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## INFORMATION DOCUMENT ON PROVISIONS ON COSTS

*drawn up by the Permanent Bureau*

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**Article 13 of the 2016 preliminary draft Convention (resulting from the June 2016 meeting of the Special Commission on the Judgments Project)**

[Article 13  
Costs of proceedings

*No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given in another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.]<sup>1</sup>*

**Introduction**

During the discussions of the June 2016 meeting of the Special Commission on the Judgments Project, it was noted that the proposed Article 13 of the 2016 preliminary draft Convention is similar to Article 14 of the 1980 Access to Justice Convention. However, it was also observed that the 2016 preliminary draft Convention does not have a provision similar to Article 15 of that Convention.

It was noted in the Aide Memoire<sup>2</sup> that Article 13 of the 2016 preliminary draft Convention “was included in square brackets to flag for future consideration the possibility of providing for this issue and certain related matters (e.g., circulation of costs judgments in favour of a successful defendant in enforcement proceedings)”.<sup>3</sup>

In light of the above, and considering the general view that this issue would benefit from inter-  
sessional work, this Information Document aims at providing information regarding provisions on costs in previous Hague instruments, together with supporting materials such as Explanatory Reports.

**I. 2005 Choice of Court Convention**

The 2005 Choice of Court Convention is silent on this issue. However, a provision titled “Article 10 – Costs of proceedings” was proposed by the Informal Working Group.<sup>4</sup>

Article 10 – Costs of proceedings

*Where a party seeks recognition or enforcement of a judgment in a Contracting State under this Convention, and recognition or enforcement is refused, an order for payment of costs and expenses of the proceedings before the court addressed shall, on the application of the person entitled to the benefit of the order, be enforceable under this Convention in any other Contracting State.*

Comments of the Informal Working Group:<sup>5</sup>

113. The group took Article 31 of the 2001 Interim Text as a starting point. It was felt that paragraph 1 was already covered by the non-discrimination provision in Article 14 of the present text.<sup>6</sup>

114. Paragraph 2 was retained for the reasons already given in 2001 where the co-Reporters stated in note 171 to the Interim Text: “The proposal for this paragraph is based on Article 15 of the Hague Convention of 1980 on International Access to Justice and Article 18 of the Hague Convention of 1954 on Civil Procedure. Its purpose is to

<sup>1</sup> Originates from Work. Doc. No 66 (EU), which was subject to minor drafting changes.

<sup>2</sup> Aide Memoire of the Chair of the Special Commission, meeting of 1 to 9 June 2016, available on the secure portal.

<sup>3</sup> Para. 26 of the Aide Memoire.

<sup>4</sup> *Proceedings of the Twentieth Session (2005)*, Tome III, *Choice of Court*, Cambridge – Antwerp – Portland, Intersentia, 2013, p. 111.

<sup>5</sup> *Id.*, p. 99.

<sup>6</sup> Art. 14 – No discrimination in procedural matters

Procedural rules of a Contracting State shall not be applied in a manner that discriminates against parties that are nationals of, or habitually resident in, other Contracting States when applying this Convention.

secure enforcement of an order made by the requested court for the payment of the costs and expenses borne by the judgment debtor in a case where the requested court has rejected enforcement of the judgment on a ground such as the fraud of the judgment creditor upon the court of origin." The drafting was amended in order to render the objective of this provision more evident. However, the requirement that a declaration of enforceability or registration for enforcement, as the case may be, be granted free of charge was dropped. While it was justified in the context of the two Conventions which served as a model and have as their aim to assist parties in need in their access to justice, the parties targeted by this Convention in a B2B context do not generally require this particular aspect of protection.

This provision was subsequently deleted at the Special Commission in December 2003, for the following reason:<sup>7</sup>

**The expert from New Zealand** who had held the seminar on Articles 14 and 10 of the draft text noted that the group worked very well and had useful exchanges as to the implications of Articles 10 and 14. Regarding Article 10 of the draft text, some delegations faced real problems and raised serious concerns. The issue had already been discussed in two Conventions, the 1954 Convention on Civil Procedure and the 1980 Convention on Access to Justice (Arts. 14 and 15). Due to the existence of these two Conventions, the group felt that they should not stray in the access to justice territory. Therefore, there was a broad consensus that Article 10 of the draft text should be deleted.

## II. 2001 Interim Text<sup>8</sup>

The 2001 Interim Text was not raised during the discussions on this point in the June 2016 meeting, but Article 31 of the 2001 Interim Text is a relevant provision.

### Article 31 - Costs of proceedings

*1. No security, bond or deposit, however described, to guarantee the payment of costs or expenses [for the procedure of Article 30]<sup>9</sup> shall be required by reason only that the applicant is a national of, or has its habitual residence in, another Contracting State.*

*[2. An order for payment of costs and expenses of proceedings, made in one of the Contracting States against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 shall, on the application of the person entitled to the benefit of the order, be rendered enforceable without charge in any other Contracting State.]<sup>10</sup>*

## III. 1999 preliminary draft Convention<sup>11</sup>

### Article 31 – Costs of proceedings

*No security, bond or deposit, however described, to guarantee the payment of costs or expenses shall be required by reason only that the applicant is a national of, or has its habitual residence in, another Contracting State.*

<sup>7</sup> *Proceedings of the Twentieth Session* (2005), *op. cit.* Note 3, p. 451.

<sup>8</sup> "Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001 – Interim Text", prepared by the Permanent Bureau and the co-Reporters, in *Proceedings of the Twentieth Session* (2005), Tome II, *Judgments*, Cambridge – Antwerp – Portland, Intersentia, 2013, p. 621.

<sup>9</sup> This addition was proposed with the intention of clarifying the scope of the article without changing the substance. The necessity for this provision was questioned and fears were expressed about unintended consequences. Reference was also made to Art. 16 of the Convention of 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations. Consensus was reached on the substance of this paragraph.

<sup>10</sup> The proposal for this paragraph is based on Art. 15 of the Convention of 1980 on International Access to Justice and Art. 18 of the Convention of 1954 on Civil Procedure. Its purpose is to secure enforcement of an order made by the requested court for the payment of the costs and expenses borne by the judgment debtor in a case where the requested court has rejected enforcement of the judgment on a ground such as the fraud of the judgment creditor upon the court of origin. There was no consensus on this point.

<sup>11</sup> "Preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, adopted by the Special Commission and Report by Peter Nygh and Fausto Pocar", Prel. Doc. No 11 of August 2000 for the attention of the Nineteenth Session of June 2001, in *Proceedings of the Twentieth Session* (2005), Tome II, *Judgments*, Cambridge – Antwerp – Portland, Intersentia, 2013, p. 191.

Nygh / Pocar Report at paragraph 356<sup>12</sup>

This Article governs the question of security which may be required in order to guarantee payment of the costs of proceedings. It reflects the traditional view that no payment of this kind may be required from the applicant for the sole reason that he / she is a national of another Contracting State or has his / her habitual residence in another Contracting State. The possibility of a security payment being required is not therefore entirely removed, but it is limited to situations in which the applicant has no connection with a Contracting State. The clause applies to both natural and legal persons.

**IV. 1980 Access to Justice Convention**

Article 14

*No security, bond or deposit of any kind may be required, by reason only of their foreign nationality or of their not being domiciled or resident in the State in which proceedings are commenced, from persons (including legal persons) habitually resident in a Contracting State who are plaintiffs or parties intervening in proceedings before the courts or tribunals of another Contracting State.*

*The same rule shall apply to any payment required of plaintiffs or intervening parties as security for court fees.*

Article 15

*An order for payment of costs and expenses of proceedings, made in one of the Contracting States against any person exempt from requirements as to security, bond, deposit or payment by virtue of Article 14 or of the law of the State where the proceedings have been commenced shall, on the application of the person entitled to the benefit of the order, be rendered enforceable without charge in any other Contracting State.*

Möller Report, p. 281<sup>13</sup>

*Article 14 - Exemption from giving security for costs*

In its modern sense, the *cautio judicatum solvi* is the obligation placed on the plaintiff in an action at law to deposit a certain sum for the purpose of guaranteeing to the defendant the settlement without complication of the costs and expenses which the non-suited plaintiff may be ordered to pay. Article 17 of the 1954 Convention confers the benefit of exemption from security upon nationals of the Contracting States who are domiciled in one of those States and who are plaintiffs or parties intervening before the courts of another of those States. In this article of the present Convention this benefit, granted to persons who are both nationals of and habitual resident in a Contracting State, has been preserved. This benefit has moreover been extended to nationals of a non-Contracting State habitually resident in a Contracting State.

Paragraph 1 of this article does not in substance differ from the corresponding article (article 13) of the Preliminary Draft presented by the Special Commission but the drafting has been considerably improved in order to make the provision quite clear. Among other things, reference has explicitly been made to legal persons, e.g. companies and associations, in order to clarify that the provision applies not only to 'natural' persons but also to legal ones.

There is, however, no provision as to the question where a legal person for the purpose of the present Convention is considered to have his habitual residence. Thus this question has to be resolved by the law of the State where proceedings are to be or have been commenced. In this context it may, however, be mentioned that the criterion 'habitual residence' has already previously been applied as to legal persons, *inter alia*, in the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 1971. The Supplementary Protocol to that Convention contains a

<sup>12</sup> *Id.*, pp. 207-313.

<sup>13</sup> Convention on International Access to Justice, Explanatory Report by Gustaf Möller, in *Proceedings of the Fourteenth Session (1980)*, Tome IV, *Judicial co-operation*, Hague Conference, Imprimerie Nationale, 1983.

definition of the habitual residence of a legal person (see paragraph 5 of that Protocol). This definition is, however, not necessarily a precedent which also applies to the present provision.

Paragraph 2 of this article is copied directly from paragraph 2 of article 17 of the 1954 Convention. According to this provision, persons (including legal persons) referred to in paragraph 1 are exempt from requirements as to security, bond or deposit of any kind of court fees. Thus those persons are exempt from security, bond or deposit not only as to the defendant's costs and expenses which the non-suited plaintiff or a party intervening may be ordered to pay, but also as far as court fees are concerned.

It should, however, be observed that the exemption from giving security for costs under this article concerns only such situations where the internal law of the State where the proceedings are to be or have been commenced requires security for costs *by reason only* of the foreign nationality or of the absence of domicile or residence in that country on the part of persons who are plaintiffs and intervening parties. If thus, for instance, the internal law of the State where the proceedings are to be or have been commenced requires security for costs from all plaintiffs or parties intervening, whether aliens or nationals and whether domiciled resident or not in the State of the proceedings, such a regulation does not introduce any kind of discrimination into international relations and is not covered by the article.

In this context it may, however, be observed that according to article 21 nothing in this Convention shall be construed as limiting any rights in respect of matters governed by this Convention which may be conferred upon a person under the law of any Contracting State or under any other convention to which it is, or becomes, a party. Therefore, an explicit provision according to which all conventions under which Contracting States have agreed that the nationals will be exempt from providing security for costs or for payment of court fees regardless of domicile (or residence) shall continue to apply, similar to paragraph 3, article 17 of the 1954 Convention, was not regarded as necessary in the article.

#### *Article 15 - Enforceability of orders for costs and expenses*

The foremost argument for certain legal systems to require security for costs by reason of a foreign element connected with the person of the plaintiff<sup>14</sup> is the fact that a plaintiff who is neither a national of nor habitually resident in the State where proceedings are to be or have been commenced does not usually in that State have any income or assets which can be distrained if the plaintiff is non-suited and therefore ordered to pay costs and expenses. Therefore the exemption from security for costs has to be compensated for by ease of enforcement of orders relating to costs and expenses in a State where such a plaintiff usually has his assets, *i.e.* in general, the State where the non-suited plaintiff has his habitual residence. Therefore the exemption from security for costs in article 14 is limited to persons habitually resident in a Contracting State. There is, however, no reason to limit the ease of enforcement of such an order to the State where the non-suited plaintiff has his habitual residence since it may well be that he has tangible property in another Contracting State. Therefore the article provides, together with articles 16 and 17 - as was previously done in articles 18 and 19 of the 1954 Convention - for ease of enforcement in any other Contracting State of an order for payments of costs and expenses of proceedings, made in one of the Contracting States against any person exempt from requirements as to security, bond, deposit or payment by virtue of article 14 or of the law of the State where proceedings have been commenced. Such an order shall thus, according to the present article, on the application of the person entitled to the benefit of the order, be rendered enforceable without charge in any other Contracting State. A corresponding provision is included in paragraph 1 of article 18 of the 1954 Convention.

The words 'or of the law of the State where the proceedings have been commenced' covers also the situation where the *cautio judicatum solvi* in general terms does not even exist in that State. Thus also those States, which are not acquainted with the *cautio judicatum solvi* have full benefit of this provision, since the orders for costs and expenses referred to in the article will, even when made in those States, be recognized and rendered enforceable in any other Contracting State.

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<sup>14</sup> What is said about a plaintiff also applies to an intervening party.

It should be observed that the article does not cover orders against persons who are nationals of and domiciled, as well as resident, in the State where the proceedings have been commenced. It appears from article 15, read together with article 14, that also the first mentioned article only relates to persons who are either not nationals of or not domiciled or resident in the State where the proceedings have been commenced.

The words 'the person entitled to the benefit of the order' cover both natural and legal persons. Thus the person concerned may also be a State or one of its authorities.

Moreover, it should be observed that the words 'be rendered enforceable without charge' only relate to the *exequatur* procedure, *i.e.* the procedure for obtaining an order for enforcement, but not to the enforcement itself.

The provision presupposes that a special procedure for rendering an order enforceable is necessary in the Contracting State concerned. Such a procedure is, however, unknown in some States. For instance, in Austria and Denmark no special procedure will be necessary to render an order for payment of costs and expenses referred to in the article enforceable, since such an order will be on the same footing as a domestic one from the beginning. The article does not impose any obligation upon those Contracting States where a special procedure for rendering a foreign court order enforceable is unknown and an order referred to in the article will be enforceable without any special procedure.

## V. 1971 Enforcement of Judgments Convention

### Article 16

*A judgment for costs or expenses given in connection with the granting or refusal of recognition or enforcement of a decision may be enforced under this Convention only if the applicant in the proceedings for recognition or enforcement relied on this Convention.*

### Article 17

*No security, bond or deposit, however termed under the law of the State addressed, shall be required by reason of the nationality or domicile of the applicant to guarantee the payment of judicial costs or expenses if the applicant, being a natural person, has his habitual residence in or, not being a natural person, has a place of business in a State which has concluded with the State addressed a Supplementary Agreement in accordance with Article 21.*

### Rapport Fragistas, p. 386<sup>15</sup>

2 L'article 16 de la convention prescrit qu'elle s'applique à la condamnation aux frais et dépens prononcée à l'occasion de l'octroi ou du refus de la reconnaissance ou de l'exécution si le requérant s'est prévalu des dispositions de la même convention.

3 L'article 17 de la convention règle la question de la cautio judicatum solvi. Aucune caution ni dépôt ne peut être imposé pour garantir le paiement des frais et dépens du procès devant le juge requis, à raison de la nationalité ou du domicile du requérant, si celui-ci a sa résidence habituelle, ou s'il s'agit d'une personne morale ayant un établissement dans un Etat contractant. Sont considérés comme Etats contractants ceux qui ont conclu avec l'Etat requis un accord complémentaire.

Il n'est pas nécessaire que la résidence habituelle ou l'établissement se trouvent dans l'Etat d'origine du jugement; il suffit qu'elles se trouvent dans un autre Etat contractant. D'autre part pour les personnes morales il n'est pas nécessaire que l'établissement principal se trouve dans un pays contractant; il suffit qu'il y existe un établissement quelconque.

Cette disposition constitue un progrès par rapport à la Convention de La Haye du premier mars 1954 relative à la procédure civile, qui exige que le demandeur ait en plus la

<sup>15</sup> Explanatory Report by Ch.N. Fragistas, in *Actes et documents de la Session extraordinaire (1966), Exécution des jugements*, Bureau Permanent de La Haye, Imprimerie Nationale, 1969, pp. 360-388.

nationalité d'un Etat contractant. Les parties à l'accord complémentaire peuvent déroger à l'article 17 (cf. Art. 23, No 20).

## **VI. 1954 Civil Procedure Convention**

### Article 17

*No security, bond or deposit of any kind, may be imposed by reason of their foreign nationality, or of lack of domicile or residence in the country, upon nationals of one of the Contracting States, having their domicile in one of these States, who are plaintiffs or parties intervening before the courts of another of those States.*

*The same rule shall apply to any payment required of plaintiffs or intervening parties as security for court fees.*

*All conventions under which Contracting States have agreed that their nationals will be exempt from providing security for costs or for payment of court fees regardless of domicile shall continue to apply.*

### Article 18

*Orders for costs and expenses of the proceedings, made in one of the Contracting States against the plaintiff or party intervening exempted from the provision of security, deposit or payment under the first and second paragraphs of Article 17, or under the law of the State where the proceedings have been instituted, shall, upon request made through diplomatic channels, be rendered enforceable without charge by the competent authority, in each of the other Contracting States.*

*The same rule shall apply to the judicial decisions whereby the amount of the costs of the proceedings is subsequently fixed.*

*Nothing in the foregoing provisions shall prevent two Contracting States from agreeing that applications for enforcement may also be made directly by the interested party.*