(BREAKING) NEWS FROM THE HAGUE

A GAME CHANGER IN INTERNATIONAL LITIGATION? ROADMAP TO THE 2019 HAGUE JUDGMENTS CONVENTION

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I. Introduction

On 2 July 2019, the Twenty-Second Diplomatic Session of the Hague Conference on Private International Law adopted the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ("2019 Hague Judgments Convention").[1]

Thus, almost twenty years after an initial, unsuccessful attempt to set up a global instrument on jurisdiction and recognition and enforcement of judgments in civil or commercial matters and after the first partial, and nonetheless meaningful, achievement marked by the adoption of the 2005 Hague Convention on Choice of Court Agreements,[2] the Hague Judgments Project has set up a new significant landmark in a core aspect of private international law in civil and commercial matters.[3]

As is well known, the Judgments Project initially focused on developing a "double convention" on both issues of jurisdiction and circulation of judgments. In this framework, two draft instruments were drawn up at the turn of the last century: the 1999 preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (1999 preliminary draft Convention)[4] and the 2001

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[1] On the same day of the signature of the Final Act of the 2019 Hague Judgments Convention, Uruguay signed the Convention. All the documents relating to the Judgments Project mentioned in this article, including the full text of the 2019 Hague Judgments Convention, are available on the website of the Hague Conference at <www.hcch.net> under the "Judgments" section.

[2] The Convention entered into force on 1 October 2015: it is currently in force between the European Union (including Denmark), Mexico, Montenegro, and Singapore. It was also signed by the United States in 2009, Ukraine in 2016, and the People's Republic of China in 2017. More information on the Convention is available on the website of the Hague Conference at <www.hcch.net> under "Choice of Court". See also, among others, R.A. BRAND/ P.M. HERRUP, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (2008).

[3] See A. BONOMI, Courage or Caution? A Critical Overview of the Hague Preliminary Draft on Judgments, this *Yearbook* 2015-2016, pp. 1-32.

[4] See the "Preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, adopted by the Special Commission and Report by Peter

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Interim Text.[5] However, the fundamental differences that characterised, in each legal system, the understanding and shaping of jurisdiction hindered any possibility of reaching a global agreement on jurisdiction.[6]

The Judgments Project was subsequently scaled down to focus on forum selection agreements: this led to the conclusion of the Hague Convention of 30 June 2005 on Choice of Court Agreements.

After resuming the Judgments Project in 2012 and investigating the Project's possible trajectories,[7] the Council on General Affairs and Policy of the Hague Conference opted for a "simple convention" focused on recognition and enforcement: in such an instrument, jurisdiction should only be regulated as a condition for recognition and enforcement, *i.e.*, as "indirect jurisdiction."[8]

Against this backdrop, a Working Group met between 2013 and 2015 and prepared a preliminary draft text[9] on the basis of which, in 2016, the Council on General Affairs and Policy convened the Special Commission on the Recognition and Enforcement of Foreign Judgments.[10] During the course of its meetings, the Special Commission discussed several drafts.[11]

Nygh and Fausto Pocar", Prel. Doc. No 11 of August 2000 for the attention of the Nineteenth Session of June 2001, in *Proceedings of the Twentieth Session (2005)*, Tome II, *Judgments*, 2013, p. 191.

[5] See the "Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001 – Interim Text" prepared by the Permanent Bureau and the Co-Reporters, in *Proceedings of the Twentieth Session (2005)*, Tome II, *Judgments*, 2013, p. 621.

[6] The feasibility of a global convention on jurisdiction is scheduled to be explored again shortly: see Conclusions & Recommendations adopted by the Council on General Affairs and Policy of 5 to 8 March 2019, para. 5, mandating the Permanent Bureau to make arrangements for a further meeting of the Experts' Group addressing matters relating to direct jurisdiction (including exorbitant grounds and *lis pendens* / declining jurisdiction), to be held the first week of February 2020. See also Conclusions & Recommendations adopted by the Council on General Affairs and Policy of 13 to 15 March 2018, para. 5.

[7] See, respectively, the Conclusions & Recommendations adopted by the Council of 17 to 20 April 2012, para. 16, and the Conclusions & Recommendations of the Experts' Group on Possible Future Work on Cross-border Litigation in Civil and Commercial Matters (Work. Doc. No 2 of April 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference).

[8] See "Ongoing work on international litigation", Prel. Doc. No 3 of March 2013 for the attention of the Council of April 2013 on General Affairs and Policy of the Conference, Annex 2, and the Conclusions & Recommendations adopted by the Council of 9 to 11 April 2013, para. 8.

[9] See the Report of the fifth meeting of the Working Group on the Judgments Project and proposed draft text resulting from the meeting, Prel. Doc. No 7A of November 2015 for the attention of the Council of March 2016 on General Affairs and Policy of the Conference.

[10] See the Conclusions & Recommendations adopted by the Council on General Affairs and Policy of 15 to 17 March 2016, para. 12.

[11] A first preliminary draft Convention in 2016, the February 2017 draft Convention, the November 2017 draft Convention, and the 2018 draft Convention, respectively. A detailed assessment of the November 2017 draft Convention, notably vis-à-vis its interaction with the legal framework of the European Union, is offered in the Study "The Hague

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In 2019, subsequent to the fourth and final meeting of the Special Commission, the Council tasked the Permanent Bureau with the preparation of the Twenty-Second Diplomatic Session. The Diplomatic Session was held in The Hague from 18 June to 2 July 2019 and resulted in the adoption of the Final Act.[12]

II. Goals and Architecture of the Convention

As underscored in its Preamble, the 2019 Hague Judgments Convention establishes a regime that fosters greater predictability and certainty in relation to the circulation of foreign judgments. The Convention aims to promote effective access to justice and to enhance trade, investment and mobility, thus contributing to both legal certainty and economic growth.

In particular, the Convention is meant to increase foreseeability and reduce costs in the transaction phase of cross-border dealings; facilitate informed decisions on whether to bring claims and whether to file a response, based on the likelihood that the ensuing decision be eligible for recognition and enforcement; reduce the need for duplicative proceedings; and curb the costs and time frames associated with obtaining recognition and enforcement of judgments.[13]

The 2019 Hague Judgments Convention is meant to complement and co-exist with the 2005 Hague Convention on Choice of Court Agreements.

The structure of the Convention is quite traditional and does not present any surprises as such. Many general provisions reflect the solutions adopted by previous Hague Conventions on recognition and enforcement. They are also in conformity with the recognition systems that are currently applied in most recognition-friendly countries.

The Convention identifies the judgments that are eligible for recognition and enforcement and sets out common provisions with respect to recognition and enforcement.

The core obligation established under the Convention is set out at Article 4, according to which a judgment given by a court of a Contracting State shall be recognised and enforced in another Contracting State in accordance with the provisions of Chapter 2. Notably, a judgment which satisfies the bases for recognition and enforcement put forth at Article 5 (see *infra*, section VI) is eligible for recognition and enforcement; however, the judgment's eligibility to circulate may be

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Conference on Private International Law 'Judgments Convention'" (April 2018), commissioned by the European Parliament and prepared by A. De Miguel Asensio, G. Cuniberti, P. Franzina, C. Heinze, and M. Requejo Isidro, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604954/IPOL_STU(2018)604954_EN.pdf.

[12] See the Conclusions & Recommendations adopted by the Council on General Affairs and Policy of 5 to 8 March 2019, para. 4.

[13] See esp. F.J. GARCIMARTÍN ALFÉREZ/ G. SAUMIER, Judgments Convention: Revised Draft Explanatory Report, Prel. Doc. No 1 of December 2018, paras 6 *et seq*.

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challenged on the limited (and traditional) set of grounds for refusal of recognition and enforcement set out at Article 7 (see *infra*, section VII). This means that, if the criteria put forth under Chapter 2 are satisfied, a Contracting State may not refuse recognition or enforcement on other grounds under national law.

In any case, if the criteria set out in the Convention are not met, the State addressed may still recognise or enforce the judgment under national law and under other bilateral or regional arrangements (Article 15; see more in detail *infra*, section IV), subject to Article 6 (which provides for an exclusive basis for recognition and enforcement of judgments ruling on rights *in rem* in immovable property).

The Convention does not include any rules on *lis pendens* and parallel proceedings. At first glance, this might seem justified, because the instrument does not address (direct) jurisdiction. However, if one considers that pending proceedings and irreconcilable decisions represent very serious obstacles to the recognition and enforcement of foreign judgments (as it also clearly results from the Convention),[14] the inclusion of some mechanism capable of preventing or at least reducing parallel proceedings would have certainly been desirable.[15]

III. The Scope of Application

A. Material Scope

1. Civil or Commercial Matters

Articles 1(1) and 2 define the material scope of application of the Convention. Using a well-known technique – notably adopted in several EU Regulations, but also in the 2005 Choice of Court Convention (Articles 1 and 2) – they do so by first positively defining, in Article 1(1), which judgments are to be covered, namely judgments “in civil or commercial matters”.

Article 1(1) goes on to explicitly exclude revenue, customs, and administrative matters. As in several EU instruments (and notably the Brussels I-bis Regulation), these express exclusions are meant to facilitate the application of the Convention in States whose national law does not establish a distinction between private and public law.[16] Similar language was not included in the 2005 Choice of Court Convention since it was obvious that such public law matters could not be construed to be civil or commercial, as explained in the Hartley/Dogauchi Report,[17] but also because the need for such clarification in the choice of court context was

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[14] See Article 7(1)(e)-(f) and Article 7(2).

[15] This question will have to be discussed in the framework of the next phase of the Judgments Project: see supra, note 6.

[16] F.J. Garcimartín Alférez/ G. Saumier, Judgments Convention: Revised Draft Explanatory Report, Prel. Doc. No 1 of December 2018, para. 28.

[17] T. Hartley/ M. Dogauchi, Explanatory Report, in *Proceedings of the Twentieth Session* (2005), Tome III, *Choice of Court Agreements*, p. 785, esp. footnote 73.

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less stringent, as it would be uncommon for there to be a jurisdiction agreement relating to disputes in those matters.[18]

Article 2(4) clarifies that a judgment is not excluded from the scope of the 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. To mitigate the strength of this principle, some delegations insisted on the introduction of Article 19, under which a State may declare that it shall not apply the Convention to judgments arising from proceedings to which that State, or a governmental agency of that State, or a natural person acting for such a governmental agency, is a party. However, such declaration shall not distinguish based on the procedural position as claimant or defendant of the public body involved; therefore, a Contracting State making the declaration will not be able to avail itself of the Convention for the recognition and enforcement of a favourable judgment.

Regardless, paragraph 5 of Article 2 clarifies that "[n]othing in the Convention is intended to affect the privileges and immunities of a State or of an international organization, in respect of themselves and of their property".

2. Exclusions

Article 2(1) then lists several matters that are specifically excluded from the material scope of the Convention. In this context, it should be noted that Article 18 on "declarations with respect to specific matters" offers the ultimate safeguard for those States that wish to further restrain the material scope of the Convention in their relationships with other Contracting States.

Some of the exclusions under Article 2 mirror the list of excluded matters under Article 1(2) of the Brussels I-bis Regulation (status and capacity of natural persons, maintenance obligations, other family matters, wills and succession, insolvency, arbitration). In many respects, however, the Convention goes further and excludes matters that would otherwise fall into the category of civil or commercial matters.

Some of these exclusions, such as the carriage of passengers and goods, liability claims for nuclear damages, and liability for maritime claims and general average, are accepted: they are also provided in Article 2 of the 2005 Choice of Court Convention and are mainly motivated either by the existence of other specific international instruments in the relevant areas or by the fact that those matters fall under exclusive jurisdiction in some legal systems.

With respect to some of these areas, the scope of the 2019 Hague Judgments Convention is broader than that of the 2005 Hague Convention on Choice of Court Agreements. The 2019 Convention is applicable in disputes over emergency towage and salvage. The inclusion of such disputes is all the more remarkable, since none of the other existing international conventions that apply to these

[18] "Explanatory Note Providing Background on the Proposed Draft Text and Identifying Outstanding Issues", Prel. Doc. No 2 of April 2016 for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments, para. 23.

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matters cover dispute resolution, and the circulation of the judgments on these matters is currently governed by national laws or regional instruments.[19]

Further complexity is introduced with respect to marine pollution. This matter is completely excluded from the scope of the 2005 Choice of Court Convention, on grounds that some existing conventions, which deal with recognition and enforcement, establish regimes with exclusive jurisdiction.[20] However, Article 2(1)(g) of the 2019 Hague Judgments Convention breaks down the exclusion in three sub-parts, providing that only transboundary marine pollution, marine pollution in areas beyond national jurisdiction, and ship-source marine pollution be excluded from its scope. This way, the 2019 Convention avoids overlap with existing specialised instruments in the area of transboundary pollution, including maritime issues.[21] Furthermore, it does not interfere with current attempts to regulate pollution in areas beyond States' jurisdiction.[22] However, at the same time it also ensures that domestic judgments on marine pollution covered by a State's jurisdiction circulate under the Convention, hence expanding the outreach of the instrument and facilitating full compensation in those cases.

The exclusion of other matters, such as defamation and privacy, intellectual property, and anti-trust matters (Article 2(1)(k)-(m) and (p), respectively), proved to be more controversial.

The exclusion of defamation and privacy (Article 2(1)(k)-(l)) is premised on the divergent national laws and policies in these very sensitive areas.[23] The recognition and enforcement of judgments on defamation and privacy usually call for a balancing exercise between fundamental principles (freedom of expression, on one hand, and personality rights, on the other) and are frequently denied if the contrary would amount to an unreasonable and disproportionate compromise of such

[19] "Note on reconsidering 'marine pollution and emergency towage and salvage' within the scope of the draft Convention on the recognition and enforcement of foreign judgments in civil or commercial matters", Prel. Doc. No 12 of June 2019, para. 61 *et seq*.

[20] Such as the International Convention on Civil Liability for Bunker Oil Pollution Damage, IMO LEG/CONF.12/19; OJ [2002] L 256/7, Article 9, and the International Convention on Civil Liability for Oil Pollution Damage, 973 UNTS 3, 9 ILM 45, as amended by the 1992 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND 1992), Article 7.

[21] "Note on reconsidering 'marine pollution and emergency towage and salvage' within the scope of the draft Convention on the recognition and enforcement of foreign judgments in civil or commercial matters", Prel. Doc. No 12 of June 2019, para. 58. Pollution and environmental issues are dealt with by, in particular, the United Nations Environmental Program and the United Nations Environmental Assembly (https://web.unep.org/environmentassembly/).

[22] A mechanism concerning the systems and laws for areas beyond national jurisdiction is currently tackled by Members of the United Nations in the context of the UN Convention on the Law of the Sea. See the Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (U.N. General Assembly resolution 72/249).

[23] C.M. MARIOTTINI, The Exclusion of Defamation and Privacy from the Scope of the Hague Draft Convention on Judgments, this *Yearbook* 2017-2018, pp. 475-486.

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principles in the requested State. For instance, because of the strong U.S. policy,[24] favouring freedom of expression under the First Amendment of the Constitution, there are significant obstacles in the U.S. to the recognition of foreign libel decisions.[25] Similar challenges may arise also with respect to decisions on privacy: this area of the law is so delicate that conflicts may emerge to the detriment of the circulation of judgments, even between States that share, to a significant extent, a common understanding of procedural law and fundamental values, and are bound by a qualified degree of mutual trust as is the case of EU Member States.[26] While the provision at Article 2(1) of the Convention omits any reference to judgments on data protection, intrusion or breach of confidence, these matters may be construed as excluded from the scope of the Convention insofar as they relate to the private life of the defendant.[27]

The question of the inclusion and treatment of judgments on intellectual property rights sparked one of the most lively discussions among members of the Special Commission: ultimately, the position of those delegations that favoured a general exclusion prevailed at the Diplomatic Session (Article 2(1)(m)). This outright exclusion is the result of the inherent complexity of this subject, which is largely governed by the principle of territoriality. It also recognises the different and variously nuanced views that States often have with respect to certain core issues related to intellectual property rights – including the fact that some aspects of it may be construed by some legal systems as falling within the realm of administrative or criminal law and may to some extent overlap with anti-trust matters. In any case, the exclusion of intellectual property from the scope of the Convention does not entail the exclusion of all contractual disputes with an IP component.

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[24] Also mirrored in the 2010 SPEECH Act, 28 U.S.C. §§ 4101-4105. See L.E. LITTLE, Internet Defamation, Freedom of Expression, and the Lessons of Private International Law, this *Yearbook* 2012-2013, pp. 181-204, esp. p. 196; C.M. MARIOTTINI, Freedom of Speech and Foreign Defamation Judgments: From *New York Times v Sullivan* via *Ehrenfeld* to the 2010 SPEECH Act, in B. HESS/ C.M. MARIOTTINI (eds), *Protecting Privacy in Private International and Procedural Law and by Data Protection. European and American Developments*, Nomos-Ashgate 2015, pp. 115-168.

[25] In particular, under title 28 U.S.C. § 4102(a)(1), recognition and enforcement are possible only if the court addressed "determines that (A) the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in the case as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located […]."

[26] See, for instance, BGH, 19 July 2018 - IX ZB 10/18 where the German Supreme Court (*Bundesgerichtshof* – BGH) declined to recognise and enforce a Polish judgment under the Brussels I Regulation (before the recast) on grounds that enforcement would conflict with German public policy. Notably, the Court ruled that, pursuant to Article 45 of the Brussels I Regulation, to mandate the defendant to publish an apology drafted by the court of origin as its own opinion would violate the defendant's fundamental rights under Article 5(1) of the German Constitution. See B. HESS, Protecting Privacy by Cross-Border Injunction, 2 *RDIPP* 2019 (forthcoming).

[27] See also F.J. GARCIMARTÍN ALFÉREZ/ G. SAUMIER, Judgments Convention: Revised Draft Explanatory Report, Prel. Doc. No 1 of December 2018, para. 55.

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The exclusion of anti-trust issues is more nuanced. In principle, this exclusion is rooted in the acknowledgment that anti-trust rules and regulations are very different among States and touch upon complex policy issues. Also, as with intellectual property, the characterisation of the legal nature of anti-trust matters is far from being uniform. Though synchronising the exclusion of anti-trust and intellectual property clarifies the scope of application of the Convention in the future, the provision at Article 2(1)(p) carves out some exceptions and enumerates specific judgments that are to be construed as falling within the scope of the Convention. Notably, judgments based on actual or potential anti-competitive behaviour based on conduct (agreement or concerted practice) are covered by the Convention, provided that both the conduct and its effect occurred in the market of the State where the judgment was rendered.[28]

Finally, Article 2(1)(q), a novelty if compared to discussions of the Special Commission, excludes, from the scope of the Convention, sovereign debt restructuring through unilateral State measures. Though obvious insofar as sovereign debt and restructuring processes fall within the realm of sovereign administration and, as such, do not qualify as civil or commercial matters, this provision – together with those found at Article 2(1)(n)-(o), excluding activities of armed forces and law enforcement activities from the scope of the Convention, Article 2(4)-(5) and Article 19 – assists in delineating the boundaries of the Convention when a State is involved in the proceedings that led to the judgment for which recognition or enforcement are sought.[29]

3. Definition of Judgments

The broad definition of "judgments" included in Article 3(1)(b) also serves to specify the material scope of the Convention.

While all judgments on the merits rendered in matters falling within the scope of the Convention are covered – including non-monetary judgments, default judgments and determinations of procedural costs or expenses (see also Article 14(2)) – the Convention is not intended to apply to interim measures of protection. Although such exclusion may be understandable in light of the restrictive approach adopted under various national legal systems, it is nevertheless disappointing in view of the great practical importance of interim relief.[30]

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[28] This inclusion has been adopted by consensus at the Diplomatic Session. Although the last condition may appear as the equivalent of a jurisdictional filter, its purpose seems to ensure that the Convention will not apply to judgments based on the extraterritorial application of anti-trust laws.

[29] The language of the provision mirrors that of the Resolution adopted by the General Assembly on 10 September 2015: Basic Principles on Sovereign Debt Restructuring Processes, UN General Assembly (69th sess.: 2014-2015), A/RES/69/319/EN.

[30] Note that the 1999 draft preliminary Convention was applicable to interim measures ordered by the court having jurisdiction to make decisions on the merits of a case (Article 13).

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On the other hand, the recognition of judicial settlements – *i.e.*, settlements approved by, or concluded before a court – is ensured by Article 11.[31] Any conflict with the 2019 Singapore Convention on International Settlement Agreements Resulting from Mediation is pre-empted by Article 1(3) of said Convention, according to which, settlement agreements that have been approved by a court or reached during the course of judicial proceedings and that are enforceable as a judgment in the State of that court, do not fall within the scope of application of the Convention.[32]

B. Geographical Scope

Article 1(2) clarifies that the 2019 Convention only applies to the recognition and enforcement of judgments in one Contracting State of a judgment given in another Contracting State. As with all existing conventions and regulations in the area of recognition and enforcement, the new instrument will be based on reciprocity and will thus only apply *inter partes*.

Pursuant to Article 24(1) and (3), the Convention is open for signature and accession by all States, even those that are currently non-Member States of the Hague Conference. While such unrestricted openness reflects the instrument's universality, it might also backfire and be perceived as a serious hindrance to ratification or accession. Since lack of trust in the legal and/or judicial systems of (certain) foreign countries is the primary reason for some States' reluctance to recognise and enforce foreign judgments,[33] the success of the Convention also depends on Contracting States (or States considering ratification or accession) being provided with the right to exclude treaty-obligations with other Contracting States that they perceive as "untrustworthy".

Since a full "bilateralisation" provision, as it was included, for instance, in Article 21 *et seq*. of 1971 Hague Judgments Convention[34] and in Article 42, Option A, of the 2001 Interim Text,[35] would have proved too complicated and potentially detrimental to the smooth functioning of the Convention, an "opt-out" mechanism,

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[31] Similarly, see Article 12 of the 2005 Hague Convention on Choice of Court Agreements.

[32] United Nations Convention on International Settlement Agreements Resulting from Mediation adopted by the General Assembly on 20 December 2018 (62nd plenary meeting) and signed in Singapore on 7 August 2019.

[33] See A. BONOMI, New Challenges in the Context of Recognition and Enforcement of Judgments, in F. FERRARI/ D.P. FERNANDEZ ARROYO (eds), *The Continuing Relevance of Private International Law and Its Challenges*, Elgar (forthcoming, 2019).

[34] Pursuant to these provisions, the recognition and enforcement of decisions between two Contracting States is subject to them concluding a bilateral "Supplementary Agreement".

[35] See *supra*, note 5. Pursuant to this provision of the Interim Text, the (planned) Convention would "become effective" between any two Contracting States only "provided that the two States [had] each deposited a declaration confirming the entry into force between the two States of treaty relations under this Convention".

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allowing a Contracting State to exclude the application of the Convention in the relationship with one or more other Contracting States, was included at Article 29 during the Diplomatic Session.

Article 29 lays down, at paragraph 1, the general policy by stating that the Convention shall have effect between two Contracting States "only if neither of them has notified the depositary" of its intention to avoid relations with the other. Such notification can be made in two cases, addressed in paragraphs 2 and 3 of the same provision: the first is where a Contracting State notifies the depositary that it objects to establishing relations with a State having deposited its instrument of ratification or accession (paragraph 2), the second one is where a newly Contracting State objects to establishing relations with another Contracting State (paragraph 3).

While a Contracting State has 12 months, under paragraph 2, to object, given the delicate nature of an objection, particularly for a Regional Economic Integration Organization, a similar period is not provided for newly Contracting States. A newly Contracting State has time to consider its decision to object before taking formal steps to ratifying or acceding to the Convention.

Finally, paragraph 4 regulates the withdrawal of objections, which can be made at any time. A withdrawal takes effect three months after its notification to the depositary.

It should be noted that neither the 2005 Choice of Court Convention, nor the 2019 Singapore Convention on International Settlement Agreements Resulting from Mediation or the 1958 New York Convention on Arbitral Awards includes a similar opt-out clause,[36] however, it is reasonable to assume that the fact that these Conventions focus on respect for party autonomy generated fewer policy reasons for objections.[37]

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IV. Non-Exclusivity of the Convention

According to Article 15, the Convention is not exclusive and will thus not prevent the recognition and enforcement of judgments under national law of the Contracting States. This provision reflects a classic approach followed in most international instruments for the recognition and enforcement of foreign judgments: since the goal of such instruments is to facilitate the transnational circulation of decisions, they normally do not prevent the application of national rules where these better serve that objective. Another well-known expression of this same principle is

[36] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).

[37] On the other hand, see (albeit with significant differences in the drafting of the opt-out clause compared to the one found in the 2019 Hague Judgments Convention) the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, at Article 28 and the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, at Article 39.

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Article VII of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[38]

It follows from Article 15 that the criteria put forth under Chapter 2 of the 2019 Hague Judgments Convention are not designed to be exclusive or exhaustive; rather, the Convention sets minimum requirements for recognition and enforcement. The only exception are judgments falling within in the scope of Article 6, a provision that expressly limits the circulation of judgments on rights *in rem* in immovable property to those rendered by a court of the State where the property is situated.

The non-exclusivity of the Convention might have been implicitly deduced by its goal (*favor recognitionis*). However, the inclusion of express language must be met with approval because it prevents possible misunderstandings on the exclusive or non-exclusive application of the instrument, such as those generated, for instance, by the 1970 Hague Evidence Convention.[39]

Article 15 will probably be quite relevant in practice. As a matter of fact, the Convention might prove on several points (and in particular with regard to indirect jurisdiction) to be less recognition-friendly than the national law of several Contracting States.[40]

V. General Provisions on Recognition and Enforcement

Article 4(1) lays down the basic obligation under the Convention, based on which recognition or enforcement may be refused only on specific grounds outlined in the Convention. The same provision also reaffirms some general principles on recognition and enforcement, mostly drawn from the 2005 Choice-of-Court Convention.

Thus Article 4(2) states that there will be no review of the foreign judgment on the merits.

Article 4(3) makes clear that recognition is only possible if the judgment has effect in the State of origin, and enforcement is only possible if the judgment is enforceable in that State (Article 4(3)).

[38] Pursuant to Article VII of the 1958 New York Convention, "[t]he provisions of the present convention shall not […] deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

[39] Contrary to most European Contracting States, U.S. courts consider that the Hague Evidence Convention does not exclude the application of national procedural rules: see *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522 (1987).

[40] While the Convention does not include a provision such as Article 5(1)(k) of the Working Group's Proposed Draft Text of November 2015, according to which recognition and enforcement would also have been possible if the court of origin "would have had jurisdiction in accordance with the national law of the requested State," Article 15 will probably have the same effect.

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Similar to the Brussels I-bis Regulation, but contrary to what is provided in several national recognition systems, the Convention allows for recognition and enforcement of a non-final judgment, provided that it has effects and is enforceable in the country of origin. However, the Contracting States are under no obligation in this respect. Thus, when the judgment is still subject to review, or when the time limit for seeking ordinary review has not expired, the courts of the requested State may refuse recognition or enforcement or postpone it until the final judgment; obviously, a refusal does not prevent a subsequent application for recognition or enforcement once the judgment has become final (Article 4(4)).

This range of possible options will allow the courts of the Contracting States to choose the solution that best fits the particular case. However, national practices will also have an impact. Thus, it is likely that courts in the EU Member States will be more easily prepared to grant immediate recognition or enforcement under a security provision because this possibility is already provided for within the Brussels systems. Meanwhile, courts in other less recognition-friendly countries will probably more easily opt for a refusal or a stay of proceedings, which might result in some disparities in the application of the Convention.

In accordance with Article 9, recognition or enforcement of a severable part of a judgment can also be granted where an application for recognition or enforcement of only that part is made, or when only a part of the judgment is capable of being recognised or enforced under the Convention. For instance, in accordance with Article 10, only part of a judgment awarding, *i.a.*, punitive or exemplary damages may be recognised or enforced by the court of the requested State under the Convention (see more in detail *infra*, section VII).

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VI. Bases for Recognition and Enforcement

Article 5 lists the grounds for recognition and enforcement: it is at the heart of the 2019 Convention. In contributing, on the one hand, to the claimant's choice on where to file a claim and, on the other hand, to the defendant's decision on whether to appear and defend the case, jurisdictional filters assist the parties to design a litigation strategy based on the eligibility of the ensuing judgment to circulate in other Contracting States.

Rather than putting forth jurisdictional filters that are as broad as possible, Article 5 identifies areas of commonality with a view to increasing acceptance.[41] Broad jurisdictional filters would hardly have garnered general acceptance at the negotiation stage and would hinder the prospect of signature/ratification, thus undermining the Convention's chances of effectiveness –

[41] "Explanatory Note Providing Background on the Proposed Draft Text and Identifying Outstanding Issues", Prel. Doc. No 2 of April 2016 for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments, para. 63, stating that: "The goal was to identify the circumstances in which the person against whom recognition or enforcement was sought could not reasonably claim that the proceeding should have been heard in some other court".

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As a result of the Convention's focus on recognition and enforcement, the courts of the Contracting States will continue to apply their national rules on jurisdiction, including those grounds that are not listed as jurisdictional filters under the Convention. In planning their litigation strategy, claimants will have to decide whether they wish to bring proceedings on "exorbitant" jurisdictional grounds, knowing that, if they do so, they may be unable to take advantage of the Convention.

However, even in those instances where the court of origin establishes jurisdiction on grounds that are not listed under Article 5, the ensuing judgment may still benefit from circulation under the Convention, provided there is a basis for recognition as set out under this instrument. The case, for instance, may be of a court of origin establishing its jurisdiction on grounds that it is located in the State where the damage occurred or on grounds that the claimant is a national of the forum State (grounds that are not listed under Article 5): the judgment will still be eligible for recognition and enforcement if, *e.g.*, the habitual residence of the person against whom recognition and enforcement is sought also happens to be situated in the State of origin.

A. Habitual Residence

Pursuant to Article 5(1)(a), a judgment is eligible for recognition and enforcement if the person against whom such recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings.

This is one of the few "general" bases for recognition included in the Convention. As such, it is meant to apply to all kinds of judgments within the scope of application of the instrument, the only exception being those rendered in violation of the exclusive jurisdiction rule under Article 6.

Of the jurisdictional filters under Article 5(1), the one at sub-paragraph (a) is also the only one whereby indirect jurisdiction is based solely on connections between the person against whom recognition is sought and the State of origin. All the other filters in paragraph 1 are based either on consent or on connections between the court of origin and the dispute giving rise to the judgment.

Being the expression of the widely-accepted principle *actor sequitur forum rei*, this provision mirrors jurisdictional grounds that are accepted in most national legal systems and international instruments. However, it does present some original features.

A first particularity is that – contrary to similar provisions currently applicable in some national or supranational systems[42] – Article 5(1)(a) does not refer to

[42] In Europe, the equivalent is obviously Article 4(1) of the Brussels I-bis Regulation, (Regulation (EU) No 1215/2012, OJ [2012] L 351, p. 1). For the U.S., see § 5(a) of the 2005 Uniform Recognition Act and § 5(a) of the 1962 Uniform Recognition Act. See R.A. BRAND, New Challenges in the Recognition and Enforcement of Judgments, in F. FERRARI/ D.P. FERNANDEZ ARROYO (eds), *The Continuing Relevance of Private*

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a party's domicile, but to his/her habitual residence. This solution is based on the frequently voiced concern that the notion of domicile could be interpreted in different ways in the Contracting States based on traditional local understanding. The same concern has led to the surge in popularity of habitual residence in the Hague Conventions as well as in most European Regulations.

According to the Convention, corporations and other legal persons also have a "habitual residence." Of course, this use of the notion of habitual residence is not completely novel: in Europe, we find it in the Rome I and Rome II Regulations.[43] And in the U.S., this notion seems to be in line with the "essentially at home" metaphor used by the Supreme Court in the *Goodyear* and *Daimler* cases – language that undoubtedly resembles the notion of habitual residence.

While the habitual residence of a natural person is not defined, the Convention provides for a definition of a legal person's habitual residence (Article 3(2)). This definition, which is drawn from the 2005 Hague Choice of Court Convention (Article 4(2)), very closely resembles that included in current Article 63 of the Brussels I-bis Regulation.

Unsurprisingly, the Convention does not allow general jurisdiction based on "doing-business" in the forum State – a U.S. doctrine that was sharply criticised abroad and finally rejected in the *Goodyear* and *Daimler* judgments of the Supreme Court. "Doing business" in a State is not the same as having the "principal place of business" there: the threshold for a court to render a decision capable of recognition or enforcement under the Convention should be distinctly higher.

Similarly, the simple fact that the defendant has a branch, agency, or establishment, *i.e.* a "place of business" in the forum State will not be sufficient to assert general jurisdiction. Following the approach of the Brussels I-bis Regulation (Article 7(5)), the Convention allows in Article 5(1)(d), for the recognition and enforcement of a judgment given at the place of a defendant's branch, agency, or other establishment, but only if "the claim on which the judgment is based arose out of the activities of that branch, agency, or other establishment." As this condition makes clear, this is not a rule of general jurisdiction, but only one of specific jurisdiction.

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Another peculiar feature of the proposed Article 5(1)(a), is that it does not refer to the habitual residence "of the defendant," but rather of "the person against whom recognition or enforcement is sought." This terminology makes sense because, as mentioned, the Convention does not deal with (direct) jurisdiction; it only provides bases for recognition and enforcement. Obviously, recognition and enforcement of a judgment can be sought not only against the original defendant, but against everyone who has become a party to the foreign proceedings (including cases of joinder, intervention, impleader, interpleader, subrogation, and succession).[44]

International Law and Its Challenges, Elgar (forthcoming, 2019), U. of Pittsburgh Legal Studies Research Paper No 2018-29, esp. section II.

[43] See Rome I Regulation (Regulation (EC) No 593/2008, OJ [2008] L 177, p. 6), Article 19; Rome II Regulation (Regulation (EC) No 864/2007, OJ [2007] L 199, p. 40), Article 23.

[44] "Explanatory Note Providing Background on the Proposed Draft Text and Identifying Outstanding Issues", Prel. Doc. No 2 of April 2016 for the attention of the

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B. Jurisdiction Based on Consent

Establishing a composite regulation based on sub-sets of provisions, the 2019 Hague Judgments Convention articulates jurisdiction based on consent in different variations: Article 5(1) governs, at sub-paragraph (e), express consent given during the course of the proceedings before the court of origin; subparagraph (f) of the same provision regulates implicit consent; the claimant's implicit consent is also the rationale for the recognition basis of the provision at sub-paragraph (c); finally, non-exclusive choice of court agreements are regulated at sub-paragraph (m).

By contrast, exclusive choice-of-court agreements do not constitute a recognition basis under the new instrument: the recognition and enforcement of judgments based on such agreements is left entirely to the 2005 Choice-of-Court Convention.

Also, some restrictions apply to the relevance of jurisdiction based on party autonomy, notably *vis-à-vis* the circulation of, on the one hand, judgments rendered against a consumer or an employee (Article 5(2)) and, on the other hand, judgments on rights *in rem* in immovable property, regarding which Article 6 sets out an exclusive basis for recognition and enforcement.

1. Explicit Consent

Article 5(1)(e) establishes two preconditions for consent to jurisdiction to operate as a basis for recognition and enforcement: the defendant must have given express consent to the jurisdiction of the court of origin and such consent must have been given "in the course of the proceedings" which later resulted in the judgment for which recognition and enforcement is sought.

The precondition whereby express consent must be given during the course of proceedings does not mandate that consent be necessarily given before the court: for instance, consent expressed in court documents (*e.g.*, memoranda, briefs, statements) that are exchanged between the parties in the course of the proceedings also satisfies such a precondition.

The provision at Article 5(1)(f) is based on the uncontroversial notion that express consent is a widely accepted basis for recognition and enforcement. It is also premised on the assumption that a defendant who has expressed its consent cannot legitimately object on jurisdictional grounds to the circulation of the ensuing judgments.

Like the jurisdictional filter on habitual residence, and subject to Articles 5(2) and 6, express consent applies to all judgments covered by the Convention, regardless of the nature of the claim.

Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments, para. 81.

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2. Implicit Consent

According to Article 5(1)(f), a foreign judgment is eligible for recognition and enforcement if the defendant argued on the merits before the court of origin without contesting jurisdiction.

The circulation of judgments rendered in proceedings where the defendant tacitly submitted to jurisdiction also mirrors a widely-accepted rule.[45]

Unlike sub-paragraph (e) of the same provision, Article 5(1)(f) governs the case where consent is implied (as opposed to expressed) during the proceedings from the defendant arguing on the merits and failing to challenge jurisdiction, in spite of grounds on which to legitimately object. To ensure that consent is actually voluntary, the provision restricts the scope of implicit consent: in particular, for the purposes of sub-paragraph (f) implied consent is established provided that: (i) the defendant argued on the merits before the court of origin; and (ii) the defendant failed to contest jurisdiction "within the timeframe provided in the law of the State of origin". Moreover, unlike most national or international systems, the Convention puts forth a negative precondition in accordance to which (iii) uncontested appearance does not entail consent when "it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded" under the law of the State of origin. The rationale of this condition is clear: uncontested appearance should not be regarded as implied consent to jurisdiction when the defendant did not have good grounds to contest the foreign court's jurisdiction.

In light of the burdens of proof that surround tacit submission, it is reasonable to presume that implied consent will come into play as a residual ground for recognition and enforcement, *i.e.* in case the other jurisdictional filters under the Convention are not satisfied.

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3. The Claimant's or the Cross-Claimant's Implicit Consent

Implicit consent is also the underlying rationale for the jurisdictional filter put forth at Article 5(1)(c), according to which the judgment against the claimant is eligible for recognition and enforcement without any further requirements. Since it is the claimant who chooses where to bring a claim, it would be contradictory to then allow the same individual to challenge the circulation of the ensuing judgment on grounds of jurisdiction.

Accordingly, regardless of the fact that a counterclaimant's procedural position is analogous to that of a claimant, the provision clarifies that the same rule does not apply to counterclaims since a counterclaimant is not the one who chooses where to bring the claim. Nevertheless, indirect jurisdiction can also be based on a counterclaim: in this respect, Article 5(1)(l) distinguishes between judgments in favour of the counterclaimant and judgments against the counterclaimant.

In the first case, pursuant to subparagraph (i) the claimant's implicit consent allows for recognition of a judgment in favour of a counterclaimant, provided the

[45] See Article 26 of the Brussels I-bis Regulation.

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counterclaim arose from the same transaction or the same occurrence as the original claim.

By contrast, if the court ruled against the counterclaimant, the judgment's eligibility for recognition and enforcement on the basis of the counterclaimant's implied consent is limited to the case where the latter freely decided to assert his claim as a counterclaim instead of bringing a separate suit ("permissive counterclaim"). By contrast, consent may not be presumed when the law of the country of origin required the counterclaim to be filed in order to avoid preclusion ("compulsory counterclaim", Article 5(1)(l)(ii)).[46]

4. Choice-of-Court Agreements

According to Article 5(1)(m), a judgment is also eligible for recognition and enforcement if the rendering court was designated in an agreement "other than exclusive choice of court agreements".

The provision does not explicitly mention that it is meant to regulate agreements reached prior to the commencement of proceedings; however, this may be reasonably implied in light of the fact that an agreement reached during the proceedings would be the result of the defendant consenting to jurisdiction of the court seized (see Article 5(1)(f)).[47]

With regard to the formal validity of the choice-of-court agreement, the new Convention follows the liberal approach of the 2005 Choice of Court Convention and only requires that the agreement be recorded in such a way as to make it accessible for future reference.

To avoid overlap with the 2005 Convention and discouraging States from ratifying that instrument, exclusive choice of court agreements are not covered by the 2019 Hague Judgments Convention.[48] Consistency in the coordination between the two instruments is also furthered by the fact that the notion of "exclusive choice of court agreement" in sub-paragraph (m) is modelled on the one found at Article 3 of the 2005 Convention.

However, a judgment, rendered on the basis of an exclusive choice of court agreement, by the court of a State that is not a Contracting State to the 2005 Hague Choice of Court Convention but that has ratified the 2019 Hague Judgments Convention, would still be eligible for recognition and enforcement under the national rules on recognition and enforcement of the State addressed, as it follows from the non-exclusivity rule of Article 15.

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[46] For example, see Rule 13(a) of the U.S. Federal Rules of Civil Procedure.

[47] In the same vein see also F.J. GARCIMARTÍN ALFÉREZ/ G. SAUMIER, Judgments Convention: Revised Draft Explanatory Report, Prel. Doc. No 1 of December 2018, para. 219.

[48] See also Article 23, esp. paragraph (2) on the relationship between the 2019 Hague Judgments Convention and international instruments concluded before it.

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C. Judgments in Contractual Matters

In accordance with Article 5(1)(g), a judgment ruling on a contractual obligation is eligible for recognition or enforcement if it was rendered by a court of the State in which performance of that obligation took place or should have taken place under the parties' agreement, or, absent such an agreement, in accordance with the law applicable to the contract. Regardless of whether this condition is satisfied, recognition or enforcement can still be denied if "the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection" to that State.

This provision exemplifies an interesting attempt to draw a compromise between diverging underlying principles regarding jurisdiction, as further detailed below.

1. Place of Performance

While the first condition, based on the place of performance of the contractual obligation, is clearly reminiscent of the European rules of specific jurisdiction in contractual matters (Article 7(1) of the Brussels I-bis Regulation), the rule at Article 5(1)(g) of the Convention does not entirely mirror those included since 2001 in the Brussels regime, and more closely resembles the original Brussels Convention, as interpreted by the European Court of Justice (ECJ).

On the one hand, unlike the Brussels I-bis Regulation – where the relevant obligation is often the "characteristic" obligation (as is the case for the sale of goods and provision of services under Article 7(1)(b) of the current Brussels system) – the Convention identifies, in the obligation on which the judgment has "ruled", the relevant factor with a view to establishing jurisdiction. This language seems to point to the "disputed obligation" or the "obligation in question", as it is called in Europe since the 1976 *De Bloos* decision[49] (which is of course still relevant today under Article 7(1)(a) of the Brussels I-bis Regulation, but only for contracts other than for the sale of goods or the provision of services). This means that, under the Convention, the place of performance will be determined based on which party has brought the claim (*e.g.* the place of delivery if the claim was brought by the buyer, and the place of payment if the claim was brought by the seller).

On the other hand, unlike the Brussels I-bis Regulation, the Convention holds that, absent an agreed place of performance, the latter is to be determined by reference to the law applicable to the contract (*lex contractus*). This mirrors the well-known *Tessili* case law of the ECJ[50] – which is still relevant under the current Brussels regime for contracts governed by Article 7(1)(a), however not for the sale of goods and provision of services under Article 7(1)(b).

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[49] ECJ, Case 14/76, *De Bloos*, ECR [1976] 1497.

[50] ECJ, Case 12/76, *Tessili*, ECR [1976] 1473; ECJ, Case C-288/92, *Custom Made*, ECR [1994] I-2913; ECJ, Case C-440/97, *Groupe Concorde*, ECR [1999] I-6307.

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The consequence of such differences is that a judgement rendered by the court of a Member State based on the Brussels I-bis Regulation will not necessarily benefit from recognition and enforcement in the (non-European) Contracting States of the Convention.

2. A Purposeful and Substantial Connection

According to the last sentence of Article 5(1)(g), recognition and enforcement of a judgment on a contractual obligation given at the place of performance is in any event excluded, if "the defendant's activity in relation with the transaction clearly did not constitute a purposeful and substantial connection to that State."

This part of the provision introduces a safeguard by prescribing that a fuller analysis of the contacts of the defendant with the State of origin be performed for the purposes of recognition and enforcement of a judgment under the jurisdictional filter on contractual matters.

The wording of the "purposeful and substantial connection" test included in the provision may be described as a hybrid stemming from the U.S.'s "purposeful availment" and Canada's "real and substantial connection" tests to establish a constitutionally proper jurisdiction.[51]

On one hand, the U.S. Supreme Court has interpreted the Fourteenth Amendment of the U.S. Constitution (in accordance to which no state shall "deprive any person of life, liberty, or property, without due process of law") as limiting personal jurisdiction to those cases in which the defendant "purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws"[52] in such a manner that the defendant "should reasonably anticipate being hauled into court" in that State.[53]

On the other hand, in a sequence of decisions the Supreme Court of Canada (SCC) has developed a test that, rather than looking into the purposeful nature of the defendant's activity, focuses on the existence of a real and substantial connection. Unlike the U.S. Supreme Court's, the SCC appeared to suggest that the

[51] See the "Note on the concept of 'Purposeful and Substantial Connection' in Article 5(1)(g) and 5(1)(n)(ii) of the February 2017 draft Convention" by R.A. Brand and C.M. Mariottini, Prel. Doc. No 6 of September 2017.

[52] The "purposeful availment" requirement was first set out by the Supreme Court in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), as a refinement of the *International Shoe*'s "minimum contacts" test. The rationale behind it is that the contacts between the defendant and the forum should not be "random, fortuitous, or attenuated", nor be a result "of the unilateral activity of another party or a third person," but be created from purposeful actions of the defendant himself.

[53] *World-Wide Volkwagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). See more recently *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*,582 U.S. ___ (2017) (Sotomayor, J., dissenting), where the U.S. Supreme Court – relying on *Walden v. Fiore et al.,* 571 U.S. ___ (slip op., at 8) (2014) – ruled that "for specific jurisdiction, a defendant's general connections with the forum are not enough".

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connection could be between the forum State and *either* the cause of action *or* the defendant.[54]

This provision introduces a certain degree of uncertainty given the possibility of different interpretations, especially by those courts whose national laws are not immediately familiar with the provision's underlying notions.

Judgments rendered at the place of performance will often satisfy the "purposeful and substantial connection" test. This will more easily be the case when the performance entails a plurality of acts to be performed in the forum State, and the defendant actually accomplished at least some of these acts there (or expressly agreed to do so). By contrast, a purposeful and substantial connection might be considered as lacking, when performance in the forum State consists of one single act (*e.g.* the delivery of the goods), unless the defendant created other purposeful contacts with that State. *A fortiori*, when the place of performance does not result from actual acts accomplished by the defendant, nor from the express contractual terms, but only from subsidiary rules of the *lex contractus,* recognition or enforcement might be refused under the Convention, even if the judgment was rendered at the place of performance.

D. Consumer and Employment Contracts

In partial derogation from the recognition bases discussed above, the Convention includes some special rules for the protection of consumers and employees in those cases where recognition and enforcement is sought of a judgment *against* a consumer or an employee.[55]

The Convention does not mandate exceptions with respect to the eligibility to circulate of judgments rendered *in favour* of consumers or employees, which therefore, remain subject to the rules put forth in paragraph 1. This differentiation is premised on the assumption that, in those latter instances, consumers and employees may actually benefit from the fact that a judgment rendered in their favour is eligible for circulation on additional grounds.

The exceptions put forth at Article 5(2) tackle jurisdiction based on consent and jurisdiction based on the place of performance of a contractual obligation. Notably, Article 5(2)(a) limits the relevance of Article 5(1)(e) on express consent given in court only to those instances where "consent was addressed to the court, orally or in writing". Contrary to other cases, implied consent cannot be inferred from other acts, such as the memoranda exchanged by the parties. Under Article 5(2)(b), the recognition basis under Article 5(1)(f), (g) and (m) cannot be invoked as against a consumer or an employee. This rules out implicit consent, the ground for special recognition based on the place of performance, and non-exclusive choice-of-court agreements.

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[54] See the "Note on the concept of 'Purposeful and Substantial Connection' in Article 5(1)(g) and 5(1)(n)(ii) of the February 2017 draft Convention" by R.A. Brand and C.M. Mariottini, Prel. Doc. No 6 of September 2017, esp. para 23.

[55] Such contracts are excluded from the scope of the 2005 Choice of Court Convention (Article 2(1)(a)-(b)).

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It follows from the exceptions carved out at Article 5(2) that eligibility to circulate judgments against a consumer or employee is limited to those judgments rendered by a court of the State of that person's habitual residence except where the consumer or employee addressed, to the court seized, express consent to the jurisdiction of that court.[56]

While excluding some of the recognition bases, the Convention does not provide for specific grounds in the interest of weak parties. In particular, contrary to the approach under the Brussels I-bis Regulation, judgments obtained by a consumer or an employee in his or her country of domicile will not be entitled to recognition under the Convention unless they meet one of the existing grounds for recognition and enforcement under Article 5. Moreover, unlike the Brussels I-bis Regulation, the Convention does not put forth a specific provision for judgments on insurance contracts.

E. Judgments in Tort Matters

Under Article 5(1)(j) a judgment on a non-contractual obligation arising from death, physical injury, damage or loss of tangible property is entitled to recognition and enforcement "if the act or omission directly causing such harm occurred in the State of origin, irrespective of where the harm occurred."

This special jurisdictional ground based on the place of wrongful conduct is widely accepted internationally. By contrast, recognition is not granted to judgments rendered at the place of the harmful event (place of the damage). While in line with U.S. case law, this departs from the broad jurisdictional approach of the Brussels I-bis Regulation and of several European countries. The narrow scope of this provision is intended to increase acceptance of the Convention.

It should be stressed that this provision does not cover damage to intangible rights, in line with the exclusion of intellectual property rights that was finally decided at the Diplomatic Session.

The fact that this provision is tailored to cover only physical injury (including death) and damage or loss of tangible property could have been an argument in support of the inclusion of judgments on non-contractual defamation or privacy matters within the Convention's scope of application. In fact, as a result of the narrow scope of the provision, judgments on such matters would not circulate under Article 5(1)(j). It follows that the problem of identifying, with respect to such matters, the place of the act or omission that directly caused the harm, would not arise in the context of the Convention.[57]

[56] F.J. GARCIMARTÍN ALFÉREZ/ G. SAUMIER, Judgments Convention: Revised Draft Explanatory Report, Prel. Doc. No 1 of December 2018, para. 231.

[57] Specifically tackling privacy (including defamation) in the cross-border setting is the work undertaken in the framework of, respectively, the ILA Committee on the Protection of Privacy in Private International and Procedural Law at <http://www.ila-hq.org> and the IDI 8th Commission on Internet and the Infringement of Privacy: Issues of Jurisdiction, Applicable Law and Enforcement of Foreign Judgments at <http://www.idi-iil.org/en/>.

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F. Judgments on Immovable Property

Under the Convention, the grounds for circulation of judgments on immovable property are listed in a sub-set of provisions.

1. The Exclusive Basis for Judgments on Rights in Rem *in Immovable Property*

Article 6 sets out a rule of exclusive jurisdiction for recognition and enforcement purposes that closely resembles some of the rules included in Article 24 of the Brussels I-bis Regulation. According to Article 6, a judgment on rights *in rem* in immovable property shall be recognised and enforced "if and only if" it is rendered by the courts of the State where the property is situated.

Unlike the grounds for recognition and enforcement at Article 5 (that establish a minimum standard for recognition and enforcement but, in accordance with Article 15, do not prevent recognition of foreign judgments that satisfy other criteria for recognition provided under national law), the obligation put forth at Article 6 is two-fold: on the one hand, it positively mandates (subject to Article 7) recognition and enforcement, in a Contracting State, of a judgment rendered by a court of the State where the property is located; on the other hand, it negatively requires the courts of a Contracting State to refuse recognition and enforcement of a judgment rendered in this matter by the court of any other State.

Rights *in rem* in immovable property and tenancies of immovable property are excluded from the scope of the 2005 Hague Choice of Court Convention (Article 2(2)(l)): this ensures consistency and coordination between the 2005 and 2019 Conventions.

It is noteworthy that Article 6 underwent significant amendments during the Twenty-Second Diplomatic Session. On one hand, the exclusive basis for the circulation of judgments on "the [registration or] validity of an intellectual property right" originally put forth at Article 6(a) of the 2018 May Draft Convention was repealed subsequent to the exclusion of intellectual property from the matters covered by the 2019 Hague Judgements Convention (Article 2(1)(m)). On the other hand, the rules on judgments on residential lease of immovable property were removed from Article 6 and replaced by specific rules under Article 5.

2. Judgments on Lease of Immovable Property

Article 5(1)(h) regulates the lease of immovable property (tenancy) by providing that such judgments are eligible for circulation if they were rendered by the court of the State in which the property is situated. This provision, which embodies a widely acknowledged rule, lays down a specific ground for recognition and enforcement which is not intended to be exclusive, *i.e.* it does not rule out that such judgments circulate under a different jurisdictional filter (for instance, on grounds of habitual residence pursuant to sub-paragraph (a)).

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3 Judgments on Residential Lease or on the Registration of Immovable Property

By contrast, pursuant to Article 5(3) a judgment ruling on residential lease of immovable property, or on the registration of immovable property is eligible for recognition and enforcement "only if it was given by a court of the State where the property is situated", to the exclusion of all the other grounds put forth at paragraph 1.

The provision at Articles 5(1)(h) and 5(3) of the Convention are based on the same jurisdictional filter in that they both identify, in the State where property is situated, the relevant connecting factor. However, unlike Article 5(1)(h), Article 5(3) makes this jurisdictional filter to a certain extent "exclusive" when it comes to residential (as opposed to non-residential or commercial) leases.

Nonetheless, the character of this "exclusivity" is not the same as the one under Article 6: in fact, unlike the provision under Article 6, the provision at Article 5(3) is without prejudice to Article 15, *i.e.* it does not prevent the recognition and enforcement of a judgment rendered elsewhere if the judgment is eligible for recognition and enforcement pursuant to the national law of the State addressed.

This distinction was introduced during the Twenty-Second Diplomatic Session. In the May 2018 Draft Convention, judgments on "tenancy on immovable property for a period of more than six months" fell within the scope of exclusive grounds for recognition and enforcement under the then Article 6(c), whereas the text emerging from the Twenty-Second Diplomatic Session requalifies the provision as non-exclusive for the purpose of Article 15. It also drops the time requirement (an element that, while present at the EU level,[58] is not broadly recognised), introduces the distinction between residential and commercial leases, and extends the scope of the provision so as to also include also the registration of immovable property.

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4. Judgments on a Related Contractual Claim

Finally, Article 5(1)(i) furthers the circulation of a judgment against the defendant arising from proceedings in which a claim on a contractual obligation secured by a right *in rem* in immovable property was joined with a claim relating to that right *in rem*.

This provision ties into the one at Article 6 in that it facilitates the circulation of a judgment against the defendant on the related contractual claim in case the judgment fails to meet other jurisdictional filters, such as the habitual residence of the person against whom recognition and enforcement is sought (Article 5(1)(a)), or where payments are due (Article 5(1)(g)).[59]

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[58] See Article 24 of the Brussels I-bis Regulation.

[59] F.J. GARCIMARTÍN ALFÉREZ/ G. SAUMIER, Judgments Convention: Revised Draft Explanatory Report, Prel. Doc. No 1 of December 2018, paras 199-200.

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While the provision at sub-paragraph (i) of Article 5(1) covers judgments rendered against the defendant, homologous judgments against the claimant may circulate, in any case, in accordance with sub-paragraph (c).

VII. Grounds for Refusal of Recognition and Enforcement

While partially departing from many national systems and from the Brussels I-bis Regulation, the grounds for refusal of recognition and enforcement listed at Article 7 of the 2019 Hague Judgments Convention are modelled on those put forth at Article 9 of the 2005 Hague Choice of Court Convention as well as in other national or supranational instruments.

As clarified in Article 4(1), the list of defences under Article 7 is exhaustive. It is also non-mandatory ("[r]ecognition or enforcement may be refused […]"). It follows that the court of a Contracting State may refuse recognition or enforcement of a judgment rendered in another Contracting State in accordance with Article 7; at the same time, the requested court is precluded from denying such recognition or enforcement on grounds other than those put forth under Article 7.

The grounds for denial under Article 7(1) include: absence of sufficient notice (Article 7(1)(a)); the manifest incompatibility with the public policy of the requested State of the judgment for which recognition or enforcement is sought (Article 7(1)(c)), which includes fundamental principles of both substantive and procedural law ("fundamental principles of procedural fairness"); the fact that the judgment was obtained in breach of an agreement or designation in a trust instrument, according to which the dispute should have been decided by a Court of a State other than the one that actually rendered the decision (Article 7(1)(d)); and, inconsistency with a judgment involving the same parties, either in the requested State or in another State (Article 7(1)(e)-(f)). In the latter case, it is requested that the judgment for which recognition or enforcement is sought be an earlier judgment, and obviously eligible for recognition in the requested State.

The defences listed at Article 7(1) closely mirror those enumerated in the Brussels I-bis Regulation (Article 45). The defence under Article 7(1)(a) applies not only (as also provided in the Brussels I-bis Regulation) when the defendant was not notified of the document which instituted the proceedings (or equivalent document) "in sufficient time and in such a way" as to enable him to defend himself, but also when such notice was given in a way that was "incompatible with the fundamental principles of the requested State concerning service of process." (see Article 7(1)(a), sub-paragraphs (i) and (ii), respectively).[60]

Furthermore, the 2019 Hague Judgments Convention puts forth some additional defences that are not found in the Brussels system.

[60] This provision is modelled on Article 9(c) of the 2005 Choice of Court Convention.

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On the one hand, recognition and enforcement can be denied when the foreign judgment was obtained by fraud (Article 7(1)(b)). This rule is found in several national systems and international conventions although its exact interpretation may differ. In many cases, fraud will be construed as already falling under the public policy exception, in particular within its "procedural" effects (lack of procedural fairness).

On the other hand, refusal is also possible when proceedings between the same parties on the same subject matter are already pending before a court of the requested State (Article 7(2) of the Convention). A similar rule is also found in several national and international recognition systems.[61] However, recognition may be refused only if the proceedings in the requested State were instituted *before* those that have led to the judgment for which recognition and enforcement is sought, and only provided the dispute was closely connected with that State.

Furthermore, pursuant to Article 10, recognition and enforcement of a judgment may be refused "if, and to the extent that" the judgment awards damages, including exemplary or punitive damages, which do not compensate a party for the actual loss or harm suffered.

This provision – which is modelled after Article 11 of the 2005 Hague Choice of Court Convention – clearly reflects the wariness that traditionally surrounds punitive damages in jurisdictions other than the U.S., and notably in civil law countries.[62] However, the provision mitigates the rejection in two ways.

On the one hand, in accordance with Article 10(1) refusal of recognition or enforcement is limited to the part of the foreign judgment which awards non-compensatory damages. It follows that the foreign judgment may not be rejected in its entirety on the sole premise that it includes an award for non-compensatory damages. Rather, provided the judgment does not meet any other grounds for refusal under the Convention, the remaining parts of the judgment are eligible for recognition and enforcement, as echoed at Article 9 on severability. This may be the case with a declaration of liability, a (positive or negative) injunction and, obviously, the award of compensatory damages.[63]

On the other hand, in accordance with Article 10(2), in assessing the eligibility of the judgment on damages to circulate, the requested court shall take into account "whether and to what extent the damages awarded serve to compensate costs and expenses relating to the proceedings."[64] This provision appears to accommodate an argument that is often invoked: punitive damages, especially in

[61] For instance, see Article 27(2)(c) of the Swiss PIL Act (Federal Act of 18 December 1987 and subsequent amendments), Article 64(1)(f) of the Italian PIL Act (Law 31 May 1995 No 218 and subsequent amendments), or Article 22(c) of the 2007 Hague Child Support Convention.

[62] Specific provisions against punitive damages are included in various national PIL codifications: *e.g.* Articles 135(2) and 137(2) of the Swiss PIL Act and Article 40(3) of the German EGBGB.

[63] See also the similar rule included in Article 33(1) of the 1999 preliminary draft Convention.

[64] A similar rule was included in Article 33(3) of the 1999 preliminary draft Convention.

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the U.S., serve to counterbalance the equal splitting of costs for the procedural expenses and attorney's fees among parties. In this respect, it is reasonable that the requested court be required to proceed with the assessment of whether and to what extent non-compensatory damages serve the purpose of compensating the procedural costs

VIII. Preliminary Questions

Like the 2005 Hague Choice of Court Convention,[65] the 2019 Convention includes two provisions addressing rulings on preliminary questions.

The first provision, Article 2(2), assists in shaping the material scope of the Convention in those instances where preliminary questions on matters excluded from the Convention arise in the course of the main proceeding before the court of origin. Under this provision, a judgment is not excluded from the scope of the Convention merely because one of the matters excluded from such scope under Article 1(1), Article 2(1) or Article 18 arose incidentally, in particular by way of defence, in the course of the proceedings before the court of origin. This reflects the widely recognised principle, according to which it is the object of the proceedings, rather than the preliminary questions, that defines the application of the Convention. Pursuant to Article 2(2), the judgment on the principal object is covered by the Convention, irrespective of the fact that a preliminary question, falling within the exclusions, arose during the course of the proceedings in the State of origin.

Article 2(2) is then complemented by Article 8, which regulates the circulation of judgments in those instances where an incidental ruling on a preliminary question is involved.

On one hand, Article 8(1) mandates that rulings on preliminary questions excluded from the scope of the Convention (see *supra*, section III.2; *e.g.* the validity of an IP right), or judgments falling within the scope of Article 6 rendered by a court of a State other than the one where the property is situated (see *supra*, sect. VI), shall not circulate under the Convention. *A contrario*, it follows from Article 8(1) that rulings on preliminary questions that do fall within the scope of the Convention or that do comply with Article 6 are eligible for recognition and enforcement under the Convention, provided of course that they satisfy all the other conditions set up by this instrument.

On the other hand, Article 8(2) introduces an *ad-hoc* basis for denial of recognition and enforcement of a judgment falling within the scope of the Convention "if, and to the extent that" such judgment is based on an incidental ruling on a preliminary question that does not fall within the scope of the Convention, or on a matter falling under Article 6, rendered by a court other than the one where the property is situated. These grounds for denial are not mandatory but merely discretionary and should only be used when the requested court finds that the judgment

[65] See Articles 2(3) and 10 of the 2005 Choice of Court Convention.

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on the main object of the proceedings would have been decided differently had the incidental question also been decided in a different manner.[66]

Article 8(2) also applies without qualification when the incidental ruling relates to the validity of an intellectual property right since the inclusion of a specific rule in line with Article 10(3) of the 2005 Hague Choice of Court Convention,[67] as it was envisaged in previous drafts,[68] was finally rejected at the Diplomatic Session.

IX. Procedure

Mirroring the approach adopted in the 2005 Hague Choice of Court Convention and several other Hague Conventions on recognition of foreign judgments,[69] as well as in the 1958 New York Convention on the recognition and enforcement of arbitral awards, the 2019 Hague Judgments Convention echoes at Article 13(1) the traditional principle according to which the law of the requested State governs the procedure for recognition and enforcement, provided the Convention does not state otherwise (see *infra*, Articles 12 and 14).

While the 2019 Convention does not put forth a uniform and thorough recognition and enforcement procedure, the last sentence of Article 13(1) of the Convention pragmatically prompts the court of the requested State to "act expeditiously". Consequently, the requested court shall have recourse to expeditious procedures under national law, and avoid unreasonable or undue delays.[70]

By providing that recognition and enforcement may not be refused on grounds that they should be sought in another State, Article 13(2) precludes the requested court from applying the doctrine of *forum non conveniens* at the recognition or enforcement stage. It remains to be seen whether the practical effect of this rule will also be to dispense with any particular requirement of personal

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[66] F.J. GARCIMARTÍN ALFÉREZ/ G. SAUMIER, Judgments Convention: Revised Draft Explanatory Report, Prel. Doc. No 1 of December 2018, para 322.

[67] Under Article 10(3) of the 2005 Hague Choice of Court Convention, when a judgment is based on a ruling regarding the validity of a registered intellectual property right, recognition or enforcement of such a judgment may be refused only where certain additional conditions are met.

[68] See Article 8(3) of the 2018 draft Convention.

[69] A notable exception can be found at Article 23 of the 2007 Child Support Convention, a provision which clearly reflects the particular importance of swift procedures in the area of maintenance recovery.

[70] F.J. GARCIMARTÍN ALFÉREZ/ G. SAUMIER, Judgments Convention: Revised Draft Explanatory Report, Prel. Doc. No 1 of December 2018, para. 356, citing the NYGH/ POCAR Report (note 4), para. 355 and the HARTLEY/ DOGAUCHI Report (note 17), para. 216.

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jurisdiction to hear a recognition or enforcement action, contrary to the approach followed by courts in some Common Law States.[71]

Regarding the procedural requirements that the Convention regulates directly, Article 12 lists the documents that, in accordance with the Convention, must be produced for the purpose of seeking recognition or enforcement.

Article 14 regulates costs of recognition and enforcement proceedings. Paragraph 1 reflects a traditional non-discriminatory rule by providing that no security, bond or deposit may be required from a party solely on grounds that the party is not domiciled and is neither a national, nor a resident of the State in which enforcement is sought. Securities, bonds or deposits may still be required on other grounds.

The provision at Article 14(2) puts forth an *ex-post* protection for the judgment debtor in those instances where the judgment is denied recognition or enforcement, and an order for payment of costs or expenses is issued against the judgment creditor: according to this provision, the order may circulate under the Convention when the judgment creditor (or any other person) was exempt from the security, bond or deposit requirement either under paragraph 1 or under the law of the requested State. This result would, otherwise, be impossible under the Convention given that, according to Article 3(1)(b), a determination of costs or expenses falls within the definition of "judgments" under the Convention only provided it relates to a decision on the merits.

Finally, Article 14(3) establishes a declaration mechanism according to which a Contracting State may opt-out of paragraph 1 or declare that it excludes the application of paragraph 1 to certain courts.

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X. Concluding Remarks

The lengthy and winding path that has led to the adoption of the 2019 Hague Judgments Convention is indicative of the fact that States identify, in the recognition and enforcement of foreign judgments in civil or commercial matters, a very delicate issue, regarding which they wish to retain a high level of scrutiny and control. However, it is also indicative of the importance that they attach to this matter, as signified by the years of commitment to the negotiations and by the determination of the experts and negotiators to identify viable solutions and reach consensus on the more complex issues. In this respect, the adoption of the 2019 Hague Judgments Convention may be welcome as an expression of openness and remarkable dedication towards global cooperation – rare and precious qualities in the times in which we live.

The negotiations that have led to the adoption of the Convention have created the opportunity for a unique forum to discuss, with a broad spectrum, the

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[71] See R.A. BRAND, Recognition and Enforcement of Foreign Judgments in the United States, Federal Judicial Center International Litigation Guide, April 2012, at 10. However, the courts in some U.S. jurisdictions (notably New York) have held that the debtor does not need to be subject to personal jurisdiction in the enforcement State.

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issues that surround the circulation of judgments in civil or commercial matters. In this respect, the value of the new instrument is further strengthened by the fact that over 400 experts representing 81 States and Observers convened to negotiate it on the occasion of the Twenty-Second Diplomatic Session.[72]

The significance of the new Convention goes beyond the inherent fact of its adoption; it extends to the exchange of knowledge between experts from different jurisdictions, often with different backgrounds, which has characterised the negotiations. The importance of this exchange will inform and be reflected in the mutual exchanges and relationships between States and their experts and practitioners for years to come.

The Convention's impact on the global circulation of judgments could have been stronger had the list of matters falling within its scope of application been broader. The impression is that the number of exclusions could have been reduced, all the more in light of the possibility for Contracting States to declare, subject to a strong interest, and in accordance with Article 18, that they will not apply the Convention to a given matter. Also, with respect to judgments rendered in some of the excluded areas, such as defamation or privacy, the grounds for denial based on the manifest incompatibility with public policy under Article 7(1)(c) could have been a sufficient safeguard.

Regrettably, despite their variety, the multifaceted jurisdictional filters of Article 5 are in many ways more restrictive than those accepted in the most advanced recognition systems.[73] While foreign judgments will continue to benefit, under the non-exclusivity principle of Article 15, from more liberal rules in force in the Contracting States, the risk exists that the 2019 Convention might inhibit, in the future, more recognition-friendly reforms at the national level.

The fragmentation and the resulting need for coordination generated by the numerous and variously articulated grounds for recognition and enforcement may raise concerns in the future. On the one hand, they may discourage ratification, as the understanding of the system in its entirety could be *prima facie* less clear-cut than it appears to be. On the other hand, the reading of some grounds for recognition and enforcement is not as unambiguous as one may wish for a global treaty. This is the case, for instance, with the crucial provision at Article 5(1)(g) on judgments on contractual obligations which is based on notions of European, U.S. and Canadian law, with which many other legal systems are not familiar in practice. The variety of (specific, semi-exclusive, and exclusive) grounds for recognition finally provided at Articles 5 and 6 for judgments on immovable property may also prove to generate unnecessary complexity.

The level of uncertainty is then increased because of the declarations that may be made under the Convention: again, while these declarations unquestionably serve the purpose of maximising the level of acceptance of the Convention, it is nevertheless also true that they increase the difficulties in the practical application of the treaty. It also remains to be seen whether the "opt out" mechanism of Article

[72] See https://www.hcch.net/en/news-archive/details/?varevent=683.

[73] See A. BONOMI (note 33).

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29 will be sufficient in practice to mitigate the concern that the openness of the Convention might raise in some States.

In light not only of the significant goals pursued with the adoption of this Convention, but also of the Convention's inherent complexity, an appropriate training of judges and practitioners will be crucial to promote and increase familiarity with the Convention, as well as to foster its success in the Contracting States.

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