

Civil Jurisdiction and Judgments

T. C. Hartley

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CIVIL JURISDICTION AND JUDGMENTS

The application in England of the Convention on Jurisdiction
and the Enforcement of Judgments in Civil and Commercial
Matters under the Civil Jurisdiction and Judgments Act 1982

by

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PREFACE

THIS book is intended to provide a short and readable account of the way in which the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Judgments Convention) will operate in England under the Civil Jurisdiction and Judgments Act 1982. Under the Act, the Convention will have the force of law in England and the main purpose of the Act is to bring it into operation. It has, however, already been in force for over 10 years in the original six Contracting States and the European Court has developed a significant body of case law on its interpretation. This will be binding on English courts. The Convention cannot therefore be regarded as "new law," in the sense of never having been before the courts, though it will be unfamiliar to English judges and practitioners. ~~21~~ 4

It is hoped that this book, which is written for the practising lawyer who is not a specialist in the field, will facilitate its assimilation into the body of English law. It can either be read straight through or used as a reference work. Certain basic information is given in Chapter 1 and the various aspects of the subject are covered in succeeding chapters. The practitioner will either be interested in the jurisdiction of English courts (Chap. 4) or the recognition and enforcement of foreign judgments (Chap. 5) and he will turn to the relevant parts of these chapters; however, the matters dealt with in the first three chapters, especially the scope of the Convention (Chap. 2) and the special meaning given to the concept of domicile (Chap. 3) can be of relevance in all contexts. There is also a special note on when the Act and Convention come into force. The Act and the Convention (which is set out in Schedules 1 to 3 of the Act) are reproduced in the Appendices; where appropriate, references to the text are given.

Small parts of this book have already appeared in the *European Law Review*, the *Journal of the Irish Society for European Law* and K. Lipstein (ed.) *Harmonisation of Private International Law by the EEC*; I would like to thank the editors and publishers of these publications for permission to re-use the material. I would also like to thank the following for helping me with information and advice: Dr. Georges A. L. Droz, Secretary-General of the Permanent Bureau of the Hague Conference on Private International Law; Mr. I. G. F. Karsten, Professor W. R. Cornish and Ms. Jennifer Temkin, all of the London School of Economics; Mr. M. Carpenter of the Lord Chancellor's Department, and the staff of the European Court of Justice. I am especially grateful to my wife, Sandra, for her help in proof-reading and related matters. Needless to say, I alone am responsible for what I have written.

The text of the book was completed in August 1983 and purported to cover all material available at that time; subsequent developments, up to the date below, are referred to briefly in footnotes where possible. It is hoped that future judgments of the European Court will be discussed in the *European Law Review*.

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WHEN THE ACT AND CONVENTION COME INTO FORCE

THE Civil Jurisdiction and Judgments Act was passed on July 13, 1982. According to section 53 and Schedule 13, certain subsidiary parts of the Act listed in Schedule 13, which are not concerned with the Convention, came into force six weeks after the Act was passed, that is on August 24, 1982. Transitional rules concerning these provisions are laid down in Part II of Schedule 13 and are noted in Appendix 1 under the provisions in question.

The main provisions of the Act, including all those concerned with the Convention, are to come into force on a day to be appointed.¹ The transitional rules concerning the Convention are laid down in Articles 34–36 of the Accession Convention (Sched. 3 to the Act). The effect of these is that the jurisdictional provisions of the Convention (discussed in Chap. 4 of this book) will apply to proceedings commenced in the United Kingdom after the Convention comes into force, but not to those commenced before that date.

The only exception is that laid down by Article 35 of the Accession Convention which provides that if the parties to a dispute concerning a contract had agreed *in writing* before the entry into force of the Convention that the contract was to be governed by the law of England, the English courts will “retain the right to exercise jurisdiction in the dispute.” This does not appear to give the English courts any additional jurisdiction but merely to permit them, as a transitional measure, to retain the jurisdiction previously exercised to the extent permitted by Article 35. It should be noted that under R.S.C., Order 11, r. 1(1)(d)(iii) (previously r. 1(1)(f)(iii)),² leave may be given to serve a writ out of the jurisdiction where the contract is “by its terms, or by implication, governed by English law.” An implied choice of law, or an express but oral choice of law, is not, however, allowed under Article 35.

The position regarding the provisions on the recognition and enforcement of judgments is a little more complex. If the foreign proceedings were commenced after the Convention came into force in both the United Kingdom and the judgment-granting country, the judgment will be recognised and enforced in England in the normal way under the Convention. If, on the other hand, the proceedings were commenced, *and the judgment was given*, before the Convention came into force in both countries, the Convention will not apply at all and the pre-existing law will apply. Special rules apply where the foreign proceedings were commenced before

¹ By statutory instrument by the Lord Chancellor and the Lord Advocate: see Sched. 13.

² A new version of Ord. 11, r. 1 comes into force at the same time as the Convention: see the Rules of the Supreme Court (Amendment No. 2) 1983 (S.I. 1983 No. 1181 (L.21)). The provision quoted remains unaltered except for its numbering.

the Convention came into force in both countries but the judgment was given after that date. Here the judgment will be recognised and enforced under the Convention provided the jurisdiction of the judgment-granting court "was founded upon rules which accorded with the provisions of Title II, as amended" of the Convention (these are the jurisdictional provisions) or with the provisions of a pre-existing bilateral convention between the United Kingdom and the judgment-granting country.³

8-12 Each of these two possibilities should be considered separately. The first envisages the case where the judgment-granting court was entitled to take jurisdiction under the rules of the Convention, even though those rules might not have been in force at the time. In such a situation the English court would be obliged, when asked to recognise the judgment, to verify that this was indeed the case.⁴ (This, of course, is the position under both the common law and the Foreign Judgments (Reciprocal Enforcement) Act 1933; it is not, however, the normal procedure under the Convention, which expressly prohibits the judgment-recognising court from independently verifying that the judgment-granting court had jurisdiction). Once the English court has determined that the judgment-granting court had jurisdiction under the rules of the Convention, the judgment will be recognised and enforced in the normal way under the Convention.

The second possibility is that the judgment-granting court had jurisdiction under the provisions of a bilateral convention between the country concerned and the United Kingdom which was in force when the proceedings were instituted. Such conventions do in fact exist with regard to all the original six Contracting States except Luxembourg. They were given effect to in the United Kingdom under the Foreign Judgments (Reciprocal Enforcement) Act 1933.⁵ This means that judgments from these countries given after the Convention comes into force, in proceedings commenced before that date, will be recognised in the United Kingdom *under the provisions of the Convention* if the judgment-granting court has jurisdiction in terms of the pre-existing bilateral convention.

³ Art. 34(3) of the Accession Convention.

⁴ See the Schlosser Report, O.J. 1979, C. 59, p.138 (para. 236).

⁵ See Order in Council of October 27, 1936, S. R. & O. 1936, No. 1169 (Belgium); Order in Council of May 28, 1936, S. R. & O. 1936, No. 609 (France); S.I. 1961 No. 1199 (Germany); S.I. 1973 No. 1894 (Italy); and S.I. 1969 No. 1063 (The Netherlands).

BASIC DOCUMENTS AND BOOKS

Conventions

Convention of September 27, 1968 on jurisdiction and enforcement of judgments in civil and commercial matters (O.J. 1978, L. 304/77).

Protocol of June 3, 1971 on the interpretation by the Court of Justice of the Convention of September 27, 1968 (*ibid.* p.97).

Convention of Accession of October 9, 1978 (*ibid.* p.1).

The 1968 Convention and the 1971 Protocol, as amended by the Convention of Accession, and Titles V and VI of the Accession Convention are set out in Schedules 1-3 of the Act and are reproduced in Appendix 1.

Reports

Report by Mr. P. Jenard on the 1968 Convention (O.J. 1979, C. 59/1).

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