

Consultation Paper on the 2016 Preliminary Draft Convention on
the Recognition and Enforcement of Foreign Judgments

Views of the Hong Kong Bar Association

1. The Hong Kong Bar Association (“HKBA”) submits its views on the Department of Justice’s Consultation Paper on the 2016 Preliminary Draft Convention on the Recognition and Enforcement of Foreign Judgments (“the 2016 Draft”) prepared by the Special Commission established by the Hague Conference on Private International Law on the subject of recognition and enforcement of foreign judgments in civil or commercial matters.

Scope of the Convention

2. The 2016 Draft sets out in Articles 1 and 2 the scope of the draft Convention. The HKBA notes that the Co-Rapporteurs are to prepare a paper on the concept of “civil or commercial matters” for the next meeting of the Special Commission. The HKBA reserves its position on the proper understanding of this concept and would like to have an opportunity to comment when the said paper becomes available.
3. Article 2 provides for a number of exclusions from the scope of the Convention. However, Article 2(2) proposes that a judgment is not excluded where a matter excluded under Article 2(1) arose “merely as a preliminary question in the proceedings in which it was given, and not as an object of the proceedings”. Then the paragraph continues: “*In particular*, the mere fact that a matter excluded under paragraph 1 arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings” (italics added).
4. The HKBA considers that Article 2(2) has been drafted in a less than clear way or confusingly. A defence or a matter pleaded in a defence is hardly a preliminary question in the proceedings.
5. This confusion is also evident in the list of excluded matters in Article 2(1). Whereas items (a), (d), (e), (i) and (j) are likely to be preliminary questions, items (b), (c), (f), (g), (h) and (k) are likely

to be objects of disputes. Two separate lists might be a better way of drafting.

6. Article 2(2) proposes this key question for case by case determination: Whether an excluded matter under Article 2(1) was not an object of the proceedings. Although the HKBA understands the rationale for drafting Article 2 in the way proposed, namely to ensure that proper civil and commercial disputes are included, the HKBA also observes that this key question enables considerable variation in the implementation of the draft Convention amongst State Parties.
7. The HKBA agrees that Article 2(4) should be included in the draft Convention. The HKBA also agrees that the draft Convention should apply to claims brought by a government agency or public authority on behalf of affected parties to claim compensation for harm suffered whether in conjunction with the enforcement action or separately.
8. The HKBA notes Article 2(5), which appears to reserve issues of state immunity. This is an issue of particular concern to the People's Republic of China, which, in spite of its participation in the negotiations in the State Immunities Convention, maintains a doctrine of absolute immunity in respect of herself and her property. On the other hand, many of her trading partners have adopted a commercial transaction exception to state immunity. This has probably generated difficulties since many Chinese trading entities in international trade, commerce and services are state-owned or state-controlled. In this situation, a declaration mechanism for excluding matters like the liability of States for acts or omissions in the exercise of State authority, from the scope of the draft Convention, might accommodate the different positions of the potential State Parties to the draft Convention.

Bases for Recognition and Enforcement

9. The HKBA notes that the discussions at the Special Commission are still at a preliminary stage.

10. Article 5 of the draft Convention provides for various bases for recognition and enforcement. This is not a definitive list and some of those bases on the list are subject of future discussion.
11. The HKBA understands the rationale for introducing Article 5(1)(b) and expresses support for its introduction.
12. The HKBA notes that Article 5(1)(e) and (f) are concerned with “submitting to the jurisdiction of a court”. The HKBA expresses support for the inclusion of Article 5(1)(e). The HKBA, on the other hand, finds the drafting of Article 5(1)(f) is not concise. Is the arguability of the defendant’s case to challenge jurisdiction (which he/she/it did not raise) a necessary condition?
13. The HKBA expresses support for the relatively limited basis for recognition and enforcement of judgments concerning trusts in Article 5(1)(m).
14. The HKBA finds that Article 5(2) is not clear over the recognition or enforcement of a judgment against an employee in matters relating to the employee’s contract of employment, since the non-application of Article 5(1)(g) suggests that the draft Convention envisages that such a judgment against an employee may not be recognized and enforced whereas a judgment against an employer may be recognized and enforced. It may be useful to clarify this in the course of future discussions.

Refusal of Recognition or Enforcement

15. Article 7(1)(c) makes provision for the ground of “public policy” for refusal of recognition or enforcement. The HKBA queries whether the requisite standard to be shown ought to be “manifestly incompatible with the public policy of the requested State”, bearing in mind that it is the judicial authority of the requested State that is the gate keeper of this ground. Such a standard may not be commensurate with the illustrative examples, including “situations involving infringements of security or sovereignty of [the requested State]”.

Intellectual Property Matters

16. The HKBA takes an interest in the provisions relating to intellectual property matters in the draft Convention and reserves the opportunity to comment further as the discussions develop.

Judicial Settlements

17. The HKBA requires clarification as to the concept of judicial settlements (transactions judiciaries) within the meaning of Article 10 of the draft Convention, including whether this includes a settlement reached by mediation incorporated as a necessary option for exploration of voluntary settlement (as in the current Rules of the High Court and Practice Direction 31). In the absence of such clarification, the HKBA considers that the proviso in the square brackets should be incorporated into Article 10. The HKBA also notes that the draft Convention proposes in Article 11(1)(d) the requirement of a certificate of a court of the State of origin that the judicial settlement is enforceable in the same manner as a judgment in the State of origin, and expresses the view that this is a necessary requirement.

Costs of Proceedings

18. Article 13 of the draft Convention affects the current procedure and practice of the HKSAR courts where security for costs can be sought solely on the ground that the party applying for enforcement (by common law action) is a foreign national or is not domiciled or resident in the HKSAR. The HKBA recognizes that the HKSAR Government is entitled to adopt a policy that no security for costs can be sought where recognition and enforcement is sought under the domestic legislation implementing the draft Convention but considers that such a policy should only be adopted on the basis of a negotiated consensus among the participating States that there would be facilitation in the mutual recognition and enforcement of costs orders.

General and Final Clauses

19. Transitional provisions: The HKBA takes the initial view that the draft Convention shall apply to judgments rendered after entry into force of the Convention.
20. Legalization of documents clause: The HKBA takes the initial view in favour of exemption from legalization or any analogous formality.
21. Non-unified legal systems clause: The HKBA favours the adoption of such a clause, bearing in mind the position of the jurisdiction of the HKSAR as a separate and distinct jurisdiction of the People's Republic of China.
22. Non-discrimination clause: The HKBA favours the adoption of such a clause.
23. Designation of Central Authorities clause: The HKBA would like to be informed of further discussions on this matter since the recognition and enforcement of judgments appears to be a primarily or exclusively judicial matter and recourse to the judicial authorities of the requested State might suffice.

Dated 21 November 2016.

HONG KONG BAR ASSOCIATION