Twenty-Second Session

Recognition and Enforcement of Foreign Judgments

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Title	Note on "common courts" in Article 4(5), (6) of the 2018 draft Convention	
Author	Permanent Bureau	
Objective	To facilitate discussions on "common courts" in the 2018 draft Convention at the Diplomatic Session	
Annexes	**ANNEX I** – Identified common courts **ANNEX II** – Explanatory paper on the nature and workings of common courts in the European Union (prepared by the European Union)	
Related documents	Note on "common courts" in Article 22 of the February 2017 draft Convention	

I. Introduction[1]

1. The draft Convention on the recognition and enforcement of foreign judgments in civil or commercial matters will facilitate the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State.[2] During the meetings of the Special Commission (hereinafter, the "Special Commission") on the Recognition and Enforcement of Foreign Judgments (hereinafter, the "Judgments Project") in February and November 2017 and May 2018, the experts discussed the need for a mechanism to deal with judgments given by courts common to two or more States (hereinafter, "common courts"), and produced several proposals to include such a mechanism in the draft Convention.[3]

2. Provisions concerning common courts were first included in the February 2017 draft Convention at the Second Meeting of the Special Commission.[4] With a view to facilitating the discussions during the Third Meeting in November 2017, the Permanent Bureau prepared a "Note on 'common courts' in Article 22 of the February 2017 draft Convention" (hereinafter, the "2017 Note").[5] At the November 2017 meeting, a number of approaches in relation to common courts were discussed, including:

a. inserting a reference to common courts in a definition of "court" in Article 3(1);

b. adding a reference to judgments given by common courts in Article 4;

c. making amendments to Article 22 of the February 2017 draft Convention, including providing for more detailed declarations and some form of bilateralisation mechanism; and

d. omitting any reference to common courts in the text of the draft Convention, and instead explaining in the Explanatory Report whether, and on what basis, the judgments of common courts may circulate under the draft Convention in the absence of any express reference to such courts.[6]

3. As each option required further consideration, the meeting decided to retain the square brackets around the text of Article 22 of the February 2017 draft Convention (Art. 21 of the November 2017 draft Convention[7]).[8] As proposed by the Chair of the Special Commission at the Third Meeting,[9] an informal working group was established to discuss the treatment of judgments

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1 The Permanent Bureau (PB) is grateful to the European Union (hereinafter, "EU") for providing the explanatory document on the nature and workings of common courts in the EU, and to the United Kingdom for providing assistance on the information of the Judicial Committee of Privy Council. The PB also thanks David Goddard QC, Chair of the Special Commission on the Recognition and Enforcement of Foreign Judgments, and Marcelo De Nardi, chair of informal working group II on the treatment of common court judgments, for their assistance in the preparation of this Note.

2 Art. 1(2) of the 2018 draft Convention (available on the HCCH website at < www.hcch.net > under "Judgments Section" and "22nd Diplomatic Session").

3 For ease of discussion, the term "draft Convention" is used to refer to the 2018 draft Convention. Where it is appropriate, other draft versions of the Convention will be specifically identified.

4 Art. 22 of the February 2017 draft Convention (available on on the HCCH website at < www.hcch.net > under the "Judgments Section", "22nd Diplomatic Session" and "Previous Special Commission meetings").

5 Prel. Doc. No 9 of October 2017 for the attention of the Special Commission of November 2017 on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017) (see path indicated in note 4).

6 *Aide memoire* of the Chair of the Special Commission of November 2017, para. 25 (available on the Secure Portal of the HCCH website at < www.hcch.net > under "Special Commission meetings" then "Special Commission on the Judgments Project").

7 Art. 21 of the November 2017 draft Convention (see path indicated in note 4).

8 *Aide memoire* of the Chair of the Special Commission of November 2017, para. 26 (*op. cit.* note 6).

9 *Ibid.,* para. 42.

delivered by common courts, and the outcome of this informal working group[10] was submitted to the Fourth Meeting of the Special Commission, which took place in May 2018.

4. At its Fourth Meeting, the Special Commission considered four different proposals on the treatment of common court judgments:[11]

a. to delete Article 21 of the November 2017 draft Convention, and leave the issue of recognition and enforcement of judgments of common courts to national law. It was considered that common courts present new and unexplored issues both for common courts already in existence and those yet to be created, and thus it would be premature to include them in the draft Convention.[12] It was also considered that this had been the approach taken by the HCCH in the *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, the "2005 Choice of Court Convention");

b. to include in the draft Convention various forms of positive declarations in relation to common courts to enhance transparency, including the option of a detailed positive declaration, given the unknown elements of common courts and their operation;[13]

c. to make provision in the draft Convention for declarations by Contracting States to opt in or opt out in relation to the recognition and enforcement of judgments of common courts;[14] and / or

d. to deal with the issue of common courts by way of definition in Article 4 of the draft Convention; this approach looks to the outcome of the common courts, *i.e.*, what types of judgments may circulate.[15]

5. The Special Commission decided to delete Article 21 of the November 2017 draft Convention and include two alternative texts (Art. 4(5); or Art. 4(5) and (6)) in the draft Convention in square brackets, as a marker to facilitate further reflection and discussion on this issue in preparation for the Diplomatic Session.[16] The alternative texts are extracted below:

"*Article 4 General provisions*

[…]

[[5. For purposes of paragraph 1, a judgment given by a court common to two or more States shall be deemed to be a judgment given by a court of a Contracting State if the Contracting

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10 Work. Doc. No 254 of May 2018, "Report of informal working group V on common courts (Art. 21)" (Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018)) (see path indicated in note 6).

11 *Aide memoire* of the Chair of the Special Commission of May 2018, para. 13 (see path indicated in note 6).

12 Work. Doc. No 245 of May 2018, "Proposal of the delegation of the Russian Federation" (Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018)) (see path indicated in note 6); for discussion, Minutes of the Fourth Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018), Minutes No 3, paras 5 and 6 (see path indicated in note 6).

13 Work. Doc. No 222 of November 2017, "Proposal of the delegation of the People's Republic of China" (Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017)) (see path indicated in note 6); for discussion, Minutes of the Fourth Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018), Minutes No 3, paras 10 and 15 (see path indicated in note 6).

14 Work. Doc. No 249 of May 2018, "Proposal of the delegations of Israel and the Republic of Korea" (Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018)) (see path indicated in note 6); for discussion, Minutes of the Fourth Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018), Minutes No 3, paras 7 and 8 (see path indicated in note 6).

15 A joint proposal of the European Union and the United States of America was included in Work. Doc. No 254 of May 2018 (*op. cit.* note 10); for discussion, Minutes of the Fourth Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018), Minutes No 3, paras 3 and 4 (see path indicated in note 6).

16 *Aide memoire* of the Chair of the Special Commission of May 2018, para. 14 (*op. cit.* note 11).

State has identified the common court in a declaration to that effect, and either of the following conditions are met –

(a) all members of the common court are Contracting States whose judicial functions in relation to the relevant matter are exercised by the common court, and the judgment is eligible for recognition and enforcement under Article 5(1)(c), (e), (f), (l), or (m); or

(b) the judgment is eligible for recognition and enforcement under another sub-paragraph of Article 5(1)[, Article 5(3),] or under Article 6, and those eligibility requirements are met in a Contracting State whose judicial functions in relation to the relevant matter are exercised by the common court.]

OR

[5. For purposes of paragraph 1, a judgment given by a court common to two or more States shall be deemed to be a judgment given by a court of a Contracting State if the Contracting State has identified the common court in a declaration to that effect, and either of the following conditions are met –

(a) all members of the common court are Contracting States whose judicial functions in relation to the relevant matter are exercised by the common court, and the judgment is eligible for recognition and enforcement under Article 5(1)(c), (e), (f), (l), or (m); or

(b) the judgment is eligible for recognition and enforcement under another sub-paragraph of Article 5(1)[, Article 5(3),] or under Article 6, and those eligibility requirements are met in a Contracting State whose judicial functions in relation to the relevant matter are exercised by the common court.

6. *A Contracting State may declare that it shall not recognise or enforce judgments of a common court that is the object of a declaration under paragraph 5 in respect of any of the matters covered by that declaration.*

or

6. The declaration referred to in paragraph 5 shall have effect only between the Contracting State that made the declaration and other Contracting States that have declared their acceptance of the declaration. Such declarations shall be deposited at the Ministry of Foreign Affairs of the Netherlands, which will forward, through diplomatic channels, a certified copy to each of the Contracting States.]]"

6. The Special Commission also suggested that the informal working group continue working on this topic. It encouraged Members to share informal and specific examples in relation to the nature and workings of common courts, and the application of the draft provision.[17]

7. Following these mandates, an informal working group was re-established. The EU prepared an explanatory document on the nature and workings of common courts in the EU (hereinafter, the "2018 EU Document"), which was shared with the group. In order to provide the participants in the Diplomatic Session with a full picture of the common courts in the EU, the 2018 EU Document is attached as Annex II to this Note.

8. With a view to facilitating further discussion on these provisions at the upcoming Diplomatic Session, the Permanent Bureau has prepared this Note. Section II of this Note first provides an

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17 *Ibid.,* para. 15.

overview of common courts which are analysed in more detail in Annex I. Section III then explains the concept and types of common courts. Section IV discusses the treatment of common court judgments both under the current common court provisions in Article 4(5) and (6) of the draft Convention, and in circumstances where there is no express provision for common courts in the draft Convention. Section V concludes by setting out two possible options to deal with common court judgments, discusses their implications, and flags certain issues for consideration.

9. For ease of discussion, the term "common court State" is used in this Note to refer to the State which is a party or member of the common court.

II. Overview of the identified common courts

10. Annex I to this Note identifies several common courts for the purposes of the draft Convention. This information intends to provide clarity and transparency on the common courts that are in existence at the time of writing. It should be noted that this list is not exhaustive.

11. By way of summary, Annex I addresses five regional / international courts with broad jurisdiction covering a wide range of civil or commercial matters. They are the Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law (CCJA), the Caribbean Court of Justice (CCJ), the Eastern Caribbean Supreme Court (ECSC), the Court of Justice of the Andean Community (TJCA), and the Judicial Committee of the Privy Council (JCPC). The Annex further identifies two regional / international courts which specialise in intellectual property matters. The two courts are the Benelux Court of Justice and the future Unified Patent Court (UPC).

12. It should be noted that the 2017 Note had included the Court of Justice of the European Union (CJEU) as one of the common courts. The 2018 EU Document, however, states that the CJEU is *not* a common court under the regime of the draft Convention.[18] It is a court of a Member of the HCCH for two reasons: first, the CJEU is part of the institutional framework of the EU, being its sole judicial body. Should the EU, as a Member of the HCCH, become bound by the future Judgments Convention, CJEU judgments would be governed by the future Convention as those of national courts. Secondly, this is the approach taken by the 2005 Choice of Court Convention. As stated in the 2018 EU Document, this approach will need to be continued, given the complementary nature of the 2005 Choice of Court Convention and the draft Convention.[19]

13. Annex I sets out the background, structure, membership, subject matter jurisdiction and function of each identified court. It also looks at the possibility of these common courts recognising or enforcing foreign judgments and, if so, how this could be done. Annex I also indicates, where appropriate, whether the common court shares jurisdiction with national courts.

14. General observations as to these courts are that:

(i) There are common courts dealing with a wider scope of civil or commercial matters that fall under the scope of the draft Convention, such as contractual matters, company law related matters, etc. From available information, it appears that common courts dealing

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18 2018 EU Document, paras 17-21.

19 T. Hartley & M. Dogauchi, "Explanatory Report on the 2005 Hague Choice of Court Convention", in *Proceedings of the Twentieth Session* (2005), Tome III, *Choice of Court Agreements*, Antwerp – Oxford – Portland, Intersentia, 2010, para. 17 ("Hartley/Dogauchi Report"): "It follows from this that a choice of court agreement designating 'the courts of the European Community' or referring specifically to 'the Court of Justice of the European Communities (Court of First Instance)' would be covered by the Convention." See also, 2018 EU Document, paras 22-24, which describe how decisions of the CJEU could circulate under the draft Convention, see Section II. d.). For further discussion, see "Judgments Convention: Revised Draft Explanatory Report", Prel. Doc. No 1 of December 2018 for the attention of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019) ("revised draft Explanatory Report"), para. 124 (see path indicated in note 2).

with specific subject matters that are within the scope of the draft Convention are only intellectual property courts.

(ii) There are common courts with an appellate function only (*e.g.*, the CCJA, JCPC), or with first instance and appellate functions (both in civil or commercial matters) (*e.g.*, the Benelux Court of Justice). There are also common courts with first instance and appellate functions, each function having jurisdiction over different subject matters, *e.g.*, the first instance may have jurisdiction over a subject matter that falls outside the scope of the draft Convention, while the appellate function may have jurisdiction over matters within scope (*e.g.,* the CCJ).

(iii) None of the identified common courts seems to have responsibility for enforcing foreign judgments (except to the extent that they have an appellate role and hear appeals about disputes concerning enforcement). The recognition of foreign judgments is of course a separate issue, and in the absence of express rules about recognition would be governed by the national law applied by the relevant common court in connection with a matter before that court.

(iv) Except for the transitional period of the future UPC, there is no shared jurisdiction between the identified common courts and their relevant national courts in adjudicating first instance cases.

III. Concept and types of common courts

15. The concept of common courts in the draft Convention is the same as that in the 2017 Note. As explained in the revised draft Explanatory Report, in the context of the draft Convention, the term "common court" refers to a court that is empowered by two or more States, by agreement or by unilateral act, to (i) exercise jurisdiction over matters including those that come within the scope of application of the draft Convention, *i.e.*, civil or commercial matters; and (ii) deliver decisions on the merits including decisions that qualify as "judgments" under Article 3(1)(b). Under such agreements or unilateral acts, States transfer or delegate their judicial power to a common court. The common court may be vested with either exclusive or concurrent power in relation to national courts. As such, the common court forms part of the judicial system of the States which established the common court and the judgments of the common court could therefore be equated to the judgments given by the national court of that State. The creation of common courts usually, but not necessarily, reflects the interests of different States in ensuring a uniform interpretation and application of harmonised substantive law, *e.g.*, unitary intellectual property rights.[20]

16. Certain international courts such as the International Court of Justice (ICJ), the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (CIDH) or the World Trade Organization (WTO) Appellate Body do not qualify as common courts under the draft Convention. These courts deal with public international law disputes, not with civil and commercial matters, and accordingly do not exercise jurisdiction *of* the States but *over* the States as subjects of international law. The term "common courts" does not extend to arbitration tribunals,[21] specialised courts established by one State,[22] nor other bodies that do not have an adjudicatory function.[23]

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20 Revised draft Explanatory Report, para. 123.

21 *E.g.*, the Permanent Court of Arbitration (PCA) or the International Centre for Settlement of Investment Disputes (ICSID) Arbitral Tribunal.

22 *E.g.*, the Singapore International Commercial Court (SICC) or the Dubai International Finance Centre (DIFC) Court.

23 *E.g.*, the Patent Office of the Co-operation Council for the Arab States of the Gulf. It should be noted that at this stage of negotiation, decisions of patent offices of Contracting States are not covered by the scope of the draft Convention, except the situation in Art. 8(3).

17. In addition, although courts established under Bilateral Investment Treaties (BIT) to deal with investor-State disputes do not qualify as common courts because they exercise jurisdiction *over* the State as a subject of international law, as highlighted in the revised draft Explanatory Report, it cannot be completely ruled out that in the future there might be cases in which these courts function as common courts.[24]

18. As to the functions of the common courts, they may serve as either an appellate court only, or as both a first instance and appellate court. When serving solely as an appellate court, the first instance court is still a court of the State which is a party to the common court. This categorisation has implications for the way in which decisions are circulated under the draft Convention.

19. It is worth noting that the "common court" issue may arise not only where a court is common to two or more States, but also for example where a non-unified legal system has common courts hearing appeals from territorial units with different systems of law. Article 23 would apply in that context, requiring certain references (including references to courts) to be read as applying "where appropriate" to either the territorial unit or the State.

IV. Treatment of common court judgments

20. The draft Convention provides explicit provisions on the treatment of common court judgments (Art. 4(5) and (6)). It would also be interesting to see whether and how common court judgments would circulate if there is no express provision under the draft Convention. This section deals with both situations.

A. Operation of Article 4(5) and (6) of the draft Convention

21. Differing from the approach taken in Article 22 of the February 2017 draft Convention, the current provisions on common courts (Art. 4(5) and (6)) look to the outcome of the common courts' processes, *i.e.*, the types of judgments that they deliver.

22. Article 4(5) and (6) of the draft Convention set out two alternative ways of addressing the circulation of common court judgments. They are substantially similar: both options provide for a declaration mechanism according to which a Contracting State may declare that judgments given by designated common courts are deemed to be judgments of that State's courts and therefore within the scope of the draft Convention (Art. 4(5)). Under the second option (Art. 4(5) and (6)), recognition and enforcement of judgments of common courts identified in such a declaration depends on the willingness of other Contracting States to recognise and enforce those judgments. There are two sub-options: either Contracting States other than the ones having made a declaration under Article 4(5) may "opt-out" by declaring that they will not recognise or enforce judgments from common courts identified in such a declaration (variant 1) or recognition or enforcement of judgments from designated common courts depends on each other Contracting State to "opt in" by express acceptance of a declaration made under Article 4(5) (variant 2).

1. Alternative 1 – Article 4(5) only[25]

23. According to this provision, judgments given by a court common to two or more States qualify as judgments for the purpose of the draft Convention if: (i) the Contracting State has identified the common court in a declaration to that effect; and (ii) certain conditions are met.

24. The first requirement means that judgments given by common courts do not automatically fall within the scope of the draft Convention: a positive declaration by the Contracting State(s) on behalf

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24 Revised draft Explanatory Report, para. 124 (the *co-Rapporteurs* invite examples on this point).

25 A detailed and comprehensive analysis of the operation of Art. 4(5) is provided in the revised draft Explanatory Report, paras 125-138. For the sake of consistency, the Note duplicates the analysis.

of which such a common court exercises jurisdiction is needed. This will provide clarity and transparency for other Contracting States.

25. Additionally, sub-paragraphs (a) and (b) of Article 4(5) clarify the application of the jurisdictional filters established by Articles 5 and 6 to judgments of common courts. Some of the filters in Articles 5 and 6 are based on links between a judgment and a specific Contracting State, *i.e.*, the State of origin, whereas common courts exercise jurisdiction on behalf of two or more States. The application of those filters does not give rise to difficulties when the common court performs an appellate function only, as the filter can be applied by reference to the first instance court in a Contracting State. The application of the filters also does not give rise to difficulties when all of the States on behalf of which the common court exercises first instance jurisdiction are Contracting States. But if only some of them are Contracting States, it may be clearer and more transparent for the application of the jurisdictional filters to be subject to additional controls to prevent the so-called "free rider problem": that parties litigating before common courts in non-Contracting States may seek to access the draft Convention system. Sub-paragraphs (a) and (b) would provide these controls and prevent the problem. Without these additional controls, States which are party to the agreement establishing the common court, but not Party to the draft Convention, could benefit from the recognition and enforcement of judgments under the draft Convention without having to adhere to any of the obligations.

26. **Jurisdictional filters based on consent: Article 4(5)(a).** Sub-paragraph (a) deals with cases where the jurisdictional filter is based on consent rather than a geographical connection to the territory of the State of origin: Article 5(1)(c), judgments against the person that brought the claim; Article 5(1)(e), defendant's express consent to the jurisdiction of the court of origin; Article 5(1)(f), the defendant argued on the merits without contesting jurisdiction; Article 5(1)(l), judgments on a counterclaim; and Article 5(1)(m) non-exclusive choice of court agreements.[26] Judgments of common courts covered by these jurisdictional filters will not be recognised or enforced under the draft Convention unless all of the State members of the common court are Contracting States because it is not possible to connect such judgments to a specific State.

27. **Jurisdictional filters based on a geographical connecting factor: Article 4(5)(b).** Sub-paragraph (b) deals with cases where the jurisdictional filter is based on a geographical connecting factor, *i.e.*, it is based on a particular link between the dispute and the territory of the State of origin: Article 5(1)(a)-(b), habitual residence or principal place of business of the person against whom recognition or enforcement is sought; Article 5(1)(d), location of a defendant's branch, agency or other establishment; Article 5(1)(g), place of performance of a contractual obligation; Article 5(1)(h), situation of an immovable property; or Article 5(1)(j), place where a harm occurs. And the same holds with regard to the jurisdictional filters laid down by Articles 5(3) and 6. In these cases, the draft Convention requires that those eligibility requirements be met in a Contracting State whose judicial function in relation to the relevant matter is exercised by the common court that delivers the judgment. This requirement of a connection to a Contracting State means that it is not necessary, unlike under sub-paragraph (a), that all State members of the common court be Contracting States to the draft Convention.

28. **Example.** Suppose that there is a common court established by States X, Y and Z. States X and Y are Parties to the draft Convention and made a declaration under Article 4(5), but State Z has not become a Party to the draft Convention. In this case, a judgment given by that common court will not circulate under the draft Convention if the only applicable jurisdictional filter is that the defendant argued on the merits before the common court without contesting jurisdiction (see Art. 5(1)(f)) or that the defendant's habitual residence was in State Z. Conversely, such a judgment will circulate if

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[26] The *co-Rapporteurs* note that sub-para. (k) is also based on consent but is however not included in Art. 5(1)(a). It is true that it refers to the "State of origin" but when the common courts have jurisdiction on trusts matters, the clause will usually refer to those common courts and letter (k) should be interpreted accordingly.

the defendant's habitual residence was in State X or Y. These outcomes ensure that State Z will not derive any benefit from the draft Convention even though State Z is a member of the common court.

29. Conversely, however, the benefit of the draft Convention would be reduced for States X and Y in this scenario. For example, a judgment of the common court sitting in State X, in circumstances where the parties to the dispute had agreed to the non-exclusive jurisdiction of the common court sitting in State X, or to "the non-exclusive jurisdiction of the courts of State X" (which would include the common court, for matters within its jurisdiction), would not circulate under the draft Convention.

30. **Intellectual property rights.** The application of Article 4(5) to the jurisdictional filters laid down by Articles 5(3) and 6(a) is not as straightforward. First, it depends on whether the common court has jurisdiction over national and / or unitary intellectual property rights. If the common court has jurisdiction over national intellectual property rights, *i.e.*, rights granted or registered for each Member State, then the Article 4(5)(b) conditions may be met if the intellectual property right was granted for the territory of a State that is Party to the draft Convention.

31. In the case of unitary intellectual property rights, *i.e.*, when the intellectual property right is granted or registered for the entire territory of the States on behalf of which that common court exercises jurisdiction, the question is more complex. As regards judgments on [registration or] validity, all of those States must be a Party to the draft Convention to meet the conditions laid down by Article 4(5)(b). But in relation to judgments on infringement, the draft Convention may be interpreted in two different ways.

32. First, one interpretation is that the parallelism between [registration or] validity and infringement entails that a unitary intellectual property right is infringed not in a particular member State but in all member States on behalf of which the common court exercises jurisdiction, *i.e.*, any infringement of that unitary intellectual property right occurs in all of them. In such a case, all those States must be Party to the draft Convention to meet the condition laid down by Article 4(5).

33. **Example.** If there is a court common to States X, Y and Z, which has jurisdiction over unitary intellectual property rights granted for the entire territory of these three States, judgments on infringement of such rights given by the common court will only meet the requirements set out by Article 4(5)(b) if those three States are Parties to the draft Convention (and obviously made the corresponding declaration).

34. Alternatively, it may be that judgments on [registration or] validity and judgments on infringement should be treated differently. Under this second interpretation, judgments on infringement of a unitary intellectual property right would meet the condition set out in Article 4(5)(b) if the infringement may be located in the territory of a particular member State(s) on behalf of which the common court exercises jurisdiction. If that member State has ratified the draft Convention and made the corresponding declaration, the condition laid down by Article 4(5)(b) would be satisfied, irrespective of whether the other member States have not.

35. **Example.** Suppose that there is a court common to States X, Y and Z, which has jurisdiction over unitary intellectual property rights granted for the entire territory of those three States. Only States X and Y are Parties to the draft Convention. In this case, judgments on validity of those intellectual property rights would not circulate under the draft Convention. Conversely, judgments on infringement of such rights would circulate and meet the condition laid down by Article 4(5)(b) if the infringement occurred in the territory of State X or Y, but not if it occurred in the territory of State Z.

36. **Appellate functions.** As a matter of principle, if the common courts only have appellate functions, paragraph 5 should apply based on the Contracting State where the proceedings at first instance were instituted. Thus, if the first instance court where the proceedings were instituted was

a court of a Contracting State that had made the declaration under Article 4(5), appeal judgments from that common court would be entitled to recognition and enforcement under the draft Convention if either of the two conditions set out by this provision are met.[27]

37. **Common courts as requested courts.** Contracting States are obliged to recognise and enforce judgments in accordance with the draft Convention. This obligation is not affected when the question of recognition arises in proceedings before a common court performing judicial functions on behalf of a Contracting State.[28] The same is true for enforcement, though it will be rare for questions of enforcement to arise before a common court.[29] Therefore, common courts must implement the draft Convention and recognise (and, if relevant to their functions, enforce) judgments in accordance with its provisions. This obligation exists irrespective of whether the Contracting States on behalf of which the common courts exercise jurisdiction have made the declaration envisaged by Article 4(5).

2. Alternative 2 – Article 4(5) and (6)[30]

38. **Introduction.** The alternative formulation of this provision maintains paragraph 5 in the same terms but includes an additional paragraph 6. Paragraph 6 reflects some States' concerns about being obliged to apply the draft Convention to judgments given by common courts based only on a declaration of the State of origin. The text envisages two possible approaches, the first one based on an opting-out system and the second on an opting-in system.

39. **Opting-out system (negative declaration).** Under the opting-out system, if the State of origin of the judgment has made a declaration to include judgments given by common courts within the scope of the draft Convention, any other Contracting State may declare that it shall not recognise or enforce such judgments in respect of any of the matters covered by that declaration. The opting-out may be comprehensive or focused on specific matters.[31]

40. The principle of reciprocity entails that if a Contracting State opts-out, the State(s) of the relevant common court may refuse recognition and enforcement of judgments given by the courts of the State which opted out on matters that fall within the scope of that State's declaration. For example, imagine there is a court common to States X and Y in respect of registered intellectual property right matters. Both States have ratified the draft Convention and made the declaration envisaged by Article 4(5). State Z, in turn, has made the negative declaration envisaged by Article 4(6). Under the reciprocity principle, States X and Y may refuse recognition and enforcement of judgments given by the courts of State Z on registered intellectual property rights.

41. **Opting-in system (positive declaration).** The opting-in system is based on reciprocal declarations. A State's declaration to include judgments given by its common courts within the scope of the draft Convention will only have effect between that State and other States that have expressly accepted that declaration. Positive declarations must be deposited at the Ministry of Foreign Affairs

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27 The *co-Rapporteurs* invite consideration of the following issue: the text of the draft Convention does not provide a different rule for courts that exercise exclusively appellate functions. As a result, one of the two conditions in Art. 4(5) must be met for such judgments to circulate even though the rationale for these jurisdictional limitations is not present where the first-instance judgment comes from a Contracting State that has made a declaration regarding the common appellate court.

28 See also Work. Doc. No 254 (*op. cit.* note 10), paras 13-14.

29 In particular, execution measures are usually strictly territorial and most likely to remain within the exclusive jurisdiction of individual States.

30 A detailed and comprehensive analysis of the operation of Art. 4(5) is provided in the revised draft Explanatory Report, paras 139-142. For the sake of consistency, the Note duplicates the analysis.

31 The *co-Rapporteurs* invite consideration of the following issue: it is not clear from the text whether a Contracting State may make a declaration to only exclude the recognition and enforcement of judgments given by a court with a purely appellate function, in circumstances where the first instance judgment from a court of a Contracting State qualifies for recognition and enforcement under the draft Convention.

of the Netherlands, which will forward a certified copy to each of the Contracting States through diplomatic channels.

B. Treatment of common court judgments without express provisions under the draft Convention

42. This sub-section discusses the recognition and enforcement of common court judgments in the absence of specific provisions like Article 4(5) and (6) of the draft Convention. It does not purport to provide a principled analysis of the way in which common court judgments ought to be recognised and enforced but rather, it is intended to sketch the possibilities helping States make an informed decision at the Diplomatic Session.

43. In advance of these discussions, it would be useful to briefly note the treatment of common court judgments under the 2005 Choice of Court Convention. The 2005 Choice of Court Convention does not contain express provisions on common court judgments. Unlike the negotiations for the draft Convention, the negotiations for the 2005 Choice of Court Convention did not expressly address the common courts issue. In spite of the complementary nature of the draft Convention and the 2005 Choice of Court Convention, the jurisdictional bases for recognition and enforcement under each instrument are fundamentally different and this may result in the different treatment of common court judgments. Under the 2005 Choice of Court Convention, the jurisdictional basis for recognising and enforcing foreign judgments is the exclusive choice of court by the parties,[32] whereas for the draft Convention, the jurisdictional grounds for recognition and enforcement are indirect and differ depending on the subject matter of the dispute. As such, the enforcement mechanism under the 2005 Choice of Court Convention occurs in comparatively narrower circumstances. The analysis of common courts under the draft Convention would not necessarily apply in an analysis of the common courts in the context of the 2005 Choice of Court Convention.

44. Assuming that the draft Convention does not contain any express provisions on common courts, the court addressed would need to rely on the remaining provisions of the draft Convention to determine whether and how common court judgments would circulate.

45. Article 3(1) of the draft Convention defines a judgment as "any decision on the merits given by a court, whatever that decision may be called…". Thus, for a common court judgment to circulate, it should fulfil two requirements: it must be (i) "a decision on the merits" and (ii) "given by a court".[33] The first requirement is not the focus of this Note. As to the second requirement – "given by a court" – the revised draft Explanatory Report explains that the term "court" must be, in principle, interpreted autonomously as referring to authorities or bodies that are part of the judicial branch of a State and which exercise judicial functions.[34] Common courts to which States have transferred or delegated their judicial power (whether it be exercised exclusively from, or concurrently with, national courts) are treated as part of the judicial branch of each of the relevant States. It is likely that they could therefore qualify as a "court" through an autonomous interpretation under the draft Convention.

46. Another important issue for the circulation of common court judgments is the need to identify a "State of origin" with which the decision can be connected. The "State of origin", which is a concept used throughout the draft Convention, enables "a judgment given by a court of a Contracting State (State of origin)" to be recognised and enforced in accordance with an indirect jurisdictional base. Some of these "jurisdictional filters" (contained in Arts 5 and 6) are also premised on geographical connections with the territory of the State of origin (*e.g.*, Art. 5(1)(a) habitually resident in the State of origin; Art. 5(1)(b) principal place of business in the State of origin). In addition, the "State of origin" is also important in the sense that the law of that State determines the validity of the

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32 Arts 8 and 9 of the 2005 Choice of Court Convention.

33 Revised draft Explanatory Report, para. 82.

34 *Ibid.,* para. 89.

judgment – "A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin".[35] Given that a common court exercises jurisdiction transferred or delegated to it by multiple States, the Diplomatic Session may need to consider which, and by what means, a common court judgment would take on the identity of a "State of origin" under the draft Convention in the absence of specific provisions.

47. In order to assist the Diplomatic Session's discussion of the potential issues, this Note provides six scenarios where these issues are at play. Throughout, one should consider whether the circulation of common court judgments ought to differ depending on whether (i) all States to the common court have joined the draft Convention; and (ii) the common court judgments are delivered on appeal (from a national court, or from its own trial division) or at first instance.

48. The discussion will start by examining the recognition and enforcement of *appellate* judgments of common courts, before turning to consider the recognition and enforcement of common court judgments of *first instance*. Scenarios 1 and 2 will consider the enforceability of common court decisions on appeal from national courts, whereas Scenarios 3 and 4 will consider common courts' appellate decisions with respect to a decision of their own trial division. Finally, Scenarios 5 and 6 will consider the enforceability of common court judgments of first instance.

49. *Appeal common court judgments*: All common courts identified in Annex I have appellate functions. The common court may exercise its appellate jurisdiction over a decision of a national court (Scenarios 1 and 2), or over a decision of the common court's own trial division (Scenarios 3 and 4).

50. **Scenario 1.** Suppose that there is a common court established by States X, Y and Z. States X, Y and Z are also Parties to the draft Convention. The common court only hears cases on appeal from the national courts of State X, Y or Z. An appellate decision of the common court is sought to be enforced in State R, also a Party to the draft Convention. The appeal judgment concerned a case from State X.

51. Where the common court decision is an appeal from a national court, and if all the common court States are Contracting States to the draft Convention, it seems acceptable to attribute the "nationality" of the court at first instance to the appeal judgment of the common court. Because the State has transferred its appeal functions to the common court, the common court could then be considered as a court of the Contracting State under Article 4(1) of the draft Convention.

52. If this is the understanding, the references to "State of origin" in Articles 5 and 6 should be interpreted as referring to the State in which the matter was heard at first instance, before it was heard on appeal in the common court. Actual location of the common court, be it in a Contracting State to the draft Convention or not, or in a Contracting State other than the State of the court of first instance, is not relevant in this regard.

53. Should the above analysis reflect an appropriate interpretation, the issue then becomes whether an appeal from the national court of a common court State that has not become a Contracting State to the draft Convention (Scenario 2) should circulate under the draft Convention in the same way that an appeal from a national court of a Contracting State would circulate (Scenario 1).

54. **Scenario 2.** Suppose that there is a common court established by States X, Y and Z. States X and Y are also Parties to the draft Convention, however State Z is not. The common court only hears cases on appeal from the national courts of State X, Y or Z. An appellate decision of the common court is sought to be enforced in State R, also a Party to the draft Convention. The appeal judgment concerned a case from State Z.

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35 Art. 4(3) of the draft Convention.

55. Following the approach in Scenario 1, since State Z has transferred its appeal function to the common court, the common court forms part of the judicial system of State Z, and it should be considered a court of State Z. Therefore, the appellate judgment of the common court would not be permitted to circulate under the draft Convention, because State Z is not a Contracting State to the draft Convention.

56. This Note now turns to consider the appellate judgments of common courts that dispose of matters also heard by the common court at first instance. Two scenarios need to be distinguished: where all common court States are also Contracting States to the draft Convention (Scenario 3) and where not all common court States are Contracting States to the draft Convention (Scenario 4).

57. **Scenario 3.** Suppose that there is a common court established by States X, Y and Z. They are also Parties to the draft Convention. The common court has heard a matter at first instance, and then on appeal. The appellate decision of the common court is sought to be enforced in State R, which is also a Party of the draft Convention.

58. In this scenario, as well as Scenarios 4, 5 and 6, the difficulty arises from the need for the court addressed to attribute a "State of origin" to the common court judgment. Unlike in Scenarios 1 and 2, it is not possible to select a "State of origin" from the "nationality" of the court of first instance.

59. In this respect, the court addressed could determine the "State of origin" by reference to the State most closely connected to the underlying claim that was before the common court. For example, if the common court appeal judgment ruled on a tenancy of immovable property that was situated in State X, then State X could be considered as the State of origin. This is the approach implicit in Article 4(5)(b) of the draft Convention. If there are connections to different States, there could be several "States of origin". For example, the defendant may also have had his or her habitual residence in State Y, such that State Y could also be considered as the State of origin.[36] But in this scenario, each of the potential States of origin is a Contracting State to the draft Convention so the issue is of limited significance.

60. **Scenario 4.** Suppose that there is a common court established by States X, Y and Z. States X and Y are Parties to the draft Convention, however State Z is not. The common court has heard a matter at first instance, and then on appeal. The appellate decision is sought to be enforced in State R, which is also a Party to the draft Convention.

61. The same difficulties concerning the identification of a "State of origin" for the common court appeal judgment arise here as in Scenario 3. Additionally, in this Scenario and in Scenario 6, the court addressed would face a possible "free-riding" issue: the judgment delivered by a common court reflects the exercise of jurisdiction that is partly transferred to it by State Z, which is not a Contracting State to the draft Convention; if the common court judgment were permitted to circulate, State Z might be seen to accrue a benefit without having contracted to the draft Convention, thus "free-riding" on the consent of States X and Y to be bound by the draft Convention. The circulation of such judgments would frustrate the operation of the draft Convention, which applies only among its Contracting States. However, the approach implicit in Article 4(5)(b), which focuses on the existence of a relevant connection with another Contracting State, would appear to avoid this free-riding issue.

62. This Note now turns to consider the enforcement of common court judgments of first instance (Scenarios 5 and 6). Importantly, the analysis in paragraphs 58-59 and 61 also applies to this discussion. The Scenarios are distinguished according to whether all common court States are Contracting States to the draft Convention (Scenario 5) or whether not all of the common court States are Contracting States to the draft Convention (Scenario 6).

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36 Art. 5(1)(a) of the draft Convention.

63. **Scenario 5.** Suppose that there is a common court established by States X, Y and Z. States X, Y and Z are also Parties to the draft Convention. The common court's decision at first instance is sought to be enforced in State R, also a Party to the draft Convention.

64. It seems acceptable that the common court judgment could circulate under the draft Convention (see Scenario 3). However, the issue again is the necessity for the court addressed to determine a "State of origin" by which to recognise and enforce the common court judgment. In this respect, the court addressed could identify the State of origin according to the jurisdiction with which the legal relationship or the underlying claim shares the closest connection. For example, if the decision ruled on a tenancy of immovable property that was situated in State X, State X could be considered as the State of origin. As noted above, this is the approach implicit in Article 4(5)(b).

65. **Scenario 6.** Suppose that there is a common court established by States X, Y and Z. States X and Y are Parties to the draft Convention, however State Z is not. A decision of the common court at first instance is sought to be enforced in State R, also a Party to the draft Convention.

66. Again, the court addressed could encounter the "free-riding" problem (similar discussion can be found in para. 61, *supra*). A mechanism (such as Art. 4(5)(b)) would be needed to ensure an appropriate connection with State X or State Y, to avoid this free-riding problem.

V. Issues requiring further reflection and discussion

67. Clarity and transparency of what common courts are and how they function, as well as the issue of reciprocity, are two issues which require consideration. In terms of clarity and transparency of common courts, a Contracting State should be able to ascertain which courts exercising jurisdiction on behalf of another Contracting State may render judgments that come within the draft Convention, including any relevant common courts. The position in relation to a common court should not be less transparent or less clear than the position in relation to other relevant courts. A Contracting State will also benefit from clarity about the criteria to be applied by its national court to determine whether to recognise and enforce common court judgments.

68. The consideration of reciprocal treatment in the context of common courts under the draft Convention is another important issue. A common court State which is a Contracting State to the draft Convention may expect its common court judgments to circulate under the draft Convention by virtue of the fact that the common court has exercised that State's delegated judicial power. From this perspective, it may propose that the common court be treated as its own national court for the purposes of reciprocal recognition and enforcement under the draft Convention. If, however, the State were denied reciprocal treatment with respect to judgments delivered by the common court, it may create imbalance in the operation of the draft Convention for the State: some judgments – delivered by national courts – would be able to circulate, whereas other judgments – delivered by common courts (the State does not have competence to adjudicate any more) – would not be able to circulate.

69. Based on these considerations, two broad options with regard to the treatment of common court judgments can be presented for discussion: 1) whether to proceed without expressly addressing the treatment of common court judgments in the draft Convention; or 2) whether to address this issue expressly in the framework of the draft Convention. Each option has various sub-options. For example, if Option 1 (no express provision on common courts) is adopted, the way in which the instrument is expected to apply in relation to common courts could be addressed in the Explanatory Report. If Option 2 (express provision in relation to common courts) is adopted, a detailed provision along the lines of Article 4(5) and (6) might be included also with an accompanying explanation in the Explanatory Report. These issues will require further reflection and discussion at the Diplomatic Session.

Option 1: Not expressly referring to common court judgments in the draft Convention

70. This option would require the court addressed to determine whether such judgments fall under the scope of the draft Convention and are therefore eligible for recognition and enforcement, in particular for common courts established in the future. While noting that the court addressed should interpret this issue uniformly (Art. 21 of the draft Convention), it seems likely that courts addressed could still have different practices: some may consider a common court judgment to be covered by the draft Convention, and would therefore attempt to recognise or enforce the judgment, while others may reach a different conclusion and not recognise the judgment. It may then lead to an inconsistent interpretation and operation of the draft Convention. To deal with common court judgments expressly in the framework of the draft Convention would help to avoid this problem. Alternatively, the application of the draft Convention to common courts could be addressed in the Explanatory Report to guide the uniform interpretation and operation of the draft Convention.

Option 2: To deal with common court judgments expressly in the framework of the draft Convention

71. Express provisions to deal with common court judgments could improve clarity under the draft Convention by (1) identifying the common courts that are governed, (2) clarifying the jurisdictional filters through which the decision may be recognised, and (3) enabling courts to declare which common court decisions they will and will not accept.

72. One disadvantage may be that the provisions of the draft Convention become quickly outdated or less relevant due to the evolving nature of common courts, especially for those that will be established in the future and the provisions in the draft Convention might not be sufficient or clear.

73. Given that this Note has previously mentioned the complementary nature of the draft Convention and the 2005 Choice of Court Convention, it may be necessary to explain in the Explanatory Report, irrespective of which approach is taken, whether, and if so, why and how the draft Convention departs from the 2005 Choice of Court Convention. In particular, whether dealing with the common court issue in the framework of the draft Convention entails a different interpretation of the 2005 Choice of Court Convention in this regard.

74. If this option is preferred, the Diplomatic Session could consider the following:

- How can transparency and clarity be promoted if common court judgments are included under the draft Convention?

75. Article 4(5) of the draft Convention addresses concern for transparency by requiring Contracting States to positively identify those common courts which may be deemed to be a court of that Contracting State (for ease of discussion, a “transparency declaration”). Specifying detailed items in the transparency declaration may assist the Contracting States that are not parties to the common court. These items could be listed either in the text of the draft Convention itself or in the Explanatory Report.

76. To include a transparency declaration containing detailed items *in the text of the draft Convention* would enhance clarity and transparency. Contracting States would be bound to make specific declarations. However, considering the evolving nature of common courts, this approach could be rigid, as the declaration requirements may require future updates so that they remain relevant and effective. In addition, this approach could lead to an imbalance in the text of the draft Convention, because the draft Convention does not contain any specific and detailed requirements for other existing declaration mechanisms.

77. If the detailed requirements of the transparency declaration were included *in the Explanatory Report*, there would be flexibility for future updates for existing common courts and for common courts to be established in the future. The non-binding nature of the Explanatory Report means that Contracting States would not be obliged to declare each item specified in the Explanatory Report,

thus providing them with a greater degree of flexibility with respect to future common courts exhibiting unique characteristics. However, at the same time, non-binding obligations do not provide a level of certainty that may be desired by some Contracting States.

78. No matter which approach is preferred, the Explanatory Report could state that the list is non-exhaustive so that other matters relevant for the operation of common courts can also be included in the transparency declaration.

- What specific items should be contained in the transparency declaration?

79. If the items in the transparency declaration need to be specified in the framework of the draft Convention, the following could be considered:

(i) *Name, location and relevant contact information of the common court;*

(ii) *A copy of the legal instrument that established the common court;*

(iii) *List of parties to the legal instrument;*

(iv) *Jurisdiction and function of the common court;*

(v) *Whether and how the common court could recognise and enforce judgments under the Convention;*

(vi) *Other necessary information.*

Any change to the membership or competence of the common court shall be subject to a new declaration.[37]

- Whether existing common courts and common courts established in the future should be dealt with differently under the draft Convention?

80. This Note, in its Annex I, has compiled a non-exhaustive list of common courts. The information provided in this Annex follows the items specified in paragraph 79.

81. New common courts could be established in the future, with features that are not currently foreseen by the Contracting States. Thus, applying common court provisions in the draft Convention to future common courts could cause uncertainty. One solution could be to confine the application of the draft Convention only to common courts in existence at the time of the adoption of the text of the draft Convention, such that Contracting States would be protected from the uncertainty associated with the rise of new common courts.

82. How to recognise or enforce judgments delivered by common courts established in the future may then warrant a separate study or protocol to the draft Convention, should the Diplomatic Session consider it appropriate.

- What other reciprocal considerations arise?

83. Issues concerning reciprocity could arise where the court of a Contracting State exercises the same subject matter jurisdiction as that transferred to a common court. The following examples present these issues.

84. **Scenario 7**: Suppose that there is a common court established by States X, Y and Z. All three States are Parties to the draft Convention, and State R, which is also a Party to the draft Convention, declares that it will not accept judgments from the common court. If a court of State R renders a

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[37] Text derived from "Report of informal working group II – Common courts", Prel. Doc. No 8 of April 2019 for the attention of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019) (see path indicated in note 2).

judgment in the exercise of the same subject matter jurisdiction that is vested in the common court, should States X, Y and Z also refuse the judgment from State R?

85. The revised draft Explanatory Report explains that States X, Y and Z may refuse recognition and enforcement of judgments given by the courts of State R that ruled on the matters falling within the scope of States X, Y and Z.[38] This is based on the reciprocity mechanism ("opt in" or "opt out") provided under the draft Convention.

86. **Scenario 8**: Some common courts may share concurrent jurisdiction with national courts over particular matters. Suppose that there is a common court established by States X, Y and Z. All three States are Parties to the draft Convention, and State R, which is also a Party to the draft Convention, declares that it will not accept judgments from the common court. If State X has concurrent jurisdiction with the common court on a certain subject matter, can courts in State R refuse the judgment given by a court in State X, which ruled on that subject matter?

87. The answer seems to be negative, as courts in State R could only refuse the recognition and enforcement of judgments based on the grounds set out in the draft Convention, none of which permit refusal on the basis that a State has made an Article 4(6) declaration. Under the current draft, the obligations of State R remain unaffected and the courts of State R would need to recognise and enforce State X judgments if other conditions required by the draft Convention are met.

[38] Revised draft Explanatory Report, para. 141.

A N N E X E S

ANNEX
IDENTIFIED COMMON COURTS

Name, location and relevant contact information of the common court	***Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law (CCJA)*** Plateau, Avenue Dr JAMOT, Face Immeuble "Les Harmonies" 01 B.P. 8702 Abidjan 01, Côte d'Ivoire Tel.: +225 20 33 60 51 / 20 33 60 52 Fax: +225 20 33 60 53 E-mail: ccja@ohada.org
A copy of the legal instrument that established the common court	Fourteen African States signed the Treaty on the Harmonization in Africa of Business Law in Port Louis on 17 October 1993 (hereinafter, "OHADA Treaty") to foster the economic growth of their respective region through the harmonisation of business law. The OHADA Treaty established the Organization for the Harmonization in Africa of Business Law (OHADA) with the CCJA as its key judicial institution.[1] The Treaty was revised on 17 October 2008. Three other States have since joined, bringing the total number to 17. The full text of the Treaty (including the 2008 revisions) is available at < http://www.ohada.com/traite.html >.
List of parties to the legal instrument	The 17 States are: Republic of Benin, Burkina Faso, Republic of Cameroon, Central African Republic, Union of Comoros, Republic of Congo, Republic of Côte d'Ivoire, Republic of Gabon, Republic of Equatorial Guinea, Republic of Mali, Republic of Niger, Republic of Senegal, Republic of Chad, the Republic of Togo, the Democratic Republic of Congo, the Republic of Guinea and the Republic of Guinea Bissau.
Jurisdiction and function of the common court	The OHADA Treaty lists areas of law that fall within the scope of its implementation – "all regulations concerning company laws and the legal status of business people, debt recovery, security interests and enforcing proceedings, companies receivership and judicial liquidation, arbitration law, labour law, accounting law, transportation and commercial transactions laws as well as any other issue decided and adopted unanimously by the Council of Ministers in accordance with this Treaty and the provisions of Article 8" shall fall

[1] Structurally, OHADA consists of the Conference of Heads of State and Government, the Council of Ministers, the Common Court of Justice and Arbitration and the Permanent Secretariat (Art. 3(2) of the OHADA Treaty). The OHADA Treaty establishes OHADA as the body tasked to perform duties under the Treaty (Art. 3(1) of the OHADA Treaty).

	within the framework of business laws.[2] During its meeting in Bangui in March 2001, the Council of Ministers expanded this list by including the following areas: competition law, banking law, intellectual property law, contract law and the law of proof.[3] To ensure the implementation of the OHADA Treaty, OHADA passes Uniform Acts regulating the listed areas of law, including Uniform Acts on Commercial Companies and Economic Interest Groups, General Commercial Law, Security Interests, Accounting Law and Financial Reporting, and Simplified Debt Collection Procedures and Enforcement Proceedings and Cooperatives.[4] The CCJA has three principal roles: it (1) reviews the OHADA draft Uniform Acts to ensure their consistency with the OHADA Treaty before they are adopted by the Council of Ministers; (2) supervises arbitrations; and (3) exercises judicial responsibilities (see below).[5]
	In its judicial capacity, the CCJA is responsible for the interpretation and uniform application of the OHADA Treaty, the regulations promulgated to further the Treaty's implementation, the uniform acts and other decisions.[6] In this respect, the court is vested with an advisory jurisdiction. It may be consulted by States, the Council of Ministers, or national courts (hearing a matter under Art. 13) on any issue pertaining to the interpretation and uniform application of the OHADA Treaty, the regulations, the uniform acts or "other decisions". The Court also sits as a court of final appeal over matters concerning the application of the uniform acts and regulations, in which it "shall invoke and rule on the substance".[7] The CCJA rules on decisions rendered by the penultimate national courts of the OHADA Member States in all matters relating to the application of the Uniform Acts and to the regulations contemplated by the OHADA Treaty, save decisions applying criminal sanctions.[8] In this respect, the CCJA functions as the

2 Art. 2 of the OHADA Treaty.

3 Report of the meeting of the OHADA Council of Ministers (Bangui, 22 and 23 March 2001), *Journal Officiel de l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires*, Nr. 12, 6. This report is available at < http://www.ohada.org/docs/JO_OHADA/JO_OHADA_journal_officiel_n_12.pdf >.

4 The process of adoption and modification of Uniform Acts is set out in Arts 5-12 of the OHADA Treaty.

5 C.M. Dickerson, "The OHADA Common Court of Justice and Arbitration: Its Authority in the Formal and Informal Economy", in K.J. Alter, L.R. Helfer and M.R. Madsen (eds), *International Court Authority*, Oxford, Oxford University Press, 2018, pp. 106 -107.

6 Art. 14 of the OHADA Treaty.

7 *Ibid.,* Art. 14(5).

8 *Ibid.,* Art. 14(3).

	highest national court of its Member States.[9] It decides these appeal cases on the merits and does not remit the matters to the national courts for further consideration.[10] The judgments are final and conclusive,[11] have the same effect as those of a national jurisdiction, and bind the lower, national courts of Member States. Execution and enforcement of the judgments is to be ensured by the Contracting States on their respective territories.[12]
Whether and how the common court could recognise and enforce judgments under the Convention	The *Acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution* (the Uniform Act on Simplified Debt Collection and Enforcement Proceedings) was adopted on 10 April 1998 in Libreville (Gabon), and entered into force on 10 July 1998. The purpose of the Act is to provide uniform law across the OHADA Member States for the recovery of debts that are due and in a fixed amount. Under the act, the Member States are required to assist in the execution of judgments and other enforceable instruments.[13] An "enforceable instrument" is defined to include "foreign acts and court decisions, as well as arbitral awards declared enforceable by a court decision, without appeal with stay of execution of the State in which such instrument is invoked".[14] Thus, although the CCJA is empowered to make one of two orders (either an order to make payment, or an order to deliver or return an object), the subsequent physical enforcement of the judgments is returned to national units, according to the Uniform Law.[15] As such, the CCJA does not appear to have jurisdiction to enforce foreign judgments. Instead, it is for Member States to enforce foreign judgments according to their own national law.
Other necessary information	When a case is on appeal by the CCJA, a national court of an OHADA Member State should stay its proceedings until the CCJA renders its decision. Such national court may resume its proceedings only if the CCJA declares that it lacks jurisdiction over a particular case.[16]

9 C.M. Dickerson (*op. cit.* note 5 of this Annex), p. 103.

10 *Ibid.,* p. 107.

11 Art. 20 of the OHADA Treaty.

12 *Id*.

13 *Ibid.,* Art. 29.

14 *Ibid.,* Art. 33.

15 J.A. Yakubu, "Simplified Recovery Procedures and Mechanisms: A Nigerian Perspective on OHADA", in C.M. Dickerson (ed.), *Unified Business Laws for Africa: Common Law Perspectives on OHADA* (2nd ed.), London, IEDP, 2012, p. 105.

16 See Art. 16 of the OHADA Treaty, "The hearing of a case on appeal by the Court, stays automatically all proceedings in view of instituting an appeal before a national court against the decision in question. However this rule does not interfere with the execution of proceedings. Such proceedings can only be carried out after that a decision of the Common Court of Justice and Arbitration declares itself as lacking jurisdiction to hear the matter in question."

Name, location and relevant contact information of the common court	***Caribbean Court of Justice (CCJ)*** Secretariat address: Turkeyen Greater Georgetown Guyana South America Tel: 592-222-0001-6 E-mail: communications@caricom.org
A copy of the legal instrument that established the common court	Since 2001, the Caribbean Community (CARICOM) has been functioning within the framework of the Revised Treaty of Chaguaramas, including the Establishment of the CARICOM Single Market and Economy (CSME).[17] Twelve members of CARICOM established the CCJ as the regional judicial tribunal (relevant establishing agreements hereinafter referred to as the "CCJ Agreement").[18] The CCJ Agreement is available at the following address: <http://www.caribbeancourtofjustice.org/wp-content/uploads/2011/09/ccj_agreement.pdf>.
List of parties to the legal instrument	The 12 Member States are: Antigua and Barbuda, Barbados, Belize, the Commonwealth of Dominica, Grenada, the Co-operative Republic of Guyana, Jamaica, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, the Republic of Suriname and the Republic of Trinidad and Tobago. The Revised Treaty applies to all CARICOM Member States, except The Bahamas and Montserrat. Only four States have accepted the CCJ's appellate jurisdiction (discussed below): Guyana, Barbados, Belize and Dominica.[19]

17 The Caribbean Community is one of the first integration movements among developing countries established by the original Treaty of Chaguaramas signed in 1973. The Treaty and its Annex (setting out the details of the Common Market Arrangements) came into effect on 1 August 1973. The community groups 20 countries: 15 Member States and five Associate Members. See the official website: < http://caricom.org/about-caricom/who-we-are >.

18 Further information on the CCJ is available at < http://www.caribbeancourtofjustice.org/about-the-ccj >.

19 S. Caserta and M.R. Madsen, "The Caribbean Court of Justice: A Regional Integration and Postcolonial Court", in K.J. Alter, L.R. Helfer and M.R. Madsen (eds.), *International Court Authority*, Oxford, Oxford University Press, 2018, p. 149.

Jurisdiction and function of the common court	The CCJ has original and appellate jurisdiction.[20] In its original jurisdiction, the CCJ has exclusive jurisdiction to hear Community law matters concerning (a) disputes between the Member States to the CCJ Agreement, (b) disputes between Member States to the CCJ Agreement and CARICOM, (c) referrals from national courts or tribunals of Contracting States, and (d) application of nationals of the Contracting Parties concerning the interpretation and application of the Revised Treaty.[21] The decisions of the CCJ are to be enforced by all courts and authorities in the territory of the Member States as if they were a decision of the superior courts of the Member States.[22]
	The appellate jurisdiction of the CCJ, on the other hand, concerns civil or commercial disputes.[23] Article XXV, Part III of the CCJ Agreement provides for detailed rules on the appellate jurisdiction of the CCJ. To the extent it is relevant for this Note, the CCJ acts as the highest appellate authority over the decisions of the courts of CARICOM Member States in two situations. First, the CCJ has appellate jurisdiction over the decisions of the Court of Appeal of a Member State ***as of right*** in, *inter alia*, the following cases: • final decisions in civil proceedings where the matter in dispute on appeal to the Court is of the value of not less than twenty-five thousand dollars Eastern Caribbean currency (EC$ 25,000) or where the appeal involves, directly or indirectly, a claim or a question respecting property or a right of the aforesaid value; • other cases as may be prescribed by any law of the Member State.[24] Secondly, the CCJ has appellate jurisdiction ***with the leave of the Court of Appeal of a Member State*** from the decisions of the Court of Appeal in, *inter alia*, the following cases: • final decisions in any civil proceedings where, in the opinion of the Court of Appeal, the question involved in the appeal is one that by reason of its great general or public importance or otherwise, ought to be submitted to the Court; and • such other cases as may be prescribed by any law of the Member State.[25]

20 Part II, Arts XI-XXIV of the CCJ Agreement govern the original jurisdiction of the Court. Under Art. XXII of this Part, the CCJ's judgments are legally binding precedents for parties in proceedings before the Court. It appears that only the judgments laid down in the exercise of the CCJ's original jurisdiction have the *stare decisis* effect. Part III, Art. XXV governs the appellate jurisdiction of the Court.

21 Part II, Art. XII of the CCJ Agreement.

22 *Ibid.,* Part IV, Art. XXVI.

23 *Ibid.,* Part III, Art. XXV.

24 *Ibid.,* Part III, Art. XXV(1)-(2).

25 *Ibid.,* Part III, Art. XXV(3).

	The CCJ enacted its Appellate Jurisdiction Rules on 21 April 2017 (replacing the 2015 version).[26]
Whether and how the common court could recognise and enforce judgments under the Convention	The CCJ Agreement does not expressly provide for the recognition and enforcement of foreign judgments.
Other necessary information	The CCJ acts as a superior court concerning final decisions of national courts.[27] Thus, it is unlikely that there will be parallel proceedings between the CCJ and a national court in the matters that fall within the scope of its jurisdiction.

26 The full text of the CCJ Appellate Jurisdiction Rules is available at <http://www.caribbeancourtofjustice.org/wp-content/uploads/2011/06/AJR-2017.pdf>.

27 *Ibid.,* Part III, Art. XXV(1) and (6): "In the exercise of its appellate jurisdiction, the Court is a superior Court with such jurisdiction and powers as are conferred on it by this Agreement, or by the Constitution or any other law of a Contracting Party" and "The Court shall, in relation to any appeal to it in any case, have all the jurisdiction and powers possessed in relation to that case by the Court of Appeal of the Contracting Party from which the appeal was brought."

Name, location and relevant contact information of the common court	***Eastern Caribbean Supreme Court (ECSC)*** 2nd Floor Heraldine Rock Building Waterfront P.O. Box 1093 Castries Saint Lucia Tel: +1 758 457 3600 Email: offices@eccourts.org
A copy of the legal instrument that established the common court	Under the *West Indies Act of 1967,* the Organisation of Caribbean States and the United Kingdom outlined a "status of association". Pursuant to section 6, a common court of the Associated States could be established by Her Majesty by Order of Council. The West Indies Associated States Supreme Court Order gave effect to section 6 of the *West Indies Act* and established a common court for the Associated States known as the "West Indies Associated States Supreme Court". The West Indies Associated States Supreme Court is now styled as the Eastern Caribbean Supreme Court.
List of parties to the legal instrument	The Organisation of Eastern Caribbean States is a ten-member grouping of islands spread across the Eastern Caribbean. Together, they form a near-continuous archipelago across the eastern reaches of the Caribbean Sea. They comprise the Leeward Islands: Antigua and Barbuda, St. Kitts and Nevis, Montserrat, Anguilla and the British Virgin Islands; and the Windward Islands: Dominica, St. Lucia, St. Vincent and the Grenadines and Grenada and Martinique.
Jurisdiction and function of the common court	Subject to certain conditions, the ECSC has jurisdiction over civil cases.[28]
	The ECSC consists of two divisions, a Court of Appeal and a High Court of Justice.[29] The rules of procedure of the court are set in the ECSC Civil Procedure Rules 2000, as amended from time to time.[30] The Court of Appeal Rules are contained separately.[31] The Court of Appeal has jurisdiction to hear and determine "any matter arising in any civil proceedings upon a case stated, or upon a question of law reserved by the High Court or by a judge." This is, however, subject to "any power conferred in that behalf by a law in operation in that State."

28 Further information is available at <https://www.eccourts.org/court-overview/>.
29 The general overview of the ECSJ, see *id.*
30 The ECSC Rules of Civil Procedure are available at <https://www.eccourts.org/civil-procedure-rules/> ("ECSC Rules of Civil Procedure").
31 The Court of Appeal Rules are available at < https://www.eccourts.org/wp-content/uploads/2015/01/Court-of-Appeal-Rules.pdf>.

	Subject to certain exceptions, the Court of Appeal is empowered to "hear and determine the appeal from any judgment or Order of the High Court in all civil proceedings." For the purposes of determining any issues incidental to an appeal and the remedies, execution, and enforcement of any judgment or order made thereto, the Court of Appeal is endowed with "all the powers, authority and jurisdiction of the High Court."
Whether and how the common court could recognise and enforce judgments under the Convention	The ECSC Rules of Civil Procedure set forth the "[p]rocedure whereby under the provisions of any enactment a judgment of a foreign court or tribunal may be registered in the High Court for enforcement within a Member State or Territory".[32] The registration of foreign judgments in the ECSC may only occur where there is an enactment in force in Member States relating to the reciprocal enforcement of judgments. Therefore, it seems that a judgment creditor needs to register the judgment before the ECSC proceeds for enforcement in the requested Member State. It does not appear that the court has jurisdiction to enforce foreign judgments itself.
Other necessary information	It appears that the ECSC has exclusive jurisdiction. Thus, it is unlikely that there will be a parallel proceeding between the ECSC and national courts in the matters that fall within the scope of the ECSC's jurisdiction.

[32] Part 72, Arts 72.1-72.9 of the ECSC Rules of Civil Procedure.

Name, location and relevant contact information of the common court	**The Court of Justice of the Andean Community (*Tribunal de Justicia de la Comunidad Andina*) (TJCA)** Calle Portete E 11-27 y Gregorio Munga Quito Ecuador Tel.: (593) 2 380-1980 Website: secretaria@tribunalandino.org
A copy of the legal instrument that establish the common court	The Treaty Creating the Court of Justice of the Cartagena Agreement was signed on 28 May 1979, while the Protocol of Cochabamba Amending the Treaty Creating the Court of Justice was signed on 28 May 1996 (the Protocol of Cochabamba hereinafter referred to as the "TJCA Agreement"). Both treaties and the Official Codified Text of the Agreement, together with other relevant instruments of the Andean Community, are available at the following address: <http://www.sice.oas.org/Andean/instmt_e.asp>.
List of parties to the legal instrument	Five States entered into the Cartagena Agreement in 1969, thereby creating a sub-regional economic integration organisation known as the "Andean Pact". Almost three decades later, the Member States adopted the Modification Protocol to the Cartagena Agreement, which created the Andean Community (CAN, *Comunidad Andina*) (hereinafter, the "Modification Protocol").[33] The TJCA is the judicial authority of the Andean Community. The group originally consisted of Bolivia, Colombia, Ecuador, Peru, and Chile; Venezuela joined in 1973 but withdrew in 2006, and Chile withdrew in 1977. Peru suspended its membership in 1992 but resumed it in 1997.

[33] The Official Codified Text of the Andean Subregional Integration Agreement (Cartagena Agreement) defines the structure and competences of the Andean Community (hereinafter, the "Andean Agreement"). Art. 5 establishes the Andean Community. As prescribed in Art. 48, the Community is a sub-regional organisation with international legal capacity or international legal status. The English version of the Andean Agreement is available at < http://www.sice.oas.org/trade/JUNAC/Decisiones/dec563e.asp#CAg >.

Jurisdiction and function of the common court	The TJCA has jurisdiction over disputes that may arise due to the application of Andean Community Law.[34] One part of the Andean Community Law concerns intellectual property rights and copyright and therefore the TJCA has jurisdiction over these areas of law.[35] The TJCA has jurisdiction over three types of actions: the action of nullification, non-compliance, and pre-judicial interpretation over decisions, agreements and other legal instruments of the bodies of the Andean Community.[36] In the number of cases requesting preliminary rulings interpreting Andean laws, references from national courts in the Andean Community are overwhelmingly dominated by intellectual property issues.
Whether and how the common court could recognise and enforce judgments under the Convention	There is no provision on whether the TJCA has the power to enforce foreign judgments.
Other necessary information	The TJCA has exclusive jurisdiction over the subject matters assigned to it in the Modification Protocol,[37] and therefore there is no shared jurisdiction between the TJCA and the Andean Community Member States.

34 Art. 47 of the Andean Agreement.

35 The list of IP Decisions is available at <http://www.wipo.int/wipolex/en/profile.jsp?code=CAN>. One of the main instruments is Decision No 486 Establishing the Common Industrial Property Regime enacted in 2000. The TJCA decides on the interpretation of the relevant acts within the scope of its jurisdiction. See *e.g.*, Case No 43-IP-2014 available at <http://www.wipo.int/export/sites/www/scp/en/meetings/session_22/comments_received/colombia_2.pdf>. However, under Decision No. 486, infringement disputes are left to national authorities, not the TJCA (Title XV, Chapter 1, Art. 238 of Decision No 486). According to the Annual Report of the TJAC, in 2013, 265 out of 273 cases that the TJAC heard are related to pre-judicial interpretation in IP matters. The Annual Report is available at <http://www.tribunalandino.org.ec/sitetjca1/index.php?option=com_filecabinet&view=files&id=3&Itemid=92>. See also L.R. Helfer *et al*., "Islands of effective international adjudication: Constructing an intellectual property rule of law in the Andean Community", *American Journal of International Law*, Vol. 103(1), 2009, p. 2, stating that around 90% of the backlog of TJAC cases concerns IP issues. The article is available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2695&context=faculty_scholarship>.

36 Arts 17-22 (nullification), 23-31 (noncompliance) and 32-36 (pre-judicial interpretation) of the TJAC Agreement.

37 Chapter IV, Art. 42 of the TJAC Agreement: "Member Countries shall not submit any dispute that may arise from the application of provisions comprising the legal system of the Andean Community to any court, arbitration system or proceeding whatsoever except for those stipulated in this Treaty."

Name, location and relevant contact information of the common court	***Judicial Committee of the Privy Council (JCPC)*** Parliament Square London SW1P 3BD Tel: 020 7960 1500 DX 157230 Parliament Sq 4 E-mail: enquiries@supremecourt.uk
A copy of the legal instrument that established the common court	The JCPC was formally created in 1833 by the Judicial Committee Act 1833. < https://www.legislation.gov.uk/ukpga/Will4/3-4/41/contents >
List of parties to the legal instrument	The JCPC acts as the final court of appeal for the overseas territories of the United Kingdom (UK) and Crown Dependencies, and for any Commonwealth country that has retained an appeal to the Queen in Council or, in the case of Republics, to the JCPC.[38]
Jurisdiction and function of the common court	The JCPC has jurisdiction over international, constitutional, civil or criminal cases. Some of the civil cases include questions such as the proper construction of the term "loss of the controlling interest" in a shareholders' agreement, the circumstances in which the corporate veil can be pierced, issues concerning competition law, and torts and liabilities.[39] The jurisdiction of the JCPC is available subject to leave being granted by a national court. The JCPC enjoys some discretion in accepting a direct appeal only in situations where a potential appellant fails to be granted a leave of appeal from a lower court.[40]
	The JCPC has an appellate function. The JCPC can hear appeals from the Crown Dependencies of the UK; overseas territories and sovereign bases of the UK, and Commonwealth countries.

38 More information on the work and structure of the JCPC is available at <https://www.jcpc.uk/>. For further information on the Privy Council, its structure and functions, see Judicial Committee of the Privy Council Appeals, White Book 2018: breakdown of the rules. The countries of the Commonwealth include Antigua and Barbuda, The Bahamas, British Indian Ocean Territory, Cook Islands and Niue (Associated States of New Zealand), Grenada, Jamaica, St Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Tuvalu. The independent republics within the Commonwealth include the Republic of Trinidad and Tobago, the Commonwealth of Dominica, Kiribati and Mauritius. The Crown dependencies are Jersey, Guernsey and the Isle of Man. The overseas territories of the UK are: Anguilla, Bermuda, British Antarctic Territory, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn Islands, St Helena, Ascension and Tristan da Cunha, Turks and Caicos Islands. Additionally, JCPC can hear appeals from sovereign base areas in Cyprus: Akrotiri and Dhekelia.

39 For further information, see the list of pending cases available at <https://www.jcpc.uk/current-cases/index.html>.

40 See Art. 10 of the Judicial Committee (Appellate Jurisdiction) Rules 2009 - As amended, available at <https://www.jcpc.uk/docs/judicial-committee-appellate-jurisdiction-rules-2009.pdf>.

	Commonwealth appeals are from commonwealth jurisdictions and the vast majority of cases disposed by the JCPC refer to this type of appeal. Since the 1960s, Commonwealth appeals seem to be dominated by business law and protection of property rights.
Whether and how the common court could recognise and enforce judgments under the Convention	The JCPC is conferred only with appellate jurisdiction. In order to appeal, leave must be granted by the lower court. It does not have jurisdiction to recognise and enforce foreign judgments of its own accord. Rather, the JCPC deals with the recognition and enforcement of a foreign judgment to the extent only that the appealed decision of a national court concerns this issue.[41]
Other necessary information	The JCPC is a court of final appeal from participating national courts and therefore it does not share that appellate jurisdiction.

41 See *e.g.*, JCPC Judgment in *Vizcaya Partners Limited (Appellant) v. Picard and another (Respondents) (Gibraltar)* [2016] UKPC 5, available at < https://www.jcpc.uk/cases/jcpc-2014-0048.html >.

Name, location and relevant contact information of the common court	***Benelux Court of Justice*** Rue de la Régence 39 1000 Brussels Belgium Tel.: +32 (0)2 519 38 61 www.courbeneluxhof.be
A copy of the legal instrument that establish the common court	In 1965, Belgium, Luxembourg and the Netherlands signed the Treaty on the Establishment and Statute of a Benelux Court of Justice, which entered into force on 1 January 1974 (hereinafter, the "Benelux Court of Justice Treaty"). The text of the consolidated Treaty and the Protocol thereto are available at <http://www.courbeneluxhof.be/fr/basisdocumenten.asp>. The Benelux Court of Justice Treaty established the Benelux Court of Justice as an international court with the primary role to promote uniformity in the application of the legal rules of the Benelux countries in a wide range of fields.[42] The Court is an institution of the Benelux Union.
List of parties to the legal instrument	Belgium, Luxembourg and the Netherlands
Jurisdiction and function of the common court	In 2012, the Benelux countries signed the Protocol amending the Benelux Court of Justice Treaty, which entered into force on 1 December 2016 (hereinafter, the "Protocol"). The Protocol expanded the powers of the Benelux Court of Justice.[43] In particular, Article 1 of the Protocol states that, in order to ensure the uniform application of the legal rules common to the Benelux countries, the court shall have: (a) powers to deal with questions on the interpretation of legal rules; (b) jurisdictional powers; (c) advisory functions.[44] The Protocol and other amendments to the Benelux Court of Justice Treaty shall hereinafter be referred to as the "Consolidated Treaty". In 2014, the Protocol was supplemented by modifications in the Benelux Convention on Intellectual Property, effective on 1 June 2018. One of the main changes brought by these modifications relates to the extension of the jurisdiction of the Benelux Court of

42 The presentation of the Benelux Court of Justice is available at < http://www.courbeneluxhof.be/fr/hof_intro.asp >. The types of matters include intellectual property law (trademarks and service marks, designs and models), motor vehicle liability insurance, penalty payments, visas, collection of tax claims, protection of birds and equal tax treatment.

43 The Benelux countries amended the Treaty and made it possible to transfer jurisdiction to the Benelux Court of Justice in specific matters falling within the scope of Regulation (EU) No 1215/2012 which was amended to regulate the relationship between the Treaty and the Regulation. See Regulation (EU) No 542/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EU) No 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice. The Regulation is available at < http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0542 >.

44 Art. 1 of the 2012 Protocol and Art. 1(2) of the Consolidated Treaty.

	Justice, to deal notably with direct actions in certain intellectual property cases, namely Benelux trademark and designs, instead of the national courts of the three Benelux States. These judgments will be subject to appeal to another chamber, but only on points of law.[45] The Benelux Court of Justice is now the sole judicial body in the Benelux Union with jurisdiction to hear appeals against the final decision of the Benelux Office for Intellectual Property (BOIP) on the registration or validity of these rights. The Benelux Court of Justice will act in these cases both as a first instance court (in the Second Chamber) and as a court having appellate functions (the First Chamber). In addition, there is a possibility of this jurisdiction to be exercised in other areas of law.
	The Benelux Court of Justice has its seat in Luxemburg and consists of the First, Second and Third Chambers.[46] The First Chamber has specific competence to deal with preliminary questions referred by national courts from the three Benelux countries on the interpretation of Benelux law, or to give advice on such interpretation at the request of one of the governments of these countries (please note that such judgments fall outside the scope of the draft Convention). The First Chamber has appellate functions for judgments rendered by the Second Chamber, which deals with direct actions against final decision the BOIP. The Third Chamber deals with staff cases, for personnel of the Benelux Secretariat-General or of the BOIP (please note that such judgments fall outside the scope of the draft Convention).
Whether and how the common court could recognise and enforce judgments under the Convention	As the Court's competence is in the field of preliminary review, and appeal on points of law in IP matters, it does not appear to have the competence to recognise or enforce foreign judgments under the draft Convention.
Other necessary information	The Treaty and its Protocols do not contain rules on parallel proceedings between the Benelux Court of Justice and relevant national courts.

45 *Ibid.,* Arts. 9bis-9quater.

46 *Ibid.,* Art. 4quinquies.

Name, location and relevant contact information of the common court	***The future Unified Patent Court (UPC)***[47]
A copy of the legal instrument that establish the common court	The text of the Agreement on a Unified Patent Court (hereinafter, the "UPC Agreement") is available at <https://www.unified-patent-court.org/sites/default/files/upc-agreement.pdf>.
List of parties to the legal instrument	The UPC Agreement will establish the UPC as a common court to the Contracting Member States of the EU.[48] This agreement is open for signature by all EU Member States and to date has been signed by all of them except for Croatia, Poland and Spain. The court will be common to all Contracting EU Member States and thus can be considered as being part of their national judicial systems. The agreement will enter into force, and thus the UPC will start functioning, once 13 Contracting EU Member States (among them France, Germany and the United Kingdom) have ratified or acceded to the agreement. To date (March 2019) there are already more than 13 ratifications, including France and the United Kingdom. Therefore, three months after Germany ratifies the UPC Agreement the Unified Patent Court will enter into force in the EU Member States that notified their ratification of the Agreement. The UPC will provide specialised dispute resolution in civil litigation on infringement and revocation matters related to European patents and European patents with unitary effect.[49] European patents with unitary effect is a new system that will provide unitary patent protection in all EU Member States that have ratified the UPC Agreement. In addition, the Court will deal with civil litigation concerning supplementary protection certificates and for European patent applications.
Jurisdiction and function of the common court	The UPC will have exclusive jurisdiction in actions for or relating to infringement, provisional and protective measures and injunctions, damages or compensation derived from provisional protection measures, and actions concerning the right of prior use.[50] In such cases action may be brought before the local/regional division of the UPC Court of First Instance (the "UCP-CFI") where either the infringement took place or may take place, or where the defendant has its residence or place of business. If the defendant does not have residence or place of business in a Contracting EU Member State then the action may be brought before the local/regional

47 For information on how the common courts provisions under the draft Convention would apply to judgments delivered by the UPC, see the 2018 EU Document, Section III. c.

48 Art. 1 of the UPC Agreement. The text of the UPC Agreement is available at <https://www.unified-patent-court.org/sites/default/files/upc-agreement.pdf>.

49 Under Art. 3, the scope of the UPC Agreement includes: European patents, European patents with unitary effect, European patents which have not yet lapsed at the date of entry into force of the Agreement or were granted after that date, supplementary protection certificates issued for a product protected by a patent and European patent applications. The area of exclusive competence of the UPC is specified in Art. 32 of the UPC Agreement. As a common court, the UPC must respect and apply EU law and together with the CJEU ensure its correct application and uniform interpretation. The UPC will in particular have the same obligation as any national court to request preliminary rulings in accordance with Art. 267 of the TFEU.

50 Art. 32(1) of the UPC Agreement.

	division where the infringement took place or before the central division. If the Contracting EU Member State in question does not host a local/regional division, then the action may be brought before the central division.[51] Actions for revocation or non-infringement of a patent shall generally be brought before the central division, except where a case between the same parties related to an infringement of the same patent is already pending before a local/regional division. Actions concerning a decision of the European Patent Office when performing tasks relating to the European patent with unitary effect shall be brought before the central division. With regard to counterclaims for revocation of patents brought before the local/regional division in pending infringement actions, the UPC Agreement[52] foresees different possible situations: either the local/regional division proceeds with both actions or it may decide to refer the counterclaim to the central division and proceed with or suspend the infringement actions or, finally, with the agreement of the parties it may refer both actions to the central division.
	Article 32(1) of the UPC Agreement defines the exclusive competence of the UPC; among other things, it includes actions for actual or threatened infringements and related defences, actions for declarations of non-infringement, actions for provisional and protective measures and injunctions, as well as actions for revocation and counterclaims for revocation.[53] Structurally, the UPC will consist of the UCP-CFI, a Court of Appeal and a Registry.[54] The UCP-CFI will be organised in a decentralised way and will include a central division located in Paris with sections in London, dealing with cases concerning human necessities, chemistry and metallurgy, and in Munich, dealing with cases concerning mechanical engineering, lighting, heating, weapons and blasting, as well as local and regional divisions. Each Contracting EU Member State may request from the UPC the setting up of a local division of the UPC-CFI (possibly up to four depending on the number of patent cases registered in that State before the date of the entry into force of the UPC Agreement) or a regional division together with one or several Contracting States. An appeal from the judgments issued by the UPC-CFI may be brought on points of law or on matters of fact before the UPC Court of Appeal. This Court will be seated in Luxembourg.

51 *Ibid.,* Art. 33(1).
52 *Ibid.,* Art. 33(3).
53 *Ibid.,* Art. 32.
54 *Ibid.,* Art. 6.

Whether and how the common court could recognise and enforce judgments under the Convention	The Agreement establishing the UPC provides that its international jurisdiction shall be established on the basis of EU Regulation (EU) No 1215/2012 (regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)) and, where applicable, the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters done at Lugano on 30 October 2007 (Lugano Convention).[55] These treaties do not provide rules on the recognition and enforcement of a judgment given by a court of non-EU Member States.
Other necessary information	National courts delegate their judicial powers to the UPC and there would, in general, be no shared jurisdiction between the UPC and national courts. As stated in Article 32(2) of the UPC Agreement, "[th]e national courts of the Contracting Member States shall remain competent for actions relating to patents and supplementary protection certificates which do not come within the exclusive competence of the Court".[56] However, the situation would be different during the transitional period, as "an action for infringement or for revocation of a European patent or an action for infringement or for declaration of invalidity of a supplementary protection certificate issued for a product protected by a European patent may still be brought before national courts or other competent national authorities."[57] The transition period is seven years, starting from the date of entry into force of the UPC Agreement, which may be extended once by up to seven years. Moreover, in accordance with Article 83(3) of the UPC Agreement, patent applicants / holders may decide to opt out from the exclusive jurisdiction of the UPC, unless an action has already been commenced before the UPC.[58] No such possibility to opt out exists with regard to the European patents with unitary effect.

55 *Ibid.,* Art. 31.
56 *Ibid.*, Art. 32(2).
57 *Ibid.*, Art. 83(1).
58 *Ibid.*, Art. 83(3).

ANNEX II

Explanatory paper on the nature and workings of common courts in the European Union

Prepared by the European Union

I. Introduction

1. In the framework of the Judgments Project the issue of common courts was discussed on several occasions. At the Fourth Meeting of the Special Commission that took place in The Hague between 24 and 29 May 2018 it has been decided to introduce between square brackets two alternative texts in Article 4(5) of the draft Convention, the purpose of which is to deal with the recognition and enforcement of judgments issued by com courts.[1] The two alternative texts are substantially similar, with the notable difference that one version is followed by sub-paragraph (6) containing possibilities for either opt-in or opt-out declarations.

2. At the same time, as questions remained in relation to the nature and the functioning of common courts, as well as with regard to the application of the text in practice, the Special Commission envisaged that work on this matter will continue ahead of the Diplomatic Session in the framework of an informal working group. Members of this informal working group were encouraged to share information and specific examples in relation to this matter. The European Union, through this explanatory paper, would like to clarify several aspects in relation to those common courts which would be relevant from its perspective in the application of this provision. These courts are the Unified Patent Court (hereinafter the "UPC") and the Benelux Court of Justice (hereinafter the "Benelux Court").

3. With regard to the Court of Justice of the European Union (hereinafter the "CJEU"), this paper will present the court, including its jurisdiction, and will explain the reasons why its judgments should in our view circulate under the future Convention just like any other national judgments, rather than as judgments issued by a common court.

II. The Court of Justice of the European Union

a. Background

4. The Court of Justice of the European Union (CJEU) is one of the key institutions of the European Union, the only one having judicial functions. Its establishment, the key features of its organisation and its jurisdiction are set out in the Treaty on the Functioning of the European Union (hereinafter "TFEU"), in Articles 251-281. The Statute of the Court of Justice of the European Union, which contains more specific rules on the organisation of the Court as well as certain basic principles of the procedure before the Court, is annexed in Protocol No 3 to the treaties[2]. For the European Union, the treaties lay down its foundation and the key features of its functioning and, as such, have constitutional value.

5. The CJEU has two levels of jurisdiction, the Court of Justice (the upper level) and the General Court (the lower level). The General Court will always act as the court of first instance, while the Court of Justice has appellate functions with regard to the judgments issued by the General Court, but also first instance jurisdiction in specific cases, to be listed below under point (b). In the latter cases the judgments cannot be appealed.

6. The Court of Justice is composed of 28 judges (each Member State appoints one judge) and 11 Advocates General, who have essentially an advisory role and assist the Court, while the General

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1 See "*Aide mémoire* of the Chair of the Special Commission", Fourth Meeting of the Special Commission on the Judgments Project (24-29 May 2018), para. 14.

2 ` Included here are the TFEU, the Treaty on European Union ("TEU") and the Treaty establishing the European Atomic Energy Community ("EURATOM").

Court is composed currently of 47 judges and is scheduled to reach 56 judges by 1 September 2019 (two judges per Member State[3]).

7. The specific procedure to be followed in cases lodged before the two jurisdictions is set out in their respective Rules of Procedure. The equality of arms between parties and the right to a fair hearing are key procedural principles before the two jurisdictions. Since its creation in 1951[4], the Court of Justice has tried thousands of cases. In its judgments, it refers regularly to international treaties on the protection of human rights to which EU Member States have become Parties. Through its case law, the Court has helped improving the protection of fundamental rights. Moreover, since 2009, when the Charter of Fundamental Rights of the European Union was recognised as having treaty value, the Court looks regularly at these standards in its judgments, including at Article 47 of the Charter which provides for the right to an effective remedy and to a fair trial[5].

b. Jurisdiction

i. The Court of Justice

8. The Court of Justice, the upper level jurisdiction at the CJEU, has jurisdiction in a number of specific cases, listed clearly in the TFEU:

- One of the main tasks of the Court – but not relevant in the context of the Judgments Convention - is to interpret European Union law. It does so through a mechanism of so-called preliminary rulings, where the court is seised by national courts with questions of interpretation of EU law that come up in pending national cases. The Court of Justice does not decide the case as such. After the Court gives its ruling, the case at the national level is resumed and the judgment in the actual case is given by the national court, paying due regard to the interpretative judgment of the Court of Justice;
- The Court has also jurisdiction on actions for failure by Member States of the Union to fulfil obligations under EU law (e.g. the proper implementation of EU law at the national level). In this case the actions can be brought either by the European Commission or by another Member State;
- The Court can give judgments in actions for annulment of a Union measure, where the case is brought by an EU Member State against either the European Parliament or/and the Council of the European Union[6] or where the case opposes two EU institutions;
- Actions for failure to act against an EU institution also fall under the jurisdiction of the Court, in the same situations as the ones described above for actions for annulment[7].
- Finally, the Court has jurisdiction to hear appeal cases from judgments rendered in first instance by the General Court. This includes appeal in all situations that can come under

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3 However, to the extent that on that date the European Union will count 27 Member States, there will be 54 judges.

4 The Court of Justice was created in 1951 first as the Court of Justice of the European Coal and Steel Community, which became in 1958 the Court of Justice of the European Communities, eventually to become the Court of Justice of the European Union in 2009.

5 Article 47 of the Charter reads as follows:
"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

6 Except in certain specifically designated areas where first instance jurisdiction lies with the General Court.

7 However, the General Court has also first instance jurisdiction for this type of actions in the specific cases enumerated below under point (ii).

the scope of application of the Judgments Convention, as described below when the jurisdiction of the General Court is presented.

9. Among the above-mentioned jurisdiction grounds, the only one relevant for the purpose of the future Judgments Convention is where the Court exercises an appellate function for judgments rendered by the General Court which would fall under the scope of application of the future instrument. In all other cases the decisions are clearly outside the realm of civil and commercial matters or they have no content that would allow recognition and enforcement (e.g. in preliminary ruling cases concerning civil and commercial matters where the Court of Justice only instructs the referring national courts how EU law has to be interpreted but decisions that could be recognised and enforced are issued only by the national courts).

ii. The General Court

10. The General Court was created in 1989 with the main purpose of alleviating the important workload accumulated by the Court of Justice, by then the only jurisdiction in the CJEU. Its most important task is to deal with direct actions brought by natural or legal persons challenging decisions of the EU institutions, bodies, offices or agencies[8] ("actions for annulment" in the terminology used under point (i) above). The legal standing in such actions is rather restrictive in the sense that such actions may be brought only by the persons to whom the decisions were addressed or for whom the decisions are of direct and individual concern. In these direct actions the persons directly concerned can challenge also regulatory acts of EU institutions as long as such acts do not need further implementing measures. As already set out above, decisions in such actions for annulment are clearly outside the realm of civil and commercial matters.

11. In addition to this main task, the General Court has jurisdiction in several types of cases:

- Actions brought by natural or legal persons against a failure to act by an EU institution, body, office or agency;
- Actions brought by EU Member States against the European Commission;
- Actions brought by EU Member States against acts of the Council of the European Union taken in the field of state aid, anti-dumping or against acts by which the Council exercises implementing powers;
- EU institutions staff cases that concern employment or social security matters;
- Actions brought by any party alleging damages resulting from non-contractual liability of the EU institutions, bodies, offices or agencies and their staff;
- Litigation based on contracts concluded by or on behalf of the European Union with third parties, where such contracts contain a clause attributing jurisdiction to the CJEU. These contracts are typically for the supply of goods or services to the EU institutions, bodies, offices or agencies. Grant contracts for third parties typically also contain such jurisdiction clauses. However, this is obviously a matter for the negotiations between the contractual parties and some of these contracts contain a jurisdiction clause attributing jurisdiction to national courts, for instance to Belgian courts.

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[8] The EU institutions are the European Parliament, the European Council, the Council of the European Union, the Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors.
Examples of EU bodies are the Economic and Social Committee or the Committee of the Regions.
An EU office relevant in the context of this paper is the European Union Intellectual Property Office.
Finally, there is a variety of EU agencies, some example being the European Medicines Agency or the European Food Safety Authority.

- Actions relating to intellectual property brought against the decisions of the European Union Intellectual Property Office and of the Community Plant Variety Office, relating to unitary IP rights.

12. Of relevance for the future Judgments Convention are the jurisdiction grounds listed in the last three bullet points. In this context, it should be mentioned that litigation related to the employment and social security status of EU staff is based on the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union, as stipulated in Article 336 TFEU and, as such, cannot be qualified as civil or commercial. The nature of that litigation is rather administrative and thus judgments in this type of cases would not be able to circulate under the Convention.

13. Out of these three relevant jurisdiction grounds, the intellectual property cases are the most relevant in quantitative terms. For instance, out of all the new cases brought before the General Court between 2013 and 2017, 32.5%[9] were intellectual property cases, or a total of 1524 cases. Actions for damages in non-contractual liability amounted to 2.5% of the new cases before the Court (126 cases), while contractual litigation based on a jurisdiction clause amounted to 1.29% (66 cases).

14. With regard to the jurisdiction in intellectual property cases, this concerns judgments on validity and registrability in proceedings under the EU Trade Mark Regulation (No 207/2009 as amended by Regulation 2015/2424/EU)[10], the EU Design Regulation (No 6/2002 as amended), and on validity and grant in proceedings under the EU Plant Variety Rights Regulation (No 2100/94 as amended)[11]. The General Court decides on appeals against decisions of the Community Plant Variety Office (CPVO, located in Angers (France)) which cannot be appealed to the Board of Appeal of the CPVO and on appeals brought against decisions of the Boards of Appeal of the European Intellectual Property Office (EUIPO) in Alicante (Spain) and of the CPVO. The judgments of the General Court concern the validity and registrability of these IP rights throughout the European Union.

15. Actions before the General Court in such cases can be based on several grounds: lack of competence, infringement of an essential procedural requirement, and infringement of the Treaty on the Functioning of the European Union (TFEU), of the relevant Regulation or of any rule of law relating to their application or misuse of power. The Court may either annul the contested decision or alter it.

16. For the European Union and its Member States it is important that these judgments could circulate under the future Convention. They are in fact equivalent to any national court judgments deciding on the validity of an IP right, be it national or unitary. As these national court judgments would circulate under the Convention, of course provided that intellectual property matters are included in its scope of application, there is no reason why the same type of judgments should not circulate when the issuing court is the CJEU because the IP right is a unitary IP right of the EU.

c. Why is it not a common court within the meaning of the Judgments Convention

17. The EU delegation has provided explanations in relation to the CJEU in previous discussions, for instance in its December 2017 Discussion Document on the operation of the future Hague Judgments Convention with regard to Intellectual Property Rights or in the framework of the discussions in the Informal Working Group on common courts. However, after further reflection and consultation on this matter we think that the Court of Justice of the European Union should not be considered a common court for the purposes of the future Judgments Convention.

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9 See the 2017 Annual Report of the CJEU, at p. 209, available at https://curia.europa.eu/jcms/jcms/index.html

10 As of 1 October 2017, the EU Trade Mark Regulation has been repealed and replaced with Regulation (EU) No 2017/2001, Official Journal of the European Union (OJ) L 154, 16.6.2017, p. 1–99.

11 See also the Discussion Document from the European Union on the operation of the future Hague Judgments Convention with regard to Intellectual Property Rights of December 2017.

18. Instead, judgments from the CJEU coming under the scope of application of the Convention should in our view be able to circulate just like any comparable judgments issued by national courts without any further stipulations being necessary. There are several reasons for this position:

19. Firstly, the Court of Justice of the European Union is part of the institutional framework of the European Union, being its sole judicial body. As such, if the European Union as a member of the Hague Conference on Private International Law becomes a Contracting Party to the future Convention, it would be only natural that judgments issued by its judicial arm would circulate. This is the functional equivalent for a REIO of the situation in which a State becomes Party to the convention and, as a result, judgments issued by its national courts would circulate. There is no reason why the situation should be different in any way for the EU.

20. Secondly, this conclusion would be simply a continuation of the situation encountered in the 2005 Choice of Court Agreements Convention, where the fact that judgments from the CJEU would circulate under the Convention was not disputed. Indeed, on this matter the Explanatory Report to the Convention on Choice of Court Agreements is rather clear when it states:

> "*17* ***Regional Economic Integration Organisations****. Regional Economic Integration Organisations, such as the European Community, are dealt with in Articles 29 and 30. Besides allowing such organisations to become Parties to the Convention in certain circumstances, Articles 29 and 30 also provide that any reference to "State" or "Contracting State" in the Convention applies equally to a Regional Economic Integration Organisation that is a Party to it, where appropriate. This means that, depending on what is appropriate, "State" in the European context could mean either the European Community, or one of its Member States (for example, the United Kingdom) or a territorial unit of such a Member State (for example, Scotland****). It follows from this that a choice of court agreement designating "the courts of the European Community" or referring specifically to "the Court of Justice of the European Communities (Court of First Instance)" would be covered by the Convention.*****"** (emphasis added).

21. This is relevant also in the context of the future Judgments Convention. As stated above, the CJEU (the General Court – the lower level jurisdiction) has jurisdiction to try contractual disputes pursuant to a jurisdiction clause inserted in a private law contract concluded between for instance an EU institution, such as the European Commission, and a supplier of goods, including from third countries. If that choice of court is exclusive, then it would be covered by the Choice of Court Convention, cf. the text above and its footnote 44[12]. If, however, that choice of court is non-exclusive, then the judgment should be able to circulate based on Article 5(m)[13] of the draft

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12 Footnote 44 of the Hartley/Dogauchi Report reads as follows:
"Under Art. 238 of the Treaty Establishing the European Community (EC Treaty), the Court of Justice of the European Communities has jurisdiction pursuant to an "arbitration clause" (in reality, a choice of court clause) in a contract concluded by or on behalf of the Community. This jurisdiction is exercised by the Court of First Instance: Art. 225(1) EC Treaty. Thus, if the European Commission concluded a commercial contract with a company resident outside the European Community, a choice of court clause in such a contract in favour of the Court of Justice of the European Communities (Court of First Instance) would be covered by the Convention."

13 Article 5(m) reads as follows:
"1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –
(…)
(m) the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement.
For the purposes of this sub-paragraph, an "exclusive choice of court agreement" means an agreement concluded by two or more parties that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction of any other courts."

convention. Treating these judgments differently in the two conventions depending on whether the choice of court is exclusive or not cannot be, in our view, justified.

d. Examples of how judgments delivered by the CJEU would circulate under the Judgments Convention

22. The last paragraph under (c) above gives a hint on the possible functioning of the future Convention on judgments issued by the CJEU in contractual matters pursuant to a non-exclusive choice of court agreement. Accordingly, if the contract is concluded between an EU institution and a party having its seat outside the EU and the contractual parties concluded a clause attributing non-exclusive jurisdiction to the CJEU, then the issuing judgment would circulate under the Convention. In this case, the judgment of the CJEU would pass, in our view, the jurisdictional filter of Article 5(m).

23. With regard to the jurisdiction of the CJEU related to actions for damages arising out of non-contractual liability of the EU institutions, bodies, offices or agencies and their staff, the issuing judgment would have to comply for instance with the jurisdictional filter set out in Article 5(j)[14] of the draft convention. Accordingly, if the act or omission directly causing such damage occurred in the European Union, then the issuing judgment should, in our view, circulate under the Convention.

24. With regard to the intellectual property filters, Article 5(3) and 6(a), the only relevant provision in the context of IP-judgments issued by the CJEU is the latter. As explained above, the CJEU does not rule on infringement of IP rights (paragraph (a) and (b) of Article 5(3)), nor does it rule on the validity of copyright or related rights, unregistered trademarks or unregistered industrial designs (paragraph (c) of Article 5(3)). It only rules on the registration or validity of registrable or registered EU-wide trademarks, designs or plant varieties. This means that only the exclusive jurisdiction filter of Article 6(a) is relevant in this context. In other words, judgments issued by the CJEU in IP-matters would be able to circulate under the Convention where the EU, as the "State of origin" under Article 6(a), can be considered as the "State" in which grant or registration has taken place. This is so because the IP-rights in question are granted for the entire EU territory.

III. The Unified Patent Court

a. Background

25. The Unified Patent Court will be a common court established pursuant to the Unified Patent Court Agreement ("UPC Agreement")[15]. This agreement is open for signature by all EU Member States and to date has been signed by all of them except for Croatia, Poland and Spain. The court will be common to all Contracting EU Member States and thus can be considered as being part of their national judicial systems. The agreement will enter into force, and thus the UPC will start functioning once 13 Contracting EU Member States (among them France, Germany and the United Kingdom) have ratified or acceded to the agreement. To date (November 2018) there are already more than 13 ratifications, including France and the United Kingdom. Therefore, three months after Germany ratifies the Agreement the Unified Patent Court will enter into force in the EU Member States that notified their ratification of the Agreement.

26. The main task of the UPC is to provide specialised dispute resolution in civil litigation on infringement and revocation matters related to classical European patents (i.e. patents granted

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[14] Article 5(j) reads as follows:
"1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –
(…)
(j) the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred;"

[15] See the Agreement on a Unified Patent Court open for signature on 19/02/2013, Official Journal of the European Union (OJ) C 175, 20.6.2013, p. 1–40.

through the European Patent Office – a non-EU body seated in Munich, Germany[16]), as well as for the newly created European patents with unitary effect[17], a new system that will provide unitary patent protection in all EU Member States that have ratified the UPC Agreement. In addition, the Court will deal with civil litigation concerning supplementary protection certificates and for European patent applications.

b. Jurisdiction

27. The UPC will have both a court of first instance ("UPC-CFI") and a court of appeal. The court of first instance will be organised in a decentralised way and will include a central division located in Paris with sections in London, dealing with cases concerning human necessities, chemistry and metallurgy, and in Munich, dealing with cases concerning mechanical engineering, lighting, heating, weapons and blasting, as well as local and regional divisions. Each Contracting EU Member State may request from the UPC the setting up of a local division of the UPC-CFI (possibly up to four depending on the number of patent cases registered in that State before the date of the entry into force of the UPC Agreement) or a regional division together with one or several Contracting States.

28. An appeal from the judgments issued by the UPC-CFI may be brought on points of law or on matters of fact before the UPC Court of Appeal. This Court will be seated in Luxembourg.

29. The UPC will have exclusive jurisdiction in actions for or relating to infringement, provisional and protective measures and injunctions, damages or compensation derived from provisional protection and/or prior use[18]. In such cases action may be brought before the local/regional division of the UPC-CFI where either the infringement took place or may take place, or where the defendant has its residence or place of business. If the defendant does not have residence or place of business in a Contracting EU Member State then the action may be brought before the local/regional division where the infringement took place or before the central division. If the Contracting EU Member State in question does not host a local/regional division, then the action may be brought before the central division[19].

30. Actions for revocation or non-infringement of a patent shall generally be brought before the central division, except where a case between the same parties related to an infringement of the same patent is already pending before a local/regional division. Actions concerning a decision of the European Patent Office when performing tasks relating to the European patent with unitary effect shall be brought before the central division.

31. With regard to counterclaims for revocation of patents brought before the local/regional division in pending infringement actions, the UPC Agreement[20] foresees different possible situations: either the local/regional division proceeds with both actions or it may decide to refer the counterclaim to the central division and proceed with or suspend the infringement actions or, finally, with the agreement of the parties it may refer both actions to the central division.

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16 A body set up by the European Patent Convention ("EPC"). The EPC has been ratified by 38 European Contracting States including all Member States of the European Union and ten additional States and provides for a single procedure for the granting of European patents by the European Patents Office. European patents may only be revoked on the basis of the revocation grounds provided for in the EPC but the issue of infringement remains governed by the national law of each Contracting State for which the patent is granted.

17 Based on Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 361, 31.12.2012, p. 208-215. See also Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, OJ L 361, 31.12.2012, p. 89-82, with regard to the language regime applicable to the unitary patent.

18 See Article 32(1) of the UPC Agreement.

19 See Article 33(1) of the UPC Agreement.

20 See Article 33(3) of the UPC Agreement.

32. In principle, the UPC has exclusive jurisdiction on the above-mentioned grounds. However, it will still share jurisdiction on certain grounds with national courts during a so-called transitional period of seven years, starting from the date of entry into force of the UPC Agreement, which may be extended once by up to seven years. During this time, national courts still have jurisdiction to deal with actions for infringement or for revocation concerning classical European patents or for a supplementary protection certificate issued for a product protected by such a patent, unless an action has been commenced already before the UPC. In addition, during this period, the proprietors of or the applicants for such patents, including of the additional protection based on supplementary protection certificates, may opt-out from the jurisdiction of the UPC, unless again an action has already been commenced. No such possibility to opt-out exists with regard to the European patents with unitary effect.

c. Examples of how the common courts provision would apply to judgments delivered by the UPC

33. The UPC is a court common to the Contracting EU Member States and is part of their judicial systems. In contrast to the CJEU, the UPC is not a court of the EU as a REIO and thus is not straightforwardly covered by the provisions of the future Judgments Convention. The UPC is a court established under a separate agreement which is open to ratification or accession by EU Member States but so far has not been signed and ratified by all of them. As such, the UPC can be regarded as a common court for the purpose of the future Judgments Convention.

34. Being a common court that will deal both with infringement and validity actions for patents, the relevant provisions of the draft convention covering the recognition and enforcement of its judgments are Article 4(5) (common courts), Article 5(3)(a) (the jurisdictional filter for registered or registrable IP-rights), as well as Article 6(a) – exclusive jurisdiction filter for the validity of IP-rights required to be granted or registered.

35. For infringement actions, if for instance the infringement of a European patent with unitary effect takes place in a Contracting State to the future Convention and the judgment on that infringement is delivered by the UPC then, under Article 4(5)(b) combined with Article 5(3)(a) the judgment would circulate under the Convention. The result will differ if the infringement took place in a Contracting EU Member State to the UPC Agreement which is not a Contracting State to the future Convention. However, in the latter case, if the infringement relates to several Contracting EU Member States, then the parts of the judgment that relate to Contracting States to the future Judgment Convention would in our view be able to circulate[21]. Conversely, the parts of the judgment that relate to a non-Contracting State will not be able to circulate, thus avoiding any potential free-rider problem.

36. With regard to validity actions and the exclusive jurisdiction filter of Article 6(a) in the State in which grant or registration has taken place or is deemed to have taken place, the Unitary patent will ultimately be valid throughout the 25 Contracting EU Member States. This means that judgments rendered by the UPC on the validity of such patents would be able to circulate under the Convention where all these EU Member States are also Contracting States to the Judgments Convention. However, if the judgment rules both on validity and on infringement, the part on infringement would in our view be recognised and enforced under the Convention if and to the extent that it relates to one or several Contracting States to the Convention even where not all members of the UPC became Party to the Convention. Article 9 of the draft Convention on severability would be applicable in such cases.

IV. The Benelux Court of Justice

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21 Article 9 of the draft convention, on severability, allows for such partial recognition or enforcement.

ANNEX II

a. Background

37. The Benelux Court was established through the 1965 Treaty concerning the Establishment and the Statute of a Benelux Court of Justice (the "Benelux Court of Justice Treaty"), which entered into force between Belgium, Luxembourg and the Netherlands on 1 January 1974. The Court is one of the Benelux Union's institutions and acts as a judicial body.

38. In 2012 the three Benelux countries signed the Protocol amending the Benelux Court of Justice Treaty. In 2014, this Protocol was supplemented by modifications in the Benelux Convention on Intellectual Property. The Protocol entered into force on 1 December 2016 and the modifications in the Convention on 1 June 2018. One of the main changes brought by these modifications relates to the extension of the jurisdiction of the Benelux Court, to deal notably with direct actions in certain intellectual property cases, instead of the national courts of the three Benelux States.

39. The Benelux Court has its seat in Luxembourg and is composed of three chambers: the first chamber has specific competence to deal with preliminary questions referred by national courts from the three Benelux countries on the interpretation of Benelux law, or to give advice on such interpretation at the request of one of the governments of these countries. In addition, this chamber has appellate functions for judgments rendered by the second chamber, that deals with direct actions against final decision of the Benelux Office for Intellectual Property (the "BOIP"). Finally a third chamber deals with staff cases, for personnel of the Benelux Secretariat-General or of the BOIP.

40. The first chamber of the Benelux Court is composed of judges of the highest courts of Belgium, the Netherlands and Luxembourg. The judges retain their positions in the national courts. The second chamber is composed of judges from the courts of appeal of these three countries, who also retain their office at the national level.

b. Jurisdiction

41. The Benelux Court has jurisdiction to try three types of cases:

- Request for preliminary rulings lodged by national courts, or request for advice lodged by governments, on the interpretation of the Benelux common legal instruments;
- Settlement of staff cases, for the civil servants employed by the Benelux Secretariat-General or the BOIP;
- Finally, the new jurisdictional power agreed in the 2012 Protocol and the modified Benelux Convention on Intellectual Property on direct actions on the merits lodged against final decisions of the BOIP. This competence regards directly intellectual property cases, namely the Benelux trademark and designs, and has been transferred, as from 1 June 2018, from the national courts of the three Benelux Countries to the Benelux Court of Justice. The Benelux Court is now the sole judicial body in the Benelux with jurisdiction to hear appeals against the final decision of the BOIP on the registration or validity of these rights. The Benelux Court will act in these cases both as a first instance court (the second chamber) and as a court having appellate functions (the first chamber).

c. Examples of how the common courts provision would apply to judgments delivered by the Benelux Court

42. In accordance with the case law of the Court of Justice of the European Union, the Benelux court is a court common to three EU Member States, Belgium, Luxembourg and the Netherland and, as such, its judgments have the potential of circulating under the future Judgments Convention. The CJEU has also ruled that, in certain fields, such as trademark law, the Benelux is to be considered as if it were the territory of a single EU Member State.

43. Out of the three jurisdictional functions exercised by the Benelux Court (as mentioned above), the only one relevant for the purposes of the Judgments Convention is the one covering direct actions in intellectual property cases. As the Benelux Court (and no longer the national courts) will deal with (certain aspects of) the validity and registrability of Benelux trademarks and designs, the relevant provisions applicable in such cases are Articles 4(5)(b) and 6(a) of the draft Convention.

44. Accordingly, if the Benelux Court issues a judgment on the validity of a Benelux trademark, that judgment would be able to circulate under the Convention. In such cases the "State in which grant or registration has taken place" mentioned in draft Article 6(a) refers to the three Benelux Sates, as the trademark is registered for all of them. This means that the term "Contracting State" mentioned in draft Article 4(5)(b) refers too to these three States, which in turn has the significance that Benelux Court judgments on the validity or the registrability of trademarks and designs will be able to circulate under the future Judgments Convention only where all three Benelux States become Parties to the Convention. As all three Benelux States are also EU Member States, an accession by the EU to the Convention would by definition cover these three States.

V. Concluding remarks

45. This explanatory paper has attempted to show the main features of the common courts important from the EU perspective, the UPC and the Benelux Court, as well as those of the CJEU, the judicial body of the European Union. In addition, the paper tried to present concrete examples on how the circulation of judgments emanating from these courts will operate in the future.

46. We believe that with this paper we have shown that these courts are no different from national courts, that they are in fact a replacement and in some cases (as for the Benelux court which is staffed by judges of the national courts) an extension of these national courts when two or more states decide to delegate their judicial power. The examples on how their judgments would circulate demonstrate, we believe, that it is perfectly feasible to apply the convention in this context and that, when faced with judgments from these courts, national courts should not encounter special difficulties.