 (4) of the Brussels Convention] applies to infringement of registered intellectual property rights, as it applies to actions concerned with validity. The US proposal that a qualifying paragraph be added to article 13 (4), allowing determination of the validity or status of rights by any court having jurisdiction over infringement proceedings involving such rights, should therefore be rejected.

One suggestion would be that the wording of Art 13 (4) of the preliminary draft Convention could be amended by adding the following to the last line of the present Article:

"provided that, where the Contracting state is a member of a regional system in which intellectual property rights are granted centrally either on behalf of states in the region, or to

have effect in all the states of the region, or are granted by one state on behalf of others, or in which member states have agreed upon particular arrangements concerning jurisdiction in relation to the infringement and validity of intellectual property rights, the special rules in such systems which allow infringement and validity issues to be heard at the same time by the same court, which need not be a court in the state in which the right was applied for or for which it was granted, shall be followed".

VII. Conclusion

The preliminary draft Convention does not meet most of the criteria developed under III above. As it stands, it would expose companies in Europe to real jurisdictional risks in the United States. It would expose them to recognition and enforcement of excessive judgments. Substantial amendment is required to make the Convention an instrument capable of reducing international forum shopping and enhancing legal protection.

As discussions will continue to progress in the Special Committee, and unwritten provisions are going to be drafted, UNICE urges the European Commission to consult the business community on forthcoming developments regarding these issues, which are of considerable importance for European companies.

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The Times

14 October 1999 **No. 66 645**

ICI faces wave of US litigation over lead paint

FROM ADAM JONES IN NEW YORK

ICI and other former manufacturers of lead paint are facing a wave of tobacco-style litigation from US local authorities demanding billions of dollars.

Having wrung $206 billion from cigarette companies - and issued copycat lawsuits against gunmakers - American states and cities are now turning their attention to paint manufacturers. Lead poisoning, often from children eating paint chippings, is seen as a cause of brain damage. Lead paint was banned in 1978 in the US, although the industry claims lead-based interior paint was withdrawn from sale in the 1950s.

The cities and states are hoping to recover the cost of treating illnesses related to lead paint and want to fund either the removal or the treatment of lead paint in people's homes. Rhode Island said yesterday it has issued a writ seeking hundreds of millions of dollars for healthcare and clean-up costs.

Among the companies named in the lawsuit are Glidden and O'Brien Corp, both part of ICI. Glidden was bought by ICI in 1986, after it stopped making interior lead paint, while O'Brien was bought last year.

ICI is fighting the litigation, denying as "unfounded" the claim that the lead paint industry hid the health risks. Other defendants in the Rhode Island suit include Atlantic Richfield and DuPont.