



Council of the
European Union

002287/EU XXVII. GP
Eingelangt am 11/11/19

Brussels, 11 November 2019
(OR. en)

13248/14
DCL 1

JUSTCIV 223

DECLASSIFICATION

of document:	13248/14 RESTREINT UE/EU RESTRICTED
dated:	16 September 2014
new status:	Public
Subject:	Judgments Project
	- Information note from services of the Commission

Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.

Council of the
European Union

Brussels, 16 September 2014

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RESTREINT UE/EU RESTRICTED

JUSTCIV 223

NOTE

from :	the services of the Commission
to :	Working Party on Civil Law Matters (General Questions)
Subject :	Judgments Project
	- Information note from services of the Commission

The purpose of this information note is to inform the delegations on the latest developments in the context of the "Judgments project" and to consult on a number of questions for future work.

Recent developments

Since the meeting of the working group in February 2014, some inter-sessional work has taken place on the development of jurisdictional filters. This work was carried out in a small sub-group of persons from the Union, the United States, Brazil, Switzerland, and Serbia. The result of this work is summarized in a document submitted by the sub-group to the members of the working group on 4 September (see annex 1 to this note). So far, this work has not led to an agreement on possible jurisdictional controls to be carried out in the context of recognition and enforcement.

During the month of August, the United States and Switzerland have presented proposals to the working group (see annexes 2 and 3 to this note). These proposals may be summarized as follows:

- US proposal: limit jurisdictional standards to defendant's home forum or the situation where the plaintiff's claim was rebutted¹ – in all other cases the judgment may be recognised and enforced if jurisdiction would have existed on the basis of the national law of the State addressed;
- CH proposal: limit jurisdictional standards to defendant's home forum and branch jurisdiction– in all other cases the judgment may be recognised and enforced if it would be recognised and enforced pursuant to the national law of either the MS addressed or the defendant's home State (certificate). The Convention could provide a possibility for States to agree on a broader set of filters on a bilateral basis.

The working group will reconvene in Hong Kong from 6 through 11 October. A subsequent meeting is tentatively scheduled to take place in February 2015; the project is expected to be discussed at the 2015 General Affairs and Policy Council in The Hague.

Matters to be discussed

It would be helpful to have Member States' views on the following questions. Please note that these questions are relevant for the work which is being carried out in the working group (not the expert group):

1. The need for jurisdictional filters

According to the information provided by Member States last year, it is clear that, to the extent that Member States allow for the recognition and enforcement of third States judgments,² most Member States do control the exercise of jurisdiction by a non-EU court. The degree of such control differs:

¹ It is assumed that in situations where the plaintiff was unsuccessful, he/she has submitted to the jurisdiction in which he/she chose to sue therefore the jurisdiction of the court of origin should not be objectionable when recognition and enforcement is sought against the plaintiff.

² A number of Member States either do not recognise and enforce non-EU judgments (FI) or subject such recognition and enforcement to the existence of a bilateral or multilateral treaty (AT, SE) or to reciprocity (AT, CZ, HU, MT, SI, DE in certain situations).

- Some Member States control an exercise of jurisdiction in comparison or compliance with national jurisdiction rules, including control of violations of the exclusive jurisdiction of the State addressed (e.g. AT, CZ, EE, DE, HU, IT, LV, LUX, MT, SK);
- others limit the control to a violation of exclusive jurisdiction (e.g. PL, PT) and the exercise of exorbitant jurisdiction (e.g. BE, SI);
- still others have a specific list of jurisdictional conditions which must be fulfilled by a court having jurisdiction (UK). These filters include defendant's home State, plaintiff or defendant's submission, moveable or immoveable property in the State of origin in the case of judgments *in rem*;
- still others require a "sufficient and reasonable connection" with the State of origin, besides control of violations of the exclusive jurisdiction of the State addressed (e.g. ES).

Based on the existing law and practice, it may be concluded that jurisdictional control is needed. This has so far also been the basis for discussions in the working group.

2. The scope of recognition and enforcement to be foreseen in a future Convention be

- a) Should the EU recognise and enforce judgments given by third States in situations where the court of origin exercised jurisdiction on the basis of rules similar to those applied in the Union?

- b) Or should the EU recognise and enforce third State judgments given on the basis of other jurisdiction grounds (e.g. place of conclusion of a contract) (subject to possible safeguards against the violation of exclusive jurisdiction or the exercise of exorbitant jurisdiction)? In such option, a positive formulation of acceptable jurisdictional grounds would not be necessary. It may be debated whether or not a non-exhaustive list of exorbitant grounds should be drafted; such a list may be felt as stigmatising.¹
- c) Or should the EU be more restrictive on recognition and enforcement compared to the situations where it would exercise jurisdiction domestically (see, for instance, the broad recognition and enforcement of tort judgments within the Union)? Should the EU recognise and enforce tort judgments given against [EU] parent companies for activities of their subsidiaries abroad which have allegedly caused serious environmental or human rights damage (cfr. the famous Kiobel litigation before the US Supreme Court involving Shell UK and Shell NL)?

3. The design of the jurisdictional filters

- a) If recognition and enforcement is to be permitted in situations where the exercise of jurisdiction by the court of origin is similar to that exercised by EU courts, should the jurisdictional filters reflect EU direct jurisdiction rules? Are the Brussels I rules suitable for use as indirect filters at international level? In particular:
 - Is the place of performance of the contract a good rule at the international level in the light of the experience with the rule in the Union? Could we expect foreign courts to apply the rule without ECJ guidance?

¹ One similar mechanism is currently being considered in some Member States: a foreign judgment shall not be recognized in the State addressed if: (i) The subject matter corresponds to the exclusive jurisdiction of the courts of the State addressed, or (ii) if the jurisdiction of the foreign State was not based on a reasonable connection. In particular, this reasonable connection is deemed to exist when the jurisdiction was based –legally or in fact- on criteria equivalent to those envisaged by the national rules on direct jurisdiction. This approach allows flexibility for the court to determine whether there is a reasonable connection and offers legal certainty to the claimant that at the very least the domestic jurisdiction rules are considered to constitute a reasonable connection. This approach thus allows a broader recognition of judgments than a mere reference to national law would do.

- Are the Union rules on torts appropriate for use at the international level, both the place of the cause of damage and the place where injury arose? Could we expect foreign courts to apply the rule without ECJ guidance?
- If not, could there be an alternative approach? Could an approach based on carrying on substantial activity be an alternative (cfr. Art. 5(5) BXL I)? The advantages of such a rule could be that there is no need to define specific places of performance of contracts or harmful events and that there would be no need to distinguish, at international level, between contract and tort? It should be taken into account, however, that under such an approach, a number of EU judgments based on contract/tort would not come in the scope of the filter and may therefore not be ensured recognition and enforcement (but they may still be under national law).
- b) Alternatively, should the filters be limited to defendants' home forum (US proposal) possibly combined with a branches forum (CH proposal), leaving all other possible jurisdictional controls to national law (either the law of the State of enforcement (US proposal) and the law of the defendant's home State (CH) proposal)?¹
- c) Would a general concept such as "real and substantial connection" constitute a valid alternative? Would such a standard add anything to the mere application of national law to the control of jurisdiction?
- d) Could a combination of a "real and substantial connection" test with a minimum "white list" and/or a "black list" (exorbitant jurisdiction) be a more attractive option?

¹ See also the question whether the application of national law should mean the application of national direct jurisdiction rules or indirect jurisdiction rules?

4. Other questions

- a) What would be of interest to European companies and citizens in their dealings with third States, for example the United States? For instance, if a heavy emphasis is put on the defendant's forum, would it be in the interest of EU parties to be ensured of the non-application of *forum non conveniens* in situations where such parties bring proceedings before the US courts (unless situation of *lis pendens*)? What else could improve the position of EU parties and in relation to which jurisdictions?
- b) If a "bilateralisation" approach as proposed by CH were to be followed, would it be preferable to avoid the need to conclude new agreements adding additional filters by inserting such filters already in the future convention, subject to declarations of the contracting parties willing to apply them?
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Notes on the Hague Conference Judgments Project Working Group**Sub-Group on Contract and Tort Jurisdiction****September 2014**

The Working Group for the Hague Conference Judgments Project held two coordinated conference calls on June 27-28, 2014, under the direction of the Chair, David Goddard. It was noted that the Working Group had before it three broad approaches. Those approaches were represented by:

- 1) US Informal Discussion Paper – Consideration of Alternatives to Jurisdictional Provisions in Possible Instrument on Recognition and Enforcement of Judgments;
- 2) Swiss Document 1 – Issues of Jurisdiction; and
- 3) Criteria discussed by the Working Group at its February 2014 session.

Upon completion of the conference calls, it was determined to form a subgroup of the Working Group to consider further the third of these approaches, and in particular to address the questions of contract and tort jurisdiction rules that would be applicable in a judgment recognition convention based an approach that would define acceptable bases of jurisdiction in the court of origin for purposes of recognizing and enforcing a judgment in the court addressed. The members of that subgroup are Ronald Brand, Andreas Bucher, Boni de Moraes Soares, Maja Stanivuković, and Karen Vandekerckhove, and Paul Beaumont with Marta Pertegás as support staff.

The text presented to the subgroup for consideration at the outset of its discussions was as follows:

For contracts:

Attachment 1, Second Working Group Meeting, 24-28 February 2014:

Criteria for Future Discussion:

Activity / contract performance in State of origin

The Working Group can see merit in providing for recognition and enforcement of a judgment given by a court in a state where the defendant has carried out regular commercial activity to which the claim relates, and/or where a contract to which the claim relates was performed. However it was recognised that there are difficulties in capturing these concepts appropriately in a text. These matters should be discussed at a future meeting of the Working Group, with the benefit of proposals developed during inter-sessional work (see Swiss Document 3)

Swiss Document 3 on Contracts:

Contracts

1. A judgment given in one Contracting State ("the State of origin") shall be recognised and enforced in other Contracting States if the defendant has conducted frequent or significant activity in the State of origin for the purpose of performing the contract, provided that the claim is based on a contract directly related to that activity.

The preceding paragraph does not apply to situations where -

- a) the defendant has taken reasonable steps to avoid performing an obligation in that State;
- b) the sole relevant activity is the payment of money provided that this exclusion shall not apply where the performance required from each party consists of the payment of money, such as a loan or a contract for the purchase and sale of currency.

For torts:

Attachment 1, Second Working Group Meeting, 24-28 February 2014:

Torts

D. A judgment will be recognised and enforced under this Convention if the proceedings in which it was given related to injury to a person or damage to property, and it was given by a court in the State in which:

- (a) The act / omission that caused the injury / damage occurred; and
- (b) The injury/damage occurred.

Note:

1. Inter-sessional work is needed on whether the highlighted "and" can be replaced with "or", with appropriate safeguards; or alternatively, whether para (b) can be omitted and replaced with the words "irrespective of where the damage occurred".

Swiss Document 2 on Chapter II:

Article 5 - Jurisdiction for Torts or Delicts

1. The court of the State of origin shall be considered to have jurisdiction for the purposes of this agreement, if the plaintiff brought an action in tort or delict in the courts of the State -

- a) in which the act or omission that caused the injury occurred;
- b) in which the person claimed to be responsible conducted the activity which caused the injury; or
- c) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act, activity or omission could result in an injury of the same nature in that State.

2. The preceding paragraph does not apply to situations where the defendant has taken reasonable steps to avoid acting in or conducting activity in that State.

3. If an action is brought in the courts of a State only on the basis that the injury arose there, those courts shall be considered to have jurisdiction only in respect of the injury that occurred in that State, unless the injured person has his or her habitual residence in that State.

The discussion within the subgroup occurred entirely by email subsequent to the conference calls. The discussion centered around three elements:

- The determination of the task of the sub-group;
- The consideration of the above-mentioned drafts;
- The consideration of alternative drafts.

On these elements, the discussion so far may be summarized as follows:

The task of the sub-group

The task of the sub-group is to consider the creation of jurisdictional filters for contract and tort judgments, i.e., jurisdiction rules to be applied only in the recognizing court, and not in the originating court that has granted the judgment. The aim should be to define what could be regarded in principle as a sufficient jurisdictional connection so as to make the exercise of jurisdiction by the court of origin in the concrete case acceptable in other contracting States.

One member of the subgroup voiced the concern that this could not be done without consideration of direct jurisdiction rules. Nevertheless, it was clarified that any indirect jurisdiction rules should not necessarily mirror direct jurisdiction rules.

It was suggested that the drafting of the bases for denial of recognition of a foreign judgment (each based on a claim that the originating court did not have jurisdiction in accordance with the rule which the convention would be propounding), can take one of two approaches. First one could establish an indirect jurisdiction rule that is broad and will not comport with the jurisdictional rules in all States that might possibly become parties to our Convention. It was suggested that this is not the approach the subgroup has been charged to address. Second, one could attempt to establish an indirect jurisdiction rule that results in reasonable certainty that under that rule jurisdiction exists according to the jurisdictional rules in each of the members of the Hague conference who co-operate with the Permanent Bureau in providing information on their current jurisdictional rules. It was suggested that this second approach is both what the subgroup has been charged to do and what the Swiss proposals tried to accomplish with the original drafts.

The consideration of drafts on the table

The discussion first focused on Swiss document 3 on contracts and Swiss document 2 on Chapter II regarding torts. It was pointed out these concern what is commonly called either "special" (in the EU) jurisdiction, or "specific" (in the US) jurisdiction. These are the jurisdictional bases that allow a plaintiff to bring an action other than in the defendant's home state. An action may always be brought in the defendant's home state (in the EU - the state of the defendant's domicile) under the rule of general jurisdiction (subject to possible application of rules on forum non convenience and/or *lis pendens*). Thus, the additional filters on contract and tort deal with a forum-shopping option for the plaintiff that brings a defendant into what for him is a foreign court - usually the plaintiff's home court. These are, by their very nature, the most difficult cases in our Working Group project, and the cases most likely to result in judgments that require recognition and enforcement in a court in a State other than the State from which the judgment originates.

On **contracts**, the discussion focused on the differences between the US and EU approaches which the proposal being considered attempted to reconcile. It was made clear that a mere reference to performance of a contract could not suffice to meet US constitutional requirements:

In the EU, the Brussels I Regulation uses a format that generally requires a nexus between the forum state and the cause of action. Thus, contract jurisdiction is based on siting the place of performance within the forum state, and tort jurisdiction is based on siting either the act or the injury in the forum state - in both instances without any need to consider a link between the forum state and the defendant. This means that two elements are important in determining the necessary connection: the forum state and the cause of action (claim). In the United States, the Constitutional Due Process Clauses have been interpreted by the US Supreme Court to require three connected elements: the forum state, the claim, and the defendant. And the most important connection - i.e., the necessary connection - is the one between the forum state and the defendant. Thus, there must be a nexus between the forum State and the defendant - a nexus that may not be required at all in the EU system. That nexus need not be as strong as what is required for general jurisdiction (i.e., the defendant's "home"), but it must nonetheless exist. This means that a link between the place of performance and the forum State in a contract case is not, alone, enough to allow jurisdiction to exist. If the defendant has not engaged in activity in or directed at the forum State (beyond simple place of performance), then jurisdiction cannot constitutionally exist. Similarly, the mere fact that an injury occurred in the forum State, so long as the tortfeasor has not acted in that State, is not sufficient to found jurisdiction (the 2011 US Supreme Court decision in *Nicaastro* makes this clear).

Several drafting suggestions were made to the proposal being considered. A proposal was made to deal with contracts performed on-line. Questions were raised regarding the activity-based jurisdiction, e.g. in situations where a party refrained from acting despite a contractual obligation to do so and in situations where parties agreed on a place of performance. Concerns were voiced with the European Court of Justice's at times formalistic interpretation of the notion of "place of performance".

It is not yet clear whether a combination of activity-based jurisdiction and place of performance based on the proposal under consideration may be possible – it was suggested that several ideas for such combination exist (e.g. Trevor Hartley's and Andreas Bucher's general course at the Academy) but these have not yet been considered.

On torts

One group member thought that tort judgments should not be recognized based on occurrence of injury only. Only tortious action in the State of origin should be acceptable for purposes of recognizing and enforcing the judgment, besides the general jurisdiction of the State of the defendant's domicile/habitual residence. Another group member thought that the possibility of extending the scope of recognition of tort judgments to those given in a State where injury occurred should be explored in combination with a delimitation of the scope of the future Convention and additional safeguards.

Concerns were voiced on the possibly uncertain and broad scope of a tort filter and on the political implications of recognizing foreign tort judgments. One group member pointed out that his or her State does not recognize foreign tort judgments given against defendants domiciled in his or her State; only tort judgments rendered in the country of defendant's residence may be recognized.

The consideration of alternative approaches*Real and substantial connection*

One member questioned whether we need individual contract and tort jurisdiction rules in order to construct a global convention on judgments recognition. It was suggested to consider the Canadian test, which requires a "real and substantial connection" between either the court and the claim or the court and the defendant. Some uncertainty was expressed as to whether this would work in all cases in the US, but it was felt as a possibility to find common ground. Other group members thought that the task of the drafters should be to attempt to define what should be considered in principle as a "sufficient connection" to be regarded as "real and substantial" in relation to a variety of types of claims including contracts and torts. They suggested to try to refine the ideas contained in the Swiss documents to ensure that they would cover judgments where jurisdiction may be acceptable in the participating legal systems.

Plaintiff domicile + fairness element

It was pointed out that the alternative filters on contract and tort in most cases lead to accepting a judgment given in the State of the plaintiff's domicile/habitual residence. One group member therefore suggested that it might be possible to accept the principle of the plaintiff's home court jurisdiction if combined with a fairness requirement. Reference was made in this respect to the Commonwealth and US practice on forum non conveniens but this was not further explored.

Not include contract and/or tort filters

This would result in a Convention that provides for the free movement of a smaller set of judgments (under the Convention). In this context, a discussion took place of whether a jurisdictional filters' approach can do more than result in a convention that would provide for recognition and enforcement of a very limited set of judgments, because it would necessarily require universally acceptable language defining each basis of jurisdiction and would result in a lowest-common-denominator approach.

Summary

The result of the subgroup email discussion so far is that

- 1) No clear text has yet surfaced to be presented that would provide jurisdictional filter provisions for judgments based on contract and tort jurisdiction grounds in the court of origin. While some members of the subgroup believe that further work on this is needed, particularly in the light of the suggestions made in the subgroup which have not yet been explored, others believe that such further work is not likely to lead to successful results.
- 2) There was an expression by some members of the subgroup that a contract/tort filter would only lead, in addition to the recognition of judgments given in the defendant's home State, to the recognition and enforcement of a limited set of judgments for which jurisdiction in the court of origin was based on a definition of contract or tort jurisdiction acceptable in those States participating (lowest common denominator).

INFORMAL U.S. DISCUSSION DRAFT**October 2014 Hague Working Group on Judgments****AN ALTERNATIVE APPROACH TO A CONVENTION ON
THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS****INTRODUCTION**

This paper follows on our earlier informal discussion paper presented at the meeting of the Working Group from February 24-28, 2014, in The Hague. We share the goal of achieving a convention based upon consensus that significantly improves the current situation by reducing, in a simple and efficient manner, the existing barriers to the recognition and enforcement of foreign judgments. In light of this shared goal, we continue to urge the Working Group to consider an approach that avoids or minimizes the use of jurisdictional prerequisites or criteria. The differences in jurisdictional rules among countries raises a substantial question whether consensus can be reached on a judgments convention built on criteria or filters that requires common establishment of acceptable rules of jurisdiction.

In our view, the most promising path to reaching our shared goal is a relatively short, simple Convention along the lines presented in the accompanying text. At its core, it would contain an article setting forth the general rule that judgments of a Contracting State should be recognized and enforced. There would be a separate article setting forth the traditional, limited grounds upon which a court to whom a judgment is addressed may deny recognition or enforcement of a judgment. This article would contain, in addition to the traditional grounds for refusal of recognition and enforcement that would pertain to many categories of cases, a further ground for refusal in certain, more difficult categories of cases.

In particular, for those “subsets of cases” discussed in the February 2014 Informal U.S. Discussion Paper for which recognition and enforcement should be a relatively easy matter (e.g., judgment against a resident defendant, judgment against a resident plaintiff), the presumption would be that such a judgment would be recognized and enforced, and there would be relatively limited grounds for refusal. These grounds would include, for example, inadequate notice to the defendant, incompatibility with the public policy of the requested State, inconsistency with an earlier judgment, or procedural fraud. However, for the more difficult “subsets of cases”, that is, where the judgment debtor is a party other than (i) a habitual resident of the State of the court of origin, or (ii) the party that brought the claim on which the judgment is based, an additional basis for non-recognition would be available. For these cases, recognition and enforcement may be refused if the court of origin, under the facts of the case, would not have had jurisdiction measured by the jurisdictional tests applicable in the court addressed.

This approach avoids elaborating rules of jurisdiction, whether directly or indirectly, which has been a roadblock in the past. It also is consistent with provisions in current national laws governing recognition and enforcement of foreign judgments not governed by a treaty. For example, section 328 of the German Civil Procedure Code provides that recognition of a foreign judgment may be refused if the court of origin did not have jurisdiction over the defendant on a basis available under German law. The U.S. Uniform Foreign-Country Money Judgments Recognition Act similarly provides that a court may refuse recognition and enforcement of a judgment if the court of origin did not have jurisdiction under the law of the State addressed.

Further, we believe that such an approach is likely to serve several policy interests, making it desirable both from the perspective of States and from the perspective of litigants who will use its rules. First, it will establish the categories of cases for which only limited bases for non-recognition are necessary. This will make cross-border litigation more efficient and predictable. Second, for the remaining categories of judgments, it will establish a common and understood basis for non-recognition among Contracting States to the Convention, thus providing additional predictability over current conditions. Third, it should have the result of incentivizing parties to crossborder litigation towards bringing lawsuits in courts that will place the resulting judgments in the simple-recognition category. Thus, while this approach would not require rules of jurisdiction to be set forth in the Convention, it should nevertheless result in promoting reliance by litigants on the most commonly used bases of jurisdiction on a global basis.

Set forth below is a proposed text of the key provisions of a Convention that reflects our proposed approach. The language in bold indicates additions to the current working text of the Convention. We welcome questions and comments from the Working Group, and we look forward to a constructive dialogue of possible approaches to our shared objective of a global convention on the recognition and enforcement of judgments.

PROPOSED TEXT

CHAPTER I - SCOPE AND DEFINITIONS

Article 1

Scope

1. This Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters. It shall not apply to revenue, customs, or other administrative matters, except to the extent that a judgment in these matters fixes rights and obligations that might obtain between private parties in private disputes.
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 judgments relating to -
 - a. Contracts to which a natural person acting primarily for personal, family, or household purposes (a consumer) is a party;
 - b. Contracts of employment, including collective agreements.
2. 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. [carriage of passengers and goods]
 - g. marine pollution, limitation of liability for maritime claims, and general average;
 - h. anti-trust(competition) matters;
 - i. liability for nuclear damage;
 - j. [the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs]
 - k. the validity or infringement of intellectual property rights other than copyright and related rights;
 - l. [the validity of entries in public registers:]
 - m. [rights or obligations in rem in movable property]; or
 - n. defamation
3. Notwithstanding paragraph 2, 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 2 arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.
4. This Convention shall not apply to arbitration and related proceedings.
5. 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.
6. Nothing in this Convention shall affect privileges and immunities of States [or of international organisations,] in respect of themselves or their property.

Article 3
Definitions

In this Convention, "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.

CHAPTER II -- RECOGNITION AND ENFORCEMENT SCHEME

Article 4
Recognition and enforcement

1. A judgment of a court of a Contracting State to which this Convention applies shall be recognised or enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.
2. Without prejudice to such review as may be necessary for the application of provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.
3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it enforceable in the State of origin.
4. Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 5

Refusal of recognition or enforcement

Recognition or enforcement may be refused only if -

1. The document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim,
 - (a) 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
 - (b) 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.
2. The judgment was obtained by fraud in connection with a matter of procedure;
3. 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;
4. The judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties;
5. The judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfills the conditions necessary for its recognition in the requested State; or
6. The court of origin would not have had jurisdiction over the judgment debtor on a basis available in the law of the State of the court addressed, and the judgment debtor is a party other than (i) a habitual resident of the State of the court of origin or (ii) the party that brought the claim on which the judgment is based.

Article 6

Preliminary questions

1. Where a judgment excluded under Article 2, paragraph 2, 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 upon a ruling on a matter excluded under Article 2, paragraph 2.
3. However, in the case of a ruling on the validity of an intellectual property right other than copyright or a related right, 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 under the law of which the intellectual property right arose; or
 - (b) Proceedings concerning the validity of the intellectual property right are pending in that State.

Article 7

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 8

Judicial settlements

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.

Article 9

Procedure

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. Nothing in this Convention requires the court addressed to apply limitation or prescription periods other than those provided in its national law. Nothing in this Convention requires the court addressed to enforce relief provided in the judgment that is not available in its national law, but the court addressed shall give effect to the judgment to the full extent permissible under its national law. The court addressed shall act expeditiously.

Article 10

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. Nothing in this provision prevents the court addressed from recognizing or enforcing additional parts of a judgment under its national law.

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*Hague Conference on PIL
Working Group on Judgments - October 2014*

Swiss Proposal 4

Amended version of Swiss Proposal 1

This amended proposal has again the aim of being *simple* and modest, reflecting the fact that in recent times, more developed instruments of the Hague Conference had difficulties to reach sufficient adherence by Members. For the purpose of facilitating comparison in respect of the overall structure of a future instrument, the proposed provisions have been integrated in the framework of the *Working Draft* retained as Attachment 2 at the February 2014 meeting.

It is suggested that a future instrument on recognition and enforcement of judgments determines as generally recognized jurisdictions only grounds representing home jurisdictions, here below called “*residence jurisdiction*” (with the addition of branch jurisdiction). All other possible grounds of jurisdictions are not defined by the instrument. The residence jurisdiction will decide whether it recognizes such other jurisdiction, either under its own law, or in view of its own appreciation of the appropriateness of that other jurisdiction in the particular case. In the affirmative, it will issue a certificate. The same principle applies to the control of proper notification of the document instituting the proceedings.

The main value added element of such a certificate is the effect that it shall be recognized by all other Contracting States, with the advantage that both issues, one relating to the so called “indirect” jurisdiction, and the other to the regularity of notification, can no longer be raised. This provides (partial) *uniformity*, in as much as the ruling of two jurisdictions (State of origin and

State of residence jurisdiction) is effective for all Parties to the Convention. Bilateral or regional agreements may provide, however, for recognized definitions of other and additional grounds of jurisdiction and more informal requirements on notification, in which case no certificate needs to be filed with the competent authority of the State addressed.

The outsourcing of “notification and jurisdiction control” (which results in a procedural splitting of recognition) has the advantage of *predictability* and *procedural economy*: Notification and jurisdiction issues are often the main items contested in the course of recognition procedures. The certificate of acknowledgement, which is an *ex ante* decision of acceptance, might therefore avoid wasteful lawsuits and save unnecessary costs when enforcement is sought in a third country. In order to enhance protection of the defendant and to ensure correct application of the foreign law, notification and jurisdiction control are assigned to the courts of the defendant's residence.

The certificate of acknowledgment may result in a certain degree of *relativity* of jurisdictional filters, as recognition might vary depending on the country of residence of the defendant, apparently “privileging” those domiciled in States with stricter recognition regimes. These effects are however of very limited scope: regardless of any certificate, and despite a potential lower level of recognition in the residence jurisdiction, recognition would always be possible abroad if a ground of jurisdiction provided for *by the laws of the State addressed* has been met. Therefore, recognition would be possible (and no “privilege” granted) even with respect to a defendant domiciled in a State with a low recognition regime. A low level of recognition would only be “exported” to States that have themselves a strict recognition regime, *id est* to States that are in any event unlikely to ratify the Convention. The relativity of jurisdictional filters is comparable with the current situation, where the level of recognition varies from State to State depending on the (purely accidental) location of assets, whereas the certificate would introduce a differentiation depending on the more adequate (because less random) criterion of residence.

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 other 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 judgments -
 - c. [relating to contracts to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party;]
 - d. [relating to contracts of employment, including collective agreements.]
2. 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, and the validity of decisions of their organs;]
 - j. [the validity of intellectual property rights other than copyright and related rights;]
 - k. [infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;]

1. [the validity of entries in public registers;]

m. defamation.

3. Notwithstanding paragraph 2, 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 2 arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.
4. This Convention shall not apply to arbitration and related proceedings.
5. 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.
6. 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

In this Convention, “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.

CHAPTER II - RECOGNITION AND ENFORCEMENT

Article 4

Recognition and enforcement conditions in general

1. A judgment of a court of a Contracting State (State of origin) to which this Convention applies shall be recognised and enforced in another Contracting State (State addressed) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified therein.
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. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.
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. Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 5

Refusal of recognition or enforcement based on fraud, public policy
and inconsistency of judgments

Recognition or enforcement may be refused if -

- a. the judgment was obtained by fraud in connection with a matter of procedure;
- b. 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;

- c. the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
- d. the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

Article 6

Notification

Subject to Article 10 and 11, recognition or enforcement may be refused if the document which instituted the proceedings or an equivalent document, including the essential elements of the claim -

- a. 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/her case without contesting notification in the court of origin, provided that the law of the State of
- b. origin permitted notification to be contested; or
- c. 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.

Article 7

Jurisdiction

Recognition or enforcement may be refused if -

- a. none of the grounds of jurisdiction as specified either in Articles 8 and 9 or in a separate agreement as provided for in Article 11 has been met;
- b. none of any other jurisdiction has been acknowledged as specified in Article 10; and
- c. no ground of jurisdiction provided for by the laws of the State addressed has been met.

Article 8

Residence Jurisdiction

The main grounds of jurisdiction retained as basis for the recognition and enforcement of a judgment are, in respect of a defendant party, as follows -

- a. for a natural person, its residence in a Contracting State;
- b. for an entity or person other than a natural person, its residence in a Contracting State, which is considered to be in the State -
 - i) where it has its statutory seat ;
 - ii) under whose law it was incorporated or formed; or
 - iii) where it has its central administration or its principal place of business.

Article 9

Branch Jurisdiction

The court of the State of origin shall also be considered to have jurisdiction for the purposes of this Convention, if the plaintiff brought an action in the courts of a Contracting State where a branch, agency or any other establishment of the defendant is situated, provided that the dispute relates directly to the activity of that branch, agency or establishment.

Article 10

Certificate of acknowledgment issued by a Court holding Residence Jurisdiction

1. If a court holding jurisdiction in the State of origin on a ground other than those determined by Articles 8 and 9 has rendered a judgment, this court or any party may request a court holding residence jurisdiction as per Article 8 in another Contracting State to acknowledge that a judgment issued by the court of the State of origin shall not be refused recognition or enforcement -
 - a. on a ground based on the provisions of Article 6;
 - b. if a ground of jurisdiction provided for by the laws of the State addressed has been met or if the court of the State addressed reaches the conclusion that it was appropriate for the court in the State of origin to exercise jurisdiction.
2. The court holding residence jurisdiction renders its ruling in a summary proceeding.
3. The courts concerned may proceed to an exchange of views.
4. The court ruling as provided in paragraph 1 shall issue a certificate drafted in accordance with the model form contained in the Annex to this Convention.
5. The court of any other Contracting State where recognition and enforcement is sought shall not object to such request on grounds based on jurisdiction or on notification, as specified in Article 6, if it is in receipt of a certificate as provided in this provision.

Article 11

Separate Agreement

1. Any Contracting State may enter into agreements with one or more other Contracting States, with a view of improving the recognition and enforcement of judgments in their mutual relations.
2. Such an agreement may provide for -
 - a. the acceptance of grounds of jurisdictions others than those determined by Articles 8 and 9;
 - b. requirements in relation to the notification of the document instituting the proceedings or an equivalent document others than those specified in Article 6.

In such a case, and to the extent agreed upon, the issuance of a certificate as provided in Article 10 is not required in the relations between the Contracting States which have concluded such an agreement.

3. Recommended model clauses to be inserted in such an agreement are issued and published by the Hague Conference on Private International Law.

Article 12

Preliminary questions

1. Where a matter excluded under Article 2, paragraph 2, or under Article [...], 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 2.

3. However, in the case of a ruling on the validity of an intellectual property right other than copyright or a related right, 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 under the law of which the intellectual property right arose; or
 - b. proceedings concerning the validity of the intellectual property right are pending in that State.
4. 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 pursuant to a declaration made by the requested State under Article [...].

Article 13

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 14

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.

Article 15

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 14, 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. The party seeking recognition or applying for enforcement may produce a certificate as provided in Article 10.
3. If the terms of the judgment or, as the case may be, the terms of the certificate, 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.
4. 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.
5. 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 16

Procedure

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.

Article 17

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.

CHAPTER III - GENERAL CLAUSES

[To come]