The 2019 Hague Judgments Convention Applied by Analogy in the Dutch Supreme Court

Written by Birgit van Houtert, Assistant Professor of Private International Law at Maastricht University

On 1 September 2023, the 2019 Hague Judgments Convention (HJC) entered into force. Currently, this Convention only applies in the relationship between EU-Member States and Ukraine. Uruguay has also ratified the HJC on 1 September 2023 (see status table). The value of the HJC has been criticised by Haimo Schack inter alia, for its limited scope of application. However, the HJC can be valuable even beyond its scope as this blog will illustrate by the ruling of the Dutch Supreme Court on 29 September 2023, ECLI:NL:HR:2023:1265.

Facts

In 2019, a couple with Moroccan and Dutch nationality living in the Netherlands separated. They have two children over whom they have joint custody. On 5 June 2020, the wife filed for divorce and ancillary relief, inter alia division of the matrimonial property, with the Dutch court. On 29 December 2020, the husband requested this court to also determine the contribution for child maintenance to be paid by the wife. However, the wife raised the objection of *lis pendens* with reference to Article 12 Dutch Civil Code of Procedure (DCCP), arguing that the Dutch court does not have jurisdiction regarding child maintenance, since she filed a similar application with the Moroccan court on 9 December 2020, and the judgment to be rendered by the latter court could be recognised in the Netherlands.

Lis pendens

On 26 March 2021, the Dutch district court pronounced the divorce and ruled that the wife must pay child maintenance. This court rejected the objection of *lis pendens* because the Moroccan and Dutch proceedings did not concern the same subject matter as in Morocco a husband cannot request child support to be paid

by the wife. Furthermore, there has been no Convention to enforce the Moroccan judgment in the Netherlands, as required by Article 12 DCCP. However, the Court of Appeal held that the district court should have declined jurisdiction regarding child maintenance, because both proceedings concerned the same subject matter, i.e. the determination of child maintenance. Subsequently, the Court of Appeal declined jurisdiction over this matter by pointing out that the Moroccan judgment, which in the meantime had been rendered, could – in the absence of a Convention – be recognised in accordance with the Dutch requirements for recognition of non-EU judgments, the *Gazprombank*-requirements (see Hoge Raad 26 September 2014, ECLI:NL:HR:2014:2838, 3.6.4).

The case brought before the Supreme Court initially concerned the interpretation of *lis pendens* under Article 12 DCCP. In accordance with this provision, the Supreme Court states that the civil action should be brought to a foreign court first, and subsequently the Dutch court to consider the same cause of action between the same parties. If it is expected that the foreign proceedings will result in a judgement that can be recognised, and if necessary enforced, in the Netherlands either on the basis of a Convention or *Gazprombank*-requirements (see Hoge Raad 29 September 2023, ECLI:NL:HR:2023:1266, 3.2.3), the Dutch court may stay its proceedings but is not obliged to do so. The court may, for example, decide not to stay the case because it is expected to take too long for the foreign court to render the final judgment (3.3.5). However, the court must declare itself incompetent if the foreign judgment has become final and this judgment could be recognised and, if necessary enforced, in the Netherlands. To define the concept of finality of the foreign judgement, the Supreme Court drew inspiration from the HJC and the Explanatory Report by Garcimartín and Saumier (paras. 127–132) by applying the definition in Article 4(4) HJC by analogy; i.e the judgment is not the subject to review in the State of origin and the time limit for seeking ordinary review has been expired. According to the Supreme Court, this prevents that the dispute cannot be settled anywhere in court (3.3.6).

In the case at hand, the Dutch district court did thus not have to decline jurisdiction as the Moroccan judgment had not been final yet. The Supreme Court has also specified the conditions under which the court at first instance's decision on the application of Article 12 DCCP can be challenged on appeal (3.4.2-3.4.6), which is outside the scope of this blog.

Finality of the foreign judgment in the context of recognition

Moreover, the Supreme Court clarifies that in proceedings involving *lis pendens*, an action may be brought for recognition of the foreign decision, including a claim to rule in accordance with the condemnation in the foreign decision (on the basis of Article 431(2) DCCP) (3.5.1). After reiterating the known *Gazprombank*-requirements for recognition, the Supreme Court addresses for the first time the issue whether the foreign judgment should be final (which has frequently been debated by scholars). According to the Supreme Court, the court may, postpone or refuse the recognition on the basis of the *Gazprombank*-requirements if the foreign judgement is not final, i.e. the judgment is the subject of review in the State of origin or the time limit for seeking ordinary review has not expired (3.6.2). The Supreme Court therefore copies Article 4(4) HJC, and refers to the Explanatory Report by Garcimartín and Saumier (paras. 127–132). Similar to the latter provision, a refusal on this ground does not prevent a renewed application for recognition of the judgment. Furthermore, the court may, on application or of its own motion, impose the condition that the party seeking recognition of a non-final foreign judgment provides security for damages for which she could be ordered to pay in case the judgement is eventually annulled or amended. The Supreme Court therefore follows the suggestion in the Explanatory Report by Garcimartín and Saumier (para. 133).

Comment

The application by analogy of the autonomous definition of finality in Article 4(4) HJC yields legal certainty in the Netherlands regarding both the *lis pendens*-conditions under Article 12 DCCP, and the recognition of non-EU judgments in civil matters to which no Convention applies. Because of the generally uncodified nature of Dutch law for recognition of latter judgements, legal certainty has been advocated. In this regard, the Dutch Government Committee on Private International Law submitted its advice in February 2023 to revise Article 431 DCCP which inter alia includes the application by analogy of the jurisdictional filters in Article 5(1) HJC (see advice, p. 6). Thus, despite its limited scope of application, the HJC has value because of its possible application by analogy by courts and legislators (see also B. van Houtert, 'Het 2019 Haags Vonnissenverdrag: een *gamechanger* in Nederland? Een rechtsvergelijkende analyse tussen het verdrag en het Nederlandse commune IPR', forthcoming *Nederlands Internationaal Privaatrecht* 4, 2023). Furthermore, the Dutch Supreme Court's application by analogy of Article 4(4) HJC contributes to the

Hague Conference on Private International Law’s aim to unify Private International Law.