

**BACKGROUND TO WORKING DOCUMENT NO 4 OF 1 JUNE 2016
ON THE NEED OF “CONSUMER” DEFINITION**

presented by the delegation of Brazil

* * *

**CONTEXTE DU DOCUMENT DE TRAVAIL NO 4 DU PREMIER JUIN 2016
SUR LA NÉCESSITE DE DÉFINIR LE TERME « CONSOMMATEUR »**

soumis par la délégation du Brésil

(disponible en anglais uniquement)

Information Document No 3 of June 2016 for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments. This document does not represent or affirm the Brazilian Government final decision on the matter, or any commitment to parts or the whole of a future document emerging from the negotiations.

Document d'information No 2 de juin 2016 à l'attention de la Commission spéciale de juin 2016 sur la reconnaissance et l'exécution des jugements étrangers. Ce document ne représente ni ne proclame la décision finale du Gouvernement du Brésil sur la question, ni un quelconque engagement à l'égard d'une partie ou de l'intégralité du futur document qui se dégage des négociations.

On the need of “consumer” definition

This document is presented by the delegation from Brazil to the HCCH Special Commission on the Judgments Project that will convene at its meeting of June 2016 for discussion purposes only, and do not represent or affirms Brazilian Government final decision on the matter, or any commitment to parts or the whole of a future document emerging from the negotiations.

Introduction

Brazil holds a well-known concern on the consumer situations issue among The Hague Conference on Private International Law (HCCH) members. This position is established through an active participation on the discussions that touch the issue, and is currently being sustained by the proposal of a draft convention on co-operation and access to justice for international tourists¹. Brazilian delegations to the meetings of the Working Group on the Judgments Project encouraged the inclusion of the issue of consumer situations within the scope of a future convention, on the belief that an easier circulation of foreign judgments in favor of consumers would provide a better protection to their positions, as related to nowadays situation.

This paper intends to: 1) declare Brazilian view on the consumer definition, *vis a vis* the definition adopted by the the HCCH Choice of Court Convention of 2005² (CoC); 2) identify relationship between CoC and the Judgments Project current work on a future convention, on the “mirror convention” basis for development of the new text, on the issue of consumers; 3) establish the conclusion of the need of a clear statement on the “consumer” definition to be included in a future convention; 4) propose a text to be submitted for further discussion by the Special Commission.

¹ The proposal has received from the Council on General Affairs and Policy of the HCCH an important recognition, stated at its 15-17 March 2016 meeting conclusion to mandate to the Permanent Bureau to *conduct a study on the desirability and feasibility of further work in this area*. See *Conclusions & Recommendations adopted by the Council*, available at: <https://assets.hcch.net/docs/679bd42c-f974-461a-8e1a-31e1b51eda10.pdf>, access in: May23, 2016. General information on the proposal is available at: <https://www.hcch.net/en/projects/legislative-projects/protection-of-tourists>, access in: May23, 2016.

² Further information on the HCCH Choice of Court Convention of 2005 is available at: <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court>, access in: May23, 2016.

Brazilian view on the consumer definition

Brazil holds a tradition of law emerging primarily from statutes prepared by parliamentary sessions. Those documents intend to provide solution in abstract for a number of concrete cases; thus, the need for certain legal definitions is frequently fulfilled by the statutes, and provide specialized material for judicial solutions. The consumer protection subject is covered in Brazil through a statute known as the *Consumer's Defense Code*³ (BrCDC), that provides for a complex system of protection that holds its main grounds on a constitutional provision for consumer protection⁴.

The issue of the consumer definition is tackled by the provision of article 2 of the BrCDC, as it declares:

Art. 2. A consumer is any physical person or corporate entity who acquires or uses a product or service as a final user.

Sole Paragraph. The concept and status of consumer is extended to a collective of individuals, that may even be indeterminate, who may have participated in consumer relations.

This definition is oriented by the object of consumers' acquisition or use, and is very comprehensive of who can be the consumer. The structure does not define a group of individuals that can act as consumers, but concentrates in the act itself⁵, establishing that when a product or service is acquired or used by a natural person or a legal entity, and by that person or entity applied or received to its purpose of existence, that situation must be qualified as consumers' situation.

Consequentially, a wide number of people or entities will be considered consumers, in not worldwide spread manner.

This view, and protection decision, can be compared to the provision that emerges from the CoC text, there present for the purpose of exclusion from scope:

³ In Portuguese, the *Código de Defesa do Consumidor*, Statute # 8.078, of Sep.11, 1990; available at: http://www.planalto.gov.br/ccivil_03/LEIS/L8078.htm, access in: May23, 2016. An English translation prepared by the Government of the Brazilian state of Rio de Janeiro is available at: http://www.procon.rj.gov.br/procon/assets/arquivos/arquivos/CDC_Novembro_2014_Ingles.pdf, access in: May23, 2016. This translation will be the basis for this work.

More information directed to consumers is available at: http://www.justica.gov.br/seus-direitos/consumidor/educacao-para-o-consumo/guia-do-consumidor-estrangeiro/anexos-1/guia_eng.pdf, access in: May23, 2016.

⁴ Article 5.XXXII - *the State shall provide, as set forth by law, for the defense of consumers.* English translation of the Brazilian constitution is available at: http://bd.camara.gov.br/bd/bitstream/handle/bdcamara/1344/constituicao_ingles_4ed.pdf?sequence=19, access in: May23, 2016.

⁵ The wide range of potential consumers that are protected by this provision can be understood through the statement of Prof. Claudia Lima Marques (*Contratos no Código de Defesa do Consumidor*. 6ª e. São Paulo: Editora Revista dos Tribunais, 2011, p. 343: *...the one that puts an end to the production chain...*

Article 2 - Exclusions from scope

(1) This Convention shall not apply to exclusive choice of court agreements –

a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party;[...]

A quick and not exhaustive comparison would easily establish that the group of consumers protected in Brazilian law is wider than that referred in CoC text. Some exclusions that the CoC definition establishes from Brazilian referred group can be listed:

- 1. Legal entities*
- 2. Natural person acting on the purpose of a natural person not related to his family*
- 3. Natural person that benefits from or is harmed by the product or service and is not directly related to the supplier*
- 4. Natural person acting for professional purposes not directly related to the product or service provided*

This difference on group of people covered by consumer's protection is relevant to the current discussions in the Special Commission on the Judgments Project. One might read the provisions on the CoC Convention and conclude that all consumer situation would be excluded from scope of that. The Brazilian definition of consumer evidences that some relationships that may be labeled as consumer situations can benefit from the CoC system of circulation of foreign judgments.

Relationship between CoC and the Judgments Project on consumers

The CoC convention is aimed at voluntary relationships. The will of parties to submit their judicial complaints to certain court is of value, as it is their will to engage in contract and provide for its conditions; those are assumptions not declared in the text.

It is inherent to consumer protection that will of parties engaging in a consumer's situation do not be of prominent value to establish legal consequences; this perception is often referred as the *presumption of the consumer's vulnerability*. In fact, Brazilian view of consumer protection allows for qualifying a situation as consumer's one where the parties did not choose to engage in a voluntary relationship with each other. The prototype of such occurrence is known in Brazil as the "bystander" case, as where a person is walking nearby a store and is hit by an object that was being demonstrated by the supplier to a potential buyer. Those cases, however, shall not be recognized as consumer ones on the current draft text, since the reading of Article 5.2 refers only *consumer contracts*, indicating a level of voluntary engagement to qualify for the enforcement of the provision.

Coherent to such a view, the CoC listed some consumer cases with the exclusions of scope, trying to remove consumer situations (that are not qualified primarily by the will of parties to engage in a trade relationship) from the range of cases that would benefit from the circulation of judgments. The strong value of parties will in the CoC system demands this decision.

The future document foreseen by the Judgments Project does not limit itself to such a view. The will of parties engaged in the relevant situation is not the primary value to establish

pertain to the system: the availability of the system to judgments awarding damages⁶ confirms this perception.

Thus, the main concern in the CoC system is to remove consumers from scope. That concept was reviewed by the Working Group on the Judgments Project, which foresaw value in establishing availability of facilitated circulation of judgments in consumer cases⁷. This decision is relevant in an international legal environment that still has not reached any way to put forward cooperation in such cases.

The technique to deal with the issue must be different, however. Whilst in the CoC system the action sought is exclusion, in the future Judgments Project document the action sought is inclusion. The relevant issue is: to what extent? The immediate answer, following the guidance of the “mirror convention” principle⁸, was to reproduce the definition of consumer stated in the CoC exclusions of scope, as it was adopted in initial phases of the Working Group consignment as also an exclusion of scope. The decision to include consumers situations within the system of the new document conducted to delete the provision on the exclusions of scope (that mirrored the CoC), leading to a lack of a definition of consumer for the purposes of the foreseen convention. This document aims to fill this emptiness.

The need of a clear statement on the “consumer” definition

The issue of consumer situations was addressed in the draft text by means of restricting judgments *rendered against the consumer* that would benefit from the enhanced circulation⁹. The judgments *rendered in favor of consumers* would circulate following general provisions of Article 5.1.

Two main objections, among others, may be addressed to that solution. The first, informed by the sense of privilege to the consumer in face of the supplier, is tackled by the perception

⁶ See Article 5.f and Article 9 of the Draft Text provided by the Working Group on the Judgments Project, presented as an annex to the final report, available at: <https://assets.hcch.net/docs/01adb7d9-13f3-4199-b1d3-ca62de79360f.pdf>, access in: May23, 2016.

⁷ As stated in p.26 of the *Explanatory Note* from the Permanent Bureau, available at: <https://assets.hcch.net/docs/e402cc72-19ed-4095-b004-ac47742dbc41.pdf>, access in: May23, 2016: [...] *the recognition and enforcement of judgments on consumer [...] matters is uncontroversial, and thus appropriate for including in the future Convention.*

⁸ The Working Group final report (see footnote 6 above) referred that the work *proceeded on the basis that the future Convention should [...] be a complementary Convention to the Choice of Court Convention* (p. 4).

⁹ From the *Explanatory Note* from the Permanent Bureau, p. 26-27:

137. *This provision [from Article 5.2] proceeds on the basis that:*

a. it is desirable to provide for recognition and enforcement of judgments in favour of consumers [...]. In this respect, there is no reason to limit the application of the jurisdictional filters.

b. On the other hand, when judgments are rendered against consumers [...], the application of the jurisdictional filters has been modified to reflect and accommodate the concerns of some States with respect to the protection of consumers [...]. Most of the filters remain applicable. But taking into account the special provision that is made for claims concerning these matters in certain jurisdictions, the Proposed Draft Text creates specific exceptions with regard to the recognition and enforcement of judgments rendered against consumers [...].

stated above in topic *Relationship between CoC and the Judgments Project on consumers*, applying the *presumption of the consumer's vulnerability*.

The second objection asks why not all judgments in favor of a consumer might circulate. This is a policy decision¹⁰, since the difference of consumer protection within several States that would adhere to the future convention demands restriction to some precise cases. The instrument available in the construction of the draft text for that purpose are the jurisdictional filters provisions (Article 5.1), and that was applied to guarantee that common recognized grounds of jurisdiction (as "habitual residence" of the defendant, or voluntary submission) met in a case solved in favor of a consumer would circulate to the full extent of the future instrument system. That objection may emerge from those that would like a wider circulation of judgments, discarding the strong link that the instrument has to the definition of jurisdictional filters.

Hence, a definition of *consumer* follows that policy decision to establish precise cases of circulation, to establish certainty for those engaged in international litigation, providing limited hypothesis for refusal of recognition or enforcement.

Text to be submitted

Brazilian view of the issue supports adoption of the *act of consumption* technique, introducing a piece of text within Article 3.1 to resemble Brazilian solution to the issue. The approach extends the concept of consumer to all those that fit the *final user* clause¹¹, restricting circulation of judgments rendered against people under that situation, thus providing more protection. Adoption of that solution has the value of moving the discussion from *the person on the consumer situation* to *the act of final consumption*, providing an easier way to establish evidence, even in those cases not recognized as consumer ones on the State of origin.

Suggested adding is:

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

¹⁰ As stated in p.4 of the *Explanatory Note* from the Permanent Bureau, available at: <https://assets.hcch.net/docs/e402cc72-19ed-4095-b004-ac47742dbc41.pdf>, access in: May23, 2016:

18. The Working Group proceeded on the basis that the future Convention should contain an efficient system for the recognition and enforcement of foreign judgments in civil and commercial matters, one that will provide for circulation of judgments in circumstances that the Working Group considered uncontroversial. The Proposed Draft Text thus provides 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 (Art. 5) and sets out the only grounds on which recognition and enforcement of such judgments may be refused.[...]

¹¹ See above, item *Brazilian view on the consumer definition*.

recognised or enforced under this Convention. An interim measure of protection is not a judgment.

c) “consumer” is a person or a legal entity that acquires or uses a product or service as a final user. [...]

In a final commentary, the adoption of the more restrictive definition that mirrors the CoC provision may have the undesired effect of allowing circulation of judgments rendered against people that engaged in *consumer like* situations, without the protection constructed through restriction of recognition or enforcement on the basis of jurisdictional filters by Article 5.2. Such case would be where a person acting not in the scope of the clause *primarily for personal, family or household purposes*, as if awarding a birthday gift to a friend, is subject to a judgment that commands relief of damages experienced by the supplier: in that case the judgment would circulate under the general rules of jurisdictional filters of Article 5.1, some of them expressly removed on the perspective of consumer protection.

Final statement

In the hope that this proposal helps to enhance the quality of the discussion of the issue, and the protection of consumers worldwide, the Brazilian delegation submits it to the Special Commission.

The only point of contact with the *Protection of Tourists* proposal is the availability of the *enhanced access to justice* desired by the new instrument to any relief obtained by a tourist with the assistance of that proposal’s provisions.