DeutscherAnwaltVerein

Position Paper

of the German Bar Association by
the Committee on Civil Procedure Law

on the proposal of the European Commission for a Council decision on the accession of the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters COM(2021) 388 final

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The German Bar Association (Deutscher Anwaltverein – DAV) is the professional body comprising more than 62.000 German lawyers and lawyer-notaries in 252 local bar associations in Germany and abroad. Being politically independent the DAV represents and promotes the professional and economic interests of the German legal profession on German, European and international level.

Summary

The German Bar Association (DAV) welcomes the accession of the EU to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Hague Convention of 2 July 2019).

However, declarations on Articles 14, 17, 18 and 29 should still be included in the decision on the accession, limiting the scope of the Convention. This should apply in particular to labour and consumer matters if the protection of the weaker party is not provided to the same extent in the other contracting states.

I. Preliminary Remark

The DAV supports in principle the European Commission's proposal for a Council decision on the accession of the European Union to the above-mentioned agreement. As early as October 2020, the DAV participated in a consultation and supported accession in principle. Nevertheless, there was certainly cause for critical comments and recommendations.

After the Recognition and Enforcement Convention was negotiated with the participation of the EU and adopted in July 2019, formal accession by the EU is now required. Such accession can take place without additional declarations. However, the Convention also allows for an accession in which, in addition to the accession itself, additional declarations are made with regard to the rules in Art. 14 (Costs of proceedings), Art. 17 (Declarations limiting recognition and enforcement), Art. 18 (Declarations with respect to specific matters) and Art. 19 (Declarations with respect to judgments pertaining to a State) or a notification under Art. 29 (Establishment of relations pursuant to the Convention). In this respect, the Commission's proposal for a decision is limited to a declaration under Article 18 of the Convention.

II. Consent in principle to accession

1. As already stated at the beginning, the DAV welcomes in principle the accession of the EU to the aforementioned agreement. The advantages associated with this are correctly described in the recitals of the proposed decision. This concerns, in particular, the recognition of decisions that have been rendered in the Union and must be recognised and enforced in a contracting state outside the Union. The creation of a simplified procedure for the recognition and enforcement of the judgment in the country concerned should be emphasised. The decisive factor here is the fact that the courts of the requested state shall no longer review the merits of the judgment to be enforced (Art. 4(2) of the Convention).

   Conversely, this naturally also applies to a judgment given in another Contracting State (especially a non-member state of the EU) that is to be recognised and enforced in the EU. This is also to be welcomed under the principle of reciprocity. Any interests of parties domiciled in the Union in subjecting such decisions to a further review by the respective national courts in the EU in individual cases should take a back seat.

   However, despite all the advantages associated with this, there are undoubtedly also cases in which such a review is not only desirable, but downright imperative. This applies in particular to decisions in which principles and legal principles are applied that cannot be reconciled with the local understanding and practice. An example of this is decisions in which a party is obliged to pay damages. In addition to compensation for the actual damage incurred, US law also recognises punitive damages or treble damages for the actual damage incurred. The latter is conceivable, for example, in patent infringement cases or other cases of tort. However, Art. 10 of the Convention provides for additional possibilities of examination by the local requested court in the recognition procedure. In such cases, the parties remain sufficiently protected.

The reservation of the *public policy* in Art. 7(1)(c) also provides an additional corrective.

2. The provisions of the Convention on the scope (Article 1) and the exclusions from the scope (Article 2) take sufficient account of the legitimate interests of the parties here. Excluded are in particular matters of family and inheritance law (Art. 2(1)(c) and (d))), insolvency (Art. 2(1)(e)), certain corporate law issues (Art. 2(1)(i)), intellectual property matters (Art. 2(1)(m))) and anti-trust law (Art. 2 (1)(p)). Furthermore, it is essential that the Convention does not apply to arbitration and related proceedings (Art. 2(3)). The limitation of the scope to certain civil and commercial matters that occurs in this way appears to be sufficient to safeguard the interests of the parties involved sufficiently.

3. There are also no concerns with regard to the parties to whom the decision to be recognised and enforced relates. It is true that natural persons (in particular consumers) are affected in addition to companies. Moreover, it is in principle irrelevant whether the party has its domicile or seat in the EU or in another Contracting State to the Convention. However, Art. 5 of the Convention contains sufficient bases for recognition and enforcement, in particular concerning the jurisdiction of the court to issue the judgment to be recognised. There are also some restrictions for consumers (Art. 5(2) and (3)). In principle, these restrictions appear to be sufficient to protect the parties concerned.

4. Further protection of the parties is provided by the grounds for refusing the recognition and enforcement of the judgment laid down in Art. 7. This concerns in particular procedural questions of proper service, default and the possibility of defence. This provision also appears appropriate.

5. The treatment of preliminary questions for the decision to be recognised is sufficiently regulated in the interaction of Art. 2(2) and Art. 8. This prevents cases or areas of law that are fundamentally excluded from the scope of the Convention from being included in the decision via the diversions of the preliminary question. The regulation prevents the recognition of decisions if

this preliminary question is in principle excluded from the scope of the Convention.

6. The inclusion of judicial settlements (Art. 11) is particularly welcome. They can be enforced in the same way as a judgment.

III. Additional declarations

1. The Commission's proposal for a decision provides in Art. 4 that only a declaration in accordance with Art. 18 shall be made in respect of the commercial leases (tenancies) of immovable property. No further declarations of reservation are to be made. The proposed resolution is therefore limited to the declaration mentioned.

   The restrictive declaration formulated in Art. 4 is first of all to be agreed with. It is true that the Convention appears to provide in this respect, in accordance with the rules of Regulation (EU) No. 1215/2012, that a judgment concerning the lease of immovable property (tenancy) may be recognised and enforced only if it has been given by a court of the State in which the property is situated (Art. 5(1)(h)). In addition, Art. 5(3) provides that paragraph 1 does not apply to a judgment that ruled on a residential lease of immovable property (tenancy) or ruled on the registration of immovable property. Such a judgment is eligible for recognition and enforcement only if it was given by a court of the State where the property is situated. However, the wording of these provisions does not appear to be so clear that a rule can necessarily be derived from them that corresponds to the order of exclusive jurisdiction under Art. 24(1) of the Regulation. The declaration provided for in Art. 4 of the draft resolution is to be supported at least as a precautionary declaration.

2. However, the draft resolution on Art. 18 does not contain any further explanations. This appears insufficient.

a. Above all, it must be considered whether matters of consumer law and labour law should not generally be excluded from the scope of the Convention. Although Art. 5(2) contains certain protective mechanisms in favour of consumers, these provisions may not be sufficient in individual cases. The level of protection of this usually rather weaker party may not be equally pronounced in all Contracting States and may lead to disadvantages in the enforcement of judgments in the EU.

b. Art. 24 No. 5 of Regulation (EU) No. 1215/2012 also contains a provision on exclusive jurisdiction for proceedings concerning the enforcement of judgments. The courts of the Member State in whose territory the enforcement is to be carried out or has been carried out have exclusive jurisdiction.

   A comparable provision seems to be missing in the Convention. This would mean that, if necessary, courts of a Contracting State would decide on the enforcement of a judgment given by the court in another Contracting State to the Convention.

   Such a rule would entail considerable uncertainties and imponderables and possibly also the risk of an erroneous decision if the proximity of the courts of the Contracting State in whose territory the enforcement is to be or has been carried out is waived.

   If this is not sufficiently clear from the Convention, there is also a need to make a declaration under Article 18. The decision should therefore be supplemented in this respect.

3. The draft resolution does not contain a declaration with regard to Art. 14(1) of the Convention either.

   At the very least, it should be possible to demand security for legal costs, unless reciprocity has been guaranteed with the Contracting State concerned. If the circle of Contracting States to the Convention does not coincide with the

Contracting States to the Hague Convention on Civil Procedure, there is a gap that needs to be filled. A declaration should also be provided for this.

4. The draft decision does not contain an explanation on Art. 17 either. It is not clear from the recitals of the draft decision why no declaration should be made on this.

   Since the Convention expressly provides for the possibility of such a declaration, there is no reason to include in the Convention decisions of a Contracting State that in fact has no connection with any State other than the requested State. In cases where there are links exclusively with the EU, there is no reason to let a court of another Contracting State outside the EU decide on them. Such judgments should not be recognised in the EU. A declaration to this effect should also be made here.

5. Art. 29 of the Convention provides that a Contracting State may notify the depositary that the ratification, acceptance, approval or accession of another State shall not have the effect of establishing relations between the two States pursuant to this Convention.

   In this regard, the DAV's previous opinion already contains the recommendation that the Commission should examine the reliability of the judicial systems in each possible contracting state before ratifying the Convention and, with regard to those states for which this examination does not lead to a sufficient determination of the guarantee, in particular of the safeguard mechanisms laid down in Art. 7 of the Convention deposit a corresponding notification.

   This basic recommendation remains valid.