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PROPOSED DRAFT TEXT ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

drawn up by the Working Group on the Judgments Project

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PROJET DE TEXTE SUR LA RECONNAISSANCE ET L'EXÉCUTION DES JUGEMENTS ÉTRANGERS

préparé par le Groupe de travail relatif au Projet sur les jugements

Preliminary Document No 1 of April 2016 for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments

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PROPOSED DRAFT TEXT ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS
(completed by the Working Group during its fifth meeting in October 2015)¹

CHAPTER I – SCOPE AND DEFINITIONS

Article 1
Scope

1. This Convention shall apply to the recognition and enforcement of judgments relating to civil or commercial matters. It shall not extend in particular to revenue, customs or other administrative matters.
2. This Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given in another Contracting State.

Article 2
Exclusions from scope

1. This Convention shall not apply to the following matters –
 - a) the status and legal capacity of natural persons;
 - b) maintenance obligations;
 - c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
 - d) wills and succession;
 - e) insolvency, composition and analogous matters;
 - f) the carriage of passengers and goods;
 - g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;
 - h) liability for nuclear damage;
 - i) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
 - j) the validity of entries in public registers;
 - k) defamation.
2. Notwithstanding paragraph 1, a judgment is not excluded from the scope of this Convention where a matter excluded under that paragraph arose merely as a preliminary question in the proceedings in which it was given, and not as an object of the proceedings. In particular, the mere fact that a matter excluded under paragraph 1 arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.
3. This Convention shall not apply to arbitration and related proceedings.
4. This Convention shall not apply to agreements to refer a dispute to binding determination by a person or body other than a court, or to proceedings pursuant to such an agreement.
5. A judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings.
6. Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

¹ In October 2015, the Working Group completed its work towards the preparation of draft provisions for inclusion in a future Convention on the recognition and enforcement of judgments and prepared a Proposed Draft Text recommending to the Council on General Affairs and Policy of the Hague Conference that it be submitted for consideration to a Special Commission. See, for further reference, the "[Report of the fifth meeting of the Working Group on the Judgments Project \(26-31 October 2015\) and Proposed Draft Text resulting from the meeting](#)", Prel. Doc. No 7A of November 2015 for the attention of the Council on General Affairs and Policy of the Hague Conference, available at < www.hcch.net > under "Judgments" and "Recent developments (2010 onwards)".

Article 3
Definitions

1. In this Convention,
 - a) "defendant" means a person against whom the claim or counterclaim was brought in the State of origin;
 - b) "judgment" means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.
2. An entity or person other than a natural person shall be considered to be habitually resident in the State –
 - a) where it has its statutory seat;
 - b) under whose law it was incorporated or formed;
 - c) where it has its central administration; or
 - d) where it has its principal place of business.

CHAPTER II – RECOGNITION AND ENFORCEMENT

Article 4
General provisions

1. A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.
2. Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.
3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.
4. Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment. In such cases, the court addressed may also make enforcement conditional on the provision of such security as it shall determine.

Article 5
Bases for recognition and enforcement

1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –
 - a)
 - i) the person who was the party in the proceedings in the court of origin and is the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin, or
 - ii) the person against whom recognition or enforcement is sought is not the person who was the party in the proceedings in the court of origin but is the successor to the obligations of the judgment, and the person who was the party in the proceedings in the State of origin was habitually resident there at the time that person became a party to those proceedings;

- b) the person against whom recognition or enforcement is sought was the person that brought the claim on which the judgment is based or is the successor to that person;
 - c) the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment;
 - d) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;
 - e) the judgment ruled on a contractual obligation and it was given in the State in which performance of that obligation took place or should take place under the parties' agreement or under the law applicable to the contract, unless the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;
 - f) the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred;
 - g) the judgment ruled on an infringement of a patent, trademark, design or other similar right required to be deposited or registered and it was given by a court in the State in which the deposit or registration of the right concerned has taken place;
 - h) the judgment ruled on the validity or infringement of copyright or related rights and the right arose under the law of the State of origin;
 - i) the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and the State of origin is –
 - (i) designated in the trust instrument as a State in which disputes about such matters are to be determined;
 - (ii) the State whose law is expressly or impliedly designated in the trust instrument as the law governing the trust; or
 - (iii) the State expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated;
 - j) the judgment ruled on a counterclaim that arose out of the transaction or occurrence on which the original claim was based. However, the judgment on a counterclaim need not be recognised and enforced under this Convention if the law of the State of origin required the counterclaim to be brought under penalty of preclusion to the extent that the counterclaim claimant was unsuccessful on the counterclaim;
 - k) the court of origin would have had jurisdiction in accordance with the law of the requested State concerning recognition and enforcement of foreign judgments.
2. If recognition or enforcement is sought against a consumer in matters relating to a consumer contract, or against an employee in matters relating to an individual contract of employment –
- a) paragraph 1(d) applies only if the consent was given before the court;
 - b) paragraph 1(e) does not apply.

Article 6

Exclusive bases for recognition and enforcement

Notwithstanding Article 5 –

- a) a judgment that ruled on the registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered shall be recognised and enforced if and only if the State of origin is the State in which deposit or registration has been applied for, has taken place, or is deemed to have been applied for or to have taken place under the terms of an international or regional instrument;

- b) a judgment that ruled on rights *in rem* in immovable property or tenancies of immovable property for a period of more than six months shall be recognised and enforced if and only if the property is situated in the State of origin.

Article 7

Refusal of recognition or enforcement

1. Recognition or enforcement may be refused if –
 - a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim –
 - (i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or
 - (ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;
 - b) the judgment was obtained by fraud in connection with a matter of procedure;
 - c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;
 - d) the proceedings in the court of origin were contrary to an agreement or a designation in a trust instrument under which the dispute in question was to be determined in a court other than the court of origin;
 - e) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
 - f) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfills the conditions necessary for its recognition in the requested State.

2. Recognition or enforcement may be refused or postponed if proceedings between the same parties and having the same subject matter are pending before a court of the requested State, where the court of the requested State was seised before the court of origin, and
 - a) the court of the requested State satisfies one of the bases for recognition and enforcement under Article 5, or there exists a close connection between the dispute and the requested State; or
 - b) the proceedings before the court of origin were brought for the purpose of frustrating the effectiveness of the pending proceedings; and

the pending proceedings were not contrary to an agreement or designation in a trust instrument under which the dispute in question was to be determined in a court other than the court of origin.

Article 8

Preliminary questions

1. Where a matter excluded under Article 2, paragraph 1, or a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled arose as a preliminary question, the ruling on that question shall not be recognised or enforced under this Convention.

2. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded under Article 2, paragraph 1, or on a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled.

Article 9
Damages

1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.
2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 10
Judicial settlements (transactions judiciaires)

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State has approved, or which have been concluded before that court in the course of proceedings, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.

Article 11
Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce –
 - a) a complete and certified copy of the judgment;
 - b) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
 - c) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;
 - d) in the case referred to in Article 10, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.
2. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require any necessary documents.
3. An application for recognition or enforcement may be accompanied by a document relating to the judgment, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.
4. If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 12
Procedure

1. The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.
2. The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

Article 13
Equivalent effects

A judgment recognised or enforceable under this Convention shall be given the same effect it has in the State of origin. If the judgment provides for relief that is not available under the law of the requested State, that relief shall, to the extent possible, be adapted to relief with effects equivalent to, but not going beyond, its effects under the law of the State of origin.

Article 14
Severability

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.

Article 15
Recognition or enforcement under national law

Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.