

**PROPOSED HAGUE CONVENTION ON JURISDICTION AND
FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS**

EMPLOYMENT DISPUTES: AN ISSUES PAPER*

The issues

- 1 The preliminary draft convention prepared by the special Commission includes, in Article 8, special provisions in relation to jurisdiction in claims relating to individual contracts of employment. In summary:
 - 1.1 an employee is permitted to bring an action against his or her employer in the State in which the employee habitually carries out his or her work (or where he/she last did so). If the employee does not habitually work in any one State, the relevant State is that in which the business that engaged the employee is (or was) situated;
 - 1.2 a claim against an employee can be brought by an employer only in the State where the employee is habitually resident, or where the employee habitually carries out his/her work;
 - 1.3 a choice of court provision in an employment contract is not enforceable against an employee unless it is entered into after the dispute has arisen. If it provides for an additional forum, the employee can take advantage of that forum. But a pre-dispute forum clause cannot prevent the employee proceeding against the employer in a forum referred to in subparagraph (1), or permit the employer to bring proceedings against the employee other than in the forum referred to in subparagraph (2).

- 2 A number of concerns have been expressed in relation to Article 8 by delegations from member States. The principal concerns can be summarised as follows:
 - 2.1 in some jurisdictions, claims relating to contracts of employment are not treated as civil or commercial matters. Rather, they are seen as administrative matters, and thus outside the substantive scope of the convention as set out in Article 1(1). So far as these jurisdictions are concerned, there is an inconsistency between the substantive scope provision, and the inclusion in the convention of a provision such as Article 8;

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- 2.2 the view has been strongly expressed by the United States and other delegations that a provision such as Article 8 is inappropriate in a world-wide convention, given the wide variation in substantive content of employment laws in different jurisdictions, and given the significant cost and inconvenience that may be associated with defending a claim in a forum on the other side of the world, especially for small and medium sized enterprises;
 - 2.3 the provision is inconsistent with the laws of jurisdictions which give effect to choice of forum clauses in employment contracts. These are seen as serving an important commercial/economic function, and it is argued that it is undesirable for the domestic law of these jurisdictions to be overridden in this way by the convention;
 - 2.4 these difficulties are said to be exacerbated by e-commerce developments, and in particular the increase in “teleworking” or “commuting via the internet”.
- 3 It is important to bear in mind that so far as claims *by* employees are concerned, Article 8 makes additional jurisdictions available, in addition to:
- 3.1 the habitual residence of the employer, which may be invoked under Article 3. It seems that this also cannot be contractually excluded (see Article 8(2)(b));
 - 3.2 the State in which a branch, agency or other establishment of the defendant is situated, where the plaintiff employee was retained by that branch etc, by virtue of Article 9;
 - 3.3 in tort cases, any special tort jurisdiction that may be available under Article 10.
- 4 As the Rapporteurs’ report notes, the relationship between Article 8 and the contract head of jurisdiction in Article 6 is not clear, so far as claims by the employee are concerned. (Jurisdiction under Article 6 in claims by employers is clearly excluded by Article 8.)

Some options

- 5 It is clear that there is no consensus in favour of retaining a provision along the line of the current Article 8. This paper explores some of the alternative options that have been identified in relation to employment disputes, if Article 8 is not retained in its current form.

6 In the absence of any consensus about how employment disputes should be dealt with under the convention, the first option is to exclude such disputes from the scope of the convention. This ensures preservation of the status quo. However it may be possible for the convention to apply to employment disputes in some circumstances. This paper identifies two further options and explores their implications, in order to clarify whether there might be widespread support for pursuing an approach along these lines. This paper does not seek to assess whether or not the concerns expressed in relation to Article 8 are well founded, or to identify a preferred option.

7 The options are:

- *Option 1:* Exclude employment disputes from the scope of the convention;
- *Option 2:* Make no special provision for jurisdiction in employment disputes; but
 - retain other required jurisdictions for the benefit of the employee, absent a forum clause selecting a different forum;
 - retain the employer's ability to bring proceedings in the employee's habitual residence;
 - otherwise preserve the status quo;
- *Option 3:* The third option is based on Option 2, but coupled with a "default jurisdiction" in favour of the employee along the lines described in paragraph 1.1 above. This default jurisdiction would not apply where a contract of employment provides for a different forum: in such cases the status quo would be retained.

8 Each option is explained briefly below.

Option 1: Exclude employment disputes from substantive scope

9 The only option which entirely resolves the concern that has been identified about the characterisation of employment disputes by some States as administrative, rather than civil or commercial, is Option 1. This option would ensure that the status quo was retained in relation to all employment disputes, and that the convention did not affect national laws on these issues.

10 On the other hand, this solution may be seen as going further than necessary to resolve the problems identified. If employment disputes are excluded from the substantive scope of the convention, many uncontroversial claims by employees

and by employers would be denied the benefits of predictability of jurisdiction and subsequent enforcement of judgments available under the convention. For example:

- 10.1 if an employee brings proceedings in the State in which a branch employing that employee is located, and in the course of those proceedings the branch is closed down and all assets removed to the head office, the employee would not be able to take the resulting judgment and enforce it under the convention in the country in which the head office was situated;
 - 10.2 indeed, even if the employee sued in the employer's habitual residence, the resulting judgment would not be enforceable under the convention;
 - 10.3 the results described in subparagraphs 1 and 2 above would follow even if the contract contained a forum clause selecting the State in which the branch was situated, or the employer's habitual residence, or if the employer voluntarily appeared to defend the proceedings in the forum selected by the employee;
 - 10.4 where an employee breached contractual obligations of confidentiality, and the employer brought proceedings in the employee's habitual residence, the resulting judgment (be it an award of damages, or an injunction) would not be enforceable under the Convention. If the employee moved to another Contracting State, for example, and sought to misuse the employer's confidential information in that Contracting State, it would be necessary to begin new proceedings in that State (unless of course the judgment were enforceable under that State's national law).
- 11 It seems odd for the convention not to apply in cases where the jurisdiction invoked by the employee is, on any approach, appropriate – especially where the States concerned do all classify disputes under individual employment contracts as civil or commercial matters.
 - 12 Nor would difficult questions of classification be entirely avoided under option 1. It would be necessary to consider whether the exclusion of employment disputes should extend to eg:
 - 12.1 claims by an employee in respect of injury suffered in the course of employment;
 - 12.2 claims by an employer against an employee to restore property retained in breach of contract, or wrongfully taken from the employer in the course of employment.

Option 2: Employment contracts included in the scope, but choice of forum provisions ineffective against employees

- 13 The basic objective of Option 2 is to ensure that where an employee or an employer seeks to take advantage of a jurisdiction that is not controversial in any way, the convention applies, and the parties obtain the benefits of greater predictability in relation to whether or not a court will exercise jurisdiction, and of enforcement in other contracting States of any resulting judgment. However Option 2 also seeks to avoid making provision for any jurisdiction that is controversial. This means that it is necessary to exclude from the “white list”:
- 13.1 any additional jurisdiction made available to employees under the current Article 8, which some delegations consider to be inappropriate;
 - 13.2 a forum specified in a forum clause in the contract of employment, where that clause operates to the detriment of the employee. That is, such clauses should not be enforceable against the employee by virtue of the convention, since this is inconsistent with the domestic law of many member States, and is considered inappropriate by many delegations;
 - 13.3 any white list jurisdiction that would be available to the employer in a claim against the employee, other than the employee’s habitual residence or habitual place of work;
 - 13.4 any convention jurisdiction that is inconsistent with a forum clause in the contract of employment, since a number of member States consider that forum clauses should not be deprived of effect by the convention.
- 14 The practical result would depend on whether or not the contract included a forum clause. If it did not:
- 14.1 the employee could bring proceedings against the employer under the convention in any jurisdiction available under Article 3 (defendant’s habitual residence), Article 9 (Branches etc) or Article 10 (Torts), and possibly Article 6 (Contracts), or any activity-based head of jurisdiction that may be included in the Convention;
 - 14.2 the employer could bring proceedings against the employee under the convention in the employee’s habitual residence, and also in the employee’s habitual place of work if that place is in another State, and that State is a convention jurisdiction (eg, because the claim relates to a tort committed there);

- 14.3 national laws might provide additional fora for claims by an employee (eg, a protective jurisdiction) or claims by an employer (eg, the place where a tort was committed). But this would be a matter for national law, and the enforcement of any resulting judgment in another Contracting State would depend on the national law of that State.
- 15 If the contract of employment did include a forum clause, on the other hand:
- 15.1 the employee could bring proceedings against the employer in the chosen forum, under the convention;
- 15.2 the employer could bring proceedings against the employee in the chosen forum if and only if the chosen forum is either the employee's habitual residence or the employee's habitual place of work;
- 15.3 national laws might provide additional fora for claims by an employee (eg, a protective jurisdiction) or claims by an employer (eg, the place where a tort was committed). But this would be a matter for national law, and the enforcement of any resulting judgment in another Contracting State would depend on the national law of that State.
- 16 It needs to be emphasised that references in this context to a forum clause are simply references to a clause designating a forum which meets the formality requirements of the current Article 4. The question whether the clause is valid under national law would not be considered for the purpose of applying this test under the convention.
- 17 The main advantage of Option 2 relative to Option 1 is that it does enable employers and employees to take advantage of the convention, where the arrangements between them do not raise the issues that have generated controversy in relation to appropriate jurisdiction in employment cases – for example, where there is no forum clause, or where there is a forum clause but it selects the jurisdiction in which the employee carries out his or her work.
- 18 The principal disadvantage of Option 2 relative to Option 1 is that it is more complex. Its other disadvantage is that it does not solve the classification problem in relation to employment disputes. But excluding employment disputes from the convention is a very far-reaching response to this concern – a more tailored response might, for example, be to provide for States which do not classify individual employment disputes as civil or commercial to enter a reservation in relation to the application of the Convention to employment matters.

- 19 It may be helpful to consider some examples which illustrate the operation of option 2.

Example 1. Q, who is habitually resident in France, is employed by Z Limited, a Canadian company, as Z Limited's sales representative in France. The contract contains a provision that the courts of Ontario have exclusive jurisdiction in all claims arising out of or in connection with the contract. Z Limited purports to dismiss Q. Q claims that the dismissal was unjustified, and a breach of the contract, and claims compensation.

- 20 In this example, Q could bring proceedings against Z Limited in Canada, by virtue of the forum clause. The resulting judgment would be enforceable under the convention. (If there were no forum clause, proceedings could still be brought in Canada by virtue of Article 3.)
- 21 Q might also be able to bring proceedings in France, under the French law providing a protective jurisdiction for employees. This would not be a convention jurisdiction, but it would not be precluded by the convention. Any judgment that Q obtained would be enforceable against Z Limited in Canada only if the relevant Canadian law provided for enforcement of such judgments. Note that this is the same outcome that would be reached if these facts occurred today, before the convention is completed.
- 22 Of course, if Z Limited voluntarily appears before the French court and defends the proceedings on their merits, Article 5 would apply, and any resulting judgment (in favour of either party) would be enforceable under the convention in all contracting States.
- 23 Now suppose that Z Limited brings proceedings seeking a declaration that Q was in breach of contract, and that the termination was valid and effective. If Q commences her proceedings first, plainly it would be open to Z Limited to counterclaim in the court in which Q brought her proceedings. The judgments on both the claim and the counterclaim would then be convention judgments, recognised in all contracting States.
- 24 What if Z Limited sought to commence proceedings first, as a pre-emptive strike? If those proceedings were commenced in France, A's habitual residence, that would not be a convention jurisdiction as it would be inconsistent with the forum clause. But it seems very likely that Q would appear, and would counterclaim in France for the relief sought by her. The resulting judgments would be enforceable under the convention in all contracting States.

- 25 What if Z Limited sought to bring proceedings in Ontario, in reliance on the forum clause? Article 4 would not apply: so Ontario would not be a convention jurisdiction. Whether or not the Ontario court agreed to hear the case would depend on Canadian law. If Q did not appear, any resulting judgment would not be enforceable under the convention. If Q responded by commencing proceedings in France, then as noted above neither set of proceedings would have been brought in a jurisdiction provided for in the convention. The current provisions on *lis pendens* in Article 21 would not apply, as neither court would be expected to render a judgment capable of being recognised under the convention. Nor would the current version of Article 22 (on declining jurisdiction) apply. In other words, the status quo would have been preserved in relation to matters of *lis pendens* and questions of declining jurisdiction: the French and Canadian courts would apply their national law on these matters.

Example 2. Y Limited, an English company, has a branch office in Sydney. The branch office employs B, based in New Zealand, to act as the company's representative in New Zealand. The contract provides that it is governed by the law of New South Wales, and that all claims must be brought in the courts of New South Wales. B claims that under the contract he is entitled to a substantial bonus. The company, which has run into financial difficulties, has been placed in receivership in England. It rejects B's claim. The receivers close the Sydney office and return all assets to England. B brings proceedings for the bonus, and for unpaid salary and loss of opportunity to earn further bonuses over the balance of what B claims was a fixed term 5 year contract.

- 26 Under Option 2, if there were no forum clause B could bring proceedings in the following States which would have jurisdiction under the convention:
- 26.1 England, as the company's habitual residence;
- 26.2 Australia, by virtue of the location of the branch (subject to timing questions about when the branch was closed, and the time at which the presence of a branch is relevant).
- 27 However the existence of the forum clause would mean that B could establish a convention jurisdiction only in Australia.
- 28 If B sought to file proceedings in New Zealand, this would not be a convention jurisdiction. As with Example 1, New Zealand law would determine whether or not the New Zealand court would entertain the claim. If the New Zealand courts do accept jurisdiction and enter judgement against Y Limited, and an attempt is

made to enforce the judgment in England, English law would determine whether the New Zealand judgment is enforceable.

- 29 If Y Limited brings proceedings seeking a declaration that B's employment contract was validly terminated, and that B is not entitled to any payment, there would be no jurisdiction as the forum clause does not designate a forum that would otherwise be a Convention jurisdiction.
- 30 However, Y Ltd could counterclaim in any State in which B first brings proceedings against Y Limited: the judgments on both claim and counterclaim would then be enforceable under the Convention.
- 31 Y Limited could not bring proceedings in New South Wales in reliance on the forum clause, under the convention. However New South Wales law might permit this as a matter of national law. The effect of any resulting judgment would then fall to be determined under the national law of the State addressed.

Option 3: Option 2 with a default jurisdiction in the employee's habitual residence

- 32 Option 3 is very similar to Option 2, but with the addition of a default jurisdiction, as opposed to a required jurisdiction, along the lines of the current Article 8 jurisdiction for claims by an employee. In other words, rather than deleting the current Article 8 it would be modified to make it clear that the employee can bring an action against the employer in the State in which the employee habitually carries out his or her work, or in the other States identified under Article 8, provided that there is no forum clause in the contract of employment which selects a different forum. If there is a forum clause selecting a different forum, however, the special employment jurisdiction would not be available as a convention jurisdiction. Nor would the chosen forum be a convention jurisdiction. That is, where the employment contract contained a forum clause selecting a forum other than those identified in Article 8, the status quo would be preserved and there would be no convention jurisdiction available.
- 33 The advantage of this approach is that in the absence of a forum clause, the employee would be given access to a forum which will in many cases be appropriate, in addition to the defendant's habitual residence and any other fora which may be available under the general provisions of the convention. Making this jurisdiction available in circumstances where there is no choice of court clause appears much less controversial than seeking to override forum clauses. Where there is a forum clause, and it points to another jurisdiction, the status quo would be preserved as under Option 2.

- 34 Both the examples given in relation to Option 2 involved forum clauses. So the default jurisdiction which forms part of Option 3 would have no effect: the result would be the same as under Option 2. Suppose however that there was no forum clause in each of these examples: what would the position be?
- 35 Under Example 1, Q would be entitled to bring proceedings not only in Canada, but also in France by virtue of the modified Article 8. This would be a convention jurisdiction: the resulting judgment would be enforceable in other contracting States. (The inclusion of the forum clause removes this convention jurisdiction, making exercise of jurisdiction based on the place where the employee carries out his or her work a “grey zone” jurisdiction, as explained under Option 2).
- 36 In Example 2, if there was no forum clause, B would be able to bring proceedings in New Zealand as well as in England and in Australia. All of these would be convention jurisdictions, with the resulting judgment enforceable in all contracting States. The effect of the forum clause is to remove New Zealand and England from the list of available white list jurisdictions. Whether the courts in New Zealand would exercise jurisdiction under Option 3, if there was a forum clause, would depend on national law (as under Option 2), and the enforceability of any resulting judgment would also depend on the national law of the court addressed (as under Option 2).
- 37 Option 3 is slightly more complex than Option 2. This is its principal disadvantage relative to Option 2. The advantage it will be seen by many as having is that it provides for the employee to have access to a forum which is widely regarded the most appropriate for employment disputes, at least absent any contractual selection of a different forum.