EXÉCUTION DES JUGEMENTS
ENFORCEMENT OF JUDGMENTS

Liste récapitulative commentée
Annotated Checklist

janvier / January 2013

HccH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

LISTE RÉCAPITULATIVE COMMENTÉE DES QUESTIONS À ABORDER PAR LE GROUPE DE TRAVAIL SUR LA RECONNAISSANCE ET L'EXÉCUTION DES JUGEMENTS

établie par le Bureau Permanent

* * *

ANNOTATED CHECKLIST OF ISSUES TO BE DISCUSSED BY THE WORKING GROUP ON RECOGNITION AND ENFORCEMENT OF JUDGMENTS

prepared by the Permanent Bureau

Document à l'attention du Groupe de travail
(réunion de février 2013)

Document for the attention of the Working Group
(meeting of February 2013)

Permanent Bureau | *Bureau Permanent*
6, Scheveningseweg 2517 KT The Hague | *La Haye* The Netherlands | *Pays-Bas*
telephone | *téléphone* +31 (70) 363 3303 fax | *télécopieur* +31 (70) 360 4867
e-mail | *courriel* secretariat@hcch.net website | *site internet* http://www.hcch.net

LISTE RÉCAPITULATIVE COMMENTÉE DES QUESTIONS À ABORDER PAR LE GROUPE DE TRAVAIL SUR LA RECONNAISSANCE ET L'EXÉCUTION DES JUGEMENTS

établie par le Bureau Permanent

* * *

ANNOTATED CHECKLIST OF ISSUES TO BE DISCUSSED BY THE WORKING GROUP ON RECOGNITION AND ENFORCEMENT OF JUDGMENTS

prepared by the Permanent Bureau

Table of contents

Introduction

1. The purpose of this document is to assist the Working Group with its charge to "prepare proposals for consideration by a Special Commission in relation to provisions for inclusion in a future instrument relating to recognition and enforcement of judgments, including jurisdictional filters."[1] The structure of the document is informed by the conclusion of the Expert Group, at its meeting in April 2012, that it would be helpful for the Working Group to receive one or more notes prepared by the Permanent Bureau that:

a. describe and comment on the provisions on recognition and enforcement found in existing instruments, as the basis for work on this topic; and

b. outline options for judicial filters.[2]

2. The present document draws upon previous work carried out by the Special Commission and the Working Group convened in earlier stages of the Judgments Project[3], relevant Hague Conventions, as well as external sources. This Note does not address technical interpretative provisions, such as relating to the need for uniform interpretation of the future instrument, the relation of the future instrument to other past and future instruments (particularly the Choice of Court Convention), the interaction between the Convention and residual national rules on recognition and enforcement, and the possible accession by Regional groupings or multi-unit States. Further discussion of these provisions is pending, subject to progress of work with respect to jurisdiction and recognition and enforcement.

3. In order to provide a useful framework for the Working Group's analysis, this annotated checklist adopts the following structure:

a. Part I canvasses discrete legal subject areas that, in the past, have been debated for inclusion (or exclusion) in Hague Conventions, as well as identifying emerging areas that may merit further consideration;

b. Part II aims to clarify which kinds of decisions constitute a judgment capable of recognition and enforcement under a future instrument;

c. Part III reflects on the procedural "mechanics" of the recognition and enforcement procedure;

d. Part IV focuses on one of the aspects to be considered with regard to the mechanics: jurisdictional filters; and

e. Part V completes the overview by presenting possible techniques of judicial cooperation and exchange of information.

4. Abbreviated titles are used to refer to the most often used sources. For full references, please refer to the Glossary (Annex I).

---

[1] Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (17-20 April 2012), available on the Hague Conference website at < www.hcch.net > under "Work in Progress" then "General Affairs", para. 17.

[2] Conclusions and Recommendations of the 2012 Expert Group, para. 4 (e).

[3] A chronology of previous stages of the Judgments Project, including the development of the Preliminary Draft Convention and discussions at the Nineteenth Session (2001) which produced the Interim Text, is available on the Hague Conference website at < www.hcch.net > under "Specialised Sections" then "Judgments Project". It should be noted that, unlike the Preliminary Draft Convention, which was adopted by majority vote, the Interim Text was adopted through the consensus method, which resulted in a large number of bracketed provisions, on which no consensus could be reached, and accompanying footnotes. It was not possible in this document to refer systematically to such brackets and footnotes, but they should be borne in mind wherever reference is made in this document to the Interim Text.

Part I – Substantive scope

5. It is uncontroversial that the scope of any future instrument will be limited to "civil and commercial matters"[4] – areas of law generally accorded the highest degree of flexibility and party autonomy (except where they overlap with overriding interests of the State). The terms "civil" and "commercial" are regarded as "autonomous" is the sense that they are able to be construed without reference to national law or other international instruments.[5] Because of this, guidance is provided as to precisely which matters are considered "civil and commercial". However, this is a fluid conception that changes regularly over time, depending on the prevailing legal practice and thought. In addition, even within such matters, there may be some subject areas that States consider not to be capable of foreign resolution, or better resolved domestically, and hence, excluded from the scope of a future instrument.

6. To assist with the deliberations of the Working Group, the Permanent Bureau has identified three categories of matters, which are generally considered to:

a. be expressly within the scope of a future instrument;
b. require further consideration; or
c. be expressly outside the scope of a future instrument.

1. Matters generally considered outside of scope

7. The following areas are generally *excluded* from the scope of similar instruments.

a. Revenue, customs, and administrative matters

Quick Reference: Art. 1 Enforcement Convention; Art. 1(1) Interim Text.

8. The Interim Text expressly excludes "revenue, customs, or other administrative matters" from its scope. The Choice of Court Convention does not contain an express exclusion, because it was thought to be unnecessary; it was considered obvious that such matters were not "civil and commercial matters".[6]

b. Matters on the status and legal capacity of natural persons

Quick Reference: Art. 1(1) Enforcement Convention; Art. 1(2)(a) Interim Text; Art. 2(2)(a) Choice of Court Convention.

9. The Interim Text and Choice of Court Convention exclude the status and legal capacity of natural persons from their respective scopes, on the grounds that such matters go beyond the "civil and commercial" realm, often involve public registers and national interests, and are subject to the operation of other Hague Conventions in this area.[7]

c. Maintenance obligations

Quick Reference: Art. 1(1) and (3) Enforcement Convention; Art. 1(2)(b) Interim Text; Art. 2(2)(b) Choice of Court Convention; Art. 2 Child Support Convention.

10. Maintenance obligations, including child support, are excluded from the Interim Text and Choice of Court Convention, on the ground that they are the subject of several

[4] The term "civil *or* commercial matters", which has appeared in past Hague Conventions, is functionally equivalent to the term "civil *and* commercial matters". In other words, no change of meaning is intended by changing "or" to "and".
[5] Hartley-Dogauchi Report, para. 49.
[6] *Ibid*.
[7] For a list of these Hague Conventions and matters covered by this exclusion, see Nygh-Pocar Report, p. 33.

specific Hague Conventions.[8] In particular, the Child Support Convention sets out a detailed regime for recognising and enforcing maintenance decisions.

d. Matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships

Quick Reference: Art. 1(1) Enforcement Convention; Art. 1(2)(c) Interim Text; Art. 2(2)(c) Choice of Court Convention; Art. 2(1)(b) and (c) Child Support Convention.

11. Matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships are expressly excluded under both the Interim Text and Choice of Court Convention.

12. In these instruments, "matrimonial property regimes" refer to communal property (usually associated with civil law countries) and separate property (usually associated with common law countries), as well as rights in property which spouses may have as a result of their marriage, including rights in respect of the matrimonial residence. "Other rights and obligations arising out of marriage" means rights arising by authority of statute, by principles of equity, or by some other unwritten law. "Or similar relationships" is intended to extend the exclusion of such regimes under the Convention to the property rights of registered unmarried cohabitees and registered unions. An increasing number of countries provide for property rights of these types of partnerships.

13. It should be noted that excluding matrimonial property regimes from the scope of a future instrument does not exclude all claims simply because they arise between parties to a marriage or similar relationship. For example, a claim arising under the general law of contract would not be excluded simply because the dispute is between parties to a registered union.

e. Matters of wills and succession

Quick Reference: Art. 1(4) Enforcement Convention; Art. 1(2)(d) Interim Text; Art. 2(2)(d) Choice of Court Convention.

14. Wills and succession are expressly excluded from both the Interim Text and the Choice of Court Convention.[9] The Reporter to the *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons* noted that the definition of the term "succession" in the Succession Convention:

> "… would appear to include (1) a 'disposition of property upon death' […] i.e., a voluntary act of transfer whether in testamentary form or that of an agreement as to succession, and (2) the transfer of property upon death that occurs by provision of law, when (a) there is no such voluntary act, or (b) the voluntary act is wholly or partly invalid, or (c) the law compels the distribution of assets belonging to the deceased to family members."[10]

15. Thus, exclusion of "wills and succession" does not exclude *all* dispositions of property upon the death of an individual from the scope of the Convention.[11]

---

[8] See, for example: *Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children; Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children; Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations; Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations; Hague Convention of 23 November 2007 on International Recovery of Child Support and Other Forms of Family Maintenance* and *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* ("2007 Child Support Convention").

[9] For further discussion on the scope of this exclusion, see Nygh-Pocar Report, p. 35.

[10] D. Waters, "Explanatory Report on the *1 August 1989 Convention on the law applicable to succession to the estates of deceased persons* 537", *Proceedings of the Sixteenth Session (1988),* Tome II, *Succession to estates – applicable law*, The Hague, SDU, 1990, p. 537, para. 28

[11] *Ibid*., p. 543.

16. Other Hague Conventions Conference deal specifically with wills and succession.[12] A new Regulation on these matters has also been recently adopted by the EU,[13] which establishes uniform rules on, among other things, the recognition and enforcement of judgments in maters of successions and wills. The Working Group may take this new instrument into consideration in determining whether these matters should be included in the scope of the new instrument.

f. Insolvency, composition or analogous matters

Quick Reference: Art. 1(5) Enforcement Convention; Art. 1(2)(e) Interim Text; Art. 2(2)(e) Choice of Court Convention.

17. The phrase "insolvency, composition, or analogous matters" is intended to cover a wide range of insolvency-related proceedings which have different names across jurisdictions. The applicable national laws across jurisdictions are widely divergent, both in terminology and substance. The Interim Text and Choice of Court Convention both exclude insolvency proceedings from their scope. This was a conscious choice made in recognition of the fact that insolvency and similar matters are often complex and involve a multitude of local and foreign stakeholders, often provided for in jurisdiction-specific mandatory national laws.

18. The 1997 UNCITRAL Model Law on Cross-Border Insolvency was designed in an attempt to assist in creating more uniformity at a substantive level.[14] The Model Law has, so far, been implemented in 19 States, and, in future, will likely go a long way to standardising cross-border insolvency actions.

2. Matters generally included in scope

19. There following areas have, in the past, been generally included within the scope of similar commercial instruments.

a. Electronic commerce matters

Quick Reference: Art 4(2)(b) Interim Text; Art 3(c)(ii) Choice of Court Convention.

20. Transactions involving electronic commerce are not excluded from either the Interim Text or the Choice of Court Convention and therefore fall within their scope. In this context, electronic commerce refers to the species of commercial transactions carried out "by means of electronic data interchange and other means of communication … which involve the use of alternatives to paper-based methods of communication and storage".[15] In every day terms, it relates to the myriad transactions conducted over or through the internet.

21. Additionally, to avoid ambiguity, in instances where parties agree that a particular court is to have jurisdiction, both the Interim Text and Choice of Court Conventions expressly indicate that such agreement may be validly evidenced by electronic means.[16]

---

[12] See *Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions; Hague Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons* and *Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons* (not yet in force).

[13] *Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession*, [2012] OJ L 201/107, available on the EU website at < http://www.europa.eu > under "Legislation and Treaties".

[14] UNCITRAL Model Law on Cross-Border Insolvency (1997); see also the *European Convention on Certain International Aspects of Bankruptcy* (Istanbul, 1990). The text and status of the Model Law are available on the UNCITRAL website at < http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html > (last consulted in December 2012).

[15] See para. 2 of the Resolution Adopted by the General Assembly (85th plenary meeting, 16 December 1996), on the UNCITRAL Model Law on Electronic Commerce (1996).

[16] Art. 4(2) *b)* of the Interim Text; Art. 3 *c) ii)* of the Choice of Court Convention.

It may be noted that, although there was wide agreement in the negotiations leading up to the Nineteenth Session that electronic commerce matters should or could not be excluded from scope, the inability to reach consensus on grounds of jurisdiction in relation to these matters was one of the reasons why the negotiations could not be brought to a final result.[17]

22. UNCITRAL's Online Dispute Resolution ("ODR") project is the most recent attempt to create a transnational dispute resolution mechanism for electronic transactions.[18] However, this will not remove the need for a future instrument applicable to disputes involving electronic commerce, as it will only apply to disputes consensually referred to it. A whole species of electronic commerce disputes – situations where parties have not chosen a particular forum to resolve their dispute – will remain governable under a future instrument.

b. Insurance matters

Quick Reference: Art. 17 Choice of Court Convention.

23. Insurance matters are not excluded from either the Choice of Court, or the Interim Text. Article 17 of the Choice of Court Convention provides specifically that the Choice of Court Convention applies to contracts for insurance and reinsurance, even where the object of the insurance is outside the scope of the Convention.

24. For example, although contracts for carriage of goods by sea are excluded from the scope of the Convention, a contract to insure the same goods on the voyage will not be excluded on this basis.

c. Matters where a State is a Party to Civil Litigation

Quick Reference: Art. 1(4) and (5) Interim Text; Art. 2(5) and (6) Choice of Court Convention.

25. The Interim Text and Choice of Court Convention explicitly provide that proceedings involving States and State instrumentalities (including governmental agencies or any person acting for a State) are *not* excluded merely by virtue of the fact that such an entity is party to those proceedings. Thus, for matters involving a State or State instrumentality to be excluded under either Convention, another specific head of exclusion must be found, or reference had, for example, to a broad exception to recognition and enforcement, such as that of the enforcing State's public policy.

26. In view of concerns expressed during the October 1999 meeting of the Special Commission[19], the Interim Text and Choice of Court Convention confirm that such a provision does not affect the immunity that States enjoy (under national or international law) from the judicial authority of other States.[20]

---

[17] See "Some Reflections on the Present State of Negotiations on the Judgments Project in the context of the Future Work Programme of the Conference", Prel. Doc. No 16 of February 2002 for the attention of Commission I (General Affairs and Policy of the Conference) of the Nineteenth Session – April 2002, para. 7, in *Proceedings of the Nineteenth Session (2001/2002)*, Tome I, *Miscellaneous matters*, Brill, 2008, p. 429. paras 5-8.

[18] Work is presently ongoing. For the most recent documents see: < http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html > (last consulted in December 2012).

[19] Nygh-Pocar Report, pp. 36-37.

[20] State immunity in respect of enforcement action taken against one State by another State in respect of a foreign judgment is dealt with in Art. 19 of the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (not yet in force, available at < http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf >, last consulted in December 2012) and Chapter III of the *European Convention on State Immunity* (available at < http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm >, last consulted in December 2012). In a 2011 case, the Supreme Court of the United Kingdom confirmed that a State is not entitled to claim immunity in respect of proceedings for the registration of a foreign judgment where it was not entitled to immunity in respect of proceedings before the court of origin: *NML Capital Limited v Republic of Argentina* [2011] UKSC 31.

3. Matters requiring further consideration

27. There is no fixed consensus on whether matters within this category should be excluded from the scope of a future instrument. In some instances, although previous Conventions have excluded a matter, this has been due to the difficulty in crafting a suitable provision – and not due to a principled legal or policy reason. Where this is the case, this has been noted.

a. Admiralty or maritime matters

Quick Reference: Art. 1(2)(h) Interim Text; Arts 2(2)(f) & (g) Choice of Court Convention.

28. The Interim Text excludes "admiralty or maritime matters" because of the highly specialised nature of the subject, with a complex body of admiralty and maritime law that has developed over many centuries.[21] Additionally, States are often unwilling to extend recognition and enforcement to judgments in this field, where other States are not party to the relevant international Conventions.[22] In this context, the term "admiralty or maritime matters" refers to claims arising in relation to ships, cargoes, and the employment of seamen, including claims arising out of the defective condition or operation of a ship or arising out of a contract for the hire of a ship, or for the carriage of goods or passengers on a ship.

29. The Choice of Court Convention does not use this terminology, and instead distinguishes between the carriage of passengers or goods (which extends to carriage by sea, land and air[23]) and certain other maritime matters (namely marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage). Both of these categories are excluded. Any other maritime matter (*e.g.*, non-emergency towage and salvage, shipbuilding, ship mortgages, and liens) is not excluded. Carriage of passengers or goods was excluded to avoid possible conflicts with other conventions.[24] Carriage by sea was excluded because States that are parties to the Hague-Visby Rules[25] may be unwilling to accept a grant of jurisdiction to a State not a party to the rules. Such a concern may not be present in a future instrument concerned with recognising and enforcing judgments.

30. UNCITRAL has adopted recent rules for international carriage of goods by sea in the *11 December 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, also known as "the Rotterdam Rules". The Rules have not yet entered into force. In general, the Rules apply to contracts of carriage in which the place of receipt and place of delivery are in different States.[26] Contracting States are only bound to recognize and enforce judgments of other Contracting States if both States have made the relevant declaration.[27] Furthermore, even where the Contracting States have taken the relevant declaration, grounds for refusal of recognition and enforcement are based on national law.[28] Consequently, a carve-out for the carriage of goods is not entirely necessary. Pursuant to the Rotterdam Rules, reference will always be had back to national law, with respect to recognising and enforcing judgments.

For a discussion on the difference between jurisdictional immunity and immunity in respect of enforcement action, see generally A. Reinsch, "European Court Practice Concerning State Immunity from Enforcement Measures", 2006, 17(4) *European Journal of International Law* 803.

[21] Nygh-Pocar Report, p. 36.

[22] *Ibid*.

[23] Hartley-Dogauchi Report, para. 58.

[24] *Ibid*. For example, the 1924 *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*, as amended by the *Brussels Protocol of 1968* ("Hague-Visby Rules"); See also 1978 *United Nations Convention on the Carriage of Goods by Sea* ("Hamburg Rules").

[25] *Ibid*.

[26] For the full rules on scope, see the 2009 *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* ("Rotterdam Rules"), Arts 5-6.

[27] Rotterdam Rules, Art. 74, which notes that: "The provisions [relating to jurisdiction, recognition, and enforcement] shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them".

[28] Rotterdam Rules, Art. 73(2).

31. The carriage of passengers – and their personal effects – by sea, falls outside the scope of the Rotterdam Rules, and is governed by the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. However, this Convention relates primarily to substantive matters, and does not contain any provisions on the recognition or enforcement of judgments.

b. Arbitration and related proceedings

Quick Reference: Art. 12(3) Enforcement Convention; Arts 1(2)(g) and 3 Interim Text; Art. 2(4) Choice of Court Convention.

32. "Arbitration and related proceedings", broadly, were excluded from the Interim Text and Choice of Court Convention "to ensure that the [Hague Conventions did] not interfere with existing instruments on arbitration".[29] The Enforcement Convention does not exclude such proceedings, but does provide that the court addressed need not recognise the jurisdiction of the court of origin if the former considers itself bound to recognise an arbitration agreement.[30] Although sometimes treated as one, the phrase "arbitration and related proceedings" refers to two distinct forms of proceedings: arbitration proceedings, potentially leading to an arbitral award, and judicial proceedings relating to arbitration matters, potentially leading to a court-issued judgment. For clarity, each is discussed separately below.

33. The enforcement of arbitral awards is governed by other international instruments, the most important of which is the United Nations Convention on the Recognition and Enforcement of Arbitral Awards ("New York Convention"). The New York Convention regime is very effective in supporting the recognition and enforcement of arbitral awards, but provides no guidance in this respect for any arbitration-related court proceedings (that may result in a judgment, requiring foreign recognition or enforcement). Consequently, the recognition and enforcement on these issues must be resolved by reference to national laws outside of the New York Convention. For a future instrument to be comprehensive and completely cover the field – that is, not leaving a legal lacuna between arbitration awards under the New York Convention, which are covered, and arbitration-related court proceedings, which are not – it will need to extend to arbitration-related proceedings.

Arbitration proceedings

34. Since the inception of the Judgments Project in 1992, it has been clear that a future instrument would not impact on the recognition and enforcement of arbitral awards. Reflecting this, no proposals have been entertained, at any stage, that a future instrument should be extended beyond the recognition and enforcement of foreign judgments, and purport to apply to any form of arbitral award. Thus, arbitration proceedings, resulting in an arbitral award, are clearly outside the scope of a future instrument.

Arbitration-related proceedings

35. The more nuanced question is whether arbitration-related proceedings should fall within the scope of a future instrument. Arbitration-related proceedings may encompass a wide range of court-support for the arbitral process including the appointment of arbitrators, points of law referred to a court throughout the course of arbitration, and any other proceedings whereby a court may give assistance to the arbitral process.[31]

---

[29] Hartley-Dogauchi Report, para. 84; see also Nygh-Pocar Report, p. 35.
[30] Art. 12(3).
[31] A comprehensive list of the ways in which courts may assist arbitral tribunals is contained in the widely-adopted UNCITRAL Model Law on International Commercial Arbitration (1985), as amended in 2006, available at < http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html > (last consulted in December 2012).

36. Much debate occurred with respect to the European Commission's proposal to bring arbitration-related court proceedings within the scope of the Brussels I Regulation.[32] It was opposed, in particular, by the arbitration community, on the basis that any interference with the jurisdiction of arbitrators would undermine the recognition and enforcement regime underpinned by the New York Convention.[33] The majority of the opposition focused on the negative effects of enforcing judgments concerning the validity of an arbitration agreement, or rendered in breach of an arbitration agreement. However, it may, in principle, be acceptable for arbitration-related judgments, to be recognised and enforced if these categories are excluded. A proposed form of wording, stemming from the proposed Article 3 of the Interim Text, is as follows:

> *This Convention shall not:*
> *…*
>
> *(1) extend to arbitration proceedings; or*
> *(2) … require a Contracting State to recognise and enforce a judgment if the exercise or declaration of jurisdiction by the court of origin was contrary to the applicable arbitration agreement.*

37. This approach is consistent with the modern pro-arbitration approach of States, ensuring: that the successful enforcement regime of the New York Convention, and the competence of arbitrators to determine their own jurisdiction, is not disturbed; and, that court-proceedings related to international commercial arbitration, where consistent with an arbitration agreement, are given full effect internationally.

c. Matters of liability for nuclear damage

Quick Reference: Art. 1(7) Enforcement Convention; Art. 1(2)(j) Interim Text; Art. 2(2)(i) Choice of Court Convention.

38. Matters involving nuclear liability are excluded from the scope of the Choice of Court Convention. The rationale for this is that States may be reluctant to allow legal proceedings in another State resolve the liability of a nuclear accident, particularly due to principles of limited liability and collective procedural laws that may exist. Additionally, jurisdiction over nuclear accidents, including nuclear liability, is governed by other international conventions.[34] However, not all nuclear countries are covered by these treaties.

d. Matters whose object is rights *in rem* in immovable property

Quick Reference: Art. 1(2)(l) Interim Text; Art. 2(2)(l) Choice of Court Convention.

39. Rights *in rem* relate to proceedings concerning the ownership or possession of immovable property (also called "real property" or "real estate"). The term only refers to proceedings which have as their object a right *in rem* – that is, claims whose object is a personal right, and are merely related to some form of immovable property, are not included. For example, a claim for damages for breach of contract for the sale of land is not an action *in rem*. The action must be based on real rather than personal rights, and must be enforceable as a right "as against the world."[35]

---

[32] For a summary of the discussion see, for example, < http://conflictoflaws.net/2009/brussels-i-review-interface-with-arbitration/ > (last consulted in December 2012).
[33] For a comprehensive response to this proposed change, see generally the International Bar Association (Arbitration Committee) Submission to the European Council (June 2009), available at < http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Projects.aspx > (last consulted in December 2012).
[34] See, for example, the *2004 Protocol To Amend The Convention On Third Party Liability In The Field Of Nuclear Energy of 29 July 1960* (the "Paris Convention")*, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982*, whereby, according to amended Art. 13 of the Paris Convention, exclusive jurisdiction rests with the courts of the State Party on whose territory the nuclear accident occurred.
[35] Nygh-Pocar Report, p. 64.

40. Rights *in rem* in immovable property fall within the scope of the Enforcement Convention and other regional instruments.[36] During past negotiations on the Judgments Project, there was in-principle agreement among experts of the Special Commission to deal specifically with immovable property, and the Preliminary Draft Convention includes a ground of exclusive jurisdiction in the courts of the State in which the property is situated.[37] However, difficulties emerged in defining the actions to which it would apply[38]. A similar provision is included in the Interim Text[39], although at the Nineteenth Session, a proposal was made to exclude the matter altogether.[40]

41. The Choice of Court Convention excludes from its scope proceedings which have as their object rights *in rem*. This can be explained by a continued view that exclusive jurisdiction over these matters lie with the courts of the State in which the property in situated (*i.e.*, that parties cannot contract out of this jurisdiction through a choice of court agreement). However, in a new instrument dealing with recognition and enforcement, it would still be possible to address rights *in rem* in immovable property through appropriately formulated jurisdictional filters (see discussion at para. 159).

e. Matters of tenancies of immovable property

Quick Reference: Art. 2(2)(l) Choice of Court Convention.

42. These matters fall within the scope of the Interim Text and are included in the ground of exclusive jurisdiction that also covers rights *in rem* in immovable property (discussed in para. 40). The Choice of Court Convention excludes from its scope all forms of tenancies in immovable property. The policy considerations for excluding these matters from scope, or alternatively providing specific provisions to address them, are similar to those for excluding rights *in rem* in immovable property.

f. The validity of entries in public registers

Quick Reference: Art. 2(2)(p) Choice of Court Convention.

43. These matters fall within the scope of the Interim Text, which includes a specific ground of exclusive jurisdiction in the courts of the State in which the register is kept. The Choice of Court Convention excludes from its scope validity of entries in public registers.[41] The policy considerations for excluding these matters from scope, or alternatively providing specific provisions to address them, are similar to those concerning rights *in rem* in immovable property. In a new instrument dealing with recognition and enforcement, it would also be possible to address judgments on the validity of entries in public registers through appropriately formulated jurisdictional filters (see discussion at para. 159 regarding rights *in rem* in immovable property).

g. The validity of legal persons and validity of decisions of their organs

Quick Reference: Art. 12(2) Interim Text; Art. 2(2)(m) Choice of Court Convention.

44. Both the Interim Text and Choice of Court Convention exclude disputes which have as their object the validity, nullity or dissolution of "legal persons" or "legal personhood"

[36] See also Art. 1(C) of the La Paz Convention and Art. 27 of the Riyadh Arab Agreement.
[37] Art. 12(1). This provision does not apply in which have as their object tenancies of immovable property where the tenant is habitually resident in a different State.
[38] See discussion in "Synthesis of the work of the Special Commission of June 1997 on international jurisdiction and the effects of foreign judgments in civil and commercial matters", Prel. Doc. No 8 of November 1997 for the attention of the Special Commission of March 1998 on the question of jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters, available on the Hague Conference website at < www.hcch.net > under "Specialised Sections", "Judgments Project" then "Preparation of a preliminary draft convention", paras 35 *et seq*.
[39] Art. 12(1).
[40] Art. 1(2)(l) of the Interim Text.
[41] Hartley-Dogauchi Report, para. 36.

(such as the incorporation or dissolution of a corporation). Such personhood is, generally, a highly regulated national matter, which varies substantially across jurisdictions.

h. Antitrust and competition matters

Quick Reference: Art. 1(2)(i) Interim Text; Art. 2(2)(h) Choice of Court Convention.

45. Whether civil[42] antitrust or competition[43] claims should be excluded from a future instrument depends on the primary way in which such civil actions are viewed: ether as predominantly public, regulatory interests (which are traditionally considered within the domain of the State); or as predominantly private interests, similar to any other commercial matter.[44] Article 10(2) of the Preliminary Draft Convention reflects the latter approach, by including antitrust and competition matters within its scope, but proscribing the acceptable bases of jurisdiction.

46. The Interim Text and Choice of Court Convention, however, exclude competition and antitrust matters entirely from their respective scopes. This reflected the prevailing view at the time that competition proceedings, even between private parties, have a predominantly public market regulatory goal and effect, and hence go beyond the "civil and commercial" realm.

i. Intellectual property matters

Quick Reference: Art. 12(4)-(6) Interim Text; Art. 2(2)(n)-(o) Choice of Court Convention.

47. In past Hague Conventions, foreign proceedings involving intellectual property ("IP") rights have been accorded different treatment in recognition and enforcement proceedings, according to their registrability (or lack thereof), and whether the proceedings relate to the validity (as opposed to the infringement) of IP rights. However, after work on the Judgments Project was suspended, in recognition of the importance of the international enforceability of judgments concerning IP rights,[45] further work was continued under the auspices of other organisations. This work has culminated in the recent creation of a number of private international law instruments on IP disputes, including:

a. American Law Institute Principles on Intellectual Property;[46]
b. *Principles on Conflict of Laws in Intellectual Property* of the European Max Planck Group on Conflict of Laws in Intellectual Property ("CLIP");[47] and

[42] Such actions may be brought as either (or, in some jurisdictions, as both) criminal or civil proceedings. It is clear that criminal antitrust or competition proceedings do not fall within the scope of "civil and commercial matters", and hence the focus is on civil matters.
[43] "Antitrust" is the term used in the United States of America; "competition" the term used in Europe. There is not intended to be a substantive difference in the terms. In this context, these terms relate to aspects of market competition, and do not extend to a broad notion of unfair "competition" laws, such as misleading advertising or passing one's goods off as those of a competitor.
[44] See, for example, H. Buxbaum and R. Michaels, "Jurisdiction and Choice of Law in International Antitrust Law – A US Perspective", in J. Basedow, S. Francq and L. Idot (eds.), *International Antitrust Litigation: Conflict of Laws and Coordination (Studies in Private International Law),* Hart Publishing, 2012, pp. 225-228.
[45] See ILA Committee on Intellectual Property and Private International Law, *First Report*, 2012, p. 10, available at < http://www.ila-hq.org/en/committees/draft-committee-reports-sofia-2012.cfm > (last consulted in December 2012), citing P. De Miguel Asensio, "Recognition and Enforcement of Judgments in Intellectual Property Litigation: the CLIP Principles", in J. Basedow, T. Kono and A. Metzger (eds.), *Intellectual Property in the Global Arena*, Mohr Siebeck, 2010, pp. 239-292; and M. Trimble, "When Foreigners Infringe Patents: an Empirical Look at the Involvement of Foreign Defendants in Patent Litigation in the US", *Santa Clara Computer and High Technology Law Journal*, Vol. 27, 2011, pp. 499-549.
[46] American Law Institute, "Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes", 14 May 2007.
[47] "Principles for Conflict of Laws in Intellectual Property", final text of 1 December 2011; available at < http://www.cl-ip.eu/en/pub/home.cfm > (last consulted in December 2012).

c. *Waseda Principles* – a joint initiative of Japanese and Korean scholars.[48]

48. These works may pave the way for IP judgments generally to be included within the scope of the future instrument; particularly, as allowing for the uniform foreign recognition and enforcement of IP rights would potentially allow litigants to consolidate disparate proceedings and alleviate the need for costly parallel IP proceedings.

49. For historical reference, the Preliminary Draft Convention generally excluded proceedings which have as their object the registration or validity of IP rights. IP rights not subject to a registration or deposit procedure, such as "copyright and related rights", were specifically noted not to be excluded from the Convention. The Interim Text presents three proposals with respect to the recognition and enforcement of IP claims, which primarily differ on whether proceedings for the infringement of patents and marks should be excluded from the scope. The Choice of Court Convention goes a step further and excludes proceedings concerned with the validity *and* infringement of IP rights, other than "copyright and related rights". However, where infringement proceedings are brought for a breach of a contract relating to such rights, these claims are not excluded from the Convention. This is consistent with Article 12(6) of the Preliminary Draft Convention and Interim Text, which provide that exclusions would not apply where the IP rights arise only as "incidental questions".

50. Although a comprehensive review of current developments in the area is outside the scope of this Note, the ILA Committee on Intellectual Property and Private International Law has recently analysed and compared the various instruments,[49] and noted that "[i]n practice, all four sets of Principles [the three indicated above, and another previous Japanese Transparency Protocol] lead to similar results allowing for recognition and enforcement of final judgments as well as of provisional measures".[50]

j. Consumer contract matters

Quick Reference: Art. 2(1)(a) Choice of Court Convention.

51. Consumer contracts are addressed in the Interim Text and Choice of Court Convention.[51] The Choice of Court Convention excludes from its scope all consumer contracts. The Interim Text includes consumer contracts within its scope, but offers consumers protection through specific jurisdictional rules.[52]

52. Pursuant to the Preliminary Draft Convention, claims brought by a foreign business ("non-consumer") are excluded from being heard anywhere but in the courts of the State of the habitual residence of the consumer. This reflects the policy rationale that consumers often face an inequality of bargaining power, and due to the relatively low-value of their transactions should be 'protected' from the cost and complexity of

[48] Joint Proposal drafted by Members of the Private International Law Association of Korea and Japan, "Commentary on Principles of Private International Law on Intellectual Property Rights", 14 October 2010, available at < http://www.globalcoe-waseda-law-commerce.org/activity/pdf/28/08.pdf > (last consulted in December 2012)
[49] See generally, ILA Committee on Intellectual Property and Private International Law, *supra* (note 45).
[50] *Ibid*, p. 11.
[51] The Interim Text and Choice of Court Convention define a consumer as a natural person acting primary for personal, family, or household purposes: Art. 7(1) of the Interim Text and Art. 2(1) *a)* of the Choice of Court Convention. The Interim Text further specifies that the other party to a consumer contract must be acting for the purposes of its trade or profession (Art. 7(1)). This differs from the Preliminary Draft Convention, which provided that a consumer is a person acting for a purpose which is outside his/her trade or profession. Concern was expressed that this formulation could be construed to include contracts concluded by parties who do not have a "trade or profession" in the ordinary sense of the words: see Explanatory Report by M. Dogauchi and T. Hartley, "Preliminary Draft Convention on Exclusive Choice of Court Agreements", Prel. Doc. No 25 of March 2004 for the attention of the Special Commission of April 2004 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, available on the Hague Conference Website at < http://www.hcch.net >, under "Conventions", "37. Convention of 30 June 2005 on Choice of Court Agreements" then "Preliminary Documents" .
[52] Art. 7.

transnational litigation and any subsequent recognition or enforcement proceedings. The Preliminary Draft Convention also provides that a consumer may bring a claim in a foreign court against a foreign business. However, no provision is made in the Convention for a transaction involving two consumers, one local and one foreign. Presumably, as this is not excluded, it would fall within the scope of the Convention, which is of a generally permissive nature (unless an exception to its scope is specified).

53. The Interim Text provides three different proposals, which in different ways, and to varying extents, are aimed at giving efficacy to choice of forum clauses in consumer contracts where: permitted by the relevant law, made pursuant to a valid agreement, and complying with any choice of forum requirements.

k. Employment matters

Quick Reference: 8 Preliminary Draft Convention; Art. 8 and Annex II Interim Text; Art. 2(1)(b) Choice of Court Convention.

54. Employment matters are defined as matters between an employer and *salaried* workers at any level. This term covers individual and collective disputes, including claims brought by a union representative on behalf of a group of employees. However, the term does not extend to persons carrying on independent professional activities (such as contractors).

55. The Special Commission which adopted the Preliminary Draft Convention contemplated excluding employment matters from the scope for three reasons:

a. employment practices were changing and it was increasingly common for workers to move from place to place and it was thought "unwise to fence these phenomena about with the traditional criteria";[53]
b. alternative non-judicial mechanisms such as mediation and conciliation were becoming predominant in this area; and
c. in many countries, especially Latin America, employment matters were dealt with by specialized courts of an administrative rather than judicial nature.

56. Despite these considerations, employment matters were included in the scope of the Preliminary Draft Convention with the rationale of ensuring a protective regime to workers engaged in international activities.

57. Employment contracts were further discussed in the lead up to Interim Text, though not by Commission II during the 1st part of the 2001 Diplomatic Conference. Annex II of the Interim Text provides for four proposals, which are broadly similar, with different criteria for exclusion, depending upon whom is bringing the enforcement action (the employer or the employee). The proposals differ most substantially in whether a reservation, or a declaration of non-applicability, can be made by a State with respect to employment matters.

58. Employment matters are excluded from the Choice of Court Convention.

l. Defamation matters

59. Defamation refers to both libel and slander, which in some jurisdictions are separate causes of actions based on whether the statement made was written or spoken, respectively. Neither the Interim Text nor the Choice of Court Convention excludes defamation matters from its respective scope.

[53] Nygh-Pocar Report, p. 54.

60. However, the recognition and enforcement of foreign judgments in defamation matters has recently gained prominence in various parts of the world in view of the worldwide publication of material using the Internet. In the United States of America, the SPEECH Act has recently been passed,[54] which calls for the non-recognition of a foreign judgment if it does not provide at least as much protection for the author or maker of the statement, as would have been provided by the First Amendment (in other words, the same judgment would not have resulted had First Amendment protections been applied). The passage of the SPEECH Act was motivated by claims about "libel tourism": that is, bringing a claim of defamation in a forum, not the home of the defendant, where favourable defamation laws will apply to the claim.

61. The issue of libel tourism remains a topic of discussion also within the European Union.[55] This discussion is taking place on a variety of levels, including proposed changes to national defamation laws, introduction of harmonised choice of law provisions,[56] and jurisdictional rules under the Brussels I Regulation;[57] the circulation of defamation judgments was raised in the context of the Recast of the Brussels I Regulation. Ultimately, the Brussels I Recast Regulation will abolish the exequatur procedure, also for defamation cases.

62. As with many other matters discussed in this Part, the Working Group may determine to include a specific exclusion from scope, or rely on a broader jurisdictional filter (such as a general ability to refuse to recognise and enforce judgments on relatively limited grounds of "public policy").

---

[54] Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act, 28 U.S.C. § 4101 *et seq*. (2012).

[55] Libel tourism has also been the subject of a recent declaration of the Committee of Ministers of the Council of Europe (adopted on 4 July 2012 at the 1147th meeting of the Ministers' Deputies), which has called for international standards. Although the declaration does not address the recognition and enforcement of foreign judgment, it does address other aspects of private international law: "if there is a lack of clear rules as to the applicable law and indicators for the determination of the personal and subject matter jurisdiction, such rules should be created to enhance legal predictability and certainty". The text of the declaration is available at < https://wcd.coe.int/ViewDoc.jsp?Ref=Decl%2804.07.2012%29&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383 > (last consulted in December 2012).

[56] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations ("Rome II Regulation") excludes from its scope "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation".

[57] In *eDate Advertising GmbH v. X* and *Martinez v. MGN Limited*, the Court of Justice of the EU (CJEU) revised its position on the ability to bring proceedings for defamation where the offending material is published on the Internet. Previously, the CJEU had held that, under the Brussels I Regulation (and its predecessor the Brussels Convention), the courts in a State where damage occurred could have jurisdiction only in respect of the harm caused in that State: *Shevill and Others v. Presse Alliance SA*, case no C-68/93, judgment of 7 March 1995, [1995] CJEU Reports of Cases I-415, para. 33. In the *eDate* case, the CJEU held that the courts of that State have jurisdiction in respect of all damage in cases where the claimant's centre of interests is based in that State. See joint cases Nos C-509/09 and C-161/10, judgment of 25 October 2011, not yet published in CJEU Reports of Cases, available at < www.curia.eu >.

Part II – What judgments should be covered?

63. This Part discusses which kinds of decisions that are considered to be "judgments" capable of recognition and enforcement under a future instrument.

1. Should the new instrument apply only to judgments by courts?

Quick reference: Art. 2 Enforcement Convention; Art. 23 Interim Text; Art. 4(1) Choice of Court Convention; Art. 19(1) Child Support Convention.

64. In the Hague Conventions, the term "judgment" has generally been understood in the broadest sense as any decision, by a "court", on the merits of a matter in dispute.[58] In the Enforcement Convention, Interim Text, and Choice of Court Convention, what is important is not the technical term given to a decision (*e.g.*, "decree" or "order"), but, rather, whether the rendering authority "regularly exercises judicial functions". As Nygh and Pocar note, this necessarily "excludes bodies of an administrative or other non-judicial nature which may have authority to make decisions which are binding upon the parties".[59] Nygh and Pocar also note that there is no restriction on the type or level of court hearing a dispute, and that a decision may be given by an officer of the court that is not necessarily a judge.

65. Of the Hague Conventions studied, only the Child Support Convention also extends to "decisions made by an authority of quasi-judicial nature", made by the relevant "administrative authorities". This extension was proposed, but did not receive sufficient support during negotiations on the Preliminary Draft Convention.[60] Administrative authorities are defined in the Child Support Convention as public bodies whose decisions may be made the subject of an appeal or review by a judicial authority, and which have a similar force and effect to a decision of a judicial authority on the same matter.[61] However, as explained in the Explanatory Report to the Child Support Convention, the inclusion of decisions by administrative authorities reflects the specific procedures for the provision of maintenance obligations. Similar reasoning does not seem to apply to a general instrument.(see para. 10 *et seq.*).

2. Should default judgments be covered?

Quick reference: Art. 6 Enforcement Convention; Art. 27(2) Interim Text; Art. 8(2) Choice of Court Convention; Art. 22(e) Child Support Convention.

66. Default judgment is understood as a judgment given in proceedings in which the defendant did not have the desire or opportunity to defend itself before the court of origin.[62] None of the Hague Conventions studied exclude default judgments from scope,

---

[58] A decision on the merits seems to exclude procedural judgments (*i.e.,* judgments ruling on *inter alia* procedural requirements for admissibility, such as international jurisdiction or the legal capacity of a party) from the scope of a future instrument. Nonetheless, further consideration to this issue may be desirable. See, in this regard, a recent judgment of the CJEU ruling that the term "judgment" under the Brussels I Regulation" also covers a judgment ending proceedings by which a court declines international jurisdiction on the basis of a jurisdiction clause (CJEU, 15 November 2012, *Gothaer Allgemeine Versicherung AG and Others v. Samskip GmbH*, available at < www.curia.eu >.

[59] Nygh-Pocar Report, p. 99.

[60] See "Proposal by the Drafting Committee" (Work. Doc. No 144), Art. 1(4). See also "Issues paper for the agenda of the Special Commission of June 1999", prepared by the Permanent Bureau in preparation for the fourth meeting of the Special Commission, question 25.1: "The first outstanding question is whether the Convention is to be limited to decisions handed down by a court, or whether the text should also embrace all decisions made by any authority of a quasi-judicial nature. In view of the wide variety of legal systems in the States affected by the future Convention, the latter approach seems to be preferable".

[61] Art. 19(3) of the Child Support Convention. Art. 2(2) of the Enforcement Convention expressly excludes "decisions rendered by administrative tribunals" from scope.

[62] Nygh-Pocar Report, pp. 107-108. The Report notes that there are considerable differences in national law and practice, giving as an example the very restrictive definition under Art. 473 of the French Code of Civil Procedure and the very broad approach under the (now) Civil Procedure Rules (England and Wales).

although each of them contains special provisions to protect the defendant where recognition and enforcement of default judgments is sought.[63]

3. Should provisional and protective measures be covered?

Quick Reference: Art. 2(2) Enforcement Convention; Art. 23A Interim Text; Arts 4 and 7 Choice of Court Convention; Art. 31 Child Support Convention.

67. Provisional and protective measures are excluded from the scope of the Enforcement Convention. Conversely, the Special Commission charged with developing the Preliminary Draft Convention decided that provisional and protective measures – when ordered by a court having jurisdiction on a permitted ground of jurisdiction – should be covered, and expanded the definition of "judgments" accordingly.[64] However, at the Nineteenth Session, a number of delegations proposed that such measures be excluded from scope altogether, or at least excluded from the scope of provisions on the recognition and enforcement of judgments.[65] The various proposals are documented in Article 23A of the Interim Text.

68. The Choice of Court Convention expressly states that provisional and protective measures (referred to as "interim measures of protection") are not judgments, and does not provide for their recognition and enforcement, even when ordered by the chosen court. At the same time, the Convention does not preclude the possible recognition of such measures in another State under that State's national law.[66]

69. Schemes allowing for the recognition and enforcement of provisional and protective measures are widely employed at both regional and national levels. Both the OAS[67] and MERCOSUR[68] have concluded instruments dealing specifically with the issue. In Europe, the Brussels/Lugano regime confers jurisdiction for provisional and protective measures,[69] but does not provide for their cross-border recognition and enforcement.[70] However, plans are underway within the European Union to expand the definition of "judgment" in the Brussels I Regulation in order to provide for the recognition and enforcement of such measures.[71] In the United States of America, the National Conference of Commissioners on Uniform State Laws has recently approved a Uniform Asset Freezing Orders Act, which provides for the recognition of certain provisional and protective measures (*i.e.*, asset-freezing orders) in circumstances similar to the

---

[63] When verifying the jurisdiction of the court of origin, the court addressed is not bound by the court of origin's findings of fact (see para. 136). Moreover, the recognition and enforcement of default judgments are susceptible to refusal on grounds of lack of proper notice to the defendant (see paras 105 *et seq*.). In addition, the party seeking recognition and enforcement of a default judgment is required to produce additional documentation to establish that the document instituting proceedings was notified to the defaulting party (see para. 125).

[64] Preliminary Draft Convention, Art. 23(b). This decision was made following a comparative study by the Permanent Bureau on provisional and protective measures under the laws of the United Kingdom and certain Commonwealth countries, the United States of America, Germany, France, the Netherlands and Switzerland, as well as under the Brussels and Lugano Conventions: see "Note on provisional and protective measures in private international law and comparative law", Prel. Doc. No 10 of October 1998 for the attention of the Special Commission of November 1998 on the question of jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters, available on the Hague Conference Website at < www.hcch.net > under "Specialised Sections" then "Judgments Project" and "Preparation of a Preliminary Draft Convention".

[65] See Minutes No 15 of Commission III of the Nineteenth Session, *Proceedings of the Nineteenth Session* (2002), Tome II, *Securities*, Brill, 2006, pp. 537-541.

[66] See discussion in Hartley-Dogauchi Report, para. 161.

[67] Art. 2 of the Inter-American Convention on Execution of Preventive Measures (< http://www.oas.org/juridico/english/treaties/b-42.html >, last consulted in December 2012).

[68] Ouro Preto Protocol, Art. 4.

[69] Art. 31 of the Brussels and Lugano Conventions.

[70] The general position is that not all provisional and protective measures are "judgments" within the definition of Art. 32 of the Brussels I Regulation: A. Dickinson, "Provisional Measures in the "Brussels I" Review", IPRax, 2010, p. 204.

[71] Art. 2(a) of the Recast Brussels I Regulation: "For the purposes of Chapter III, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement".

recognition and enforcement of foreign judgments under its 2005 Uniform Foreign-Country Money Judgments Recognition Act.[72]

70. Other models for ordering provisional and protective measures in cross-border litigation exist that do not depend on recognition and enforcement. For example, both the American Law Institute Proposed Statute and Trans-Tasman Agreement allow the courts of one State[73] to order provisional and protective measures on a discretionary basis in aid of proceedings before the courts in another State. These models resemble the mechanism employed in the UNICTRAL Model Law on Cross-Border Insolvency for the protection of debtor assets and creditor interests.

71. In the arbitral context, one of the main focuses of the 2006 amendments to the UNCITRAL Model Law on International Commercial Arbitration was the provision of enforceable interim measures. Article 17H provides that an interim measure granted by a tribunal shall be recognised as binding, and "enforced upon application to the competent court, irrespective of the country in which it was issued". This global recognition and enforcement of arbitral interim orders is subject to Article 17I, which provides grounds for refusing to recognise or enforce an interim order (along similar grounds for refusing to recognise or enforce a judgment).

72. The question of whether to cover provisional and protective orders in a future instrument and if so, how to deal with them, may require further consideration at a later stage.

73. It is interesting to note here that the Hague Conference is currently assessing the need and feasibility of an instrument on the recognition and enforcement of foreign civil protection orders.

4. Should non-money judgments be covered?

Quick Reference: -

74. In some States, particularly common law States, only judgments for a debt or definite sum of money are covered by applicable national, bilateral or regional recognition and enforcement schemes.[74] Accordingly, non-money judgments, such as orders for the transfer and delivery of property, orders which seek to regulate the conduct of the parties (*e.g.*, injunctive relief), and orders declaring the rights and liabilities of the parties, are not covered.

75. Neither the Enforcement, Choice of Court, Preliminary Draft or Child Support[75] Conventions are limited to money judgments. A proposal that a distinction be drawn between the enforcement of money judgments and non-money judgments was rejected by a large majority by the Special Commission tasked with preparing the Preliminary Draft Convention.[76] Additionally, none of the regional instruments studied (*i.e.*, the Montevideo Convention, Las Leñas Protocol, Riyadh Arab Agreement, Lugano Convention) are limited to money judgments.

---

[72] Full text (including commentary) available at < www.uniformlaws.org >.
[73] In the case of the ALI Proposed Statute, the courts of the US; in the case of the Trans-Tasman Agreement, the courts of either Australia or New Zealand.
[74] See, for example, the enforcement provisions of the UK-Canada Agreement, which apply only to a "judgment whereby a sum of money is made payable": Art. II(3).
[75] Para. 65 of the Explanatory Report confirms that "maintenance" is not restricted to periodic payments, and may include property transfers.
[76] Nygh-Pocar Report, p. 98 and accompanying notes.

76. It is also relevant to note that preliminary discussions within the Commonwealth Secretariat have revealed that Member States (with predominantly common law systems) may be willing to consider covering at least some non-monetary judgments in a proposed new model law on the recognition and enforcement of foreign judgments.[77] Not to do so, it was found, would be to fail to recognise the fact that judgments, especially in a commercial context, often require more than the simple payment of a sum of money.[78]

5. Should judgments awarding non-compensatory damages be covered?

Quick Reference: Art. 33 Interim Text; Art. 11 Choice of Court Convention.

77. A provision dealing with non-compensatory damages was included in the Interim Text. The provision was revisited during negotiations on the Choice of Court Convention, where a simplified formulation, developed by a Working Group specifically established for that task, was accepted for inclusion in the final text. According to this provision, Article 11(1), the court addressed may refuse to recognise and enforce a foreign judgment if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered. As explained in the Hartley-Dogauchi Report, the court addressed is not allowed to examine whether it could have awarded the same amount of damages. Rather, the provision operates when it is obvious from the judgment that the award appears to go beyond the actual loss or harm suffered.[79]

78. Making specific provision for addressing foreign judgments that award non-compensatory damages has been a focal point for discussion throughout the Judgments Project. Early on, it was acknowledged that certain States may be reluctant to recognise and enforce such judgments.[80] Still today, some States routinely apply a public policy ground under their national law to refuse recognition and enforcement, or apply blocking statutes to prevent recognition and enforcement of certain foreign judgments.[81] Of these States, some apply an all-or-nothing approach such that the entire judgment will not be recognisable or enforceable, even those parts that award compensatory damages.[82] In other States, however, the public policy ground is not wide enough to capture judgments awarding excessive damages.[83]

79. Since the drafting of the Choice of Court Convention, a number of international and national initiatives have addressed similar provisions. The law adopted by the Uniform Law Commission of Canada includes a provision addressing excessive and punitive damages. In the case of punitive damages, the court addressed may limit enforcement to an amount similar or comparable to an amount that could have been awarded in the province of territory of the court addressed.[84] In the case of excessive damages, the court addressed may limit enforcement to an amount not less than that which the court

---

[77] See Commonwealth Secretariat, "The Recognition and Enforcement of Foreign Judgments" (Paper, June 2010), for the attention of the meeting of Senior Officials of Commonwealth Law Ministries, 18-20 October 2010, SOLM(10)10, paras 53-60 ("Commonwealth Secretariat Report").
[78] *Ibid.,* para. 59.
[79] Hartley-Dogauchi Report, para. 205 (d).
[80] "Conclusions of the Special Commission of June 1994", Prel. Doc. No 2 of December 1995 for the attention of the Special Commission of June 1996 on the question of jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters, para. 37, available on the Hague Conference website at < www.hcch.net > under "Specialised Sections" then "Judgments Project" and "Preliminary Work".
[81] *Ibid*. For a recent survey of this practice, see Comparative Summary of the IAJ 2nd Study Commission Responses [copy available on request from the Permanent Bureau].
[82] Hartley-Dogauchi Report, para. 205; see also discussion in Commonwealth Secretariat Report, *supra* note 77, para. 86.
[83] *Ibid*. In a recent decision, the French Court of Cassation stated that "*une décision étrangère condamnant une partie à paiement de dommages-intérêts punitifs n'est pas, par principe, contraire à l'ordre public international de fond*" ("a foreign decision ordering a party to pay punitive damages is not, in principle, contrary to international public policy" – translation by the Permanent Bureau): *Arrêt No 1090 du 1 décembre 2010* (09-13.303), available at < http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/1090_1_18234.html > (last consulted in December 2012) and *Revue critique de droit international privé,* 2011, p. 93, with commentary by H. Gaudemet-Tallon.
[84] Uniform Law Commission of Canada, Uniform Enforcement of Foreign Judgments Act, section 6(1).

addressed could have awarded in the circumstances.[85] A provision on excessive damages has also been accepted in recent instruments concerning international litigation in intellectual property matters.[86] Preliminary discussions within the Commonwealth Secretariat on a proposed model law have revealed support for including provisions covering both non-compensatory and excessive damages.[87]

6. Should parts of a judgment that fall outside of scope be severable?

Quick Reference: Art. 14(2) Enforcement Convention; Art. 34 Interim Text; Art. 15 Choice of Court Convention; Art. 21 Child Support Convention.[88]

80. Each of the Hague Conventions studied contains a provision allowing for the court addressed to recognise and enforce a part or parts of an otherwise unenforceable judgment, provided that the part or parts are severable from the rest of the judgment. An example of this would be the refusal to recognise or enforce an award of non-compensatory damages (as discussed in para. 77 *et seq*.), which should not stand in the way of the recognition or enforcement of the remainder of the judgment.

7. Should judicial settlements be covered?

Quick Reference: Art. 19 Enforcement Convention; Art. 36 Interim Text; Art. 12 Choice of Court Convention; Art. 19(1) Child Support Convention.

81. Judicial settlements are covered in all of the Hague Conventions studied. A "judicial settlement" refers to the largely civil law practice of concluding a contract before a judge to put an end to litigation, usually by making mutual concessions. They are distinguished from consent orders (which are considered to be a judgment in their own right) and out-of-court settlements.[89] Unlike the Interim Text and Child Support Convention, the Enforcement Convention and Choice of Court Convention only provide for the enforcement (*i.e.*, not the recognition) of judicial settlements in the same manner as judgments. According to the Hartley-Dogauchi Report, this is mainly because the effects of judicial settlements are so different across various legal systems, and hence the effects or need for recognition without enforcement are unclear.[90]

82. It is relevant here to note that the Hague Conference has recently decided to establish an Experts' Group to carry out further exploratory research on cross-border recognition and enforcement of agreements reached in the course of international child disputes, including those reached through mediation, taking into account the implementation and use of the 1996 Convention.[91]

8. Should judgments rendered in class actions be covered?

83. None of the international or regional instruments studied specifically address judgments resulting from class actions (also known as collective redress). This may not be surprising given the fact that large-scale class actions are a relatively recent phenomenon, made possible by the promulgation of specific legislative schemes in

---

[85] *Ibid.*, section 6(2) and French case law cited in note 83.
[86] CLIP Group, "Principles for Conflict of Laws in Intellectual Property", *op. cit.* (note 47), Art. 4:402; American Law Institute, "Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes", 14 May 2007, §411; "Commentary on Principles of Private International Law on Intellectual Property Rights", *op. cit.* (note 48).
[87] See Commonwealth Secretariat Report, *supra* (note 77), para. 50.
[88] See also Art. 23 of the Las Leñas Protocol; Art. 4 of the Montevideo Convention; Art. 32(3) of the Riyadh Arab Agreement; Art. 48 of the Lugano Convention.
[89] For a discussion of the scope of "judicial settlements", see paras 206-209 of the Hartley-Dogauchi Report.
[90] *Ibid.,* para. 209.
[91] Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (17-20 April 2012), *op cit*. (note 1), para. 7. This decision follows discussion of the issue at the Special Commission of 2011 and 2012 on the practical operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention.

various national legal systems.[92] The issue has previously been considered by the Hague Conference in the context of proposed work in respect of civil liability for environmental damage, where the Permanent Bureau noted that there would certainly be a great many questions and major difficulties to overcome to include rules relating to collective redress in a possible new instrument.[93]

84. A preliminary hurdle is that class actions are often brought in matters of public or regulatory interest, such antitrust (competition), which are as such subject to exclusion from scope. More pressingly, courts in the enforcing State may choose to refuse recognition and enforcement simply because the notion of class action judgments is contrary to the forum's public policy (see paras 98 *et seq.*) or has breached the requirement for proper notice (see paras 105 *et seq.*). Judgments resulting from an "opt-out" procedure are particularly susceptible to these grounds.[94] If class actions are to be recognised and enforced under a future instrument, the grounds for refusal may need to be modified accordingly to properly accommodate such situations. Moreover, given that recognition and enforcement of judgments rendered in class actions is often sought by the defendant in order to preclude fresh proceedings abroad, a specific ground of review may need to be included to address the rights of class members, particularly where "opt-out" actions are concerned, to parallel the standard ground of review designed to address the rights of defendants.

85. Nevertheless, some of these issues have been addressed in recent work in other international forums. For instance, in 2008, the ILA adopted the *Paris-Rio Guidelines of Best Practices for Transnational Group Actions*,[95] which were developed by the Committee on International Civil Litigation and the Interests of the Public. Relevantly, these guidelines set out standards for notification of absent claimants, and provide that recognition and enforcement should not be refused merely because the judgment resulted from an "opt-out" procedure. In the same year, the International Bar Association adopted the *Guidelines for Recognising and Enforcing Foreign Judgments for Collective Redress*,[96] which contain similar provisions.

---

[92] For a survey, see ILA Committee on International Civil Litigation and the Interests of the Public, *Transnational Group Actions: Report and Resolution*, 2008, available at < http://www.ila-hq.org/en/committees/index.cfm/cid/1021 > (last consulted in December 2012).

[93] See "Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?" Prel. Doc. No 8 of May 2000 for the attention of the Special Commission of May 2000 on General Affairs and Policy of the Conference, pp. 53 *et seq.*, available on the Hague Conference website under "Work in Progress" then "General Affairs". In particular, the Permanent Bureau raised the "awkward question" of the effect abroad of any decision resulting from collective redress.

[94] See ILA Committee on International Civil Litigation and the Interests of the Public, *op cit.* (note 92), paras 116-123. This will be particularly the case where a ground of refusal is that of "proper notice", and this applies not only to the defendant only, but to any party.

[95] Resolution No 1/2008, available at < http://www.ila-hq.org/en/committees/index.cfm/cid/1021 > (last consulted in December 2012).

[96] Available at < http://www.ibanet.org/Document/Default.aspx?DocumentUid=C1F679E5-7F71-4A19-B3F6-DF5BC79C07A9 > (last consulted in December 2012).

Part III – Mechanics of the recognition and enforcement scheme

1. Introduction

Quick reference: Art. 4 Enforcement Convention; Art. 25(1) Interim Text; Art. 8(1) Choice of Court Convention; Art. 20(1) Child Support Convention.

86. The recognition and enforcement schemes of the international and regional instruments studied have the following elements, which are described and commented upon in the following sections, in common:

a. they provide for **jurisdictional filters** and **other conditions** for a foreign judgment to be entitled to recognition and enforcement;

b. they provide for **grounds for refusal** to recognise and enforce the foreign judgment; and

c. they address certain **procedural aspects** for seeking recognition and enforcement of the foreign judgment.

87. However, it should be noted that the mechanics of a recognition and enforcement scheme are relatively settled. As the ILA Committee on International Civil Litigation and the Interests of the Public noted in a recent report:[97]

> "very little has changed [since the Enforcement Convention]. This is due to the fact that the law on recognition and enforcement is pretty settled, both in international law and comparative law. The list of potential obstacles to the recognition and enforcement of foreign judgments is the same and is a pretty much a closed list. The only real divergence among countries deals with the reciprocity requirement and the way one words the public policy exception."

2. Which conditions should be provided for?

Quick reference: Art. 4 Enforcement Convention; Art. 25(2) and (3) Interim Text; Art. 8(3) Choice of Court Convention; Art. 20(6) Child Support Convention.[98]

88. Each instrument studied establishes conditions that a judgment must meet in order to be exportable to other States (*i.e.*, be recognised and enforced in those States). These conditions apply in addition to the scope provisions discussed in Parts I and II, which also have the effect of filtering out foreign judgments that are not eligible for recognition and enforcement.

89. The most significant condition in all of the Hague Conventions studied, as well as most regional instruments, concerns the jurisdiction on which the foreign judgment is based, which is assessed by applying "jurisdictional filters". In view of the significance of this condition, the nature and content of possible jurisdictional filters are addressed separately in Part IV.

90. Another condition in all of the Hague Conventions derives from the principle that a judgment cannot acquire greater effects abroad than it has in the State of origin.[99] Accordingly, in order for a foreign judgment to be recognised, it *must have effect* in the State of origin. In order for it to be enforced, the judgment *must* be enforceable in the State of origin. Similar conditions are found in other international and regional

---

[97] *International Civil Litigation for Human Rights Violations: Final Report*, 2012, pp. 63-64. Although the Guidelines are designed to apply in the context of international civil litigation for human rights violations, the comments here extend to all forms of recognition and enforcement – including the present civil and commercial context.

[98] Art. 2(g) of the Montevideo Convention; Art. 20(e) of the Las Leñas Protocol; Art. 55(a) of the Minsk Convention; Arts 25(b) and 31(a) of the Riyadh Arab Agreement and Art. 38(1) of the Lugano Convention.

[99] See Fragistas Report, p. 370 (§ 5 II).

instruments.[100] In all other respects, the conditions for recognition are the same as the conditions for enforcement.

91. As explained in the Nygh-Pocar Report, there is no uniformity among national legal systems as to when a judgment is enforceable. In some States (typically civil law States), a judgment will not have an effect until the decision is no longer subject to ordinary forms of review. In other States (typically common law States), a judgment will be immediately effective as soon as it is rendered, even though it may be subject to review.[101] In deference to these divergent practices, the Choice of Court Convention provides that "[r]ecognition and enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired".[102]

92. To facilitate the circulation of foreign judgments, all of the instruments studied contain a provision allowing for only a severable part of the judgment to be recognised and enforced to the extent that the other parts of the judgment do not satisfy the conditions for recognition and enforcement (see para. 80).[103] This provision also applies where parts of the judgment are liable to be refused recognition and enforcement by application by one of the grounds for refusal, which are addressed in the following paragraphs.

3. Which grounds for refusal should be provided for?

93. In all international and regional instruments studied, foreign judgments are subject to review in the State addressed against certain substantive and procedural standards, which, if applicable, allow recognition and enforcement to be refused. In all of the Hague Conventions studied, these grounds for refusal apply equally to recognition and enforcement.

94. In most instruments, including all the relevant Hague Conventions, grounds for refusal generally apply as **exceptions** to recognition and enforcement, *i.e.*, a judgment is entitled to recognition and enforcement *unless* it is determined that one of the grounds applies. In other instruments, such as the Montevideo Convention and Las Leñas Protocol, these grounds apply as **conditions** to recognition and enforcement; *i.e.*, such that a judgment is not entitled to recognition or enforcement *until* it is determined that none of the grounds apply. The balance between exceptions and conditions is significant, as it could affect the simplicity and effectiveness of the recognition and enforcement scheme, which is one of the goals of the work to be undertaken by the Working Group.[104]

95. In all the relevant Hague Conventions, the grounds for refusal (*i.e.*, the exceptions to recognition and enforcement) are *discretionary*; recognition and enforcement may be refused where one of the grounds applies.[105] In some regional instruments, such as the Riyadh Arab Agreement and the Lugano Convention, the grounds for refusal are *mandatory*; recognition and enforcement must be refused where one of the grounds applies. A different approach is taken by the ALI Proposed Statute, in which some grounds for refusal are discretionary and others are mandatory.[106]

---

[100] In most instruments, the recognition and enforceability of the judgment in the State of origin are a condition for recognition and enforcement, respectively. In the Minsk Convention, however, the lack of *res judicata* effect and enforceability are grounds to refuse recognition and enforcement (respectively): Art. 55(a).

[101] Nygh-Pocar Report, p. 103.

[102] Art. 8(4).

[103] Art. 14(2) of the Enforcement Convention; Art. 34 of the Interim Text; Art. 15 of the Choice of Court Convention; Art. 21 of the Child Support Convention. See also Art. 23 of the Las Leñas Protocol; Art. 4 of the Montevideo Convention; Art. 32(3) of the Riyadh Arab Agreement and Art. 48 of the Lugano Convention. For further discussion, see Hartley-Dogauchi Report, para. 217.

[104] See Conclusions and Recommendations of the 2012 Expert Group, para. 3(c): "This work should seek to develop mechanisms for recognition and enforcement that are as simple and effective as possible".

[105] The one exception is Art. 6 of the Enforcement Convention – due process.

[106] Compare §5(a) ("A foreign judgment *shall not* be recognized or enforced in a court in the United States if…") and §5(c) ("A foreign judgment *need not* be recognized or enforced in a court in the United States if…") (emphasis added).

96. By making grounds for refusal discretionary, the State addressed is allowed to establish or develop rules that may provide for foreign judgments to be recognised and enforced even when a ground for refusal applies.

97. The following sections describe and comment on some of the possible grounds for refusal for inclusion in a new instrument.

a. Should incompatibility with public policy be included as a ground for refusal?

Quick reference: Art. 5(1) Enforcement Convention; Art. 28(1)(f) Interim Text; Art. 9(e) Choice of Court Convention; Art. 22(a) Child Support Convention.[107]

98. It is a standard ground in international and regional instruments for the recognition and enforcement of a foreign judgment to be subject to review against the public policy of the State addressed. A notable exception is the Minsk Convention, which does not expressly provide a public policy ground. Subject to the views of the Working Group, an exception on the basis of international public policy may be also considered.

99. The requirement that the judgment be "manifestly incompatible" with public policy has been developed at the Hague Conference and is found in all relevant Hague Conventions. A similar threshold is established in the Montevideo Convention, Las Leñas Protocol, and Lugano Convention.[108] The formulation should underscore that this ground for refusal is to be rarely invoked and only as a last resort[109], a situation that has been reflected in commentary and case law at a national level.[110]

b. Should procedural unfairness be included as a ground for refusal?

Quick reference: Art. 5(1) Enforcement Convention (English text); Art. 28(1)(c) Interim Text; Art. 9(e) Choice of Court Convention.[111]

100. This ground for refusal is only found as a standalone ground in a handful of international and regional instruments, including the Interim Text. It is arguable that to some extent, the ground falls within the ambit of others grounds, such as the public policy ground (see paras 98 *et seq.*), procedural fraud (see paras 104 *et seq.*) or the requirement that the defendant be notified (see paras 105 *et seq.*).[112] Relevantly, the Choice of Court Convention expressly provides that the scope of the public policy ground includes "situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness".[113]

101. In the Interim Text, it was proposed to include an express acknowledgment that "fundamental principles of procedure" included "the right of each party to be heard by an

---

[107] See also Art. 2(h) of the Montevideo Convention; Art. 20(f) of the Las Leñas Protocol; Art. 30(a) of the Riyadh Arab Agreement and Art. 34(1) of the Lugano Convention.

[108] It is also common to recent international projects on international litigation in intellectual property matters: see ILA Committee on Intellectual Property and Private International Law, *supra* (note 45), p. 13.

[109] See Nygh-Pocar Report, p. 114. For a recent confirmation by the Court of Justice of the European Union in respect of the public policy ground under the Brussels I Regulation and the Lugano Convention, see *Trade Agency Ltd v. Seramico Investments Ltd*, case No C-619/10, judgment of 6 September 2012, para. 48, available at < http://curia.europa.eu/juris/liste.jsf?language=enandnum=C-619/10 > (last consulted in December 2012).

[110] See, for example, ALI Proposed Statute, pp. 72-73; The Federal Court of Australia in *Stern v. National Australia Bank* [1999] FCA 1421 (per Tamberlin J) noted that "[t]he thread running through the authorities is that the extent to which the enforcement of the foreign judgment is contrary to public policy must be of a high order to establish a defence". See also *Ross v. Ross* [2010] NZCA 447, in which it was noted by the New Zealand Court of Appeal that "The New Zealand Courts have also emphasised that the public policy exception is a narrow one". See also comments of Natalia Viktorova, "Public Order in the Practice of Russian Courts" (2012) 3 (Public Policy and *Ordre Public*) *Czech Yearbook of International Law* 101, which identifies a trend in Russian courts to the effect that public policy challenges to the application of foreign law will only be upheld in exceptional circumstances.

[111] See also Art. 30(a) of the Riyadh Arab Agreement.

[112] *Ibid*., p. 9; see also Nygh-Pocar Report, p. 114.

[113] For further explanation, see Hartley-Dogauchi Report, para. 189.

impartial and independent court". This inclusion was designed to reflect human rights standards set out in Article 14(1) of the International Covenant on Civil and Political Rights[114] and Article 6(1) of the European Convention on Human Rights. During the Nineteenth Session, concerns were raised that the ground, as formulated, would encourage attacks on the impartiality and independence of the court of origin in an attempt to delay enforcement. It was also thought that the provision would be contrary to the need for mutual trust and confidence among the courts of Contracting States. No consensus was reached on the inclusion of the acknowledgment.[115]

102. Instances of national systems requiring the independence and impartiality of the court of origin as a ground for refusal are rare.[116] A notable exception to this trend is the United States of America, in which uniform State law on the recognition and enforcement of foreign judgments allows the court addressed to review the impartiality of the judicial system of the State of origin at a systemic level as well as the integrity of the court of origin at a case-specific level.[117] Furthermore, in recent cases, the courts of some other States have referred with approval to the lack of impartiality of the court of origin as grounds for refusal.[118] Preliminary discussions within the Commonwealth Secretariat on a proposed model law have also revealed support for including a ground for refusal in cases where "the judgment was rendered in a proceeding that was conducted contrary to the principles of procedural fairness and natural justice".[119]

103. The Permanent Bureau has previously noted that recognition and enforcement of foreign judgments within a multilateral system presupposes a minimum of confidence of each Contracting State in the quality of the judiciary of the other Contracting States.[120] It has also highlighted that any allowance for a review of the independence and impartiality of the court of origin should be drafted in such a way to ensure that the court addressed concerns itself only with the proceedings before the court of origin and not the judicial system of the State of origin.[121] A number of recent high profile cases in the United States of America reveal some of the practical and political difficulties surrounding the application of a ground that provides for review of the impartiality of the judicial system

[114] United Nations General Assembly Resolution 2200A [XX1], 16 December 1966, Art. 14(1).
[115] See comments in note 157 of the Interim Text.
[116] "Note on the recognition and enforcement of decisions in the perspective of a double convention with special regard to foreign judgments awarding punitive or excessive damages", Prel. Doc. No 4 of May 1996 for the attention of the Special Commission June 1996 on the question of jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters, available on the Hague Conference website at < www.hcch.net > under "Specialised Sections" the "Judgments Project" and "Preliminary Work", p. 8.
[117] Section 4(c)(7) of the 2005 Uniform Foreign-Country Money Judgments Recognition Act. A similar provision is contained in §5(a)(ii) of the ALI Proposed Statute.
[118] In a case concerning the enforcement in South Africa of a money judgment rendered in Germany, the Western Cape High Court cited with approval by Christopher Forsyth, *Private International Law* (Juta, 4th ed., 2007) [now in its 5th ed., 2012], that natural justice requires that "the hearing should take place before an impartial tribunal": *Doerner v. Gubalke* [2012] ZAWCHC 64 (20 March 2012); in Australia, the Federal Court of Australia reaffirmed in 2012 that natural justice in the procedure of a foreign court requires that each party must have had the opportunity of presenting his or her case before an impartial tribunal: *Federal Treasury Enterprise (FKP) Sojuzplodoimport v. Spirits International BV (No 2)* [2012] FCA 23 (25 January 2012). While the Court did not pronounce on the impartiality of the foreign judgment concerned (rendered by the Presidium of the Supreme Arbitrazh Court of the Russian Federation), it did express the general reluctance of Australian courts to entertain claims of impartiality: "The allegations made in each of these paragraphs are serious, as they impugn the impartiality of the courts of another sovereign nation. The accusation of actual or apprehended bias is levelled at the court of highest instance in the Russian Federation. That requires clear, specific and detailed pleading if it is to be allowed to proceed" (at [56]).
[119] See Commonwealth Secretariat Report, *supra* (note 77).
[120] See Prel. Doc No 4 of May 1996, *supra* (note 116), p. 8.
[121] See "International Jurisdiction and Foreign Judgments in Civil and Commercial Matters", Prel. Doc. No 7 of April 1997, available on Hague Conference website at < www.hcch.net >, under "Specialised Sections" then "Judgments Project" and "Preparation of a preliminary draft convention", para. 183 and accompanying notes.

of the State of origin.[122] It is important to note that US courts have only rarely pronounced on this ground[123], although some commentators consider the recent cases to herald a new breed of transnational litigation.[124]

c. Should procedural fraud be included as a ground for refusal?

Quick reference: Art. 5(2) Enforcement Convention; Art. 28(1)(e) Interim Text; Art. 9(d) Choice of Court Convention; Art. 22(b) Child Support Convention.

104. This ground for refusal is common to all relevant Hague Conventions, including the most recent Child Support Convention. However, it is not found in regional instruments such as the Montevideo Convention, Las Leñas Protocol, Riyadh Arab Agreement, or the Lugano Convention. For some national systems, procedural fraud falls within the scope of public policy, whereas for others, it does not. Accordingly, Members of the Hague Conference agreed to provide for procedural fraud as a standalone ground in the Choice of Court Convention to avoid any uncertainty.[125]

d. Should lack of proper notice to the defendant be included as a ground for refusal?

Quick reference: Art. 6 Enforcement Convention; Art. 28(1)(d) Interim Text; Art. 9(c) Choice of Court Convention; Art. 22(e) Child Support Convention.[126]

105. A separate ground for refusal that protects the defendant's right to be notified of the proceedings leading to the judgment is common to international and regional instruments. The scope of this ground does, however, vary from one instrument to the next. In most of the instruments studied, the ground for refusal only applies to judgments given in default of appearance. In the Montevideo Convention, the ground applies irrespective of whether the defendant made an appearance.

106. In the Enforcement Convention, the sufficiency of notification is assessed against the law of the State of origin, whereas in the Montevideo Convention, it is assessed against the law of the State addressed. In the Choice of Court Convention, the sufficiency of notification is assessed autonomously as a matter of fact (*i.e.*, in sufficient time and in such a way as to enable the defendant to arrange a defence). A preference for an

---

[122] In the *Osorio* case [*Osorio v. Dole Food Co*, 665 F.Supp.2d 1307 (2009)], the US District Court refused to recognise a judgment rendered by the Second Civil and Labor District Court of Chinandega, Nicaragua, in part on the ground that the judgment was rendered under a system which did not provide impartial tribunals. In doing so, the Court admitted (at para. 25) that it was "not entirely comfortable sitting in judgment of another nation's judicial system". The decision to refuse recognition was upheld by the US Court of Appeal, although in its judgment, the Court did not seek to address the "broader issue of whether Nicaragua as a whole 'does not provide impartial tribunals'" and declined to adopt the District Court's decision on that question. In the *Chevron* case, the impartiality of the courts of Ecuador was raised by Chevron, which sought an injunction to restrain proceedings in the United States of America to recognise and enforce a judgment rendered by the Provincial Court of Justice of Sucumbios, Ecuador. In its decision of 7 March 2011, the United States of America District Court [*Chevron Corp v. Donziger*, 768 F. Supp. 2d 581] agreed to issue the injunction. In doing so, the Court commented (at para. 18): "while the Court is far from eager to pass even a provisional judgment as to the fairness of the judicial system of another country, it of course is obliged to do so. Moreover, it must do so here on a record less complete than it would have on a motion for summary judgment or at trial. That said, there is abundant evidence before the Court that Ecuador has not provided impartial tribunals or procedures compatible with due process of law, at least in the time period relevant here, especially in cases such as this". The decision was overturned on appeal [*Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 26 January 2012)]. The Court of Appeal held that any challenge to the recognition or enforceability of the foreign judgment would have to wait until recognition or enforcement proceedings by the judgments creditors were actually brought. The US Supreme Court has since rejected a request to hear an appeal by Chevron against the Court of Appeal's finding.

[123] Reporters' Notes on the ALI Proposed Statute, p. 70.

[124] W.E. Thomson and P.M. Jura, *Confronting the New Breed of Transnational Litigation: Abusive Foreign Judgments* (Study, US Chamber Institute for Legal Reform, Oct 26 2011), available at < http://www.instituteforlegalreform.com/doc/confronting-the-new-breed-of-transnational-litigation-abusive-foreign-judgments > (last consulted in December 2012).

[125] See Hartley-Dogauchi Report, para. 188.

[126] See also Art. 2(e) of the Montevideo Convention; Art. 20(d) of the Las Leñas Protocol; Art. 55(b) of the Minsk Convention; Art. 30(b) of the Riyadh Arab Agreement and Art. 34(2) of the Lugano Convention.

autonomous assessment is also demonstrated in a number of recent international projects on international litigation in intellectual property matters.[127]

107. The Choice of Court Convention is also unique insofar as it makes additional provision for recognition and enforcement of the judgment to be refused where the defendant was notified in the State addressed "in a manner that is incompatible with fundamental principles of the requested State concerning service of documents". The rationale behind this provision is not protection of the defendant, but rather protection of the State addressed, which might consider its sovereignty to have been infringed by the method of service used to notify the defendant.[128]

108. Admittedly, there is potential overlap between this ground and the public policy and procedural fairness grounds (discussed above at paras 98 *et seq.*).[129] In past negotiations, it was suggested to provide for a single ground of refusal based on basic guarantees of due process. This would have the benefit of simplifying recognition and enforcement by reducing the number of grounds against which foreign judgments could be reviewed. At the same time, it was acknowledged that a provision that was too vague would only lead to delays in the recognition or enforcement phase and might encourage abuse.[130]

e. Should parallel domestic proceedings be included as a ground for refusal?

Quick reference: Art. 5(3)(a) Enforcement Convention; Art. 28(1)(a) Interim Text; Art. 22(c) Child Support Convention.[131]

109. This provision is common to international and regional instruments, and is particularly significant where the assumption of jurisdiction in instances of *lis pendens* is not regulated. In each of the instruments providing such a ground, the proceedings in the State addressed must have been commenced first.

110. It is notable that the use of this ground has been approved in two recent initiatives within predominantly common law jurisdictions, which are typically less familiar with *lis pendens*.[132]

f. Should an inconsistent foreign or domestic judgment be a ground for refusal?

Quick reference:
Art. 5(3)(b) and (c) Enforcement Convention; Art. 28(1)(b) Interim Text; Arts 9(f) and (g) and 22(2)(b) Choice of Court Convention; Art. 22(d) Child Support Convention.[133]

111. It is a standard provision in international and regional instruments for a foreign judgment to not be recognised or enforced if it is inconsistent with an existing judgment of the State addressed, or another foreign judgment that has been, or may be,

---

[127] CLIP Group, "Principles for Conflict of Laws in Intellectual Property", final text of 1 December 2011, Art. 4:501(1); available at < http://www.cl-ip.eu/en/pub/home.cfm > (last consulted in December 2012); American Law Institute, "Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes", 14 May 2007, §403(1)(c).
[128] See Hartley-Dogauchi Report, para. 187.
[129] See acknowledgment in Hartley-Dogauchi Report, para. 190.
[130] See "Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters", Prel. Doc. No 9 of July 1998 for the attention of the Special Commission of November 1998 on the question of jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters, available on the Hague Conference website at < www.hcch.net > under "Specialised Sections", "Judgments Project" then "Preparation of a preliminary draft convention", para. 31.
[131] See also Art. 22(2) of the Las Leñas Protocol and Art. 30(e) of the Riyadh Arab Agreement.
[132] ALI Proposed Statute, §5(c)(iii); Uniform Law Commission of Canada, Uniform Enforcement of Foreign Judgments Act, section 4(h)(i).
[133] See also Art. 22(1) of the Las Leñas Protocol; Art. 55(c) of the Minsk Convention; Art. 30(d) of the Riyadh Arab Agreement and Art. 34(3) of the Lugano Convention. In the Las Leñas Protocol, this ground only applies to inconsistent judgments of the State addressed.

recognised or enforced. Most instruments do not require the judgment to have been rendered before the judgment of the court of origin.[134]

4. Which procedural aspects should a future instrument regulate?

Quick reference: Art. 14(1) Enforcement Convention; Art. 30 Interim Text; Art. 14 Choice of Court Convention; Art. 23(1) Child Support Convention.[135]

112. The procedure for having a judgment recognised and rendered enforceable varies considerably between States. For instance:

a. in some States, both recognition and enforcement are subject to a special procedure before a court (*e.g.*, China[136], Russian Federation[137]), whereas in other States, recognition is not (*e.g.*, Australia[138], Japan[139]);

b. in some States, enforcement is subject to a declaration of enforceability (*exequatur*), whereas others, it is subject to registration, or action on the judgment;[140]

c. in some States, recognition is a precondition to enforcement.[141]

113. This diversity of practice impacts the time and costs involved for litigants to reach the point at which their judgment is recognised or rendered enforceable in the State addressed.[142]

114. Over the course of the Judgments Project, experts at the Hague Conference have considered unifying certain elements of national procedures for the recognition and enforcement of foreign judgments in an effort to facilitate the international circulation of judgments. In its 1992 note, the Permanent Bureau stated that "[o]ne of the main purposes of a new convention should, no doubt, be to provide for a simplified and expeditious method for obtaining the recognition and enforcement of judgments".[143] In subsequent discussions, a range of proposals were made to pursue this purpose, including:

a. automatic recognition of judgments; and

b. the ability to seek a declaration of enforceability or registration for enforcement *ex parte*.

115. These proposals received mixed reactions, with some experts questioning the feasibility of devising simplified procedures for a global instrument.[144] In the end, the only common denominator on which agreement could be reached was a requirement for

---

[134] See, however, the Las Leñas Protocol (for inconsistent judgments of the State addressed) and the Lugano Convention (for inconsistent foreign judgments).
[135] See also Art. 6 of the Montevideo Convention; Art. 24 of the Las Leñas Protocol; Art. 54(3) of the Minsk Convention; Art. 31(b) of the Riyadh Arab Agreement and Art. 40(1) of the Lugano Convention
[136] Art. 268 of the *Civil Procedure Law* of the People's Republic of China.
[137] Art. 241 of the *Arbitrazh (Commercial) Procedure Code* of the Russian Federation.
[138] *Foreign Judgments Act 1991*, section 12(1).
[139] Art. 118 of the *Code of Civil Procedure*.
[140] See Nygh-Pocar Report, p. 104.
[141] *Ibid.*
[142] See G. Walter and S.P. Baumgartner, "General Report: The recognition and enforcement of judgments outside the scope of the Brussels and Lugano Convention" in G. Walter and S.P. Baumgartner (eds.), *Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions*, Kluwer Law International, 2000, pp. 37-38.
[143] See the 1992 Note, p. 237, para 20. In 1994, the Permanent Bureau asked the first meeting of the Special Commission whether there was "a need to further harmonise or unify the domestic procedures for enforcement or registration in the various Contracting States".
[144] See discussion on Art. 30 of the Preliminary Draft Convention in the Nygh-Pocar Report, p. 116. For other accounts of these discussions, see "Conclusions of the Special Commission of June 1994 on the question of the recognition and enforcement of foreign judgments in civil and commercial matters", Prel. Doc. No 2 of December 1995 for the attention of the Special Commission of June 1996 on the question of the recognition and enforcement of foreign judgments in civil and commercial matters, para. 38, available on the Hague Conference website at < www.hcch.net > under "Specialised Sections", "Judgments Project" then "Preliminary work"; see also Prel. Doc. No 9 of July 1998, *supra* (note 130).

the court addressed to act expeditiously,[145] a provision that was subsequently adopted in Article 14 of the Choice of Court Convention.

116. Unlike the Interim Text and Choice of Court Convention, the Child Support Convention did succeed in providing certain unified procedures designed to streamline the enforcement procedure (for maintenance orders). Specifically, the Child Support Convention establishes two alternative procedures. The primary procedure provides for an *ex parte* request for declaration of enforceability or registration for enforcement, with the possibility for the declaration or registration to be challenged or appealed within a specified timeframe and on specified grounds.[146] The alternative procedure, which a Contracting State may apply by declaration, provides for an *inter-partes* hearing before the declaration or registration is made, and leaves the question of appeal to the law of the State addressed.

117. As previously noted,[147] it remains to be seen whether, and to what extent, the substance of the streamlined procedures established by the Child Support Convention could offer an acceptable solution in the context of a broader instrument on foreign judgments in civil and commercial matters.

118. Similarly, other international and regional instruments do not seek to regulate all procedural aspects having a judgment recognised or rendered enforceable but they do, however, regulate certain procedural aspects. For instance, the Lugano and Minsk Conventions[148] provide for foreign judgments to be recognised without the need for any special procedure (*i.e.*, recognition is automatic). A similar result is achieved in the Child Protection Convention, which requires child protection measures to be recognised "by operation of law".[149] The Lugano Convention also provides a harmonised procedure for obtaining a declaration of enforceability or registration for enforcement.[150]

a. Should the instrument limit the review of foreign judgments by the court addressed?

Quick reference: Art. 8 Enforcement Convention; Art. 28(2) Interim Text; Art. 28 Child Support Convention.

119. It is a standard provision in the international and regional instruments studied that the court addressed may not review the merits of a foreign judgment.[151] At the same time, the court addressed must have the opportunity to review the foreign judgments to determine whether the conditions for recognition and enforcement have been satisfied, and establish whether any of the grounds of review apply.

---

[145] See Art. 30 of the Interim Text.
[146] Art. 23(5)-(8) of the Child Support Convention.
[147] Background Note, para. 58.
[148] Art. 33(1) of the Lugano Convention provides: "A judgment given in a State bound by this Convention shall be recognised in the other States bound by this Convention without any special procedure being required". Art. 52(1) of the Minsk Convention provides: "Those judgments which have been rendered by any judicial authorities in any Contracting State and become *res judicata* which, by their nature, do not require enforcement shall be recognised in the other Contracting States without the need for any special further proceedings". Note that the Enforcement Convention contemplated that regulation of the "procedure for obtaining recognition or enforcement" may be the subject of the Supplementary Agreement between Contracting States (Art. 23(14)). In a way, the Las Leñas Protocol harmonises how the procedure for recognition and enforcement may be initiated insofar as Article 19 provides for requests for recognition and enforcement to be processed by way of letter rogatory transmitted through a Central Authority mechanism. In 2000, the Las Leñas Protocol was amended to provide for requests to be made directly by an interested party. At present, this amended provision applies only in Argentina, Brazil and Paraguay (see status chart (in Spanish) at < http://www.mercosur.int > under "Normativa", then "Tratados, Protocolos y Acuerdos").
[149] See P. Lagarde, Explanatory Report, *Proceedings of the Eighteenth Session (1996),* Tome II, *Protection of children,* The Hague, SDU, 1998, pp. 585, para. 119: "Recognition by operation of law means that it will not be necessary to resort to any proceeding in order to obtain such recognition, so long as the person who is relying on the measure does not take any step towards enforcement."
[150] Title III, section 2.
[151] Art. 8 Enforcement Convention; Art. 28(2) Interim Text; Art. 8(2) Choice of Court Convention; Art. 28 Child Support Convention. See also Art. 54(2) Minsk Convention; Art. 32(1) Riyadh Arab Agreement and Art. 45(2) Lugano Convention. For further discussion, see Hartley-Dogauchi Report, para. 165.

120. At its meeting in March 1998, the Special Commission discussed a proposed provision by which the court addressed would only be permitted to review a foreign judgment to the extent that issues were raised by the party challenging recognition and enforcement (*i.e.*, no own motion review).[152] Many experts supported the proposal as a way to avoid major delays, thereby facilitating the circulation of judgments. Other experts did not accept the proposal, on the basis that the review of a foreign judgment should not be left in the hands of the parties. Among these experts, some supported a partial limitation, whereby the court addressed would only be able to review the foreign judgment on its own motion against the public policy ground and, possibly, notification of the defendant.[153]

121. In the end, no such restriction was included in the Interim Text. The Child Support Convention, however, does contain such a restriction. Under Article 23 of the Convention, the court addressed is only permitted to review a foreign judgment against the public policy ground. It is then up to the parties, in challenging or appealing the finding of the court, to raise the other grounds of refusal, or argue that none of the jurisdictional filters applied.

122. No other international instrument studied contains such a restriction. At best, the instruments studied merely allocate the onus among the parties of establishing the various grounds of review.

b. Should the instrument at least require the court addressed to act within a certain time limit?

Quick reference: Art. 30 Interim Text; Art. 14 Choice of Court Convention; Art. 23(3) Child Support Convention.[154]

123. As noted above, the Choice of Court Convention requires the court addressed to act *expeditiously* in proceedings brought before it for recognition, declaration of enforceability or registration for enforcement. In the Interim Text, a provision was suggested that would require for the court addressed to act "in accordance with the most rapid procedure available under local law". No consensus was reached on this provision.[155]

124. In the Child Support Convention, the court addressed must declare the judgment enforceable, or register the decision for enforcement, "without delay". In the Lugano Convention, the judgment must be declared enforceable "immediately".

c. What documentary evidence should be produced?

Quick reference: Art. 13(1) Enforcement Convention; Art. 29(1) Interim Text; Art. 13(1) Choice of Court Convention; Art. 25(1) Child Support Convention.[156]

125. Each instrument studied provides a list of documents that must be produced to support the recognition and enforcement of a foreign judgment. In each of the Hague Conventions, as well as the Lugano Convention, the relevant documents are to be produced by the party seeking recognition and enforcement. In the Las Leñas Protocol and Riyadh Arab Agreement, it is the court of the State of origin that produces the documentation.

---

[152] See Prel. Doc. No 9 of July 1998, *supra* (note 130), p. 28.
[153] *Ibid*.
[154] See also Lugano Convention, Art. 41.
[155] See Art. 30 and discussion at accompanying note.
[156] See also Arts 2(b), 2(c) and 3 of the Montevideo Convention; Arts 20(1)(b) and 20(2) of the Las Leñas Protocol; Art. 53(2) and (3) of the Minsk Convention; Art. 34 of the Riyadh Arab Agreement and Art. 53 of the Lugano Convention.

126. The requirement to produce specific documentation assists the court addressed in determining that the judgment is entitled to recognition and enforcement, and whether any of the grounds of review apply. It also may assist the party seeking recognition and enforcement, by setting out in definite terms the documentation that must be produced, thereby avoiding more onerous requirements that may be imposed under national procedures.[157]

127. The nature and extent of required documentation differs from one instrument to the next. In general, an authenticated copy of the judgment is required, as well as documentary evidence confirming the effect and enforceability of the judgment in the State of origin, as well as certain procedural aspects (*e.g.*, that the defendant was notified). It is also common for a translation of the required documentation to be provided in the official language of the State addressed.

d. Should the instrument make provision for the use of a prescribed form?

Quick reference: Art. 29(2) Interim Text; Art. 13(3) Choice of Court Convention.

128. This provision is found in the Interim Text and Choice of Court Convention, where the prescribed form is set out in an annex. Production of the confirmation/certificate is not mandatory and it is up to the court addressed to determine the effect of the information set out therein. A similar provision is also found in the Lugano Convention, where production is mandatory.[158]

129. In the Las Leñas Protocol, the request for recognition and enforcement must be accompanied by an affidavit certifying certain conditions for recognition and enforcement, although no form is prescribed.

[157] See Fragistas Report, p. 385 (§ 11 III).
[158] Art. 54. Note, however, Art. 55(1): "If the certificate referred to in Article 54 is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production."

Part IV – Jurisdictional filters

1. What should be the nature of the jurisdictional filters?

130. At its meeting in April 2012, the Expert Group anticipated that a future instrument would provide for jurisdictional filters.[159] Accordingly, the Expert Group envisaged an instrument that would catalogue the relevant acceptable grounds of jurisdiction,[160] as opposed to an instrument that would leave a control of jurisdiction to the internal law of the State addressed,[161] or impose no control of jurisdiction.[162] The Expert Group recommended that the structure of jurisdictional filters "can be informed by the Hague Conference's previous work in this area, and by other existing instruments".[163]

131. With regard to relevant Hague Conventions, Article 10 of the Enforcement Convention provides a convenient starting point. The Child Support Convention is also relevant as the most recent instrument by the Hague Conference to establish a recognition and enforcement scheme. Reference is also made to the grounds of direct jurisdiction set out in Chapter II of the Interim Text. In saying this, the Permanent Bureau is mindful that these grounds were developed primarily with the allocation of jurisdiction in mind. As a result, the nature and content of the grounds in the Interim Text, while a useful reference point, are not determinative of what is feasible, or indeed desirable, in a future instrument on recognition and enforcement of foreign judgments.

132. As far as other instruments are concerned, regional instruments such as the La Paz Convention (OAS), the Buenos Aires Protocol (MERCOSUR), and the Riyadh Arab Agreement (Arab League) are useful references, all of which provide for jurisdictional filters. It is also relevant to note that the Lugano Convention (EU-EFTA) also provides jurisdictional filters in respect of judgments rendered in insurance matters and consumer contracts, or judgments rendered in matters of exclusive jurisdiction.[164] The work of other national and international initiatives may also be relevant to the development of jurisdictional filters.

133. In addition, developments within various international forums may offer new solutions and shed light on existing solutions developed over the course of the Judgments Project (such as, the project of the Commonwealth Secretariat to prepare model legislation on the recognition and enforcement of foreign judgments or studies conducted by various committees of the International Law Association ("ILA") related to cross-border litigation).

134. Finally, developments at a national level, including new legislation, evolving case law, and the work of law reform bodies, may also be relevant to the range and structure

---

[159] Conclusions and Recommendations of the 2012 Expert Group, para. 3(d).

[160] As is the case in the various Hague Conventions studied, as well as the Riyadh Arab Agreement and some bilateral agreements (*e.g.*, Art. V of the *Convention of 24 April 1984 providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters* (United Kingdom and Canada), full text available at < http://www.fco.gov.uk/resources/en/pdf/3706546/3896702/fco_tr_enforcement_canada > (last consulted in December 2012)).

[161] As is the case in the Montevideo Convention and Las Leñas Protocol, as well as other bilateral agreements (*e.g.*, Art. 16 of the *Convention d'aide mutuelle judiciaire d'exequatur des jugements et d'extradition* (France and Morocco), full text available (in French) at < http://adala.justice.gov.ma/production/Conventions/fr/Bilaterales/France/CJ_exq_jugt_extradition_FR_58.htm >, last consulted in December 2012).

[162] As is the case in the Lugano and Minsk Conventions. As noted in the Background Note (para. 61), dispensing with a control of jurisdiction in these instruments is premised on the court of origin being under an obligation to observe the grounds of jurisdiction in the first place (and the courts addressed having confidence that this will be done correctly), as is the case in "closed" double conventions. Nevertheless, the Lugano Convention does provide for a control of jurisdiction by the court addressed in cases where the foreign judgment allegedly conflicts with the jurisdictional grounds established for insurance matters and consumer contracts, as well as the grounds of exclusive jurisdiction (Art. 35(1)). In respect of all other jurisdictional grounds, the Lugano Convention expressly prohibits a control of jurisdiction (Art. 35(3)).

[163] Conclusions and Recommendations of the 2012 Expert Group, para. 3(e). Relevant reference points are the Enforcement Convention and previous work by the Hague Conference on international jurisdiction (although most of it developed as grounds for direct jurisdiction).

[164] Art. 35(1).

of jurisdictional filters, to the extent that they are transposable to a multilateral level. In this regard, the work of the Uniform Law Commission of Canada on a *Uniform Enforcement of Foreign Judgments Act* and the American Law Institute on a proposed federal *Foreign Judgments Recognition and Enforcement Act* is particularly relevant.

a. Should the jurisdictional filters apply as conditions or exceptions?

Quick reference: Art. 12 Enforcement Convention; Arts. 2 and 4 Enforcement Protocol; Art. 26 Interim Text.

135. In past instruments developed by the Hague Conference, jurisdictional filters were applied not only to permit, but also to prohibit, the recognition and enforcement of foreign judgments. Permissive filters are those bases for jurisdiction which are accepted for the purposes of recognition and enforcement. Preventive filters are used when the court addressed refuses or refrains from recognising or enforcing foreign judgments that were based on grounds of jurisdiction that were deemed either exorbitant or the exclusive domain of another court (particularly the court addressed).

b. Should the court addressed be bound by the court of origin's findings of fact?

Quick reference: Art. 9 Enforcement Convention; Art. 27(2) Interim Text; Art. 8(2) Choice of Court Convention; Art. 27 Child Support Convention.[165]

136. It is a standard provision in international and regional instruments containing jurisdictional filters that the court addressed, in verifying the jurisdiction of court of origin, is bound by the findings of fact on which the court of origin based its jurisdiction. In each instrument studied, this provision does not apply in relation to default judgments.[166]

2. What should the content of the jurisdictional filters be?

a. Should jurisdiction based on the defendant's submission be accepted?

Quick reference: Art. 10(6) Enforcement Convention; Art. 4(3) Interim Text; Art. 20(1)(b) Child Support Convention.[167]

137. Each of the instruments studied allows jurisdiction to be based on a defendant's submission to it.[168] Submission may be explicit (*e.g.*, by choice of court agreement[169] or express consent[170]), or tacit (*i.e.*, by appearance in the proceedings). Some of the instruments recognise both explicit and tacit submission, whereas others recognise one or the other.

Explicit submission

138. So far as explicit submission is concerned, it would be preferable to defer as far as possible to the operation of the Choice of Court Convention. If the Working Group were to consider it desirable to address questions of explicit submission that are not currently covered by the Choice of Court Convention (for instance, recognition of judgments

[165] See also Art. 29 of the Riyadh Arab Agreement and Art. 35(2) of the Lugano Convention.
[166] For a discussion of the rationale behind the special treatment of default judgments, see Nygh-Pocar Report, pp. 107-108.
[167] See also Art. 1(A)(4) of the La Paz Convention; Art. 4(1) of the Buenos Aires Protocol; Art. 28(f) of the Riyadh Arab Agreement.
[168] Note that problems identified at the Nineteenth Session with regard to this ground (*i.e.*, the "white-washing" of grey) are not relevant here; see "Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters", Prel. Doc. No 19 of August 2002 for the attention of the meeting of the Informal Working Group of October 2002, in *Proceedings of the Twentieth Session (2005)*, Tome III, *Choice of Court*, Antwerp – Oxford – Portland, Intersentia, 2010, p. 29.
[169] See Art. 4(1) of the Interim Text and Art. 4(1) of the Buenos Aires Protocol.
[170] See Art. 1(A)(4) of the La Paz Convention.

rendered in matters excluded by virtue of Art. 2(2)), further work could be done pursuant to the review mechanism established under Article 24 of the Choice of Court Convention, rather than in a new general instrument on recognition and enforcement.[171]

Tacit submission

139. With regard to tacit submission, each instrument only accepts the jurisdiction of the court of origin in cases where the defendant has not contested jurisdiction. In the Child Support Convention, this must be done "at the first available opportunity" whereas in the La Paz Convention, it must be done "in a timely manner". The Riyadh Arab Agreement contains no time stipulation.

140. The Preliminary Draft Convention contains a ground of jurisdiction based on the defendant's submission and specifies that the defendant had the right to contest jurisdiction "no later than at the time of the first defence on the merits". At the Nineteenth Session, however, it was agreed to delete tacit submission as a ground of jurisdiction and require instead that the defendant expressly accept jurisdiction.[172] This change was prompted by concerns that a mere failure to contest jurisdiction would convert a "grey" basis of jurisdiction (*i.e.*, a basis for jurisdiction under national law that was tolerated, but not accepted for the purposes of recognition and enforcement) to a "white" basis of jurisdiction (*i.e.*, a basis for jurisdiction accepted by the Convention for the purposes of conferring jurisdiction, and recognition and enforcement). Given that these concerns were so closely connected to the unique structure of the Preliminary Draft Convention,[173] they may not apply in the context of a future instrument limited to the recognition and enforcement of judgments.

b. Should jurisdiction based on the defendant's home forum be accepted?

Quick reference: Art. 10(1) Enforcement Convention; Art. 3 Interim Text; Art. 20(1)(a) Child Support Convention.[174]

141. This is a standard ground of jurisdiction in international and regional instruments, although differences exist in how the "home forum" is defined for both natural and legal persons. A separate Note, prepared for the attention of the Expert Group, gives further consideration to the characterization of the defendant's "home forum".

142. For natural persons, the forum has been defined in terms of "habitual residence", which is the standard connecting factor in the Hague Conventions, and "domicile".[175] During negotiations on the Preliminary Draft Convention, some experts expressed concerns that "habitual residence" had acquired a too technical meaning in the interpretation of earlier Hague Conventions, particular the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. It was suggested to replace it with "residence" and include indicia for determining residence, although no consensus was reached on this point.[176]

143. For legal persons, forum has been variously defined by reference to the location of the statutory seat, place or law of incorporation, location of central administration, or principal place of business. Each of these connecting factors is included in the Interim Text and Choice of Court Convention as determining the "residence" or "habitual residence" of entities or persons other than natural persons.

---

[171] Art. 24 provides that the Secretary General of the Hague Conference shall, at regular intervals, make arrangements for "consideration of whether any amendments to this Convention are desirable".
[172] Art. 4(3) of the Interim Text.
[173] See discussion in Prel. Doc. No 19 of August 2002, *supra* note 168, §II. 1: "What if we added a rule on conset/waiver/submission?".
[174] See Art. 1(A)(1) and (2) of the La Paz Convention; Arts 7(b) and 9 of the Buenos Aires Protocol; Art. 28(a) of the Riyadh Arab Agreement.
[175] Jurisdiction based on the defendant's nationality was briefly considered by the Special Commission, where many experts considered it inappropriate as a basis for the defendant's "natural" forum: see Prel. Doc. No 8 of November 1997, *supra* (note 38), para. 86.
[176] See note 17 of the Interim Text.

c. Should jurisdiction based on the defendant's branch be accepted?

Quick reference: Art. 10(2) Enforcement Convention; Art. 9 Interim Text.[177]

144. "Branch jurisdiction" is common to the international and regional instruments studied, albeit in different formulations. For instance, the Enforcement Convention refers to "commercial, industrial or other business establishment, or a branch office", whereas the La Paz Convention refers to "branch, agency, or affiliate" and the Riyadh Arab Agreement refers to "a place or branch of business or industry or any other such activity". In each instrument, there must be a connection between the dispute and the branch.

145. During past negotiations, it was proposed to include a provision clarifying that a subsidiary does not, in and of itself, fall within the scope of branch jurisdiction. No agreement was reached on this proposal.[178] It was also proposed to expand branch jurisdiction to include "activity-based jurisdiction"[179] by which the court of origin would be considered to have jurisdiction "where the defendant has carried on regular commercial activity by other means" (*i.e.*, means other than the establishment of a branch). Activity-based jurisdiction is discussed separately below (at paras 146 *et seq.*).

d. Should jurisdiction based on the defendant's regular commercial activities be accepted?

Quick reference: Art. 9 Interim Text.

146. The Interim Text sought to introduce a ground of jurisdiction based on the commercial activities of the defendant. This was done by expanding the provision on branch jurisdiction (see discussion above at paras 144 *et seq.*) to cover disputes related directly to the "regular commercial activity" of the defendant in the absence of a branch, agency or other establishment. The basic principle underpinning this proposal was that a party seeking to derive gain from commercial activities in a particular State should be subject to the jurisdiction of that State in respect of claims arising out of those activities, notwithstanding the formal means employed for conducting those commercial activities".[180] Jurisdiction based on the defendant's regular commercial activities may be distinguished from "doing business" jurisdiction, which was sought to be included as a prohibited ground of jurisdiction in the Interim Text.[181]

147. The introduction of so-called "activity-based jurisdiction" attracted significant debate in the lead-up to the Nineteenth Session without consensus being reached.[182] Indeed, "activity-based jurisdiction" was identified as one of the major areas in respect of which a lack of consensus created an obstacle to progress at the Nineteenth Session.[183]

---

[177] See also Art. 1(A)(3) of the La Paz Convention; Art. 9(1)(b)(1) of the Buenos Aires Protocol and Art. 28(b) of the Riyadh Arab Agreement.

[178] Art. 9(2) and accompanying notes of the Interim Text. The Nygh-Pocar Report notes (p. 57) that "[a] subsidiary, even one that is wholly owned by the parent, will not by that fact alone be regarded as falling within the definition of "branch, agency or other establishment" as long as it is maintained as a separate and distinct entity". However, it goes on to confirm that the activities of a subsidiary may attract jurisdiction over a parent defendant where the subsidiary acts as an agent of the parent defendant.

[179] It was also proposed to expand or replace the grounds of jurisdiction for tort claims and contractual matters, each of which is discussed below. For further discussion on activity-based jurisdiction, see paras 146 *et seq*.

[180] Nygh-Pocar Report, p. 57.

[181] See Art. 18(2) *e)* and accompanying notes.

[182] "Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference", Prel. Doc. No 16 of February 2002 for the attention of Commission I, para. 5. For arguments against expanding branch jurisdiction, see P. Gottwald, "Jurisdiction based on 'Business Activities' in the Hague Draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters", *European Journal of Law Reform*, Vol. 4, No 1, 2002, pp. 210 *et seq.*

[183] See Prel. Doc. No 16 of February 2002, *supra* note 182, para. 5. Further, see commentary by A. Borrás, "The 1999 Hague Preliminary Draft Convention on Jurisdiction, Recognition and Enforcement of Judgments: Agreements and Disagreements", in F. Pocar and C. Honorati (eds), *The Hague Preliminary Draft Convention on Jurisdiction and Judgments*, Milan, Cedam, 2005, pp. 63-66.

However, a review of the negotiations and related commentary suggests that the lack of consensus was not so much the result of in-principle disagreement as a result of drafting and procedural issues.[184]

It should also be noted that, so far, the discussion on this ground of jurisdiction took place in the context of a "mixed Convention" in view of defining a direct ground of jurisdiction. In the hypothesis that the future Convention were limited to recognition and enforcement, conceivably there might conceivably be more room for such a ground of jurisdiction.

148. Support for this ground of jurisdiction can be found in a number of recent international initiatives. For example, the 2004 ALI/UNIDROIT Principles of Transnational Civil Procedure provide for the recognition and enforcement of judgments where a significant part of the transaction or occurrence in dispute occurred in the State of origin.[185] In addition, the *Paris / New Delhi Principles on Jurisdiction over Corporations*, adopted in 2002 by the ILA, accept that a corporation may be sued "in the courts of a state in respect of a claim arising directly out of an activity carried on by that corporation in that state".[186]

149. Against this background, there seems to be merit in considering provision in a future instrument of a jurisdictional filter based on regular commercial activities. In saying this, significant efforts would need to be made to formulate the ground with sufficient precision as to satisfy the needs for predictability.[187] As the former Deputy Secretary General noted, "[j]urisdiction based on activities, like any provision based essentially on factual notions as opposed to legal notions, is a bit more difficult to draft, because it is vaguer, giving the court that has to apply it more room for interpretation and thus, offering the litigants less foreseeability as to what court will have jurisdiction".[188]

3. Should additional filters related to specific matters be included?

150. Subject to the substantive scope of the future instrument (as discussed in Part I), it may be desirable to include jurisdictional filters relating to specific matters. This approach is taken in all instruments studied, although the extent of matters covered varies. This section describes and comments on the provisions contained in these instruments.

---

[184] See, for example, Work. Doc. No 97 of Commission II of the Nineteenth Session, cited in Prel. Doc. No 16 of February 2002, *supra* note 182, in which the delegations of Argentina, Australia, New Zealand and Norway highlighted activity-based jurisdiction as an area of possible future agreement. See also "Comments on the preliminary draft Convention, adopted by the Special Commission on 30 October 1999, and on the Explanatory Report by Peter Nygh and Fausto Pocar", Prel. Doc. No 14 of April 2001 for the attention of the Nineteenth Session of June 2001, in particular the responses of Japan and Korea (available on the Hague Conference website at < www.hcch.net > under "Specialised Sections", "Judgments Project" then "Response to the preliminary draft convention"). According to R. Brand, "while activity-based jurisdiction can be faulted as the source of difficulties that were not overcome, I also believe it is this concept that allows consideration of the fundamental divergences and convergences of jurisdictional rules in major legal systems, and thus the analytical point that indicates possible common ground on which successful rules of jurisdiction might have been developed": "The 1999 Hague Preliminary Draft Convention Text on Jurisdiction and Judgments: A View from the United States", in *The Hague Preliminary Draft Convention on Jurisdiction and Judgments, supra* (note 183), p. 4. See also D. Bennett, "The Hague Convention on Recognition and Enforcement of Foreign Judgments – A failure of characterization", in T. Einhorn and K. Siehr (eds), *Intercontinental Cooperation Through Private International Law: Essays in Memory of Peter E. Nygh*, T.M.C. Asser Press, The Hague, pp. 22-23.

[185] Principle 2.1.2, available at < http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf > (last consulted in December 2012).

[186] Resolution No 4/2002, principle 3.3, available at < http://www.ila-hq.org/en/committees/index.cfm/cid/18 > (last consulted in December 2012).

[187] For concerns about the drafting of Art. 9 of the Interim Text, see P. Gottwald, *supra* note 182, pp. 210 *et seq*.

[188] Prel. Doc. No 9 of July 1998, *supra* (note 130), para. 71.

a. Should a specific jurisdiction for actions in contract be included?

Quick reference: Art. 6 Interim Text.[189]

151. Support for this ground of jurisdiction can be found in a number of recent international initiatives. For example, the 2004 ALI/UNIDROIT Principles of Transnational Civil Procedure provide for the recognition and enforcement of judgments where a significant part of the transaction or occurrence in dispute occurred in the State of A separate ground of jurisdiction in contractual matters exists in the Buenos Aires Protocol and Riyadh Arab Agreement. A ground was also included in the Interim Text, although no consensus was reached as to its substance. Conversely, neither the Enforcement Convention nor the La Paz Convention contains a separate ground. During the preparation of the Enforcement Convention, the question was raised whether to make provision for such a ground, based on the place of execution.[190] After a focussed debate, it was determined that such a ground was unnecessary, and difficult to formulate in view of the divergent approaches taken by national systems (at least those that recognised a separate ground in the first place).[191]

152. Of the instruments that contain a ground of jurisdiction for contractual matters, the substance varies in terms of the types of claims covered, and connecting factors. The ground of jurisdiction in the Buenos Aires Protocol applies to "contractual matters" whereas the ground in the Interim Text applies to any "action in contract". Both of these grounds cover not only claims relating to breach of a contract, but also claims relating to its validity and construction.

153. As to the jurisdictional criteria, the Buenos Aires Protocol provides that the court of origin will have acceptable jurisdiction for the purposes of recognition and enforcement on the basis of any of the following[192] (the place of performance; the respondent's domicile; or the plaintiff's domicile or corporate headquarters when it demonstrates that it has fulfilled its obligation). The Interim Text also provides for the place of performance as connecting factor. It also provides the activity of the defendant in the State of origin as an alternative connecting factor (see paras 146 and following). No consensus was reached on either. More recently, the place of performance rule has attracted support from the Commonwealth Secretariat[193] in connection with its work towards a model law on the recognition and enforcement of foreign judgments. It has also been affirmed in recent national reform initiatives in a number of Member States (of civil and common law traditions).[194]

---

[189] See also Art. 7 of the Buenos Aires Protocol and Art. 28(c) of the Riyadh Arab Agreement.

[190] See G. Droz, "Mémoire sur la question de la reconnaissance et de l'exécution des jugements étrangers en matière patrimoniale", Prel. Doc. No 1 of January 1962, *Actes et documents de la Session extraordinaire (1966), Exécution des jugements*, *Imprimerie Nationale*, The Hague, 1969, p. 15 (§ V. A 2 *b*)).

[191] Ch.N. Fragistas, "Rapport de la Commission spéciale", *Actes et documents de la Session extraordinaire (1966), Exécution des jugements*, p. 35 (§ III. 8 *a)*).

[192] Art. 7.

[193] Commonwealth Secretariat Report, *supra* (note) 77, paras 30-31.

[194] For example, Japan and Canada. In Japan, recent amendments have been made to the Code of Civil Procedure to introduce a list of grounds of accepted international jurisdiction for the purposes of conferring jurisdiction on the court of Japan, as well as filtering foreign judgments sought to be recognised and enforced; see *Act for the Partial Amendment of the Code of Civil Procedure and the Civil Interim Relief Act* (No 36, 2011). The list includes a ground of jurisdiction for contractual disputes "when the place of performance of the obligation as specified in the contract is located in Japan or when the place of performance of the obligation is located in Japan according to the governing law chosen in the contract" (trans.): see Takahashi, "Japan's newly enacted rules on international jurisdiction: With a reflection on some issues of interpretation", *Japanese Yearbook of Private International Law*, Vol. 13, 2011, p. 146. For Canada, see Uniform Law Commission of Canada, Uniform Enforcement of Foreign Judgments Act, section 8(f) in conjunction with section 9(d).

b. Should a specific jurisdiction for actions in tort be included?

Quick reference: Art. 10(4) Enforcement Convention; Art. 10 Interim Text.[195]

154. Most of the instruments studied contain a separate ground of jurisdiction for torts. Such a ground does not exist in the La Paz Convention. Like with contractual matters (see para. 152), the types of claims covered in each instrument and the connecting factors recognised vary between instruments.

155. The Enforcement Convention provides for a ground of jurisdiction in cases of personal injury ("injuries to the person") or property damage ("damage to tangible property"). The Interim Text and Riyadh Arab Convention cover a much broader range of cases, with the former referring to any "action in tort" and the latter to "cases of non-contractual liability". This opens the ground up to a variety of other types of judgments that might be characterised as relating to tort, such speech torts (*e.g.*, defamation, libel and slander) and economic torts (*e.g.*, intellectual property infringement).[196] During past negotiations on the Judgments Project, doubts were raised about the feasibility of applying a common ground of jurisdiction to these various torts, and ultimately, only the ground of jurisdiction for physical injury torts was identified within the "core area" of possible grounds of jurisdiction.[197]

156. In the Enforcement Convention and Riyadh Arab Agreement, the ground of jurisdiction is based on the *locus delicti* rule.[198] The Enforcement Convention also requires the author of the injury or damage to have been present in the State of origin at the time that the injury or damage occurred. In its 1992 note, the Permanent Bureau hinted that the *locus delicti* rule could be revisited in a future instrument on recognition and enforcement.[199] However, the 1992 Working Group found that admitting both the place of the harmful event and the place where the damage or injury occurred might be "too broad in the context of a worldwide convention".[200]

157. The Interim Text applies both the harmful event rule and place of damage rule, although the latter does not apply where "the person claimed to be responsible could not reasonably foresee that the act or omission could result in an injury of the same nature in that State".[201] It was also proposed to include the activity of the defendant in the State of origin as an additional connecting factor, although no consensus was reached in this regard.[202]

158. More recently, the place of injury rule has been favourably received in the context of work being undertaken by the Commonwealth Secretariat towards a model law on the recognition and enforcement of foreign judgments. In view of perceived difficulties in applying a foreseeability criterion similar to that in the Interim Text, it has been agreed to recommend a text referring to both the place of the wrongful act and the place of injury, but without further elaboration of the latter rule. [203] A similar approach has been adopted by the Uniform Law Commission of Canada.[204]

---

[195] See also Art. 28(d) of the Riyadh Arab Agreement.
[196] See Prel. Doc. No 19 of August 2002, *supra* note 168. See also D. Bennett, *op cit.* (note 184), p. 21.
[197] *Id.*
[198] In the Enforcement Convention, "the facts which occasioned the damage" must have occurred in the territory of the State of origin. In the Riyadh Arab Agreement, the "act incurring liability" must have occurred in the territory of the State of origin.
[199] 1992 Note, page 237, para. 19. This was in light of the interpretation given by the CJEU to Art. 5.3 of the Brussels Convention in the case *Bier v. Mines de Potasse d'Alsace*, Case No 21/76, judgment of 30 November 1976, [1976] CJEU Reports of Cases 1735.
[200] "Conclusions of the Working Group meeting on enforcement of judgments", drawn up by the Permanent Bureau, Prel. Doc. No 19 of November 1992, *Proceedings of the Seventeenth Session (1993)*, Tome I, *Miscellaneous matters*, The Hague, SDU, 1995, p. 259, para. 8 *e).*
[201] See Art. 10(2).
[202] Art. 10(2) of the Interim Text and accompanying notes.
[203] Commonwealth Secretariat Report, *supra* (note 77), paras 32-34.
[204] Uniform Enforcement of Foreign Judgments Act, section 8(f) in conjunction with section 9(b).

c. Should a specific jurisdiction for actions relating to immovable property be included?

Quick reference: Art. 10(3) Enforcement Convention; Art. 12(1) Interim Text.[205]

159. Each of the instruments studied accepts the jurisdiction of the court of origin for certain actions relating to immovable property.

160. On the one hand, the Enforcement Convention accepts a broad ground of jurisdiction for actions relating to immovable property, *i.e.*, any action whose object is the determination of "an issue" relating to immovable property situated in the State of origin. On the other hand, the La Paz Convention accepts a more limited ground for actions involving "property rights".

161. During past negotiations on the Judgments Project, there was in-principle agreement that matters of immovable property would require a specific treatment. However, difficulties emerged in defining the actions to which it would apply.[206] As discussed in paragraphs 39 *et seq.*, the Interim Text includes an exclusive ground of jurisdiction that applies to "proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property", from which certain tenancies are excluded.[207]

d. Should a specific jurisdiction for actions relating to trusts be included?

Quick reference: Art. 11 Interim Text.

162. Only the Interim Text contains a specific ground of jurisdiction for disputes relating to trusts, which applies to "proceedings concerning the validity, construction, effect, administration or variation" of voluntary trusts. There was general support for the inclusion of such a ground early on in the Judgments Project,[208] and the ground set out in the Interim Text was identified by the Nineteenth Session as part of a "core area" of possible grounds of jurisdiction for future discussion.[209]

163. Preliminary discussions within the Commonwealth Secretariat have revealed support for including a specific ground of jurisdiction for trusts in any future model law.[210] In addition, the Uniform Law Commission of Canada has accepted a specific ground for trusts, albeit with fewer connecting factors to the ground contained in the Interim Text.[211]

---

[205] See also Art. 1(C) of the La Paz Convention; Art. 27 of the Riyadh Arab Agreement.
[206] See Prel. Doc. No 8 of November 1997, *supra* (note 38).
[207] Art. 12(1), which excepts "proceedings which have as their object tenancies of immovable property [concluded for a maximum period of six months]", where the tenant "is habitually resident in a different State" to the State in which the property is situated.
[208] See Prel. Doc. No 19 of November 1992, *supra* (note 200)
[209] "Commission I on General Affairs and Policy held on 22-24 April 2002 (Summary prepared by the Permanent Bureau)", available on the Hague Conference website at < www.hcch.net > under "Specialised Sections", "Judgments Project", then "Focus on international litigation involving choice of court agreements" ("Conclusions of Commission I of the XIXth Diplomatic Session of April 2002"). See, however, the words of caution about proceeding with jurisdictional rules on trusts in the context of a mixed convention, see D. Goddard, "Rethinking the Hague Judgments Convention: A Pacific Perspective", *Yearbook of Private International Law*, 2001, p. 55.
[210] See "The Recognition and Enforcement of Foreign Judgments", paper of June 2010 by the Commonwealth Secretariat for the attention of the meeting of Senior Officials of Commonwealth Law Ministries, 18-20 October 2010, SOLM(10)10, paras 35-37 [copy available on request from the Permanent Bureau].
[211] Uniform Enforcement of Foreign Judgments Act, section 8(f) in conjunction with section 9(e).

Part V – Additional mechanisms

164. This Part outlines some of the possible additional mechanisms that could be used to provide for more efficient and effective recognition and enforcement of foreign judgments. As the Expert Group noted in April 2012, innovations in this respect could make a future instrument more attractive.[212]

1. Co-operation (including judicial communication)

Quick Reference: Art. 16 Access to Justice Convention; Art. 10 Child Support Convention.[213]

165. Co-operation refers to efforts to streamline the recognition and enforcement of foreign judgments by courts working directly with other courts ("judicial co-operation") and administrative authorities doing the same ("administrative co-operation").

a. Judicial co-operation

166. The recognition and enforcement of foreign judgments is considered by some to be *itself* an exercise in judicial co-operation.[214] For others, and in particular, in the context of prior Hague Conference work, judicial co-operation in a narrow sense is understood as being principally concerned with the service of documents and taking of evidence.[215]

167. Regardless of these conceptual differences, a future instrument could include a general rule requiring the courts of the various Contracting States to co-operate to facilitate the recognition and enforcement of foreign judgments.[216] This rule could encompass a range of possible forms of co-operation, including (as highlighted by Professor Schlosser):

a. provisional and protective measures taken by the court addressed to prevent the judgment debtor from removing assets from the State addressed
b. measures allowing the judgment creditor to recover the costs of enforcing the judgment (to the extent not covered by the Access to Justice Convention);
c. measures to address problems arising from differences in currency conversion and interest; and
d. measures designed to protect the judgment debtor from double execution (*i.e.*, "double-dipping" by the judgment creditor).[217]

168. If the Working Group desires, the Permanent Bureau could carry out further studies on the merits of these and other possible forms of judicial co-operation.

---

[212] Conclusions and Recommendations of the 2012 Expert Group, para. 3(g).
[213] See also Art. 19 of the Las Leñas Protocol.
[214] The European Union, for example, considers the principle of mutual recognition and enforcement of judgments to be the "cornerstone" of judicial co-operation, available at < http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/index_en.htm > (last consulted in December 2012). A similar connectivity is also reflected in the range of bilateral and regional instruments on judicial co-operation that contain provisions on the recognition and enforcement of foreign judgments: see, for example, the Riyadh Arab Agreement and Las Leñas Protocol. See also P. Schlosser, "Jurisdiction and International Judicial and Administrative Co-operation", *Rec. Cours*, Vol. 284, 2000, p. 200 (Schlosser considers recognition to be an exercise in "passive co-operation" and enforcement to be an exercise in "active co-operation").
[215] See D. McClean, *International Co-operation in Civil and Criminal Matters*, Oxford, OUP, 2012, 2. See also the Hague Conference website, which distinguishes between work on "international judicial and administrative co-operation" and work on "jurisdiction and enforcement of judgments".
[216] For an example of such a rule, see para. 8.1 of the Paris-Rio Guidelines of Best Practices for Transnational Group Actions: "Whether expressly authorized by States or not, judges from different countries should cooperate with one another to best manage transnational group actions".
[217] See P. Schlosser, *op cit.* (note 214), p. 200 *et seq.*

b. Judicial communication

169. Although often used synonymously with the term judicial co-operation, judicial communication refers to one way that courts can co-operate, via direct contact.[218] A future instrument could include explicit provisions encouraging, or mandating, that courts engage, to some degree, in judicial communication.

170. Situations can readily be envisaged where communication between the court addressed and the court of origin could facilitate the recognition and enforcement of judgments. For example, the court addressed may wish to communicate with the court of origin to seek further information, if not evident from the judgment, on the grounds on which the latter based its jurisdiction in order to apply the jurisdictional filters. The court addressed may also wish to communicate with the court of origin to clarify procedural issues: for example, the date when other proceedings were commenced.[219]

171. The idea of addressing judicial communication in international litigation was raised early on in the Judgments Project.[220] However, no provision with respect to judicial communication was ultimately included in the Preliminary Draft Convention or the Interim Text.[221] At the time, the Permanent Bureau noted that a proposed provision on "transfrontier communication between judges"[222] represented "further progress in a direction which, although it is not the rule today, will be followed increasingly in future".[223] This view has proved prescient as judicial communication in civil and commercial matters has since become a reality in other forums, such as the Ibero American Network for Judicial Co-operation (IberRed)[224] and the European Judicial Network (EJN), and has received strong support from commentators and other stakeholders.[225]

---

[218] The ILA Committee on International Civil and Commercial Litigation considers judicial communication to be an enhanced form of judicial co-operation: see *Third Interim Report: Declining and Referring Jurisdiction in International Litigation*, 2000, para. 46, available at < http://www.ila-hq.org/en/committees/index.cfm/cid/18 > (last consulted in December 2012).

[219] See, for example, Art. 29(2) of the Recast Brussels I Regulation, which requires that in cases of *lis pendens*, the court first-seised must, "without delay", inform the second court of the date that it was seised.

[220] In its 1992 Note, the Permanent Bureau noted that "[o]ne could imagine, for example, that at the request of any interested party the original courts confirms that it has verified that it has assumed jurisdiction on a ground which corresponds with one or more of the grounds of jurisdiction of the Convention".

[221] Judicial communication was debated during the November 1998 meeting of the Special Commission: Work. Doc. No 52 of the Special Commission on international jurisdiction and the effects of foreign judgments in civil and commercial matters (10-20 November 1998). A number of concerns were expressed during the discussions. One expert noted that the idea of judicial communication was an impractical solution in light of the diverse cultures and languages. Another expert noted that the rights of parties could be adversely affected by judicial communication. It is relevant to note that the Hague Conference has sought to address these concerns in its work on judicial communication in the area of international child protection.

[222] This provision was limited to cases involving provisional measures, *lis pendens* and *forum non conveniens*. See "Preliminary draft out line to assist in the preparation of a convention on international jurisdiction and the effects of foreign judgments in civil and commercial matters", Info. Doc. No 2 of September 1998 for the attention of the Special Commission of November 1998 on the question of jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters, paras 35 *et seq*., available on the Hague Conference website at < www.hcch.net > under "Specialised Sections", "Judgments Project" then "Preparation of a preliminary draft convention", Art. 35.

[223] See "Issues Paper for the Agenda of the Special Commission of June 1999", available on the Hague Conference website at < www.hcch.net > under "Specialised Sections", "Judgments Project" then "Preparation of a preliminary draft convention".

[224] Under those regimes, Member States designate one or more "contact points" within their own judicial, administrative, and financial institutions, which are then collected and made available by a central body (the IberRed Secretariat and the European Commission, respectively). See "Reglamento de la red iberoamericana de cooperación jurídica internacional", adopted by the Conference of Ibero-American Public Ministers, 29 October 2004, available on the IberRed website at < http://www.iberred.org/sites/default/files/contenido/reglamento_iberred_es.pdf > (last consulted in December 2012); Council Decision 2001/470/EC of 28 May 2001, "Establishing a European Judicial Network in Civil and Commercial Matters", as amended by Decision No 568/2009/EC of the European Parliament and of the Council of 18 June 2009.

[225] See J.J. Spigelman, "International Commercial Litigation: An Asian perspective", *Australian Business Law Review*, Vol. 35, 2007, pp. 335-336. See also P. Schlosser, *supra* (note 214), pp. 417-418. See also the Conclusions and Recommendations of the Joint EC-HCCH Conference on Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks", para. 17, available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Judicial Communications." The Conclusions

172. Should the Working Group see merit in the development of rules on judicial communication for the facilitation of the recognition and enforcement of judgments, the experience of the Hague Conference in promoting judicial communications in the field of international child protection could be of particular interest,[226] as well as the experiences of the EJN and IberRed. In addition, the Working Group could also draw inspiration from the work of UNCITRAL on judicial communication in the area of cross-border insolvency[227] and the extensive work the ILA has undertaken in formulating rules on judicial communication in international litigation in civil and commercial matters.[228]

c. Administrative co-operation

173. Several Hague Conventions provide for administrative co-operation through the creation of a network of Central Authorities to receive and process requests for judicial assistance at various stages of international litigation. For instance, under the Access to Justice Convention,[229] Central Authorities receive applications for rendering enforceable costs orders made by the courts of other Contracting States and "take the appropriate steps to ensure that a final decision on them is reached".[230] Another example is the Child Support Convention, under which Central Authorities receive and process applications for the recognition and enforcement of maintenance orders coming from the Central Authority of another Contracting State.[231] It should be noted that both instruments allow a party to make an application for recognition and enforcement directly to the competent authority in the State addressed (*i.e.*, without the intervention of Central Authorities).[232]

174. A similar mechanism of administrative co-operation is also employed for the recognition and enforcement of foreign judgments among MERCOSUR States. Under the Las Leñas Protocol, requests for recognition and enforcement of judgments are processed by means of letters rogatory through Central Authorities designated by the respective States Parties.[233]

---

and Recommendations were adopted by consensus by over 140 judges from more than 55 jurisdictions representing all continents.

[226] See, in particular, the "Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards" set out in "Emerging guidance regarding the development of the International Hague Network of Judges and general principles for judicial communications, including commonly accepted safeguards for direct judicial communications in specific cases, within the context of the International Hague Network of Judges", Prel. Doc. No 3A Revised of July 2012, available on The Hague Conference website < www.hcch.net > under "Work in Progress" then "Child Abduction".

[227] Chapter IV of the 1997 UNCITRAL Model Law on Cross-Border Insolvency, *op cit*. (note 14) provides a legislative framework for co-operation between courts. In particular, Article 26(2) entitles the bodies administering an insolvency proceeding "to communicate directly with foreign courts and foreign representatives". The work of UNCITRAL is further discussed in the Note for the attention of the Expert Group, as far as it relates to judicial communication at the jurisdiction stage.

[228] See, for example, para. 5.2 of the *London-Leuven Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters* (ILA Resolution No 1/2000), available at < http://www.ila-hq.org/en/committees/index.cfm/cid/18 > (last consulted in December 2012), which provides for judicial communication between a court seised and an alternative court on when the court seised is determining to refer a case to the alternative court in cases of *lis pendens*, *forum non conveniens* and related actions. Para. 8.1 of the *Paris-Rio Guidelines of Best Practices for Transnational Group Actions* (ILA Resolution No 1/2008), available at < http://www.ila-hq.org/en/committees/index.cfm/cid/1021 >, provides that "[a] Court may communicate with a Court in another different country in connection with matters relating to proceedings in a group action which is also pending or foreseen in other countries with a view to coordinating the proceedings to avoid duplication and costs and enhance efficiency in the administration of justice". A similar provision is also contained in para. 4.2 of the *Sofia Guidelines on Best Practices for International Civil Litigation for Human Rights Violations* (ILA Resolution No 2/2012). The work of the ILA is further discussed in the Note for the attention of the Expert Group, as far as it relates to judicial communication at the jurisdiction stage.

[229] *Hague Convention of 25 October 1980 on International Access to Justice*. See also discussion in "Report on legal aid and security for costs", *Proceedings of the Fourteenth Session (1980)*, Tome IV, *Judicial co-operation*, The Hague, SDU, 1980, pp. 24-25 (II D).

[230] Art. 16(1) and (2).

[231] See Chapter III.

[232] Art. 16(5) of the Access to Justice Convention (this is subject to the State addressed not having declared that it will not accept applications made in this manner); Art. 19(5) of the Child Support Convention.

[233] The Las Leñas Protocol was amended in 2002 to allow – in addition – an interested party to apply directly to the judicial authorities of the State addressed for recognition and enforcement: see Amendment to the Las Leñas Protocol.

175. The use of administrative co-operation mechanisms may enhance the attractiveness of a future instrument in a number of ways. First, administrative co-operation may facilitate the circulation of judgments involving unsophisticated litigants (particularly small to medium enterprises), which might otherwise not be prepared to apply directly to the courts of the State addressed. Secondly, it might make the instrument more amenable to States whose national procedural rules do not contemplate direct application by parties for the recognition and enforcement of foreign judgments.[234] At the same time, establishing and operating a network of Central Authorities has resource implications for Contracting States, as discussed during the meeting of the Expert Group in April 2012.

176. If desired by the Working Group, the Permanent Bureau could carry out further studies on the utility of administrative co-operation mechanisms in a future instrument in light of the current international litigation landscape.

2. Exchange of information

Quick Reference: Art. 57 Child Support Convention.

177. The experience of the Hague Conventions has shown the value of an exchange of information on laws and procedures in different Contracting States.[235] A number of recent Hague Conventions contain specific rules requiring Contracting States to provide information concerning the laws and procedures in respect of matters within their scope.[236] Relevantly, the Child Support Convention requires each Contracting State to provide the Permanent Bureau with, among other things, "a description of its enforcement rules and procedures, including any limitations on enforcement, in particular debtor protection rules and limitation periods".[237] No similar requirements are found in the Enforcement Convention, Interim Text[238] or Choice of Court Convention; although a number of the regional instruments studied make provision for an exchange of information that could be relevant to the recognition and enforcement of foreign judgments.[239]

178. A future instrument could benefit from a similar regime of information sharing by making recognition and enforcement more efficient and less expensive. For example, each Contracting State could be required to provide information on its jurisdictional rules to assist courts in other States in applying jurisdictional filters (discussed in Part IV), as well as rules and procedures (insofar as they are not harmonised by the new instrument) for applying for recognition and enforcement to assist the parties in enforcing their judgments in the State. The Permanent Bureau could also facilitate the provision of such information through the development and dissemination of "country profile" forms, as mandated under the Child Support Convention. Completed forms would then be made accessible via a specialised section of the Hague Conference website.

---

[234] In this regard, it is relevant to note that the introduction of a Central Authority mechanism under the Access to Justice Convention to support the enforcement of costs orders was considered more efficient than the *status quo* under the 1954 Civil Procedure Convention, whereby applications for rendering costs orders enforceable were transmitted by diplomatic channel: See G. Möller, "Explanatory Report on the 1980 Hague Access to Justice Convention", *Proceedings of the Fourteenth Session (1980)*, Tome IV, *Judicial co-operation*, The Hague, SDU, 1980, p. 348.

[235] See A. Borrás and J. Degeling "Explanatory Report on the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance", available on the Hague conference website under "All Conventions" then "Convention 38" and "HCCH Publications", para. 683.

[236] See also Art. 30(2) of the Child Protection Convention.

[237] Art. 57(1)(d). The Contracting State may fulfil this obligation by submitting a country profile using a form recommended and published by the Hague Conference.

[238] A suggestion was made during the 1994 Special Commission that a future Convention require Contracting States to provide the depositary or the Permanent Bureau with information on the competent court to receive requests for recognition and enforcement, and the conditions for appeal.

[239] Art. 15 of the Minsk Convention; Art. 28 of the Las Leñas Protocol; Art. 1 of the Riyadh Arab Agreement and Protocol 2 to the Lugano Convention on the uniform interpretation of the Convention and on the Standing Committee.