

A Study on the Interpretation of Non-substantive Review Clauses in the Hague Convention on Judgements

Pengju Xu

Anhui University of Finance and Economics, Bengbu, 233030, China

Abstract: The non-material review clause stipulated in Article 4 (2) of the 2019 Hague Convention on Judgments is the basic clause of the Convention and the concept of facilitating the circulation of foreign civil and commercial judgments pursued by the Convention. However, there are some obstacles in practice, such as differences among countries on the concept of non-material review, vagueness of the scope of non-material review in the Convention and unitary initiation method of non-material review, which hinder the application of non-material review provisions. Based on this, by defining the concept of non-material review, clarifying the scope of non-material review matters and constructing a new diversified non-material review initiation method, this paper aims to improve the relevant provisions of non-material review provisions and promote their application in the process of recognizing and enforcing foreign civil and commercial judgments.

Keywords: Hague Judgment Convention, A non-substantive review, Recognition and enforcement of foreign judgments.

1. Introduction

The "No Review of Merit" clause is an important part of the Convention on the Recognition and Enforcement of Foreign Civil and Commercial Judgments (hereinafter referred to as the Hague Judgment Convention) in 2019. It aims to promote the free flow of judgments across borders in the face of huge differences in the economic development, geopolitical and legal backgrounds of the contracting parties. We will build a close international judicial cooperation system and create a high-quality international legal environment. On July 2, 2019, the Hague international private law 22 times diplomatic conference meeting, the Chinese delegation Xu Hong ruling at the Hague convention negotiating text for the signed confirmation, means that our country will become the ruling at the Hague convention of states parties, because the ruling at the Hague convention on formal effect to our country there are time, This paper probes into the existing problems of the non-material review clause by referring to its application in practice, and puts forward the corresponding improvement path, in order to provide useful ideas for the effective implementation of the non-material review clause in the field of international civil and commercial adjudication.

2. The Connotation, Development and Rationality of The Non-substantive Review Clause of the Hague Judgment Convention

Ruling at the Hague convention establishes a ban on foreign judgment recognition and enforcement of substantive examination principle, on the one hand, satisfied by the requesting state of the examination way of foreign judgments to take practical demand, on the other hand, the concept of substantive examination to carry out the ruling multinational free flow, from two aspects of theory and practice to maintain the requested state and the rights and interests of the parties.

(1) The connotation and development of the non-substantive review clause

Article 4 (general provisions), paragraph 2, of the Hague

Convention on Judgments provides that "the requested State shall not undertake a review of the substantive nature of the judgment and shall take such a review into account only for the purposes of the application of the Convention". Generally speaking, immaterial review generally refers to that the court of the requested country only reviews whether the foreign judgment conforms to the domestic law or the conditions for recognition and enforcement stipulated in the relevant conventions and agreements, and does not review the legal application and fact determination of the foreign judgment.

In 2009 *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Oran*'s case, The European court made it clear that, in general, the requested state court not to foreign and applicable law in fact decide to take the examination as to substance, only when the foreign judgment clear violations by the requesting state citizens basic rights or breach of by the requesting state critical legal this special circumstances, only have the right to take substantive examination of foreign judgment.

(2) The reasonableness of non-material review clause in the Hague judgment convention -- the reasonableness of the non-material review clause in the Hague judgment convention

As a general principle of non-substantive review of foreign judgments established in the Hague Convention on Judgments, immaterial review reflects the basic objective of the Convention, that is, civil and commercial judgments made by one country can be effectively recognized and enforced in other countries. First of all, the non-substantive review is in line with the concept of respecting the principle of national sovereignty. In the international community, every country, strong or weak, enjoys equal sovereign status and equal participation in the decision-making and implementation of international affairs. Finally, the change of the effect of foreign judgments provides theoretical support for non-substantive review. In the traditional view, the foreign judgment is only a superficial judgment, which has no decisive legal effect in the requested country and can only preliminarily identify the fact that there is a corresponding dispute. The requested country can conduct a substantive review of the facts and laws of the foreign judgment.

3. The Problems of Non-substantive Review Provisions in the Hague Convention on Judgements

At the Diplomatic Assembly of the 2019 Hague Conference on Private International Law, representatives of dozens of countries, including China, confirmed the text of the Hague Convention on Judgements. However, there are still some omissions in the non-substantive review clause of the Convention, which causes certain obstacles in the application of the article by the States parties, and may reduce the enthusiasm of the States parties in applying the article.

(1) The concept of the non-material review clause is unclear

Immaterial review usually does not review the fact-finding and application of law of foreign judgments, so does immaterial review mean that any review is prohibited? Or is it a ban on censorship of substantive issues? First, are the courts of the requesting country still barred from substantive review of foreign judgments when they are based on erroneous legal concepts and facts? Article 4 (1) of the U.S. Constitution provides that states shall fully trust and respect the judgments of sister states, and shall not make any substantive examination of the cause of action and the legal basis of the judgments of sister states on the basis of the principles of law or the facts of the case.

(2) The scope of the non-material review clause is vague

Article 4, paragraph 2, of the Hague Convention on Judgments provides that the requested State may not review the substantive aspects of the judgment and that such review may be considered only if it is also necessary for the application of the Convention. But what matters fall within the scope required by the application of the Convention? The convention does not give a clear interpretation. Some countries have made foreign trials in absentia and fraudulent judgments exceptions to non-substantive reviews. For example, in *Ermgassen&Co.Limited v. Sixcao Financial Pte Limited* (2018) [*Ermgassen&Co.Limited v. IXcap Financials Pte Limited*,[2018]SGHCR8,p.6.], the High Court of Singapore expressly stated that Singapore is not bound by the judgment of the court of the country of origin and is entitled to substantive review only when the foreign judgment is based on the absence of the defendant. But most countries treat foreign inconsistencies, procedural fraud and violations of public policy as situations that warrant substantive review. The European Court of Justice considers that the foreign judgment is final when it applies to the requested State for recognition and enforcement.

4. Ways to Improve the Non-substantive Review Provisions of The Hague Convention on Judgements

From the above analysis, it can be seen that the application of non-material review provisions mainly faces obstacles such as unclear concept, unclear scope and single starting method of non-material review provisions, which make it difficult to effectively implement non-material review provisions into specific execution procedures of judgment and recognition of foreign civil and commercial matters.

(1) The path of concept determination

First of all, non-substantive reviews are not the same as banning any reviews. The second half of Article 4, paragraph

2, of the 2019 Hague Convention on Judgments provides that "such reviews can be considered only for the purpose of applying the Convention". Although the circumstances under which a substantive review would take place were not indicated, the possibility of a review was set out. Article 5 of the 1971 Hague Convention on Judgments states that "the requested State may refuse to recognize or enforce a judgment in any of the following circumstances". Both from the specific provisions of the Convention and the historical text, the Convention clearly states that the review can be carried out in exceptional cases, rather than prohibiting any review.

(2) Scope clearing path: adopt the method of principle and exception

With the evolution of the international community, the matters under non-substantive review show dynamic changes, but their core values always adhere to respect for the sovereignty of the requested State and protection of the rights of the parties. Article 7 of the 2019 Hague judgment convention (refusal of recognition and enforcement) provides for the following circumstances :(1) failure to notify the defendant of his reply; (2) the document served by the requesting State does not comply with the rules of the requesting State; (3) the judgment was obtained on the basis of fraud; It is clear that the Convention has adopted the model of generalized and enumerations, and it can be seen that this model contains too many exclusions for non-material review, which seriously weakens the effectiveness of the non-material review provisions. With the new development of the non-material review reversal clause, the exception has been questioned by many countries. Therefore, the principle and exception model can be adopted for the development and change of the scope of immaterial review, with the concept of reciprocity and comity, the principle of immaterial review, and the exception as a special case. First, the current concept of reciprocity has reached a consensus among states. China has also taken similar measures. Article 283 (1) of the Civil Procedure Law of China stipulates that "in accordance with international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity, the courts of foreign countries may serve on their behalf documents, investigations, evidence collection or other acts of litigation". Second, the ruling at the Hague convention is designed in order to promote foreign civil and commercial judgments can be effectively between countries recognition and enforcement, so stick to the principle of the substantive examination unshakable, only on the basis of the substantive examination, to promote the convenience of foreign judgments in the field of international civil and commercial matters, efficient flow, form the international judicial environment work closely.

(3) Startup mode reconstruction path: introducing hybrid and multivariate mode

At present, the immaterial review mainly relies on the passive review by the court of the requested country. In this mode, there are two types of initiation modes: one is initiated by the court of the requested country according to its authority; The other is initiated by a party's application. The two initiating modes undoubtedly expand the scope of substantive review and reduce the legal effect of non-substantive review clauses.

5. Conclusion

Ruling at the Hague convention (draft) in 1971, is limited by the time of the international environment has not been

effective, accompanied by the court in the Hague option agreement by, the private international law in the Hague conference began to draft convention on foreign civil and commercial judgment recognition and enforcement, finally in 2019 through the formal negotiations, long span, embodies the negotiations of the twists and turns and hardships. Current our country is in the key stage of the "region", to promote regional and global economic and trade exchanges between, adhering to the convenient and efficient concept of recognition and enforcement in our country, on the question of recognition and enforcement of foreign judgments, adhere to the principle of the substantive examination and improve the relevant rules, help to better integrated into the regional economic and trade system, power development in China.

References

- [1] liu Yang, xiang zaisheng: on the prohibition of substantive review clause in the Hague judgment convention [J], international law review of wuhan university, 2020,4(05),44-56.
- [2] Wang Yahan: The principle of non-material review in the recognition and enforcement of foreign court judgment [J], China Applied Law, 2020,(04),78-95.
- [3] He Qisheng, Principles and Rules of International Civil Procedure in China: Recognition and Enforcement of Judgments of Foreign Courts (Proposed Draft), International Law Review of Wuhan University, No.2, 2016, pp.18-19.
- [4] Xu Guojian, Establishment of an International Legal System for the Global Circulation of Court Judgments -- Legislative Materials, Views and Comments on the Hague Draft Convention on the Recognition and Enforcement of Foreign Judgments, International Law Review, Wuhan University, No.5, 2017.
- [5] Qian Feng, A Study on Recognition and Enforcement of Civil and Commercial Judgments in Foreign Courts, China Democracy and Legal System Press, 2008, page 120.
- [6] He Qisheng, Principles and Rules of International Civil Procedure in China: Recognition and Enforcement of Judgments of Foreign Courts (Proposed Draft), International Law Review of Wuhan University, No.2, 2016, p. 19.