

October / octobre 2015

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**COMPARATIVE NOTE ON *LIS PENDENS***  
**IN THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS**

*drawn up by the Permanent Bureau*

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**ÉTUDE COMPARATIVE SUR LA LITISPENDANCE DANS LE CADRE DE LA RECONNAISSANCE  
ET DE L'EXECUTION DES JUGEMENTS ETRANGERS**

*établie par le Bureau Permanent*

*For the attention of the Working Group on the Judgments Project*

*À l'attention du Groupe de travail relatif au projet sur les Jugements*

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At the fourth Working Group meeting of the Judgments Project, the Working Group requested the Permanent Bureau to prepare a research note on the issue of pending domestic proceedings in the phase of recognition and enforcement of foreign judgments, *i.e.*, the "*lis pendens* issue".<sup>1</sup> As mandated, the scope of this note is limited to the situation where a domestic proceeding is pending in a State when recognition and enforcement of a foreign judgment is sought in this State. This situation should be distinguished from that where two parallel proceedings addressing the same / similar cause of action or subject matter between the same parties are pending in the courts of different States.<sup>2</sup>

This note examines in detail how a court of the State addressed reacts to a request seeking the recognition and enforcement of a foreign judgment when there are pending proceedings in the State addressed. On the basis of a comparative survey of the approaches adopted by several national legal regimes, regional and international instruments, as well as certain model laws, this note presents recommendations as to how the *lis pendens* issue may be addressed by the Working Group.

This note contains two parts. Part A consists of an analysis of the laws and practices adopted by some national legal regimes and international treaties on whether and how the *lis pendens* issue is applicable as a ground for refusal of recognition and enforcement of foreign judgments. Based on that comparative survey, the Permanent Bureau recommends two possible approaches (with a few variations). Part B provides a table containing the surveyed comparative materials.<sup>3</sup>

## **A. Analysis and Recommendations**

In its present wording, Article 5 of the February 2015 Preliminary Draft Text is silent on the *lis pendens* issue.

### **I. Surveyed legal regimes**

This note refers to a number of national legal regimes around the world, regional and international instruments, as well as model laws in the field of international judicial co-operation. To that end, the Permanent Bureau surveyed twenty-eight jurisdictions<sup>4</sup> and thirteen regional and international instruments, including Hague

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<sup>1</sup> The Working Group referred to this issue as *lis pendens* in the phase of recognition and enforcement of foreign judgments. Hereafter, this note refers to this issue as the "*lis pendens* issue".

<sup>2</sup> The issue of parallel proceedings has been briefly discussed by the Experts' Group in 2012, and further elaboration was provided in Note No 2 (2013)- Issues Paper on Matters of Jurisdiction (including Parallel Proceedings), which is accessible via the Judgments Project Sharepoint site and the [hidden](#) webpage.

<sup>3</sup> The Permanent Bureau is very thankful to all experts who assisted in the compilation of relevant legal materials from a number of legal regimes around the world. Special thanks go to Mr Derek Bayley, Ms Qian Shen and Ms Shi Ing Tay, Interns, for their helpful contributions in the preparation of this note.

<sup>4</sup> Australia, Belgium, Brazil, Bulgaria, Canada (Uniform Enforcement of Foreign Judgments Act (2003) as implemented in Saskatchewan, other common law provinces and Quebec), People's Republic of China (Mainland, Hong Kong, Macau), Costa Rica, France, Germany, Italy, Japan, the Republic of Korea, Macedonia, Mexico, Montenegro, the Netherlands, New Zealand, the Russian Federation, Serbia, Singapore, Spain, Switzerland, the United Kingdom (England and Wales) and the United States of America.

Conference materials<sup>5</sup> (1971 Enforcement Convention, 2001 Interim Text and 2007 Child Support Convention),<sup>6</sup> six other multilateral treaties,<sup>7</sup> one bilateral treaty,<sup>8</sup> and three model laws.<sup>9</sup>

It should be noted that not all surveyed national legal regimes contain rules which address the *lis pendens* issue. Of the twenty-eight jurisdictions surveyed, seventeen contain codified provisions;<sup>10</sup> and eight do not have codified provisions, but have developed case law that addresses this situation.<sup>11</sup> Some jurisdictions, based on the information available to us, do not have a specific rule dealing with the *lis pendens* issue.<sup>12</sup>

Similarly, not all regional and international instruments, including model laws under review, deal explicitly with the *lis pendens* issue. Nevertheless, as will be discussed in the following section, some instruments that do not contain specific provisions can be understood as having addressed the *lis pendens* issue implicitly.

## **II. Foreign judgment or pending domestic proceedings: which prevails?**

Legal regimes which address the *lis pendens* issue fall broadly into two categories. While some legal regimes give a preference towards pending domestic proceedings over the recognition and enforcement of a foreign judgment, others provide a preference towards recognising the foreign judgment over the pending domestic proceedings.

The different outcome of the two approaches is evident. Legal regimes which give preference to pending domestic proceedings acknowledge that the presence of pending domestic proceedings forms a ground for refusal of the recognition and enforcement of the foreign judgment. On the other hand, legal regimes which give preference to a foreign judgment despite the existence of pending domestic proceedings are likely to recognise and enforce the foreign judgment, and stay or dismiss the pending domestic proceedings.

The following sub-sections analyse each approach separately.

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<sup>5</sup> This note limits its research to certain Hague Conference precedents that deal with the recognition and enforcement of foreign judgments.

<sup>6</sup> The full titles of the Hague Conference materials and other regional and international instruments referred to in this Note are available in the Glossary of Commonly Used Terms and References, which is accessible via the Judgments Project Sharepoint site.

<sup>7</sup> Brussels I *bis* Regulation; Montevideo Convention; Lugano Convention; Riyadh Arab Agreement, Las Leñas Protocol and Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases (adopted in Minsk on 22 January 1993, entered into force on 19 May 1994, and amended on 28 March 1997) (Minsk Convention).

<sup>8</sup> Trans-Tasman Court Proceedings and Regulatory Enforcement Agreement.

<sup>9</sup> ALI Proposed Statute; Draft OHADAC Model Law Relating to Private International Law (Draft OHADAC Model Law) and Commonwealth Draft Model Law On Recognition and Enforcement of Foreign Judgments (2014) (Draft Commonwealth Model Law).

<sup>10</sup> Belgium, Brazil, Bulgaria, Canada (Quebec, Saskatchewan), China (Macau), Costa Rica, Germany, Italy, India, Macedonia, Mexico, Montenegro, the Russian Federation, Serbia, Spain and Switzerland.

<sup>11</sup> Australia, Canada (other common law provinces), China (Hong Kong), France, New Zealand, Singapore, the United Kingdom (England and Wales) and the United States of America.

<sup>12</sup> China (Mainland), Japan, Korea and the Netherlands.

## **II. A. Preference towards pending domestic proceedings**

Under such an approach, a court of the State addressed may or shall refuse to recognise and enforce a foreign judgment, and continue the pending domestic proceedings.

### *II. A. 1. Surveyed legal regimes*

A majority of the legal regimes surveyed in this note adopt an approach preferring pending domestic proceedings.

#### National legal regimes

Of the twenty-eight jurisdictions surveyed, fifteen have codified rules according to which recognition and enforcement of foreign judgments may/shall be declined when a *lis pendens* issue arises.<sup>13</sup>

In certain jurisdictions where there is no express provision in national laws, case law has shown that there exists a preference towards pending domestic proceedings. For example, French courts held that if domestic proceedings had commenced before the request for recognition and enforcement of a foreign judgment (*exequatur*), the request would be denied or stayed until the end of the domestic proceedings.<sup>14</sup>

#### Regional and international instruments, and model laws

Most of the regional and international instruments under review give preference to pending domestic proceedings when dealing with the *lis pendens* issue. These include the Riyadh Arab Agreement, the Las Leñas Protocol and the Minsk Convention, all of which have express provisions. Similarly, relevant Hague Conference materials surveyed also take this approach: the 1971 Enforcement Convention, the 2001 Interim Text and the 2007 Child Support Convention specifically provide that the *lis pendens* issue can be a ground for refusing recognition and enforcement of foreign judgments.

Likewise, the model laws surveyed in this note, namely the ALI Proposed Statute, the Draft OHADAC Model Law and the Draft Commonwealth Model Law, also adopt this approach.

It should be noted that certain conditions have to be met before the court addressed may/shall refuse recognition and enforcement of the foreign judgment in favour of the pending domestic proceedings. These conditions will be analysed in the following sub-section.

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<sup>13</sup> Belgium, Bulgaria, Canada (Quebec, Saskatchewan), China (Macau), Costa Rica, Germany, Italy, Macedonia, Mexico, Montenegro, the Russian Federation, Serbia, Spain and Switzerland.

<sup>14</sup> P. Mayer and V. Heuzé, *Droit International Privé*, 11<sup>th</sup> Ed., Montchrestien, Lextenso Éditions, 2014, p. 320.

## II. A. 2. Conditions

The surveyed legal regimes impose different conditions in assessing whether a *lis pendens* issue has arisen. Based on a comparative analysis, it appears that a majority of these legal regimes impose two conditions - timing and identity. Most legal regimes require both conditions to be fulfilled in order to establish a *lis pendens* issue. However, certain regimes require only one of the two conditions to be satisfied. One particular legal system does not expressly refer to identity, but imposes a different condition instead.

### Timing

The timing factor refers to a temporal requirement in relation to the pending domestic proceedings. Certain legal regimes only require domestic proceedings to be pending at the time when recognition of the foreign judgment is sought, while others require domestic proceedings to have been commenced earlier.

Two legal regimes surveyed<sup>15</sup> refer to the existence of pending domestic proceedings when recognition of the foreign judgment is sought in the State addressed. It appears from the wording of such rules that a *lis pendens* issue arises even if the domestic proceedings were commenced after the foreign proceedings.

On the other hand, most of the surveyed legal regimes require the pending domestic proceedings to have been commenced earlier. This requirement is expressed in different terms, depending on the legal regime.

Five national laws,<sup>16</sup> the relevant Hague Conference materials and the Draft OHADAC Model Law require the domestic proceedings to be pending earlier, or commenced/instituted first.

Other legal regimes express the condition slightly differently. Reference is made to the timing of the proceedings which gave rise to the foreign judgment whose recognition is being sought. In this respect, the laws of these regimes compare the timing of the foreign proceedings with that of the domestic proceedings. For example, the laws of Belgium and China (Macao), as well as the rules set out in the Riyadh Arab Agreement require the domestic proceedings to have been commenced prior to the claims or actions brought in the foreign proceedings; while the rules provided in Canada (Saskatchewan), Italy, the Russian Federation, Spain, the ALI Proposed Statute and the Draft Commonwealth Model Law require domestic proceedings to have been commenced prior to the commencement of the foreign proceedings.

In contrast, the Las Leñas Protocol requires domestic proceedings to have been commenced before the request for recognition at the State addressed is filed.

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<sup>15</sup> Costa Rica and Canada (Quebec). The law of Quebec requires that the domestic proceeding be pending at the first instance.

<sup>16</sup> Germany, Macedonia, Mexico, Montenegro and Serbia.

## Identity

In addition to the timing condition, most legal regimes require strict identity of parties and/or cause of action in determining whether a pending domestic proceeding at the State addressed could be raised as a ground for refusing recognition and enforcement of a foreign judgment.

With the exception of a legal regime which requires only one factor to be identical,<sup>17</sup> most of the legal regimes have stricter rules, requiring both identity factors to be fulfilled. In contrast, Costa Rica takes a liberal approach, in that it does not seem to require identity of either factor. By inference, a foreign judgment will not be recognised by Costa Rican courts as long as there are pending domestic proceedings on the same legal dispute, broadly speaking. Germany takes a different approach. Instead of requiring strict identity, it defines a *lis pendens* issue as one where the proceedings leading to the foreign judgment are “incompatible with proceedings that have become pending earlier in Germany”.<sup>18</sup>

### *The same parties*

Almost all legal regimes surveyed<sup>19</sup> require identical parties as a condition, *i.e.*, “the same parties” are involved in both the pending domestic proceedings and the foreign proceedings which gave rise to the foreign judgment whose recognition and enforcement is being sought.

### *The same causa*

Most legal regimes under review require the same identity of *causa* in the pending domestic proceedings and the proceedings which gave rise to the foreign judgment. This Latin term is used here to globally refer to various concepts, including “same cause of action”, “same subject matter”, “same facts”, “same purpose”, “same claim”, “same reasons”, “same legal grounds”, “same issue”, “same object”, “same demand”, and “same transaction or occurrence”. In general, “same cause of action”, “same subject matter” and “same facts” are the terms which are most frequently used.

## *II. A. 3. Judicial discretion or mandatory application*

Once a *lis pendens* issue is raised, the court addressed has either a mandatory obligation to give preference to pending domestic proceedings, or a certain degree of discretion to deviate from the domestic proceedings preference approach. A distinction is therefore drawn between the mandatory or discretionary approach taken by the courts addressed.

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<sup>17</sup> The Riyadh Arab Agreement.

<sup>18</sup> Section 328(1)3 of the German Code of Civil Procedure.

<sup>19</sup> Except Canada (Saskatchewan) and the Riyadh Arab Agreement.

### Mandatory application

A majority of the legal regimes surveyed impose a mandatory obligation on courts to adopt a preference towards pending domestic proceedings. Accordingly, these courts will have to refuse the recognition and enforcement of the foreign judgment when a *lis pendens* issue arises and the requisite conditions are met.

In expressing this mandatory nature of the rule, these legal regimes use the terms "shall",<sup>20</sup> "will",<sup>21</sup> "is",<sup>22</sup> "must",<sup>23</sup> or "cannot".<sup>24</sup> The wording makes it clear that courts are not given any room for discretion.

### Discretionary application

Among the legal regimes that give preference to pending domestic proceedings, only six regimes accord judicial discretion to courts in dealing with the *lis pendens* issue. In other words, the court addressed may ultimately decide to recognise the foreign judgment in spite of pending domestic proceedings.

Russia is the only surveyed national legal regime which confers judicial discretion to the court in this respect.

The ALI Proposed Statute confers a degree of discretion to courts by stating that "a foreign judgment need not be recognised or enforced in a court in the United States, if the party resisting recognition or enforcement establishes that:

[...]

(iii) the judgment results from a proceeding initiated after commencement in a court in the United States of a proceeding including the same parties and the same subject matter, and the proceeding in the United States was not stayed or dismissed".

Similarly, the Hague Conference materials under review<sup>25</sup> and the Minsk Convention use "may" in order to allow the court addressed to exercise discretion in determining whether recognition and enforcement of the foreign judgment should be refused when a *lis pendens* issue arises.

## **II. B. Preference towards recognition of foreign judgments**

A number of the surveyed legal regimes adopt an approach in favour of the recognition and enforcement of foreign judgments, which gives priority to the foreign judgment first rendered over the pending proceedings at the State addressed. It follows in principle that the court of the State addressed recognises the foreign judgment and stays or dismisses the pending domestic proceedings.

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<sup>20</sup> Belgium, Bulgaria, Germany, Macedonia, Mexico, Montenegro, Serbia and the Riyadh Arab Agreement.

<sup>21</sup> France, Spain, the Las Leñas Protocol and the Draft OHADAC Model Law.

<sup>22</sup> Canada (Quebec), Italy and the Draft Commonwealth Model Law.

<sup>23</sup> Costa Rica and Switzerland.

<sup>24</sup> Canada (Saskatchewan) and China (Macau).

<sup>25</sup> Art. 5(3)(a) of the 1971 Enforcement Convention; Art. 28(1)(a) of the 2001 Interim Text; Art. 22(c) of the 2007 Child Support Convention.

## II. B. 1. Surveyed legal regimes

### National legal regimes

Several national legal regimes that follow common law traditions, such as Australia, Canada (other common law provinces), China (Hong Kong), India, New Zealand, Singapore, the United Kingdom (England and Wales) and the United States of America tend to give preference to foreign judgments when addressing the *lis pendens* issue. Under the laws of these regimes, a foreign judgment will be recognised as *res judicata*, provided certain conditions are met. A foreign judgment that is recognised as *res judicata* has preclusive effects on domestic proceedings, and the court of the State addressed may either stay or dismiss the pending domestic proceedings.<sup>26</sup>

Similarly, in Brazil, the recognition of a foreign judgment prevails over pending domestic proceedings. This position will soon be codified in a new Civil Procedure Code, which will be effective as of 17<sup>th</sup> March 2016. According to Art 24 (sole paragraph) of this new Code, pending proceedings before a Brazilian court do not prevent the recognition and enforcement of a foreign judgment.

### Regional and international instruments

Of the regional and international legal instruments surveyed, four implicitly adopt a foreign judgment preference approach, although these instruments do not provide an express rule on the *lis pendens* issue. In line with the objectives and framework of these instruments, they accord foreign judgments preference over pending domestic proceedings.

In the European continent, the Brussels *Ibis* Regulation and the Lugano Convention apply to many cases relating to the recognition and enforcement of foreign judgments in civil and commercial matters. In line with their common objective of free circulation of judgments among connected States<sup>27</sup> and based on mutual trust in the administration of justice,<sup>28</sup> the Brussels *Ibis* Regulation and the Lugano Convention provide that a judgment rendered by a court of a Member/Contracting State will be enforceable throughout the Brussels or Lugano area, respectively, provided that certain conditions are met. In addition, an express *lis alibi pendens* rule at the stage of jurisdiction provides that if a court of a Member/Contracting State has already established its jurisdiction over a case, then courts of other Member/Contracting States must decline to hear the case. This mandatory obligation imposed on the courts seised second minimises the occurrence of a *lis pendens* issue at the recognition phase.<sup>29</sup> Notably, the issue of *lis pendens* is not expressly provided for as a ground for refusal under the Brussels *Ibis* Regulation and the Lugano Convention, and thus the court addressed cannot refuse recognition of the foreign judgment, even if there are pending domestic

<sup>26</sup> P. Barnett, *Res Judicata, Estoppel, and Foreign Judgments*, Oxford, OUP, 2001, pp. 8-11.

<sup>27</sup> Recital 27 of the Brussels *Ibis* Regulation and Recital 2 of the 2007 Lugano Convention.

<sup>28</sup> Recital 26 of the Brussels *Ibis* Regulation.

<sup>29</sup> P. Jenard, "Report on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters", OJ 1979 C 59, p. 45: "It is to be anticipated that the application of the provisions of Title II regarding *lis pendens* and related actions will greatly reduce the number of irreconcilable judgments".



proceedings.<sup>30</sup> This implies, for the purposes of this comparative survey, that the Brussels *Ibis* Regulation and the Lugano Convention adopt a foreign judgment preference approach.

Also, the Trans-Tasman Court Proceedings and Regulatory Enforcement Agreement between Australia and New Zealand is silent on the *lis pendens* issue. However, as stated in the implementation acts of both States,<sup>31</sup> the private international law rules provided in one State do not affect the enforcement of the registered judgment rendered by the other State.<sup>32</sup> It can therefore be understood that the Agreement adopts a foreign judgment preference approach even though there is no express provision addressing the *lis pendens* issue.

In the Montevideo Convention, the issue of *lis pendens* does not constitute a ground of refusal of recognition and enforcement of foreign judgments. Since the Convention promotes extraterritorial validity of judgments among the State Parties,<sup>33</sup> it may be inferred that the foreign judgment should be recognised even if the *lis pendens* issue arises in the State addressed.

## *II. B. 2. Conditions for recognition*

When resolving the *lis pendens* issue, the laws of national legal regimes that prefer recognition of foreign judgments, in particular those of common law traditions, provide preclusive pleas which can be raised to request for a stay or dismissal of pending domestic proceedings. It is, however, essential for the courts of these regimes to first examine whether the foreign judgment can be recognised before it can take preclusive effect within the local forum.<sup>34</sup>

In order to be recognised, a foreign judgment needs to fulfill the following conditions.

### Competent court<sup>35</sup>

All the legal regimes surveyed require the court of origin to have international jurisdiction over the case, which is to be determined by the indirect jurisdiction rules applied by the court of the State addressed.

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<sup>30</sup> See also, Magnus, Mankowski and Vlas, *Brussels I Regulation*, 2<sup>nd</sup> Ed., Sellier European Law Publishers, 2012, p. 691, where Vlas states that "considering that the grounds for refusal are exhaustive, proceedings which are merely pending in the state seised with recognition for instance do not thus justify a refusal."

<sup>31</sup> Australia: Trans-Tasman Proceedings Act 2010, C2010A00035 No 35, 2010, date of assent 13 April 2010; New Zealand: Trans-Tasman Proceedings Act 2010, 2010 No 108, date of assent 31 August 2010.

<sup>32</sup> Clause 79 of the Australian Trans-Tasman Proceedings Act 2010. The Explanatory Memorandum provides that Clause 79 makes it clear that certain rules of private international law in Australia which may operate to prevent recognition and enforcement of certain New Zealand judgments do not affect the operation of the Part; Clause 68 of the New Zealand Trans-Tasman Proceedings Act 2010.

<sup>33</sup> Preamble of the Montevideo Convention.

<sup>34</sup> P. Barnett, *supra* note 26, p. 25.

<sup>35</sup> Part II of this note provides detailed conditions for each individual legal regime.

### A final and conclusive judgment on the merits<sup>36</sup>

All the legal regimes surveyed require the foreign judgment to be final and conclusive on the merits. The finality and conclusiveness of the foreign judgment is determined by the law of the State of origin.

#### Mandatory recognition

In the surveyed common law jurisdictions, a foreign judgment which satisfies the above conditions is *prima facie* entitled to recognition, unless one of the recognised defences applies.<sup>37</sup>

#### *II. B. 3. Conditions for preclusive pleads*

A foreign judgment may be relied upon to address the *lis pendens* issue, *i.e.*, to preclude domestic proceedings by way of estoppel,<sup>38</sup> although courts still retain a certain degree of discretion in deciding whether to stay or dismiss the pending domestic proceedings.<sup>39</sup> In most of the surveyed jurisdictions, the conditions for relying on the preclusive pleads are the same parties, and depending on the type of estoppel, the same issue/*causa*.

#### The same parties

The legal regimes surveyed require identical overlap of the parties. It should be noted that some of those legal regimes, for example England and Wales, extend this condition to apply to the same parties "and their privies".<sup>40</sup>

#### The same issue/*causa*

Depending on the type of estoppel, the legal regimes surveyed require the same issue/*causa*, although *causa* is expressed in slightly different terms, including "the same interest",<sup>41</sup> "the same cause of action" and "the same claim".<sup>42</sup>

### **III. Recommendations**

Based on the analysis above, the Working Group is presented with two possible approaches (with variations), the domestic proceedings preference approach or the foreign judgment preference approach. This section presents an overview of the main advantages and concerns in relation to the possible adoption of either approach.

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<sup>36</sup> *Ibid.*

<sup>37</sup> P. Barnett, *supra*, note 26, p. 18.

<sup>38</sup> *E.g.*, cause of action estoppel or issue estoppel.

<sup>39</sup> *Penner v. Niagara (regional Police Services Board)* [2013] 2 SCR 125 (Supreme Court of Canada); *Danyluk v. Ainsworth Technologies Inc* [2001] 1 SCR 460 (Supreme Court of Canada).

<sup>40</sup> *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, 936; *International Coal Pte Ltd v. Kristle Trading Ltd* [2009] 1 SLR(R) 945.

<sup>41</sup> *Blohn v. Desser* [1962] 2 QB 116.

<sup>42</sup> *Cooke v. Gill* (1873) LR 8 LP 107.

### Approach I: preferring pending domestic proceedings

The Working Group may consider adopting the approach preferring pending domestic proceedings. Adopting such an approach has the advantage of providing legal certainty and discouraging parties from instituting multiple proceedings. However, this approach also has a disadvantage: it could be manipulated by a *mala fide* party who, with the aim of delaying the case or objecting to the recognition of foreign judgments, first commences proceedings in a State which has slow legal processes, the result of which is that the foreign judgment will not be recognised in the State addressed, even though it is rendered first.

Should the Working Group consider that the *lis pendens* issue constitutes a ground of refusal, it will need to decide what conditions should be required to constitute the ground of refusal. Well-established conditions of requiring the same parties and the same *causa*, as well as a timing condition, can protect domestic proceedings and provide a certain degree of legal certainty, because under these circumstances, denying recognition of foreign judgments can only occur in exceptional cases. Laying down such conditions can mitigate the disadvantage of this approach which, as discussed above, is that a party with bad faith may institute *torpedo* proceedings.

Alternatively, the Working Group may instead consider introducing the condition of "incompatibility". In this respect, a foreign judgment may/shall be refused if the proceedings on which it is based are incompatible with pending domestic proceedings. Introducing this condition will provide certain flexibility to the court addressed, which can avoid the rigidity of refusing the recognition of a foreign judgment on the mere ground that there are pending domestic proceedings. However, the lack of foreseeability for the parties, and the fact that it may not prevent multiple proceedings may be disadvantageous.

Furthermore, the Working Group may need to decide whether courts of the State addressed should be granted with judicial discretion or be compelled to deny the recognition and enforcement of the foreign judgment. The considerations for giving discretion to the court addressed are as follow. First, the future Convention is of an international nature and it needs to provide certain flexibility to attract more States to join. Second, such a discretionary approach has been consistently adopted in the Hague Conference materials under review.

Imposing a mandatory obligation on the court addressed will provide legal certainty to the parties, but it may encourage a "race to court", where a *mala fide* party may pre-emptively commence proceedings first, in order to object to the recognition of a subsequently rendered foreign judgment. Further, requiring the court addressed to deny the recognition of foreign judgments may raise another concern. Since the February 2015 Preliminary Draft Text does not compel the court of the State addressed to refuse recognition of the foreign judgment even where there is an inconsistent domestic judgment, one may question why the court of the State addressed should be compelled into refusing recognition of the foreign judgment when domestic proceedings are merely pending.

In any event, a new provision in the February 2015 Preliminary Draft Text is needed if the Working Group wishes to adopt the pending domestic proceedings approach. *Prima facie*, it seems appropriate to include a provision in Article 5(1). However, as the February 2015 Preliminary Draft Text provides that Article 6 is subject to Article 5(1), doing so may have a collateral effect of undermining foreign judgments which are rendered on exclusive grounds, e.g. a judgment on an immovable property dispute rendered by a court of the State in which the property is situated may ultimately be refused by the court of the State addressed if there are pending domestic proceedings. Such an effect may deviate from the initial goal of Article 6 to ensure free circulation of the judgments which are rendered on exclusive grounds.

Based on the foregoing, in the event that the Working Group would wish to include a provision preferring pending domestic proceedings in the next draft text, Article 5(1) may be drafted as follows:

*Article 5 Refusal of recognition or enforcement*

1. Recognition or enforcement may be refused if  
f). proceedings between the same parties on the same cause of action/subject matter, based on the same legal ground are pending before a court of the requested State and the proceedings were commenced prior to the commencement of foreign proceedings;

or

f). the foreign judgment is incompatible with proceedings pending in the requested State [which were commenced prior to the commencement of foreign proceedings];

Approach II: preferring the recognition of foreign judgments

The Working Group may consider adopting the foreign judgment preference approach. The advantages of this approach are to respect that a foreign judgment constitutes *res judicata*, and to increase the mobility of foreign judgments. This ensures legal certainty. The disadvantage, however, lies in its rigidity, as the pending domestic proceedings cannot be safeguarded even if they were commenced earlier than the foreign proceedings. Further, this approach may not be effective in preventing the multiplicity of proceedings.

Should the Working Group choose to adopt the foreign judgments preference approach, it will not be necessary to introduce a new provision, since the February 2015 Preliminary Draft Text is drafted in an exhaustive manner, i.e. all judgments shall be recognised and enforced except the grounds for refusal provided in the text (draft Art. 4 (1)). Not providing a specific provision in the next draft text means that judgments rendered by one Contracting State will be recognised and enforced in another Contracting State, despite the fact that there is a pending proceeding in the State addressed.

## B. Comparative Table of Laws and Practices<sup>43</sup>

### I. National legal regimes

	Jurisdiction	Rules	Approach			
			Foreign Judgment Preference	Domestic Proceedings Preference		
				Conditions		Judicial discretion
	Timing of Domestic Proceedings (DP)	Identity				
1	Australia	<p>Under common law, a foreign judgment that constitutes <i>res judicata</i> has preclusive effects on pending domestic proceedings.</p> <p><b>Res judicata</b> Under common law, a foreign judgment will be recognised as <i>res judicata</i> if the party seeking recognition of the foreign judgment proves:<sup>44</sup></p> <ul style="list-style-type: none"> <li>- that the foreign court exercised jurisdiction that is recognised by the Australian forum (presence or residence in the foreign jurisdiction, or submission to that forum);<sup>45</sup></li> <li>- that the judgment is final and conclusive;<sup>46</sup> and</li> <li>- for <i>in personam</i> judgments, that the judgment is for a fixed debt.</li> </ul> <p>Once the party seeking to rely on the foreign judgment satisfies the onus of proof, the judgment is <i>prima facie</i> entitled to recognition and enforcement, unless the defendant can establish one or more of the recognised defences.</p> <p>A foreign judgment that is entitled to recognition has preclusive effects on domestic proceedings.</p>	√			

<sup>43</sup> English translations of various rules have been provided where necessary. Unless otherwise indicated, the translations were prepared by the Permanent Bureau.

<sup>44</sup> M. Davies, A. Bell and P. Brereton, *Nygh's Conflict of Laws in Australia*, 9<sup>th</sup> Ed., LexisNexis, 2013, p. 807. It cites *Benefit Strategies Group Inc. v. Prider* (2005) 91 SASR 544, [18].

<sup>45</sup> *Id.*, p. 808.

<sup>46</sup> *Schnabel v. Yung Lui* [2002] NSWSC 15, [77].

	Jurisdiction	Rules	Approach				
			Foreign Judgment Preference	Domestic Proceedings Preference			
				Conditions		Judicial discretion	
	Timing of Domestic Proceedings (DP)	Identity					
		<ul style="list-style-type: none"> <li>- <i>Issue estoppel</i><sup>47</sup> – parties will be estopped from reopening issues that have been dealt with in the foreign judgment.</li> <li>- <i>Anshun estoppel</i><sup>48</sup> - parties will be prevented from litigating an issue that could reasonably have been raised in earlier foreign proceedings.</li> <li>- <i>Cause of action estoppel</i> - operates to prevent the intrinsic merits of the foreign judgment from being re-examined by the forum.<sup>49</sup></li> </ul>					
2	Belgium	<p>The <i>lis pendens</i> issue is dealt with in Article 25 of the Code of Private International Law (2004).<sup>50</sup></p> <p>“§ 1. A foreign judgment shall not be recognized or declared enforceable if:</p> <p>[...]</p> <p>6. the claim was brought abroad after a claim which is still pending between the same parties and with the same cause of action was brought in Belgium;”</p>		√	DP were pending when the claim was brought abroad	Between the same parties and with the same cause of action	no
3	Brazil	<p>Under Brazilian procedural law,<sup>51</sup> <i>lis alibi pendens</i> is unknown. Instead, the first judgment in time prevails when addressing the <i>lis pendens</i> issue: a foreign judgment will be recognised even if there is an action on the same dispute pending before the Brazilian courts. The Superior Court of Justice affirmed this rule in AG SEC 854. STJ, (2011), although with regards to a foreign arbitral award.</p> <p>Conversely, if a case brought before a Brazilian court reaches a final decision first, a pending request for the</p>	√				

<sup>47</sup> *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* (No 2) [1967] 1 AC 853.

<sup>48</sup> *Port of Melbourne Authority v. Anshun Pty Ltd.* [1981] 147 CLR 589.

<sup>49</sup> *Ainslie v. Ainslie* [1927] 39 CLR 381, 402.

<sup>50</sup> English translation was prepared by C. Clijmans and P. Torremans, available in English at <[www.ipr.be/data/B.WbIPR%5BEN%5D.pdf](http://www.ipr.be/data/B.WbIPR%5BEN%5D.pdf)>.

<sup>51</sup> Comments provided by Prof N. de Araújo (PUC University, Rio de Janeiro).

	Jurisdiction	Rules	Approach			
			Foreign Judgment Preference	Domestic Proceedings Preference		
				Conditions		Judicial discretion
				Timing of Domestic Proceedings (DP)	Identity	
		<p>recognition of a foreign judgment before the Superior Court of Justice becomes irrelevant. Under these circumstances, the foreign decision will not be recognised.</p> <p>The new Code of Civil Procedure, which enters into force on 17 March 2016, maintains this rule in Article 24 (sole paragraph), stating that pending proceedings before a Brazilian court will not prevent the recognition and enforcement of foreign judgments in Brazil.</p>				
4	Bulgaria	<p>The <i>lis pendens</i> issue is addressed in Article 117 of Private International Law Code (2005).<sup>52</sup></p> <p>“The judgments and authentic acts of the foreign courts and other authorities shall be entitled to recognition and enforcement: [...] 4. if no proceedings based on the same facts, involving the same cause of action and between the same parties, are brought before a Bulgarian court earlier than a case instituted before the foreign court in the matter of which the judgment whereof the recognition is sought and the enforcement is applied for has been rendered;”</p>	√	DP were brought prior to the institution of proceedings in the foreign court	Based on the same facts, involving the same cause of action and between the same parties	no

<sup>52</sup> English translation was retrieved from the website of International Federation of Red Cross and Red Crescent, at <<http://www.ifrc.org/Docs/idrl/868EN.pdf>>.

	Jurisdiction	Rules	Approach				
			Foreign Judgment Preference	Domestic Proceedings Preference			
				Conditions		Judicial discretion	
				Timing of Domestic Proceedings (DP)	Identity		
5	Canada (Quebec)	<p>Article 3155 of the Civil Code of Quebec (1991) deals with the <i>lis pendens</i> issue.<sup>53</sup></p> <p>“Article 3155. A decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases: [...] (4) a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Québec, whether or not it has acquired the authority of a final judgment (<i>res judicata</i>), or is pending before a Québec authority, in first instance, or has been decided in a third State and the decision meets the conditions necessary for it to be recognized in Québec;”</p>		√	DP are pending in first instance	Between same parties, based on the same facts and having the same object	no
6	Canada (Saskatchewan)	<p>The Enforcement of Foreign Judgments Act<sup>54</sup> addresses the issue of <i>lis pendens</i> in Part II Enforcement.</p> <p>“Article 4. A foreign judgment cannot be enforced in Saskatchewan if: [...] (h) at the time the judgment was submitted for registration or an action for enforcement was commenced, a civil proceeding based on the same facts and having the same purpose (i) was pending before a court in Saskatchewan, having been commenced before the civil proceeding that gave rise to the foreign judgment was commenced;”</p>		√	DP were commenced before commencement of the foreign proceedings	Based on the same facts and having the same purpose	no

<sup>53</sup> Text available at <[http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ\\_1991/CCQ1991\\_A.html](http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ_1991/CCQ1991_A.html)>.

<sup>54</sup> Chapter E-9.121 of the Statutes of Saskatchewan, 2005 (effective April 19, 2006), as amended by the Statutes of Saskatchewan, 2012, c.12.



	Jurisdiction	Rules	Approach			
			Foreign Judgment Preference	Domestic Proceedings Preference		
				Conditions		Judicial discretion
				Timing of Domestic Proceedings (DP)	Identity	
7	Canada (other common law provinces)	<p>A foreign judgment <i>in personam</i> given by a court of competent jurisdiction is enforceable provided that it is final and conclusive, and for a definite sum of money.<sup>55</sup></p> <p>A foreign judgment which is entitled to recognition may give rise to a cause of action estoppel or issue estoppel.</p> <p>“Cause of action estoppel” precludes a person from bringing an action against another person when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction.</p> <p>The criteria for the application of the cause of action estoppel are:<sup>56</sup></p> <ul style="list-style-type: none"> <li>- there must be a final decision of a court of competent jurisdiction in the prior action;</li> <li>- the parties to the subsequent litigation must have been parties to or privy with the parties to the prior action;</li> <li>- the cause of action in the prior action must not be separate and distinct; and</li> <li>- the basis of the cause of action in the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.</li> </ul> <p>Issue estoppel estops the parties from reopening issues that were subject to a foreign judgment. The requirements are:<sup>57</sup></p>	√			

<sup>55</sup> *Pro Swing Inc. v. Elta Golf Inc.* [2006] 2 SCR 612.

<sup>56</sup> *Beattie v. The Queen* [2001] FCA 309.

<sup>57</sup> *Angle v. Minister of National Revenue* [1975] 2 SCR 2248.

	Jurisdiction	Rules	Approach			
			Foreign Judgment Preference	Domestic Proceedings Preference		
				Conditions		Judicial discretion
				Timing of Domestic Proceedings (DP)	Identity	
		<ul style="list-style-type: none"> <li>- that the same question has been decided;</li> <li>- that the judicial decision which is said to create the estoppel is final</li> <li>- the parties to the judicial decision or their privies were the same in both proceedings.</li> <li>- that the determination of the issue must be so fundamental to the substantive decision that the latter cannot stand without the former.</li> </ul>				
7	People’s Republic of China (Mainland)	The Civil Procedure Act does not provide a rule addressing the <i>lis pendens</i> issue. The Judicial Interpretations of the Act, however, allow a People’s Court to hear a dispute even though there are ongoing foreign proceedings on the same matter. <sup>58</sup> The same provision further provides that a People’s Court will not hear a dispute if a foreign judgment in respect of the same dispute has been recognised by a People’s Court.				
8	People’s Republic of China (Hong Kong)	<p>Foreign judgments in civil and commercial matters may be enforced in the Hong Kong SAR under a statutory registration scheme or under common law.</p> <p>The Foreign Judgments (Reciprocal Enforcement) Ordinance,<sup>59</sup> which aims at facilitating reciprocal</p>	√			

<sup>58</sup> Art. 533 of the Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China ( 2015 ) "For the cases over which both the People's Court of the People's Republic of China and the foreign court have the jurisdiction, if one party files a lawsuit with the foreign court while the other party files a lawsuit with the People's Court of the People's Republic of China, the People's Court may accept the case. If, after judgment was rendered, the foreign court or one party requests the People's Court to recognize and enforce the judgment or ruling rendered by the foreign court concerning this case, the People's Court shall not consent to the request, unless it is otherwise prescribed by an international treaty concluded or acceded to by both countries. The People’s Court will not hear an action if there has already been a foreign judgment based on the same parties and the same dispute, and the foreign judgment has been recognised by the People’s Court”.

<sup>59</sup> Applies to Australia, Austria, Belgium, Bermuda, Brunei, France, Germany, India, Israel, Italy, Malaysia, the Netherlands, New Zealand, Singapore and Sri Lanka.

	Jurisdiction	Rules	Approach				
			Foreign Judgment Preference	Domestic Proceedings Preference			
				Conditions		Judicial discretion	
				Timing of Domestic Proceedings (DP)	Identity		
		<p>recognition and enforcement of judgments on the basis of reciprocity, does not deal with the <i>lis pendens</i> issue.</p> <p>Under common law, a foreign judgment which is <i>res judicata</i> may have preclusive effects on pending domestic proceedings. For a foreign judgment to be recognised in Hong Kong, it must be</p> <ul style="list-style-type: none"> <li>- final and conclusive upon the merits of the claim,</li> <li>- rendered by a "competent" court, as determined by the private international law rules applied by the Hong Kong SAR courts,<sup>60</sup></li> <li>- for a fixed sum of money (not being a tax or a penalty).</li> </ul> <p>Case law has established that pending domestic proceedings should be stayed where a foreign judgment constitutes <i>res judicata</i>, notwithstanding that the foreign judgment was based on an action which was not yet in existence when local proceedings were initiated.<sup>61</sup></p>					
9	People's Republic of China (Macao)	Article 1220(1)(d) of the Civil Procedure Code provides that where recognition of a foreign judgment is sought, <i>lis pendens</i> based on a case pending before a Macau court cannot be invoked, unless the first action was brought in a court outside Macau. <sup>62</sup>		√	DP were instituted first in Macau	The same matter and parties	no
10	Costa Rica	Article 705 of the Civil Procedure Code (2001) <sup>63</sup> provides that		√	DP are pending in Costa Rica	Not defined	no

<sup>60</sup> Hong Kong follows the leading English case of *Adams v. Cape Industries* [1990] 1 Ch. 433.

<sup>61</sup> *James S Lee v. Citibank, NA* [1981] HKCA 149.

<sup>62</sup> A.C. Leyda (ed.), *Asian Conflict of Laws*, New York, Wolters Kluwer, 2015, p. 126.

<sup>63</sup> Civil Procedure Code of Costa Rica, Law No 7130, updated on 31 August 2001.

	Jurisdiction	Rules	Approach				
			Foreign Judgment Preference	Domestic Proceedings Preference			
				Conditions		Judicial discretion	
		Timing of Domestic Proceedings (DP)	Identity				
		<p>"In order for a judgment, resolution, or foreign award, to have effects in the country, it must fulfil the following requirements:            (...)            4) There is no pending process in Costa Rica, or an enforceable decision, that produces <i>res judicata</i> effects."</p>					
11	France	<p>There is no express provision addressing the <i>lis pendens</i> issue. This issue is instead examined through case law: when the domestic proceedings commenced before the request for recognition and enforcement of the foreign judgment (<i>exequatur</i>), the request for recognition and enforcement will be denied or stayed until the end of the domestic proceedings.<sup>64</sup> However, regarding personal status (<i>i.e.</i>, divorce proceedings), the <i>Cour de Cassation</i> did not give preference to the French pending proceedings.<sup>65</sup></p>		√	DP were commenced before the request for recognition and enforcement of a foreign judgment	Between the same parties, and based on the same demand	no
12	Germany	<p>The Code of Civil Procedure contains a provision dealing with the <i>lis pendens</i> issue.<sup>66</sup></p> <p>"Section 328 Recognition of foreign judgments            (1) Recognition of a judgment handed down by a foreign court shall be ruled out if:            [...]            3. The judgment is incompatible with a judgment delivered in Germany, or with an earlier judgment handed down abroad that is to be recognised, or if the proceedings on which such judgment is based are incompatible with proceedings that have become pending earlier in Germany;"</p>		√	DP were pending earlier in Germany	Proceedings on which the foreign judgment is based are incompatible with proceedings that have become pending earlier in Germany	no

<sup>64</sup> P. Mayer and V. Heuzé, *supra*, note 14.

<sup>65</sup> Cass. 1re civ. 30 septembre 2009. - n° 08-18.769, JDI 2010, p. 136.

<sup>66</sup> English translation was retrieved from the website of the German Ministry of Justice, <[http://www.gesetze-im-internet.de/englisch\\_zpo/](http://www.gesetze-im-internet.de/englisch_zpo/)>.

	Jurisdiction	Rules	Approach				
			Foreign Judgment Preference	Domestic Proceedings Preference			
				Conditions		Judicial discretion	
		Timing of Domestic Proceedings (DP)	Identity				
13	India	<p>Section 13 of the Civil Procedure Code provides:            "A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-</p> <ul style="list-style-type: none"> <li>(a) where it has not been pronounced by a Court of competent jurisdiction;</li> <li>(b) where it has not been given on the merits of the case;</li> <li>(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;</li> <li>(d) where the proceedings in which the judgment was obtained are opposed to natural justice;</li> <li>(e) where it has been obtained by fraud;</li> <li>(f) where it sustains a claim founded on a breach of any law in force in India.</li> </ul>	√				
14	Italy	<p>In dealing with the <i>lis pendens</i> issue, Private International Law (1995) provides:</p> <p>"64. Recognition of foreign judgments.            1. A foreign judgment is recognised in Italy without any special procedure being required when:            [...]            (f) No proceedings initiated prior to the foreign proceedings are pending before an Italian court between the same parties and on the same issue."<sup>67</sup></p>		√	DP were commenced prior to the foreign proceedings	Between the same parties and on the same issue	no

<sup>67</sup> Italian Private International Law (1995), Statute No 218. See T. Ballarino and A. Bonomi, "The Italian Statute on Private International Law", *Yearbook of Private international Law*, Vol. 2, 2000, p. 128 for translation and commentary.

	Jurisdiction	Rules	Approach			
			Foreign Judgment Preference	Domestic Proceedings Preference		
				Conditions		Judicial discretion
				Timing of Domestic Proceedings (DP)	Identity	
15	Japan	<p>Japan does not have a specific rule that addresses the <i>lis pendens</i> issue.</p> <p>A court decision in Osaka states that recognition of a foreign judgment always runs counter to “procedural public policy” (Art. 118 No. 3 Code of Civil Procedure)<sup>68</sup>, whenever there exists a final and conclusive judgment rendered by the Japanese court.<sup>69</sup> It is however doubtful whether the existence of a local proceeding will fall under “procedural public policy”.<sup>70</sup></p>				
16	The Republic of Korea	<p>Under Korean law, there is no specific provision addressing the <i>lis pendens</i> issue.</p> <p>A judgment of the Korean Supreme Court in a divorce case provides that where a party files a suit regarding the same cause of action before a court of Korea, where a final and conclusive foreign judgment has already been rendered, the court of Korea can recognise and enforce the foreign judgment, and dismiss the proceedings before the Korean court.<sup>71</sup> This is mainly because when a final and conclusive judgment by a foreign court is acknowledged to be valid, the judgment constitutes <i>res judicata</i> in the territory of Korea. Accordingly, the court dismissed the pending domestic proceedings which were commenced after the foreign proceedings. However, it remains unclear what a Korean court would do if the pending domestic proceedings were commenced earlier than the foreign proceedings.</p>				

<sup>68</sup> Art. 118 CCP provides for the automatic recognition of foreign judgments under the following conditions: (1) the foreign judgment has become a *res judicata*; (2) international jurisdiction of the foreign court; (3) proper service or notice to the defeated defendant; (4) conformity with substantive and procedural public policy; (5) reciprocity.

<sup>69</sup> Osaka District Court, 22 December 1977, Hanrei Times 361, 127.

<sup>70</sup> Comments provided by Prof Y. Nishitani (Kyoto University).

<sup>71</sup> The Supreme Court of Korea No 86 MEU57, 58, decided on 14 April 1987.

	Jurisdiction	Rules	Approach				
			Foreign Judgment Preference	Domestic Proceedings Preference			
				Conditions		Judicial discretion	
				Timing of Domestic Proceedings (DP)	Identity		
17	Macedonia	Article 106 of the Private International Law Act (2007) <sup>72</sup> provides that when concerning the final decision on the same matter between the same parties, “[...] (2) The court shall stop the recognition of a foreign court decision if in a court of the Republic of Macedonia there is pending litigation initiated earlier in the same subject matter between the same parties and until the final conclusion of this litigation.”		√	DP were initiated first	Based on the same subject-matter between the same parties	no
18	Mexico	In the Federal Code of Civil Procedure <sup>73</sup> , Article 571 states that “Judgments, non-commercial private arbitral awards and court orders by foreign courts shall be enforceable if they satisfy the following conditions: [...] VI. The action that gave rise to the judgment was not the subject of proceedings pending between the same parties before a Mexican court where the Mexican court was seized first;”		√	The court hearing the DP was first seized	The same subject of proceedings between the same parties	no
19	Montenegro	Article 146 of the International Private Law Act <sup>74</sup> provides that “The court shall stay the proceedings for a recognition of a foreign judgment if before a Montenegrin court the proceedings instituted earlier and involving the same cause of action and between the same parties are still pending. The proceedings will be stayed until the earlier proceedings have been completed.”		√	DP were instituted first	The same cause of action and between the same parties	no

<sup>72</sup> The Private International Law Act, in Official Gazette No 87 of 7 December 2007. Translation was made by google, assisted by commentary from T. Deskoski, “New Macedonian Private International Law Act of 2007”, *Yearbook of Private international Law*, Vol. 10, 2008, p. 457.

<sup>73</sup> The Federal Code of Civil Procedure (1943) was published in the Official Journal of the Federation (DOF) on 24 February 1943. It was last amended and republished in the DOF on 9 April 2012.

<sup>74</sup> Official Gazette of Montenegro, No 1/14 of 9 January 2014 and No 6/2014, which entered into force on 17 January 2014 and is applicable as from 9 July 2014.

	Jurisdiction	Rules	Approach				
			Foreign Judgment Preference	Domestic Proceedings Preference			Judicial discretion
				Conditions			
				Timing of Domestic Proceedings (DP)	Identity		
20	The Netherlands	<p>The Civil Procedural Act does not provide a rule on the <i>lis pendens</i> issue.</p> <p>Case law provides that three conditions have to be fulfilled before a foreign judgment is recognised:</p> <ul style="list-style-type: none"> <li>- the jurisdiction of the foreign court is based on internationally accepted jurisdictional grounds;</li> <li>- the rules for due process have been observed;</li> <li>- the recognition of the foreign judgment does not violate Dutch public policy.<sup>75</sup></li> </ul> <p>However, based on available materials, it remains unclear how a Dutch court would deal with the <i>lis pendens</i> issue.</p>					
21	New Zealand	<p>A foreign judgment may be recognised and enforced under the available statutory regimes,<sup>76</sup> or under common law. Under common law, a foreign judgment may be recognised and enforced, provided that:</p> <ul style="list-style-type: none"> <li>- the judgment is for a debt, or definite sum of money</li> <li>- it is final and conclusive</li> <li>- the foreign court’s jurisdiction is recognised by New Zealand’s rules of private international law.</li> </ul> <p>There are certain types of judgments given in foreign courts which, as a matter of public policy, a New Zealand court will decline to enforce. For example, attempts to enforce foreign revenue and penal law, judgments obtained by fraud, and judgments given overseas in breach of the rules of natural justice.</p>	√				

<sup>75</sup> M. Freudenthal, “Dutch national rules on the recognition and enforcement of foreign judgments, Article 431 CCP”, 4 NIPR, 2014, pp. 563-572.

<sup>76</sup> Reciprocal Enforcement of Judgments Act 1934, Trans-Tasman Proceedings Act 2010, Judicature Act 1908.



	Jurisdiction	Rules	Approach				
			Foreign Judgment Preference	Domestic Proceedings Preference			
				Conditions		Judicial discretion	
				Timing of Domestic Proceedings (DP)	Identity		
		A foreign judgment which is entitled to recognition in New Zealand may be raised as a defence to pending domestic proceedings, either as a cause of action estoppel or, by extension, an issue estoppel. <sup>77</sup>					
22	Russian Federation	The <i>lis pendens</i> issue is dealt with in Article 412 of the Civil Procedural Code, <sup>78</sup> which provides,  "1. A rejection of a forcible execution of the decision of a foreign court may be admissible if: 4) [...] or in the proceedings of a court in the Russian Federation there is a case instituted on the dispute between the same parties, for the same object and on the same grounds before the case was instituted in the foreign court;"		√	DP were instituted before the proceedings were instituted abroad	Between the same parties, for the same object and on the same grounds	yes
23	Serbia	Article 90 of the Law on Resolution of Conflict of Laws with Regulations of Other Countries (1982) <sup>79</sup> provides that "2. The court shall stay recognition of a foreign judgment if a litigation instituted earlier involving the same matter between the same parties is pending before the court of the Federal Republic of Yugoslavia, until the final decision is rendered in that litigation."  It is trite to note that the same provision has been kept in the Draft Act on Private International Law (2014). <sup>80</sup> "Conditions for recognition - Article 185 [...]"		√	DP were instituted first	Involving the same matter between the same parties	no

<sup>77</sup> S. Bower and Handley, *Res Judicata*, 4th Ed., London, LexisNexis, 2009, [1.05], cited with approval in *Kidd v. Van Heeren* [2015] NZHC 517.

<sup>78</sup> Civil Procedural Code of the Russian Federation No 138-Fz of 14 November 2002. English translation is found at <<http://www.wipo.int/edocs/lexdocs/laws/en/ru/ru081en.pdf>>.

<sup>79</sup> English translation was prepared by Prof M. Stanivukovic.

<sup>80</sup> *Ibid.*

	Jurisdiction	Rules	Approach			
			Foreign Judgment Preference	Domestic Proceedings Preference		
				Conditions		Judicial discretion
		Timing of Domestic Proceedings (DP)	Identity			
		2. The court shall stay recognition of a foreign judgment if a litigation instituted earlier involving the same matter between the same parties is pending before the court of the Republic of Serbia, until the final decision is rendered in that litigation."				
24	Singapore	<p>Recognition and enforcement of a foreign <i>in personam</i> judgment may be achieved through the common law regime or through one of two statutory regimes.<sup>81</sup></p> <p>The statutory regimes do not contain express rules relating to the <i>lis pendens</i> issue.</p> <p>For a foreign judgment to be recognised under common law, three requirements need to be met:</p> <ul style="list-style-type: none"> <li>- the foreign judgment must be final and conclusive on the merits;</li> <li>- the foreign judgment must be rendered by a foreign court which was internally competent and had 'international jurisdiction' over the party sought to be bound;</li> <li>- there are no relevant defenses against the recognition of the foreign judgment.</li> </ul> <p>A foreign judgment which satisfies these requirements is <i>res judicata</i>, and may give rise to a cause of action estoppel or an issue estoppel between parties to the earlier litigation or their privies. In such a situation, the court has the power to dismiss or stay pending domestic proceedings.<sup>82</sup></p>	√			

<sup>81</sup> The relevant statutes are the Reciprocal Enforcement of Foreign Judgments Act (Cap. 265, 2001 Rev Ed) and the Reciprocal Enforcement of Commonwealth Judgments Act (Cap. 264, 1985 Rev Ed).

<sup>82</sup> Supreme Court of Judicature Act (Cap. 322, 2007 Rev Ed) s 18, First Schedule para 9.

	Jurisdiction	Rules	Approach				
			Foreign Judgment Preference	Domestic Proceedings Preference			Judicial discretion
				Conditions			
				Timing of Domestic Proceedings (DP)	Identity		
		<p>Cause of action estoppel can arise to prevent a party from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties.<sup>83</sup></p> <p>Issue estoppel can arise to estop one party from denying a question of fact or law already decided by the foreign court. The requirements for issue estoppel are as follows:</p> <ul style="list-style-type: none"> <li>- the judgment is from a court of competent jurisdiction that is final and conclusive on the merits of the case</li> <li>- the parties in the local proceedings are the same parties (or are privy to the parties) in the foreign proceedings<sup>84</sup></li> <li>- the issue decided in the foreign court must be identical to the issue before the forum court. The decision on the issue must have been a "necessary step" to the decision, or a "matter which was necessary to decide and which was decided as the ground work of the decision".<sup>85</sup></li> </ul>					
25	Spain	The newly enacted Law on International Judicial Co-operation in Civil Matters <sup>86</sup> addresses the <i>lis pendens</i> issue.		√	DP are pending, and were initiated prior to the	Between the same parties and the same purpose	no

<sup>83</sup> *Thoday v. Thoday* [1964] P 181 at 197-198, affirmed in *Goh Nellie v. Goh Lian Teck and others* [2007] 1 SLR(R) 453.

<sup>84</sup> *International Coal Pte Ltd v. Kristle Trading Ltd* [2009] 1 SLR(R) 945, where the court held that the plaintiff who was the alter ego of a party in the arbitration and who played a central role in its arbitration was its privy and as such the doctrine of issue estoppel operated to prevent him from re-litigating issues earlier disposed of in the arbitration.

<sup>85</sup> *Lee Tat Development Pte Ltd v. Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157.

<sup>86</sup> Law 29/2015, 30 July 2015, on International Judicial Cooperation in Civil Matters.

	Jurisdiction	Rules	Approach				
			Foreign Judgment Preference	Domestic Proceedings Preference			
				Conditions		Judicial discretion	
				Timing of Domestic Proceedings (DP)	Identity		
		Article 46(1)(f) states that a foreign judgment will not be recognised when there is pending litigation at a Spanish court between the same parties and the same purpose, which is initiated before the proceeding abroad.			proceeding abroad		
26	Switzerland	The Federal Code on Private International Law (1987) <sup>87</sup> deals with the <i>lis pendens</i> issue in Article 27(3).  "2. Recognition of a decision must also be denied if a party establishes: [...] c. that a dispute between the same parties and with respect to the same subject matter is the subject of a pending proceeding in Switzerland or has already been decided there, or that such dispute has previously been decided in a third state, provided that the latter decision fulfils the prerequisites for its recognition."		√	DP are pending	Between the same parties and with respect to the same subject matter	no
27	United Kingdom (England and Wales)	Under common law, a foreign judgment which is <i>res judicata</i> may have preclusive effects on pending domestic proceedings involving the same parties or their privies, <sup>88</sup> for the same claim. <sup>89</sup>  <b>Res Judicata</b> A foreign judgment which qualifies as <i>res judicata</i> may be relied upon in subsequent proceedings for preclusive purposes- the decision can prevent or preclude the commencement or continuance of subsequent proceedings involving the same or similar subject-matter as between	√				

<sup>87</sup> English translation was edited by Prof A. Bucher, available in English at <[http://www.andreasbucher-law.ch/images/stories/pil\\_act\\_1987\\_as\\_amended\\_until\\_1\\_7\\_2014.pdf](http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_amended_until_1_7_2014.pdf)>.

<sup>88</sup> *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* (No 2) [1967] 1 AC 853, 936.

<sup>89</sup> *Cooke v. Gill*, *supra*, note 42.

	Jurisdiction	Rules	Approach				
			Foreign Judgment Preference	Domestic Proceedings Preference			Judicial discretion
				Conditions			
				Timing of Domestic Proceedings (DP)	Identity		
	<p>the same parties or their privies.<sup>90</sup> However, the local court must first recognise the foreign judgment and verify that it is <i>res judicata</i>.<sup>91</sup></p> <p>For a foreign judgment to be recognised at common law, it must fulfil these basic criteria:<sup>92</sup></p> <ul style="list-style-type: none"> <li>- The foreign court must be of competent jurisdiction;<sup>93</sup></li> <li>- the foreign decision must be final and conclusive on the merits;<sup>94</sup></li> </ul> <p>Once the party seeking to rely on the foreign judgment satisfies the onus of proof, the judgment is <i>prima facie</i> entitled to enforcement, unless the defendant can establish one or more of the recognised defences.<sup>95</sup></p> <p>A foreign judgment which is entitled to recognition may give rise to a cause of action estoppel or an issue estoppel:<sup>96</sup></p> <ul style="list-style-type: none"> <li>- Cause of action estoppel prevents a party to proceedings from asserting or denying, as against the other party, the existence of a cause of action, the nonexistence or existence of which has been determined by the foreign court,</li> </ul>						

<sup>90</sup> P. Barnett, *supra*, note 26, p. 18.

<sup>91</sup> *Id.*, p. 35.

<sup>92</sup> *Id.*, p. 40.

<sup>93</sup> *Id.*, pp. 40-41.

<sup>94</sup> *Eastwood & Holt v. Studer* [1926] 31 Com Cas. 251, 256-257.

<sup>95</sup> P. Barnett, *supra*, note 26, p. 25. These defences include: a foreign judgment obtained in breach of a jurisdiction or arbitration agreement; a foreign judgment procured by fraud; a foreign judgment procured in breach of natural or substantial justice; foreign judgment is inconsistent with a prior local judgment; recognition of a foreign judgment would infringe public policy of local forum; a foreign judgment enforces a penal, revenue or other public law of the foreign State.

<sup>96</sup> Dicey, A.V., Morris, J.H.C., and Collins, L., *Dicey, Morris, and Collins on the Conflict of Laws*, 15<sup>th</sup> Ed., Sweet & Maxwell, 2012, 14-030.

	Jurisdiction	Rules	Approach			
			Foreign Judgment Preference	Domestic Proceedings Preference		
				Conditions		Judicial discretion
				Timing of Domestic Proceedings (DP)	Identity	
		- Issue estoppel prevents a matter of fact or law necessarily decided by a foreign court from being re-litigated in England. <sup>97</sup>				
28	United States of America	<p>The Full Faith and Credit Clause of the U.S. Constitution does not extend to foreign country judgments. Enforcement of foreign judgments within the United States is largely a matter of state law.<sup>98</sup> Under common law, judgments of the courts of foreign states may be recognised via the doctrine of comity where</p> <p>“there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect...”<sup>99</sup></p> <p>Generally, <i>res judicata</i> can operate with respect to the same cause of action and as between or among the same</p>	✓			

<sup>97</sup> *Ibid.* See also *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* (No 2) [1967] 1 AC 853.

<sup>98</sup> Restatement (Second) of Conflict of Laws (1986), s 98 cmt.c, “The Supreme Court of the United States has never passed upon the question whether federal or state law governs the recognition of foreign nation judgments. The consensus among the state courts and lower federal courts that have passed upon the question is that, apart from federal question cases, such recognition is governed by state law and that the federal courts will apply the law of the state in which they sit”.

<sup>99</sup> *Hilton v. Guyot* 150 U.S. 113 (1895), 203. See also L. E. Teitz, “Both Sides of the Coin: A decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation”, Roger Williams University Law Review, Vol. 10, No 1, 2004, pp. 56-57.

	Jurisdiction	Rules	Approach			
			Foreign Judgment Preference	Domestic Proceedings Preference		
				Conditions		Judicial discretion
				Timing of Domestic Proceedings (DP)	Identity	
		<p>parties or their privies, to prohibit the plaintiff from re-litigating the same claim (claim preclusion).<sup>100</sup></p> <p>Collateral estoppel extends the <i>res judicata</i> effect of a judgment to encompass the same issues arising in a different action (issue preclusion) and even to different parties where the issue has been determined in prior litigation.<sup>101</sup></p>				

<sup>100</sup> P. Hay, P. Borchers and S. Symeonides, *Conflict of Laws*, 5<sup>th</sup> Ed., West Academic Publishing, 2010, p. 1436.

<sup>101</sup> *Id.*, p. 1437.

## II. Multilateral legal regimes

1. Hague Conference Materials						
Name of Instrument	Rules	Approach				
		Foreign Judgment Preference	Domestic Proceedings Preference			Judicial discretion
			Conditions			
Timing of Domestic Proceedings (DP)	Identity					
1971 Enforcement Convention	Article 5 of the Convention contains a provision dealing with the <i>lis pendens</i> issue. "Recognition or enforcement of a decision may nevertheless be refused in any of the following cases, - (3) if proceedings between the same parties, based on the same facts and having the same purpose - a). are pending before a court of the State addressed and those proceedings were the first to be instituted ..."		√	DP are initiated first	The same parties, based on the same facts and having the same purpose	yes
2001 Interim Text	Article 28 <i>Grounds for refusal of recognition or enforcement of the Text</i> provides a provision addressing the <i>lis pendens</i> issue.  "1. Recognition or enforcement of a judgment may be refused [only] if: a) proceedings between the same parties and having the same subject matter are pending before a court of the State addressed, if first seized in accordance with Article 21."  A court is considered to be seized with the matter when the document instituting the proceedings has been lodged with that court or in the case that the document has to be served first if it is received by the competent authority or actually served on the defendant (Article 21).		√	DP are instituted first in accordance with Article 21	Between the same parties and having the same subject matter	yes
2007 Child Support Convention	Article 22 of the Convention provides that recognition and enforcement of a decision may be refused if - c) proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were the first to be instituted;		√	DP are instituted first	Between the same parties and having the same purpose	yes



2. Other Regional and Multilateral Instruments						
Name of Instrument	Rules	Approach				
		Foreign Judgment Preference	Domestic Proceedings Preference			Judicial discretion
			Conditions			
Timing of Domestic Proceedings (DP)	Identity					
Brussels Regulation	No specific provision dealing expressly with the <i>lis pendens</i> issue.	√				
Montevideo Convention	The issue of <i>lis pendens</i> is not provided for in the grounds of refusal of recognition.	√				
Lugano Convention	The Convention does not expressly address the issue of <i>lis pendens</i> .	√				
Riyadh Arab Agreement	Article 30 of the Agreement provides that "Recognition of judgments shall be refused in the following cases: [...] (e) If the dispute is also the subject of a case being heard by the courts of the requested state and the action has been brought before the courts of the requested state on a date preceding the presentation of the dispute to the court of the requesting state."		√	The action was brought prior to the presentation of the dispute to the court of the requesting state.	The same subject	no
Las Leñas Protocol	Article 22 is a provision dealing with the <i>lis pendens</i> issue. "[...] Likewise, a judgment will not be recognized or enforced whenever a proceeding has been brought between the same parties, grounded on the same facts and on the same matter, with any court or tribunal of the requested State prior to the filing the request on recognition with the authority that would have decided on this matter."		√	DP are brought before the filing of the request for recognition	Between the same parties, grounded on the same facts and on the same matter	no

2. Other Regional and Multilateral Instruments						
Name of Instrument	Rules	Approach				
		Foreign Judgment Preference	Domestic Proceedings Preference			Judicial discretion
			Conditions			
			Timing of Domestic Proceedings (DP)	Identity		
Minsk Convention <sup>102</sup>	<p>Article 55 Refusal to recognize or execute decisions</p> <p>The recognition of the decisions mentioned in Article 52 and the issue of the permission for coercive execution may be refused in cases, where:</p> <p>[...]</p> <p>(c) Another decision was taken beforehand on the territory of the Contracting Party, where the decision must be recognized and executed, that had already come into effect by the same case between the same sides, on the same subject and on the same reasons, or in case, where there is a recognized decision of a court of the third party, or if a judicial organs of the Contracting Party had started before the proceedings on this case;</p>		√	DP have started before the foreign proceedings	The same case between the same sides, on the same subject and on the same reasons <sup>103</sup>	yes

<sup>102</sup> English translation was retrieved from <http://www.unhcr.org/4de4edc69.html>.

<sup>103</sup> Although the identity conditions are not expressly provided for in relation to the *lis pendens* issue, it may be inferred from sub-paragraph (c) that these conditions have to be met before recognition of the foreign judgment may be refused.

3. Bilateral Instrument and Model Laws						
Name of Instrument	Rules	Approach				
		Foreign Judgment Preference	Domestic Proceedings Preference			Judicial discretion
			Conditions			
Timing of Domestic Proceedings (DP)	Identity					
Trans-Tasman Court Proceedings and Regulatory Enforcement Agreement	No specific provision under the Agreement deals directly with <i>lis pendens</i> at the level of recognition and enforcement.	✓				
ALI Proposed Statute	The Proposed Statute deals with the <i>lis pendens</i> issue in § 5. Nonrecognition of a Foreign Judgment “(c) A foreign judgment need not be recognized or enforced in a court in the United States if the party resisting recognition or enforcement establishes that: [...] (iii) the judgment results from a proceeding initiated after commencement in a court in the United States of a proceeding including the same parties and the same subject matter, and the proceeding in the United States was not stayed or dismissed;”		✓	DP commenced first and are not stayed or dismissed	The same parties and the same subject matter	yes
Draft OHADAC Model Law	Article 74 of the draft Model Law provides that “A foreign judgment will not be recognised if: [...] iv) a dispute pending before a Caribbean court between the same parties and involving the same cause of action has been commenced first;”		✓	DP commenced first and are pending	Between the same parties and involving the same cause of action	no
Draft Commonwealth Model Law	According to Article 6(3) of the draft Model Law, a foreign judgment is not to be recognised in the court, if, “(a) at the time the foreign judgment is relied upon in proceedings in requested court, proceedings between the same parties and having the same subject matter were pending before the requested court, having been commenced before the proceedings that gave rise to the foreign judgment were commenced;”		✓	DP commenced prior to the foreign proceedings and are pending	Between the same parties and having the same subject matter	no

