The EU prepares to become a party to the Hague Convention on Choice of Court Agreements

By Pietro Franzina

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On 30 January 2014 the European Commission adopted a proposal for a Council decision on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements. In short, the Convention lays down uniform rules conferring jurisdiction on the court designated by the parties to a cross-border dispute in civil and commercial matters, and determines the conditions upon which a judgment rendered by the designated court of a contracting State shall be recognised and enforced in all other contracting States.

In light of the Lugano Opinion rendered by the Court of Justice in 2006, the conclusion of the Convention comes under the exclusive external competence of the Union.

Once the Council decision will be enacted, and the approval effected, the European Union – which signed the Convention in 2009 (following Council decision No 2009/397/EC of 26 February 2009) – shall join Mexico as a contracting party to the Convention, thereby triggering its entry into force on the international plane. Pursuant to Article 31, the Convention shall in fact enter into force "on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession".

In the Commission's view, the European Union should avail itself of the possibility to make a declaration under Article 21 of the Convention, stating that the latter shall not apply to matters in respect of insurance contracts. The text of the proposed declaration is annexed to the proposal (as Annex II) and may be found here.

When the Hague Convention will become binding upon the Union, the issue will arise of its relationship with the rules on choice of court agreements and the recognition and enforcement of judgments laid down in the Brussels I and the Brussels I *bis* regulation, as well as in the Lugano Convention of 30 October 2007.

The coordination between the Convention and the two regulations is addressed in the explanatory memorandum accompanying the proposal. The relevant passage begins by noting that the said regulations do not "govern the enforcement in the Union of choice of court agreements in favor of third State courts". This would rather be achieved by the Convention. The amendments to the Brussels I regulation introduced with the recast of 2012 "have strengthened party autonomy" and now "ensure that the approach to choice of court agreements for intra-EU situations is consistent with the one that would apply to extra-EU situations under the Convention, once approved by the Union".

The Commission recalls that the relationship between the Convention and the existing and future EU rules is the object of a disconnection clause set out in Article 26(6). Pursuant to this provision, the Convention shall not affect the application of the regulation "where none of the parties is resident in a Contracting State that is not a Member State" of the Union and "as concerns the recognition or enforcement of judgments as between Member States".

In practice, "the Convention affects the application of the Brussels I regulation if at least one of the parties is resident in a Contracting State to the Convention", and shall "prevail over the jurisdiction rules of the regulation except if both parties are EU residents or come from third states, not Contracting Parties to the Convention". As regards the recognition and enforcement of judgments, the regulation "will prevail where the court that made the judgment and the court in which recognition and enforcement is sought are both located in the Union". Thus, to put it with the Commission, the Convention will "reduce the scope of application of the Brussels I regulation", but "this reduction of scope is acceptable in the light of the increase in the respect for party autonomy at international level and increased legal certainty for EU companies engaged in trade with third State parties".