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The European Union and Ukraine Push Forward With the Hague Judgments Convention—What Does It Mean for the Rest of Us?

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In 2023, the European Union and Ukraine will enter treaty relations under the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the "Convention" or the "Hague Judgments Convention").[1] In announcing this news, the EU Council confirmed that there are no "fundamental obstacles" to prevent the EU from entering treaty relations with Ukraine under the Convention. As of September 1, 2023, the two government states will recognize each other's civil and commercial judgments—thus limiting the "myriad of substantive, procedural, and practical hurdles" that parties may face when seeking recognition and enforcement of their judgments in foreign jurisdictions.[2]

This agreement between the EU and Ukraine is an important step towards greater recognition of the Hague Judgments Convention, an international treaty that commits contracting states to recognize and enforce judgments in civil or commercial matters. The Convention applies to both monetary and non-monetary judgments that a court may render in civil or commercial matters. While its scope is broad, the Convention specifically excludes subjects viewed as fundamental to state sovereignty or public policy (*e.g.*, criminal, revenue, customs, or administrative matters) and other areas that are subject to various treaty regimes or where the rules vary more significantly across jurisdictions (*e.g.*, family disputes, intellectual property, antitrust, defamation, privacy, or armed forces matters).[3]

The portability and enforcement of foreign judgments is important to any person or company that does business internationally. In this area, predictability is key.[4] There exists a general presumption that foreign judgments will be recognized and enforced, and a refusal may create inefficient and uncertain litigation results. Countries may seek to recognize and enforce each other's judgments for a myriad of reasons—including efficiency, access to justice, and comity.[5] The current state of recognition and enforcement varies from country to country and court to court, creating confusion and inefficiency. Further ratification of the Hague Judgments Convention may ease some of that burden.

Procedure to Ratify the Hague Judgments Convention

With the EU and Ukraine ratifying the Convention, it will go into effect between these two states later this year. Several steps must take place before a treaty like the Hague Judgments Convention is effective:

- *First*, the states negotiate the treaty's terms at a conference. The Hague Judgments Convention was negotiated during and concluded at the Hague Conference on Privacy and International Law on July 2, 2019.

- *Second*, a treaty opens for signature for a certain time following the conference. The Hague Judgments Convention has been open for signature since 2019, and in addition to the EU and Ukraine, five countries have signed—Costa Rica, Israel, the Russian Federation, the United States, and Uruguay.

- *Third*, signatory states may choose to ratify the treaty. A signature is not binding unless the state endorses that signature by ratification. Each foreign state has its own ratification procedure. On August 29, 2022, the EU became the first party to ratify the Hague Judgments Convention, and shortly thereafter, Ukraine became the second. The other signatories (including the United States) have yet to ratify the Convention.

- *Fourth*, with two contracting parties (the EU and Ukraine), the Convention is binding between those foreign states and enters into force on September 1, 2023, one year after the first two states completed ratification.[6]

Ratification in the United States—Is It Possible? And How Would It Help American Individuals and Companies?

The United States signed the Hague Judgments Convention on March 2, 2022, but has yet to ratify it. Were it to happen, ratification would be a two-step process: the Senate formally gives its advice and consent, which empowers the president to ratify the treaty.[7] US ratification could create a straightforward path for the recognition of US judgments abroad.[8] Wider ratification could also provide a natural counterpart to the widely adopted New York Convention of 1958, which provides recognition and enforcement of arbitral awards across international borders.[9]

As of June 2023, there exists no federal law governing the recognition of foreign judgments in the United States,[10] and recognition and enforcement of judgments remain questions of state law.[11] Most US states model their approach to recognizing foreign judgments on the Uniform Foreign Money-Judgments Recognition Act of 1962 and the Uniform Foreign-Country Money Judgments Recognition Act of 2005. US courts are liberal in recognizing foreign judgments, and typically do so unless there are specific mandatory or discretionary grounds to decline recognition.[12] Grounds to deny recognition include, but are not limited to: doubt about the foreign court's integrity, lack of due process rendering procedures fundamentally unfair, or judgment by fraud.

The Hague Judgments Convention Could Simplify Enforcement and Recognition of Us Judgments Abroad

Because US law is generally receptive to the recognition and enforcement of foreign judgments, the Hague Judgments Convention would not drastically change the procedure for enforcement and recognition of foreign judgments in the US.[13] For example, if a prevailing party seeks to collect on a Zimbabwean judgment in the US, there is a presumption in US courts that the Zimbabwean judgment should be recognized and enforced, absent any grounds to deny recognition. There are still procedural hurdles and costs the prevailing party will incur. The

Hague Judgments Convention could make the enforcement and recognition process more efficient in the US by creating a single framework to replace the myriad of state court procedures.

The story may change for those individuals and companies seeking enforcement and recognition of US judgments abroad. Currently, there are significant differences among governments' legal systems that can create confusion and inconsistent results. If, for example, a party obtains a judgment in a US court and seeks its recognition and enforcement against a party with assets in Zimbabwe, the party would need to consider carefully how to petition the courts in Zimbabwe and enforce the judgment against those Zimbabwean assets. There may or may not be a similar presumption to recognize and enforce that US judgment in Zimbabwe. The process and likelihood of success may change entirely if the judgment needs to be enforced against assets in a country other than Zimbabwe. The dearth of reliable information about and lack of consistency in the procedure for recognition and enforcement among foreign states complicates what could be a straightforward step following litigation in the selected forum.[14]

The Hague Judgments Convention may considerably simplify the current process. Article 5(1) of the Hague Judgments Convention presents thirteen bases of recognition and enforcement. If any of these bases are met, a judgment is eligible for recognition and enforcement. These bases include, among others, ensuring:

1. *Domicile* – the judgment debtor is habitually resident and/or holds their principal place of business in the foreign forum.

2. *Consent* – the judgment debtor consented to the foreign court's jurisdiction.

3. *Waiver* – the judgment debtor waived any jurisdictional objections by arguing the merits in the forum state without contesting jurisdiction.

4. *Real Property* – the judgment implicates the lease on property within the foreign court's jurisdiction.

Article 7 presents the bases that *dis*qualify a judgment from recognition. These include, among others:

1. *Service* – the judgment debtor was not notified with sufficient time to arrange for a defense.

2. *Fraud* – the judgment was obtained by fraud.

3. *Public Policy* – recognition of the judgment would be manifestly incompatible with the foreign state's public policy.

4. *Procedural Fairness* – the proceedings that produced the judgment were not compatible with fundamental procedural fairness in the foreign state.

5. *Inconsistent Judgment* – the judgment is inconsistent with an earlier judgment from the foreign court.

The Secretary General of the Hague Conference has called the Hague Judgments Convention a "gamechanger for cross-border dispute settlement," as well as "an apex stone for global efforts to improve real and effective access to justice."[15]

If ratified by the United States and other foreign states, the Convention could provide litigants with a uniform path for recognizing and enforcing foreign civil judgments worldwide. Before even filing a case, litigants could look to the Convention to guide them on where and how to seek enforcement of an ultimate award. The Convention would obviate the current need to obtain local counsel and tiptoe through idiosyncrasies in foreign jurisdictions to determine enforceability. There is comfort, especially for cross-border litigants seeking to enforce their US judgments abroad, in the predictability that a widely ratified Convention could bring.

Concerns Remain About Ratification of the Hague Judgments Convention

The beauty of the Convention's simplicity may also lead to a cut-and-dry application, thus limiting the nuanced discretion that courts may take in choosing to enforce a foreign judgment. Applying the Hague Judgments Convention's simple framework, courts worldwide may find themselves obligated to recognize what they perceive as a corrupted judgment if it does not fall into the narrow grounds that Article 7 provides for nonrecognition.[16]

Unless countries feel the benefit to their corporate and individual citizens outweighs any possible concerns, there will be hesitance to ratify the Hague Judgments Convention. A prime example of hesitancy in the ratification context is the Hague Convention of Choice of Court Agreement ("COCA"), which has been called the "litigation counterpart" to the New York Convention.[17]

COCA provides, among other things, that when parties have agreed to resolve their disputes in a specific court, (1) the signatory states must abstain from asserting jurisdiction over the matter; and (2) a judgment rendered by that chosen court will be enforced in all signatory states.[18]

Like the Hague Judgments Convention and the Singapore Convention, the United States has signed COCA, but considerations of whether to implement it at the state or federal level have delayed ratification.[19]

There is significant opposition to COCA's ratification, with the dissenters arguing that COCA would dilute essential protections that the New York Convention provides, including those for party autonomy and procedural fairness.[20]

Unless there is movement on either side, that impasse appears to have delayed COCA's ratification indefinitely.

We might not see a major change in how foreign judgments are recognized and enforced by US courts if the US were to ratify the Hague Judgments Convention. For individuals and entities who want their judgments recognized internationally, however, ratification could allow greater portability of US judgments abroad. This benefit would be of significant interest to parties engaged in international trade agreements and other cross-border disputes that may require enforcing a judgment abroad.

Without further ratification of the Hague Judgments Convention, the *status quo* for recognition and enforcement of judgments remains—with all of its benefits and limitations. Moreover, until the Hague Judgments Convention sees

further ratification, it is likely that international arbitration will remain a preferred method for resolving cross-border disputes. This is in part because the New York Convention allows easy portability for recognition and enforcement of those arbitral awards, thus allowing international arbitration awards to be enforceable in nearly every jurisdiction worldwide.

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[1] Council of the European Union Press Release, The EU and Ukraine will recognise and enforce each other's court decisions (Apr. 24, 2023); *see also* European Commission, *Proposal for a Council Decision on the Accession by the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, COM (2021) 388 (July 16, 2021) (recommending accession to the Convention so as to ensure the circulation of foreign judgments beyond the EU area and to increase "*growth in international trade and foreign investment and the mobility of citizens around the world*").

[2] Sarah E. Coco, Note, *The Value of a New Judgments Convention for U.S. Litigants*, 94 N.Y.U. L. Rev. 1209, 1212–13 (2019) ("Although it is difficult to assess the scope of the problem of non-recognition, a survey by the American Bar Association found that litigants seeking to get U.S. judgments recognized abroad face 'a myriad of substantive, procedural, and practical hurdles.'") (quoting Comm. on Foreign & Comparative Law, *Survey on Foreign Recognition of U.S. Money Judgments*, 56 Rec. Ass'n B. City N.Y. 378, 410 (2001)).

[3] Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019 (hereinafter "**Convention**"), at art. 1(2) and 2.

[4] *See* Boris Kozolchyk, *The "Best Practices" Approach to the Uniformity of International Commercial Law: The UCP 500 and the NAFTA Implementation Experience*, 13 Ariz J. Int'l & Comp. L. 443, 452 (1996) ("Free trade, especially in large volume cross border transactions, presupposes a high degree of uniformity and standardization of commercial law and practice.").

[5] *See, e.g.*, Arthur T. Von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 Harv. L. Rev. 1601, 1603 (1968) (noting "desire to avoid the duplication of effort and consequent waste involved in reconsidering a matter that has already been litigated"); William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071, 2089 (2015) (noting that "[c]omity [has] served . . . as the basis for recognizing foreign judgments"); Christopher A. Whytock, *Transnational Access to Justice*, 38 Berkeley J. Int'l L. 154, 168–69 (2020) (arguing that failures to enforce foreign judgments can produce access-to-justice gaps).

[6] Convention at art. 29.

[7] U.S. Const. art. II, § 1 (stating the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.").

[8] Sarah E. Coco, Note, *The Value of a New Judgments Convention for U.S. Litigants*, 94 N.Y.U. L. Rev. 1209, 1212–13 (2019).

[9] Article 2(3) of the Hague Judgments Convention categorically excludes arbitration proceedings, which the New York Convention addresses. Officially known as the Convention on the Recognition and Enforcement of Foreign

Arbitral Awards, the New York Convention has been recognized as one of the most successful international conventions. The Singapore Convention, were it to be ratified, seeks to do for mediation what the New York Convention did for arbitration—it would create a system for recognition and enforcement of mediated settlement agreements without requiring a new litigation or arbitration action. *See* United Nations Convention on International Settlement Agreements Resulting from Mediation, opened for signature Aug. 7, 2019 (adopted Dec. 20, 2018) (the "Singapore Convention"). The Singapore Convention opened for signature on August 7, 2019. As with the Hague Judgments Convention, the United States has been a signatory to the Singapore Convention since 2019, but has yet to ratify it. Eight countries have ratified the Singapore Convention: Belarus, Ecuador, Fiji, Honduras, Qatar, Saudi Arabia, Singapore, and Turkey.

[10] In 2006, the American Law Institute released a proposed federal statute for recognizing and enforcing foreign judgments, but to date, no federal law has been adopted. *See* Recognition and Enf't of Foreign Judgments: Analysis and Proposed Fed. Statute (Am. L. Inst. 2006). Notably, the U.S. Constitution's Full Faith and Credit Clause (guaranteeing that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State") applies between the various U.S. states, but not to recognition and enforcement of foreign judgments.

[11] Restatement (Fourth) of Foreign Relations Law of the United States pt. iv, ch. 8, intro. note (Am. L. Inst. 2018) ("Customary international law imposes no obligation on states to give effect to the judgments of other states. Instead, domestic law and treaty regimes typically govern recognition and enforcement.").

[12] *See generally* Louise Ellen Teitz, *Another Hague Judgments Convention? Bucking the Past to Provide for the Future*, 29 Duke J. Comp. & Int'l L. 491 (2019) (reviewing the Convention's negotiations history); *see also* Hilton v. Guyot, 159 U.S. 113 (1895) ((stating the general rule that "the merits of the case should not, in an action brought in this country upon the [foreign] judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact"); Ronald A. Brand, *The Continuing Evolution of U.S. Judgments Recognition Law*, 55 Colum. J. Transnat'l. L. 277, 282 (2017) (describing the legacy of *Hilton* as a U.S. regime that is "very receptive" to recognizing foreign judgments).

[13] *See* Brand, *supra* note 12, at 282 (noting "[*Hilton*] is the foundation for a system that is very receptive to the recognition and enforcement of foreign judgments. The *Hilton* legacy is the application of the doctrine of comity to the recognition of foreign judgments–showing respect for, and giving effect to, the decisions of foreign courts."); *see also* Samuel P. Baumgartner & Christopher A. Whytock, *Enforcement of Judgments, Systematic Calibration, and the Global Law Market* 23 Theoretical Inquiries L. 119 (2022).

[14] *See* Baumgartner, *supra* note 13, at 126 ("Even if choice-of-law and forum selection clauses are reliably enforced, the effectiveness of the resulting dispute resolution outcomes will be uncertain unless the parties can expect those outcomes to be enforceable. If the defendant lacks assets in the selected forum, the parties' expectations will depend on whether a different state where the defendant does have assets would enforce the judgment against those assets. Other things being equal, parties would have weaker incentives to select the law and courts of a given state if they do not expect a resulting judgment to be enforceable. Those expectations depend, in turn, on the rules governing the enforcement of foreign judgments.").

[15] Hague Conference on Private International Law, *Gamechanger for Cross-Border Litigation in Civil and*

Commercial Matters to be Finalized in the Hague (June 18, 2019) (quoting the Secretary General of the Hague Conference).

[16] Diana A.A. Reisman, *Breaking Bad: Fail-Safes to the Hague Judgments Convention*, 109 Geo L.J. 879, 906 (2021) ("Prudence dictates that before adhering to the Judgments Convention, the United States explore fail-safes under international law should the judicial integrity of a co-contracting state fall below a minimum standard.").

[17] *See* Glenn P. Hendrix, *Memorandum of the American Bar Association Section of International Law Working Group on the Implementation of the Hague Convention on Choice of Court Agreements*, 49 Int'l Law. 255, 256 (2016).

[18] *See* Hague Convention on Choice of Court Agreements, art. 6, 8(2).

[19] *See* Hendrix, *supra* note 17, at 255 (noting "The Convention enjoys universal support in the United States, but its transmittal to the Senate for advice and consent to ratification has been held up by disagreements over whether it should be implemented by federal law or by a combination of federal and state law.").

[20] *See* Gary B. Born, *Why States Should Not Ratify, and Should Instead Denounce, the Hague Choice-of-Court Agreements Convention, Part I* (June 16, 2021); *Part II* (June 17, 2021); and *Part III* (June 18, 2021), Kluwer Arbitration Blog (noting that "notwithstanding a valid choice-of-court agreement, there is no justification for recognizing judgments from courts whose integrity and independence are suspect.").

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