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Résumé de l'article

Un nouvel accord international concernant la compétence et les jugements étrangers en matière civile et commerciale est nécessaire compte tenu de l'échec de la Convention de La Haye de 1971. La Convention de Bruxelles de 1968 ainsi que la Convention de Lugano de 1988 ont aidé à résoudre les problèmes de compétence et de reconnaissance dans le contexte européen, mais à cause de l'absence de réciprocité de l'approche européenne, même si les tribunaux nord-américains ont adopté une approche libérale envers la reconnaissance des jugements étrangers, les jugements nords-américains se trouvent désavantagés devant les tribunaux européens. L'initiative des États-Unis de promouvoir une approche internationale cohérente pour la reconnaissance des jugements étrangers pourrait mener à une nouvelle Convention de La Haye.

L'auteur discute de la procédure de la Conférence de La Haye sur le droit international privé et du travail de la Commission spéciale, chargée de rédiger un avant-projet pour la nouvelle convention sur les jugements. L'auteur est d'avis que les décisions qui ont été prises à la Conférence de La Haye auront un impact important sur les avocats pratiquant le droit international ainsi que leurs clients. Il identifie les membres-clés de la délégation canadienne à la Commission spéciale et encourage les praticiens à les contacter afin que leurs préoccupations et leurs idées soient prises en considération pendant le processus de rédaction de la nouvelle convention.

THE PROPOSED HAGUE CONVENTION ON JURISDICTION, RECOGNITION AND ENFORCEMENT OF JUDGMENTS

By Bradbrooke Smith[*]

Un nouvel accord international concernant la compétence et les jugements étrangers en matière civile et commerciale est nécessaire compte tenu de l'echec de la Convention de La Haye de 1971. La Convention de Bruxelles de 1968 ainsi que la Convention de Lugano de 1988 ont aidé à résoudre les problèmes de compétence et de reconnaissance dans le contexte européen, mais à cause de l'absence de réciprocité de l'approche européenne, même si les tribunaux nord-américains ont adopté une approche libérale envers la reconnaissance des jugements étrangers, les jugements nords-américains se trouvent désavantagés devant les tribunaux européens. L'initiative des États-Unis de promouvoir une approche internationale cohérente pour la reconnaissance des jugements étrangers pourrait mener à une nouvelle Convention de La Haye.

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A new international agreement on juridiction and foreign judgments in civil and commercial matters is needed because the Hague Convention of 1971 has proven unworkable. The Brussels Convention of 1968 and the Lugano Convention of 1988 were helpful in resolving jurisdictional issues in the European context, but because of the lack of reciprocity in the european approach, even though North American courts have a liberal approach towards the recognition of foreign judgements, North American judgements are at a disadvantage before European courts. The United States' initiative in promoting a consistent international approach to the enforcement of foreign judgments may lead to a new Hague Convention.

The author discusses procedures of the Hague Conference on Private International Law and the work of the Special Commission, which is charged with the task of working up a draft text for a new judgments convention. The author's view is that decisions made at the Hague Conference will have real impacts on the practice of international lawyers and their clients. He identifies key members of the Canadian delegation to the Special Commission and encourages practitioners to contact the members so their concerns and ideas will be considered during the drafting process of the convention.

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I. Background

There are three elements to the background of this important initiative which is currently scheduled to be put in place at a diplomatic conference in the year 2000.

1. The Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 1971 has seen few ratifications. Because it required supplementary agreements between contracting states to make it effective, it was fatally flawed from the beginning. Moreover, it did not address the question of the jurisdiction of the courts of the sate of origin.

2. There was, in addition, a parallel system established in the European Community (then the EEC) by a 1968 Convention known as the Brussels Convention subsequently extended in 1988 by the Lugano Convention, this latter being required by the addition of so many new states to the original organization. Brussels and Lugano address, first, the issue of the jurisdiction of the courts of the several states and then deal with the recognition and enforcement of the judgments of those courts.

3. Finally, there is now a new development as a result of the 1998 Treaty of Amsterdam which, grosso modo, gives to the EU Commission certain powers to regulate the subject matters dealt with by Brussels and Lugano.

II. Proposal

While these European developments were taking place, in Canada the administrative and civil law rules for recognition were being changed by the new Civil Code and, more particularly, by jurisprudence of the Supreme Court of Canada. The important jurisprudential watershed was the case of *Morguard Investments Ltd. v. De Savoye* [1903] 3 S.C.R. 1077. Suffice it to say, the liberalization of the rules on recognition in Canada would seem to call for similar treatment for Canadian judgments in other jurisdictions.

As far as I have been able to determine, no general problem exists as to recognition and enforcement of judgments from Canadian courts in the United States. A similar liberal approach applies in respect of other foreign judgments. The difficulty is that, particularly in Europe, there is not a reciprocal approach. Judgments from outside Europe are at a disadvantage with reference to European judgments sought to be enforced in European jurisdictions.

In the result, the United States has taken the lead in trying to promote a broader, world-wide, approach to the enforcement of foreign judgments. This would in many ways parallel the position in respect of the recognition of arbitral awards under the widely accepted New York Convention. The Hague Conference on Private International Law is the forum in which the negotiation is taking place.

III. The Hague Procedure

The Hague Conference, which for more than 100 years has been a leader in the development of private international law, has been following its usual thorough procedure in developing a judgments convention. this involved some preliminary meetings before the formal process was begun with its inscription in a normal four year work plan which began in 1996.

The first step in the process consists in the preparation by the Permanent Bureau of the Conference of an extensive study of the subject matter. This was produced by Professor Catherine Kessedjian, a well-known and highly qualified French academic who joined the staff of the Permanent Bureau of The Hague conference at the time the matter was put on its agenda. This meticulous and extensive study, by setting forth and discussing the many issues involved, provides a framework or backdrop for the discussions which have ensued.

These discussions, which lead up to an eventual draft convention, take place in the context of what is known as a Special Commission. This is constituted by experts from among the member states as well as observers from other states and from a number of international organizations both public and private. The Special Commission usually has a somewhat disparate membership in that it will include academics, bureaucrats active in the field, as well as some practising lawyers. The actual composition is dependent to some degree on those whom states and invited organizations decide to designate to attend.

It should be stressed that the work of the Special Commission involves an essentially technical, not a political or diplomatic, process. The sessions of the Special Commission are normally two weeks in duration and there may be three, four or even five that are required to work up a draft that is subsequently considered by a diplomatic conference. Such a draft is accompanied by a lengthy commentary by the rapporteur of the Special Commission. In the Special Commission on the judgments convention, there are two very experienced and knowledgeable co-rapporteurs, Professor Peter Nygh from Australia and Professor Fausto Pocar from Italy.

The diplomatic conference, which is the last step in the process, usually takes place in the fourth year of the cycle, in this case it is anticipated to be in the year 2000. The sessions of the diplomatic conference normally last three weeks. It is by no means a rubber stamp for the work of the Special Commission. While the main lines of a convention may have been laid down by the Special Commission, they are carefully reviewed and there are always some, and often many, important issues which require reworking and frequently substantial change from that which the Special Commission has proposed.

IV. The Activities of the Judgments Special Commission

The Special Commission on the judgments will now have met on four occasions. It could meet again for a final wind-up session. Some forty member states

along with a significant number of observers have been participating. We have, at any given time, approximately seventy-five or eighty people in the room. Given that some delegations are numerous and some experts more retiring than others, only a limited number of participants are active interveners in the debate. For all purposes, other than voting, which is restricted to the representatives of member states, all organizations who are participating do so on an equal basis.

In this regard, it is both of interest and of importance that a number of public and private international organizations contribute very significantly to our discussions. The European Union, which as I have indicated, will have, through the Commission, a larger role in private international law matters, is an important participant. Likewise, the International Bar Association, the International Law Association as well as the Union Internationale du Notariat Latin, to mention but three, offer major assistance to the process.

That process is founded on working documents submitted by representatives individually or in concert with others. These are made available to all by the efficient secretariat which transcribes and reproduces them after receipt from delegates. Propositions and amendments from the floor, except on minor matters, that are otherwise not reduced to writing, are discouraged. Some idea of the extent of participation and the keen attention to detail, it is noteworthy that at the end of the first three sessions there were 144 such documents that had been submitted, distributed and considered to a greater or lesser extent during these sessions.

Against a background of this documentation, decisions at the formative stage of a convention are taken as much as possible on a consensus or informal basis backed up as required by indicative votes. Voting becomes more frequent as the process moves along because it is necessary to narrow the issues and to complete a text for the draft convention. Frequently, as well, various alternatives are developed and are incorporated as variants in the resultant draft. As we get closer to a final draft, a more formal approach is adopted. Of course, at the diplomatic conference, there are fairly strict rules in relation to the taking of decisions on the various issues and on the proposed provisions of the convention.

An important step in the process is the circulation of the draft of the Special Commission with accompanying report by the co-rapporteurs for consideration by the legal communities in the member states. The diplomatic conference may well be influenced by the broader reaction which is thereby brought out. But there is a major hurdle to overcome in this regard. It is frequently difficult to raise the level of interest in this type of project to attract the attention, and consequent critical review, of a large segment of the practising bar. Because of the long term importance of the judgments initiative, it is to be hoped that this difficulty can in this case be overcome. We very much require to develop a convention that is practical and will respond to the needs of lawyers and their clients.

V. Future Steps

The Canadian delegation to the Special Commission has been composed of a representative of the Federal Department of Justice, a representative from the common law provinces and a civil law representative from Quebec. In addition, we have had the benefit of advice and assistance from practitioners from both common and civil law systems for varying periods of time during the sessions.

To add a more personal touch and give you individuals whom you may wish to contact about this matter, the following constitute the core of the Canadian delegation: Kathryn Sabo, Department of Justice, Frederique Sabourin, Department of Justice, Quebec, and Darcy McGovern, Saskatchewan Department of Justice. Practising lawyers who have participated at past sessions include Greg Steele from Vancouver, Scott Fairley (currently chairman of the CBA International Law Section) from Toronto, Isabelle D'aoust of Heenan Blaikie and Jacques Papy of McCarthy Tetrault of Montreal.

As some of you will know, the Federal Department of Justice a couple of years ago arranged meetings with practitioners in several regions to attempt to get some input with respect to the general issues raised by the proposed judgments convention. I would hope that if finances are available, similar meetings can be held later this year or early next year against a backdrop of the draft that will emerge from the meetings in The Hague this year.

This is an important endeavor. It is also a very difficult one in terms of securing a final product that will command broad support. We shall need all the help we can get. Participation by lawyers in the consultative process in Canada will be most important in securing the practical and analytical assistance that is required. That help will ultimately enure, I am quite sure, to the benefit of all Canadian lawyers and their clients.