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**Contribution of the Hague Conference on Private International Law (HCCH)
to the work of the Fourth Session of the Intergovernmental Group of Experts
on Consumer Protection Law and Policy, UNCTAD**

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**Contribution of the Hague Conference on Private International Law (HCCH)
to the work of the Fourth Session of the Intergovernmental Group of Experts on Consumer
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1. There are several HCCH instruments and projects dealing with or having considered consumer protection, which the Intergovernmental Group of Experts may find relevant to note. The newly adopted HCCH *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (2019 Judgments Convention) contains specific provisions that aim at protecting consumers; on the other hand, HCCH instruments such as the HCCH *Convention of 30 June 2005 on Choice of Court Agreements*¹ (2005 Choice of Court Convention) and the *2015 Hague Principles on Choice of Law in International Commercial Contracts*² (2015 HCCH Principles) explicitly exclude consumer matters from their operation, with the reason that consumers, who are weaker parties in their contractual transactions, require specific or detailed consideration. As a matter of interest, the HCCH had previously worked towards a bespoke Convention on the law applicable to certain consumer sales in the 1980s, however the Convention was never realised and the draft text was removed to an agenda for future work. These instruments and projects are discussed below in more detail.

A. 2019 Judgments Convention

2. The 2019 Judgments Convention aims to facilitate the recognition and enforcement of judgments among Contracting States. After four Special Commission meetings, State-level negotiation, this Convention was further negotiated at the 22nd Diplomatic Session, took place from 18 June to 2 July 2019, in The Hague, and was adopted on 2 July 2019. On this day, Uruguay signed the Convention. The text of the new Convention can be found [here](#).

3. The Convention establishes a uniform framework for the recognition and enforcement of foreign judgments whereby a judgment from a Contracting State is entitled for circulation in another Contracting State if one of the enumerated jurisdictional “filters” in Articles 5 and 6 are established. The filters reflect jurisdictional connections with the defendant, the State of origin, or the consent of the parties. Recognition and enforcement may only be refused if a ground for refusal specified under the Convention is met.³ The 2019 Judgments Convention does not prevent the recognition and enforcement of judgments under national law.⁴

4. During the negotiations, delegations recognised the importance of circulating consumer-related judgments under the Convention given the ever-expanding volume of international consumer dealings, and noted the importance of providing protection to consumers due to their weaker position in comparison with enterprises.⁵ The 2019 Judgments Convention therefore permits consumer-related judgments to circulate, while providing a degree of consumer protection by qualifying the Article 5(1) “filters” that may be applied to judgments sought against consumers.⁶

5. Consumers may avail themselves of the full array of jurisdictional filters in Article 5(1) to recognise or enforce a foreign judgment in their favour. The filters include: *e.g.*, the defendant’s habitual residence in the State of origin (Art. 5(1)(a)); the defendant’s branch in the State of origin (Art. 5(1)(d)); the fact that the judgment is obtained against the person bringing claim (other than counterclaim) (Art. 5(1)(c)); the fact that the defendant consented to the jurisdiction (Art. 5(1)(e)) or

¹ Further information on the 2005 Choice of Court Convention is available on the HCCH website < www.hcch.net > under “Choice of Court”.

² Information of the 2015 HCCH Principles is available on the HCCH website < www.hcch.net > under “Choice of Law in Contracts”.

³ Art. 4(1) of the 2019 Judgments Convention.

⁴ *Id.*, Art. 15.

⁵ Report of Meeting Minutes No 1, Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (1-9 June 2016), para. 18.

⁶ Art. 5(2) of the 2019 Judgments Convention.

argued on the merits without contesting jurisdiction (Art. 5(1)(f)); the fact that the judgment was given in the place of performance of the contractual obligation, unless the defendant's activities did not constitute a "purposeful and substantial connection" with the State of origin (Art. 5(1)(g)); or the fact that the court of origin was designated in a non-exclusive choice of court agreement (Art. 5(1)(m)), etc.

6. However, Article 5(2) limits the availability of some Article 5(1) filters where a foreign judgment is obtained against a consumer in a matter relating to a consumer contract. These exceptions are consistent with the protection accorded to consumers in domestic or private international law.⁷ First, a judgment against a consumer may only circulate under the Article 5(1)(e) filter (defendant's express consent to jurisdiction) where such consent was expressly provided to the court orally or in writing (Art. 5(2)(a)). Secondly, Article 5(1)(f), (g) and (m) are not available for judgments against consumers, because the mode of consent or place of performance is deemed not to be sufficient in consumer contracts where there is uneven bargaining power.⁸ In practice, this means that judgments against consumers will only likely circulate where they are obtained in the place of the consumer's habitual residence, or where the consumer provides its express consent to the court of origin.⁹ The consumer contract may apply to contracts between consumers and non-consumers, and consumer-to-consumer contracts.¹⁰

7. It should be noted that the 2019 Judgments Convention defines a "consumer" as "a natural person acting primarily for personal, family or household purposes". This definition is copied from the 2005 Choice of Court Convention (see below).

B. 2005 Choice of Court Convention

8. The 2005 Choice of Court Convention aims to ensure the effectiveness of choice of court agreements (also known as "forum selection clauses" or "jurisdiction clauses") between parties to international transactions and to facilitate the recognition and enforcement of the ensuing judgments. There are three basic rules in the Convention: the chosen court must hear the case; the non-chosen court should not hear the case; and the judgments given by the chosen court should be recognised and enforced in other Contracting States.

9. Unlike the 2019 Judgments Convention, the 2005 Choice of Court Convention deliberately excludes from its scope any choice of court agreement concluded with a consumer.¹¹ This is because "special considerations" were seen to apply to consumer contracts.¹²

10. Under the 2005 Choice of Court Convention, a consumer is defined as a natural person "acting primarily for personal, family or household purposes".¹³ The exclusion applies to contracts between a consumer and a non-consumer party (e.g., between an insurer and a natural person taking out personal, family or household insurance;¹⁴ or in contracts for a tenancy of private property¹⁵), or to contracts between two consumers.¹⁶

C. 2015 HCCH Principles

⁷ F. Garcimartín and G. Saumier, "Judgments Convention: Revised Draft Explanatory Report", Preliminary Document No 1 of December 2018 ("Garcimartín/Saumier Report"), para. 226. (A revised draft Explanatory Report to the 2019 Judgments Convention is being prepared.)

⁸ *Id.*, para. 230.

⁹ *Id.*, para. 231.

¹⁰ *Id.*, para. 227.

¹¹ Art. 2(1)(a) of the 2005 Choice of Court Convention.

¹² T. Hartley & M. Dogauchi, "Explanatory Report on the 2005 Hague Choice of Court Convention", in *Proceedings of the Twentieth Session (2005)*, Tome III, *Choice of Court Agreements*, Antwerp – Oxford – Portland, Intersentia, 2010 ("Hartley/Dogauchi Report"), para. 18.

¹³ Art. 2(1)(a) of the 2005 Choice of Court Convention.

¹⁴ Hartley/Dogauchi Report, para. 302.

¹⁵ *Id.*, para. 68.

¹⁶ *Id.*, para. 50.

11. The 2015 HCCH Principles are the first soft-law instrument developed under the auspices of the HCCH. They are designed to promote party autonomy in international commercial contracts. While recognising that parties to a contract may be best positioned to determine the law applicable to their dealings, so as to enhance predictability and legal certainty, the Principles also set balanced boundaries to party autonomy and thus may provide a refinement of the concept where it is already accepted.

12. The 2015 HCCH Principles explicitly exclude their application to consumer contracts,¹⁷ with the consideration that the substantive law of many States subjects consumer contracts to special protective rules from which the parties may not derogate by contract.¹⁸ Nor do the Principles explicitly address the characterisation of the so-called “dual-purpose contracts”, *i.e.*, contracts intended for purposes that fall partially within and partially outside a party’s trade or profession.¹⁹

D. Previous Consumer Sales Conventions

13. During its Fourteenth Session in 1980 the HCCH agreed upon articles for a [*Convention*] on the law applicable to certain consumer sales.²⁰ This was to revise its earlier *Convention of 15 June 1955 on the law applicable to international sales of goods*, which was not considered to have sufficiently taken into account the interests of consumers.²¹ However, the new Convention was not realised. The Fourteenth Session resolved that further debate on the articles should be avoided, and decided that the articles should be placed on an agenda for future work towards a new convention on the law applicable to consumer sales, or a general sales convention.²² It did, however, declare that the 1955 Convention does not prevent States Parties from applying special rules on the law applicable to consumer sales.²³

E. Conclusion

14. In conclusion, protecting consumers has always been taken into consideration in the development of HCCH instruments. In the 2019 Judgments Convention, it was decided to include consumer contracts in the scope and provide extra protection when circulating judgments sought against consumers in consumer contracts. On the other hand, the 2005 Choice of Court Convention and the 2015 HCCH Principles exclude consumer contracts all together.

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¹⁷ Art. 1(1) of the 2015 HCCH Principles.

¹⁸ Commentary of the 2015 HCCH Principles, para. 1.10.

¹⁹ *Id.*, para. 1.12.

²⁰ *Acts and documents of the Fourteenth Session (1980)*, Tome I (*Miscellaneous Matters*), pp. I-60 – I-62.

²¹ *Ibid.*

²² *Id.*, p. I-60.

²³ *Id.*, p. I-62.