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(E)



**“CIVIL OR COMMERCIAL MATTERS” / “ACTA IURE IMPERII”**

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**« MATIÈRE CIVILE ET COMMERCIALE » / « ACTA IURE IMPERII »**

*(disponible en anglais uniquement)*

*Information Document No 4 of June 2016  
for the attention of the Special Commission of June 2016  
on the Recognition and Enforcement of Foreign Judgments*

*Document d'information No 4 de juin 2016  
à l'attention de la Commission spéciale de juin 2016  
sur la reconnaissance et l'exécution des jugements étrangers*

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## 1. EU Proposed Wording of Art. 1 (Working Document 46)

The EU has proposed wording to the effect:

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 administrative matters **or to liability of the State for actions or omissions in the exercise of state authority (*acta iure imperii*)**.

## 2. "Civil and commercial matters"

The precise meaning of this phrase has been discussed in previous HCCH publications, extracted below and in the attached.

### ***Hartley / Dogauchi Report to the Choice of Court Convention 2005***

The Hartley / Dogauchi Report provides a concise overview of the key points in the development of the phrase (emphasis added):

**"49. Civil or commercial matters.** Like other concepts used in the Convention, "civil or commercial matters" has an autonomous meaning: it does not entail a reference to national law or other instruments. The limitation to civil or commercial matters is common in international conventions of this kind. It is primarily intended to exclude public law and criminal law. The reason for using the word "commercial" as well as "civil" is that in some legal systems "civil" and "commercial" are regarded as separate and mutually exclusive categories. The use of both terms is helpful for those legal systems. It does no harm with regard to systems in which commercial proceedings are a sub-category of civil proceedings. However, certain matters that clearly fall within the class of civil or commercial matters are nevertheless excluded from the scope of the Convention under Article 2."

**The Hartley / Dogauchi Report in turn references the Nygh / Pocar Report of 2000.**

### ***Nygh / Pocar Report of 2000***

The relevant discussion from (*Prel. Doc. No 11 of August 2000 for the attention of the Nineteenth Session*). In particular, numbered pages 30-32 (relating to Art. 1(1)) and numbered pages 36-37 (relating to Article 1(3)). The below observations are pertinent:

"No substantive change should be implied from the use of the conjunctive "and" instead of the disjunctive "or". It certainly is not intended that the matter should have both a civil and a commercial character. While commercial matters will always have a civil character, there are civil matters which are not commercial."

### ***The Service and Evidence Handbook***

Discuss the evolution of the term "civil and commercial" under the *Service (and Evidence) Convention*, and refer to the way this has been considered and developed across Special Commissions:

**Autonomous interpretation** - without referring exclusively to either law of State of origin or the law of requested State, or to both laws cumulatively;

"13. [...] The SC reaffirms that the words 'civil or commercial matters' should be interpreted in an autonomous manner, without reference exclusively either to the law of the requesting State or to the law of the requested State, or to both laws cumulatively." (SC 2009)

### **Liberal / broad approach**

"14. The SC takes the view that a liberal interpretation should be given to the phrase 'civil or commercial matters'...." (SC 2009)

One should keep in mind, however, that the Service and Evidence Conventions do not contain lists of excluded matters. The following matters are (now) generally regarded as within the scope:

- bankruptcy and insolvency
- insurance matters
- employment matters
- consumer protection matters

### **3. "Acta iure imperii"**

There does not appear to have the same level of discussion in HCCH literature concerning the issue of *acta iure imperii*.

- o *However, see caution statement in Evidence Handbook: Liability of a government agency for acts or omissions in the exercise of sovereign authority (acta jure imperii), and actions brought by a State acting in a regulatory capacity (particularly in anti-trust (competition) matters may be considered by some States to fall outside the scope of the term "civil or commercial matters". However, the fact that a State is party to proceedings should not alone deny the character of the matter as civil and commercial (iure gestionis).*

The following EU instruments include a mention to this phrase:

- **Brussels I Recast:** The text includes mention of *acta iure imperii* as an exclusion from scope under Article 1. *Work Doc No 46* is verbatim wording of this instrument.
- **Rome II Regulation:** The text includes mention of *acta iure imperii* as an exclusion from scope under Article 1. *Work Doc No 46* is verbatim wording of this instrument.
- **EU Service Regulation:** The text includes mention of *acta iure imperii* as an exclusion from scope under Article 1. *Work Doc No 46* is verbatim wording of this instrument.
- **Brussels I:** *Acta iure imperii* were not explicitly mentioned in Article 2 (Scope), however, they have been adjudicated as not to be of a civil or commercial nature. This has been confirmed by the ECJ in case *C-292/05 Lechouritou et al. v. Germany*.