Consultation Paper No. 2
on
2018 Draft Convention on the Recognition and Enforcement of Foreign Judgments

International Law Division
Department of Justice
Hong Kong Special Administrative Region
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Summary

1. In October 2016, the Department of Justice of the Government of the Hong Kong Special Administrative Region ("HKSAR") launched the first public consultation on "The 2016 Preliminary Draft Convention on the Recognition and Enforcement of Foreign Judgments" ("Preliminary Draft Convention").

2. The purpose of the first consultation was to gauge views of members of the public on the Preliminary Draft Convention prepared by the Special Commission set up by the Hague Conference on Private International Law ("Hague Conference") after the conclusion of the first meeting of the Special Commission in June 2016.

3. The views given by different sectors of the community on the Preliminary Draft Convention in the first consultation have been taken into account in formulating the HKSAR's position on various issues in the subsequent meetings of the Special Commission in February 2017, November 2017 and May 2018 respectively.

4. At its May 2018 meeting, the Special Commission prepared a revised draft of the Convention ("2018 Draft Convention") with square brackets which indicate key areas that require further consultation and discussion. The work of the Special Commission has now reached the point where a Diplomatic Session will be convened in mid-June 2019 with a view to adopting the 2018 Draft Convention (subject to necessary modifications) by Member States of the Hague Conference.

5. If the 2018 Draft Convention is adopted by the Hague Conference at the Diplomatic Session, the HKSAR Government will consider its application to the HKSAR after assessing the views of interested parties and the provisions of the finalised Convention.

6. As it is envisaged that the HKSAR will be represented at the Diplomatic Session as part of the Chinese delegation,[1] we are now seeking comments on the 2018 Draft Convention and the subjects discussed in this paper for the preparation of the Diplomatic Session.

7. This paper sets out the key outstanding issues of the 2018 Draft Convention and seeks comments from interested parties, by 31 March 2019. The 2018 Draft Convention is reproduced in the Appendix, which may also be downloaded from the website of the Hague Conference.[2] This consultation paper may also be found on the website of the Department of Justice.[3] Useful references may be made to the Explanatory Report on the 2005 Convention on Choice of Court Agreements ("Choice of Court Convention")[4], and the Revised Preliminary Explanatory Report of the 2018 Draft Convention[5] which is subject to updates by the co-rapporteurs to the Special Commission before the Diplomatic Session.

8. Comments may be addressed to the Treaties and Law Unit, International Law Division, Department of Justice, 7th Floor, Main Wing, Justice Place, 18 Lower Albert Road, Hong Kong (fax no.: 3918 4791; email: ild@doj.gov.hk) before 31 March 2019. Inquiries on this subject should be directed to Ms Lorraine Chan, Deputy Principal Government Counsel / Treaties and Law (Acting) (tel: 39184305; email:lorrainechan@doj.gov.hk) of the Treaties and Law Unit, International Law Division, Department of Justice, also at the above address.

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[1] Membership of The Hague Conference is limited to sovereign States.

[2] The 2018 Draft Convention can be found on the Hague Conference's website at https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf

[3] This consultation paper may be found on the website of the Department of Justice at https://www.doj.gov.hk/eng/public/ild_consultationPaper.html

[4] The Explanatory Report on the 2005 Convention on Choice of Court Agreements drawn up by Professors Trevor C Hartley and Masato Dogauchi is available at this website: http://www.hcch.net/index_en.php?act=publications.details&pid=3959.

[5] The Revised Preliminary Explanatory Report on the 2018 Draft Convention prepared by Professors Francisco J. Garcimartín Alférez and Geneviève Saumier, co-rapporteurs to the Special Commission, is available at this website: https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf

Background

1. The Hague Conference on Private International Law ("Hague Conference") has been, since 1992, undertaking work on two key aspects of private international law in cross-border litigation in civil and commercial matters, namely, international jurisdiction of courts and recognition and enforcement of foreign judgments, commonly known as the Judgments Project.[6] Initially, the Hague Conference worked towards developing a comprehensive convention but due to the significant differences amongst States participating in the negotiation, it was subsequently scaled down to focus on international cases involving choice of court agreements, which led to the conclusion of the Choice of Court Convention.[7]

2. In 2011, the Council on General Affairs and Policy ("the Council"), the governing organ of the Hague Conference, agreed that an Experts' Group should be established to assess the possible merits of resuming the Judgments Project. In 2012, the Council established a Working Group to prepare proposals on the recognition and enforcement of judgments, including jurisdictional filters, and requested the Experts' Group to further study and discuss the desirability and feasibility of making provisions in relation to jurisdiction. In light of the useful progress made by the Working Group, particularly the completion by the Working Group of a proposed draft text of a future instrument,[8] the Council decided in 2016 to set up a Special Commission to prepare a draft *Convention on the Recognition and Enforcement of Foreign Judgments*. The main goals of the future convention are to enhance access to justice and facilitate cross-border trade and investment by reducing costs and risks associated with cross-border dealings. It is expected that the future convention, if widely accepted on a global basis, will also facilitate trade and investment as well as international

[6] More details about the Judgments Project can be found on the Hague Conference's website at: https://www.hcch.net/en/projects/legislative-projects/judgments

[7] The Choice of Court Convention can be found on the Hague Conference's website at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=98

[8] The Proposed Draft Text on the Recognition and Enforcement of Foreign Judgments can be found on the Hague Conference's website at- https://assets.hcch.net/docs/01adb7d9-13f3-4199-b1d3-ca62de79360f.pdf

dispute resolution because of the certainty and predictability that such a convention may bring.

3. The Judgments Project was originally started as a project on both direct jurisdiction and recognition and enforcement of judgments, but was later focusing solely on recognition and enforcement. However, the work on direct jurisdiction is intended to be resumed following the completion of the mandate of the Special Commission.

Future Convention

4. Therefore, the future convention is not concerned with matters of direct jurisdiction and will only focus on recognition and enforcement of judgments between Contracting States. It seeks to set out the minimum requirements for the courts of one Contracting State to recognise and enforce a judgment rendered in another Contracting State. In other words, if the criteria set out in the future convention are met, the judgment must be recognised and enforced. However, if the criteria are not met, it would be open to the State addressed to decide whether the judgment should be recognised and enforced under its domestic law, except matters regarding intellectual property and immovable property.[9] The future convention is also intended to sit alongside, and complement, the Choice of Court Convention.

Previous Consultation

5. The Special Commission which was tasked to prepare the future convention convened its first meeting in June 2016. At the conclusion of its first meeting, the Preliminary Draft Convention was prepared. The Department of Justice therefore conducted a public consultation on the text of the Preliminary Draft Convention in October 2016, the outcome of which assisted the Department of Justice in formulating the HKSAR's position on various issues in the subsequent meetings of the Special Commission in February 2017[10], November 2017[11] and May 2018 respectively.

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[9] See Article 6 of the 2018 Draft Convention.

[10] At the conclusion of its meeting in February 2017, the Special Commission prepared the February 2017 Draft Convention, which is available at:-

New Development

6. At the meeting in May 2018, the 2018 Draft Convention was prepared with square brackets which indicated key areas for further consultation and discussion. There was also general agreement that the Special Commission's work reached the point where a Diplomatic Session could be convened in mid-2019 with a view to adopting the 2018 Draft Convention (subject to necessary modifications).

HKSAR's Participation

7. Membership of the Hague Conference is limited to States. The Department of Justice's representative will participate in the Diplomatic Session (in mid-June 2019) as part of the Chinese delegation. It is envisaged that the Government of the HKSAR will continue to be represented in the work of the Hague Conference in this project until its conclusion.

8. Once the 2018 Draft Convention has been adopted (with modifications made at the Diplomatic Session), the HKSAR Government will consider the question of its application to the HKSAR after making an assessment of the provisions of the finalised Convention and the views of the interested parties.

2018 Draft Convention

9. The Appendix to this paper is the 2018 Draft Convention. In many instances, the draft clauses represent a difficult compromise after intensive discussions among members of the Special Commission who represent different legal systems and interests of Member States of the Hague Conference. On the other hand, square brackets can be found in a number of draft articles. They represent proposals, alternatives and

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https://assets.hcch.net/docs/d6f58225-0427-4a65-8f8b-180e79cafdbb.pdf

[11] At the conclusion of its meeting in November 2017, the Special Commission prepared the November 2017 Draft Convention, which is available at:-
https://assets.hcch.net/docs/2f0e08f1-c498-4d15-9dd4-b902ec3902fc.pdf

options which have been discussed in the meetings of the Special Commission, for which a clear consensus is yet to be reached. The contents of the square brackets will be further discussed and considered in the Diplomatic Session in mid-June 2019.

The Structure of the 2018 Draft Convention

10. The 2018 Draft Convention contains 32 Articles under four Chapters. The first three Articles under Chapter I define its scope and provide definitions for some important terms. The next 13 Articles under Chapter II deal with matters in connection with the bases for recognition and enforcement of foreign judgments and grounds for refusal of recognition or enforcement. The other 8 Articles under Chapter III and 8 Articles under Chapter IV deal with general clauses and final clauses respectively.

Key Outstanding Issues

Scope of the Convention

11. The 2018 Draft Convention shall apply to the recognition and enforcement of judgments relating to civil or commercial matters and only focus on recognition and enforcement of judgments between Contracting States. Articles 1 and 2 of the 2018 Draft Convention set out the scope of the draft Convention with a list of excluded matters.

12. The Special Commission considered that regarding the scope of the future convention, the following matters, in particular, would require further discussion and consultation.

(a) Privacy

13. Article 2(1)(l) of the 2018 Draft Convention proposes to exclude “privacy” or “privacy, except where the proceedings were brought for breach of contract between the parties” from its scope . The rationale for the proposed exclusion is that “privacy” is a matter where judicial decisions are usually based on a delicate balance between constitutional rights, and is therefore a sensitive matter for many States.

(b) Intellectual Property

14. Article 2(1)(m) of the 2018 Draft Convention proposes to exclude "intellectual property" or "intellectual property and analogous matters[12]" from its scope.

15. There are basically two main approaches which have been identified in previous Special Commission meetings on how to deal with "intellectual property" in the future convention. The first one is to exclude "intellectual property" entirely from the scope of the future convention, and the second one is to include certain intellectual property matters within the scope of the future convention. The former approach for total exclusion is based on the "territoriality" nature of intellectual property matters, and the concern of unforeseeable changes that may be brought to a Contracting State's domestic laws. The latter approach for inclusion contains various options ranging from total inclusion of all intellectual property matters to partial inclusion of certain intellectual property matters only.

16. The proposals in Article 2(1)(m) of the 2018 Draft Convention should also be read together with the related provisions in Articles 5(3), 6(a), 7(1)(g), 8(3) and 11 of the 2018 Draft Convention.

17. In light of the above, the relevant issues include:-

(i) Should "intellectual property" be excluded from the scope of the future convention in its entirety or not? If the answer is in the affirmative, should "analogous matters" be also excluded?

(ii) Should the meanings of "court" and "decision" be extended to cover respectively "competent authority" and "decision made by a competent authority" given that in some jurisdictions, a decision on intellectual property is made by a competent authority rather than a court?

[12] For the meaning of "analogous matters", experts from the United States proposed some basic core concepts, such as exclusive rights that would be recognised by a sovereign State, limited to a specific territory, and related to an intangible property. These matters could include patents, industrial designs, trademarks, geographical indications, copyright and related rights, trade secrets and confidential business information, plant variety rights, traditional knowledge, and the like.

(iii) Should a judgment ruling on an infringement be recognised and/or enforced only to the extent that it rules on a monetary remedy in relation to harm suffered in the State of Origin as proposed in Article 11 of the 2018 Draft Convention?

(iv) If intellectual property matters are included within the scope of the future convention, should a declaration mechanism be put in place to allow Member States to opt out these matters?

(c) Activities of Armed Forces and Law Enforcement Personnel

18. Article 2(1)(n) and (o) of the 2018 Draft Convention propose to exclude "activities of armed forces, including the activities of their personnel in the exercise of their official duties" and "law enforcement activities, including the activities of law enforcement personnel in the exercise of official duties" from the scope of the future convention. Should such matters be excluded from the scope? In this connection, consideration may also be given to whether a declaration mechanism should be put in place to allow Contracting States to opt in or opt out the inclusion or exclusion of these matters.

(d) Anti-trust (Competition) Matters

19. Article 2(1)(p) of the 2018 Draft Convention proposes to exclude "anti-trust (competition) matters" from its scope . However, in connection with this matter, the relevant issues include:

(i) Should "anti-trust (competition) matters" be totally excluded from the scope of the future Convention, or should only certain aspects of anti-trust (competition) matters be excluded? If the latter approach is to be adopted, what are those excluded aspects of anti-trust (competition) matters?

(ii) Should a judgment ruling on anti-trust (competition) matters be refused to be recognised or enforced if it rules on a non-monetary remedy?[13]

[13] Article 11 of the 2018 Draft Convention provides that "[In intellectual property matters, a judgment ruling on an infringement shall be [recognised and] enforced only to the extent that it rules on a monetary remedy in relation to harm suffered in the State of Origin.]" A similar provision may be considered for excluding non-

Recognition and Enforcement

20. Article 4 of the 2018 Draft Convention sets out the general provisions regarding the recognition and enforcement of a foreign judgment. The bases for recognition and enforcement (also referred to as "indirect jurisdiction" or "jurisdictional filter") are listed in Article 5 whereas the grounds on which a judgment may be refused to be recognised or enforced are listed in Article 7.

(a) Common Court

21. In its May 2018 meeting, the Special Commission discussed whether a judgment made by a "common court" (e.g. the European Court of Justice) should be deemed to be a judgment given by a court of a Contracting State covered by the future convention and be recognised and enforced by the requested State. The proposals are now included in Article 4(5) of the 2018 Draft Convention for further discussion and consideration.[14]

22. Article 4(5) of the 2018 Draft Convention includes two parts: The first part is on the meanings and scopes of a common court and the recognition and enforcement of a decision made by a common court in accordance with the provisions of the future convention. The second part includes a declaration mechanism for opting out or opting in the recognition and enforcement of a judgment made by a common court. In this connection, the relevant issues are:-

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monetary remedies in connection with judgments ruling on anti-trust (competition) matters, if the policy so decides. On this issue of proposed exclusion of anti-trust (completion) matters, reference may be made to the paper titled "The possible exclusion of anti-trust matters from the Convention as reflected in Article 2(1)(p) of the 2018 draft Convention" by Ms Cara North available at https://assets.hcch.net/docs/dcd7c92a-d3fd-46a5-bae5-627ff1636003.pdf.

[14] The Special Commission noted that:

(i) a common court may perform different roles (e.g. first instance, appellate);

(ii) international courts which do not exercise the jurisdiction of a State, but rather exercise jurisdiction over Sates on matters of public international law (e.g. the International Court of Justice and the European Court of Human Rights), will not be covered by any provision concerning common courts; and

(iii) it will be rare for questions of enforcement to arise before a common court, but that questions of recognition remain as relevant for common courts as they do for other courts of a Contracting State.

(i) Should a judgment made by a common court be deemed to be a judgment given by a court of a Contracting State and covered by the future convention?

(ii) Should a declaration mechanism be put in place to allow member States to opt in or opt out recognition and enforcement of a judgment made by a common court?

General Clauses

23. The following general clauses and related key issues, in particular, will require further deliberation at the Diplomatic Session.

(a) Declarations with Respect to Judgments Pertaining to Governments

24. Should a Contracting State be allowed to declare that the future convention will not apply to any judgments pertaining to governments as provided for in Article 20 of the 2018 Draft Convention? If the answer is in the affirmative, should there be any need to limit the scope of such declaration? For example, it is currently proposed that such declaration may not exclude from the application of the future convention judgments arising from proceedings to which an enterprise owned by a State is a party (Article 20(2)).

(b) Relationship with Other International Instruments

25. Article 24 of the 2018 Draft Convention on “Relationship with other international instruments” deals with the relationship between the future convention and the treaties concluded before or after the future convention. The outstanding questions include :

(i) Should “other international instrument” be included in addition to “treaty” (see Article 24(2) and (3) of the 2018 Draft Convention)?

(ii) Should the future convention affect the application by a Contracting State of a treaty (or other international instrument) concluded before the future convention and entered into force for that Contracting State as between the

Parties to that instrument (see Article 24(2) of the 2018 Draft Convention)?

(iii) Should the treaty (or other international instrument) concluded after the future convention and entered into force for a Contracting State affect the obligations on matters under Article 6 (which concern exclusive bases for recognition and enforcement) towards Contracting States that are not Parties to that instrument (see Article 24(3) of the 2018 Draft Convention)?

(iv) Should a Contracting State be allowed or required to list in a declaration other international instruments which shall remain unaffected by the future convention (see Article 24(5) of the 2018 Draft Convention)?

Views and Comments

26. Views and comments on the 2018 Draft Convention are now invited. They will be taken into account in formulating the HKSAR's position on the various issues in preparation for the Diplomatic Session to be held in mid-June 2019.

27. In particular, we invite comments on the key outstanding issues identified above such as: -

- The proposals to exclude "privacy" matters (see paragraph 13 above)

- The proposals to exclude "intellectual property" matters (see paragraphs 14 to 17 above)

- The proposals to exclude "activities of armed forces and law enforcement personnel" (see paragraph 18 above)

- The proposals to exclude "anti-trust (competition)" matters (see paragraph 19 above)

- The proposals to extend the future convention to cover judgment made by a common court (see paragraphs 21 to 22 above)

- The proposals on the provision regarding “Declarations with respect to judgments pertaining to governments” (see paragraph 24 above)

- The proposals on the provision regarding “Relationship with other international instruments” (see paragraph 25 above)

28. Views and comments may be addressed to the International Law Division, Department of Justice, 7th Floor, Main Wing, Central Government Offices, 18 Lower Albert Road, Hong Kong (fax no.: 3918 4791; email: ild@doj.gov.hk) before 31 March 2019. Inquiries on this subject should be directed to Ms Lorraine Chan, Deputy Principal Government Counsel / Treaties and Law (Acting) (tel: 3918 4305; email:lorrainechan@doj.gov.hk) of the International Law Division, Department of Justice.

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Department of Justice
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APPENDIX

2018 DRAFT CONVENTION

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 by a court of 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, resolution of financial institutions, 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;

[(l) privacy[, except where the proceedings were brought for breach of contract between the parties];]

[(m) intellectual property [and analogous matters];]

[(n) activities of armed forces, including the activities of their personnel in the exercise of their official duties;]

[(o) law enforcement activities, including the activities of law enforcement personnel in the exercise of official duties;]

[(p) anti-trust (competition) matters].

2. A judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings. In particular, the mere fact that such a matter 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 that decision 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. There shall be no review of the merits of the judgment in the requested State.[This does not preclude such examination as is necessary for the application of this Convention.]

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 made subject to the provision of such security as it shall determine;

(b) postpone the decision on recognition or enforcement; or

(c) refuse recognition or enforcement.

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

[[5. For purposes of paragraph 1, a judgment given by a court common to two or more States shall be deemed to be a judgment given by a court of a Contracting State if the Contracting State has identified the common court in a declaration to that effect, and either of the following conditions are met –

(a) all members of the common court are Contracting States whose judicial functions in relation to the relevant matter are exercised by the common court, and the judgment is eligible for recognition and enforcement under Article 5(1)(c), (e), (f), (l), or (m); or

(b) the judgment is eligible for recognition and enforcement under another sub-paragraph of Article 5(1)[, Article 5(3),] or under Article 6, and those eligibility requirements are met in a Contracting State whose judicial functions in relation to the relevant matter are exercised by the common court.]

OR

[5. For purposes of paragraph 1, a judgment given by a court common to two or more States shall be deemed to be a judgment given by a court of a Contracting State if the Contracting State has identified the common court in a declaration to that effect, and either of the following conditions are met –

(a) all members of the common court are Contracting States whose judicial functions in relation to the relevant matter are exercised by the common court, and the judgment is eligible for recognition and enforcement under Article 5(1)(c), (e), (f), (l), or (m); or

(b) the judgment is eligible for recognition and enforcement under another sub-paragraph of Article 5(1)[, Article 5(3),] or under Article 6, and those eligibility requirements are met in a Contracting State whose judicial functions in relation to the relevant matter are exercised by the common court.

6. A Contracting State may declare that it shall not recognise or enforce judgments of a common court that is the object of a declaration under paragraph 5 in respect of any of the matters covered by that declaration.

or

6. The declaration referred to in paragraph 5 shall have effect only between the Contracting State that made the declaration and other Contracting States that have declared their acceptance of the declaration. Such declarations shall be deposited at the Ministry of Foreign Affairs of the Netherlands, which will forward, through diplomatic channels, a certified copy to each of the Contracting States.]]

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, other than a counterclaim, 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 argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;

(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, in accordance with

(i) the parties' agreement, or

(ii) the law applicable to the contract, in the absence of an agreed place of performance,

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 against the defendant on a contractual obligation secured by a right *in rem* in immovable property located in the State of origin, if the contractual claim was brought together with a claim against the same defendant relating to that right *in rem*;

(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 concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and –

(i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in which disputes about such matters are to be determined; or

(ii) at the time the proceedings were instituted, the State of origin was 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 regarding internal aspects of a trust between persons who are or were within the trust relationship;

(l) 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;

(m) the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement.

For the purposes of this sub-paragraph, an "exclusive choice of court agreement" means an agreement concluded by two or more parties that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction of any other courts.

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) paragraph 1(e) applies only if the consent was addressed to the court, orally or in writing;

(b) paragraph 1(f), (g) and (m) do not apply.

[3. Paragraph 1 does not apply to a judgment that ruled on an intellectual property right or an analogous right. Such a judgment is eligible for recognition and enforcement if one of the following requirements is met –

(a) the judgment ruled on an infringement in the State of origin of an intellectual property right required to be granted or registered and it was given by a court in the State in which the grant or registration of the right concerned has taken place or, under the terms of an international or regional instrument, is deemed to have taken place[, unless the defendant has not acted in that State to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State];

(b) the judgment ruled on an infringement in the State of origin of a copyright or related right, an unregistered trademark or unregistered industrial design, and it was given by a court in the State for which protection was claimed[, unless the defendant has not acted in that State to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State];

(c) the judgment ruled on the validity[, subsistence or ownership] in the State of origin of a copyright or related right, an unregistered trademark or unregistered industrial design, and it was given by a court in the State for which protection was claimed.]

Article 6
Exclusive bases for recognition and enforcement

Notwithstanding Article 5 –

[(a) a judgment that ruled on the [registration or] validity of an intellectual property right required to be granted or registered shall be recognised and enforced if and only if the State of origin is the State in which grant or registration has taken place, or, under the terms of an international or regional instrument, is deemed to have taken place;]

(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;

[(g) the judgment ruled on an infringement of an intellectual property right, applying to that [right / infringement] a law other than the internal law of the State of origin.]

2. Recognition or enforcement may be postponed or refused 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. A ruling on a preliminary question shall not be recognised or enforced under this Convention if the ruling is on a matter to which this Convention does not apply or on a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled.

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 to which this Convention does not apply, 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 postponed, or refused 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
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 10
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 11
Non-monetary remedies in intellectual property matters

In intellectual property matters, a judgment ruling on an infringement shall be [recognised and] enforced only to the extent that it rules on a monetary remedy in relation to harm suffered in the State of origin.]

Article 12
Judicial settlements (transactions judiciaires)

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, 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 13
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 12, 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 14
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 15
Costs of proceedings

1. 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.

2. An order for payment of costs or expenses of proceedings, made in a Contracting State 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 in any other Contracting State.

3. A State may declare that it shall not apply paragraph 1 or designate by a declaration which of its courts shall not apply paragraph 1.

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.

CHAPTER III – GENERAL CLAUSES

Article 17
Transitional provision

This Convention shall apply to the recognition and enforcement of judgments if, at the time the proceedings were instituted in the State of origin, the Convention was in force in that State and in the requested State.

Article 18
Declarations limiting recognition and enforcement

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the court of origin, were connected only with the requested State.

Article 19
Declarations with respect to specific matters

1. Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

2. With regard to that matter, the Convention shall not apply –

(a) in the Contracting State that made the declaration;

(b) in other Contracting States, where recognition or enforcement of a judgment given in a Contracting State that made the declaration is sought.

[Article 20
Declarations with respect to judgments pertaining to governments

1. A State may declare that it shall not apply this Convention to judgments arising from proceedings to which any of the following is a party –

(a) that State, or a person acting on behalf of that State, or

(b) a government agency of that State, or a person acting on behalf of such a government agency.

The declaration shall be no broader than necessary and the exclusion from scope shall be clearly and precisely defined.

2. A declaration pursuant to paragraph 1 shall not exclude from the application of this Convention judgments arising from proceedings to which an enterprise owned by a State is a party.

3. If a State has made a declaration pursuant to paragraph 1, recognition or enforcement of a judgment originating from that State may be refused by another Contracting State if the judgment arose from proceedings to which that other Contracting State, one of its government agencies, or equivalent persons to those referred to in paragraph 1 is a party, to the same extent as specified in the declaration.]

Article 21
Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 22
Review of operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for –

(a) review of the operation of this Convention, including any declarations; and

(b) consideration of whether any amendments to this Convention are desirable.

Article 23
Non-unified legal systems

1. In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention –

(a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;

(b) any reference to habitual residence in a State shall be construed as referring, where appropriate, to habitual residence in the relevant territorial unit;

(c) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;

(d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.

2. Notwithstanding the preceding paragraph, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

3. A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

4. This Article shall not apply to a Regional Economic Integration Organisation.

Article 24
Relationship with other international instruments

1. This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2. This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] that was concluded before this Convention entered into force for that Contracting State [as between Parties to that instrument].

3. This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] concluded after this Convention entered into force for that Contracting State for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that instrument. [Nothing in the other instrument shall affect the obligations under Article 6 towards Contracting States that are not Parties to that instrument.]

4. This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

[5. A Contracting State may declare that other international instruments listed in the declaration shall remain unaffected by this Convention.]

CHAPTER IV – FINAL CLAUSES

Article 25
Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States.

4. Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 26
Declarations with respect to non-unified legal systems

1. If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. A declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3. If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.

4. This Article shall not apply to a Regional Economic Integration Organisation.

Article 27
Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3. For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 28, paragraph 1, that its Member States will not be Parties to this Convention.

4. Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation that is a Party to it.

Article 28
Accession by a Regional Economic Integration Organisation without its Member States

1. At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

2. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a “Contracting State” or “State” in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 29
Entry into force

1. This Convention shall enter into force on the first day of the month following the expiration of [three] [six] months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 25.

2. Thereafter this Convention shall enter into force –

(a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of [three][six] months after the deposit of its instrument of ratification, acceptance, approval or accession;

(b) for a territorial unit to which this Convention has been extended in accordance with Article 26 on the first day of the month following the expiration of [three] [six] months after the notification of the declaration referred to in that Article.

Article 30
Declarations

1. Declarations referred to in Articles [4,]15, 18, 19, [20,] [24,] 26 and 28 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2. Declarations, modifications and withdrawals shall be notified to the depositary.

3. A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of six months following the date on which the notification is received by the depositary.

5. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall not apply to judgments resulting from proceedings that have already been instituted before the court of origin when the declaration takes effect.

Article 31
Denunciation

1. This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 32
Notifications by the depositary

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles […] of the following –

(a) the signatures, ratifications, acceptances, approvals and accessions referred to in Article 25;

(b) the date on which this Convention enters into force in accordance with Article 29;

(c) the notifications, declarations, modifications and withdrawals of declarations referred to in Article 30; and

(d) the denunciations referred to in Article 31.