

Council on General Affairs and Policy of the Conference – March 2017

Document	Preliminary Document <input checked="" type="checkbox"/> Procedural Document <input type="checkbox"/> Information Document <input type="checkbox"/>	No 1 A of January 2017
Title	Judgments Project: Report on Special Commission meeting of June 2016 and next steps	
Author	Permanent Bureau	
Agenda item	Item IV.1	
Mandate(s)	C&R Nos 11-14, in particular No 12, of the 2016 Council on General Affairs and Policy	
Objective	To report on the first outcomes of the Special Commission on the Judgments Project	
Action to be taken	For Approval <input type="checkbox"/> For Decision <input checked="" type="checkbox"/> For Information <input type="checkbox"/>	
Annexes	2016 preliminary draft Convention	
Related documents	n.a.	

A. Introduction

1. In March 2016, the Council on General Affairs and Policy (“the Council”) decided to set up a Special Commission on the Judgments Project (“the Special Commission”) “to prepare a draft Convention and instructed the Secretary General to convene the first meeting in June 2016 (and tentatively a second meeting in February 2017)”.¹ The Council “endorsed the recommendation of the Working Group that matters relating to direct jurisdiction (including exorbitant grounds and *lis pendens* / declining jurisdiction) should be put for consideration to the Experts’ Group of the Judgments Project with a view to preparing an additional instrument. The Experts’ Group will be convened soon after the Special Commission has drawn up a draft Convention”.²

2. This document concisely reports the most important developments in the context of the Judgments Project,³ since the last meeting of the Council until January 2017.⁴ Members were informed of the outcomes of the first meeting of the Special Commission with L.c. ON No 29(16) of 17 June 2016. The purpose of this document is to proceed to inform the Council about the results so that proceedings are complete.

3. From 1 to 9 June 2016, the Special Commission met in The Hague. The Special Commission was attended by 153 participants from 53 States and one Regional Economic Integration Organisation (“REIO”), representing Members of the Hague Conference on Private International Law, and a select number of non-Member States, and 16 international governmental and non-governmental organisations.

B. Main results of the June 2016 meeting

4. The Special Commission appointed:

- a) Mr David Goddard QC of the New Zealand delegation as the Chair of the Special Commission;
- b) Mr Boni de M. Soares of the Brazilian delegation, Mr Ang Sun of the Chinese delegation and Mr Paul Herrup of the delegation of the United States of America as the Vice-Chairs of the Special Commission;
- c) Ms Geneviève Saumier of the Canadian delegation and Mr Francisco Garcimartín Alférez of the Spanish delegation as *Co-Rapporteurs* of the draft Convention; and
- d) Mr Fausto Pocar of the Italian delegation as Chair of the Drafting Committee.

5. The Special Commission discussed all of the provisions in the Proposed Draft Text, and on that basis, agreed upon a preliminary draft Convention (the “2016 preliminary draft Convention”), which is annexed to this Report (see Annex I, that reproduces the text set out in Working Document No 76 E revised).

6. All Working Documents for the attention of the Special Commission are available on the Secure Portal for the National and Contact Organs of the Members and the participants in the June 2016 meeting of the Special Commission. The documents uploaded to the Secure Portal will remain available with a view to the second meeting of the Special Commission.

7. The 2016 preliminary draft Convention will be further discussed and reviewed at the second meeting of the Special Commission, which will take place in The Hague from 16 to 24 February 2017. The Special Commission will then attempt to complete a first comprehensive text of a preliminary draft Convention and will report on progress made to the Council by means of a report (Prel. Doc. 1B for the attention of the Council of March 2017 on General Affairs and Policy of the Conference, to be expected by early March 2017 at the latest).

¹ “Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (15-17 March 2016)”, C&R No 12.

² *Ibid.*, C&R No 13.

³ “Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (17-20 April 2012)”, C&R No 17.

⁴ This document was finalised in January 2017.

8. Depending on the outcome of the discussions and progress made during that meeting, the Special Commission may also be in a position to discuss the nature and timing of the “next steps” towards the successful conclusion of the Convention.

ANNEX

2016 PRELIMINARY DRAFT CONVENTION*

* This Annex reproduces the text set out in Working Document No 76 revised

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 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 or associations of natural or 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. 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.
5. 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.
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. If a judgment referred to in paragraph 3 is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired, the court addressed may –
 - a) grant recognition or enforcement, which enforcement may be conditional on the provision of such security as it shall determine;
 - b) postpone the recognition or enforcement; or
 - c) refuse the recognition or enforcement.

A refusal under sub-paragraph c) does not prevent a subsequent application for recognition or enforcement of the judgment.

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) 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;
- [b) the natural person against whom recognition or enforcement is sought had his or her principal place of business 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 business;]
- c) the person against whom recognition or enforcement is sought is the person that brought the claim on which the judgment is based;
- d) 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;
- e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;
- [f) the defendant entered an appearance before the court of origin without contesting jurisdiction at the first opportunity to do so, if the defendant would have had an arguable case that there was no jurisdiction or that jurisdiction should not be exercised under the law of the State of origin;]
- g) the judgment ruled on a contractual obligation and it was given in the State in which performance of that obligation took place or should have taken place under the parties' agreement, or, in the absence of an agreed place of performance, 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;
- h) the judgment ruled on a tenancy of immovable property and it was given in the State in which the property is situated;
- [i) the judgment ruled on a contractual obligation secured by a right in rem in immovable property, if the claim was brought together with a claim relating to that right and the immovable property was located in the State of origin;]
- j) 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;
- k) the judgment ruled on an infringement of a patent, trademark, design, [plant breeders' right,] 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, or is deemed to have taken place under the terms of an international or regional instrument;
- l) the judgment ruled on the validity, [ownership, subsistence] or infringement of copyright or related rights [or other intellectual property rights not required to be [deposited or] registered] and the right arose under the law of the State of origin;
- m) 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 aspect of the trust that is the subject of the litigation that gave rise to the judgment; 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.

This sub-paragraph only applies to judgments between persons bound by the terms of a trust regarding internal aspects of that trust.

- [n) the judgment ruled on a counterclaim –
 - (i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim;
 - (ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion.]
- [o) the judgment revised or overturned a previous judgment that was eligible for recognition and enforcement in accordance with this Convention and was given by a court of the State that gave such previous judgment.]

2. If recognition or enforcement is sought against a natural person acting primarily for personal, family or household purposes (a consumer) in matters relating to a consumer contract, or against an employee in matters relating to the employee's contract of employment –

- a) sub-paragraph 1 e) applies only if the consent was given before the court;
- b) sub-paragraph 1 g) 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[, plant breeders' rights,] 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 shall be recognised and enforced if and only if the property is situated in the State of origin;
- c) a judgment that ruled on a tenancy of immovable property for a period of more than six months shall not be recognised and enforced if the property is not situated in the State of origin and the courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State.

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;
 - 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 [and situations involving infringements of security or sovereignty 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 subject matter, 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 on the same subject matter are pending before a court of the requested State, where –

- a) the court of the requested State was seised before the court of origin; and
- b) there is a close connection between the dispute and the requested State.

A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

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 3, or on a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled.

3. However, in the case of a ruling on the validity of a right referred to in Article 6, paragraph a), recognition or enforcement of a judgment may be refused or postponed under the preceding paragraph only where –

- a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State referred to in Article 6, paragraph a); or
- b) proceedings concerning the validity of that right are pending in that State.

A refusal under sub-paragraph b) does not prevent a subsequent application for recognition or enforcement of the judgment.

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[, provided that such settlement is permissible under the law of the requested State].

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
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.]

Article 14
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 15
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 16
Recognition or enforcement under national law

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