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établie par le Bureau Permanent

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RESEARCH PAPER ON PERSONAL JURISDICTION AND *FORUM NON CONVENIENS* IN THE ENFORCEMENT CONTEXT

prepared by the Permanent Bureau

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Introduction

1. This paper has been prepared at the request of the Working Group to assist it with its future discussions.[1] The issues of personal jurisdiction and *forum non conveniens* in the enforcement context were raised at the first meeting of the Working Group from 18 to 20 February 2013 with reference to recent cases in the United States in which foreign judgments and arbitral awards had been refused enforcement on grounds of lack of personal jurisdiction or by application of the doctrine of *forum non conveniens*.

2. This paper commences by defining the two issues (Part I). It then outlines the current state of play in the United States of America as well as in certain other jurisdictions regarding the application in the enforcement context of rules of personal jurisdiction (Part II) and the doctrine of *forum non conveniens* (Part III). After examining how the issues have been addressed in past work on the Judgments Project, it suggests how they might be addressed in the work of the Working Group (Part IV).

Part I – Defining the issues

3. This paper focuses on the jurisdiction of the *court addressed*, namely whether that court has jurisdiction to render enforceable a foreign judgment in the State addressed, and whether it may decline to exercise that jurisdiction.[2] This is important to recall, as work regarding personal jurisdiction and *forum non conveniens* has so far almost exclusively been examined in connection with the jurisdiction of the *court of origin* (*i.e.*, whether the court of origin has jurisdiction to determine the merits of the case, and whether it may decline to exercise that jurisdiction).[3] This paper does *not* refer to direct grounds of jurisdiction (a matter within the mandate of the Experts' Group), or jurisdictional filters (a separate matter being discussed by the Working Group).

4. It is also useful to recall what is meant by the terms "personal jurisdiction" and "*forum non conveniens*". Personal jurisdiction (also known as "*in personam* jurisdiction") is a concept particularly familiar to common law jurisdictions. It refers to the establishment, and subsequent existence, of adjudicative competence of a court over a particular person.[4] This needs to be contrasted with other forms of jurisdictions, including, for example, jurisdiction over a particular subject (subject matter jurisdiction), or over particular property ("*in rem* jurisdiction").[5]

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[1] See Report of the First Meeting of the Working Group on the Judgments Project (18-20 February 2013), Annex 1 to Preliminary Document No 3 of March 2013 for the attention of the Council on General Affairs and Policy of the Conference of April 2013, available on the Hague Conference website at < http://www.hcch.net/upload/wop/genaff2013pd03e.pdf > ("To assist with future discussions, the Working Group requested the Permanent Bureau to prepare a research paper on each of the following topics… personal jurisdiction and *forum non conveniens* in the enforcement context").

[2] As defined in the glossary of the Judgments Project, the term "court addressed" refers to the court that is asked to recognise or enforce a judgment. This is distinguished from the "court of origin", which is defined as the court that rendered the judgment.

[3] As will be seen in Part III, the issue has been addressed - albeit summarily - in past work on the Judgments Project.

[4] In *Lipohar v The Queen* (1999) 200 CLR 485, https://jade.barnet.com.au/Jade.html#ftn11 the Australian High Court explained the concept of personal jurisdiction as describing "the amenability of a defendant to the court's writ […]" expressing the sovereign's command. See also *Laurie v Caroll* (1958) 98 CLR 310, p. 332, where the High Court reflected the transitory nature of jurisdiction over a defendant, and *Flaherty v Girgis* [1987] HCA 17, para. 41.

[5] See A. von Mehren, "Theory and practice of adjudicatory authority in private international law: a comparative study of the doctrine, policies and practices of common- and civil-law systems : general course on private international law", *Recueil des cours, Académie de Droit International de La Haye*, Vol. 295, 2002, pp. 59-62.

5. The doctrine of *forum non conveniens*, first applied by the courts in Scotland in the 19th century,[6] is known predominantly to common law jurisdictions, although it does not have a uniform meaning across the various jurisdictions, and has substantial equivalence in several civil law jurisdictions.[7] In essence, the doctrine dictates that a court with jurisdiction has discretion to decline to exercise that jurisdiction on the basis of an assessment of the appropriateness of possible alternative forums to hear the case.[8]

6. Despite recent developments in the United States of America (discussed in Parts II and III of this paper), the issues of personal jurisdiction and *forum non conveniens* in the enforcement context appear to seldom arise in practice, particularly in view of the volume of actions brought around the world for the enforcement of foreign judgments. As will be seen, the issues appear to only arise in exceptional cases where the judgment debtor is absent from the State addressed (*e.g.*, the judgment debtor is resident or domiciled abroad) and / or does not have assets in the State addressed to satisfy the judgment (in whole or in part). It is actually reasonable to assume that in most cases, the judgment creditor will seek to enforce a judgment in a State in which the judgment debtor has assets (*i.e.*, in which enforcement measures may be taken).[9]

Part II – Personal jurisdiction

7. For the purposes of the Judgments Project, rendering a judgment enforceable (by way of *exequatur*, registration, or action on the judgment) subjects the judgment debtor to the measures of enforcement that the law of the State addressed applies to its own judgments. It is understandable that States might wish to limit enforcement actions to instances where the judgment can effectively be enforced by the State addressed. In some States, the law defines these instances as a matter of convenience and administrability, conferring jurisdiction on the courts of the judgment debtor's home forum, or where the enforcement measures are sought to be taken.[10] In other States, essentially

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[6] T.C. Hartley, *International Commercial Litigation* (Cambridge University Press 2009), p. 207

[7] See, for a brief overview, "Issues Paper on Matters of Jurisdiction (including Parallel Proceedings)", available at < www.hcch.net > under "Specialised Sections", then "Judgments Project" and "Recent developments", paras 26-44.

[8] The doctrine of *forum non conveniens* has been the subject of considerable discussion and comparative study in past work on the Judgments Project. See, *e.g.*, "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 at < 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 at < www.hcch.net > under "Specialised Sections" then "Judgments Project" and "Preliminary Work", paras 6-10; and "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 at < www.hcch.net > under "Specialised Sections", then "Judgments Project" and "Preparation of a preliminary draft convention", paras 101-112. As noted in para. 3, the focus of this work has been exclusively on the application of the doctrine by the court of origin to decline jurisdiction to determine the merits of a case.

[9] The Superior Court of Justice of Ontario has recently acknowledged that there may be "legitimate reasons" for a judgment debtor to seek recognition and enforcement in the absence of assets in the jurisdiction, for instance where the enforcement mechanisms within the jurisdiction allow for foreign assets to be called into the jurisdiction: *Yaiguaje v. Chevron Corporation* [2013] ONSC 2527, para. 81, available at < http://www.canlii.org/en/on/onsc/doc/2013/2013onsc2527/2013onsc2527.html >.

[10] See, for example, Art. 985 of the Code of Civil Procedure of the Netherlands, and § 722(2) of the Code of Civil Procedure of Germany. Article 39(2) of the Brussels I Regulation provides that the jurisdiction of the court addressed "shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement". As clarified by the Jenard Report on the 1968 Brussels Convention (which is the predecessor to the Brussels I Regulation), this

those whose civil procedure system is based on common law, the law defines these instances as a matter of personal jurisdiction, conferring jurisdiction on the courts that have power to exercise judicial authority over the judgment debtor. This section explores the position in some of these States, starting with the United States.

1. United States of America

8. In the United States of America, a court (at either state or federal level) seised of an action brought against a particular person must always establish that it has jurisdiction over that person. This is the case both for actions on the merit (*i.e.*, where the court is the court of origin) and for actions to recognise and enforce a foreign judgment (*i.e.*, where the court is the court addressed).[11]

9. Personal jurisdiction is shaped by constitutional constraints inspired by the concept of "due process" requiring that "the defendant's due process rights to life, liberty, and property have been respected in the procedures by which he or she is subjected to the court's power and authority."[12] Personal jurisdiction over the out-of-state defendant is established when there are sufficient "minimum contacts" between the defendant and the forum state (the "forum state" of a federal court is the state in which it is located), and when the exercise of jurisdiction by the particular court satisfies traditional notions of "fair play and substantial justice."[13]

10. In the past half century, the requirements of personal jurisdiction over foreign or "out-of-state" defendants have been subject to a series of decisions of the Supreme Court. These decisions focused almost exclusively on personal jurisdiction in actions on the merits, dividing personal jurisdiction cases into two types: cases of (a) *specific jurisdiction*, and (b) *general jurisdiction*.[14]

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means that jurisdiction is vested in either the court of the State where the judgment debtor is domiciled, or the State where the judgment debtor has assets (p. 49, commenting on the equivalent Art. 32 of the Brussels Convention). In his recent work on private international law in Commonwealth Africa, Richard Oppong refers to decisions in Botswana and South Africa which suggest that the courts in those States, whose civil procedure system is based on Roman Dutch law, will not exercise jurisdiction in actions for enforcement of foreign judgments where the judgment debtor is not resident or domiciled in the jurisdiction, or where there are no assets present: *Private International Law in Commonwealth Africa* (Cambridge University Press 2012). In the case of *Cloete v. Brink* 1995 BLR 275, available at < http://www.elaws.gov.bw/rep_export.php?id=2738&type=pdf >, the High Court of Botswana refused to exercise jurisdiction in an action for enforcement of a South African judgment in the absence of evidence that the judgment debtor was resident in the forum. In delivering judgment for the court, Judge Nganunu noted that "it seems obvious to me that the court is being asked to assume jurisdiction on a matter which may well have nothing to do with this country and of which this court can give no effective implementation after judgment is granted". He added that "[i]n a situation of this type a court in Botswana is entitled to refuse to assume jurisdiction", even if the South African judgment were otherwise entitled to recognition and enforcement in Botswana. The case of *Zwyssig v Zwyssig* 1997 (2) SA 467 before the Western Cape High Court of South Africa is taken as authority for the view that the mere fact that the judgment debtor is not resident or domiciled in the forum will not suffice to deny a court in South Africa of jurisdiction to enforce a foreign judgment in the situation where assets of the debtor are present.

[11] R. A. Brand, "Recognition Jurisdiction and The Hague Choice of Court Convention" in H. Sikirić, V. Bouček and D.Babić (eds), *Liber Amicorum Kresimir Sajko* (2012) 155, 179, available at < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1629360 >.

[12] *Ibid.*, p. 178. The principle of due process is found in the 5th and 14th Amendments to the Constitution of the United States of America.

[13] *International Shoe v. State of Washington,* 326 U.S. 310 (1945); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980).

[14] See J. Ginsburg in *Goodyear Dunlop Tires, S.A. v. Brown*, S. Ct. 2846, 2853-2854 (2011), citing von Mehren & Trautman, "Jurisdiction to Adjudicate: A Suggested Analysis", 79 Harv. L. Rev. 1121, 1136 (1936): "Specific jurisdiction depends on an 'affiliation between the forum and the underlying controversy', principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation", "specific jurisdiction is confined to the adjudication of 'issues deriving from, or connected with, the very controversy that established jurisdiction'"; general jurisdiction can be exercised when the defendant's contacts with the forum state are sufficiently

Subsequently, the Supreme Court had occasion to further refine its jurisprudence in relation to both types[15], culminating in its most recent decision on *general jurisdiction*, *Daimler AG v. Bauman.*[16] The Court held that allowing an expansive application of general jurisdiction would undermine principles of international comity and pose barriers to foreign investment, underscoring that over-expansive rules of personal jurisdiction over foreign defendants in actions on the merits can "impede […] negotiations of international agreements on the reciprocal recognition and enforcement of judgments."[17]

11. In a much earlier decision, the Supreme Court had occasion to consider the requirements of personal jurisdiction in the enforcement context. In its 1977 decision in *Shaffer v. Heitner,*[18] the court drew a distinction between actions on the merits and actions for the recognition and enforcement of (domestic) judgments. It suggested a more relaxed approach to the latter. In a footnote, the Court stated:

> *Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.*[19]

Although the case itself did not concern an action for the recognition and enforcement of a foreign judgment, the language of the footnote is said to be "at the core of all subsequent cases addressing the question of recognition jurisdiction […] in the context of foreign judgments recognition" in the United States.[20] In this regard, the subsequent case law in the United States has revealed three different approaches.

a. <u>The main approach</u>

12. With regard to the recognition and enforcement of foreign judgments, a majority of courts in the United States have interpreted the footnote in *Shaffer v. Heitner* to mean that the jurisdiction inquiry of the court addressed can be satisfied *either* if it has personal jurisdiction over the judgment debtor *or* if the judgment debtor has assets in the forum, regardless of the connection between those assets and the judgment debt (so-called "*quasi-in-rem* jurisdiction"). For example, in the 2002 case of *Pure Fishing, Inc. v. Silver Star Co. Ltd.,*[21] a District Court found that the assignee of an Australian judgment against a South Korean corporation did not have to establish personal jurisdiction in the court's forum state of Iowa when trying to enforce the judgment. The Court found that the

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"continuous and systematic", which render him essentially at home in the forum state. If a court has general jurisdiction, it can hear "any and all claims" against the defendant. See also . *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-419 (1984); *Perkins v. Benguet Consolidated Mining Co.* - 342 U.S. 437 (1952).

[15] In the 2011 case of *Goodyear v. Brown*, the Supreme Court addressed the requirements of "minimum contacts" for the purposes of general jurisdiction: 131 S. Ct. 2846 (2011). At the same time, the Supreme Court issued a decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, which addressed the requirements of specific jurisdiction: 131 S. Ct. 2780 (2011).

[16] *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). In this landmark decision regarding general jurisdiction over a German car manufacturer, the Supreme Court found that a California District Court did not have jurisdiction over the defendant simply because its subsidiary sold large volumes of cars in the forum state, where the cause of action was completely unrelated to its contacts there and occurred entirely outside of the United States. See also *Goodyear*, 131 S. Ct. at 2853-2854 (finding that a North Carolina state court lacked personal jurisdiction over foreign subsidiaries of an American tire manufacturer, given that those subsidiaries were in "no sense at home in North Carolina").

[17] *Ibid.*, at 763.

[18] *Shaffer v. Heitner*, 433 U.S. 186 (1977).

[19] *Ibid*., at 210 n.36.

[20] R. A. Brand, *op. cit.* (note 11), p. 189.

[21] 202 F. Supp. 2d 905 (N. D. Ia. 2002).

"minimum contacts" requirement "does not prevent a state from enforcing another state's valid judgment against a judgment-debtor's property located in that state, regardless of the lack of other minimum contacts by the judgment-debtor".[22] In the 2003 case of *Electrolines v. Prudential Assurance Co. Inc.,*[23] the Court of Appeals of Michigan found that the creditor trying to enforce a judgment by a court in Liberia failed to show that there was either personal or *quasi-in-rem* jurisdiction over the debtor in Michigan. The court confirmed that "in an action brought to enforce a judgment, the trial court must possess jurisdiction over the judgment-debtor *or* the judgment debtor's property".[24] A similar approach has been accepted in cases involving the recognition and enforcement of foreign arbitral awards.[25]

13. This "either-or" approach is supported by the 1987 *Restatement (Third) Foreign Relations Law*[26] as well as the 2005 ALI Proposed Statute.[27] Although neither of these sources has been codified into state or federal law, they serve as influential guides to courts in addressing the jurisdictional inquiry. Indeed, the drafters of the 2005 Uniform Foreign-Country Money Judgments Recognition Act, which has become law in several U.S. states, chose not to take a position on the jurisdiction issue. Instead, they stated that the Act "is not intended to create any new procedure not currently existing in the state or to otherwise effect existing state procedural requirements… [n]or does [it] address the question of what constitutes a sufficient basis for jurisdiction to adjudicate with regard to a [recognition] action".[28]

b. Two alternative approaches

14. Several recent U.S. cases have been interpreted as suggesting two alternative approaches to the jurisdiction inquiry in the enforcement context.

15. The first alternative approach is that reflected in the 2001 decision of the New York Appellate Division (an intermediate-level appeals court in the State of New York) in the case of *Lenchyshyn v. Pelko Electric, Inc.*[29] ("Lenchyshyn"), which has been interpreted to suggest that an action to recognise and enforce a foreign judgment may be brought in the United States regardless of whether the court has personal jurisdiction over the judgment debtor, or whether the judgment-debtor has assets in the state addressed.[30] In that case, the Court, after confirming that the judgment debtor did not need to be subject to personal jurisdiction in New York, found that:

> *[E]ven if defendants do not presently have assets in New York, plaintiffs nevertheless should be granted recognition of the foreign country money judgment… and thereby should have the opportunity to pursue all such*

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[22] *Ibid.*, 910.
[23] 260 Mich. App. 144 (2003).
[24] 260 Mich. App. 144, 163 (2003) (emphasis added).
[25] For example, in *Glencore Grain Rotterdam BV v. Shivnath Rai Harnarian Co.*, the Court of Appeals for the Ninth Circuit found that a party seeking the confirmation of a foreign arbitral award against an Indian company did not satisfy either personal or *quasi-in-rem* jurisdiction in California: 284 F.3d 1114 (2002).
[26] An official ALI comment accompanying its Restatement states that "an action to enforce a judgment may usually be brought wherever property of the defendant is found, without any necessary connection between the underlying action and the property, or between the defendant and the forum": § 481 cmt. H (1986).
[27] Section 9 of the ALI Proposed Statute provides that "[a]n Action to recognize or enforce a judgment under this Act may be brought in the appropriate state or federal court (i) where the judgment debtor is subject to personal jurisdiction; or (ii) where assets belonging to the judgment debtor are situated."
[28] 2005 Recognition Act § 6 cmt. 4.
[29] 281 A.D.2d 42 (2001).
[30] R. A. Brand, *op. cit.* (note 11), p. 189.

> *enforcement steps in futuro, whenever it might appear that defendants are maintaining assets in New York.*[31]

The decision in the *Lenchyshyn* case has been criticised by the International Commercial Disputes Committee of the New York City Bar Association as a "departure from prior New York authority", which had previously followed the "either-or" approach described above.[32]

16. The second alternative approach, reflected in the 2002 decision of the Court of Appeals for the Fourth Circuit in the case of *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"* [33] ("Base Metal"), lands on the other end of the spectrum. In that case, the court refused to recognise a foreign arbitral award against a Russian debtor on the basis that *quasi-in-rem* recognition was insufficient for enforcement. The court confirmed that there must be personal jurisdiction, or at least if there are only assets in the state addressed, that those assets must be directly related to the dispute underlying the original arbitral award.[34] A similar position was taken by the Court of Appeals for the Fifth Circuit in the case of *First Investment Corporation of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd*[35] ("First Investment"), in which the Court upheld a decision to dismiss an enforcement action under the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("New York Convention") for want of personal jurisdiction.

17. As with *Lenchyshyn*, however, the decisions in *Base Metal* and *First Investment* appear to be outliers, and it is not clear how (or if) they might affect the most commonly accepted approach to jurisdiction in actions for the enforcement of foreign judgments.

2. Other jurisdictions

18. In other common law jurisdictions, questions of personal jurisdiction can arise in the enforcement context.[36] In these jurisdictions, establishing personal jurisdiction over the judgment debtor depends on whether a person is present in the jurisdiction or whether the person has submitted to a court's authority. Is the person located outside the jurisdiction and has not submitted willingly, then personal jurisdiction may only be established if the person abroad can be served validly.[37] In each case, service of process is said to be the "foundation" of personal jurisdiction.

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[31] *Lenchyshyn*, *op. cit.* (note 29), p. 50.
[32] The International Commercial Disputes Committee of the Association of the Bar of the City of New York, *Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards* 15 (2005), available at < http://www.nycbar.org/pdf/report/ForeignArbitral.pdf > (hereinafter "New York Bar").
[33] 283 F.3d 208 (2004).
[34] *Ibid.*, at 213.
[35] 703 F.3d 742 (2012).
[36] The authority for the position that an action for the enforcement of a foreign judgment creates a jurisdictional instance is often considered to be the judgment of the English Court of Appeal in *Perry v. Zissis* [1977] 1 Lloyd's Law Report 607. See also Lord Collins of Mapesbury *et al*, *Dicey, Morris & Collins: The Conflict of Laws* (15th edn, Sweet & Maxwell 2012) p. 678 ("The English court must have *in personam* jurisdiction over the judgment debtor").
[37] For Australia, see A. Davies *et al*, *Nygh's Conflict of Laws in Australia*, p. 26, para. 3.4. For the United Kingdom, see *Dicey, Morris & Collins* (*op. cit.* note 36). For Canada, see Castel (2nd ed., 1968) p. 948. For New Zealand, see New Zealand Law Commission, Electronic Commerce (Report No 50), para. 264. For Israel, see T. Einhorn, *Private International Law in Israel*, (Kluwer Wolters, Alphen aan den Rijn, 2009), p. 279, para. 771. For Singapore, see < http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview/chapter-6 >, para. 6.2.1. For Commonwealth Africa, see generally Oppong (*op. cit.* note 10), *Private International Law in Commonwealth Africa* (2013) (which includes a survey of Gambia, Ghana, Kenya, Nigeria, Sierra Leone, Uganda, Zambia, and Zimbabwe). This may be

19. Where the judgment debtor is present *in the jurisdiction*, there appears to be no jurisdictional bar to an enforcement action. This is because at common law, the court may serve process anywhere within the territory of the jurisdiction.[38]

20. However, where the judgment debtor is *outside the jurisdiction* (*e.g.*, present, resident or domiciled abroad), separate legislative authorisation is required before the court may serve process abroad.[39] This authorisation may be given expressly or, in some instances, has been implied to exist.

21. In several jurisdictions, the rules of civil procedure expressly authorise service outside the jurisdiction where the action is brought on a foreign judgment. This is the case in some of the Australian jurisdictions,[40] England and Wales,[41] Israel,[42] New Zealand,[43] Northern Ireland,[44] and Singapore.[45]

22. In a 2007 decision in *Tasarruf Mevduati Sigorta Fonu v. Demirel* ("*Tasarruf*"), the English High Court confirmed that such a rule did not require any other connection between the forum and the judgment debtor, such as the presence of assets.[46] This finding was subsequently upheld by the Court of Appeal.[47]

23. In other jurisdictions, there is no specific rule authorising service outside the jurisdiction for an action on a foreign judgment. This is the case in some of the Australian jurisdictions and several States of Commonwealth Africa.[48] In some of these jurisdictions, the courts have sought to overcome this obstacle by applying the rule authorising service outside the jurisdiction in contract actions, on the basis that a foreign judgment establishes an *implied* contract on the part of a judgment debtor to pay the judgment debt to the judgment creditor.[49] This approach has been questioned by some commentators.[50] However, the

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contrasted to the United States of America, where service is not viewed as a precondition to the establishment of jurisdiction.

[38] See, *e.g.*, the decision of the High Court of Australia in *Laurie v. Carroll* (1958) 98 CLR 310, p. 323.

[39] In this regard, the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* plays an important role is facilitating the establishment of jurisdiction in common law courts over foreign defendants.

[40] See, for example, New South Wales (*Uniform Civil Procedure Rules 2005*, Schedule 6(u)).

[41] *Civil Procedure Rules*, r. 6.20(9).

[42] *Civil Law Procedure Regulations 5744-1984*, r. 500(8).

[43] High Court Rules, r. 6.27(2)(m).

[44] Rules of the Court of Judicature (NI) 1980, O. 11, r. 1(1)(m).

[45] Supreme Court Rules of Court, O. 11, r. 1(m).

[46] [2007] 2 All ER 815, available at < http://www.bailii.org/ew/cases/EWHC/Ch/2006/3354.html >. It can be expected that a similar approach will be applied in other common law legal units. Note, however, that this seemingly clear pronouncement has been put in some doubt in the light of the subsequent High Court decision in *Linsen International Ltd v. Humpuss Sea Transport Pte Ltd* [2011] EWHC 2339 (Comm) (14 September 2011). According to the *White Book Service*, vol. 1, 2012, p. 280, section 6.37.45, "[i]t appears that this decision [in *Linsen*] has revived the question (thought to have been settled by the *Tasarruf* case) whether there is any territorial limitation to para. 3.1(10) and created doubt".

[47] *Demirel v. Tasarruf Mevduati Sigorta Fonu* [2007] 4 All ER 1014, available at < http://www.bailii.org/ew/cases/EWCA/Civ/2007/799.html >.

[48] It was also the case in England and the other common law jurisdictions prior to the introduction of a specific rule. This has been referred to as a "small but irritating loophole in the law": *White Book Service, op. cit.* (note 46).

[49] *Grant v. Easton* (1883) 13 QBD 302, where Brett MR (with whom Baggallay and Bowen LJJ concurred) stated (at 303): "An action upon foreign judgment may be treated as an action in either debt or assumpsit: the liability of the defendant arises upon the implied contract to pay the amount of the foreign judgment". This view has been accepted by the Supreme Court of Victoria (Australia) in *Earthworks and Quarries Ltd v FT Eastment and Sons Pty Ltd* [1966] VicRp 5; [1966] VR 24 (24 March 1965), per Dean J.. So much was noted by the Supreme Court of New South Wales (Australia) in *Belan v. Casey*: "The view that the law implies a promise to do that which a party is legally liable to perform led to a decision that there was an implied contract on the part of a judgment debtor to pay a judgment debt, including a foreign judgment debt… This implied contract to pay a judgment debt justified the court in using a rule which permitted service out of the jurisdiction of actions for breach of contract to enforce a judgment debt".

[50] One leading textbook in Australia has described the approach as "rather dubious": *Nygh's Conflict of Laws in Australia*, para. 3.45, fn. 119. The approach was doubted, but nevertheless followed by the

Permanent Bureau is unaware of any recent cases in which the notion of an "implied contract" has been tested as a main issue.

24. Even in common law jurisdictions where service abroad is authorised, it may require the prior permission of the court ("leave"), which is granted at the court's discretion.[51] It is worth mentioning that in the *Tasarruf* case, the English Court of Appeal stated that leave to serve outside the jurisdiction in an enforcement action should not be granted "unless it is just to do so", adding that it would ordinarily not be just to do so unless there was a "real prospect of a legitimate benefit to the claimant from the English proceedings".[52] The Permanent Bureau is unaware of any other case in which a court of another jurisdiction has considered the exercise of its discretion to grant leave to serve outside the jurisdiction in an enforcement action.

25. In almost all of the common law jurisdictions surveyed, valid service is sufficient for the court to establish jurisdiction over the judgments debtor. In Canada, however, the Supreme Court has confirmed that the rules authorising service abroad are not grounds for jurisdiction *in themselves* (although they may indicate when jurisdiction is established); instead, establishing jurisdiction requires a "real and substantial" connection between the forum, the subject matter of the litigation, and the defendant.[53] In other words, even if legislation allows for service abroad,[54] jurisdiction is not established unless a real and substantial connection is established.[55]

26. Although some commentators have stated that the requirement of a real and substantial connection applies both to actions on the merits as well as to actions to enforce a foreign judgment,[56] a recent unanimous decision of the Court of Appeal for Ontario has accepted that such a requirement is not applicable in the enforcement context.[57] To support this finding, the court noted that the "constitutional and comity imperatives" underpinning the real and substantial connection test for actions on the merits are absent for enforcement actions, in

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NSW Supreme Court in *Nominal Defendant v. Motor Vehicle Insurance Trust of Western Australia* (1983) 50 ALR 511, 515. One commentator has noted that in the various common law States in Africa (Gambia, Ghana, Kenya, Malawi, Nigeria, Sierra Leone, Tanzania, Uganda and Zambia), it is an undecided issue whether service outside the jurisdiction may be allowed in an action to enforce a foreign judgment: Oppong, *op. cit.* (note 10), p. 321.

[51] In relation to Australia, see the Australian Attorney-General's Department's 2012 paper "Reducing legal complexity of cross-border transactions and relationships: Driving micro-economic reform through the establishment of more cohesive and clearer jurisdictional, applicable law and choice of court rules", Discussion Paper 1, available at < http://consult.govspace.gov.au/pil/consultation-documents/ > p. 11.

[52] *Tasarruf* case, *op. cit.* (note 47), para. 27. In that case, which concerned an action to recognise and enforce a Turkish judgment in the absence of assets in England, the court found that there was a reasonable possibility that the judgment debtor would have assets in the jurisdiction (either in the form of physical assets or in the form of claims against other institutions), and accordingly upheld the decision to grant leave.

[53] *Van Breda v. Village Resorts Limits* 2012 SCC 17, para. 100. The issue of whether such a connection exists will generally be raised by the defendant in seeking to set aside service, and the burden is on the plaintiff of "identifying a presumptive connecting factor that links the subject matter of the litigation to the forum".

[54] See, *e.g.*, *Rules of Civil Procedure*, r. 17.02(m).

[55] In some provinces, the rules of civil procedure have been revised to incorporate the "real and substantial" requirement, such that service abroad is only authorised if there is a real and substantial connection. See, *e.g.*, Alberta (*Rules of Court*, Rule 11.25(2)) and British Columbia (*Supreme Court Civil Rules*, r. 4-5(1) coupled with s. 10(k) of the *Court Jurisdiction and Proceedings Transfer Act*).

[56] S. Pitel and N. Rafferty, *Conflict of Laws*, 2010, p. 159-160, who note that the real and substantial connection requirement should virtually always be satisfied by the presence of assets of the judgment debtor within the jurisdiction.

[57] *Yaiguaje v. Chevron Corporation* [2013] ONCA 758, see in particular para. 34, available at < http://www.ontariocourts.ca/decisions/2013/2013ONCA0758.htm >. In this respect, the court upheld the decision on appeal of the Superior Court of Justice of Ontario, which had noted that the requirement of a real and substantial connection would render "meaningless" the rule authorising service abroad (*i.e.*, r. 17.02(m) of the *Rules of Civil Procedure*): *Yaiguaje v. Chevron Corporation*, *op. cit.* (note 9), para. 80.

view of the fact that the court addressed is only being asked to exercise jurisdiction in respect of the enforceability of a judgment in its territory (in this case, Ontario), and is not purporting to intrude on matters that are properly within the jurisdiction of foreign courts.[58]

27. On the basis of the foregoing, the Permanent Bureau makes the following observations with regard to surveyed common law jurisdictions other than the United States of America:

a. there appears to be no jurisdictional obstacle to bringing an action for the enforcement of a foreign judgment where the judgment debtor is present in the jurisdiction or voluntarily submits to the jurisdiction of the court;

b. the absence of a specific rule in some common law jurisdictions authorising service outside the jurisdiction for actions on a foreign judgment may be a jurisdictional obstacle to bringing an action for the enforcement of a foreign judgment in those jurisdictions against an absent judgment debtor;

c. the existence of a specific rule in some other common law jurisdictions authorising service outside the jurisdiction for actions on a foreign judgment appears to remove this jurisdictional obstacle;

Part III – *Forum Non Conveniens*

1. United States of America

28. Within the United States, the doctrine of *forum non conveniens* has been developed and refined, at federal level, in the case law of the Supreme Court.[59] Its jurisprudence offers federal courts a substantial discretion in determining whether to stay or dismiss proceedings where an alternative forum exists, and that forum is adequate and more appropriate to hear the case. In determining whether the alternative forum is appropriate, the court will evaluate certain "private interest" and "public interest" factors.[60]

29. At state level, the states and state courts have their own – often diverging – state law versions of *forum non conveniens*, developed either under common law or legislated for by state statute. A commentator recently noted that these versions are not uniform, with "the law of the various states [tending] to both move away from, and back to, the federal standard."[61]

30. By and large, the doctrine of *forum non conveniens* is applied in actions on the merits (whereby the court of origin divests declines to exercise jurisdiction). However, in several cases, the doctrine has been raised — and applied — in

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[58] [2013] ONCA 758, para. 33.

[59] See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Koster v. Lumbermens Mut. Cas. Co*., 330 U.S. 518 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). The doctrine of *forum non conveniens* was mostly recently addressed by the court in its decision of 3 December 2013 in the case of *Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas* (no 12-929).

[60] These factors were listed by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) 330 U.S. at 506-9. "Private" interests include the availability of information, sources, evidence, witnesses, and all other practical factors that make trial of a case "easy, expeditious and inexpensive," along with a consideration of the financial, reputational, or other potential burden on the defendant potentially resulting from the enforcement action in the particular forum. "Public" interests include the alleviating the administrative burden on congested legal centres and a preference for having localised controversies decided at home.

[61] R. A. Brand, "Challenges to *Forum Non Conveniens*", 45 NYU Journal of International Law and Politics 1003-1035 (2013), p. 1016.

actions for the recognition and enforcement of a foreign judgment under uniform state legislation:

a. In a 1998 decision in *Watary Services Limited v. Law Kin Wah,*[62] the Appellate Division of the New York State Supreme Court held that a Hong Kong judgment could not be refused recognition and enforcement on grounds that New York was an inconvenient forum as this was not one of the grounds for non-recognition provided for under New York legislation.

b. In a 2004 decision in *Turksoy v. Acar,*[63] another department of the same court took a different approach by affirming the dismissal of an action to enforce a foreign judgment on *forum non conveniens* grounds.

c. In a 2010 decision in *Thomas v. Carvel*[64], the District Court for the Southern District of New York stated — albeit as a passing comment in a footnote — that, notwithstanding the limited grounds for non-recognition under New York legislation, it was open for a judgment debtor to move to dismiss an action to enforce an English judgment under the doctrine of *forum non conveniens*.[65]

31. The application of the doctrine of *forum non conveniens* in the enforcement context has attracted greater attention in the context of the recognition and enforcement of foreign arbitral awards. This is particularly so in the wake of the following two decisions of the U.S. Court of Appeals for the Second Circuit dismissing actions to enforce foreign arbitral awards under the New York Convention and its Inter-American counterpart, the *Convention of 30 January 1975 on International Commercial Arbitration* ("Panama Convention"):

a. In a 2002 decision in *Monegasques de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine* ("Monde Re")[66], the court affirmed the dismissal of an action for the recognition and enforcement of a foreign arbitral award on *forum non conveniens* grounds, even before establishing that it had jurisdiction to hear the case. In that case, an action was brought against the award debtor as well as Ukraine (on the basis that the debtor had acted as agent for Ukraine). After an evaluation of the private and public interest factors, taking into account the location of the relevant evidence, the applicability of Ukrainian law to determine the liability of Ukraine as principal, and the absence of any U.S. parties, the court agreed that a forum in Ukraine would be more appropriate to hear the case.[67]

b. In a 2011 decision in *Figueiredo Ferraz e Engenharia de Projeto v. Republic of Peru* ("Figueiredo Ferraz"),[68] the court again applied the doctrine of *forum non conveniens* to dismiss an application to enforce a foreign arbitral award.[69] In that case, a Brazilian

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[62] 247 A.D.2d 281, 668 N.Y.S.2d 458.
[63] 772 N.Y.S.2d 831. In this case, the dismissal was based on § 327 of the Civil Practice Law and Rules, which codifies the doctrine of *forum non conveniens* in the State of New York.
[64] 736 F. Supp. 2d 730 (S.D.N.Y. 2010), fn. 25.
[65] *Ibid*.
[66] *Monegasques de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2002)
[67] The decision in *Monde Re* confirming the applicability of the doctrine of *forum non conveniens* in cases brought under the New York Convention was followed by the District Court for the Southern District of New York in a 2010 decision in *Constellation Energy Commodities Group v. Transfield ER Cape Ltd*, 801 F.Supp.2d 211 (2011). In that case, however, the court determined, after evaluating the private and public interest factors, to proceed with the action, ultimately ordering a U.K. arbitral award to be enforced.
[68] 665 F.3d 384 (2011).
[69] *Inter-American Convention on International Commercial Arbitration.*

> company sought to enforce a Peruvian arbitral award against a Peruvian governmental agency. In what has been seen as a slight but significant departure from the use of the *forum non conveniens* analysis in its earlier decision in the *Monde Re* case, the public interest cited by the court in justifying the dismissal was *not* the interest of the Second Circuit specifically or the U.S. courts in general (as described above in the terms laid out in *Gulf Oil Corp*), but instead the public interest of Peru itself. The court found that there was a "public interest in assuring respect for a sovereign nation's attempt" to address the specific financial contention at issue in the case, and that only the Peruvian courts were "empowered to speak authoritatively" on the subject.[70]

32. The applicability of *forum non conveniens* in the enforcement context has been criticised by commentators[71] and the New York Bar,[72] as well as by Judge Lynch in his dissenting opinion in the *Figueiredo Ferraz* case. For the most part, however, such criticism has not been levelled at the applicability of the doctrine of *forum non conveniens* in the enforcement context generally,[73] but specifically at cases brought under the New York Convention as an internationally agreed compact. In this context, the real issue is whether the New York Convention — with its obligation to enforce foreign arbitral awards and limited grounds for refusal — preserves or displaces the doctrine of *forum non conveniens* under internal law.

33. According to the Court of Appeals, the obligation in Article III of the New York Convention (to "recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon") allowed for the application of *forum non conveniens* as this was a doctrine of a *procedural* nature.[74] Moreover, nothing in the grounds for refusal in Article V of the Convention displaced *forum non conveniens* as these were all of a *substantive* nature.[75] The approach taken by the Court of Appeals was supported by the United States in an *amicus* brief submitted in the *Figueiredo Ferraz* case, which expressed the view that the doctrine of *forum non conveniens* is procedural

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[70] 665 F.3d at 392. The decision in *Figueiredo Ferraz* has been followed by the District Court for the Southern District of New York in a 2012 decision in *Skanga Energy & Marine, Ltd v. Arevenca S.A.* 875 F.Supp.2d 264 (2012). In that case, however, the court determined, after evaluating the private and public interest factors, to proceed with the action.

[71] See, *e.g.*, W.W. Park and A.A. Yanos, "Treaty obligations and national law: Emerging conflicts in international arbitration", Hastings Law Review, Vol. 58, 2006, p. 251, 361 ("In concluding that the New York Convention imposes no limitations (other than non-discrimination) on procedural rules at the enforcement forum, the Second Circuit seems to have gone astray as a matter of both logic and history").

[72] *Op. cit.* note 32.

[73] But see M.H. Adler, who seems to query the appropriateness of applying the doctrine of *forum non conveniens* in the enforcement context, noting that the doctrine is designed to measure whether it is convenient to hold a trial on the underlying merits rather than hear an enforcement action: "*Figueiredo v. Peru*: A Step Backward for Arbitration Enforcement", 32 Northwest Journal of International Law and Business, Vol. 32, 2012, 38A, 42A. Another commentator, A.S. Rau, has leveled criticism at *how* the Court of Appeals in *Figueiredo Ferraz* evaluated the private and public interest factors in determining that the alternative forum in Peru was appropriate. In this regard, Rau finds the decision to be "astonishing and inexcusable". It should be noted that the New York Bar has supported the decision of the Appellate Division of the New York State Supreme Court in *Watary Services Limited v. Law Kin Wah*, *op. cit.* (note 62) (that the doctrine of *forum non conveniens* was not available in an action for the recognition and enforcement of a foreign judgment) and has rejected the decision of the court in *Turksoy v. Acar*, *op. cit.* (note 63): New York Bar, *op. cit.* (note 32), p. 22 (accompanying note 100).

[74] *Monte Re*, *op. cit.* (note 66), 496. In coming to this conclusion, the court relied on the characterisation made by the U.S. Supreme Court in a case that was not concerned with the interpretation of Art. III of the New York Convention.

[75] *Figueiredo Ferraz*, *op. cit.* (note 68), 392-3.

rather than substantive, and therefore "an available ground for dismissal in proceedings brought pursuant to the Panama Convention".[76]

34. Critics of the approach taken by the Court of Appeals argue that the reference to "rules of procedure" in Article III of the New York Convention relates to formalities for bringing actions to recognise and enforce a foreign arbitral award, such as fees and forms.[77] It is a reference to *how* the arbitral award is to be enforced, not *whether* the award should be enforced.[78] They draw authority from the decision of the Court of Appeals for the Ninth Circuit in *Hosaka v. United Airlines, Inc.*, which held that the jurisdictional rule under Article 28 of the Warsaw Convention[79] — which provides for "questions of procedure" to be governed by the law of the forum — displaced the application of the doctrine of *forum non conveniens*.[80]

35. Critics also point to Article V of the Convention as constituting an international agreement on the limited instances in which an award will be refused recognition and enforcement. They argue that by effectively refusing recognition and enforcement by the application of a doctrine that is not recognised in many other negotiating States, the approach taken by the Court of Appeals imports into the international regime an element that the negotiating States did not bargain for.[81] They also point to the fact that applying the doctrine of *forum non conveniens* to actions for recognition and enforcement of foreign arbitral awards under the New York Convention undermines the objective of the Convention to enhance and unify the worldwide recognition and enforcement of such awards.[82]

36. The American Law Institute (ALI) and American Bar Association (ABA) have recently added their voices to the debate in support of prohibiting the application of the doctrine of *forum non conveniens* to actions for recognition and enforcement of foreign arbitral awards under the New York (and Panama) Conventions. According to the draft Restatement (Third) of the United States Law

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[76] Extracted in "Office of the Legal Adviser", United States Department of State, *Digest of United States Practice in International Law* (2011) pp. 450-451, available at < http://www.state.gov/documents/organization/194113.pdf >.

[77] Park and Yanos (*op. cit.*, note 71), p. 261.

[78] Judge Lynch ("the "procedure" provisions of the treaties permit variation with regard to the manner in which signatory states enforce international arbitration awards; they do not provide a means by which a state may decline to enforce such awards"); New York Bar (Article III of the New York Convention "was intended to deal only with the issue of *how* awards are to be enforced under the treaty, not *whether* such awards are to be enforced"), p. 19.

[79] Convention for the Unification of Certain Rules relating to International Carriage by Air.

[80] In particular, the court refused to "infer from the treaty's incorporation of local procedural law that the drafters acquiesced in the application of *forum non conveniens*, a concept that was (and is) both alien to an unwelcome by the majority of the contracting parties". The New York Bar has argued that the same analysis as applied by the court should apply to Arts III and V of the New York Convention: p. 20.

[81] Judge Lynch ("there is little reason to think that the drafters of the treaties, who were drawn from a variety of legal traditions, considered what impact this rather technical and distinctly American use of the term [doctrine of procedure] might have on the enforceability of international arbitration awards"); See also Park and Yanos, *op. cit.* (note 71), pp. 262-3 ("[a]lthough a Convention country can certainly set up ministerial conditions for award enforcement, such as making the application to the correct court or paying a reasonable filing fee, the Convention drafters did not expect the recognition forum would establish procedural bars to award confirmation").

[82] The New York Bar refers to the comment by the U.S. Supreme Court in *Scherk v. Alberto-Culver Co* that "[t]he goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries": 417 U.S. 506, 520 n. 15 (1974). See also Rau, who comments that "[t]o strive for the universal recognition of awards is to assume that enforcement actions may (and are likely to) go forward in multiple fora wherever it seems worthwhile to pursue the respondent; in imposing its obligations, the Convention in fact *institutionalizes* the forum shopping that *forum non conveniens* is designed to avoid", at 4. He further adds that "to start down the path of asking an enforcement court whether an "adequate alternative forum" exists may lead us far from the route mapped out by the Convention", at 5.

of International Commercial Arbitration approved by the Council of the ALI in December 2011, "[a]n action to confirm a U.S. Convention award or enforce a foreign Convention award is not subject to a stay or dismissal in favour of a foreign court on *forum non conveniens* grounds".[83] In a Resolution adopted at its annual meeting in August 2013, the ABA affirmed that "the U.S. common law doctrine of *forum non conveniens* is not an appropriate basis for refusing to confirm or enforce arbitral awards that are subject to the provisions of the [New York Convention] or the [Panama Convention] and that refusal on that basis is not consistent with U.S. treaty obligations under these Conventions and U.S. implementing legislation".[84]

37. Without an authoritative ruling from the U.S. Supreme Court, the applicability of the doctrine of *forum non conveniens* to actions for recognition and enforcement of foreign arbitral awards under the New York Convention remains a matter of debate. At this stage, it is unclear whether the approach taken by the Court of Appeal for the Second Circuit will be followed by U.S. courts in other circuits.

2. Other jurisdictions

38. In other jurisdictions that recognise the doctrine of *forum non conveniens*, its application in the enforcement context has attracted very little attention in the case law and commentary. Courts in Canada and England have confirmed its availability in actions for the recognition and enforcement of foreign judgments at common law.

39. In *Beals v. Saldanha*, the Supreme Court of Canada noted that *forum non conveniens* could be raised to challenge the enforcement of a foreign judgment[85] (although *forum non conveniens* was not an issue in that case). Similarly, in the recent case of *Yaiguaje v. Chevron Corporation*, the Court of Appeal for Ontario noted that a *forum non conveniens* motion could be brought to challenge the enforcement of a foreign judgment, although queried whether a *forum non conveniens* analysis was "apposite" in the enforcement context.[86]

40. In the Tasarruf case, the English High Court accepted that the existence or non-existence of assets within the jurisdiction could possibly be a *forum conveniens* factor, for example if there were related issues being fought, or to be fought, in another jurisdiction.[87] However, the Permanent Bureau is unaware of any cases in which the doctrine of *forum non conveniens* has been applied in these jurisdictions to decline jurisdiction in an action to enforce a foreign judgment.

41. Indeed, it appears from the commentary that the doctrine would only ever be applied in exceptional circumstances. For instance, one Canadian commentator argues that because an order enforcing a foreign judgment applies to local assets alone, there is no basis for staying an action on the grounds that the forum is inappropriate or that the judgments debtor's principal assets are elsewhere.[88] A similar argument was accepted in the Tassaruf case, where the English High

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[83] Section 4-29(a).
[84] Resolution adopted by the House of Delegates, 12-13 August 2013.
[85] 2003 SCC 72, para. 35.
[86] Op. cit. note 57, see particularly paras 60 and 72.
[87] *Tasarruf*, *op. cit.* (note 46), para. 54. In that case, the judgment debtor argued that the claim should be heard in the Cayman Islands, where a similar enforcement action had already been commenced.
[88] J. Walker, *Castel & Walker: Canadian Conflict of Laws* (6th ed., 2005), pp. 14-10.

Court agreed that England was clearly the appropriate forum for the enforcement of a foreign judgment in England.[89]

42. The Permanent Bureau has been unable to find any cases in other jurisdictions in which the application of the doctrine of *forum non conveniens* has arisen in the enforcement context.

Part IV – Addressing the issues in future work on the Judgments Project

43. The issue of *forum non conveniens* in the enforcement context does not appear to have been raised during past work on the Judgments Project. Conversely, the issue of jurisdiction in the enforcement context has been discussed, albeit briefly.

44. In a meeting of the Special Commission in June 1997,[90] a suggestion was made to include a provision establishing jurisdiction in the State of the place of enforcement of the judgment. Some experts stressed that this jurisdiction was self-evident and that the provision was not needed, whilst others noted that such a provision would be helpful in clarifying that the enforcement of a judgment should not be restricted solely to the defendant's forum, which might otherwise be implied in the absence of such a provision. The issue was not raised in subsequent meetings of the Special Commission, and no such provision was ultimately included in the Preliminary Draft Convention.

45. In carrying out its mandate, the Working Group may wish to consider the merits of addressing these two issues in future meetings.[91] To assist in this regard, the Permanent Bureau offers the following observations:

On the issue of personal jurisdiction in the enforcement context

a. The internal law of many States (not only the United States of America and other common law jurisdictions) imposes jurisdictional limits on actions for the enforcement of foreign judgments. Whatever the basis for these limits, and despite the different labels used, the relevant rules appear to share a similar objective of directing the enforcement of foreign judgments to the judgment debtor's home forum, or the forum in which enforcement measures may be taken to satisfy the judgment (*e.g.*, by the presence of assets).

b. Most recognition and enforcement regimes established under regional treaties do not contain rules prescribing the jurisdiction of the court addressed to hear an enforcement action.[92] At the same time, it is conceivable for an instrument on the recognition and enforcement of foreign judgments to contain such rules (or indeed to contain a provision confirming that the instrument does not affect existing jurisdictional rules under the law of the State addressed).

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[89] *Tasarruf*, *op. cit.* (note 46), para. 56. On appeal, the Court of Appeal, *op. cit.* (note 47), confirmed that "England is obviously the proper place to bring a claim to enforce a judgment in England because there is nowhere else where such a claim can be brought" (para. 45).

[90] See Prel. Doc. No 8, para. 45.

[91] In this regard, the Permanent Bureau suspects that the desirability of any future work may be linked to the "openness" of the recognition and enforcement regime under the future instrument, including its provisions on substantive scope (see Part I of the "Annotated checklist of issues to be discussed by the working group on recognition and enforcement of judgments") and the grounds for refusal (see Part III.3 of the "Annotated checklist of issues to be discussed by the working group on recognition and enforcement of judgments").

[92] *Cf* the regime under the Brussels I Regulation in the European Union, discussed above at note 10.

c. Rules prescribing the jurisdiction of the court addressed to hear an enforcement action, even if contained in a binding instrument, would not displace constitutional constraints in the United States that shape the requirements of personal jurisdiction in view of the supremacy of the U.S. Constitution under internal law — so much is clear from the decisions cited in this paper on the enforcement of arbitral awards under the New York Convention.[93] The situation is different in the other jurisdictions where jurisdictional limits are not the subject of constitutional constraints.

On the issue of forum non conveniens *in the enforcement context*

d. The doctrine of *forum non conveniens* plays a very marginal role in the enforcement context in those jurisdictions to which it is known.

e. In the United States of America, debate continues as to whether the doctrine of *forum non conveniens* is displaced by recognition and enforcement regimes established under treaties such as the New York Convention (noting that the doctrine does not evoke the same constitutional constraints in that State as personal jurisdiction). This debate centres on whether the doctrine of *forum non conveniens* is a matter of "procedure", and whether it is therefore permitted under rules contained in these treaties providing for the recognition and enforcement procedure to be governed by the law of the State addressed.

f. Like the New York Convention, the Choice of Court Convention contains a rule providing for the recognition and enforcement procedure to be governed by the law of the State addressed.[94] The Hartley-Dogauchi Report notes that national procedure law may not be applied to refuse the recognition and enforcement of a foreign judgment, and therefore that the application of *forum non conveniens* has been displaced by the Convention.[95] The Working Group has determined that the starting point for preparing proposals for inclusion in a future instrument should be the corresponding provisions of the 2005 Hague Choice of Court Convention, where relevant.[96]

g. A rule excluding the application of the doctrine of *forum non conveniens* in the enforcement context could be included in a future instrument.[97] The rule would effectively mirror Article 5(2) of the 2005 Hague Choice of Court Convention, which excludes the

[93] For example, *First Investment*, *op. cit.* (no 35).
[94] Art. 14 ("The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously").
[95] Hartley-Dogauchi Report, para. 215 ("National procedural law does not of course cover the grounds on which recognition or enforcement may be refused. These are governed exclusively by the Convention: see Article 8(1) (second sentence)").
[96] "Report of the First Meeting of the Working Group on the Judgments Project (18-20 February 2013)", Prel. Doc. No 3 of March 2013, Annex 1.
[97] In the context of ongoing discussions regarding the implementation of the Choice of Court Convention in the United States, Peter Trooboff has suggested that the doctrine might be excluded by a provision in the implementing legislation preventing a court from declining recognition or enforcement "on the ground that the matter should be heard in a court of another country… including on the ground of *forum non conveniens*": "Ensuring jurisdiction over treaty party's judgments", *National Law Journal*, 1 October 2012, p. 2. Brand has noted that such a rule "would be consistent with the expectation of U.S. treaty partners in the negotiation of the 2005 Hague Convention and would prevent unnecessary litigation that is certain to occur if such a rule is not included": "Challenges to *forum non conveniens*", Ronald A. Brand, "Challenges to *Forum Non Conveniens*", 45 NYU Journal of International Law and Politics 1003-1035 (2013), p. 1030.

application of the doctrine of *forum non conveniens* in actions on the merits.

46. If the Working Group wishes to address these two issues in future meetings, some of the ideas contained in the above observations may be further developed and refined. The Permanent Bureau remains available to assist the Working Group in this regard.