ANNEX H

Draft Hague Convention on Jurisdiction and Judgments

Bilateralisation

Introduction

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Introduction

At previous meetings on draft the Convention there has been little or no discussion of an issue which has the potential to bar eventual ratification of the Convention by some members of the Hague Conference. This is the strong objection by legal practitioners in those countries to any Convention which exposes their clients to enforcement of judgments given by courts in certain countries which are subject to undue influence.

In opposing discussion of this issue other delegations seem to have taken the view that:

- there are more important issues which need to be resolved first in drafting the Convention;

- discussion of 'ratification procedures' can, as with other Hague Conventions, be left until the final 'formal' clauses are drafted at the end of the Diplomatic Session; or

- article 28(1)(c) of the draft Convention deals with the problem of lack of impartiality.

Why discuss this issue now ?

Not important enough ?

The question of whether the Convention obliges you to accept another country as a Contracting State is perhaps the most 'political' of all issues to be faced in preparing the Convention. Accepting a treaty obligation to on jurisdiction and enforcement of commercial judgments without review on the merits is an entirely different proposition than that faced by the Hague Conference in drafting Conventions on recognition of child custody orders (1996) or of adult disability judgments (1999). While the drafting of an appropriate clause may not be difficult, agreement on the need for a clause may be difficult to obtain.

Wait until the Diplomatic Session ?

This issue is too sensitive to be discussed openly at the Diplomatic Session, where many non member States will have observers present. If it is to be dealt with properly, it is appropriate that the Edinburgh meeting reach a consensus on the need for, and the form of, an appropriate draft provision in order for it to be considered at the Diplomatic Session.

Why is bilateralisation necessary ?

Article 28(1)(c) deals with the problem ?

Article 28(1)(c) provides:

> 1. Recognition or enforcement of a judgment may be refused if -
>
> > c) the judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed, including the right of each party to be heard by an impartial and independent court;

Article 28(1)(c) will not deal effectively with the problem of judicial corruption. Legal practitioners rightly make the point that in practice a defendant opposing enforcement of a foreign judgment can rarely obtain evidence sufficient to establish that a foreign court was corrupt or was subject to other undue interference. While information about the integrity of the judiciary of a country might be common knowledge among lawyers and diplomats in that country, it is unrealistic to expect those persons to give evidence to a foreign court on such a question. In some parts of the world there is an occasional and isolated problem with some judges but in others the problem is endemic [Attachment F] and requires a more broad brush solution.

An Executive or judicial function ?

In some countries it is traditionally the function of the executive arm of government to decide whether the integrity of the judiciary of another country is such that it is appropriate for the two countries to reciprocate in the enforcement of commercial judgments. The Executive's decisions are subject to tabling in, and disallowance by, the elected legislature.

At present the draft Convention will not permit the Executive in those countries to continue with that role on a country by country basis. A refusal by the Hague Conference to include an appropriate adherence provision may amount to an unacceptable interference in the internal allocation of government responsibilities in those countries.

What are the arguments against bilateralisation ?

Bilateralisation would cause difficulties for users of the Convention?

In the past it has been argued that it is difficult for litigants and other users of a Convention to ascertain whether the Convention has entered into force bilaterally between two countries.

However this problem has been dealt with by the practice, recently introduced by the Permanent Bureau, of listing ratifications, accessions and acceptances on the internet.

Bilateralisation is contrary to the established practice of the Hague Conference?

It might be argued that, in view of the nature of the Hague Conference as a limited circle of States, any State Party to a Convention should accept any other Member State as a co-Contracting Party.

The contrary argument is that a distinction should be drawn between a Convention containing elements of reciprocity (in the recognition to be given to acts and judgments of Contracting States) and Conventions which aim solely at a universal unification of conflict rules and where elements of reciprocity are absent. As the proposed Convention deals with recognition and enforcement of commercial judgments, it falls into the latter category [*Hague Permanent Bureau, Memorandum on the Final Clauses of Hague Conventions Preliminary Document No.2 of September 1972, Actes and Documents de la Douzieme session*].

Bilateralisation would hinder wide acceptance of the Convention ?

One of the reasons given for the failure of the Hague Convention on the Recognition and Enforcement of Foreign Judgments 1971 was that its implementation required the cumbersome further step of executing bilateral agreements between those nations which wanted to avail themselves of its provisions. Article 21 of the 1971 Convention effectively provided that the Convention had no effect between two Contracting States unless those States concluded a "Supplementary Agreement". Article 22 listed twenty two matters that needed to be resolved in the Supplementary Agreement. The complexity of the provisions was increased by the Supplementary protocol.

It may not be necessary to have a bilateralisation provision in the sense of the 1971 Convention. A simple adherence provision, allowing declarations to be lodged with the depositary, would avoid the problem of separate bilateral agreements. Similar adherence provisions have been used successfully in the Hague Abduction

Convention and the Hague Evidence Convention. Those Conventions have achieved a wide acceptance despite their adherence provisions.

Possible options

Option 1 : mutual declaration
Option 1 is that the Convention would have effect between Contracting State F1 and Contracting State F2 only if F1 and F2 have lodged with the depositary of the Convention declarations that F1 and F2 accept each others adherence (ratification or accession).

> This was the mechanism proposed in Working Document 88 (attachment A).

Option 2 : acceptance of accessions of non member States
Option 2 is that the Convention would have effect between Contracting State F1 and Contracting State F2 only if F1 and F2 are members of the Hague Conference as at the date of the nineteenth session. If F2 is a non member at that time, the Convention would have effect only if member F1 has lodged with the depositary of the Convention a declaration that F1 accepts the accession of F2.

> This is the mechanism used in the Hague Abduction Convention 1980, articles 37 and 38 (attachment B).

Option 3 : acceptance of accessions of States not represented
Option 3 is that the Convention would have effect between Contracting State F1 and Contracting State F2 only if F1 and F2 were represented at the nineteenth session of the Hague Conference. If F2 was not represented, the Convention would have effect only if represented F1 has lodged with the depositary of the Convention a declaration that F1 accepts the accession of F2.

> This mechanism is used in the Hague Evidence Convention 1970, articles 37 and 39 (attachment C).

Option 4 :objection to accessions of States not represented
Option 4 is that the Convention would come into effect between represented F1 and unrepresented F2 if no objection to F2's accession is lodged with the depositary within six months of F2's accession.

> This device is used in the Hague Service Convention 1965, articles 26 and 28 (attachment D).

Option 5 :accession by any State
Option 5 is that a Contracting State F1 would have effect in relation to any State F2 which has acceded to the Convention.

> This mechanism is used in the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods 1986, article 25 (attachment E).

Issues

Some issues that might be the basis for discussion are:

- Should the Convention include a bilateralisation provision ?

- Should the provision draw a distinction between members and non members of the Hague Conference ? or between States represented at the nineteenth session and States not represented ?

- Should a bilateralisation provision operate by positive acceptance of accessions or negative objection to accessions ?

- Should non members of the Hague Conference, in adhering to the Convention, have the option of refusing to accept the adherence of a member of the Conference?

- Should the acceptance by F1 of the adherence of F2 be able to be varied/withdrawn by F1 at a later date (eg if F1 takes the view that the integrity of the judiciary in F2 has changed over time) ?

Australian delegation
10 April 2001

Attachment A

Special Commission on
the question of jurisdiction,
recognition and enforcement
of foreign judgments

(3 - 13 March 1998) WORK. DOC. No 88

Proposal of the delegation of the United States of America

Article X - Ratification and deposit of declarations on entry into force of Convention between Contracting States

1 This Convention shall become effective between any two Contracting States after the deposit with the depository of declarations by the two states confirming the entry into force between the two States of treaty relations under this Convention.

2 At the time of deposit of its instrument of ratification of or accession to this Convention, each State shall deposit with the depository copies of its declarations concerning all Contracting States with which the new State will enter into treaty relations under the Convention.

3 Upon the issuance of declarations concerning the entry into force of treaty relations between Contracting States, each State shall deposit with the depository copies of such declarations.

4 Notwithstanding any other provision of this Convention, its provisions referring to the rights, obligations and treatment of Contracting States, habitual residents thereof and legal entities organized under the law thereof shall apply only with respect to those States that have filed declarations under this Article X and only with respect to treaty relations between and among such States.

5 The Hague Conference on Private International Law shall regularly publish information
reporting on the declarations that have been deposited pursuant to this Article X.

Summary:

I Every state that ratifies or accedes to the Convention would be a "Contracting State" under the
Convention.
2 Each Contracting State will issue declarations concerning the Contracting States with which the
declaring state will enter into treaty relations.
3 Each Contracting State will determine on what basis it will agree to issue declarations to establish
treaty relations with another Contracting State under the Convention.
4 Only a declaration is required to establish treaty relations under the Convention for two Contracting
States. No formal bilateral agreement is required or prescribed by the Convention.
5 Provisions of the Convention referring to Contracting States will be effective only with respect to those States that have deposited one or more declarations with the depository and only between and among such States.

Hague Abduction Convention 1980

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Attachment C

Hague Evidence Convention 1970

Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Hague Service Convention 1965

Article 26
The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.
It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 28
Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Hague Convention on the Law Applicable to
Contracts for the International Sale of Goods 1986

Article 25

(1) The Convention is open for signature by all States.

(2) The Convention is subject to ratification, acceptance or approval by the signatory States.

(3) The Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

[*NAMED COUNTRY*]

[*NAMED CITY*]: The Supreme Court was red-faced yesterday when newspapers splashed the transcript of a recording in which one of its clerks could be heard saying a verdict was for sale to the highest bidder.

The 20-minute tape recording, made in 1997, was released to the local press by a lawyer, Mr [*name A*], in [*name city*] on Wednesday in the presence of the Supreme Court secretary-general, [*name B*], and several lawyers, the *[name newspaper]* reported.

"I am hurt. This is sickening, embarrassing and saddening for law enforcement in [*named country*]," [*name B]* said after listening to the tape, *[name newspaper]* reported.

The clerk, identified only as [*name C*], could be heard on tape advising [*name A*] by phone that it was not the amount that counted in winning his case, but whether he offered more money to the court than his opponent.

"If you give us [*amount D*] [$35,000 at the time] but your opponent gives us more, then the case will be won by your opponent," [*name C*] told [*name A*] in the taped conversation.

He could also be heard telling *[name A*] to "hurry up" in placing money into a [*named bank F*] account that he said belonged to his wife if [*name A*] wanted to speed up the case, which had been going on for five years. Details of the case were not revealed The [*name newspaper]* quoted [*name B*] as saying [name C]'s interrogation had begun and the matter should be resolved within three weeks.

The case, which [*name A*] said had been won by his client in 1998, came to light as the Government was selecting 22 new Supreme Court judges to replace existing members of the court.

The Government's nominees must be approved by the [*name institution G*], the country's highest legislative body, and intense lobbying by political parties is under way.

The [*name newspaper*] claimed yesterday that at least six commercial court judges regularly "sold verdicts" in bankruptcy cases. It said the commercial court, which was supposed to help rebuild the credibility of the country's bankruptcy system, had produced judges and lawyers willing to deal in judicial rulings.

Agence France-Presse April 2000

Mystery creditors, law of the Jungle claims *[NAME BANK A]* - [*name city*] Observed - [*name jounalist*]

The [*name Australian bank A]* is a long-term investor in [*name country B*]. Since 1983 it has had a subsidiary [*name bank C*] in [*name country B*] - a joint venture with [*name bank D]* which operated successfully through the economic crisis and into the improved conditions which now prevail.

But even a long-term presence and abundant experience in the country is no guarantee that [*name country B*]'s corrupt legal system will not bite you.

[name Australia bank A]'s 85 per cent-owned subsidiary, [*name bank C*], has had to write off a $10 million loan to [*name company E*], one of [*name country B*]'s many troubled financial enterprises, which happens to be majority owned by the same private conglomerate which controls the [*name bank D*].

The loan write-off, in itself, is not surprising for a bank operating in [*country B*]'s troubled economic climate. What's interesting is that [*name company E*] - when facing bankruptcy and liquidation -turned to one of [*name country B*]'s most notorious lawyers and exploited the city's corrupt judicial system to avoid that fate. And in the process [*name bank C*] - a distantly related company -lost the opportunity to recover whatever value was left in its loan.

How it happened is both instructive and typical of the hazards of doing business in [*name country B*] .

[*name bank C*] was one of 17 creditors owed about $125 million by *[name company E]*. Among the creditors was the International Finance Corporation, a unit of the World Bank, which began last year to take a harder line with its debtors in [*name country B*], including *[name company E]*. (The IFC has a 6 per cent stake in *[name company E]*.)

A negotiated solution was tried and failed and so last September the *IFC*, with support from other creditors which were mainly foreign banks, filed a bankruptcy petition.

But at this point another 14 creditors magically appeared - with addresses in the Bahamas, Western Samoa or Hong Kong - who were owed a total of about $315 million by *[name company E]*. These new creditors favoured a 10-year restructuring plan for *[name company E]* under which it will repay about l0c in the dollar, according to the *IFC's* lawyer, [*name H*]

When the creditors meet to vote on the bankruptcy petition this month, it predictably failed. The newly arrived creditors outvoted the existing ones. Since then, against bitter protests of the *IFC* which alleges that the creditors are fictitious, both the commercial court and the supreme court have endorsed the decision of the creditor meeting.

The *IFC*'s lawyer, [*name H*], is outraged by the court decisions. [*Name H*], a former human rights activist who is now in demand from foreign corporate clients looking for a representative they can trust, calls it "legitimising robbery" and says the courts are as corrupt now as they were in [*name I*]'s time.

"In the [*name I*] era it was intervention through politics. Now it is intervention through money," he says. *[name company E]*'s lawyer [*name M*], said in an interview with the [*name*] news magazine that it was "presumption without evidence" to assume. the creditors were fake. But he is well known in [*country B*] as the man some business people turn to when they face a sticky legal problem.

He first attracted notoriety last year when the Canadian insurance giant [*name company J*] tried to buy out .a 40 per cent stake in its *[name country B]* subsidiary held by a local company which had been declared bankrupt. But the purchase plans went on hold in October when it was claimed that the 40 per cent stake had already been sold, by a Hong Kong shelf company called [*name company K]*, to a West Samoan company called [*name company L*].

That was round one of [*name company J*]'s joust with [*name M]*. Round two came in December when the holders of a life insurance policy with [*company J*]'s *[name country B]* subsidiary, represented by [*name M*], petitioned to bankrupt the company for not paying out the policy after the family member who had been insured died. [*name company J]* claimed the deceased had not notified it of a preexisting illness which caused his death. But, threatened with bankruptcy in the commercial court if it did not pay, [*name company J]* reversed its stance and paid $US680,000 ($1.3 million) to the family.

Interestingly, the two foreign shelf companies [*company K*] and [*company L*], turned up again as "creditors" of *[name company E]*. One of [*company K*]'s alleged directors, [*name N*], has an address in [*country B*] which turns out to be a noodle soup restaurant whose occupants deny any knowledge of the director or [*company K*].

Compared to others, *[bank A]* seems to have got off lightly in its brush with danger in the [*country B*] legal jungle. It has been caught in the cross-fire rather than having been the target of *[name M]*or another of his ilk.

But *[name bank A]* is not the only Australian corporation hurt recently by the absence of the rule of law in *[name country B]*. Last Friday mining company [*name O*] announced it was pulling out of its [*country B region*] gold and silver project, on which it has already spent $55 million, after a long and unsuccessful struggle to remove illegal miners. Not only were local authorities not willing to accord the company its legal rights, but there is also evidence that they were complicit in the illegal mining activities which are polluting the area with mercury.

It is against this background that Trade Minister Mark Vaile led a business delegation to *country B* and proudly announced that Australian investors had committed $1.3 billion to *[name country B]* over the next five years.

Maybe they'll do well, as there are many bottom-fishing opportunities for investors in *[name country B]* at the moment. They just have to watch out for the law of the jungle

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