

**DOCUMENT DE DISCUSSION EN MATIÈRE DE COMPÉTENCE  
(Y COMPRIS LES PROCÉDURES PARALLÈLES)**

*établi par le Bureau Permanent*

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**ISSUES PAPER ON MATTERS OF JURISDICTION  
(INCLUDING PARALLEL PROCEEDINGS)**

*drawn up by the Permanent Bureau*

*Document à l'attention du Groupe d'experts  
(réunion de février 2013)*

*Document for the attention of the Experts' Group  
(February 2013 meeting)*

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## Introduction

1. At its first meeting in April 2012, the Experts' Group met to explore the background of the Judgments Project and recent developments with the aim to assess the possible merits of resuming this Project. After this meeting, the Council on General Affairs and Policy ("Council") considered the exploratory work of the Experts' Group and its Conclusions and Recommendations on possible future work,<sup>1</sup> and acknowledged that the desirability and feasibility of making provisions in relation to matters of jurisdiction (including parallel proceedings) – whether in a future instrument relating to recognition and enforcement of judgments, or in another future instrument – required further study and discussion. To this end, the Council invited the Experts' Group to reconvene in order to consider and make recommendations on these matters.<sup>2</sup>

2. The purpose of this Issues Paper (Note 2) is to outline further elements to assist the Experts' Group.<sup>3</sup> These discussions are to take place alongside the deliberations of a Working Group that has been established by the Council to prepare proposals "in relation to provisions for inclusion in a future instrument relating to recognition and enforcement of judgments".<sup>4</sup> It is indeed expected that these deliberations will inform the discussions of the Experts' Group particularly in as far as they concern substantive scope and jurisdictional filters, as "indirect jurisdiction rules as a requirement for international recognition and enforcement of foreign judgments [*i.e.*, jurisdictional filters, as referred to by the Experts' Group]... have a potential harmonising effect on direct jurisdiction rules".<sup>5</sup>

3. This Issues Paper describes, in four separate sections, a range of measures in the area of jurisdiction. Part I examines grounds of jurisdiction. Part II examines measures that deal with a multiplicity of forums (namely through rules of *lis pendens* and *forum non conveniens*), which do not necessarily depend on international agreement on grounds of jurisdiction. Part III introduces a number of less intrusive techniques that could be used to co-ordinate the flow of judgments. Finally, Part IV outlines the expected outcomes of the meeting.

## Part I – Prescribing grounds of jurisdiction

### 1. Introduction

4. Work carried out in the past on the Judgments Project included work in the area of jurisdiction.<sup>6</sup> The work on jurisdiction (as embodied in Chapter I of the Interim Text) had three objectives:

- a. to prescribe grounds of jurisdiction that were considered to be internationally accepted ("required grounds");<sup>7</sup>

<sup>1</sup> Conclusions and Recommendations of the 2012 Expert Group.

<sup>2</sup> 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. 18.

<sup>3</sup> See Conclusions and Recommendations of the 2012 Expert Group, para. 4(e)(iii). This Issues Paper relies upon the document drawn up by the Permanent Bureau for the attention of the Experts' Group at its first meeting (*i.e.*, the Background Note), particularly paras 40-42 and 68-72.

<sup>4</sup> Conclusions and Recommendations adopted by the Council *supra* (note 2), para. 17.

<sup>5</sup> H. van Lith, "Uniform Rules for Contract Disputes: Putting Activity-Related Jurisdiction on the Agenda", *Netherlands International Law Review*, Vol. 59(1), 2012, p. 96.

<sup>6</sup> For further discussion on past efforts, see Background Note, para. 40 and accompanying notes.

<sup>7</sup> The word "required" was used as the objective was to require Contracting States to provide the relevant grounds to potential litigants: Nygh-Pocar Report, p. 28. For the purposes of further discussion, the more neutral term of "accepted grounds" is used in this Paper.

- b. to prescribe grounds of jurisdiction that were considered to be internationally unacceptable ("prohibited grounds");<sup>8</sup> and
- c. to permit the use of other grounds of jurisdiction under their own national law ("permitted grounds").

5. This approach is reflected visually in the "white list", "black list" and "grey area" (respectively) of grounds set out in the Interim Text.

6. A number of required grounds received at-least in-principle agreement in the context of the Interim Text at the Nineteenth Session,<sup>9</sup> and some prohibited grounds appeared to be more amenable than others to consensus.<sup>10</sup> It might therefore be preferable to make initial progress on required grounds before tackling prohibited grounds.<sup>11</sup> In saying this, it is acknowledged that regulating prohibited grounds may have been considered in the past to be a necessary component of a future instrument, with "doing business" jurisdiction being one of the primary targets.<sup>12</sup> However, recent developments in US case law concerning this ground of jurisdiction<sup>13</sup> – by which it appears that the Supreme Court has confirmed greater limitation on the availability of the "doing business" forum –

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<sup>8</sup> Addressing prohibited grounds was considered a priority from the very beginning of the Judgments Project. The Working Group that met in October 1992 to consider the proposal for a new convention expressed a preference for a convention that would contain a list of accepted and prohibited grounds: "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*, p. 256, para. 6, also available on the Hague Conference website at < www.hcch.net > under "Specialised Sections" then "Judgments Project" and "The originating proposal". This approach was supported by the Special Commission that convened soon after to study further the problems involved in drafting a new convention. 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. 6, available on the Hague Conference website at < www.hcch.net > under "Specialised Sections" then "Judgments Project" and "Preliminary work". It was also noted at the start of negotiations on the Preliminary Draft Convention that addressing prohibited grounds would make a future Convention more attractive and useful to litigants: see "International Jurisdiction and Foreign Judgments in Civil and Commercial Matters", Prel. Doc. No 7 of April 1997, para. 135, available on the Hague Conference website at < www.hcch.net > under "Specialised Sections" then "Judgments Project" and "Preparation of a preliminary draft convention".

<sup>9</sup> 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 XIXth Diplomatic Session – April 2002, para. 7, in *Proceedings of the Nineteenth Session (2001/2002)*, Tome I, *Miscellaneous matters*, p. 429.

<sup>10</sup> See, for example, Work. Doc. No 97 of Commission II, submitted on 18 June 2001 by the delegations of Argentina, Australia, New Zealand and Norway, cited in Prel. Doc. No 16, *supra* (note 9), which suggested that further work on the Preliminary Draft Convention could comprise a provision on prohibited grounds of jurisdiction including "at least tag jurisdiction; plaintiff's nationality; defendant's nationality; plaintiff's domicile, residence or presence; defendant's temporary presence; presence or seizure of property (for unrelated claims); enforcement/registration of judgment proceedings (for unrelated claims); unilateral designation (not in contractually binding provisions); mere formal execution of a contract". For a discussion of some of the obstacles to reaching consensus in respect of prohibited grounds of jurisdiction, see 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*, Cedam, Milan, 2005, p. 50. See also R. Brand, "Concepts Consensus and the Status Quo Zone: Getting to "Yes" on a Hague Jurisdiction and Judgments Convention" in C. Carmody, Y. Iwasawa and S. Rhodes (eds), *Trilateral Perspectives on International Legal Issues: Conflict and Coherence*, American Society of International Law, Baltimore, 2003, p. 91.

<sup>11</sup> This approach has been suggested by A. Bucher, "La dimension sociale du droit international privé : cours général", *Recueil des cours, Académie de Droit International de La Haye*, Vol. 341, 2010, p. 437 ("pour préparer le terrain, on pourrait s'entendre, tout d'abord, sur les fors qui sont internationalement acceptables, avant de s'engager à bannir ceux qui ne le sont pas").

<sup>12</sup> See Prel. Doc. No 7, *supra* (note 9), para. 135.

<sup>13</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011). This case is discussed further below (paras. **Fout! Verwijzingsbron niet gevonden.**-24).

may eventually have the effect of allaying this need.<sup>14</sup> More generally, work on prohibited grounds is particularly relevant in order to reinforce the compulsory nature of prescribed grounds. This Paper suggests that priority should be given to the consideration of internationally accepted grounds, before it is discussed whether (a) such accepted grounds should necessarily be made compulsory to Contracting States and (b) addressing prohibited grounds.

a. The function of accepted grounds of jurisdiction

7. The desirability and feasibility of including accepted grounds of jurisdiction in a future instrument should be measured against the function they would serve. As a comparison, required grounds in the Interim Text served a double purpose:

- a. to oblige Contracting States to provide for the relevant grounds to potential litigants (subject to provisions dealing with the multiplicity of forums)<sup>15</sup> and
- b. when exercised, to entitle the resulting judgments to recognition and enforcement.<sup>16</sup>

8. If, as suggested, discussions were to focus on accepted grounds of jurisdiction without imposing an obligation on Contracting States to implement them, one could question the value of these future rules. The Permanent Bureau considers that an instrument providing for non-compulsory grounds of jurisdiction may be useful on account of the following considerations:

- a. it would set up internationally accepted standards on international jurisdiction without some of the complications associated with required grounds, including constitutional and sovereignty issues as noted during past negotiations;<sup>17</sup>
- b. judgments based on an accepted ground of jurisdiction should be exempt from a control of jurisdiction at the recognition and enforcement stage;
- c. judgments based on an accepted ground of jurisdiction could benefit from a fast-track procedure for recognition and enforcement, inspired by the two alternative procedures provided for in the Child Support Convention;<sup>18</sup>
- d. other "priority" treatment could be envisaged; for instance, it is conceivable that the application of rules on the multiplicity of forums (discussed in Part II) would be influenced by the fact that a court exercises jurisdiction on an accepted ground of jurisdiction.

9. In any event, a list of accepted grounds could serve as a model for each Contracting State (and indeed any other State) to follow when developing or applying its own national jurisdictional rules.

b. The link between jurisdiction and substantive scope

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<sup>14</sup> See S. Burbank, "International Litigation in U.S. Courts: Becoming a Paper Tiger?", *U. Pa. J. Int'l L.* Vol. 33(3), 2012, pp. 669 *et seq.*

<sup>15</sup> Nygh-Pocar Report, p. 28.

<sup>16</sup> *Ibid.*, p. 29.

<sup>17</sup> See, for example, the comments at note 66 of the Interim Text concerning the acceptance of a ground of jurisdiction for torts.

<sup>18</sup> See Note 1, paras 116 *et seq.*

10. The experience of the Hague Conference reveals a link between substantive scope and the nature and content of accepted grounds of jurisdiction. The commentary on subject matters that have previously been debated for inclusion or exclusion in Hague Conventions (Part I of Note 1) is therefore relevant to the discussion on the feasibility of further provisions in relation to matters of jurisdiction.

11. A broad substantive scope essentially means that a greater number of civil and commercial matters will be regulated, which may suggest a need for differentiated treatment. One way this can be managed is by excluding certain problematic subject matters from scope. For example, difficulties in reaching consensus at the Nineteenth Session on grounds of jurisdiction for consumer contracts, employment contracts and intellectual property could have been addressed by excluding these matters from scope.<sup>19</sup> Another way to deal with this is to assume that, for the time being, accepted grounds are being developed for a "core" of common international transactions, *i.e.*, cases arising out of transactions in the most common branches of commerce (*e.g.*, the sale and carriage of goods, provision of banking and financial services, insurance and re-insurance, and business agency).

12. In addition, it is conceivable that provisions in a future instrument on jurisdiction could have a different substantive scope of application to those on recognition and enforcement. For instance, if consensus can only be achieved on grounds of jurisdiction dealing with certain subject matters, there is no reason why this should compromise the possible agreement on a recognition and enforcement scheme that applies to a broader range of matters.

## **2. Grounds of jurisdiction on which consensus is potentially achievable**

13. Following the Nineteenth Session, Commission I on General Affairs and Policy identified a number of individual grounds of jurisdiction in the Interim Text that had met with (relatively) broad agreement among negotiating States, and which could be explored in further work on jurisdiction.<sup>20</sup> These were:

- a. jurisdiction based on a choice of court agreement (which is now elaborated in the Choice of Court Convention);
- b. jurisdiction based on the defendant's forum;
- c. jurisdiction based on the defendant's branches;
- d. jurisdiction based on the defendant's submission;
- e. jurisdiction for counter-claims;
- f. jurisdiction for trusts; and
- g. jurisdiction for physical injury torts.

14. In view of the observations made in the Introduction, the Permanent Bureau has focussed its preparatory work on identifying a general ground of jurisdiction (*i.e.*, one that applies to all claims, regardless of their subject-matter or the

<sup>19</sup> See Prel. Doc. No 16, *supra* (note 9), para. 5. For further discussion on the inclusion of intellectual property within scope in a future instrument, see paras 47 *et seq.* of Note 1. For consumer contracts, see paras 51 *et seq.* and for employment matters, paras 54 *et seq.*

<sup>20</sup> See "Summary of Commission I on General Affairs and Policy (April 2002)", prepared by the Permanent Bureau and Co-reporters, available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Judgments Project" then "Focus on international litigation", para. 3.

connection between the claim and the forum) and that would address the above-mentioned grounds of jurisdiction under b, c and d (in addition to the defendant's "centre of relevant interests" and the defendant's "regular commercial activity"). If we accept that the objective of a general ground of jurisdiction is to establish a sufficient connection between the defendant and the forum, the deliberations of the Experts' Group should focus on whether this list of grounds provides the required nexus.

a. Does the defendant's submission provide the required nexus?

15. It is reasonable to suggest that a general ground of jurisdiction focussing on the defendant's centre of relevant interests should encompass cases where the defendant participates in proceedings without objection. Not only is this approach widely accepted,<sup>21</sup> it seems coherent with an interest-based approach, if we assume that a decision to submit to the forum is based on the defendant's best interests assessment.<sup>22</sup>

b. Does the defendant's habitual residence or domicile provide the required nexus?

16. The Hague Conference has traditionally used the concept of "habitual residence" as the connecting factor for a general defendant's forum.<sup>23</sup> This approach was accepted early on during negotiations on the Judgments Project for natural persons,<sup>24</sup> and was reflected in the Preliminary Draft Convention.<sup>25</sup> For legal persons, it was decided to retain the term "habitual residence", but list four circumstances under which, if established, the person would be deemed to be habitually resident in the State concerned.<sup>26</sup> This list remained unchanged in the Interim Text although the term "habitual residence" was called into question at the Nineteenth Session in view of concerns that it had acquired too technical a meaning in the interpretation of earlier Hague Conventions, particularly the Child Abduction Convention.<sup>27</sup> It should be noted, however, that "habitual residence" remains a relevant connecting factor for matters outside family law in several jurisdictions.<sup>28</sup> It has also been employed in the 2004 *ALI / UNIDROIT Principles of Transnational Civil Procedure* to define the home forum for natural persons.<sup>29</sup>

<sup>21</sup> According to A. von Mehren, "[a] defendant that chooses to participate in court proceedings without objection is universally taken to accept the appropriateness of the forum exercising adjudicatory authority over the pending action": A. von Mehren, "Theory and Practice of Adjudicatory Authority", *Recueil des cours, Académie de Droit International de La Haye*, Vol. 295, 2002, p. 219. For further discussion on previous work on this ground at the Hague Conference, see Note 1, paras 137 *et seq.*

<sup>22</sup> Von Mehren also frames the forum of defendant's submission in terms of interests ("Rules respecting appearance balance, on the one hand, the forum's and the parties' interests in litigational efficiency and economy against, on the other hand, the forum's and the defendant's interests in ensuring that the defendant's procedural as well as his substantive rights are protected"): *Ibid.*

<sup>23</sup> See, for example, Art. 10(1) of the Enforcement Convention.

<sup>24</sup> See "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, para. 9, available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Specialised Sections" then "Judgments Project" and "Preparation of a preliminary draft convention".

<sup>25</sup> Art. 3(1) provides that "a defendant may be sued in the courts of the State where that defendant is habitually resident".

<sup>26</sup> These are: (a) statutory seat; (b) law of incorporation; (c) central administration; and (d) principal place of business.

<sup>27</sup> The term "residence" was suggested as an alternative. "Residence" was preferred in the drafting of the Choice of Court Convention, although it is used in the Convention to determine whether a case is "international" (and therefore within the scope of the Convention), rather than to determine the defendant's home forum *per se*.

<sup>28</sup> For example, in a 2010 decision, the New Zealand High Court found no reason to depart from case law in respect of the Child Abduction Convention in determining habitual residence in the context of cross-border insolvency proceedings: *Williams v. Simpson*, [2011] 2 NZLR 380, para. 42, available at < <http://www.nzlii.org/nz/cases/NZHC/2010/1786.pdf> >. This finding was followed by the Federal



17. The Brussels I Regulation and Lugano Convention use “domicile” to define the defendant’s forum,<sup>30</sup> which is determined by reference to internal law for natural persons.<sup>31</sup> For legal persons, domicile is determined autonomously by reference to a list of three circumstances under which, if established, the person would be deemed to be domiciled in the State concerned.<sup>32</sup> Each of these circumstances appears in the corresponding list set out in the Interim Text (see discussion at para. 16 above), which demonstrates considerable overlap between “domicile” and “habitual residence” as far as legal persons are concerned.

18. A decision was taken early on during the Judgments Project not to use “domicile” in favour of “habitual residence”.<sup>33</sup> A number of commentators have also recently expressed their preference for “habitual residence” over “domicile”.<sup>34</sup> Nevertheless, the recent Brussels I Recast Regulation<sup>35</sup> has reaffirmed “domicile” as the appropriate connecting factor.<sup>36</sup> Interestingly, the term “domicile” has also been used in the 2012 *Sofia Guidelines on Best Practices for International Civil Litigation for Human Rights Violations* adopted by the International Law Association (“ILA”), although for natural persons it is defined as habitual residence, which demonstrates further overlap between the two concepts.<sup>37</sup>

c. Does the defendant’s centre of relevant interests provide the required nexus?

19. If we accept that the objective of a general ground of jurisdiction is to establish a connection between the defendant and the forum, we should recognise that establishing such a connection with a single place can be difficult, particularly in view of the increasingly wide geographic dispersion of the organisation of economic activities.<sup>38</sup> In particular, the defendant’s forum as traditionally defined (e.g., habitual residence and domicile) does not necessarily correlate with the centre of the defendant’s activities. Accordingly, a reformulated general ground of jurisdiction linked to the defendant’s centre of relevant interests could alternatively be considered.

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Court of Australia in *Gainsford, in the matter of Tannenbaum v. Tannenbaum*, [2012] FCA 904, para. 41, available at < <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2012/904.html> >. In civil law jurisdictions, see for instance Art. 5(1) of the Belgian Code of Private International Law and Arts. 2 and 3 of the Dutch Code of Civil Procedure, which refer to habitual residence together with domicile as a general ground for jurisdiction. In addition, Art. 3-2(1) of the Code of Civil Procedure of Japan refers to residence (*kyosho*) as a subsidiary means of general jurisdiction in the absence of domicile (*jusho*).

<sup>29</sup> Principle 2.1.2, available at < <http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciplese.pdf> > (last consulted December 2012).

<sup>30</sup> Art. 2.

<sup>31</sup> Art. 59.

<sup>32</sup> Art. 60. These circumstances are: (a) statutory seat; (b) central administration; or (c) principal place of business.

<sup>33</sup> For further discussion, see Nygh-Pocar Report, p. 40.

<sup>34</sup> After reviewing recent practice, H. van Lith states that “[i]n sum, the use of “habitual residence” is preferred”. See H. van Lith, *International Jurisdiction and Commercial Litigation. Uniform Rules for Contract Disputes* (The Hague, T.M.C. Asser Press 2009), p. 373.

<sup>35</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1, available on the EU website at < <http://europa.eu> > under “find legislation”.

<sup>36</sup> *Ibid.*, Art. 4(1). This is despite suggestions that a definition based on habitual residence might be preferable: see *Report on the Application of Regulation Brussels I in the Member States*, September 2007 (“Hess Report”), para. 186.

<sup>37</sup> ILA Resolution No 2/2012, para. 42, available at < <http://www.ilahq.org/en/committees/index.cfm/cid/18> > (last consulted December 2012). For legal persons, domicile is defined by reference to a list of three circumstances similar to those found in the Brussels I Regulation and Lugano Convention.

<sup>38</sup> See A. Bucher, *supra* (note 11), p. 398.

20. A similar approach was taken in the area of cross-border insolvency, where the major international instruments – namely the *UNCITRAL Model Law on Cross-Border Insolvency*<sup>39</sup> and the *EC Regulation on Insolvency Proceedings*<sup>40</sup> – have adopted the concept of “centre of main interests” (or “COMI”) for the purposes of establishing a connection between the defendant and a particular forum.<sup>41</sup> COMI is not defined in either instrument, and its interpretation is left to courts to determine on a case-by-case basis<sup>42</sup> based on a factual enquiry. There is a wealth of cases and commentary on the interpretation of COMI under the UNCITRAL Model Law and EC Regulation,<sup>43</sup> and further study might be undertaken to see whether the concept provides an appropriate solution for a general ground of jurisdiction in a future instrument.

21. It should be noted that the UNCITRAL Model Law does provide that in the absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor’s main interests.<sup>44</sup> A similar presumption appears from the EC Regulation and commentary.<sup>45</sup> Accordingly, traditional connecting factors such as “habitual residence” and “domicile” will continue to be relevant.

d. Does the place where the defendant conducts its regular commercial activity provide the required nexus?

22. The place of regular commercial activity can be described as a possible general ground for jurisdiction. This places an emphasis on “commercial activity”, rather than just formal aspects (e.g., headquarter) of a legal entity. This concept, if adopted, could function in a manner that takes into greater consideration the geographic dispersion of commercial activity as well as in a manner that covers different organisational structures; for example, there should be little doubt that a place where a company has its branch engaging in business would fall under this category.

23. In this regard, an issue that requires consideration is whether “doing business” as applied by US courts would fall within the scope of regular

<sup>39</sup> Available at < [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html) > (last consulted December 2012).

<sup>40</sup> Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, available at < [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/l33110\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33110_en.htm) > (last consulted December 2012).

<sup>41</sup> It should be noted that the term is employed differently in the EC Regulation and Model Law. As UNCITRAL notes, “[a]lthough the concepts in the two texts are similar, they serve different purposes. The determination of “centre of main interests” under the EC Regulation relates to the jurisdiction in which main proceedings should be commenced [*i.e.*, ground of jurisdiction]. The determination of “centre of main interests” under the Model Law relates to the effects of recognition, principal among those being the relief available to assist the foreign proceeding”: see *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*, 2012, para. 77, available at < [http://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial\\_Perspective\\_ebook-E.pdf](http://www.uncitral.org/pdf/english/texts/insolven/V1188129-Judicial_Perspective_ebook-E.pdf) > (last consulted December 2012).

<sup>42</sup> See commentary by Judge L.M. Clark, “‘Centre of Main Interests’ finally becomes the Centre of Main Interests in case law”, *Texas International Law Journal Forum*, Vol. 24, 2008, p. 14.

<sup>43</sup> For a recent digest of case law on COMI in the EC Insolvency Regulation, see B. Wessels, *International Insolvency Law*, 2012, paras 10558 *et seq.*

<sup>44</sup> Art. 16(3).

<sup>45</sup> For a company or legal person, Art. 3(1) provides that “the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary”. For natural persons, the explanatory report by M. Virgós and E. Schmit on the Convention of Insolvency Proceedings (Virgós-Schmit Report) states that in principle, the centre of main interests will be the place of their habitual residence. However, in the particular case of professionals, the COMI will be the place of their professional domicile. See < [http://aei.pitt.edu/952/1/insolvency\\_report\\_schmidt\\_1988.pdf](http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf) >, p. 52. Although the Virgós-Schmit Report relates to the unsuccessful European Insolvency Convention that preceded the EC Regulation, it is still used to provide assistance on the interpretation of the EC Regulation.

commercial activity. In the recent decision of the US Supreme Court, *Goodyear v Brown*,<sup>46</sup> the Supreme Court framed general jurisdiction (under the heading of “doing business”) in terms of the defendant’s home forum. It stated that “[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State”<sup>47</sup>. While in the decision the court held that, the connection between the defendant and the forum State did not “establish the ‘continuous and systematic’ affiliation necessary”<sup>48</sup>, it did not specify what constitutes ‘continuous and systematic’ affiliations with a forum State.<sup>49</sup> However, one point the Goodyear decision does make clear is that the “density of activity”, as phrased in previous work on Judgments,<sup>50</sup> is considered to be a key factor when looking at the ‘doing business’ ground of jurisdiction.

24. In past negotiations, States have expressed concern over “doing business” as a ground of general jurisdiction due to the abstract nature of the concept and the resulting risk of its application being considered too broad. Accordingly, the Interim Text incorporated a *specific* (rather than a general) ground of jurisdiction based on regular commercial activity.<sup>51</sup> The Experts’ Group might wish to revisit whether regular commercial activity (which is interconnected with “doing business”) could be incorporated into a future instrument as a ground of general jurisdiction.

e. Other possible grounds

25. In addition to a broadly accepted ground of jurisdiction, the Experts’ Group may wish to consider other possible grounds of jurisdiction, such as counter-claims, trusts and physical injury torts (as those further identified following the Nineteenth Session). At the same time, some of the grounds that proved to be more challenging in the past (such as contracts, economic torts and intellectual property) are also open to reconsideration in light of recent developments. A preliminary discussion on some of these other possible grounds (as jurisdictional filters) is contained in Note 1 (see paras 150 *et seq.*).

## **Part II – Dealing with a multiplicity of forums**

26. During its meeting in April 2012, the Experts’ Group briefly discussed the issue of parallel proceedings, which was understood to involve provisions dealing with situations of *lis pendens* (*i.e.*, situations where multiple courts are simultaneously seised) as well as rules dealing with declining jurisdiction (whether

<sup>46</sup> 131 S. Ct. 2846 (2011).

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> According to one commentator, “[t]he opinion’s narrowly framed issues and comparative evaluation of corporate activity can support a flexible approach that approves general jurisdiction in multiple states where a foreign corporation has strong permanent connections. Yet its formal doctrines can equally support a restrictive approach that limits general jurisdiction to the place of incorporation and a place that is the fundamental equivalent of the principal place of business.” See M. H. Hoffheimer, “General Personal Jurisdiction After *Goodyear Dunlop Tires Operations, S.A. v. Brown*”, *University of Kansas Law Review*, Vol 60(3), 2011-2012, p. 551-552. See also, L.J. Silberman, “*Goodyear and Nicastro*: Observations from a Transnational and Comparative Perspective”, *South Carolina Law Review*, Vol. 63, 2012, p. 613; See also, A.R. Stein, “The Meaning of ‘Essentially at Home’ in *Goodyear Dunlop*”, *South Carolina Law Review*, Vol. 63, 2012, p. 532.

<sup>50</sup> See “Synthesis of 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”, para 88.

<sup>51</sup> See Art. 18(2)(e). This ground of jurisdiction – known as “activity-based jurisdiction”, is discussed further at paragraph 146 *et seq.* of Note 1.

or not more than one court had been seised). The Experts' Group concluded that the possibility remained open of making provision in a future instrument in relation to parallel proceedings, and recommended that it reconvene to consider the possibility further.<sup>52</sup>

27. For as long as there are multiple grounds of jurisdiction available to litigants (whether under national rules or under an international instrument), there is a risk of proceedings being brought in multiple forums or in one that is not the most appropriate forum to hear the case. These situations threaten to reduce the efficiency and effectiveness of cross-border litigation as well as the proper administration of justice.<sup>53</sup> The experience of the Hague Conference suggests that it is possible to include provisions dealing with multiple forums in an instrument despite the absence of provisions on direct jurisdiction. For example, the Enforcement Convention makes provision for courts to apply a first-in-time rule to decline jurisdiction, despite otherwise dealing exclusively with the recognition and enforcement of judgments. Similarly, the ILA<sup>54</sup> and the Institute of International Law<sup>55</sup> have adopted resolutions providing for rules dealing with the multiplicity of forums without providing for grounds of direct jurisdiction.

28. Most States recognise the potential risks associated with multiple forums, and have developed rules (whether at a national level, or in a bilateral, regional or international treaty) providing for their courts to decline jurisdiction in these situations.<sup>56</sup> Generally speaking, there are two approaches that States have adopted for declining jurisdiction: applying a "first-in-time" rule (commonly associated with civil law jurisdictions), which applies where proceedings have been commenced in the forum as well as the courts abroad, and applying a *forum non conveniens* analysis (which is commonly associated with common law jurisdictions), which applies regardless of whether proceedings have been commenced in courts abroad.

29. The experience of the Hague Conference suggests that it is feasible to accommodate both approaches in a single instrument.<sup>57</sup> The Interim Text indeed includes a first-in-time rule alongside an exceptional rule for declining jurisdiction

<sup>52</sup> See Conclusions and Recommendations of the 2012 Expert Group, paras 3(h) and 4(d).

<sup>53</sup> For expressions of the risks associated with simultaneous proceedings, see para. d of the preamble to *The principles for determining when the use of the doctrine of forum non conveniens and anti-suit injunctions is appropriate* adopted by the Institute of International Law ("Bruges Resolution"), available at < [http://www.idi-iil.org/idiE/resolutionsE/2003\\_bru\\_01\\_en.PDF](http://www.idi-iil.org/idiE/resolutionsE/2003_bru_01_en.PDF) > (last consulted December 2012), and Recital 15 of the preamble to the Brussels I Regulation. See also C. McLachlan, "Lis Pendens in International Litigation", *Recueil des cours, Académie de Droit International de La Haye*, Vol. 336, 2008, pp. 215 *et seq.*

<sup>54</sup> See 2000 *Leuven / London 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 December 2012).

<sup>55</sup> Bruges Resolution, *supra* note 53.

<sup>56</sup> See J.J. Fawcett, "General Report" in J.J. Fawcett (ed.), *Declining Jurisdiction in Private International Law*, Clarendon Press, Oxford, 1995. See, for example, "Note on the question of *forum non conveniens* in the perspective of a double Convention in judicial jurisdiction and the enforcement of decisions", Prel. Doc No 3 of April 1996 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, available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Specialised Sections" then "Judgments Project" and "Preliminary Work". See also "Conclusions of the second Special Commission meeting on the recognition and enforcement of foreign judgments in civil and commercial matters", Prel. Doc. No 6 of August 1996, available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Specialised Sections" then "Judgments Project" and "Preliminary Work", paras 6-10. See also "Synthesis of work of the Special Commission of March 1998 on international jurisdiction and the effects of foreign judgments in civil and commercial law", 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 law, available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Specialised Sections" then "Judgments Project" and "Preparation of a preliminary draft convention", paras 101-112.

<sup>57</sup> For commentary, see Nygh-Pocar Report, pp. 89 *et seq.*

based on a *forum non conveniens* analysis.<sup>58</sup> Articles 21 and 22 of the Interim Text may still represent a position on which consensus can readily be achieved. As Peter Nygh foreshadowed in 2002, the ideas and concepts that these provisions represent “will persist and have to be considered at some future stage, even if present negotiations do not produce an immediate result”.<sup>59</sup> This package received at least in-principle agreement at the Nineteenth Session<sup>60</sup> and, as Ronald Brand states, “indicates both the search for common ground and the willingness to reach out to unfamiliar systems in an effort to achieve global benefits”.<sup>61</sup>

30. The common basis achieved during past negotiations, as well as recent developments at an international, regional and national level, suggest that dealing with a multiplicity of forums remains at the forefront of policy-making in the area of international litigation. A closer look at recent developments may also be helpful in the search for internationally acceptable solutions.

31. At an international level, the ILA has adopted a number of resolutions relating to declining jurisdiction in international cases. The 2000 *Leuven / London Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters* contain a mandatory first-in-time rule,<sup>62</sup> which operate in conjunction with a rule based on the doctrine of *forum non conveniens*.<sup>63</sup> More recently, the 2012 *Sofia Guidelines on Best Practices for International Civil Litigation for Human Rights Violations* accept a rule based on the doctrine of *forum non conveniens* albeit with limited applicability in view of the particular nature of human rights litigation.<sup>64</sup>

32. In 2003, the Institute of International Law adopted the Bruges Resolution,<sup>65</sup> which contains a first-in-time rule that will however not apply when the proceedings before the court first seised are designed to frustrate proceedings in a second forum which is clearly more appropriate.<sup>66</sup> It also includes a standalone principle by which a court may refuse to hear a case on the basis that a competent court in another State is clearly more appropriate to determine the

<sup>58</sup> See Arts 21 and 22 of the Interim Text.

<sup>59</sup> See also G. Andrieux, “Declining Jurisdiction in a Future International Convention on Jurisdiction and Judgments: How Can We Benefit from Past Experiences in Conciliating the Two Doctrines of *Forum Non Conveniens* and *Lis Pendens*?”, *Loyola of Los Angeles International and Comparative Law Review*, Vol. 27, p. 323.

<sup>60</sup> See Prel. Doc. No 16, *supra* (note 9), para. 7.

<sup>61</sup> R. Brand, “Comparative *Forum Non Conveniens* and The Hague Convention on Jurisdiction and Judgments”, *Texas International Law Journal*, Vol. 37(3), 2002, p. 495. See also A. Nuyts, *L’exception de forum non conveniens: étude de droit international privé comparé*, Bruylant, Brussels, 2003, who states (at p. 908) that Art. 22 of the Interim Text “n’était pas seulement le résultat d’un compromis difficile, mais qu’elle constituait aussi le fruit d’une réflexion approfondie qui traduit l’amorce d’une évolution des mentalités non seulement de la part des juristes de civil law, qui ont compris la nécessité de modérer dans certains cas la compétence, mais aussi des juristes de common law, qui ont perçu l’opportunité d’éviter une application débridée du *forum non conveniens*”.

<sup>62</sup> *Supra* (note 54), Principle 4.1.

<sup>63</sup> *Ibid*, Principle 4.3.

<sup>64</sup> According to Art. 2.5, the power to stay proceedings in favour of the courts in another State is not available where the court is seised in accordance with certain grounds of jurisdiction (*i.e.*, defendant’s domicile, connected claims and forum of necessity). The idea of restricting the power to stay when jurisdiction is based on the defendant’s domicile was raised during the Judgments Project (see Prel. Doc. No 6, para. 9), and has since been suggested by a number of commentators: see, for example, L. Usunier, *Yearbook on Private International Law*, Vol. 9, pp. 571-572 and R. Brand and S. Jablonski, *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements*, Oxford University Press, 2007, p. 177.

<sup>65</sup> See *supra* (note 53). The Bruges Resolution was the result of work conducted by the Second Commission, for which Sir Lawrence Collins acted as *rapporteur*, and Georges Droz as *co-rapporteur*.

<sup>66</sup> *Ibid*. Para. 4: “In principle, the court first seised should determine the issues (including the issue whether it has jurisdiction) except (a) when the parties have conferred exclusive jurisdiction on the courts of another country, or (b) when the first seised court is seised in proceedings which are designed (*e.g.* by an action for a negative declaration) to frustrate proceedings in a second forum which is clearly more appropriate”.

issues in question.<sup>67</sup> Similar mechanisms are found in the *Principles of Transnational Civil Procedure* adopted by the ALI and UNIDROIT in 2004.<sup>68</sup>

33. At the regional level, one of the new provisions in the recent Brussels I Recast Regulation<sup>69</sup> is a *lis pendens* rule for parallel proceedings involving the courts of a third State. It provides that the courts of EU Member States may stay their own proceedings if other proceedings are pending before a court in a third State, and the matters before it involve the same cause of action and are between the same parties, or involve an action that is “related to” the action in the court of the third State. However, proceedings before the court of a Member State may only be stayed in favour of proceedings in the third State if:

- a. it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, enforcement in that Member State; and
- b. the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

34. It should be noted that the new rule further provides that if the proceedings in the third State are discontinued, stayed or unlikely to be concluded within a reasonable period of time, the court of the Member State may reinstate and continue the proceedings. However, once the court of the third State makes a decision “capable of” recognition or enforcement in that Member State, the court of the Member State must dismiss the proceedings.

35. Another interesting development has taken place at the bilateral level in the context of the 2008 *Agreement on Trans-Tasman court proceedings and regulatory enforcement* between Australia and New Zealand (“Trans-Tasman Agreement”).<sup>70</sup> The Agreement enables the courts within the territory of one Party (*i.e.*, Australia or New Zealand) to stay proceedings on the ground that “a court within the territory of the other Party is the more appropriate forum to determine the proceedings”. The rule sets out a non-exclusive list of factors to which the court must have regard when determining the more appropriate forum. The rule is significant in that it establishes a common *forum non conveniens* test between two common law jurisdictions that otherwise apply different tests.<sup>71</sup>

36. Finally, it is interesting to note that the issue of a multiplicity of forums has also been addressed at the national level, reflecting a common understanding about the detrimental effects of parallel litigation (injustice, risk of inconsistent decisions, delay, increased expense) and the wish to remediate these effects. This short overview takes us to common law and civil law jurisdictions in four different continents.

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<sup>67</sup> *Ibid.* Para. 1.

<sup>68</sup> ALI / UNIDROIT Principles of Transnational Civil Procedure, Principles 2.5 and 2.6, available at < <http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf> > (last consulted December 2012).

<sup>69</sup> See Brussels I Recast Regulation, *supra* (note 35), Arts. 33 and 34.

<sup>70</sup> The full text of the Trans-Tasman Agreement is available at < <http://www.austlii.edu.au/au/other/dfat/treaties/notinforce/2008/12.html> > (last consulted December 2012). As noted in the Background Note (para. 21), the Agreement is expected to enter into force in the very near future, once Australia and New Zealand have finished putting in place regulations and amending court rules to complete the domestic implementation process.

<sup>71</sup> For a summary of the different approaches in Australia and New Zealand, see J.J. Fawcett, “General Report”, *supra* (note 56), pp. 12-13. The test in the Trans-Tasman Agreement reflects the existing approach taken in New Zealand, which follows the precedent set by the House of Lords in *Spiliada Maritime Corp. v. Cansulex Ltd* [1987] AC 460. The test represents a bigger change for Australian courts, which have hitherto applied a more forum-centric “clearly inappropriate forum” test in international litigation, laid down by the High Court of Australia in *Voth v. Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

37. The 2004 Belgian Code of Private International Law introduced, for the first time in Belgian law, a rule which enables Belgian courts to take into consideration a situation of *lis pendens* abroad.<sup>72</sup> The rule is discretionary, and requires the Belgian court to take into account the requirements of the proper administration of justice when confronted with a situation of parallel proceedings.

38. In Japan, recent amendments to the Code of Civil Procedure have introduced a notable rule among a new set of provisions regarding international jurisdiction. Under the rule, a court which has international jurisdiction is allowed to dismiss<sup>73</sup> all or part of a proceeding if it finds there to be special circumstances in which hearing and determining the case in Japan would impair equity between the parties or hinder the proper and prompt implementation of the hearing.<sup>74</sup> Although the codified rule was intended to largely reflect existing case law,<sup>75</sup> its codification may be evaluated as a recent example of a civil law jurisdiction introducing a device functionally similar to *forum non conveniens*. Interestingly, the drafters of the amendments were unable to reach consensus on including a rule for suspension of a proceeding in Japan in the case of international simultaneous proceeding, and consequently the "special circumstances" rule in practice remains a principal means for dealing with international simultaneous proceedings in Japan.

39. In contrast with Japan, Quebec provides an example of a civil law jurisdiction that has codified outright the doctrine of *forum non conveniens*.<sup>76</sup> The Civil Code of Quebec of 1994 thus provides a unique example of a civil law jurisdiction which has codified both the doctrine of *forum non conveniens* (Art. 3135 C.c.Q.) and *lis pendens* (Art. 3137 C.c.Q.) with the objective of avoiding parallel proceedings. In the same vein, a recent decision of the Supreme Court of Canada<sup>77</sup> has confirmed that when deciding whether to decline jurisdiction when *forum non conveniens* is raised, the Canadian courts, in both common law and civil law, must examine the likelihood that the decision rendered by the foreign jurisdiction would be recognised and enforceable in Canada as part of a test with several factors applicable to determine whether an alternative forum is more appropriate.

40. In 2005, the American Law Institute adopted a proposed US federal statute on the recognition and enforcement of foreign judgments, which contains a hybrid rule for dealing with situations of "declination of jurisdiction".<sup>78</sup> The rule provides for a first-in-time rule provided other criteria are met in deciding whether to stay or dismiss the action.

<sup>72</sup> Art. 14 of the Belgian Code of Private International Law, 2004. See P. Wautelet, *Commentary on Article 14*, in J. Erauw, et al. (eds) *Le Code de droit international privé commenté*, Antwerp, Intersentia, 2006, pp. 81-82. See also Article 9 of Switzerland's Federal Code of Private International Law, 1987 and Article 7 of Act No. 218 of 31, Reform of Italian System of Private International Law, 1995. Compare with Quebec, another civil law jurisdiction, which includes both a *forum non conveniens* rule (Art. 3135) and a *lis pendens* rule (Art. 3137).

<sup>73</sup> This dismissal shall be without prejudice to the merit of the case ("*kyakka*").

<sup>74</sup> Arts 3-9 of the Code of Civil Procedure of Japan.

<sup>75</sup> Minutes of the 5th Meeting of Subcommittee for Legislating International Jurisdiction in Legislative Council of the Ministry of Justice (*housei shingikai kokusai saiban kankatsu bukai*) on 27 February 2009, pp. 9-10, available at < [http://www.moj.go.jp/shingqi1/shingqi\\_090227-1.html](http://www.moj.go.jp/shingqi1/shingqi_090227-1.html) > (last consulted December 2012); See M. Dogauchi, "Japan" in J.J. Fawcett (ed.), *Declining Jurisdiction in Private International Law*, *supra* (note 56), p. 308. For a comparison of the new rule and existing rule under existing case law, see K. 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, pp. 164-167.

<sup>76</sup> See G. Goldstein, "Private International Law" in A. Grenon & L. Bélanger-Hardy (eds.), *Elements of Quebec Civil Law: A Comparison with the Common Law of Canada*, Carswell, Toronto, 2008, p. 460, who considers it "the most original element of Quebec's private international law".

<sup>77</sup> *Breeden v. Black*, 2012 SCC 19, paras 23-25, 35.

<sup>78</sup> ALI Proposed Statute, § 11.



41. Elsewhere, there are signs that courts in South Africa might be willing to accept the doctrine of *forum non conveniens*, which had previously been rejected.<sup>79</sup> In the same vein, in India, the Division Bench of the High Court of Delhi has reaffirmed, after a detailed review of practice across the common law world, that the doctrine may be applied to stay proceedings before Indian courts in favour of a foreign forum.<sup>80</sup>

42. It is possible that such recent developments may prompt further reflection on the scope of the provisions set out in the Interim Text, and the Experts' Group may wish to refer some of these matters to the Permanent Bureau for further preliminary study. Such issues may include the mandatory application of the first-in-time rule and the possibility of allowing a court seised to exercise some degree of discretion in deciding to suspend or dismiss proceedings (e.g., based on the considerations of the proper administration of justice). They may also include the nature of the review by the court seised of the foreign proceedings, and whether such a review should involve a control of the jurisdiction of other courts involved, an assessment of the prospects of resulting foreign judgments being recognised and enforced in the State of the court seised (the "recognition prognosis"), and / or an assessment of the appropriateness of proceedings before any one of the courts involved.

43. Furthermore, any decision by the Experts' Group on further work with regard to direct grounds of jurisdiction might prompt further reflection on the modalities of the rules dealing with multiple available forums. In any event, preparing proposals on provisions for a future instrument should take account of other international instruments such as the Choice of Court Convention, which provides for the chosen court to hear the case regardless of when it was seised and whether there is another more appropriate court to hear the case. The Experts' Group may wish to refer the issue of conflict of norms to the Permanent Bureau for further study.

44. Finally, it should be recalled that the development of provisions dealing with multiple forums could be assisted by the institution of direct judicial communications.<sup>81</sup>

### **Part III – Other techniques to co-ordinate the flow of judgments**

45. A number of other techniques can be envisaged that regulate the flow of judgments without going as far as prescribing direct grounds of jurisdiction. Whereas Part V of Note 1 describes several "additional mechanisms" that could facilitate the application of the rules on *recognition and enforcement*, this section

<sup>79</sup> In *Bid Industrial Holdings v. Strang* (2008 (3) SA 355 (SCA)), President Howie, delivering judgment for the Supreme Court of Appeal, noted (at para. 369) that "if the plaintiff decides in favour of suing here it is open to the defendant to contest, among other things, whether the South African court is *the forum conveniens* and whether there are sufficient links between the suit and this country to render litigation appropriate here rather than in the court of the defendant's domicile". The text of the judgment is available at < [http://www.justice.gov.za/sca/judgments/sca\\_2007/sca07-144.pdf](http://www.justice.gov.za/sca/judgments/sca_2007/sca07-144.pdf) > (last consulted in January 2013). For commentary, see S. Eiselen, "Goodbye *arrest ad fundandam*. Hello *forum non conveniens*?", *Journal of South African Law*, 2008, p. 794. In an earlier case, the Supreme Court of Appeal had stated the "[t]he court will not inquire into the merits or whether the court is a convenient forum in which to bring the action": *Distillers Ltd v. Drop Inn Group of Liquor Supermarkets (Pty) Ltd* (1990 (2) SA 906 (A) at 914).

<sup>80</sup> *Horlicks v. Heinz India* FAO (OS) No 86 of 2009, available at < <http://www.liiofindia.org/in/cases/dl/INDLHC/2009/4339.html> > (last consulted January 2013). In a judgment delivered by Justice Sanjay Kishan Kaul, the court stated (at para. 52) that its inherent power under the Civil Procedure Code, 1908, "is the fountain from which flows the power to stay another suit or to give a finding that the court where the suit is filed is not the forum convenience in respect of matters where litigation has been instituted in foreign forums".

<sup>81</sup> See *infra*, paras 48 *et seq.*



suggests that some of these mechanisms may also be considered at the *jurisdiction* stage (*i.e.*, before a judgment is rendered). Reference is made to relevant precedents developed by the Hague Conference as well as recent developments at the national and international level.

## **1. Anticipating foreign application of recognition and enforcement rules**

46. As pointed out in the Background Note, one possible method would be the introduction in a future instrument of a rule that “places the onus on the court of origin to consider whether the judgment sought is likely to require enforcement abroad, and if so, to only exercise jurisdiction if it is expected that the judgments will be capable of enforcement under the convention.”<sup>82</sup> Such a rule might assist in promoting awareness of potential hurdles in enforcing judgments abroad and motivate the court of origin to provide a more comprehensive summary of the reasons for its decision to exercise jurisdiction.

47. Indeed, this rule is found in previous work of the Judgments Project as it was already discussed in the context of the Interim Text,<sup>83</sup> albeit not as a standalone principle but rather as a factor in the *forum non conveniens* analysis at Article 22(2) *d*).<sup>84</sup> In the Interim Text, it was explicitly stated that when a court is deciding whether to decline jurisdiction, one of the factors the court shall take into account is “the possibility of obtaining recognition and enforcement of any decision on the merits.” As further underlined in the Nygh-Pocar Report, this provision calls for the court to direct its attention to “the possibility of obtaining recognition and enforcement of any decision on the merits given either by itself or by the alternative forum.”<sup>85</sup> More recently, the Experts’ Group in its April 2012 meeting explicitly noted that “[p]rovisions on jurisdictional filters will encourage proceedings to be brought in a court that exercises jurisdiction consistent with those filters, because it will enable subsequent recognition and enforcement abroad of the resulting judgment.”<sup>86</sup>

## **2. Judicial communication**

48. The idea of using judicial communications was raised early on in the Judgments Project. The Permanent Bureau noted that the provision represented “further progress in a direction which, although it is not the rule today, will be followed increasingly in future.”<sup>87</sup> However, a general provision on “transfrontier communication between judges”, which applied in cases of provisional measures, *lis pendens* and *forum non conveniens*, did not ultimately make it into the Preliminary Draft Convention (or the Interim Text).

<sup>82</sup> Background Note, para. 66.

<sup>83</sup> See Art. 22(2) *d*) of the Interim Text.

<sup>84</sup> 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, available on the Hague Conference website at < www.hcch.net > under “Specialised Sections” then “Judgments Project” and “Preparation of a preliminary draft convention”. See in particular Art. 24(2)(d), variant 2 (“In doing so, the [court][tribunal] shall consider all the relevant factors, including... the enforcement of an eventual judgment.”).

<sup>85</sup> See Nygh-Pocar Report, pp. 95-96.

<sup>86</sup> See Conclusions and Recommendations of the 2012 Expert Group, para. 3(f); see also 2010 Note, para. 15 (“It would seem that a global Convention defining *positively* for the purposes of recognition and enforcement the circumstances under which the court of origin would be considered to have jurisdiction, would by itself in due course provide an important incentive to litigate in courts whose judgments would, under the Convention, qualify for recognition and enforcement.”).

<sup>87</sup> Issues Paper for the Agenda of the Special Commission of June 1999, Prepared by the Permanent Bureau, available on the Hague Conference website at < www.hcch.net > under “Specialised Sections” then “Judgments Project” and “Preparation of a preliminary draft convention”, No 35.

49. Judicial communication at the jurisdiction stage of international litigation has been the subject of considerable work at the ILA by the Committee on International Civil and Commercial Litigation and its successor. The Leuven / London Principles are aimed at encouraging the consideration of measures at the international level for mutual co-operation in the referral of jurisdiction in civil and commercial matters. They provide that judicial communications can be used when deciding to dismiss proceedings on grounds of *lis pendens* and *forum non conveniens*.<sup>88</sup> We may further point to other authoritative instruments subsequently developed at the ILA, such as the Paris-Rio Guidelines,<sup>89</sup> which were developed to establish a set of guidelines of best practices for the transnational aspects of group actions and explicitly endorse the idea of transnational co-operation between courts. The ILA most recently adopted the Sofia Guidelines, which were developed with specific regard to international civil litigation for human rights violations.<sup>90</sup> Both the Paris-Rio and Sofia Guidelines differ from the Leuven / London Principles in that they provide for much broader scope in the use of judicial communications, encompassing any stage of the proceedings, including jurisdictional questions in general (*i.e.*, not just for *forum non conveniens* and *lis pendens*). As noted by the Background Note, these developments support the view that judicial communication can be used to “support the orderly rendition of judgments”,<sup>91</sup> helping courts in dealing with questions of jurisdiction (*e.g.*, dealing with multiple proceedings, deciding to suspend proceedings on grounds of *forum non conveniens*, or applying direct grounds).

50. Beyond judgments, most work carried out by the Hague Conference in the area of judicial communications relate to the area of international child protection law. While the role of the International Hague Network of Judges remains limited to international child protection law for the time being, the value of its potential application to a “broad range of international instruments” was recognised on the occasion of a joint EC-HCCH Conference in January 2009.<sup>92</sup> UNCITRAL’s work on judicial communication in the area of cross-border insolvency provides yet another example of judicial co-operation in civil and commercial litigation. For example, Chapter IV of the 1997 UNCITRAL Model Law on Cross-Border Insolvency provides a legislative framework for co-operation between courts.<sup>93</sup> Like the UNCITRAL Model Law, a future Hague Conference instrument could include a specific legislative basis for co-operation between courts and / or provisions that may require co-operation between courts, at their discretion. Such co-operation between courts could also take place without an international legislative basis as is done currently under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and most probably, as future experience will reveal, under the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*. Under these three scenarios, co-operation between courts – which could include general non-case specific communications, the establishment of a network, direct

<sup>88</sup> See *supra* (note 54), para. 5.2.

<sup>89</sup> *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> >.

<sup>90</sup> *Sofia Guidelines on Best Practices for International Civil Litigation for Human Rights Violations* (ILA Resolution No 2/2012), available at < <http://www.ila-hq.org/en/committees/index.cfm/cid/1021> >, see section on *Transnational Judicial Cooperation*, pp. 35-36.

<sup>91</sup> Background Note, para. 67.

<sup>92</sup> “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](http://www.hcch.net) > under “Child Abduction Section” then “Judicial Communications.” These Conclusions and Recommendations were adopted by consensus by more than 140 judges from more than 55 jurisdictions representing all continents.

<sup>93</sup> See *supra* (note 39), Arts 25-27; see also *supra* (note 41).

judicial communications in specific cases (e.g., co-ordination of jurisdiction matters) – could be undertaken following the Hague Conference Guidance and General Principles for Judicial Communications.<sup>94</sup>

51. It is ultimately for the Experts' Group to recommend whether guidelines on direct communication should be included in the future instrument. It can safely be stated for now that judicial communication has gradually been considered in the work of the HCCH and other organisations in the area of civil and commercial cross-border litigation.<sup>95</sup>

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<sup>94</sup> Prel. Doc. No 3 A Revised July 2012, "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", drawn up by the Permanent Bureau for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, available on The Hague Conference website < [www.hcch.net](http://www.hcch.net) > under "Work in Progress" then "Child Abduction".

<sup>95</sup> See J.J. Spigelman, "International Commercial Litigation: An Asian Perspective", *Australian Business Law Review*, Vol. 35, 2007, pp. 335-336.

#### **Part IV – Expected outcomes**

2. The findings of the Experts' Group will be consolidated in a set of conclusions and recommendations that will be submitted to Council. It is hoped that the February 2013 meeting will be a fruitful opportunity for the Experts' Group to arrive at a clear position concerning future work in the area of jurisdiction (including parallel proceedings). Council would benefit from any further recommendations that the Experts' Group might make on the core elements of a future chapter / instrument on matters of jurisdiction. This would help build on the confines of the Judgments Project in a foreseeable future. After all, the feasibility of any future instrument in this area is very much linked to the targeted goal and the procedure leading up to its successful conclusion.<sup>96</sup>

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<sup>96</sup> See "Ongoing work on international litigation and possible continuation of the Judgments Project", submitted by the Permanent Bureau, Prel. Doc. No 5 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference, available on the Hague Conference Website at < [www.hcch.net](http://www.hcch.net) > under "Specialised Sections" then "Judgments Project" and "Recent developments", paras 36-38.