

**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**

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**RAPPORT DE LA CINQUIÈME RÉUNION DU GROUPE DE TRAVAIL RELATIF
AU PROJET SUR LES JUGEMENTS (DU 26 AU 31 OCTOBRE 2015)
ET PROJET DE TEXTE RÉSULTANT DE LA RÉUNION**

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Fifth Meeting of the Working Group on the Judgments Project (26-31 October 2015)



Report

Introduction

From 26 to 31 October 2015, the Working Group on the Judgments Project (“the Working Group”) met in The Hague for its fifth meeting under the chairmanship of Mr David Goddard QC. The Working Group was composed of 31 participants from 17 Members.¹

In accordance with the mandate given in 2012 by the Council on General Affairs and Policy of the Conference (“the Council”),² the Working Group has continued to work on its initial task “to prepare proposals for consideration by a Special Commission in relation to provisions for inclusion in a future instrument relating to recognition and enforcement of judgments, including jurisdictional filters”.³ Pursuant to the Council’s decision of 2015, the Working Group has also addressed and made recommendations for work to be done on matters relating to direct jurisdiction (including exorbitant grounds and *lis pendens* / declining jurisdiction).⁴

This report provides an overview of the evolution of the Judgments Project, an explanation as to the status of the work and the structure of the Proposed Draft Text and a recommendation for next steps.

Brief overview of the evolution of the Judgments Project

The origins of the Judgments Project go back to 1992 when a proposal was made to undertake work on jurisdictional bases and the recognition and enforcement of judgments in civil and commercial matters.⁵ Between 1992 and 2001, useful progress was made which resulted in a draft mixed convention, combining direct rules of jurisdiction with rules on conflicts of jurisdiction, exorbitant fora and recognition and enforcement of foreign judgments.⁶ However, at the conclusion of the first part of the Diplomatic Conference in 2001, a number of important areas remained where consensus could not be reached.

Mindful of the useful work already having been carried out,⁷ the Hague Conference then decided to consider the areas for which it seemed likely that a consensus-based instrument could be achieved. As a result, work focussed on creating an instrument dedicated to ensuring the

¹ The participating Members were Australia, Brazil, Canada, China (People’s Republic of), Cyprus, European Union, Germany, India, Japan, Korea (Republic of), Russian Federation, Serbia, Singapore, Spain, Switzerland, United Kingdom and United States of America.

² Conclusions and Recommendations adopted by the Council of 17 to 20 April 2012, para. 17.

³ The term “jurisdictional filters” used in the Council’s Conclusions and Recommendations refers to jurisdictional criteria for recognition and enforcement of judgments, also sometimes referred to as “indirect grounds of jurisdiction”.

⁴ Conclusions and Recommendations adopted by the Council of 24 to 26 March 2015, para. 4.

⁵ See the letter from the Legal Adviser of the Department of State of the United States of America dated 5 May 1992 with regard to a “mixed Convention”. Available on the Hague Conference website at < www.hcch.net > under “Specialised Sections” then “The ‘Judgments Project’” and “The originating proposal”.

⁶ See Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted by the Special Commission (the “Interim Text”), available at < <http://www.hcch.net/upload/wop/jdgm11.pdf> >.

⁷ See “Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference”, Prel. Doc. No 16 of February 2002 for the attention of Commission I of the Nineteenth Session, *Proceedings of the Nineteenth Session*, Tome 1, *Miscellaneous matters*, Leiden, Koninklijke Brill NV, 2008, p. 429. See also, A. Schulz, “Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters”, Prel. Doc. No 19 of August 2002 for the attention of the meeting of the Informal Working Group of October 2002.

effectiveness of choice of court agreements between parties to international commercial transactions. With the benefit of the previous 10 years of work, the *Hague Convention of 30 June 2005 on Choice of Court Agreements* ("Choice of Court Convention") was concluded. That Convention came into force on 1 October 2015 for Mexico and the European Union (except Denmark).⁸

In 2011, the Hague Conference agreed to consider the feasibility of a new global instrument. An Experts' Group was convened with the aim of assessing the possible merits of resuming aspects of the Judgments Project, in the light of recent developments in this area of the law. The Experts' Group met in April 2012 and concluded that further work on cross-border litigation was desirable, provided that it met real, practical needs which were not met by existing instruments and institutional frameworks. It also determined that further work was essential to identify gaps in the existing framework for resolution of cross-border disputes that are of particular practical significance.⁹

In April 2012, after examining the findings of the Experts' Group, the Council approved two mandates for further work on the Judgments Project. First, it established a Working Group, the initial task of which was to prepare proposals for consideration by a Special Commission in relation to provisions for inclusion in a future instrument relating to recognition and enforcement of judgments, including "jurisdictional filters". Secondly, it tasked the Experts' Group with further study and discussion of the desirability and feasibility of making provisions in relation to matters of jurisdiction, including parallel proceedings, in the same or another future instrument.¹⁰

In February 2013, the Working Group and the Experts' Group each met in The Hague. At the conclusion of the two meetings, it was decided that the Groups needed to consider whether work for the Experts' Group and Working Group could be progressed simultaneously. Following extensive consultations, it was recommended that the work of the Working Group should be advanced first and that the discussions of the Experts' Group be resumed at a later stage.¹¹ In 2014 the Council instructed the Working Group to continue its work.¹²

Since 2013, the Working Group has met on four further occasions in order to develop a draft text of core provisions aimed at facilitating the global circulation of judgments.

In March 2015 the Council invited the Working Group to address matters within the mandate of the Experts' Group and make appropriate recommendations.¹³

At its meeting in October 2015, the Working Group completed its work on a proposed draft text, which appears as an annex to this report. The Working Group also addressed and made recommendations for work to be done on matters relating to direct jurisdiction (including exorbitant grounds and *lis pendens* / declining jurisdiction). The Working Group believes that this completes the mandate conferred on it by the Council.

Proposed Draft Text

Objectives and operation of the Proposed Draft Text

The objectives of the Proposed Draft Text are to –

- enhance access to justice through the recognition and enforcement of judgments given by courts which the parties could reasonably have expected to determine their rights and obligations in the circumstances of the particular case. In order for access to justice

⁸ Mexico acceded to the Convention on 26 September 2007 and the European Union approved it on 11 June 2015. The Convention was also signed by the United States of America on 19 January 2009 and by Singapore on 25 March 2015. The status table of the Convention is available on the website of the Hague Conference at < www.hcch.net > under "Choice of Court Section".

⁹ Conclusions and Recommendations of the Expert Group on Possible Future Work on Cross-Border Litigation in Civil and Commercial Matters, Work Doc. No 2 E (12-14 April 2012).

¹⁰ See *supra*, note 2.

¹¹ Process Paper on the Continuation of the Judgments Project of August 2013.

¹² Conclusions and Recommendations adopted by the Council of 8 to 10 April 2014, para. 6.

¹³ See *supra*, note 4.

to be meaningful, a judgment that is rendered by the relevant court must be capable of effective recognition and enforcement; and

- facilitate trade and investment, thus contributing to economic growth by enhancing legal certainty and reducing costs and uncertainties associated with cross-border dealings, and with the resolution of cross-border disputes.

The Working Group gave careful consideration to identifying an effective architecture for the future Convention, which would advance these objectives. After considering a number of innovative approaches, the Working Group proceeded on the basis that the future Convention should –

- be a complementary Convention to the Choice of Court Convention;
- provide for recognition and enforcement of judgments from other Contracting States that meet the requirements set out in a list of bases for recognition and enforcement;
- set out the only grounds on which recognition and enforcement of such judgments may be refused; and
- not prevent recognition and enforcement of judgments in a Contracting State under national law or under other treaties, subject to one provision relating to exclusive bases for recognition and enforcement.

The structure of the Proposed Draft Text

In view of the complementary nature of the future Convention and the Choice of Court Convention, the Working Group proceeded on the basis that the starting point for preparing proposals for inclusion in the future Convention should be the corresponding provisions of the Choice of Court Convention, and that there should be a material departure from corresponding provisions of the Choice of Court Convention only where the Group identified a justification for such a difference, having regard to the subject-matter of the proposed instrument.

(a) Substantive scope

The substantive scope provisions of the Proposed Draft Text are modelled on Articles 1 and 2 of the Choice of Court Convention. However, in light of the different subject matter of the future Convention, the Working Group concluded that certain matters excluded from scope under the Choice of Court Convention should be brought within the scope of the future Convention.

In particular, the text prepared by the Working Group would apply to matters relating to consumer contracts and matters relating to an individual contract of employment, subject to certain restrictions provided for in Article 5(2) of the Proposed Draft Text.

The Working Group retained the exclusion from scope of arbitration and related proceedings in the Choice of Court Convention and supplemented it with an additional exclusion from scope of agreements to refer a dispute to binding determination by a person or body other than a court, and proceedings pursuant to such an agreement, as provided for in Article 2(4) of the Proposed Draft Text.

(b) Recognition and enforcement

Article 4 is modelled closely on Article 8 of the Choice of Court Convention. It states the basic principle that a judgment given by a court of a Contracting State will be recognised and enforced in other Contracting States, and that recognition and enforcement may be refused only on the grounds specified in the Convention.

Article 5 sets out the bases for recognition and enforcement of judgments. A judgment must meet one of these requirements to be eligible for recognition or enforcement under the future Convention. As noted above, this does not limit recognition or enforcement under national law.

Article 6 makes special provision for two exclusive bases for recognition and enforcement of judgments, namely in the fields of intellectual property rights and immovable property. These

are exclusive bases in the sense that judgments on these matters may only be enforced if given by the specified court, and may not otherwise be enforced under the Convention or national law. Other exclusive jurisdictional bases of particular Contracting States may have to be addressed, possibly through Article 6 or a declaration system.

The recognition and enforcement process is dealt with in Articles 7 to 15 of the Proposed Draft Text. These provisions are modelled on Articles 9 to 15 of the Choice of Court Convention, with appropriate modifications to reflect the different subject matter of the future Convention.

One such modification is found in Article 7(2) which permits (but does not require) a Contracting State to refuse or postpone recognition and enforcement of a judgment if proceedings between the same parties with the same subject matter are pending in the requested State and such proceedings commenced before the proceedings in the court of origin, provided certain other prescribed criteria are met.

Articles 13 and 15 address certain matters that the Working Group considered should be made explicit in the context of the future Convention. Article 13 provides for relief to be adapted to measures available under the law of the requested State. Article 15 confirms that recognition and enforcement under national law are not prevented by the Convention, except as specified in Article 6.

Other matters identified for future consideration

The Working Group discussed the relationship between the Convention and the development of other international instruments, in particular the United Nations Commission on International Trade Law (UNCITRAL) Project on Insolvency-Related Judgments¹⁴ and the UNCITRAL Project on Conciliation.¹⁵ The Group noted the need for further consideration of co-ordination between the future Convention and these projects, with a view to avoiding overlap between these streams of work.

Recommendations

The Working Group recommends to the Council that –

- a) the attached Proposed Draft Text of a future Convention on the recognition and enforcement of foreign judgments in civil and commercial matters be submitted for consideration to a Special Commission to be held, if possible, in June 2016; and
- b) matters relating to direct jurisdiction (including exorbitant grounds and *lis pendens* / declining jurisdiction) be considered by the Experts' Group with a view to preparing an additional instrument. The Experts' Group should meet soon after the Special Commission has drawn up a draft Convention.

The Hague, 31 October 2015

¹⁴ UNCITRAL Project on Cross-Border Recognition and Enforcement of Insolvency-Related Judgements (Working Group V).

¹⁵ UNCITRAL Project on International Commercial Conciliation: Enforceability of Settlement Agreements (Working Group II).

ANNEX / ANNEXE

**PROPOSED DRAFT TEXT OF THE WORKING GROUP ON THE JUDGMENTS PROJECT
RESULTING FROM ITS FIFTH MEETING**

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.

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.