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Table of contents

PART I. PREFACE
[TBI]

1. This draft Convention is a private international law instrument in civil and commercial matters. Among the three classical areas of private international law, it only covers one aspect, the recognition and enforcement of foreign judgments. Contracting States would therefore remain free to establish and apply their own rules – national law or other supranational instruments – with regard to jurisdiction to adjudicate disputes in those matters (direct jurisdiction) and with regard to applicable law.

Origins of the draft Convention

2. The origins of the Judgments Project date back to 1992 when a proposal was made to undertake work on jurisdictional bases and the recognition and enforcement of judgments in civil and commercial matters. Between 1992 and 2001, progress was made which resulted in a draft mixed convention, combining direct rules of jurisdiction with rules on conflicts of jurisdiction, exorbitant fora and recognition and enforcement of foreign judgments. However, at the conclusion of Part One of the Nineteenth Session (6 to 22 June 2001), a number of important areas remained where consensus could not be reached.

3. The Hague Conference then decided to consider separately the areas for which it seemed likely that a consensus-based instrument could be achieved. With the benefit of the previous 10 years of work, the *Hague Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 Choice of Court Convention") was concluded.[1] The 2005 Choice of Court Convention is aimed at ensuring the effectiveness of choice of court agreements in civil and commercial matters. It entered into force on 1 October 2015.[2] In 2011, the Hague Conference agreed to consider the feasibility of a new global instrument. An Experts' Group met in April 2012 and concluded that further work on cross-border litigation was desirable, provided that it met real, practical needs which were not met by existing instruments and institutional frameworks. It also determined that further work was essential to identify gaps in the existing framework for resolution of cross-border disputes that are of particular practical significance. From 2013, the Working Group met on five occasions to develop a draft text of core provisions aimed at facilitating the global circulation of judgments.

4. The Working Group completed its work on a Proposed Draft Text for the Convention on the recognition and enforcement of judgments in civil or commercial matters at its fifth meeting in October 2015. Since then, the Hague Conference has convened three Special Commission meetings to progress work on this draft Convention. In June 2016, the First Meeting was convened to discuss the proposed draft text that had been prepared by the Working Group. This meeting of the Special Commission produced a 2016 preliminary draft Convention that was published as Working Document No 76 Revised. The Second Meeting was held in February 2017, the Special Commission reconsidered all provisions in the 2016 preliminary draft Convention and discussed General and Final Clauses. This February 2017 meeting produced a revised draft of the Convention (hereinafter, "the February 2017 draft Convention"), published as Working Document No 170 Revised. At its Third Meeting in November 2017, the Special Commission reviewed and discussed the square-bracketed matters reflected in Chapters I and II of the February 2017 draft Convention, including a detailed discussion on intellectual property related matters, and General and Final Clauses. This Third Meeting produced a further revised draft of the Convention (hereinafter, "the

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1 More information about the origins of the 2005 Choice of Court Convention is available in the "Explanatory Report by Trevor Hartley and Masato Dogauchi" (hereinafter, the "Hartley/Dogauchi Report"). See the *Proceedings of the Twentieth Session*, Tome III, *Choice of Court Agreements*, Antwerp/Oxford/Portland, 2010, pp. 785 and 787.

2 At the time of writing, Mexico, the European Union (except Denmark) and Singapore are Contracting Parties to the Convention. The Convention was also signed by the United States of America on 19 January 2009, by the People's Republic of China on 12 September 2017 and by Montenegro on 5 October 2017. The status table of the Convention is available on the Hague Conference website at < www.hcch.net > under "Choice of Court Section".

November 2017 draft Convention"), published as Working Document No 236 Revised. The draft Explanatory Report is prepared based on the November 2017 draft Convention.

PART II. OVERVIEW - Objective, architecture and outline of the draft Convention

5. **Objective.** This draft Convention has as its main objective the promotion of international trade, investment and mobility through enhanced judicial co-operation. Such co-operation will promote access to justice and reduce costs and risks associated with cross-border dealings.

6. These goals will be advanced in a number of ways.

7. First, and most importantly, it will generally ensure that judgments to which it applies will be recognised and enforced in all Contracting States, thereby enhancing the practical effectiveness of those judgments and ensuring that the successful party can obtain meaningful relief. Access to justice is frustrated if a wronged party obtains a judgment, but that judgment cannot be enforced in practice because the other party and / or his or her assets are in another State where the judgment is not readily enforceable.

8. Secondly, it will reduce the need for duplicative proceedings in two or more Contracting States: a judgment determining the claim in one Contracting State will be effective in other Contracting States, without the need to re-litigate the merits of the claim.

9. Thirdly, it will reduce the costs and timeframes associated with obtaining recognition and enforcement of judgments: access to practical justice will be faster and at lower cost.

10. Fourthly, it will improve the predictability of the law: individuals and businesses in Contracting States will be able to ascertain more readily the circumstances in which judgments will circulate among those States.

11. Fifthly, it will enable claimants to make informed choices about where to bring proceedings, taking into account their ability to enforce the resulting judgment in other Contracting States and the need to ensure fairness to defendants.

12. In a globalised and interconnected world, with ever-increasing movement across borders of people, information and assets, the practical importance of achieving these objectives is self-evident.

13. **Relationship with the 2005 Choice of Court Convention**. The 2005 Choice of Court Convention pursued similar objectives by enabling parties to agree on the court that would hear a claim, and providing for the recognition and enforcement of a judgment given by the chosen court. However, in many cases there is no choice of court agreement between the parties to a dispute. This draft Convention seeks to extend the benefits of enhanced access to justice, and reduced costs and risks of cross-border dealings, to a broader range of cases.

14. **Outline**. The draft Convention is designed to provide an efficient system for the recognition and enforcement of foreign judgments in civil or commercial matters, one that will provide for the circulation of judgments in circumstances that are largely uncontroversial. The draft Convention provides for the recognition and enforcement of judgments from other Contracting States that meet the requirements set out in a list of bases for recognition and enforcement (Art. 5) and sets out the only grounds on which recognition and enforcement of such judgments may be refused (Art. 7). Furthermore, in order to facilitate the circulation of judgments, the text does not prevent recognition and enforcement of judgments in a Contracting State under national law or under other treaties (Art. 16), subject to one provision relating to exclusive bases for recognition and enforcement (Art. 6).

15. **Architecture**. The draft Convention is divided into four chapters. Chapter I deals with questions of scope and definitions. The scope of the draft Convention extends to judgments relating to civil or commercial matters (Art. 1). This scope is further defined by excluding certain matters (Art. 2), either because they are covered by other instruments or are typically matters on which multilateral consensus cannot be achieved. Article 3 provides essential

definitions of “judgment” and “defendant” as well as for the habitual residence of legal persons.

16. Chapter II is the core of the draft Convention and its first article establishes the general principle of circulation of judgments among the Contracting States (Art. 4). A judgment given by a court of a Contracting State shall be recognised and enforced in another Contracting State in accordance with the provisions of Chapter II. The main criterion for circulation is provided in Article 5, which stipulates eligible grounds against which the judgment from the State of origin is to be assessed by the State where recognition or enforcement is sought. These grounds are limited by the exclusive jurisdictional bases listed in Article 6. Where a judgment meets the requirements of Articles 4, 5 and 6, the only grounds for refusal to recognise or enforce it are provided in Article 7. This Article establishes an exhaustive list of grounds for refusal that allow, but do not require, the requested State to refuse recognition and enforcement. It is useful to point immediately to Article 16 that reserves the right of a requested State to recognise or enforce a foreign judgment based on national law.

17. The remainder of Chapter II deals with specific issues whose resolution in the draft Convention will assist in its interpretation and application: preliminary questions (Art. 8), severability (Art. 9), damages, including punitive damages (Art. 10), and judicial settlements (Art. 12). Another series of provisions deal with procedural particularities that are intended to facilitate access to the effective mechanism of the draft Convention: documents to be produced (Art. 13), procedure (Art. 14) and costs of proceedings (Art. 15).

18. Chapter III deals with general clauses: transitional provision (Art. 17), allowable declarations (Arts 18-21), uniform interpretation (Art. 22), non-unified legal systems (Art. 24) and relationship with other instruments (Art. 25).

19. Chapter IV provides for final clauses on the ratification process (Arts 26-29), entry into force (Art. 30), manner of declarations (Art. 31), denunciation (Art. 32) and notifications (Art. 33).

PART III. ARTICLE-BY-ARTICLE COMMENTARY

Chapter I – Scope and definitions

Article 1 – Scope

20. **Scope**. Article 1 defines the scope of application of the draft Convention. Paragraph 1 deals with the substantive scope of application and provides that the draft Convention applies to the recognition and enforcement of judgments relating to civil or commercial matters. This provision must be read in conjunction with Article 2(1), which contains a list of excluded matters, and Article 19, which allows Contracting States (“States”)[3] to make a declaration excluding specific matters from the scope of application of the draft Convention. Paragraph 2 deals with geographical or territorial scope and provides that the draft Convention applies to the recognition and enforcement in one State of a judgment given by the court of another State.

Paragraph 1

21. **Civil or commercial matters**. The draft Convention applies to judgments relating to civil or commercial matters; it does not extend, in particular, to revenue, customs or administrative matters. The characterisation of a judgment as relating to civil or commercial matters is determined by the nature of the claim or action that is the subject of the judgment, and not necessarily by the (i) nature of the court of the State of origin; (ii) or the mere fact that a State was a party to the proceedings.

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[3] In order to simplify the text, the term “States” is used to refer to “Contracting States”. The distinction between Contracting and non-Contracting States is only drawn where relevant.

22. The draft Convention applies whatever the nature of the court, *i.e.*, irrespective of whether the (civil or commercial) action was brought before a civil, criminal, administrative or labour court.[4] Thus, for example, the draft Convention applies to judgments on civil claims brought before a criminal court, where such a court had jurisdiction under its own procedural law to entertain the action on which the civil judgment was rendered.

23. The draft Convention also applies irrespective of the nature of the parties, *i.e.*, legal or natural persons, private or public. As indicated in Article 2(4), a judgment is not excluded from the scope of application of the draft Convention by the *mere* fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings in the State of origin (see *infra* commentary to Art. 2(4)).

24. Furthermore, the characterisation of an action does not change by the *mere* fact that the claim is transferred to another person, be it by assignment, by succession or that the obligation is assumed by another person. That is, if a private body were to transfer a claim to a State, government or government agency, its characterisation as a civil or commercial claim would not be precluded. The same holds in cases of subrogation, *i.e.*, when a governmental agency is subrogated to the rights of a private party.

25. **Autonomous meaning**. Although the characterisation of a judgment as to whether it relates to civil or commercial matters is exclusively carried out by the courts of the requested State, these courts must follow an autonomous characterisation. The concept of "civil or commercial matters", like other legal concepts used in the draft Convention, must be defined autonomously, *i.e.*, by reference to the objectives of the draft Convention and its international character, not by reference to national law.[5] This ensures a uniform interpretation and application of the draft Convention (see *infra* Art. 22). Furthermore, the interpretation of those terms should be applied consistently across other Hague instruments, in particular the 2005 Choice of Court Convention.

26. **Civil *versus* commercial matters**. The difference between "civil" and "commercial" matters is aimed at encompassing those legal systems where "civil" and "commercial" are regarded as separate and mutually exclusive categories. The use of both terms may be helpful for those legal systems and is not intended to prejudice systems in which commercial proceedings are a sub-category of civil proceedings.[6] Although other international instruments used the terms "civil *and* commercial matters",[7] the draft Convention follows the 2005 Choice of Court Convention and refers to "civil or commercial matters". In any event, both alternatives must be considered interchangeable.

27. **Civil or commercial matters *versus* public law**. The concept of "civil or commercial matters" is used as opposed to public and criminal law, where the State acts in its sovereign capacity.[8] To clarify this idea, unlike the 2005 Choice of Court Convention, Article 1 (1) of the draft Convention adds that it does not apply, "[…] in particular, to revenue, customs or administrative matters". This enumeration is not exhaustive and includes other matters of public law, *e.g.*, constitutional matters, but facilitates the application of the instrument in those States where the distinction between private and public law is not established.[9]

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4 "Preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, adopted by the Special Commission and Report by Peter Nygh & Fausto Pocar", Prel. Doc. No 11 of August 2000 drawn up for the attention of the Nineteenth Session of June 2001 (hereinafter, "Nygh/Pocar Report"), para. 27. See the *Proceedings of the Twentieth Session*, Tome II, *Judgments*, Cambridge/Antwerp/Portland, Intersentia, 2013, pp. 191-313. "Note on Article 1(1) of the 2016 Preliminary draft Convention and the term `civil or commercial matters´", drawn up by the co-Rapporteurs of the draft Convention and the Permanent Bureau, Prel. Doc. No 4 of December 2016 for the attention of the Special Commission of February 2017 on the Recognition and Enforcement of Foreign Judgments (hereinafter, "Prel. Doc. No 4"), para. 6.

5 Nygh/Pocar Report, para. 27; Hartley/Dogauchi Report, para. 49; Prel. Doc. No 4, para. 5.

6 Nygh/Pocar Report, paras 23-26; Hartley/Dogauchi Report, para. 49.

7 See Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition of judgments in civil and commercial matters (hereinafter, the "Brussels I Regulation"), Art. 1.

8 Hartley/Dogauchi Report, para. 49; Prel. Doc. No 4, para. 40.

9 See Nygh/Pocar Report, para. 23: "[…] the expressions 'civil matters' or 'civil law' is not a technical terms in common law countries such as England and the Republic of Ireland and can have more than one meaning. In the widest sense they exclude only criminal law. On that basis, constitutional law, administrative law and tax law are included in the description of "civil matters". This is clearly not the

28. The key element in order to characterise a matter as "civil or commercial" is whether one of the parties is exercising governmental or sovereign powers that are not enjoyed by ordinary persons.[10] This implies that in order to establish whether the judgment relates to civil or commercial matters, it is necessary to identify the legal relationship between the parties to the dispute and to examine the legal basis of the action brought before the court of origin. If this action derives from the exercise of public powers (or duties), the draft Convention does not apply. A typical manifestation of those powers is the capacity to enforce a claim by way of administrative enforcement proceedings with no need for any court action. Thus, for example, the draft Convention does not apply to enforcement orders brought by governments or governmental agencies, such as anti-trust/competition authorities or financial supervisors, which seek to ensure compliance or to prevent non-compliance with regulatory requirements.[11] Nor does it apply to judgments on judicial actions brought either to enforce or appeal such orders (see also *infra* para. 63). This also includes claims against officials who act on behalf of the State and liability for the acts of public authorities, including liability of publicly appointed office-holders acting in that capacity.

29. Criminal or penal matters are typical examples of the exercise of sovereign powers and therefore are excluded from the scope of the draft Convention. This exclusion covers actions in which a State - or a public authority - seeks to punish a person for conduct proscribed by criminal law, including by means of pecuniary penalties that do not compensate the State or those for whom it acts for losses resulting from the conduct at issue.[12]

30. Conversely, if neither of the parties is acting in the exercise of public powers, the draft Convention applies. Thus, for example, it applies to private claims for harm caused by anti-competitive conduct.[13] By the same token, when a government agency is acting on behalf of private parties, such as consumers or investors, without that agency exercising extraordinary powers or privileges, the draft Convention will also apply (see *infra* commentary to Art. 2(4)).

31. **Joining of actions**. When a judgment has ruled on two actions, one of which qualifies as "civil or commercial" and another which does not, the principle of severability applies (see, *infra*, Art. 9). The draft Convention will only apply to the former and not to the latter. In some cases, the public-law matter may arise not as a main action, but as a preliminary question, *e.g.*, a private action for damages based on an infringement decision by an anti-trust authority. The draft Convention also applies in these cases (see *infra* Art. 2(4), as well as Art. 8(1) and (2)).

Paragraph 2

32. **Territorial scope**. Paragraph 2 of Article 1 defines the geographical or territorial scope of application of the draft Convention: it applies to the recognition and enforcement in one State of a judgment given by a court in another State. That is, both the State of origin and the requested State must be parties to the draft Convention. The State of origin is the State in which the court granting the judgment is situated and the requested State is the State where recognition and enforcement of that judgment is sought (Art. 4(1)). This provision must be read in conjunction with Articles 21 ("Declarations with regard to common courts" *infra* paras 353-360) and 24 ("Non-unified legal systems" *infra* paras 364-373).

33. **Relevant time**. The relevant time is the date of institution of the proceedings in the State of origin: both the requested State and the State of origin must have been parties to

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intention of the preliminary draft Convention which in the second sentence of paragraph 1 explains that matters of a revenue, customs or administrative nature are not to be regarded as falling within the scope of 'civil or commercial matters'." (notes omitted) In the 2005 Choice of Court Convention this clarification was considered unnecessary, see Hartley/Dogauchi Report, para. 49, note 73.

10 Hartley/Dogauchi Report, para. 85; Prel. Doc. No 4, para. 40.

11 Prel. Doc. No 4, para. 41.

12 See Work. Doc. No 189 of October 2017, "Proposal of the delegation of the United States of America" (Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017)).

13 Prel. Doc. No 4, para. 41.

the draft Convention at that moment (see *infra* Art. 17). Otherwise, the draft Convention does not apply.

34. **Definition of the time the proceedings are instituted**. Although the draft Convention refers to "the time proceedings were instituted" in some provisions (*e.g.*, Arts 5(1)(k), 17, or Art. 31(5); Art. 7(2)(a) refers to the moment when the court "was seised"), it does not define this term. The institution of proceedings implies the completion of the first procedural act that gives rise to the commencement of the proceedings in the corresponding State, *e.g.*, the filing of the documents instituting the proceedings with the court, or if that document has to be served before being filed with the court, the reception by the authority responsible for service.[14]

Article 2 – Exclusions from scope

35. **Introduction**. Article 2 supplements the provision on the substantive scope of application of the draft Convention set forth in Article 1(1). First, it excludes certain matters from the scope of application despite their civil or commercial nature (para. 1). Secondly, it indicates that the draft Convention applies even if a matter excluded from its scope arose as a preliminary issue in proceedings in the State of origin (para. 2). Thirdly, it contains a specific provision excluding arbitration and related proceedings from the scope of the draft Convention (para. 3). And finally, it sets forth that the draft Convention applies even if a State or government body was a party to the proceedings in the State of origin, but that this application will not affect the privileges and immunities enjoyed by States or international organisations (paras 4 and 5).

Paragraph 1

36. **Exclusions**. Paragraph 1 of Article 2 contains a list of specific matters excluded from the scope of the draft Convention despite their civil or commercial nature. Paragraph 2 of the same provision, however, indicates that these exclusions only apply where a matter included in the list was the "object" of the proceedings, and not where it arose as a preliminary question, in particular by way of defence (see *infra* para. 57).

37. **Rationale**. In general terms, the rationale for the exclusions is either (i) that those matters are already governed by other international instruments, in particular other Hague Conventions, and it was deemed preferable that these instruments operate without any interference by the draft Convention,[15] or (ii) that they are matters of particular sensitivity for many States and it would be difficult to reach broad acceptance on how the draft Convention should deal with them. Most of the matters included in the list are similar to those contained in the parallel provision of the 2005 Choice of Court Convention, but there are significant differences: the scope of the draft Convention is broader than the scope of the 2005 Choice of Court Convention. Thus, for example, unlike the 2005 Choice of Court Convention, the draft Convention applies to employment and consumer contracts, personal injuries, damage to tangible property, rights *in rem* and tenancies over immovable property, anti-trust / competition or [intellectual property].

38. **Status and legal capacity of natural persons**. Sub-paragraph (a) excludes the status and legal capacity of natural persons from the scope of the draft Convention. This exclusion encompasses judgments on divorce, legal separation, annulment of marriage, establishment or contestation of parent-child relationships, adoption, emancipation or the status and capacity of minors or persons with disabilities. It also comprises judgments on parental responsibility, including custody, rights of access, guardianship, curatorship or equivalent measures, as well as measures for the protection of children or the administration, conservation or disposal of children's property.[16] Judgments ruling on the name or nationality

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14 See Nygh/Pocar Report, para. 264, explaining the reasons for this option in the *lis pendens* rule of the 1999 preliminary draft Convention.

15 Nygh/Pocar Report, para. 29; Hartley/Dogauchi Report, para. 53.

16 Nygh/Pocar Report, para. 30, note 16. The exclusion of matters under sub-para. (a) must be consistent with other Hague instruments, in particular, as regards (i) parental responsibility and measures for the

of natural persons are captured under this exclusion as well. Maintenance obligations and other family matters are excluded under sub-paragraphs (b) or (c).

39. **Maintenance obligations**. Sub-paragraph (b) excludes maintenance obligations from the scope of the draft Convention. This exclusion encompasses any maintenance obligations deriving from family relationships, parentage, marriage or affinity. [17] Because both maintenance obligations and matrimonial property regimes are excluded from the scope of the draft Convention, there is no need to draw an exact definitional boundary between them. [18]

40. **Other family matters, including matrimonial property regimes**. Sub-paragraph (c) excludes matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships from the scope of the draft Convention. [19] As in the 2005 Choice of Court Convention, "matrimonial property" includes the special rights that a spouse has to the matrimonial home in some jurisdictions. [20] In general terms, it covers judgments on claims between the spouses – and exceptionally with third parties – during or after dissolution of their marriage, and which affect rights in property arising out of their matrimonial relationship. It includes rights of administration and disposal of property belonging to the spouses, and matrimonial property agreements by which the spouses organise their matrimonial property regime. Conversely, claims between spouses arising under the general law of property, contracts or torts are not excluded from the scope of the draft Convention. [21] The term "similar relationships" covers relationships between unmarried couples, *e.g.*, registered partnerships, to the extent that they are given legal recognition. [22]

41. **Wills and successions**. Sub-paragraph (d) excludes wills and succession from the scope of the draft Convention. [23] The exclusion refers to succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, either by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession. The use of the word "wills" simply indicates that matters concerning the form and material validity of dispositions upon death are excluded from the draft Convention. [24] In relation to trusts created by testamentary disposition, judgments on the validity and interpretation of the will creating the trust are excluded from the draft Convention. However, judgments on the effects, administration or variation of the trust between persons who are or were within the trust relationships are included within the scope of the draft Convention. [25]

42. **Insolvency, composition, resolution of financial institutions, and analogous matters**. Sub-paragraph (e) excludes insolvency, composition, resolution of financial institutions, and analogous matters from the scope of the draft Convention. The term "insolvency" covers the bankruptcy of both individuals and legal persons. It includes the winding-up or liquidation of corporations in insolvency proceedings; conversely, the winding-up or liquidation of corporations for reasons other than insolvency is dealt with by sub-

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protection of children, with Art. 3 of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*; and (ii) protection of adults, with Art. 3 of the *Hague Convention of 13 January 2000 on the International Protection of Adults*.

17 See, on maintenance obligations, the *Hague Convention of 15 April 1958 concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations toward Children*; the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*; or the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (hereinafter, the "2007 Child Support Convention").

18 Nygh/Pocar Report, para. 32.

19 See the *Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*.

20 Nygh/Pocar Report, para. 33; Hartley/Dogauchi Report, para. 55.

21 Nygh/Pocar Report, para. 35.

22 *Ibid.*; Hartley/Dogauchi Report, para. 55.

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

24 Nygh/Pocar Report, para. 36.

25 *Ibid*.

paragraph (i).[26] The term "composition" refers to proceedings whereby the debtor may enter into an agreement with his or her creditors to restructure or reorganise a company to prevent its liquidation. These agreements usually imply a moratorium on the payment of debts and a discharge.[27] Purely contractual arrangements – *i.e.*, voluntary out-of-court agreements – are, however, not covered by the exclusion. The term "analogous matters" is used to cover a wide range of other methods whereby insolvent or financially distressed persons can be assisted to regain solvency while continuing to trade, such as Chapter 11 of the United States Bankruptcy Code.[28]

43. The term "resolution of financial institutions" is not included in the parallel provision of the 2005 Choice of Court Convention. This is a relatively new concept that refers to the legal framework enacted in many jurisdictions under the auspices of the Financial Stability Board (FSB) to prevent the failure of financial institutions. A resolution may include: liquidation and depositor reimbursement; transfer and / or sale of assets and liabilities; establishment of a temporary bridge institution; and write-down or conversion of debt to equity.[29] It is true that most of these measures do not qualify as civil or commercial matters, but as administrative matters, and therefore are outside the scope of application of the draft Convention under Article 1(1). However, in the Second Meeting of the Special Commission, many delegations considered an explicit reference to this new framework in sub-paragraph (e) appropriate to prevent any ambiguity or loophole in the text.[30]

44. **Insolvency-related judgments.** Judgments are excluded from the scope of the draft Convention under sub-paragraph (e) if they directly concern insolvency.[31] For this exclusion to apply, it must be determined whether the right or the obligation which was the legal basis of the action in the State of origin found its source in either general common rules of civil or commercial law or in rules pertaining specifically to insolvency proceedings. If the action derives from the latter, the exclusion would preclude the circulation of such a judgment under the draft Convention, but if the action derives from the former, the judgment may circulate (however, see *infra* para. 46). Criteria that may be taken into account by the courts of the requested State in considering whether the judgment was based on insolvency rules are, in particular: whether the judgment was given on or after the commencement of the insolvency proceedings, whether it served the interest of the general body of creditors, or whether the proceedings from which the judgment derived could not have been brought but for the debtor's insolvency.[32] Thus, the draft Convention does not apply, for example, to judgments opening insolvency proceedings, their conduct and closure, a court approval of a restructuring plan, judgments setting aside transactions detrimental to the general body of creditors or judgments on the ranking of claims.[33]

45. Conversely, the draft Convention does apply to judgments on actions based on general civil or commercial law, even if the action is brought by or against a person acting as insolvency administrator in one party's insolvency proceedings. Thus, the draft Convention applies to judgments on actions for the performance of obligations under a contract concluded by the debtor, or actions on non-contractual damages.[34] For example, consider where A enters into a sale contract with B. A is then declared bankrupt in State X. The draft Convention will apply to any judgment against B to perform the contract even if the action was brought by the person appointed as insolvency administrator in A's bankruptcy. By the same token, the draft Convention will apply if such action was brought by B against A acting through the person appointed as insolvency administrator in A's bankruptcy.

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26 *Ibid.*; Hartley/Dogauchi Report, para. 56.

27 *Ibid*.

28 Nygh/Pocar Report, paras 38 and 39; Hartley/Dogauchi Report, para. 56. Some national proceedings may be subsumed under the concept of "compositions" or under "analogous matters", but since both are excluded from the scope of the draft Convention, the issue is not relevant here.

29 See Financial Stability Board, *Key Attributes of Effective Resolution Regimes for Financial Institutions,* 15 October 2014.

30 Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017), Minutes No 2, paras 30-50.

31 Hartley/Dogauchi Report, para. 57.

32 See Work. Doc. No 104 of February 2017, "Proposal of the delegation of the European Union" (Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017)).

33 *Ibid*.

34 *Ibid.;* Hartley/Dogauchi Report, para. 57.

46. Note, however, that the application of the draft Convention in the latter types of cases, *i.e.*, when the judgment debtor is in insolvency proceedings, has a limited effect. Insolvency proceedings are collective proceedings that usually prevent individual creditors from enforcing their claims by means of separate enforcement actions; otherwise, the orderly administration and liquidation of the estate or the reorganisation of the debtor would not be feasible. Accordingly, the jurisdiction to judge the merits of a contractual claim may be determined by general jurisdiction rules; but if the judgment is favourable to the insolvent debtor's counterparty – B in the above example -, the enforcement of such judgment may be affected by the insolvency proceedings. In general terms, the effect of commencing insolvency proceedings on individual enforcement actions is not governed by the draft Convention. In practice, this implies that the judgment creditor may seek recognition of the judgment under the draft Convention in the jurisdiction where insolvency proceedings are commenced – State X in the example – but will only receive payment through the insolvency process or the reorganisation plan. Likewise, the judgment creditor may seek recognition and enforcement of the judgment in other States different from that where insolvency proceedings are commenced, but the enforcement of this judgment may be affected by the commencement of insolvency proceedings against the judgment debtor if these proceedings are recognised in the requested State (under the UNCITRAL Model Law or otherwise). In this sense, sub-paragraph (e) may, unlike other exclusions, directly interfere with the obligation laid down by Article 4(1) of the Draft Convention to enforce a judgment given in another Contracting State.

47. **Carriage of passengers and goods**. Sub-paragraph (f) excludes contracts for the national or international carriage of passengers or goods, regardless of the means of transport. Exclusion extends to carriage by sea, land and air, or any combination of the three.[35] The international carriage of persons or goods is subject to a number of other important Conventions, and this exclusion prevents conflicts of instruments from arising. In any event, the exclusion is not limited to commercial contracts for carriage and, therefore, it also covers consumer contracts, *e.g.*, the draft Convention does not apply to a judgment for personal injury to a passenger injured in an accident as a result of a taxi driver's negligence. Conversely, this exclusion does not cover damages to third parties, *e.g.*, a victim in an accident who was not a passenger. Nor does it apply to complex contracts that combine tourist services, such as transport, accommodation and other services, where the transport alone is not the main object of the contract.

48. **Maritime matters**. Sub-paragraph (g) excludes five maritime matters: marine pollution, limitation of liability for maritime claims, general average, emergency towage and emergency salvage. Because of the highly specialised nature of this field and that not all States have adopted the relevant international instruments, the 2005 Choice of Court Convention introduced this exclusion, which has been maintained in the draft Convention. Subject to the limitation of liabilities, other maritime matters, such as marine insurance, non-emergency towage and salvage, shipbuilding or ship mortgages and liens are included in the scope of the draft Convention.[36]

49. **Nuclear damages**. Sub-paragraph (h) excludes liability for nuclear damage. As regards this exclusion, the explanation given by the Hartley/Dogauchi Report may be sufficient.[37] This is the subject of various international Conventions, which provide that the State where the nuclear accident takes place has exclusive jurisdiction over actions for damages for liability resulting from the accident. In some cases, Article 25 of the draft Convention might give those instruments priority over this draft Convention. However, there are some States with nuclear power plants that are not parties to any of the nuclear liability Conventions. Such States would be reluctant to recognise judgments given in another State by virtue of one of the filters laid down by Article 5 of the draft Convention, since, where the

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35 Hartley/Dogauchi Report, para. 58.

36 Hartley/Dogauchi Report, para. 59. For an explanation on the scope of the terms "limitation of liability for maritime claims", see P. Schlosser, "Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice", *Official Journal of the European Communities*, No C 59/71, Luxembourg, 1979 (hereinafter, the "Schlosser Report"), paras 124-130.

37 Hartley/Dogauchi Report, para. 64 (notes omitted).

operators of the nuclear power plants benefit from limited liability under the law of the State in question, or where compensation for damage is paid out of public funds, a single collective procedure in that State under its internal law would be necessary in order to have a uniform solution in respect of liability and an equitable distribution of a limited fund among the victims. This exclusion addresses nuclear accidents and therefore it does not cover tortious medical claims regarding nuclear medicine (including radiation therapy, for example).

50. **Legal persons**. Sub-paragraph (i) excludes the validity, nullity or dissolution of legal persons, and the validity of decisions of their organs. The exclusion also encompasses "associations of natural or legal persons", *i.e.*, unregistered entities without legal personality. These matters are often subject to the exclusive jurisdiction of the State whose law applies to those entities in order to avoid a plurality of fora in this field and to ensure legal certainty.[38] Accordingly, it was considered preferable to exclude them from the scope of the draft Convention, since judgments on those matters are not usually recognised and enforced in other States.[39] The exclusion only covers the validity, nullity or dissolution of legal companies and associations, or the validity or nullity of decisions of their organs, *e.g.*, the shareholders' meeting or the board of directors. But the exclusion does not cover other judgments related to company law issues, such as judgments on directors' liability, claims for dividend payments or for payments of members' contributions. Naturally, any contract or tortious matter relating to the activities of a legal person remains within the scope of the draft Convention.

51. **Validity of entries in public registers**. Sub-paragraph (j) excludes the validity or nullity of entries in public registers, including land registers, land charges registers and commercial or intellectual property registers. The Hartley/Dogauchi Report explains that "some people may not regard this as civil or commercial matters. However, as some international instruments (for instance, Art. 22(3) of the Brussels I Regulation) provide for the exclusive jurisdiction over proceedings that have the validity of such entries as their object, it was thought better to exclude them explicitly in order to avoid any doubts".[40] Public registers are kept by public authorities and imply the exercise of a sovereign power; actions on validity of entries must usually be brought against the public authority keeping the register. This includes, for example, cases where the registration is refused or amended by the Registrar and the applicant appeals against such decisions. This litigation usually takes place between the applicant and the Registrar. Accordingly, in principle, entries in public registers would qualify as administrative matters. Article 2(1)(j) merely prevents any misinterpretation of the draft Convention.

52. The exclusion does not extend, however, to the legal effects of the entries.[41] Thus, for example, an action against a third party, purchaser of an immovable property, based on a right of pre-emption registered in the land register is not covered by the exclusion. By the same token, an action against a private person based on the invalidity of the conveyance of ownership over an immovable is not excluded either, even if the defendant's ownership is registered in the land register. This judgment is not on the "validity of the entry" as such, but on the validity of the title (*i.e.*, the contract) which gave rise to that entry.

53. **Defamation**. Sub-paragraph (k) excludes defamation from the scope of the draft Convention. Defamation is a sensitive matter for many States, since it touches upon freedom of expression and therefore has constitutional implications. The exclusion covers defamation of both natural and legal persons, and by any means of public communication, such as press, radio, television or the internet. It includes cases of libel and slander (*i.e.*, news or opinions affecting the honour or reputation of a person).

54. **[Privacy.** Sub-paragraph (l) excludes privacy. The *rationale* for this exclusion is the same as that discussed for defamation. Privacy is a matter where judicial decisions are usually based on a delicate balance between constitutional rights, and therefore is a sensitive matter for many States. Unlike defamation, this exclusion applies to the disclosure of *true* information, including, *e.g.*, pictures or audio recordings. This exclusion may be formulated in more precise terms, defining privacy as *an unauthorised public disclosure of information*

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38 Nygh/Pocar Report, para. 170.
39 Hartley/Dogauchi Report, para. 70.
40 *Ibid.*, para. 82.
41 Nygh/Pocar Report, para. 172.

relating to private life.[42] This definition contains three key elements. *Firstly*, the information must be disclosed, like in the case of defamation, by means of public communication such as press, radio, television or the internet. *Secondly,* the disclosure must be *unauthorised.* This term basically means that the disclosure was not authorised by the relevant person, in the context of a contract for example, or by a competent authority. In practise, however, the application of this condition may require a review on the merits of the judgment by the courts of the requested State. And *thirdly,* it only applies to natural persons since public persons do not have a "private life". Data protection, intrusion or breach of confidence are only included in sub-paragraph (l) in so far as they relate to the private life of natural persons. When the exclusion applies, it covers both claims to prevent the public disclosure of private information and claims for the compensation of damages.]

55. **[Intellectual Property rights.** Sub-paragraph (m) excludes intellectual property [and analogous matters]. The scope of the exclusion was discussed at length at the November 2017 meeting of the Special Commission. There was a proposal to include a detailed but non-exhaustive list of IP matters, while there were also preferences of having an open list without detailing specific types of IP matters. In particular, the discussion focused on how to exclude IP rights that are not universally recognised. A solution was then found to use the term "analogous matters", which captures a broad range of issues that are considered intellectual property rights according to certain national laws, but not so under other national laws, such as traditional knowledge, genetic resources and traditional cultural expressions. As there were still discussions as to what would be covered by "analogous matters"[43], this term was put into square brackets for further consultation. It should be noted that a similar term, "analogous right", is included in Article 5(3). If intellectual property-related judgments were to be excluded from the draft Convention, whether and how such judgments should be recognised and enforced will only be determined by the national law of each State or other bilateral or multilateral instruments concluded by the States with regard to recognition and enforcement. The draft Convention, like the 2005 Choice of Court Convention, applies to contracts dealing with intellectual property rights such as licensing agreements, distribution agreements, joint venture agreements or agreements for the development of an intellectual property right.[44]]

Paragraph 2

56. **Preliminary questions**. Paragraph 2 limits the effect of the exclusions from the scope of the draft Convention. It deals with the case where the court of origin ruled on a question of law as a preliminary matter to the decision on the plaintiff's claim, *i.e.*, the main or principle subject matter. For example, [in an action for infringements of intellectual property rights (as a main issue), it might have to rule on whether the intellectual property right is valid (as a preliminary issue)]; in an action seeking the nullity of a contract for lack of capacity (as a main issue), it might have to rule on the legal capacity of a minor (as a preliminary issue); or in an action seeking the payment of corporate dividends (as a main issue), it might have to rule on the decision of the shareholders' meeting approving such payment (as a preliminary issue).

57. In these circumstances, paragraph 2 sets forth that a judgment is not excluded from the scope of the draft Convention where one of the excluded matters arises merely as a preliminary issue, and in particular where it is raised by way of defence. Thus, the application of the draft Convention is determined by the object of the proceedings: if the object of the proceedings in which the judgment was given falls within the scope of the draft Convention,

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42 See Work. Doc. No 226 Revised of November 2017, "Proposal of the delegation of the European Union" (Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017)); C. North (with the assistance of the Permanent Bureau), "Note on the possible exclusion of privacy matters from the Convention as reflected in Article 2(1)(k) of the February 2017 draft Convention", Prel. Doc. No 8 of November 2017 for the attention of the Third Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017) (available on the Hague Conference website at < www.hcch.net >, under the "Judgments Section", then "Special Commission on the Judgments Project"), para. 51.

43 See Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017), Minutes No 6, paras 35-42, Minutes No 7, paras 4-18.

44 See Hartley/Dogauchi Report, para. 76.

as is the case in the examples mentioned above, this instrument applies. This provision has to be read in conjunction with Article 8, which deals with the consequences of rulings on preliminary issues (see *infra* paras 279 - 294).

58. Unlike the parallel provision in the 2005 Choice of Court Convention (Art. 2(3)), Article 2(2) of the draft Convention refers to any matter "to which this Convention does not apply". It therefore applies to any matter excluded under Article 1(1) or Article 2(1), but also arbitration and related proceedings (Art. 2(3)). Thus, for example, a judgment on private damages that was based on a prior decision of an anti-trust authority (follow-on actions) is not excluded from the scope of the draft Convention; a judgment on a breach of contract that disregards an arbitration clause is not excluded either (see however *infra* paras 59-61).

Paragraph 3

59. **Arbitration**. The draft Convention does not apply to arbitration and related proceedings. This should be interpreted widely to prevent the draft Convention from interfering with arbitration and international conventions on this subject, in particular the 1958 New York Convention.[45] The exclusion covers both arbitral awards and court decisions relating to arbitration. Thus, for example, the draft Convention does not apply to the recognition and enforcement of arbitral awards, nor to the recognition and enforcement of court decisions giving assistance to the arbitral process, *e.g.*, deciding whether the arbitration clause is valid or not, inoperative or incapable of being performed; ordering parties to proceed to arbitration or to discontinue arbitration proceedings; revoking or amending arbitral awards; appointing or dismissing arbitrators; fixing the place of arbitration; or extending the time-limit for making awards.[46]

60. The exclusion of arbitration also covers the effects that an arbitration agreement or an arbitral award may have on the provisions of the draft Convention, in particular Article 4(1), *i.e.*, the obligation to recognise and enforce judgments given in another State. Thus, the requested State may refuse the recognition and enforcement of a judgment given in another State if the proceedings in this State were contrary to an arbitration agreement, even if the court of origin ruled on the (in)validity of the arbitration agreement as a preliminary question (see Art. 8(2)). Since the purpose of this exclusion is to ensure that the draft Convention does not interfere with arbitration, it entails that the court of the requested State might also refuse recognition and enforcement of a judgment contrary to an arbitration agreement even if the validity of this agreement was not addressed by the court of origin, *e.g.*, if it is a default judgment.[47]

61. By the same token, the requested State may refuse the recognition and enforcement of a judgment given in another State, if this judgment is irreconcilable with an arbitral award.

62. **Alternative Dispute Resolution.** Paragraph 3 however does not cover other forms of alternative dispute resolution (ADR), *e.g.*, conciliation or mediation. Accordingly, the fact that the proceedings in the court of origin were contrary to an agreement on an ADR mechanism (alternative or prior to the court proceedings) may not be invoked as a ground for refusing recognition or enforcement. Naturally, the draft Convention does not apply to the recognition or enforcement of ADR settlements since they do not qualify as "judgments" according to Article 3(1)(b) of the draft Convention, *i.e.*, they are not "decisions on the merits given by a court" (for their qualification as "judicial settlements", see *infra* para. 307).

Paragraph 4

63. **States and other governmental bodies**. Paragraphs 4 and 5 deal with the application of the draft Convention to disputes involving States. The former makes it clear

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45 See also Hartley/Dogauchi Report, para. 84. The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 1958 (hereinafter, "1958 New York Convention").

46 Hartley/Dogauchi Report, para. 84.

47 Note that if the defendant entered into appearance before the court of origin and argued on the merits without contesting jurisdiction, the judgment would not, in principle, be contrary to the arbitration agreement (see Art. II (3) of the 1958 New York Convention; also *infra* paras 143-157).

that the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings in the State of origin does not exclude a judgment from the scope of the draft Convention. This is a corollary of the way the material scope of application of the draft Convention is defined in Article 1(1). As explained above (see *supra* paras 21-22), this scope is determined by the nature of the dispute (*i.e.*, civil or commercial), irrespective of the nature of the parties or the courts. Paragraph 4 is thus a mere clarifying rule. This provision, however, must be read in conjunction with Article 20, which permits States to exclude the application of the Convention to judgments which arise from a proceeding to which they are a party (see *infra* para. 345).

64. Unless a declaration under Article 20 is made, the draft Convention applies when the State or a governmental agency is acting as a private person, *i.e.*, without exercising sovereign powers, and regardless of whether those public entities are the judgment creditor or the judgment debtor. In this regard, the Nygh/Pocar Report sets out three core criteria to determine the application of the 1999 Preliminary draft Convention to disputes involving government parties, that may also be useful for the application of the draft Convention:[48]

- the conduct upon which the claim is based is conduct in which a private person can engage;
- the injury alleged is injury which can be sustained by a private person;
- the relief requested is of a type available to private persons seeking a remedy for the same injury as the result of the same conduct.

65. This explains that, unlike paragraph 5, this provision does not make an explicit reference to "international organisations". It is evident that, in spite of this silence, a judgment is not excluded from the scope of the draft Convention by the mere fact that an international organisation was a party to the proceedings, insofar as this organisation was acting as a private person, without exercising any extraordinary powers.

Paragraph 5

66. **Privileges and immunities**. Paragraph 5 is a "nil-effect clause" that prevents a misinterpretation of paragraph 4.[49] The fact that the draft Convention applies to States and governmental agencies does not mean that it interferes with their privileges and immunities. The clarification of this idea is precisely the purpose of paragraph 5. According to this provision, nothing in the draft Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property. It also covers the privileges and immunities of State officials, including those persons entitled to diplomatic and consular immunity.[50]

67. It is true that, in principle, there is no overlap between Article 1(1) and the privileges and immunities of States or international organisations. Insofar as these privileges and immunities are usually linked to acts or omissions in the exercise of State authority (*acta iure imperii*), the draft Convention does not apply. The acts or omissions of States exercising their sovereign authority are not civil or commercial matters, and therefore are outside the scope of application of the draft Convention in accordance with Article 1(1). Accordingly, even if a State renounces its immunity and submits itself to the jurisdiction of the court of a foreign State, the draft Convention will not apply to the recognition and enforcement of that judgment.[51]

68. The solution is different in exceptional cases where the immunities of States and governmental bodies, according to the relevant rules, encompass acts or omissions that may qualify as "civil or commercial matters" in accordance with the draft Convention. This may be the case, for example, if the immunity covers a tort claim against a governmental body (a diplomatic agent) deriving from *acta iure gestionis*. In such a case, Article 2(5) of the draft

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48 Nygh/Pocar Report, para. 43; Prel. Doc. No 4, para. 40.

49 Nygh/Pocar Report, para. 46; Hartley/Dogauchi Report, para. 87.

50 Nygh/Pocar Report, para. 46.

51 See Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (1-9 June 2016), Minutes No 8, para. 59.

Convention has practical relevance. Accordingly, if the beneficiary waives its immunity and submits itself to the jurisdiction of the court of the State of origin, the draft Convention will apply to the recognition and enforcement of the corresponding judgment.[52]

69. Although, in principle, the scope of privileges and immunities of States or of governmental agencies is mainly determined by public international law, this provision does not limit itself to these immunities and therefore may also cover privileges and immunities under domestic law. Furthermore, the scope of these privileges and immunities is determined by the law and standards of the requested State. Thus, a State may refuse the recognition and enforcement of a judgment given in violation of *its* rules on privileges and immunities.[53]

Article 3 – Definitions

70. **Definitions**. Article 3 of the draft Convention contains two definitions, one of the term "defendant" and another of the term "judgment" (para. 1). It also specifies how to determine the habitual residence of legal persons (para. 2). This ensures a uniform interpretation and application of the draft Convention (see Art. 22).

Paragraph 1

71. **Defendant**. The term "defendant" is used in several provisions of the draft Convention (Art. 5(1)(d), (e), (f), (g), (i), Art. 5(3)(a), (b) and Art. 7(1)(a)). Sub-paragraph (a) defines "defendant" as the person against whom the claim or counterclaim was brought in the State of origin. That is, in the context of a counterclaim, the term refers to the initial claimant;[54] in the context of a third-party claim, *i.e.*, an action brought by the defendant to force a third party to become a party to the proceedings, it must be interpreted as referring to the third party against whom this claim was made.

72. **Subrogation, assignment or succession.** The "defendant" may be different from the person against whom the judgment was rendered in the State of origin, as the wording of sub-paragraph (a) focuses on a person against whom the claim or the counterclaim was *brought* (and not against whom the judgment was rendered). Further, a "defendant" may be even different from the person against whom recognition and enforcement is sought in the requested State. This may happen if the claim is transferred to another person, by assignment or succession, in the course of the proceedings in the State of origin, or after the judgment was given but before recognition and enforcement is sought (see *infra* paras 122-124).

73. **Judgment**. Following the 2005 Choice of Court Convention, sub-paragraph (b) defines "judgment" as any decision on the merits given by a court, whatever that decision may be called, including a decree or order. It also includes a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under the draft Convention. An interim measure of protection however is not a judgment for the purpose of the draft Convention.

74. The definition of judgment contains two main elements: it must be (i) "a decision on the merits" (ii) given by a "court".

75. **A decision on the merits**. First, the judgment, whatever it is called, including a decree or order, must be "a decision on the merits". The term implies some kind of contentious judicial proceedings in which a court makes a decision (for judicial settlements, see *infra* Art. 12). Insofar as it implies a decision on the merits, it includes money and non-money judgments, judgments given by default (see, however, Arts 7(1) and 13(1)(b)), or judgments derived from collective actions. Conversely, procedural rulings, different from orders

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52 Prel. Doc. No 4, para. 42.

53 *Ibid.*

54 The terms "plaintiff" and "claimant" are used interchangeably in this Report [TBI in the Preface].

determining costs or expenses, are excluded from the definition of judgments.[55] Thus, for example, decisions ordering the disclosure of documents or the hearing of a witness are not judgments for the purpose of Article 3(1)(b) of the draft Convention. Orders for payments concerning uncontested pecuniary claims are not judgments for this purpose either.[56] Finally, decisions on recognition and enforcement of foreign judgments or arbitral awards given by the court of a State cannot be recognised or enforced in another State under the draft Convention (*exequatur sur exequatur ne vaut pas*); neither can they be enforcement orders, such as garnishee orders or orders for seizure of property.

76. **Non-monetary judgments**. Non-monetary (or non-money) judgments, *i.e.*, judgments that order the debtor to perform or refrain from performing a specific act, such as an injunction, are often enforced by means of pecuniary penalties that "reinforce" the main part of the judgment. That is, the judgment defendant is ordered to perform, or not to perform, an act and may be required to pay a sum of money to encourage compliance with the order. These pecuniary penalties are severable from the part of the judgment providing the injunctive remedy and they may have been granted by the courts of the State of origin, which also may determine the final amount, or by the courts of the requested State.[57] Furthermore, in some jurisdictions these pecuniary penalties are payable to the courts or fiscal authorities, whilst in others they are payable to the judgment creditor. In the former case, those penalties are not within the scope of the draft Convention since they do not qualify as civil or commercial matters. In the latter case, in principle, they may be within this scope if their objective is to compensate the judgment creditor for any delay in the fulfilment of the injunction. However, Article 10 may apply in this case.

[Alternative formulation: periodic penalties that accompany injunctive relief are not decisions on the merits and therefore do not meet the definition of judgment for the purposes of the draft Convention, irrespective of whether they are payable to a public authority or the judgment creditor. One may also consider the consistency of this formulation with the concept of a decision on the merits, since the judgment as a whole is a decision on the merits, and this is one aspect of the relief ordered in the course of determining the merits of the dispute.][58]

77. **Decision on costs**. The definition of sub-paragraph (b) includes two additional elements. On the one hand, a determination of costs or expenses by a court, including an officer of the court, is also a judgment for the purposes of the draft Convention, provided that it relates to a decision on the merits which may be recognised and enforced under the draft Convention (see also *infra* Art. 15(2)). Such determination of costs may be included in the same judgment as the decision on the merits or in a separate judgment. In both cases, recognition and enforcement under the draft Convention is partially linked to the decision on the merits (*i.e.*, ancillary matters follow the principal issue). If the latter may not be recognised or enforced under the draft Convention (for example, because it is outside its scope, is not eligible for recognition, or a ground for refusal is applicable), then the decision on costs shall not be recognised or enforced either (Art. 3(1)(b)). Conversely, if the decision on the merits may be recognised or enforced under the draft Convention, in principle, the determination of costs may be recognised and enforced as well. It is sufficient that the recognition of the merits "may be" recognised or enforced in the requested State, and not that it has already been recognised and enforced. In exceptional cases, however, the decision on the merits may be recognised and enforced, but the determination of costs may not, for example, because it was obtained by fraud (see Art. 7(1)(b)).

78. It follows that, in accordance with this principle, and due to the fact that interim measures of protection are not eligible for recognition and enforcement under the draft

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55 Hartley/Dogauchi Report, para. 116.

56 Some States have established a simplified procedure concerning uncontested pecuniary claims. This procedure is based on an initial order for payment issued by the court on the basis of the information provided by the claimant. This order gives the defendant the option between paying the amount awarded to the claimant or lodging a statement of opposition. If within a certain time limit no statement of opposition is lodged, the court will then declare the order for payment enforceable. This latter judgment will fall within the scope of application of the draft Convention.

57 Note also that the "penalty" may be a fixed sum, *e.g.*, a civil fine, or a periodic penalty payment for each day of delay.

58 [The Special Commission should make a decision on this issue.]

Convention (see *infra* para. 79), any costs order made against a party for the cost of the proceedings in connection with such measures cannot be recognised or enforced under the draft Convention.

79. **Interim measures of protection**. Sub-paragraph (b) sets forth that an interim measure of protection is not a judgment for the purposes of the draft Convention. The concept of "interim measure of protection" covers measures that serve two main purposes: either providing a preliminary means of securing assets out of which a final judgment may be satisfied, or maintaining the *status quo* pending determination of the issue at trial.[59] Thus, for example, an order freezing the defendant's assets, an interim injunction or an interim order for payment do not benefit from the rules on recognition and enforcement of the draft Convention. Naturally, they may still be recognised and enforced under national law (Art. 16).

80. **Court**. Secondly, for a decision on the merits to qualify as a judgment under sub-paragraph (b), it must have been given by a "court". The draft Convention does not define this term. The Hartley/Dogauchi Report mentions that it includes "a patent office exercising quasi-judicial functions".[60] However, this interpretation seems excessively broad. At the Second Meeting of the Special Commission, the inclusion of a definition in the following terms was proposed:

> "'court' means: (i) a tribunal belonging to the Judiciary of a Contracting State at any level, and (ii) any other permanent tribunal that, according to the law of a Contracting State, exercises jurisdictional functions on a particular subject matter, according to pre-established procedural rules, being independent and autonomous."[61]

81. The proposal was not adopted due to the difficulty of articulating an appropriate definition, but there was some support for the idea.[62] In principle, the term "court" must be interpreted autonomously and refers to the judicial authorities or bodies of a State, *i.e.*, authorities or bodies that are part of the judicial branch of a State, and which exercise judicial functions. It does not include administrative authorities, such as patent or trademark offices (or the board of appeal which may have been established within these offices),[63] officers of the court (with the exception of determination of costs, see *supra* para. 77), public notaries, or registers, nor non-State authorities, *e.g.*, religious courts. Common courts, *i.e.*, courts common to two or more States, fall within the scope of the draft Convention under certain conditions (see *infra* Art. 21).

Paragraph 2

82. **Habitual residence**. Paragraph 2 deals with the concept of "habitual residence" of entities or persons other than natural persons. According to this provision, these entities are considered to be habitually resident in the State (i) where they have their statutory seat, (ii) under whose law they were incorporated or formed; (iii) where they have their central administration; or (iv) where they have their principal place of business.[64] The term

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59 On the definition of interim measures, see Nygh/Pocar Report, paras 178-180.

60 Hartley/Dogauchi Report, note 146.

61 Work. Doc. No 166 of February 2017, "Proposal of the Delegations of Ecuador and Uruguay" (Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017)). See also Work. Doc. No 235 of November 2017, "Proposal of the Delegations of Ecuador and Uruguay" (Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017)).

62 See *Aide memoire* of the Chair of the Special Commission (Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017)), para. 21. Note that this definitional difficulty has been encountered in other international conventions and has resulted in the general absence of a comprehensive definition of the term "court" from instruments such as the 2005 Choice of Court Convention. It is also worth noting that at the Second Meeting of the Special Commission, experts considered that a court may have further characteristics; see Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017), Minutes No 11, paras 48-56.

63 Therefore, decisions by the European Patent Office, the Community Plant Variety Office, the European Union Intellectual Property Office or the Eurasian Patent Office are outside the scope of the draft Convention.

64 The Nygh/Pocar Report (paras 62-66) and the Hartley/Dogauchi Report (paras 120-123) explain the rationale underpinning these alternative criteria. Note also that the Hartley/Dogauchi Report explains

"habitually resident" is used in Article 5(1)(a). Articles 15 and 18 only use the term "resident" (without any qualification), and Article 24(1)(b), the term "habitual residence".

83. Paragraph 2 refers to "an entity or person other than a natural person" in order to include legal persons but also associations or unincorporated entities, *i.e.*, associations of natural or legal persons which lack legal personality but are capable, under the law which governs them, of appearing and being a party to the proceedings. The provision will, however, typically apply to corporations.

84. **Statutory seat and State of incorporation**. The terms "statutory seat" and the law under which "the entity is incorporated or formed" refer to two different legal circumstances. The former is the "domicile" of the entity as determined by its bylaws or comparable constituent documents. In English law, the nearest equivalent term is "registered office". The latter refers to the law of the State under which the entity was created, *i.e.*, that gave birth to it and endowed it with legal personality or procedural capacity.[65] In practice, both criteria, the statutory seat and the place of incorporation, will usually coincide in the same State.

85. **Central administration and principal place of business**. Conversely, the terms "central administration" and "principal place of business" refer to two different factual circumstances. The former refers to the place where the head office functions are located, *i.e.*, where the most important decisions about the running of the entity are made. It looks at the "brain" of the entity. The latter refers to the principal centre of its economic activities.[66] It looks at the "muscles" of the entity. For example, a mining company may have its headquarters in London, but carry out its mining activity in Namibia.[67]

86. The four connecting factors mentioned in paragraph 2 operate in an alternative way and there is no hierarchy between them. The four connecting factors are also not mutually exclusive. If an analysis of the factors mentioned in paragraph 2 proves that the defendant is habitually resident in two or more different States concurrently, the defendant may be considered to be habitually resident in any one of them. Thus, for example, if Company A is incorporated in State X, has its central administration in State Y and its principal place of business in State Z, a judgment given by a court of any of those three States will be eligible for recognition and enforcement under Article 5(1)(a) of the draft Convention.

CHAPTER II – RECOGNITION AND ENFORCEMENT

Article 4 – General provisions

87. Article 4 is the most important provision in the draft Convention: it lays down the principle of mutual recognition of judgments among States (para. 1). It also contains general provisions setting forth the conditions and some of the consequences of that obligation. A judgment given in another State shall be recognised and enforced in the requested State without reviewing the merits of the decision (para. 2), but only insofar as it has effects in the State of origin (para. 3). Finally, paragraph 4 deals with cases where the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired.

Paragraph 1

88. **Obligation to recognise and enforce**. Paragraph 1 establishes the central obligation imposed on States by the draft Convention: the mutual recognition and enforcement of judgments. According to this provision, a judgment given by a court of a State (State of origin) shall be recognised and enforced in another State (requested State) in accordance with the provisions of Chapter II. This obligation, naturally, presupposes three positive

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that "A State or a public authority of a State would be resident only in the territory of that State", see note 148 of Hartley/Dogauchi Report. The same should hold for the purposes of the draft Convention.

65 Nygh/Pocar Report, para. 63; Hartley/Dogauchi Report, para. 120.

66 Nygh/Pocar Report, paras 65 and 66; Hartley/Dogauchi Report, para. 120.

67 Hartley/Dogauchi Report, para. 120.

conditions: (i) that the judgment falls within the scope of application of the draft Convention (see Arts 1 and 2); (ii) has effect in the State of origin (Art. 4(3)); and (iii) is eligible for recognition and enforcement under Article 5 or 6. The obligation also presupposes a negative condition: that there are no grounds for refusal of recognition or enforcement under Article 7.

89. The second sentence of paragraph 1 sets forth that if the draft Convention applies, recognition or enforcement *may* be refused only on the grounds specified in the draft Convention. Thus, if a judgment is eligible for recognition and enforcement within the scope of the draft Convention, and the criteria laid down in the following provisions of Chapter II are met, it is not open to a State to refuse recognition or enforcement on other grounds under national law. On the other hand, even where one of the grounds of refusal under the draft Convention is applicable, the national law of the requested State may nevertheless provide for recognition and enforcement of the judgment (see *infra* Art. 16).

Paragraph 2

90. **No review on the merits**. Paragraph 2 expressly states an important point that is implicit in paragraph 1. In the course of making a decision on recognition and enforcement, there is to be no review of the merits of the judgment given by the court of origin. That is, if a judgment meets the criteria set out by the draft Convention for recognition and enforcement, it will not be revisited in the requested State. This rule is a corollary of the principle of mutual recognition of judgments: there would be little purpose to the draft Convention if the court of the requested State could review the underlying factual or legal basis upon which the court of origin reached its decision. In practice, this would imply that the parties may be forced to re-litigate the same cause in the requested State.[68] Accordingly, the court addressed is not to examine the substantive correctness of that judgment: it may not refuse recognition or enforcement if it considers that a point of fact or law has been wrongly decided. In particular, the court addressed cannot refuse recognition or enforcement solely on the ground that there is a discrepancy between the legal rule applied by the court of origin and that which would have been applied by the court addressed.

91. **Exception**. This rule is however qualified with the sentence “Without prejudice to such review as is necessary for the application of the provisions of this Chapter”. In particular, the application of Articles 5 and 6, which define which judgments are eligible for recognition and enforcement, or Article 7, which lays down the grounds for refusal, may require some form of review of the decision of the court of origin.

92. Under Article 5, for example, the court addressed must verify that the judgment is eligible for recognition and enforcement on the basis of the connection between the case and the courts of the State of origin. The verification of this connection encompasses the legal and factual elements that determine the (indirect) basis of jurisdiction established by that provision. For example, in the case of a judgment that ruled on a contractual obligation, the application of Article 5(1)(g) would require the court addressed to review whether the performance of the obligation took place, or should have taken place, in the State of origin. This requires or may require a review of legal elements, such as the place of performance of the contract under the applicable law. Or, for example, the application of Article 5(1)(a) may require the court addressed to verify elements of facts such as where a legal person had its principal place of business at the time that person became a party to the proceedings in the State of origin. The same, *mutatis mutandis*, holds for other paragraphs of Article 5 and other provisions of Chapter II, in particular Article 7 (“refusal of recognition or enforcement”) or Article 10 (“damages”). In the latter case the court addressed may review whether the judgment awards damages that do not compensate a party for the actual loss or harm suffered.

93. Following Article 8(2) of the 2005 Choice of Court Convention, Article 4(2) of the draft Convention originally contained a reference to the finding of facts. According to the first version of Article 4(2), the court addressed was bound by the finding of facts on which the court of origin had based its jurisdiction, unless the judgment had been given by default. In the 2005 Choice of Court Convention that provision only applies to the “jurisdiction” under the

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[68] Nygh/Pocar Report, para. 347.

Convention, *i.e.*, when the court of origin bases its jurisdiction on a choice of court agreement. Such a provision makes sense when the instrument establishes harmonised rules on direct jurisdiction. The draft Convention, however, only contains rules on recognition and enforcement of foreign judgments, and not direct (harmonised) rules on jurisdiction. The First Meeting of the Special Commission therefore concluded that it would be preferable not to include such a provision in this draft Convention.[69] Thus, the court addressed may review rulings by the court of origin on jurisdiction, irrespective of whether they relate to fact or law.

94. Although Article 4(2) of the draft Convention only refers to "the provisions of this Chapter", *i.e.*, Chapter II, the application of the draft Convention itself may also require a certain review of the decision of the court of origin. Thus, the court addressed may, for example, review the ruling of the court of origin on the characterisation of a dispute as civil or commercial matters, irrespective of whether they relate to elements of fact or law.

Paragraph 3

95. **Giving effect**. The obligation to recognise and enforce implies "giving effect" to the foreign judgment in the requested State, *i.e.*, conferring on the foreign judgment the authority and effectiveness accorded to it in the State of origin. Paragraph 3 contains a corollary to this principle: 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. The text is similar to Article 8(3) of the 2005 Choice of Court Convention.

96. **Recognition *versus* Enforcement**. This provision is based on a distinction between recognition and enforcement. In its broadest meaning, recognition includes all legal effects of a judgment, including its binding effects on subsequent litigation (*res judicata* or preclusive effects) and enforceability. However, since recognition and enforcement are treated as separate concepts in the draft Convention, recognition may be defined in the negative: it covers all effects of a judgment except for those relating to its enforcement.

97. **Recognition**. Recognition usually implies that the court addressed gives effect to the determination of the legal rights and obligations made by the court of origin. For example, if the court of origin held that a plaintiff had (or did not have) a given right, the courts of the requested State would accept that this is the case, *i.e.*, would treat that right as existing (or not existing). Or, if the court of origin renders a declaratory judgment on the existence or non-existence of a legal relationship between the parties, the court addressed accepts that judgment as determining the issue.[70] Such determination of legal rights is binding on subsequent litigation. Thus, if the foreign judgment is recognised, it could be invoked, for example, to prevent proceedings between the same parties and having the same subject matter (*res judicata* or issue preclusion defence) in the requested State; the defendant is not burdened by having to defend the same claim twice.

98. ***Res judicata*.** In former versions of the draft Convention, a provision stated that the recognition of a judgment would require the court addressed to give it "the same effects" it had in the State of origin.[71] This entailed that the scope of the *res judicata* effect was determined by the law of the State of origin, not by the law of the requested State. The same applied to equivalent effects, such as issue preclusion or collateral estoppel. This approach was based on the so-called "doctrine of extension of effects": *i.e.*, recognising a foreign judgment implies *extending* the effects that such judgment has under the law of the State of origin, and not equalising it to a resolution of the requested State.

99. The Third meeting of the Special Commission decided to delete this provision since the 2005 Choice of Court Convention was silent on this issue and several delegations expressed their concern about its practical consequences; in particular, when the law of the State of origin has a broad approach to the extension of effects based on issue preclusion or collateral

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69 Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (1-9 June 2016), Minutes No 3, paras 4-16, and Minutes No 13, paras 3 and 4.

70 Hartley/Dogauchi Report, para. 170. See also Nygh/Pocar Report, para. 303.

71 According to Art. 9 (first sentence) of the draft Convention of February 2017, "A judgment recognised or enforceable under this Convention shall be given the same effect it has in the State of origin."

estoppel doctrines.[72] But the draft Convention does not opt for the application of the law of the requested State to determine the effects of a foreign judgment either. The silence of the draft Convention on this issue must be interpreted in a uniform manner in accordance with its objectives. The obligation to recognise a foreign judgment under the draft Convention implies that the same claim or cause of action cannot be re-litigated in another State. Thus, if the foreign judgment determines the existence or non-existence of rights or obligations asserted in a claim, these rights or obligations shall not be subject to further litigation in the courts of the requested State.[73]

100. **Enforcement**. Enforcement means the application of legal procedures by the courts (or any other competent authority) of the requested State to ensure that the judgment-debtor obeys the judgment given by the court of origin. Enforcement is usually needed when the foreign judgment rules that the defendant must pay a sum of money (monetary judgment), or must do, or refrain from doing, something (injunctive relief), and typically implies the exercise of the State's coercive power to ensure compliance. Thus, if the court of origin rules that the defendant must pay the plaintiff USD 10,000, the court addressed would, through an enforcement procedure, ensure that the money is handed over to the plaintiff. Since this would be legally indefensible if the defendant did not owe USD 10,000 to the plaintiff, a decision to enforce the judgment must logically presuppose the recognition of the judgment.[74]

101. In contrast, recognition need not be accompanied or followed by enforcement.[75] For example, if the court of origin held that the defendant did not owe any money to the plaintiff, the court addressed may simply recognise this finding by dismissing the subsequent claim on the same issue. In case of injunctive relief, enforcement is needed, which implies the application of the legal procedure of the court addressed to force the defendant to meet the obligations to do or refrain from doing something deriving from the judgment (see *infra* paras 317-318).

102. In the light of this distinction, it is easy to see why paragraph 3 affirms that a judgment will be recognised only if it *has effect* in the State of origin.[76] Having effect means that it is legally valid and operative. If it does not have effect, it will not constitute a valid determination of the parties' rights and obligations. Thus, if it does not have effect in the State of origin, it should not be recognised under the draft Convention in any other State. Moreover, if it ceases to have effect in the State of origin, the judgment should not thereafter be recognised under the draft Convention in other States.

103. Likewise, if the judgment is not enforceable in the State of origin, it should not be enforced elsewhere under the draft Convention. It is possible that a judgment will be effective in the State of origin without being enforceable there, for example, because enforceability has been suspended pending an appeal (either automatically or by an order of the court). Moreover, if the judgment ceases to be enforceable in the State of origin, because it has been overturned on appeal, for example, it should not thereafter be enforceable in another State under the draft Convention.[77]

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72 See *Aide memoire* of the Chair of the Special Commission (Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017)), para. 33.

73 See Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017), Minutes 9, para. 28; also Work. Doc. No 195 of October 2017, "Proposal of the delegation of the United States of America" (Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017)). The Hartley/Dogauchi Report makes it clear that the recognition of rulings on preliminary issues on the basis of doctrines as issue estoppel, collateral estoppel or issue preclusion is not required by the Convention, but may be granted under national law, see para. 195.

74 Because the draft Convention does not apply to interim measures of protection or to maintenance obligations (and other analogous family matters), the potential challenge related to the absence of *res judicata* effect of an otherwise enforceable judgment does not arise. See the discussion on this issue in the Nygh/Pocar Report, paras 302-315.

75 *Ibid*.

76 *Ibid.*

77 *Ibid.*

104. **Adaptation of remedies.** Former versions of the draft Convention contained a rule on adaptation.[78] However, the Third Meeting of the Special Commission decided to delete this provision since the 2005 Choice of Court Convention was also silent on this issue. This silence should, therefore, be interpreted in the same manner as in the 2005 Choice of Court Convention. According to the Hartley/Dogauchi Report (para. 89):

> "The Convention does not require a Contracting State to grant a remedy that is not available under its law, even when called upon to enforce a foreign judgment in which such a remedy was granted. Contracting States do not have to create new kinds of remedies for the purpose of the Convention. However, they should apply the enforcement measures available under their internal law in order to give as much effect as possible to the foreign judgment."

Paragraph 4

105. Paragraph 4 deals with the case where a judgment is the subject of review in the State of origin or where the time limit for seeking ordinary review of the judgment has not expired. According to this provision, in such a situation, the court addressed has three options. It may (i) grant recognition or enforcement; (ii) postpone its decision on it; or (iii), refuse recognition or enforcement. Paragraph 4 applies to judgments "referred to in paragraph 3"; that is, only insofar as a judgment has effect under the law of the State of origin (see *supra* para. 102), will paragraph 4 apply.

106. **Rationale**. This provision recognises that the impact of review mechanisms on the effectiveness or enforceability of judgments varies across legal systems. There is, therefore, no uniformity as to the point in time when a decision acquires the effect of *res judicata* or "*autorité de chose jugée*". In the common law, *res judicata* arises when a final judgment is given on the issues between the parties which cannot be reconsidered by the same court in ordinary proceedings even though the decision may potentially or actually be the subject of appeal to a higher court. In contrast, many, if not most, civil law systems take the view that a judgment does not have the status of *res judicata* or "*autorité de chose jugée*" until the decision is no longer subject to ordinary forms of review.[79] The same holds with regard to enforcement. In some jurisdictions, a judgment is enforceable even if it is the subject of appeal to a higher court. In other jurisdictions, a judgment only becomes enforceable if the time limit seeking ordinary review has expired.

107. Because of this divergence, the draft Convention does not require that the judgment be "final and conclusive", as there is no uniform definition of this characterisation. Instead, according to paragraph 3, it is sufficient that the judgment has effect or is enforceable under the law of the State of origin. This implies that judgments on the merits, which may not be considered to be final either in the State of origin or under the law of the requested State, may still be recognised and enforced under the draft Convention. This solution protects the interest of the judgment creditor and simplifies the application of this instrument insofar as the concepts of "final and conclusive judgment" or "*res judicata* effect" have no uniform meaning.[80] However, this approach in the draft Convention may give rise to situations where a judgment already recognised or enforced in the requested State is reversed or set aside in the State of origin. Paragraph 4 addresses this problem by including an exception to the obligation, under paragraph 1, to recognise and enforce a judgment given in another State.

108. **Review in the State of origin**. As indicated above, paragraph 4 presupposes that the judgment has effect in the State of origin, that is why it expressly refers to paragraph 3, and envisages two different situations: (i) that the judgment is the subject of review in the State of origin, or (ii) the time limit for seeking ordinary review has not expired. The former implies that the proceedings for the review of the judgment are already pending in the State of origin, and does not differentiate between ordinary and extraordinary review. The latter

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78 According to Art. 9 (second sentence) of the draft Convention of February 2017, "If the judgment provides for relief that is not available under the law of the requested State, that relief shall, to the extent possible, be adapted to relief with effects equivalent to, but not going beyond, its effects under the law of the State of origin."

79 Nygh/Pocar Report, para. 304.

80 *Ibid.*, paras 306-311.

implies that the review of the judgment has not yet been sought by the interested party, but the time limit for such review has not expired. In this case, the rule only applies to *ordinary* review. The draft Convention does not define the concept of "ordinary review". In principle, there are certain criteria that may be used to qualify a review as ordinary. Typically, it includes any review that may result in the annulment or amendment of the judgment and: (i) which is part of the normal course of an action and which, as such, constitutes a procedural development which any party must reasonably expect; and (ii) which is limited by the law of the State of origin to a specific period of time which starts to run by virtue of the actual decision whose recognition or enforcement is sought.[81]

109. **Consequences**. If the judgment is the subject of review in the State of origin or the time limit for seeking ordinary review has not expired, the court addressed is not obliged to grant recognition or enforcement. Instead, paragraph 4 gives the court addressed three different options. The court addressed has discretion to decide which option is the most appropriate.[82] For this purpose, elements such as (i) a *prima facie* assessment of the chance that the party against whom recognition or enforcement is sought will succeed in the review procedure; or (ii) the consequences for both parties of each option, will be factors to be taken into account.

110. **Granting recognition and enforcement**. First, the court addressed may grant recognition or enforcement of the foreign judgment, and in the latter case it may make enforcement subject to the provision of a security. The main purpose of this security is to compensate the judgment debtor if the judgment is eventually annulled or amended in the State of origin and its enforcement has to be rescinded in the requested State.[83] If the court addressed decides to make enforcement conditional upon a security, the amount and nature of this security is also determined by the court addressed.

111. **Postponing the decision**. Secondly, the court addressed may postpone the decision on recognition and enforcement. In this case, the court addressed simply stays or suspends its decision on recognition and enforcement until the review is decided or the time limit for seeking it has expired. The court addressed shall then continue with the proceedings and decide accordingly. This provision does not prejudice the ability of the court addressed, during the period the decision is suspended, to take protective measures to ensure the future enforcement of the judgment, in accordance with its national law.

112. **Refusing recognition or enforcement**. Finally, the court addressed may also refuse recognition or enforcement. In principle, sub-paragraph (c) envisages a refusal of recognition and enforcement merely based on the provisional nature of the judgment, *i.e.*, based on the fact that a review is on-going in the State of origin, or the time limit for seeking ordinary review has not expired. For this reason, the Article includes a clarification in the sense that a refusal under sub-paragraph (c) does not prevent a subsequent application for recognition or enforcement of the judgment. Here, refusal means dismissal without prejudice.[84] Once the judgment becomes final, the judgment creditor may also seek its recognition and enforcement under the draft Convention. Naturally, the court addressed may also refuse recognition and enforcement on other grounds, *e.g.*, that the judgment is not eligible for recognition or enforcement under Article 5 or 6 of the draft Convention. If decided on such

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81 See, on the differentiation between "ordinary" and "extraordinary" review, Schlosser Report (*op. cit.* note 36), paras 195-204; also referred to in the Hartley/Dogauchi Report, para. 173, note 209.

82 Note that the Hartley/Dogauchi Report, para. 173, note 211, points out that the discretion permitted under the parallel provision in the 2005 Choice of Court Convention may be exercised by the legislator. In the draft Convention, it is directly given to the court addressed.

83 See the Hartley/Dogauchi Report, para. 173. The draft Convention does not deal with the issue of how to rescind a foreign judgment that has already been enforced in the requested State but is subsequently annulled or set aside in the State of origin. This issue was thoroughly discussed in the First and Second Meetings of the Special Commission, and different solutions were considered. See Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (1-9 June 2016), Minutes No 2, para. 48, Minutes No 3, paras 51-66, Minutes No 6, paras 41-49; Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017), Minutes No 4, paras 76-82, Minutes No 10, paras 6-8. Finally, the Second Meeting of the Special Commission considered it preferable to leave this issue to the procedural law of the requested State.

84 Hartley/Dogauchi Report, para. 174.

other grounds, the decision of the court addressed to refuse recognition or enforcement will prevent a subsequent application for recognition or enforcement.

Article 5 – Bases for recognition and enforcement

113. **Introduction**. Article 5 is a central provision of the draft Convention. It defines the jurisdictional bases that are recognised as legitimate for the purposes of recognition and enforcement of judgments from States, as provided for in Article 4. In addition to the three exclusive grounds of jurisdiction in Article 6, the grounds in Article 5 provide an exhaustive list of jurisdictional bases that trigger the mutual recognition principle embodied in the draft Convention. States can still recognise foreign judgments on the basis of other jurisdictional grounds provided under national law, as per Article 16, but only those grounds listed in Articles 5 and 6 create obligations under the draft Convention. As such, Article 5 defines the perimeter of "eligible judgments", *i.e.*, judgments that circulate under the draft Convention, and therefore prescribes a minimum standard for mutual recognition or enforcement of judgments.

114. **Direct *versus* indirect jurisdiction**. The grounds listed in Article 5 are only *indirect* jurisdictional bases. In other words, they do not determine the grounds that establish the jurisdiction of courts seised of proceedings on the merits – which can be referred to as *direct* jurisdictional bases.[85] These remain to be determined by national law. The grounds listed in Article 5 are those that a requested State, asked to recognise or enforce a foreign judgment of the rendering State, will accept as legitimate grounds for the purpose of recognition or enforcement. They are *indirect* in the sense that they are referred to by the requested State in its assessment of connections with the rendering State. The *direct* basis upon which a rendering State considered itself to have jurisdiction is therefore irrelevant for the purposes of the draft Convention. In considering whether a foreign judgment meets the threshold jurisdictional conditions of Article 5 or 6, the requested State is not involved in an evaluation of the rendering State's application of that State's own jurisdictional rules. While the draft Convention does not purport to affect existing national laws on jurisdiction in international cases, judgments from States with *direct* jurisdictional rules similar to the *indirect* jurisdictional rules in Articles 5 and 6 will be more likely to circulate under the draft Convention.

115. This Article is divided into three paragraphs. The first paragraph lists the connections with the rendering State that meet the jurisdictional requirement for recognition or enforcement in the requested State. The second paragraph deals with judgments rendered against consumers or employees and modifies or excludes the application of certain connections listed in the first paragraph. The third paragraph establishes the jurisdictional grounds applicable in intellectual property matters. This paragraph excludes the application of all connections listed in the first paragraph.

Paragraph 1

116. This paragraph contains thirteen jurisdictional grounds. Three traditional jurisdictional categories are reflected in paragraph 1: jurisdiction based on connections with the defendant, jurisdiction based on consent, and jurisdiction based on connections between the claim and the State or origin. Many of the grounds listed in paragraph 1 are found in national law but may be formulated more precisely or more narrowly in the draft Convention. It should be noted that there is no hierarchy present in paragraph 1, such that no ground listed therein is considered to be superior or more legitimate than another for the purpose of recognition or enforcement under the draft Convention. Moreover, as expressly stated by this provision, satisfaction of a single jurisdictional basis under paragraph 1 is sufficient to meet the jurisdictional criterion established in that paragraph.

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[85] This terminology is used only in some legal systems.

Sub-paragraph (a)

117. **Introduction.** This sub-paragraph is a general rule based on the idea of the "natural" or "home State" forum. It seems reasonable that if the person against whom recognition or enforcement is sought "lived", *i.e.*, had his or her habitual residence, in the State of origin this connection is a legitimate base for jurisdiction. This principle holds irrespective of the procedural position of that person. Thus, this sub-paragraph is not limited to the defendant but includes any other person, natural or legal, against whom recognition or enforcement is sought. Recognition or enforcement of the foreign judgment may be granted against the defendant, the claimant or a third party that was habitually resident in the State of origin at the time that that person became a party to the proceedings.

118. Sub-paragraph (a) is the only one in Article 5 that concerns jurisdiction based solely on links with the person against whom recognition is sought. All of the other connecting factors in paragraph 1 relate either to consent or to connections related to the dispute giving rise to the judgment.

119. **"Person against whom recognition or enforcement is sought"**. Because the draft Convention deals only with bases for indirect jurisdiction, its focus is on the relationship between the State of origin and the person against whom the judgment was rendered and is sought to be recognised and enforced in the requested State. Because the person may not have been the defendant in the court of origin, it would be too narrow to limit sub-paragraph (a) to that one party. Indeed, it may be that claimant lost the case and the defendant seeks recognition and enforcement against that person in the requested State. To capture this, sub-paragraph (a) uses the expression "person against whom recognition or enforcement is sought". Throughout paragraph 1, the terms "person against whom recognition and enforcement is sought" and "defendant" are used, but in each provision the choice reflects the types of issues just mentioned. When those issues do not exist, "defendant" suffices. While this causes some possible overlap between sub-paragraphs (a) and (c), it captures some situations that would not be caught by sub-paragraph (c).

120. **"Habitual residence" as a connecting factor**. The draft Convention uses habitual residence as a connecting factor, as opposed to other options found in national law or uniform law instruments, such as domicile or nationality. This is consistent with modern Hague instruments that have preferred habitual residence. The advantage of habitual residence is that it is a more fact-based connecting factor than either domicile or nationality, expresses a close connection between a person and his or her socio-economic environment, and is less likely to give rise to conflicting assessments by courts. Admittedly, the absence of a definition of habitual residence for natural persons in the draft Convention may give rise to divergent national interpretations, although this should be discouraged by Article 22.[86] With regard to a person or entity other than a natural person, it should be recalled that the definition of habitual residence in Article 3(2) includes four alternatives. As a result, under sub-paragraph (a), the requested State may consider that the rendering State had jurisdiction if any one of the four potential connecting factors listed in Article 3(2) is satisfied.

121. **"At the time" of the proceedings in the court of origin**. The location of a person's habitual residence may change over time, possibly over the course of litigation before the judgment is eventually rendered or even after the judgment was rendered but before recognition or enforcement in the requested State is sought. For the purposes of sub-paragraph (a), habitual residence is to be assessed at the time the person against whom recognition or enforcement is sought became a party to the proceedings in the court of origin.[87] In other words, it is not necessary that this person still be habitually resident in the

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[86] Requiring that in interpreting the draft Convention, "regard shall be had to its international character and to the need to promote uniformity in its application".

[87] As explained, this person may be the plaintiff initiating the proceedings against a single defendant, but this "person" could also be a person added, in accordance with the procedural rules of the State of origin, subsequent to the initiation of proceedings, such as an additional plaintiff or defendant added through a forced or voluntary joinder mechanism, an intervenor, a third-party, etc. It is therefore more precise to refer to the time a person became a party to the proceedings rather than to the time the proceedings were originally instituted.

State of origin at the moment that the requested State is assessing the connection, so long as the connection at the time the person became a party is established.

122. **Subrogation, assignment or succession**. The wording of sub-paragraph (a) presupposes that the person against whom recognition or enforcement is sought is the same as the person who was a party to the proceedings in the State of origin. But this provision does not prevent seeking recognition or enforcement of a judgment against a person different from that who was a party to the proceedings in the State of origin, insofar as the former has "assumed" the obligations of the latter, be it by transfer, succession or any other equivalent means. This would be the case, for example, if the party to the proceedings in the State of origin has died and, before recognition or enforcement is sought, the heirs have assumed his or her obligations; or if the party to the proceedings in the State of origin was a company that, before recognition or enforcement is sought, has merged with another company (which has absorbed it). In these situations, recognition or enforcement may be granted against a person different from that who was a party to the proceedings in the State of origin, *insofar as the former has validly succeeded to the obligations of the latter*. The issue of whether there has been a "valid succession" is governed by the law of the requested State, including its private international law rules.

123. **Example 1**. A brings a claim against B in State X, where B is habitually resident. A judgment is rendered against the defendant. However, during the proceedings in the State of origin or after the judgment is given but before recognition and enforcement is sought, B dies and her obligations are transferred to her heir. In this case, the judgment is eligible for recognition and enforcement under sub-paragraph (a) since the defendant had her habitual residence in the State of origin and the person against whom recognition or enforcement is sought has validly succeeded to that defendant. Naturally, the habitual residence of the heir is irrelevant in this case.

124. **Example 2.** Company A brings a claim against Company B in State X, where B has its statutory seat. In the course of the proceedings, Company B merges with Company C (the acquiring company) and, as a consequence, the former transfers all its assets and liabilities to the latter. In this case, the judgment is given against a person (Company C) different from the defendant as defined in Article 3 (1)(a). Likewise, the merger may take place after the judgment was given in the State of origin but before its recognition and enforcement is sought in the requested State. In this second case, the person against whom recognition or enforcement is sought (Company C) is also different from the person against whom the proceedings were instituted in the State of origin (Company B). The judgment is, however, eligible for recognition and enforcement under sub-paragraph (a) since the defendant had its habitual residence in the State of origin and the person against whom recognition or enforcement is sought has validly succeeded to such defendant.

Sub-paragraph (b)

125. **Introduction**. This sub-paragraph is inspired by the same principle as sub-paragraph (a) and its application is targeted to natural persons engaged in business or in the exercise of a profession. Natural persons may carry on business or professional activities through establishments located in States other than the State of their habitual residence. This is particularly likely in border towns but with the ease of personal travel, it may also occur beyond this context. The draft Convention provides that where the principal place of business of that natural person is in the State of origin, that will constitute a sufficient connecting factor with that State for recognition and enforcement purposes but only where the claim arose from the activities of that business.

126. **Rationale**. Natural persons carrying on business activities can be conceived of as analogous to legal persons with respect to jurisdictional connections. As seen above, if the business is a legal person, it will be considered to be habitually resident, *inter alia*, at its principal place of business under Article 3(2). However, if the business is not a legal person separate from the natural person who provides the goods or services, then there is no jurisdictional connection to the State of the principal place of business under sub-paragraph (a), although the two situations may be considered analogous, save for the juridical status of the business involved in the dispute. Sub-paragraph (b) recognises that the principal place of business of a natural person carrying on business in a State other than the

State of that person's habitual residence has a legitimate connection to any claims made against that natural person when these claims arise from that person's business activity. Allowing claims to be litigated in the State of the principal place of business is consistent with the legitimate expectations of the parties.

127. **Conditions**. Sub-paragraph (b) includes two further conditions. First, the claim on which the judgment is based must have arisen from the activities of the natural person's business. In other words, the courts of the principal place of business of the natural person will only be recognised to have a limited jurisdiction, unlike the general jurisdiction admitted under sub-paragraph (a). The wording of sub-paragraph (b) indicates that the claim must arise from "business activities" but does not require that the activities in question were connected specifically to the principal place of business. The very fact that sub-paragraph (b) refers to the "principal" place of business implies that a natural person may carry on business in more than one place, but only one of them will qualify as a "principal" place of business. Of course, these distinctions are more likely to be present in face-to-face rather than online situations.

128. **Example**. A is an accountant who is habitually resident in State X, in a town on the border of States Y and Z. A's main office is located in a town in State Y, where she does most of her business and works on a regular basis. However, she also travels to State Z once a week, to provide services to her smaller clientele there. Because the price of copier paper is lower in State Z, A purchases her weekly supply of copier paper for both offices on Fridays, when she is in State Z, from ABC Paper Inc. Should a dispute arise regarding this paper supply, a judgment rendered against A by a court of origin in State Y would satisfy sub-paragraph (b) because State Y is the state of the principal place of business of A even though the claim arises out of a transaction that took place in State Z, because the claim arises out of the "business activities" of the natural person engaged in those activities. Conversely, when the claim derives from the personal or family activities of A, this sub-paragraph shall not apply.

129. The second condition relates to the timing of the claim and the establishment of the principal place of business. Sub-paragraph (b) requires that the natural person's principal place of business be situated in the rendering State *at the time* that person *became a party* to the proceedings brought before the court of origin. This requirement of contemporaneity is the same as the one in sub-paragraph (a) for habitual residence.

Sub-paragraph (c)

130. **Introduction**. Where a person brings a civil or commercial claim to a court, this typically indicates that person's acceptance of the jurisdiction of that court. This is unlike other persons, such as the defendant, who may have no choice but to respond to the proceedings or risk a default judgment. The person bringing the claim may not necessarily have much, or even any choice,[88] regarding *where* proceedings can be initiated, which will be determined by the rules on direct jurisdiction of each State, but this does not detract from an interpretation of the act of bringing the claim as an indication of consent to have that claim adjudicated upon by that court. Sub-paragraph (c) states that the very fact of bringing a claim in the court of origin makes any judgment on that claim enforceable against the person who brought the claim in the court of origin.

131. **Example**. A, habitually resident in State X, travels to State Y for a camping holiday, where he encounters B, habitually resident in State Z, on the camping grounds. Damage is caused to A's camping equipment which A claims is due to B's negligence. A decides to bring proceedings before the courts of State Z, seeking compensation for the loss allegedly caused by B's fault. B successfully defends against the claim, the court declares that B is not liable for any of A's loss and grants B an award of costs. If A attempts to start new proceedings on the negligence claim in State Y, B could request recognition of the judgment from State Z, referring to Article 5(1)(c) to satisfy the jurisdictional criterion. Because A initiated the claim in State Z, the judgment rendered by the court in State Z is recognisable against A in any

[88] For example, in cases involving exclusive jurisdictional bases, there may be only one State where the plaintiff can bring the claim.

other State. Furthermore, if B wants to enforce the cost award against A in State X, the jurisdiction of the court of origin, in State Z, would be validated by reference to Article 5(1)(c).

132. **Relationship with other provisions**. It is worth noting that if the claimant was habitually resident in the rendering State at the time the claim was brought, jurisdiction will also be valid under sub-paragraph (a). In other words, sub-paragraph (c) is necessary only when the claimant was not habitually resident in the rendering State. Note also that there is one limitation to the rule in sub-paragraph (c) – it does not apply when the claim is a counterclaim. Counterclaims are dealt with specifically in sub-paragraph (l).

Sub-paragraph (d)

133. **Introduction**. This paragraph contains a basis of jurisdiction for secondary establishments. Where a claim arises from the activities of a branch of a person whose habitual residence is in a different State, the draft Convention recognises the jurisdiction over the defendant exercised by the courts in the State where the branch itself is located. This so-called "branch jurisdiction" is found in several legal systems.[89] The draft Convention takes a narrow approach by requiring that the judgment against the defendant involves a claim that arose directly from the activities of the branch located in the State of origin, and not from the activities of the defendant generally.

134. **Rationale**. The rationale for this provision is that when a person sets up and maintains an establishment in another State, that person must assume the jurisdiction of the courts of such State with regard to claims that derive from the activities of that establishment. Indeed, it is the control by the defendant over the branch, agency or other establishment that justifies the jurisdiction over the former in the State where the latter is situated. This is consistent with the legitimate expectations of the parties. Furthermore, since this base of jurisdiction is limited to the disputes that arose from the activities of the branch, it is also justified by the existence of a close connection between the dispute and the court which is called upon to hear it, in particular to ascertain the facts.

135. **Branch, agency or other establishment**. The provision refers to "branch, agency or other establishment without separate legal personality". The draft Convention does not define this concept. In principle, an establishment implies a stable physical presence of the defendant in the State of origin where such defendant carries out an economic activity.[90] This terminology seems to indicate that the person addressed by sub-paragraph (d) is not a natural person, which distinguishes this ground from the one in sub-paragraph (b). Moreover, as stated expressly in the provision itself, only establishments that do not have a legal personality separate from the defendant are included. The criterion appears to exclude subsidiaries and any other part of a commercial organisation that is constituted as a separate legal entity.[91]

136. **Scope**. For sub-paragraph (d) to apply, there must be a link between the claim and the activities of the branch, agency or establishment in the State of origin. In other words, it is not sufficient that the claim arises from the defendant's business activities generally; it must arise out of the activities of the branch or establishment in the State of origin. Thus, for example, with regard to a contractual dispute, the contract from which the claim derives must have been concluded through the establishment in the State of origin or this establishment must be responsible for its performance. But a mere remote or incidental connection is not sufficient.

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89 Nygh/Pocar Report, para. 127; See also Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition of judgments in civil and commercial matters (recast) (hereinafter, the "Brussels I *bis* Regulation"), Art. 7(5); Civil Code of Québec, Art. 3168(2).

90 Nygh/Pocar Report, para. 127.

91 In applying Art. 7(5) of the Brussels I *bis* Regulation, the European Court of Justice (hereinafter, "ECJ") has also included subsidiaries, *i.e.*, establishments with legal personality, under the doctrine of appearance, that is, when they appear vis à vis third parties as a mere branch of the foreign defendant, see Judgment of the 9 December 1987, *SAR Schotte GmbH v. Parfums Rothschild SARL*, C-218/86, EU:C:1987:536.

137. This activity-based connection is, however, not limited according to the nature of the claim. The dispute may arise out of the internal management of the branch or from conduct in the course of its operations, and the action may be based on contract, tort or any other basis, such as unjust enrichment.[92] It might therefore overlap with other paragraphs dealing with contractual (sub-para. (g)) and non-contractual obligations (sub-para. (j)).

Sub-paragraphs (e) and (f)

138. **Introduction**. These two paragraphs deal with judgments rendered against defendants who consented to the jurisdiction of the court of origin. Consent of the defendant is largely accepted as a legitimate basis for the exercise of international jurisdiction. Three ways of consenting are envisaged in Article 5(1) – unilateral express consent during proceedings (sub-para. (e)), implied consent or submission (sub-para. (f)) and agreement of the parties (sub-para. (m), see *infra* paras 187-194). Where the court in the requested State finds that the defendant consented to the jurisdiction of the court of origin in one of these three ways, this is sufficient to satisfy the jurisdictional requirement under Article 5(1), regardless of the absence of any connections with the State of origin. Because of the significant implications of consent as regards recognition and enforcement of the ensuing judgment under the draft Convention, it must be precisely and carefully circumscribed to avoid injustice to the defendant.

139. As will be seen below, all three ways of consenting are subject to specific limitations where judgments are rendered against defendants who are consumers or employees, as per paragraph 2.

Sub-paragraph (e)

140. **Express consent in the course of the proceedings**. Where a defendant expressly consents to the jurisdiction of the court of origin during the course of proceedings, the requested court will consider that the jurisdictional requirement in Article 5(1) is satisfied. Sub-paragraph (e) does not prescribe the form or substance of this express consent, *i.e.*, it could be oral or in writing. However, to interpret the concept of "express consent" in this sub-paragraph, other provisions should be taken into account. First, since there is a separate provision dealing with implied consent (sub-para. (f)), the scope for express consent in sub-paragraph (e) is necessarily narrowed and should require a positive action expressing consent as opposed, for example, to a failure to raise an objection or the mere withdrawal of a procedure challenging the jurisdiction of the court of origin. Second, unlike paragraph 2, this paragraph does not require the consent be addressed to the court. Thus, it may be addressed to the court or to the other party, but in the course of the proceedings.

141. This manner of consenting may not be known or recognised in all procedural systems. However, this is not an impediment to the assessment of such consent by the requested State. The existence of an express consent should be considered a question of fact to be determined by the court of the requested State. This is because under paragraph 1, the requested State is not assessing whether the court of origin was properly seized under its own rules of *direct jurisdiction*, which include rules on consent. Rather, under paragraph 1, the requested State is verifying whether one of the criteria for *indirect jurisdiction* is satisfied regardless of the ground on which the court of origin might have based its jurisdiction.

142. **Examples**. The following scenarios illustrate the potential relevance of sub-paragraph (e):

(i) A initiates proceedings against B in State X and B is properly notified. In its email response, B reminds A that their contract includes an arbitration clause but that the cost of arbitration would be prohibitive given the value of the claim. B indicates that it will agree to defend in State X in this case but reserves its right to raise the arbitration clause in any future disputes under the parties' contract.

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92 Nygh/Pocar Report, para. 134.

(ii) C initiates proceedings against D in State X. D reacts by inviting negotiations to resolve the dispute. The parties successfully resolve part of the dispute but are unable to agree on other aspects. As part of the settlement agreement, C expressly agrees to amend the claim brought before the court in State X and D expressly accepts that this amended claim will be decided by the court in State X.[93]

(iii) E initiates proceedings against F in State X. Under the procedural law of State X, the court is obligated to verify its jurisdiction *ex officio* in claims against foreign defendants. Noting that there is no connection between the claim and State X, the court asks F, habitually resident in State Y, if she wishes to raise any objections to jurisdiction. F answers that she accepts the jurisdiction of the court in State X and is prepared to proceed before it.

Sub-paragraph (f)

143. **Introduction**. Unlike the express consent contemplated in sub-paragraph (e) above, the consent in sub-paragraph (f) is rather implied, typically by the defendant's failure to contest the jurisdiction of the court of origin. By failing to object to the jurisdiction of the court of origin, the defendant is held to have indicated its acceptance that the claim brought against it be decided by that court. In considering submission under sub-paragraph (f), it is critical to recall that paragraph 1 includes numerous recognised indirect jurisdictional grounds, only *one* of which need be satisfied. Submission is thus only relevant when there is no other basis under paragraph 1 by which to recognise the jurisdiction of the court of origin in the rendering State.

144. **Rationale**. Consent, either express or implied, is a legitimate basis of jurisdiction in most States. Submission is based on the premise that the defendant has implicitly agreed that the dispute will be adjudicated by the court where the claim was brought, even though there may have been some basis for an objection to that jurisdiction. The defendant might wish to avoid the cost and delay of a jurisdictional challenge, or sees no significant juridical advantage in being sued elsewhere, or is unaware that a challenge to jurisdiction is available. Whatever the reason for individual defendants, most States agree that a defendant can implicitly consent to the international jurisdiction of a court. Thus, if the defendant accepted the jurisdiction of the State of origin, the judgment is eligible for recognition and enforcement under the draft Convention.

145. **Conditions**. Submission under sub-paragraph (f) is subject to two positive conditions. First, it can only occur if the defendant argued on the merits before the court of origin. Second, it can only occur if the defendant failed to contest jurisdiction. However, a negative condition is included: that an objection to jurisdiction would have been unsuccessful.

146. **The defendant argued on the merits without contesting jurisdiction**. It is generally agreed that if a defendant does not argue on the merits, there has been no submission to the jurisdiction of the court of origin. This may be the case if the defendant does not appear before that court, *i.e.*, if the judgment is given by default, or because, even if the defendant appears, he or she does not argue on the merits. Thus, a defendant is entitled to respond to a claim for the sole purpose of objecting to jurisdiction without this being considered to amount to submission for recognition purposes. If the objection fails, the defendant may choose not to continue to participate in the proceedings. In many legal systems, this will not end the proceedings as the court can continue and render a judgment for the claimant that is susceptible to circulate under the draft Convention. In such a case, however, jurisdiction will not be recognised on the basis of submission and will thus have to be based on another ground listed in paragraph 1.

147. The draft Convention does not define the precise contours of arguing on the merits. In certain States, any act by a defendant that goes beyond mere contestation of jurisdiction will be considered to involve submission, such as a request for particulars, a motion for communication of documents or other forms of discovery, a motion to strike pleadings, etc. The language in the draft Convention refers to a material, not a procedural issue: whether the

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[93] This scenario might also be considered to fall within sub-para. (p) if the clause within the settlement agreement is interpreted as the "designation of a court".

defendant engaged in any action or procedure in the proceedings before the court of origin that involved contestation of the merits of the dispute, regardless of any different rules governing submission to jurisdiction under the law of the court of origin. In this sense, the assessment of whether the defendant "argued on the merits" should be a factual one and be considered independently of how the issue is considered in the State of origin.

148. In some systems, if the defendant chooses to continue participating in the proceedings to argue on the merits after having failed on its jurisdictional challenge, this can be considered to constitute submission.[94] The draft Convention rejects this view and holds that a defendant who properly contested jurisdiction but lost can still defend on the merits without being considered to have submitted for the purposes of recognition and enforcement. This is the effect of the second condition in sub-paragraph (f). As such, the lack of a definition for "argued on the merits" in the draft Convention is mitigated by the possibility for the defendant to avoid a finding by the requested State by ensuring that an objection to jurisdiction has been made before the court of origin.

149. **Contesting jurisdiction "within the timeframe provided in the law of the State of origin"**. Procedural rules in the law of the State of origin may set a specific time frame within which an objection to jurisdiction must be made by the defendant. This might be either in terms of days from a certain point, such as notice of the claim, or in terms of order, such as prior to engaging in any other procedure. Some legal systems may also envisage the inclusion of all defences, procedural and substantive, in the same procedural document. Under sub-paragraph (f), untimely objections do not count for the purpose of avoiding submission. Thus, if the defendant does not abide by the procedural rules of the State of origin to contest jurisdiction, and argues on the merits, the judgment will circulate under sub-paragraph (f). The draft Convention does not impose any specific time frame for objecting, leaving that to the domestic law of the State of origin, but it does draw its own conclusion from the failure to abide by any such time frame.

150. **Objection to jurisdiction would not have succeeded**. As noted above, submission is based on the premise that the defendant has implicitly agreed that the dispute will be adjudicated by the court where the claim was brought, even though there may have been some basis for an objection to that jurisdiction. It is the failure to raise the objection that grounds the implied submission of the defendant. A major assumption of this rule is that the procedural law in the court of origin allows the defendant to challenge jurisdiction. It is only in such a case that the failure to contest can be interpreted as implied consent. By its very terms, sub-paragraph (f) reflects this assumption by framing the rule in terms of a challenge to jurisdiction.

151. Sub-paragraph (f) also takes into account whether such a challenge would have had any chance of success given that it would otherwise be unreasonable to require that the defendant have undertaken such a challenge. In other words, the draft Convention does not impose upon the defendant the burden to contest jurisdiction if this objection was doomed to fail: if the defendant can show, before the requested State, that any attempt to contest the jurisdiction of the court of origin had no chance of success, the defendant's failure to raise such a challenge before the court of origin will not be deemed equivalent to implied consent or submission. Thus, unless the requested State considers that the court of origin had jurisdiction under another ground in paragraph 1, the jurisdictional criterion for recognition or enforcement based on submission will not be met in such a case.

152. However, to prevent strategic or opportunistic behaviour by the defendant, the draft Convention sets out a relatively high standard of proof. It must be *evident* that the objection to jurisdiction would not have succeeded under the law of the State of origin.

153. **Example**: The court of origin takes jurisdiction on the sole basis that the foreign defendant has property in the jurisdiction even though there is no relation between the claim and that property. Prior decisions in the court of origin indicate that challenges to such jurisdiction are always denied and, as a result, the defendant does not contest jurisdiction in

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[94] This is the case throughout Canada, although there is a limited exception where this future participation is done to comply with a court order to do so: see for example: *Van Damme v. Gelber*, 2013 ONCA 388.

the court of origin. On the assumption that no other paragraph in Article 5 (or 6) is satisfied, the eventual judgment of the court of origin will not be considered to have satisfied sub-paragraph (f) despite the fact that the defendant did not contest jurisdiction before that court and argued on the merits.

154. **Objection to the exercise of jurisdiction**. This limit on submission to jurisdiction is also said to extend to the defendant's failure to request that the court of origin decline to exercise jurisdiction. This possibility is particularly relevant in States where the doctrine of *forum non conveniens* allows a defendant to request that a court decline to exercise its jurisdiction. The wording of sub-paragraph (f) as regards this limit on submission to jurisdiction raises some interpretive difficulties. The first part of the provision refers only to contesting jurisdiction, while the caveat relating to the chance of success of such a challenge includes both the objection to jurisdiction and to its exercise.

155. In most States where *forum non conveniens* is available, it is clearly distinguished from jurisdiction *per se*. This is evident from the presentation of the doctrine as one allowing a court to *decline to exercise jurisdiction*, and thus does not involve any admission that the court is *without jurisdiction*. It is not uncommon, in such States, for the defendant to first contest jurisdiction and second, in the alternative, should the court reject that challenge, to request that the court decline to exercise its jurisdiction. Defendants may even *concede* jurisdiction and only request that the court decline to exercise it. In such a case, it may not be appropriate to say that the defendant has *contested* jurisdiction.

156. It is not immediately clear how this latter scenario is to be treated under sub-paragraph (f). On the one hand, if the defendant is considered not to have contested jurisdiction at all, then submission to jurisdiction is established. On the other hand, the last part of sub-paragraph (f) states that a finding on submission to jurisdiction can be avoided if there was no chance that the court would decline to exercise jurisdiction. The current drafting of sub-paragraph (f) may thus be understood to be treating *forum non conveniens* as a way of contesting jurisdiction. The fact that this may not coincide with the way *forum non conveniens* is treated in those States that allow it may be justified in the draft Convention. First, paragraph 1 deals with *indirect* jurisdictional grounds that are not meant to have any impact on the *direct* jurisdictional grounds in the court of origin. If it is considered that a defendant's request that a court decline to exercise its jurisdiction is a way of contesting jurisdiction, this has no implications for the way the same act is understood in the court of origin. Second, if the objective of sub-paragraph (f) is to limit submission to cases where the defendant's consent is genuine, any indication of resistance to that jurisdiction by the defendant, in whatever form is permitted under the procedural law of the court of origin, should be given some effect. Conversely, if a defendant has the opportunity to request that a court decline to exercise its jurisdiction and fails to do so, or fails to show that such a request would have had no chance of success, then this should also be given some effect.

157. **Scenarios**. Concretely, this means that several scenarios can be imagined for the application of the exceptions to submission in sub-paragraph (f).

(i) If the doctrine of *forum non conveniens* was not available in the State of origin:

(a) The defendant contested jurisdiction in the court of origin. This avoids a conclusion of submission by a straightforward application of the conditions for submission under sub-paragraph (f).

(b) The defendant did not contest jurisdiction in the court of origin because it was evident that such a challenge would not succeed. There is no submission under sub-paragraph (f) pursuant to the exception in the last part of that article.

(ii) If the doctrine of *forum non conveniens* was available in the State of origin:

(a) The defendant contested jurisdiction in the court of origin but, in addition and in the alternative, invoked *forum non conveniens.* Again, this is an obvious "no submission" situation under sub-paragraph (f) based on the explicit challenge to jurisdiction. The addition of the *forum non conveniens* element confirms that the defendant has resisted jurisdiction in every way available.

(b) The defendant only invoked *forum non conveniens* in the court of origin without also contesting jurisdiction *per se*. There are two versions to this scenario:

(1) The defendant did not challenge jurisdiction because there was no chance that this would succeed. In this case, there is no submission and no interpretive difficulty in applying sub-paragraph (f).

(2) The defendant did not challenge jurisdiction although there was no evidence that this would have had no chance of succeeding. This may present an interpretive challenge. If the defendant's request to the court of origin that it decline to exercise its jurisdiction is equivalent to "contesting jurisdiction" under the first part of sub-paragraph (f), then the failure to object to jurisdiction *per se* will not be an obstacle to a conclusion that there was no submission, even though the defendant cannot or did not show that there was no chance of success on contesting jurisdiction *per se*. If the request to the court of origin that it decline to exercise jurisdiction is not considered to be a contestation of jurisdiction as required under the first part of sub-paragraph (f), the result in this scenario is not clear.

In both of these versions of scenario (b), it should not matter whether, under the law of the court of origin, the failure to contest jurisdiction amounts to submission. Since the draft Convention contains only indirect jurisdictional grounds, the court in the requested State is not concerned with how the court of origin assesses jurisdiction, but only with whether any one of the jurisdictional grounds in paragraph 1 is satisfied. And in these two cases, it seems clear that the defendant did not wish to proceed before the court of origin or proceeded under protest. This might suffice to support a conclusion that there is no submission to jurisdiction in either scenario.

(c) The defendant *did not contest* jurisdiction and *did not request* that the court of origin decline to exercise its jurisdiction. Again, there are different versions to this scenario:

(1) The defendant can show that neither had a chance of success.[95] This will lead to a finding of no submission under sub-paragraph (f).

(2) The defendant can show that the challenge to jurisdiction *per se* had no chance of success but cannot show that a request to decline to exercise jurisdiction would have been futile. As in scenario (b)(2) above, this might present an interpretive challenge. If, under the draft Convention, a request to decline the exercise of jurisdiction is equivalent to contesting jurisdiction, then the defendant's failure to invoke *forum non conveniens*, where it was an option, and its inability to prove that any such request had no chance of success could lead to a conclusion of submission under sub-paragraph (f). If, on the other hand, a request to the court of origin that it decline to exercise jurisdiction is not considered to be a contestation of jurisdiction as required under the opening portion of sub-paragraph (f), the result in this scenario is not clear. It is possible that the defendant's ability to show that a challenge to jurisdiction *per se* was bound to fail is sufficient to avoid submission without having to show also that a request to decline to exercise jurisdiction (possibly expressly conceded by the defendant) was not attempted because it was also bound to fail.[96]

Sub-paragraph (g)

158. **Introduction**. This sub-paragraph recognises a jurisdictional link for judgments on contractual obligations. The content of the rule is the result of a compromise between two

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95 Note that the provision requires the defendant to show that "it is evident" that an objection "to the exercise of jurisdiction would not have succeeded". In practice, this may be difficult to prove.

96 These interpretive challenges could be addressed by amending the wording of sub-para. (f) or by a decision of the Special Commission on the treatment of these scenarios that could be included in the Explanatory Report.

approaches. On the one hand, those States that consider the place of performance as a sufficient basis of jurisdiction, without further qualifications. And, on the other hand, those States that require a more "factual" appraisal based on the activities of the defendant in the State of origin. It is worth noting that, because parties to international contracts often include choice of court agreements or arbitration clauses in their contracts, this sub-paragraph may not often be invoked at the enforcement stage.[97]

159. **Place of performance as a starting point**. The starting point of sub-paragraph (g) represents the first approach. It defines a basis for the recognition and enforcement of a judgment that ruled on a contractual obligation connected to the place of performance of that particular obligation. This formulation means that jurisdiction may vary according to the source of the dispute between the parties. For example, in a contract for the sale of goods, if the vendor files a claim for payment, sub-paragraph (g) will recognise the jurisdiction of a court at the place where the payment was due; whereas if the purchaser files a claim for delayed delivery, sub-paragraph (g) will refer instead to the courts in the place of delivery. This is unlike other instruments, such as the Brussels I *bis* Regulation, that, for certain types of contract, posits a single contractual forum that does not vary depending on the obligation forming the basis of the claim.[98]

160. **The place of performance of the contractual obligation: parties' agreement**. The draft Convention envisages two distinct possibilities regarding the identification of the place of performance of contractual obligations. The first situation arises where the terms of the contract specify the place for performance of the obligation in question. In such a case, a judgment rendered by a court at that place will be considered to satisfy the jurisdictional requirement in sub-paragraph (g)(i). This is the case whether performance actually took place in that location or not. In other words, the parties' agreement as to the place of performance is determinative.[99] In practice, it is very common that the place of performance is included among the general contractual conditions of one of the parties (or both of them). The validity of these clauses will be determined by the law of the requested State, including its private international law rules.

161. **Applicable law**. The second situation arises where there is no agreement on the place of performance; in other words, the contract is silent as to that subject. The same holds if the agreement on the place of performance is not valid. In such a case, the place of performance will have to be identified pursuant to the law governing the contract. The draft Convention does not specify how that law is to be identified and therefore this determination is left to the law of the requested State, including its rules of private international law.

162. **Example**. A brings a claim against B in State X. The basis of the claim is the payment for certain goods delivered to B in State Y. The contract was concluded by telephone and the parties did not designate the place of payment. In this case, if A obtains a favourable judgment, it will be recognised and enforced under sub-paragraph (g), if in accordance with the law governing the contract, the place of payment was State X. The law of the requested State, including its private international law rules, will determine which law governs that contract.

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97 For judgments rendered by the court designated in an agreement, see sub-para. (p) below. For a discussion on the exclusion of arbitration from the draft Convention, see Art. 2(3) above.

98 See Art. 7(1) of the Brussels I *bis* Regulation.

99 If the terms of the contract do not specify the place of performance but the parties have included a choice of law clause in the contract, would this fall under the first or the second scenario? Since sub-para. (g) speaks of the case where the place of performance is determined according to "the parties' agreement", it is arguable that this includes an agreement on the applicable law, which will then identify the place of performance of the relevant obligation. However, as indicated for the second scenario, the draft Convention does not set forth choice-of-law rules for contracts. It may be that in a given requested State, no effect or a limited effect would be given to the parties' choice of law clause under sub-para. (g)(ii). Thus, to be consistent with the scope of the draft Convention, which does not intend to set down choice of law rules, it might be preferable to limit the first scenario to cases where the terms of the contract specify the place of performance directly. If the contract is silent, the situation falls under the second scenario, and it will be up to the law in the court of origin to determine how to treat the parties' agreement on the law applicable to the contract.

163. **Safeguard: "purposeful and substantial connection to the State of origin"**. Sub-paragraph (g) recognises jurisdiction exercised in the State of the place of performance of the disputed contractual obligation. However, especially in cases where the parties have not designated the place of performance and have not chosen an applicable law, the place of performance designated by the requested State's choice of law rules may point to a place that is arbitrary, random or insufficiently related to the transaction between the parties. Recognising the jurisdiction of the State of such a place might be considered unfair to the defendant. The same holds true, *e.g.*, with regard to contracts performed online. In these cases, even if the parties designated the place of performance or chose the applicable law, the connection with the State of origin may be merely virtual and therefore insufficient. To address this, the draft Convention allows the defendant to resist recognition or enforcement of a judgment rendered in the State of the place of performance on the basis that the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State. The formulation of this clause in sub-paragraph (g) imposes the burden of proof on the defendant ("unless") and a high threshold ("clearly did not constitute").

164. This clause has no counterpart in other instruments or national laws, although it can be seen to reflect concerns present in some systems relating to the protection of fairness afforded to foreign defendants or to their due process rights.[100] The terms "purposeful and substantial" are meant to avoid jurisdiction-establishing geographical links that are arbitrary, random or insufficiently related to the transaction between the parties.[101] Thus, for example, where the judgment is connected to the court of origin *solely* on the basis that it is the place of performance of the disputed obligation, sub-paragraph (g) will allow the foreign defendant to resist enforcement on the grounds that the defendant clearly did not intend to engage in activities in that State in a manner significant enough to justify its jurisdiction over that defendant.

Sub-paragraph (h)

165. **Tenancy of immovable property.** This provision is a compromise between two conflicting views of tenancies over immoveable property. In some jurisdictions, tenancies over immovable property are treated in the same way as rights *in rem* and claims regarding them are subject to the *exclusive* jurisdiction of the State where the property is situated. In other jurisdictions, conversely, tenancies are treated as contracts (*i.e.*, rights *in personam*) without the accompanying exclusivity accorded to the courts of the State where the immovable property is located for claims related to the tenancy.

166. The draft Convention takes the second approach as its starting point. In accordance with sub-paragraph (h), a judgment that rules on a tenancy of immovable property is eligible for recognition and enforcement if it was given in the State in which the property is situated. But this provision does not exclude the application of other jurisdictional filters, for example sub-paragraph (a), *i.e.*, the habitual residence of the defendant. Thus, a judgment given by the courts of the State where the defendant was habitually resident (State X) will circulate under the draft Convention even if it ruled on a tenancy over an immovable property located in another State (State Y). However, the *in rem* conception is retained in Article 6(c), which lays down an exception to this rule but only for long-term tenancies, and only where the law of the State where the immoveable is situated considers that it has exclusive jurisdiction in the matter.

Sub-paragraph (i)

167. **Contractual obligations secured by rights *in rem*.** This provision is intended to recognise the efficiency of allowing the joining, in one proceeding, of a claim on a contractual

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100 See R.A. Brand and C.M. Mariottini, "Note on the concept of 'Purposeful and Substantial Connection' in Article 5(1)(g) and 5(1)(n)(ii) of the February 2017 draft Convention", Prel. Doc. No 6 of September 2017 for the attention of the Third Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017) (see path indicated in note 42).

101 See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), especially Brennan J. at pp. 478-479.

obligation secured by a right *in rem* with a claim relating to that right *in rem*.[102] Under Article 6(b), only the State where the immoveable is located is considered to have jurisdiction with respect to *in rem* claims. Without sub-paragraph (i), it might not be possible to recognise a judgment on the related contractual claim brought in that State where, for example, the debtor was not habitually resident in that State (sub-para. (a)) or if payments were not due in that State (sub-para. (g)).

168. **Example**. D, habitually resident in State X, purchases an immoveable property in State Y, secured by a mortgage granted by a bank in State Z. The mortgage agreement provides that payments are due in State Z. D defaults on the mortgage and the bank takes proceedings in State Y to obtain a judicial sale of the property and a judgment against D for any deficiency resulting from the judicial sale. The property sells for less than the amount remaining on the mortgage. The judgment from the court in State Y declaring D liable for the deficiency will be enforceable in State X under sub-paragraph (i).

Sub-paragraph (j)

169. **Introduction**. This sub-paragraph defines the jurisdictional condition for recognition or enforcement of judgments in matters concerning non-contractual obligations. Again, it must be recalled that this connection need not be satisfied if the person against whom enforcement is sought was habitually resident in the State of origin at the relevant time (sub-para. (a)). With respect to the defendant in the court of origin, this provision would thus be limited to judgments in claims against foreign defendants in the court of origin. Those are, admittedly, the situations where enforcement outside the State of origin are more likely to occur, assuming the defendant is found liable and ordered to pay compensation.

170. The draft Convention does not define non-contractual obligations, just as it does not define contractual obligations in sub-paragraph (g). In principle, these concepts must be defined by national courts in an autonomous manner, in order to promote uniformity in the application of the draft Convention (see Art. 22). In the case of this sub-paragraph, since its scope of application is defined according to the type of harm suffered, this serves as an implicit delimitation of its scope of application.

171. **Non-contractual obligations arising from death, physical injury, damage to or loss of tangible property**. Not all claims involving non-contractual obligations are covered by this provision. It is limited in scope to obligations arising from two types of injuries: to persons and to property. Moreover, even within these categories it is limited to physical injury (including death) for individuals and to tangible property (damage or loss). This Article will not apply where the claim in the court of origin is based on losses that are not connected to a physical injury or to damage to tangible property.

172. **The place where the act or omission causing the harm occurred**. The draft Convention has adopted a narrow basis for indirect jurisdiction relating to non-contractual obligations by selecting only the place of the act (or omission) directly causing the harm. This distinguishes the draft Convention from other legal systems that also recognise jurisdiction exercised by the court in the State where the harm occurred.[103] The combination of the limitation on the types of harm, noted above, and the restriction to a single jurisdictional connection noted here, may restrict or eliminate interpretive difficulties that have commonly arisen in other systems. For example, arguments that some types of injuries are merely "indirect" often arise with respect to non-physical injuries suffered by so-called secondary victims, whose losses arise as a consequence of a physical injury, including death, suffered by another person. An obvious example is that of a spouse or child claiming for moral or economic loss subsequent to the wrongful death of a spouse or parent. As sub-paragraph (j) excludes non-physical injuries, and deals with harm directly caused, it is possible that claims

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[102] Combining these two claims in a single proceeding is to be expected in jurisdictions where the realisation of a security on an immoveable is judicially administered. Where realisation can be unilaterally effected by the creditor, that is, where extra-judicial enforcement is permitted, only the claim on the eventual deficiency will need to be brought, reducing the relevance of this sub-paragraph for those legal systems.

[103] Of course this is only relevant if this place is different from the place of the act or omission. See Brussels I *bis* Regulation, Art. 7(2) as interpreted by the ECJ; see also Nygh/Pocar Report, paras 135-149.

for dependents pursuant to wrongful death will not be covered by sub-paragraph (j). Alternatively, as sub-paragraph (j) deals with non-contractual obligations *arising* from death, such claims for dependents may well be included within this jurisdictional filter.

173. On the other hand, the wording of sub-paragraph (j) eliminates any need to determine whether continuing pain and suffering in the State of origin consequent to a physical injury suffered in another State is sufficient to justify jurisdiction in the State of origin.[104] By restricting sub-paragraph (j) to the place where the wrong occurred, there is no room for an alternative jurisdictional basis at the place of the "continuing injury". This may not be sufficient to address all interpretive difficulties relating to the exclusion of the place of injury in sub-paragraph (j). For example, a judgment brought against a foreign manufacturer in the State where a physical injury allegedly occurred would appear not to satisfy the requirements under sub-paragraph (j), if the place of the act (defective design or production) is understood to be in the State where the manufacturer is located. However, if the claim is based on an alleged failure to warn, it might be argued that this omission occurred at the place of injury, where the product was sold or used.[105] If the location of the place of omission is considered to be a question of law rather than one of fact in the requested State, the scope of sub-paragraph (j) may vary according to the way in which this question is resolved in the requested State.[106]

Sub-paragraph (k)

174. **Introduction**. This sub-paragraph applies to judgments concerning the validity, construction, effects, administration or variation of a trust.[107] As specified in the final part of sub-paragraph (k), only judgments dealing with disputes which are internal to the trust, are included. Judgments dealing with disputes between the parties to the trust and third parties must be considered under other provisions of paragraph 1.

175. **Trusts**. The term "trust" is not defined in the draft Convention. It is essentially a common law concept and may not be known in other legal systems. However, it is defined in Article 2 of the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* (hereinafter, the "1985 Trusts Convention") for the purposes of that Convention.[108] Since that definition recites the attributes of a trust according to existing common law concepts, reference to that definition will be instructive should any question of definition arise.[109]

176. This sub-paragraph applies to a trust created voluntarily and evidenced in writing whether between living persons or by testament.[110] It does not include situations whereby at common law a resulting or constructive trust is imposed by law. Although the trust must be created voluntarily it need not be the product of an agreement: it can be created unilaterally by a trust deed or in a testamentary instrument. The exclusion of wills and succession from the substantive scope of the draft Convention (Art. 2(1)(d)) does not conflict with the inclusion of testamentary trusts within sub-paragraph (k). The exclusion means that preliminary issues, such as questions as to the validity of the will and its interpretation even in so far as they relate to the validity and meaning of the trust, are excluded. But other issues arising in the course of the administration of a testamentary trust which has been validly created are covered by sub-paragraph (k).[111]

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104 See *Club Resorts v. Van Breda*, 2012 SCC 17, at para. 89 (Supreme Court of Canada).

105 Indeed, it is notoriously difficult to locate an omission in space. See H.P. Glenn, "Where is an omission?", *Canadian Bar Review*, Vol. 59 (840) 1981.

106 In other words, the requested court may look to its domestic law or to the law applicable to the issue according to its choice of law rules. Nygh/Pocar Report, para. 141.

107 According to Art. 8 of the 1985 Trusts Convention which on this point reflects established common law doctrine, these matters are determined by the law governing the trust.

108 This Convention is in force in 14 Contracting States: Australia, Canada, People's Republic of China (Hong Kong SAR), Cyprus, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, United Kingdom, San Marino, Switzerland and Paraguay.

109 Nygh/Pocar Report, para. 150.

110 This is also the limit of application of the 1985 Trusts Convention (see Art. 3).

111 See, for a similar exclusion, the 1985 Trusts Convention (Art. 4).

177. **Designation of a State for determination of listed issues**. Sub-paragraph (k) envisages two alternative bases of jurisdiction depending on the content of the instrument evidencing the creation of the trust. The first option under sub-paragraph (k) is where the trust instrument designates the courts of a State for the determination of the validity, construction, effects, administration or variation of the trust. If that State is the State of origin, the jurisdictional criterion is met. The language of sub-paragraph (k)(i) does not require that the designation in the instrument be exclusive. Moreover, the designation must be included in the instrument at the time the proceedings were instituted. Any modification in this regard will not be effective to bar recognition of the eventual judgment at a later date.

178. **Designation of the place of administration of the trust**. The second option depends on the trust instrument containing an express or implied designation of the State in which the principal place of administration of the trust is situated. Where that place is in the State of origin, a sufficient connection will be established to satisfy the jurisdictional criterion for recognition or enforcement of the judgment rendered in that State. As with the first option above, the designation must exist at the time the proceedings are instituted and subsequent variations in the instrument will not retroactively extinguish the connection at the moment of recognition or enforcement of the judgment.

179. These two options are alternatives and a judgment rendered by a State that is designated in either of those manners will satisfy the jurisdictional criterion in sub-paragraph (k).

180. **Internal aspects**. The limitation in the final sentence of the sub-paragraph (k) confirms that this provision is only intended to operate in relation to disputes that are internal to the trust, and thus to occur between persons within the trust relationship (such as the settlor, the trustee and the beneficiaries) and not persons external to it. The use of "*are or were* within the trust relationship" reflects the possibility that a person may have initially been within the trust relationship but was no longer in such a position at the time of recognition or enforcement of the subsequent judgment. Judgments dealing with disputes between the parties to the trust and third parties must be considered under other provisions of paragraph 1.

Sub-paragraph (l)

181. **Introduction**. This sub-paragraph establishes an indirect basis of jurisdiction for counterclaims. In many legal systems, a defendant may respond to a claim not only by a direct defence against that claim, which would have the effect of wholly or partially extinguishing the plaintiff's claim; but also by making an independent claim of its own that seeks a judgment against the original claimant, then called a counterclaim.[112] For example, in a contract for the sale of goods on instalment, if the vendor sues for payment of the remaining part of the price, the purchaser can defend against that claim on the basis that this amount is not due and add a counterclaim for damages on the basis that the goods were delivered late. The counterclaim need not necessarily arise from the same contract but typically has to be connected to the relationship between the parties. While the counterclaim could have been brought separately in another proceeding, it is considered more efficient to allow it to be advanced within the initial proceeding. In some jurisdictions, where certain conditions are met, it may even be compulsory for the defendant to bring its own claim as a counterclaim. If this is not done, the claim is waived and cannot be brought later in a separate proceeding.[113]

182. Sub-paragraph (l) contains two bases of jurisdiction depending on whether the judgment on the counterclaim was in favour or against the counterclaimant. The differential treatment of successful and unsuccessful counterclaims is included to balance the interests of the parties with regard to the counterclaim and to account for the possibility of compulsory counterclaims under the procedural law in the court of origin.

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112 According to the Nygh/Pocar Report, para. 199, a counterclaim is distinguished from a defense of "set-off" or "compensation" according to which a defendant relies upon a debt due by the claimant to extinguish or reduce the debt claimed from the defendant. Views on this may have evolved since 2001.

113 For example, under Rule 13 of the US Federal Rules of Civil Procedure.

183. **Judgments in favour of the counterclaimant**. Where the counterclaim is successful (sub-para. (l)(i)), the defendant / counterclaimant suffered no prejudice from having been forced to bring its claim as a counterclaim and therefore there is no jurisdictional exception to circulation in this case. To satisfy this condition, and to ensure fairness to the original claimant / defendant in the counterclaim, the counterclaim must arise out of the transaction or occurrence on which the original claim is based. Since the original claimant voluntarily brought her / his claim before the court of origin, he / she consented to that jurisdiction, and it is therefore legitimate that this jurisdiction may also rule on a counterclaim but only insofar as it derives from the same transaction or occurrence.

184. The English word "transaction" has been used as the counterpart of the French *relation contractuelle* because it has a wider scope than "contractual relationship". In other words, the counterclaim need not arise out of the actual contract on which the original claim is based: it may arise out of another collateral contract which is part of the wider transaction between the parties. Similarly, the English word "occurrence" has been used to represent the French "*des faits*" in order to stress that the facts on which the counterclaim is based need not be identical, but may arise out of a broader, but related, set of circumstances.[114]

185. **Judgments against the counterclaimant**. Where the counterclaim fails, however, there is no need to protect the original claimant by imposing a close connection requirement. The interest of the original claimant is precisely to benefit from the draft Convention. And as regards the counterclaimant, since he / she brought the counterclaim, he / she implicitly consented to the jurisdiction of the court of origin. Since the defendant is essentially a claimant with respect to the counterclaim, this jurisdictional criterion may be seen to replicate sub-paragraph (c). But this rationale presupposes that counterclaimant voluntarily brought his / her counterclaim. Therefore, to account for the possibility that the counterclaim was compulsory under the law of the State of origin, sub-paragraph (l)(ii) provides protection to the counterclaimant if the counterclaim should fail. Indeed, under the exception in sub-paragraph (l)(ii), the initial compulsion is considered an obstacle to recognition or enforcement of the negative result elsewhere. In other words, the losing counterclaimant would not be prevented from instituting the same claim elsewhere.

186. It is essential to underline the fact that this provision will not prevent circulation of the judgment on the counterclaim if another jurisdictional filter in paragraph 1 applies. For example, if the counterclaimant is habitually resident in the State of origin, the judgment against that counterclaimant will satisfy sub-paragraph (a) and the exception for compulsory counterclaims in sub-paragraph (l)(ii) will not protect that unsuccessful counterclaimant. Similarly, if the original claimant is habitually resident in the State of origin, the successful counterclaim will also meet sub-paragraph (a) even if it did not arise out of the same transaction.

Sub-paragraph (m)

187. **Introduction**. This sub-paragraph recognises a ground of jurisdiction based on express consent. Where parties have agreed in advance on the forum to resolve their disputes, adjudication in that forum is considered fair to both parties and will usually satisfy jurisdictional requirements for recognition and enforcement purposes in the requested State. The 2005 Choice of Court Convention provides for the enforcement of such agreements and the resulting judgments with respect to exclusive choice of court agreements. The definition of a choice of court agreement in sub-paragraph (m) is drawn from the 2005 Choice of Court Convention both with respect to the form of the agreement and to its nature as exclusive or non-exclusive. This should ensure consistency in interpretation across the two instruments.

188. **Relationship with the 2005 Choice of Court Convention**. The draft Convention seeks to avoid overlap with the 2005 Choice of Court Convention. To that end, the draft Convention only deals with non-exclusive choice of court agreements in sub-paragraph (m).

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114 Nygh/Pocar Report, para. 200. Contrast the narrower formulation of Art. 8(3) of the Brussels I *bis* Regulation which contains the phrase "the same contract or facts on which the original claim was based".

This allows the court in the requested State to consider that the court of origin had jurisdiction where the parties' agreement designated that court as one before which disputes could be brought for adjudication but not where that designation provided for the jurisdiction of that court to the exclusion of all other courts. In this case, only the 2005 Choice of Court Convention will apply.[115]

189. **Non-exclusive agreements**. The draft Convention defines non-exclusive agreements in the negative. It includes a definition of an "exclusive choice of court agreement", taken from Article 3(a) of the 2005 Choice of Court Convention, and declares its application to any agreement "other than an exclusive choice of court agreement". Furthermore, the 2005 Choice of Court Convention contains a presumption according to which a choice of court agreement which designates the courts of one State or one or more specific courts of one State is deemed to be exclusive unless the parties have expressly provided otherwise (Art. 3(b)). In principle, the approach followed by the draft Convention prevents any gaps between the two instruments.

190. Non-exclusive agreements can take various forms. The agreement may provide for a list of courts in different States among which the claimant is invited (or required) to choose. It may merely indicate that the parties agree not to object to jurisdiction if the claim is brought before a designated court. The agreement may instead be "asymmetrical" (or "hybrid"), meaning that it is exclusive for one party but non-exclusive for another. Asymmetrical clauses are not considered exclusive under the 2005 Choice of Court Convention and may therefore fall within the scope of the draft Convention.[116] The Hartley/Dogauchi Report includes the following practical examples of non-exclusive choice of court agreements:

> "– The courts of State X shall have non-exclusive jurisdiction to hear proceedings under this contract."
>
> "– Proceedings under this contract may be brought before the courts of State X, but this shall not preclude proceedings before the courts of any other State having jurisdiction under its law."
>
> "– Proceedings under this contract may be brought before court A in State X or court B in State Y, to the exclusion of all other courts."
>
> "– Proceedings against A may be brought exclusively at A's residence in State A; proceedings against B may be brought exclusively at B's residence in State B."

191. In principle, a choice of court agreement combined with an arbitration agreement would qualify as an exclusive choice of court agreement and would therefore fall outside the scope of sub-paragraph (m).

192. The draft Convention, like the 2005 Choice of Court Convention, limits the application of this basis for jurisdiction to agreements concluded or documented in writing or by any other means of communication which render information accessible so as to be usable for subsequent reference.[117] Oral agreements, therefore, do not benefit from this sub-paragraph.

193. **Examples**. The written agreement between A (habitually resident in State X) and B (habitually resident in State Y) contains the following clause: "For any disputes arising from this agreement, the parties agree to the jurisdiction of the courts of State Z". Following a dispute that the parties are unable to resolve amicably, B brings a claim against A before the courts of State Z, which would not otherwise have jurisdiction. A judgment is granted in B's favour and enforcement is sought in State X where A has assets. If State X is not a party to the 2005 Choice of Court Convention, it is possible that under its law, such a clause is not an exclusive choice-of-law clause but merely an agreement not to object to the jurisdiction of the courts of State Z. In such a case, applying sub-paragraph (m), the court in State X should find that the jurisdiction of the court of origin is established for the purposes of enforcement

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115 For more details on the relationship between the 2005 Choice of Court Convention and the draft Convention, see *infra* paras 381-387.

116 Hartley/Dogauchi Report, paras 32, 106 and 249.

117 See, on this formal requirement, Hartley/Dogauchi Report, paras 110-114.

in State Z. If such a clause is considered to be an exclusive choice of court clause by the requested court, or if State X and State Z are both party to the 2005 Choice of Court Convention, then sub-paragraph (m) does not apply and the judgment will not circulate under the draft Convention if there is no other basis for jurisdiction under paragraph 1.

194. The written agreement between A (habitually resident in State X) and B (habitually resident in State Y) contains the following clause: "For any disputes arising from this agreement, the parties resolve to bring claims exclusively to the commercial courts of Capital City, State Z". Following a dispute that the parties are unable to resolve amicably, B brings a claim against A in State Z, which would not otherwise have jurisdiction. Judgment is granted in B's favour and enforcement is sought in State X where A has assets. Sub-paragraph (m) is not applicable to this case since the clause designating the courts of State Z is an exclusive choice of court agreement. Moreover, as no other ground listed in paragraph 1 is applicable, the requested State is not obliged to recognise the judgment under Article 4 of the draft Convention, although it may recognise it under its national law, as allowed by Article 16. If State Z and State X are both party to the 2005 Choice of Court Convention, then the judgment will circulate under that instrument.

Paragraph 2

195. **Introduction**. Paragraph 2 sets out a few exceptions to the general rules in paragraph 1 with respect to consumer and employment contracts. These only apply to situations where a judgment is sought to be recognised or enforced against a consumer or employee, and thus do not apply where recognition or enforcement is sought by the consumer or employee. This is consistent with the protection accorded to consumers or employees within the contractual sphere, whether in domestic or private international law, by many legal systems. Paragraph 2 does not create special jurisdictional filters for these two types of contracts, which remain subject to the rules set down in paragraph 1. Instead, paragraph 2 limits or excludes, in favour of the weaker party, reference to the three sub-paragraphs in paragraph 1 that deal with jurisdiction based on consent and to sub-paragraph (m) that deals with jurisdiction on contractual obligations.

196. **Definition of consumer.** The draft Convention defines consumer as "a natural person acting primarily for personal, family or household purposes". This is the same definition found in the 2005 Choice of Court Convention, which excludes consumer contracts from its scope in Article 2(1)(a). It is also consistent with the definition of consumer found in the *1980 Vienna Convention on Contracts for the International Sale of Goods* (Art. 2(a)); and the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods* (Art. 2(c)). The other option would have been the negative formulation found in the Brussels I *bis* Regulation (Art. 17(1)) and Rome I Regulation (Art. 6(1)): "for a purpose […] outside his trade or profession […]". Unlike the European Regulations, the draft Convention does not specify that the other contracting party must be acting in its trade or professional capacity. This suggests that consumer to consumer contracts might be included under sub-paragraph (m), which would be consistent with the understanding of the inclusion of such contracts within the exclusion from scope in the 2005 Choice of Court Convention.[118]

197. **Employment contracts**. Employment contracts are not defined under the draft Convention. However, it is clear that the clause is essentially only intended to cover salaried workers at any level, and does not relate to people carrying on an independent professional activity.[119]

198. **Collective bargaining agreements**. Moreover, by referring to "matters relating to the employee's contract of employment", the provision is intended to apply to individual employment contracts, that is, to disputes between the employee and the employer arising from their labour relationship. This includes any claim based on the legal framework applicable to that relationship, including labour law or collective bargaining agreements.[120]

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118 Hartley/Dogauchi Report, para. 50.

119 Nygh/Pocar Report, para. 117.

120 In the 2005 Choice of Court Convention, Art. 2(1)(b) excludes choice of court agreements "relating to contracts of employment, including collective agreements".

Conversely, disputes arising from a collective bargaining agreement between the parties to this agreement -typically a trade union or a body of representative of the employees, on the one hand, and an employer or an association of employers, on the other-, are not covered by this paragraph.

199. **Exception to paragraph 1 regarding jurisdiction based on consent**. Paragraph 2(a) limits the effect of paragraph 1(e) in relation to express consent given in the course of proceedings. Where employees and consumers are concerned, the consent is required to have been "addressed to the court, orally or in writing". In other words, in the examples provided above to illustrate paragraph 1(e), the first and second would not satisfy paragraph 2(a) but the third one would, it being the only situation where the expression of consent was directed at the court and not at the other party. The other modes of consenting to jurisdiction recognised in paragraph 1 are implied consent (para. 1(f)) and consent by advance agreement between the parties (para. 1(m)).[121] With respect to consumers and employees, neither form of consent is admitted under the draft Convention. In other words, a judgment rendered against a consumer or an employee, in relation to a contractual claim, will not circulate under the draft Convention if the court of origin's jurisdiction was based solely on consent of either type. Of course, where the employee or consumer was habitually resident in the State of origin, that will satisfy paragraph 1(a).

200. **Exclusion of jurisdiction based on the place of performance of a contractual obligation**. Similar to the above, paragraph 2 excludes recourse to paragraph 1(g), meaning that if the connection to the State of origin only existed because it was the place of performance of the contractual obligations that was the basis of the claim, jurisdiction will not be recognised in the requested State. In practice, this implies that, when recognition or enforcement is sought against the weaker party, only those judgments given in the State of the habitual residence of this party may circulate under the draft Convention.

[Paragraph 3]

201. **[Introduction.** This paragraph is concerned with judgments on certain intellectual property claims. These claims are subject to a separate regime. As stated in the first sentence of paragraph 3, the bases for jurisdiction listed in paragraph 1 do not apply to judgments that ruled on intellectual property rights or analogous rights. These judgments are only eligible for recognition and enforcement under the draft Convention if one of the bases of jurisdiction established by paragraph 3 is met.

202. **Example.** A brings a claim against B in State X, where B is habitually resident, alleging infringement of a patent registered in State Y. The judgment on this claim is not eligible for recognition and enforcement under the draft Convention since Article 5(1) does not apply to judgments on intellectual property rights. The same holds true, *e.g.*, if the jurisdiction of State X was based on the defendant's consent under Article 5(1)(e) or (f). Conversely, if A had brought the claim in State Y, the judgment would have been eligible for recognition and enforcement under Article 5(3)(a).

203. In this sense, Article 5(3) establishes exclusive bases for jurisdiction within the draft Convention. Judgments on intellectual property rights are only eligible for recognition and enforcement under the draft Convention if they are given by a court of the State under the law of which the intellectual property right is protected. As for judgments given in consolidated proceedings in multi-State intellectual property infringement disputes, the draft Convention covers only the severable part of the judgments that ruled on an infringement of the intellectual property right registered in the State of origin (if it also ruled on rights registered in other States, Art. 9 may apply). However, unlike Article 6(a), Article 5(3) does not exclude recognition and enforcement under national law (see *infra* para. 228).

204. ***Rationale: the territoriality principle.*** The approach followed by the draft Convention as regards intellectual property rights is the result of a compromise. Intellectual property rights are included within the scope of the draft Convention, but they are subject to a strict

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[121] The 2005 Choice of Court Convention excludes from its scope choice of court agreements in consumer and employment contracts as well: Art. 2(1)(a) and (b).

application of the territoriality principle. Intellectual property rights are territorial, *i.e.*, the existence of an intellectual property right and the prerogatives afforded to the rightholder are limited to the territory of the State granting such a right. The territoriality of these rights has a clear impact on the conflict of laws dimension. The existence and content of an intellectual property right can only be determined by the law of the State granting it, and the same holds true for the prerogatives of the rightholder and any infringements of that right. An intellectual property right can only be infringed in the State where it exists and is protected. Infringement of an intellectual property right registered in State X may only occur in State X; it is conceptually impossible for infringement of an intellectual property right registered in State X to occur in State Y. Thus, at the conflict of laws level, the territoriality principle requires the application of the *lex loci protectionis*, *i.e.*, the law of the State *for which* protection is sought, to determine the existence, content and infringement of intellectual property rights.

205. The draft Convention mirrors this principle at the jurisdictional level. A judgment on this matter may only circulate under the draft Convention if it was given by the court of the State under the law of which the intellectual property rights concerned was protected (*lex loci protectionis).* And this applies to both judgments on the validity of an intellectual property right and judgments on an infringement of such right. This ensures the parallelism between *forum* (jurisdiction) and *ius* (applicable law). For the purpose of the draft Convention, disputes on the validity of an intellectual property right granted by the substantive law of State X are only subject to the jurisdiction of the courts of such State. However, in relation to infringement, some States assume jurisdiction over foreign intellectual property rights, and apply the foreign intellectual property law; these judgments would not circulate under the draft Convention, while a judgment given by the State that granted the intellectual property right would circulate. Thus, in principle, the State of origin of the judgment will coincide with the *lex loci protectionis*, *i.e.,* the State under the law of which the intellectual property right exists and is protected. This solution responds to the concern of several delegations with regard to the application of the basis of jurisdiction established in paragraph (1) to intellectual property matters. The application of that paragraph would entail that the court of origin would have to apply a foreign law. With regard to intellectual property rights, legal and technical aspects are closely intertwined in litigation, and those delegations' concern was that the court of origin may apply either its own law or a foreign law wrongly. The guarantee that the State of origin of the judgment applied the "proper law" is strengthened by Article 7(1)(g) (see *infra* para. 271).

206. **Intellectual property rights and analogous rights.** The *chapeau* of paragraph 3 refers to intellectual property rights and "analogous rights". It is an open list. Those terms include (i) intellectual property rights that are universally recognised based on TRIPS agreements or WTO membership, but also (ii) others that are not, *i.e.*, "sui generis intellectual property rights" that are only recognised under some national systems such as traditional knowledge or traditional cultural expressions. All judgments ruling on these rights are excluded from the scope of application of paragraph (1). Conversely, sub-paragraph (a) and (b), where the bases for jurisdiction on intellectual property rights are laid down, set forth a closed list. They only include (i) intellectual property rights required to be granted or registered, and (ii) copyrights or related rights, unregistered trademarks and unregistered industrial designs. The consequence of this difference between the open list of the *chapeau* and the closed list of sub-paragraphs (a) and (b) is that judgments on intellectual property rights and analogous rights that are not included in this latter list do not circulate under the draft Convention. It is as if they were excluded from its scope of application.

207. **Structure.** Paragraph 3 makes a distinction between registered and unregistered intellectual property rights. Sub-paragraph (a) deals with judgments ruling on the infringement of an intellectual property right required to be granted or registered, *i.e.*, intellectual property rights which require registration before coming into existence. Sub-paragraphs (b) and (c) deal with judgments ruling on infringement, validity[, ownership, or subsistence] of copyright or similar rights that do not require registration.

Sub-paragraph (a)

208. **Introduction.** Sub-paragraph (a) lays down a jurisdictional filter for intellectual property rights required to be granted or registered, *e.g.*, patents, trademarks, industrial designs or plant breeders' rights ("registered intellectual property rights"). According to this

provision, a judgment is eligible for recognition and enforcement if it ruled on an infringement of such a right and it was given by a court in the State in which the grant or registration of the right concerned (i) had taken place, or (ii) was deemed to have taken place under the terms of an international or regional instrument, *i.e.*, the "State of registration". Sub-paragraph (a) includes a safeguard mainly aimed at dealing with cases of infringement through digital media, framed as an exception to the above eligibility criteria: even if the judgment was given in the State of registration, it will not be eligible for recognition or enforcement if the defendant has not acted in the State of origin to initiate or further the infringement, or if their activity cannot reasonably be seen as having been targeted at that State.

209. **Relationship with other provisions.** Sub-paragraph (a) has to be read in conjunction with Article 6(a). The scope of sub-paragraph (a) refers to the judgments ruling on the *infringement* of registered intellectual property rights; whereas Article 6(a) refers to judgments ruling on the *validity [and registration]* of such rights. Article 6(a) lays down an exclusive basis for jurisdiction in favour of the State in which a grant or registration (i) has taken place, or (ii) is deemed to have taken place under the terms of an international or regional instrument. Both provisions are based on the same connecting factor, and therefore the State of origin will be the same under Article 5(3)(a) and Article 6(a).[122] The difference between these two provisions is that only the latter excludes recognition or enforcement under national law (see *infra* para. 228).

210. **Example.** If A brings a claim against B in State X, alleging infringement of a patent registered in that State, the ensuing judgment will be eligible for recognition and enforcement under sub-paragraph (a) as the court of origin is a court of the State in which the intellectual property right concerned is registered. The same holds true if the claim was on the validity of the patent under Article 6(a). But if A brings a claim against B in State Y, where B is habitually resident, alleging infringement of a patent registered in State X, this judgment will not be eligible for recognition and enforcement under the draft Convention, only under national law. In this second case, if the judgment ruled on the validity of the patent (as main object), it would not be eligible for recognition and enforcement under national law either.

211. **Registered intellectual property rights.** Sub-paragraph (a) covers registered intellectual property rights such as patents, (registered) trademarks, industrial designs,[123] plant breeders' rights[124] or similar rights[125] required to be granted or registered. The issue of whether an intellectual property right is "required to be granted or registered" is to be determined by the law of the requested State, although, in general, the conclusion will be the same under both the law of the State of origin and the law of the requested State since this field is highly harmonised. It follows that intellectual property rights that may be voluntarily registered, such as copyright in certain jurisdictions, are not covered by this provision, as such rights would not be "required" to be registered in the ordinary sense of the word. This is the case even if voluntary registration provides certain advantages, such as a legal presumption of ownership.

212. **Connecting factor**. Sub-paragraph (a) uses the granting or registration of the right concerned as a connecting factor. A judgment ruling on the infringement of a registered intellectual property right will be eligible for recognition and enforcement if it was given by a

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122 Note however that there is a difference with the formulation, the reference to "the right concerned" is not included in Art. 6(a).

123 The term "industrial design" is used in the Paris Convention for the Protection of Industrial Property (Arts 4 and 5 *quinquies*) and the Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization (WTO) (1994) (hereinafter, "TRIPS Agreement") (Arts 25 and 26).

124 The protection of plant breeders' rights is envisaged in the TRIPS Agreement, either by patents, by an effective *sui generis* system or by a combination thereof, see Art. 27(3)(b). Most countries have introduced a plant variety protection system under the *International Convention for the Protection of New Varieties of Plants* of 2 December 1961, as revised at Geneva on 10 November 1972, on 23 October 1978, and on 19 March 1991 (hereinafter, "UPOV Convention").

125 *E.g.*, "utility models", or "supplementary protection certificate" protected under EU law. These are *sui generis* intellectual property rights that serve as an extension to a patent after the patent's term of protection has expired in order to compensate for the time for obtaining any authorisation to bring the product to market. In other jurisdictions, similar results are achieved under the "patent extension" or the "patent restoration".

court in the State in which the grant or registration of the right concerned took place, or is deemed to have taken place under the terms of an international or regional instrument. The phrase "deemed to have taken place under the terms of an international or regional instrument" addresses those situations where, in accordance with an international or regional instrument, the granting or registration of the right is obtained by one registration procedure for one or more States. This is the case, for example, for a European Patent under the Munich Convention. [126] This instrument introduces a common international patent application procedure for the States Parties to that Convention, centralised in the Munich office, although the patent subsequently granted is national in scale. A single application and examination procedure leads to the grant of a bundle of national patents. In these cases, sub-paragraph (a) does not refer to the State in which the registration of the right concerned or the filing of the application has taken place, but to the State for which protection is granted, *i.e.*, to the State in which the intellectual property right is deemed to be registered or granted under the terms of the relevant instrument. This naturally may require an examination of the terms of the instrument under which the right was granted. The same holds for the WIPO-administered Patent Cooperation Treaty (PCT) and the Madrid, Hague and Lisbon Systems. [127] [For supranational rights and common courts see *infra* Art. 21.]

213. **Deposit.** Sub-paragraph (a) uses the words "granted or registered". Under intellectual property systems, the commonly used terminology to describe the relevant act giving rise to intellectual property rights is "registration" for trademark and industrial designs, and "grant" for patents, design patents and plant breeders' rights.[128] In certain jurisdictions, the deposit or application is the first step in the procedure for obtaining the full protection of the right, but triggers some form of protection, *i.e.*, the right may come into existence through procedural steps and formalities preceding the actual grant or registration. The inclusion of the word "deposit" was discussed at the First and Second Special Commission meetings but eventually rejected.[129] Nevertheless, sub-paragraph (a) also applies to jurisdictions where registration is not always subject to any kind of prior examination. "Registered rights" or "rights required to be registered" are therefore to be understood broadly including rights that come into existence through formalities that involved public administrative authorities, which may include deposit (or application).[130]

214. **Ubiquitous infringement**. Sub-paragraph (a) includes a safeguard aimed at protecting a defendant against claims in unforeseeable jurisdictions or in jurisdictions that do not have a substantial connection to the dispute. Even if the judgment was given in the State where the intellectual property right is granted or registered, it will not be eligible for recognition or enforcement if the defendant has not acted in the State of origin to initiate or further the infringement, or his or her activity cannot reasonably be seen as having been targeted at that State. This safeguard is based on Article 2:202 of the Principles for Conflict of Laws in Intellectual Property of 2011.[131]

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126 See Art. 2 of the *Convention on the Grant of European Patents of 5 October 1973* (hereinafter, "European Patent Convention") as revised by the Act revising Article 63 EPC of 17 December 1991 and the Act revising the EPC of 29 November 2000 (hereinafter, "EPC 2000").

127 See Arts 31-42 of the *Patent Cooperation Treaty*, done at Washington on June 19, 1970, amended on September *28,* 1979, modified on February *3,* 1984, and on October *3,* 2001 (hereinafter, "Patent Cooperation Treaty"); Art. 5(2)(e) of the *Protocol relating to the Madrid Agreement Concerning the International Registration of Marks*, adopted at Madrid on June 27, 1989, as amended on October 3, 2006, and on November 12, 2007 (hereinafter, "Madrid Agreement Protocol"); the *Hague Agreement Concerning the International Registration of Industrial Designs Geneva Act of July 2, 1999* (hereinafter, the "Hague Agreement"); *Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications and Regulations Under the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications*.

128 See Work. Doc. No 77 of September 2016, "Comments submitted by the World Intellectual Property Organization" (Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017)).

129 See Minutes of the Special Commission on Recognition and Enforcement of Foreign Judgments (1-9 June 2016), Minutes No 10, paras 62 to 79.

130 See Minutes of the Special Commission on Recognition and Enforcement of Foreign Judgments (16-24 February 2017), Minutes No 5, para. 37.

131 See European Max Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property – The CLIP Principles and Commentary*, Oxford, Oxford University Press, 2013 (hereinafter, "CLIP Principles"); see also "Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet (with Explanatory Notes)", adopted by the Assembly of the Paris Union for the Protection of Industrial Property and the General

215. This safeguard will typically apply to infringements carried out through ubiquitous media such as the internet. In principle, an infringement committed through the internet affects intellectual property rights existing under all national laws across the world, as this means of communication is accessible worldwide. This would imply that the alleged infringer might be sued in any State, even where the infringement has only marginal effects, and the ensuing judgment should qualify as eligible for recognition and enforcement under the draft Convention. This risk is particularly significant if the law of the State of origin regards the mere accessibility of a website as an infringement of the intellectual property rights registered in that State. Sub-paragraph (a) thus qualifies the conduct necessary of a defendant to meet the jurisdictional filter based on the place of infringement. The jurisdictional filter is not met if the defendant (i) did not act in the State of origin to initiate or further the infringement ("act-based test"), or (ii) did not target his or her activity to that State ("targeted-at test"). The latter circumstance is expressed in an objective manner, i.e., the defendant's activity "cannot reasonably be seen as having been targeted at that State". This circumstance must be assessed by the court of the requested State taking into account all the elements of the defendant's activities, from an objective perspective.

216. **Example.** A brings a claim against B in State X for infringement of a trademark registered in that State. The defendant (B), habitually resident in State Y, uses an identical trademark, registered in State Y, on his website operated also from State Y. The webpage is in a language which is not spoken in State X, and the defendant does not sell his products in State X. In this case, the safeguard included in Article 5(3)(a) may be invoked to argue that a judgment given against B in State X should not be entitled for recognition or enforcement under the draft Convention.

Sub-paragraphs (b) and (c)

217. **Non-registered rights**. Sub-paragraphs (b) and (c) contain two additional filters dealing with copyright and similar rights not required to be registered. In general, these provisions apply to intellectual property rights that come into existence without any specific application, examination or registration system.[132] But the list of non-registered intellectual property rights covered by these provisions is closed. As explained above, sub-paragraphs (b) and (c) only apply to: copyrights and related rights, unregistered trademarks and unregistered industrial designs. The term "related rights" includes: rights of performers (such as actors and musicians) in their performances, rights of producers and sound recorders in their recordings, and rights of broadcasting organisations in their radio and television broadcasts.[133]

218. Although the connecting factor is the same, *i.e.*, the unregistered intellectual property right must be governed by the law of the State of origin, the draft Convention lays down two different provisions under sub-paragraphs (b) and (c) respectively: one for judgments ruling on the *validity[, subsistence or ownership]* of those intellectual property rights, and another for judgments ruling on an *infringement* of those rights. The draft Convention distinguishes between these two categories of judgments on unregistered intellectual property rights, as the latter category requires a safeguard aimed at protecting the defendant in cases of ubiquitous infringements.

219. **Infringements**. Sub-paragraph (b) sets out a jurisdictional filter for judgments ruling on an *infringement* of copyright or related rights, unregistered trademarks and unregistered

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Assembly of the World Intellectual Property Organization (WIPO) at the Thirty-Sixth Series of Meetings of the Assemblies of the Member States of WIPO, September 24 to October 3, 2001; and the American Law Institute, Intellectual Property: *Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes*, para. 204(1) and (2).

132 See the *Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, and amended on September 28, 1979* (hereinafter, the "Berne Convention").

133 See Hartley/Dogauchi Report, para. 73, with further references to the TRIPS Agreement.

industrial designs. Such judgment will be eligible for recognition and enforcement under the draft Convention if it was given by a court in the State for which protection was claimed.

220. **Example.** If A brings a claim against B in State X on the infringement of a copyright in this State, the ensuing judgment will be eligible for recognition and enforcement in the requested State under sub-paragraph (b). This is because the court of origin is a court of the State whose law governs the right concerned and for the territory of which protection is sought. This necessarily entails that the judgment could only rule on damages arising in that State.

221. The connecting factor used in this sub-paragraph is that the State of origin was the State "for which protection was claimed" (*i.e.*, the *lex loci protectionis)*. The original version of this provision referred to the fact that "the right arose under the law of the State of origin" (*i.e.*, to the *lex creationis*). However, this concept was avoided to prevent a reading of the word "arose" in this Article as inviting the court of the requested State to undertake a review of the merits.[134] Furthermore, the words "the State for which protection was claimed" conform more broadly to private international law instruments.[135]

222. **Safeguard.** Sub-paragraph (b) contains a safeguard to protect a defendant's interests in cases of ubiquitous infringement, parallel to that included in sub-paragraph (a) (see *supra* paras 214-216).

223. **Validity [subsistence or ownership].** Sub-paragraph (c) lays down a jurisdictional filter for judgments ruling on validity[, subsistence or ownership] of certain non-registered intellectual property rights. As in sub-paragraph (b) the list of intellectual property rights covered by this provision is closed, it only includes copyrights and related rights, unregistered trademarks and unregistered industrial designs. The connecting factor is also the same as in sub-paragraph (b), *i.e.,* the State of origin was the State for which protection is sought.

224. While the term "validity" is commonly associated with trademarks and industrial designs, the two other terms are commonly associated with copyright and related rights.[136] The term "ownership" refers to the person who is the owner of the copyright and its inclusion facilitates the application of this provision in those systems where the creator is not necessarily the first owner of a certain work. For example, where an employee creates a work during the course of his or her employment, in some legal systems, the employer is the owner of the copyright. The term "ownership" also includes the concept of "entitlement", for the purpose of those jurisdictions that separate ownership and entitlement;[137] for example, in cases of succession in some States, heirs may be entitled to, but may not yet be owners of a work. It is the intention of this provision to capture such cases within the definition of the term "ownership". The term "subsistence" refers to the coming into being of the copyright and the term of protection, *i.e.*, when it expires. Judgments on ownership and subsistence of copyright and related rights are eligible for recognition and enforcement if the right concerned is governed by the law of the State of origin. Note that in this case, the draft Convention does not preclude the application of national law (see *infra* paras 328-330). Non-registered rights are not included in the provision dealing with exclusive bases of jurisdiction (see *infra* Art. 6).[138]]

Article 6 – Exclusive bases for recognition and enforcement

225. Article 6 contains three exclusive bases for recognition and enforcement. In principle, this provision has a twofold (positive and negative) effect: judgments that meet those bases of jurisdiction are eligible for recognition and enforcement, and judgments that do not, shall not be recognised or enforced, either under the draft Convention or under national law.

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134 See Minutes of the Special Commission on Recognition and Enforcement of Foreign Judgments (16-24 February 2017), Minutes No 5, para. 37.

135 See, *e.g.,* Art. 8(1), Rome II Regulation (EU Regulation 864/2007 on the law applicable to non-contractual obligations).

136 See Work. Doc. No 77 (*supra* note 128), para. 23.

137 See Art. 2:205 CLIP Principles.

138 See also Nygh/Pocar Report, para. 174.

Article 6 applies, therefore, "[n]otwithstanding Article 5". The first and second limb lay down "absolute" exclusive bases of jurisdiction for registered intellectual property rights and rights *in rem* over immovable property. The third limb lays down a "relative" or "conditional" exclusive basis of jurisdiction for tenancies of immovable property. It can be considered "conditional" since its application depends on whether the law of the State where the immovable property is situated grants its courts exclusive jurisdiction.

226. Article 6, however, only applies to judgments ruling on those matters as the main object of the proceedings. The draft Convention contains a special rule where those matters arose merely as a preliminary or incidental issue (see *infra* Art. 8).

[Sub-paragraph (a)]

227. **[Introduction.** Sub-paragraph (a) lays down an exclusive basis of jurisdiction for the recognition and enforcement of judgments on the [*registration* or] *validity* of intellectual property rights required to be granted or registered. According to this provision, those judgments shall be recognised and enforced *if and only if* the State of origin is the State in which grant or registration of the right concerned has taken place, or, under the terms of an international or regional instrument, is deemed to have taken place. This provision mirrors the widely accepted principle that the State of registration of an intellectual property right should have exclusive jurisdiction to deal with issues of validity [and registration] of such right.

228. **Scope**. This provision is parallel to Article 5(3)(a). Both apply to the same intellectual property rights required to be granted or registered (see *supra* paras 208-216). Both also use the same connecting factor: the State of origin must be the State in which grant or registration has taken place, or is deemed to have taken place under the terms of an international or regional instrument (see *supra* para. 212). The difference lies in the nature of the dispute: Article 5(3)(a) applies to judgments on an *infringement* of those rights, whereas Article 6(a) applies to judgments on the [*registration* or] *validity* of those rights.[139][140] They also differ in the fact that only Article 6(a) excludes recognition and enforcement of judgments under national law.

229. **Relationship with Article 2(1)(j)**. Sub-paragraph (a) applies to judgments on the [registration or] validity of a granted or registered intellectual property right. The validity of entries in public registries is, however, a matter excluded from the scope of the draft Convention in accordance with Article 2(1)(j) (see *supra* paras 51-52). As explained above, this exclusion covers disputes between the applicant (or an interested third party) and the administrative authority in charge of the register, normally in the context of an application for, or procedural matters relating to, registration; for example, when registration is refused or amended and the applicant has challenged such a decision. This dispute would ordinarily qualify as an administrative matter, and would thus be excluded from the scope of the draft Convention under Article 1(1). Sub-paragraph (a), however, applies to disputes between private persons over the validity [or registration] of an intellectual property right, typically once the patent is registered and a party brings a claim against the registered owner challenging the validity of the concerned right. Such a claim could be, for example, based upon expiration of the time of protection.[141]

230. **Consequences**. Sub-paragraph (a) establishes an exclusive basis for recognition and enforcement for judgments ruling on the registration or validity of registered rights. This has both a positive and a negative operation, expressed by the phrase "*if and only if*". On the one

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139 Delegations were divided as to whether "validity" subsumes "registration" or not, see Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017), Minutes No 6, paras 8-9; see also ECJ C-341/16 (of 5 October 2017).

140 It is debatable whether "ownership" is covered by Art. 6 (a) or not. According to the ECJ, in the context of Art. 22(4) Brussels I *bis* Regulation, the term validity does not encompass the question of who must be regarded as the proprietor of a registered IP right (C-341/16, of 5 October 2017: Art. 22(4) Brussels I *bis* does not apply to proceedings between an assignee of a registered trade mark and the heiress of the assignor). Note that if it were not covered, judgments on ownership over registered IP rights would not circulate under the draft Convention.

141 Naturally, the administrative authority may intervene in these proceedings.

hand, the positive operation of the provision is that judgments that ruled on the registration or validity of a registered intellectual property right shall be recognised and enforced *if* the State of origin is the State in which grant or registration has taken place, or is deemed to have taken place under the terms of an international or regional instrument.[142] On the other hand, the negative operation of the provision is that where a judgment that ruled on registration or validity of a registered right is given by a court from a State other than the State of registration, that judgment *shall not be* recognised or enforced under national law. For this reason, Article 16 starts by saying "Subject to Article 6" (see *infra* paras 328-330).[143]

231. The negative effect of sub-paragraph (a) also includes non-Contracting States. Thus, for example, if A brings a claim against B in State X on the validity of a patent registered in State Y, the ensuing judgment shall not be recognised or enforced in any other State, irrespective of whether State Y is also a Contracting State or not.]

Sub-paragraph (b)

232. **Rights *in rem* in immovable property**. Sub-paragraph (b) establishes an (indirect) basis of exclusive jurisdiction for judgments that rule on rights *in rem* in immovable property. According to this provision, a judgment that rules on such rights will circulate under the draft Convention *if and only if* it was given by the courts of the State where the immovable property is situated. Thus, judgments on such matters given by the courts of other States must not be recognised or enforced either under the draft Convention or under national law. For example, if A brings a claim against B in State X on a right *in rem* over an immovable situated in State Y, the ensuing judgment shall not be recognised or enforced in any other State; as in the case of sub-paragraph (a), this conclusion holds irrespective of whether State Y is also a Contracting State or not.

233. **Rationale**. This is a common and uncontroversial category of exclusive jurisdiction in many legal systems. The courts of the State where the immovable property is situated are the best placed, for reasons of proximity, to ascertain the facts satisfactorily and to apply the rules and practices governing rights *in rem* which are generally those of the State in which the property is situated. Furthermore, such proceedings usually involve the registration in public registers or other kinds of public documents.[144]

234. **Scope: rights *in rem***. Sub-paragraph (b) applies to proceedings which have as their object rights *in rem*, *i.e.*, rights that directly concern an immovable property and are enforceable "against everybody (*erga omnes*)".[145] The concept of rights *in rem* includes, for example, ownership, mortgages, usufructs or servitudes. Sub-paragraph (b), however, only applies to actions based on rights *in rem*, and covers actions which seek to determine the existence of those rights, their extent and content, and to provide the holders with the protection of the powers attached to their entitlements. Conversely, actions based on rights *in personam* merely connected with immovable property are not included within the scope of this provision. Thus, for example, a personal action for the delivery of an immovable property based on a contract for sale (*i.e.*, where the issue is the defendant's personal obligation to carry out all acts necessary to transfer and hand over the property) or an action in tort for damages to an immovable property are not covered by this provision. Rights *in rem* over movable property are also excluded from the scope of application of this Article.

235. **Immovable property**. The term "immovable property" is not defined under the draft Convention, but it should be taken to include land, benefits or improvements to land, and fixtures (as opposed to chattels), including things embedded, attached, or affixed to the earth, or permanently fastened to anything embedded, attached, or affixed to the earth. This guidance in relation to immovable property is not exhaustive.

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142 Naturally, recognition or enforcement may be refused under Art. 7 of the draft Convention.

143 Note that since Art. 5 does not establish any bases of jurisdiction for the recognition or enforcement of judgments on the validity or registration of IP registered rights, the terms "Notwithstanding Article 5" in the chapeau of Art. 6 do not have any particular meaning as regards Art. 6(a).

144 For the arguments in favour of this basis for jurisdiction, see Nygh/Pocar Report, para. 164.

145 Nygh/Pocar Report, para. 164.

Sub-paragraph (c)

236. **Introduction**. Sub-paragraph (c) envisages an (indirect) basis of exclusive jurisdiction for tenancies, but only insofar as the law of the State where the immovable property is situated establishes such exclusive jurisdiction. According to this provision, a judgment that rules on a tenancy of immovable property for a period of more than six months ("long-term tenancies") shall not be recognised or enforced if the property is not situated in the State of origin and the courts of the State in which it is situated have exclusive jurisdiction under the law of that State.

237. **Rationale**. This provision is a compromise between two conflicting policies. In some jurisdictions, tenancies over immovable property are treated in the same way as rights *in rem* and, accordingly, the exclusive jurisdiction covers both matters; in particular, this is the case in those jurisdictions where tenancy contracts are subject to a special regime of a mandatory nature designed to protect tenants. In other jurisdictions, conversely, tenancies are treated as contracts (*i.e.*, rights *in personam*) without conferring any exclusivity to the courts of the State where the immovable property is located. The draft Convention takes the second approach as its starting point. In accordance with Article 5(1)(h), a judgment that rules on a tenancy of immovable property is eligible for recognition and enforcement if it was given in the State in which the property is situated. But this provision does not exclude the application of other jurisdictional filters, for example Article 5(1)(a), *i.e.*, the habitual residence of the defendant. Thus, a judgment given by the courts of the State where the defendant was habitually resident (State X) will circulate under the draft Convention even if it ruled on a tenancy over an immovable property located in another State (State Y). Sub-paragraph (c) lays down an exception to this rule. The scope of this exception is, however, limited.

238. **Conditions for application.** First, it only applies to "long-term tenancies", *i.e.*, tenancies of immovable property for a period of more than six months. And second, it only applies if, under the law of the State where the immovable property is situated, the courts of this State have exclusive jurisdiction in this matter. Thus, for example, a judgment on a long-term tenancy given by the courts of the State where the defendant was habitually resident (State X) is not eligible for recognition or enforcement, either under the draft Convention or under national law, if the property is situated in another State (State Y) and according to the law of this latter State, State Y's courts have exclusive jurisdiction in that matter. Sub-paragraph (c) is merely a rule that recognises and gives effect to the policy of certain States in favour of exclusive jurisdiction for tenancies.

239. Note that sub-paragraph (c) of Article 6 is different from the other two limbs of this provision. It does not lay down a harmonised basis of exclusive jurisdiction, but instead includes a reference to the national law of the State where the immovable property is situated. Furthermore, it only applies if this State is a Contracting State; that is, in the example immediately above, sub-paragraph (c) will only apply if State Y, where the immovable property is situated, and whose law grants State Y's courts exclusive jurisdiction, is a Contracting State (in principle, at the time the proceedings were instituted in State X). And, finally, sub-paragraph (c) does not contain a positive basis of jurisdiction (which is found in Art. 5(3)(a)) but only a negative basis: it prohibits recognition or enforcement of certain judgments if the conditions for its application are met.

240. **Long-term tenancies**. Sub-paragraph (c) only applies to tenancies of immovable property for a period of more than six months (the text does not require the six months to be consecutive). It includes any tenancy irrespective of its nature, *i.e.*, for a professional, commercial or personal purpose. Furthermore, that provision is designed to cover disputes between landlord and tenant including, for example, on the existence or interpretation of the tenancy agreement, eviction, compensation for damages caused by the tenant, or the recovery of rent.

Article 7 – Refusal of recognition and enforcement

241. Recognition and enforcement of judgments is the main objective of the draft Convention and is generally provided for under Article 4, with jurisdictional requirements set out in Articles 5 and 6. The draft Convention also sets out specific defences to recognition and

enforcement in Article 7. These are grouped into two categories. The first, in paragraph 1, lists grounds that *allow*, but do not require, the requested State to refuse recognition or enforcement based either on the way the proceedings took place in the State of origin or on the nature or content of the judgment itself. As confirmed in Article 4(1), this is an exhaustive list that limits what a judgment-debtor can invoke in the requested State and what a court in the requested State can do. The second category deals with the particular situation of international *lis pendens*, and is covered by paragraph 2.

Paragraph 1

242. **Introduction**. This paragraph includes seven grounds that can lead to the refusal to recognise or enforce a judgment in the requested State. They largely replicate the equivalent provision in the 2005 Choice of Court Convention.[146] The grounds in sub-paragraphs (a), (b) and (d) relate to the way in which proceedings were instituted and conducted in the State of origin. Grounds in sub-paragraphs (c) and (e) refer instead to the effect that recognition or enforcement would have in the requested State. Finally, ground in sub-paragraph (f) takes account of judgments rendered in a third State.

243. Article 7 establishes that States "*may*" refuse recognition or enforcement if one or more grounds are met. But this provision is addressed to States. Therefore, it does not prevent States from applying this provision in a compulsory manner, *i.e.*, States may compel national courts to refuse recognition or enforcement in those cases.

Sub-paragraph (a)

244. **Introduction**. The first defence to recognition or enforcement refers to the manner in which the defendant[147] was notified of the claim brought in the State of origin (sub-para. (a)). Essentially, it provides that if a defendant was not properly notified, this will justify non-recognition or enforcement of the ensuing judgment in the requested State.

245. **Document instituting the proceedings**. The document that must be notified to the defendant is the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim. The rationale of this provision is to guarantee that the defendant was notified of the elements of the claim and had the opportunity to arrange for his defence. Thus, the concept of the document instituting the proceedings includes any document that, under the law of the State of origin, initiates proceedings in a manner that enables the plaintiff to obtain a judgment which may circulate under the draft Convention.[148] Moreover, the document must contain the "essential elements of the claim" to allow the defendant to make a reasonable decision on his procedural strategy.

246. Sub-paragraph (a) includes two distinct considerations regarding proper notification. The first is concerned with the interests of the defendant; and the second with the interests of the requested State, when it is the State where notification occurred.[149]

247. **Protection of the defendant**. First, under sub-paragraph (a)(i), the issue is whether the defendant was aware, in fact and in a timely manner, of the claim brought in the State of origin. This is to ensure the most basic principle of procedural justice: the right to be heard.[150] The test for appropriate notification is factual rather than technical.[151] The protection of the defendant at the recognition and enforcement stage depends on that defendant's behaviour in the State of origin. If the defendant did not enter an appearance in the court of origin and the judgment was rendered by default, the defence based on improper notification could be invoked to refuse recognition or enforcement. Conversely, under sub-paragraph (a)(i), if the

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146 Art. 9 of the 2005 Choice of Court Convention.

147 See the definition of defendant in Art. 3(1)(a) of the draft Convention.

148 This recognises the variety of means by which procedural law determines how claims are started.

149 Hartley/Dogauchi Report, para. 185.

150 As such, this overlaps with sub-para. (c) that specifically refers to fundamental principles of procedural fairness. Sub-para. (a) can thus be understood as a specific application of sub-para. (c) in relation to notification, with its own conditions, which should, arguably, exclude recourse to sub-para. (c) on questions falling within sub-para. (a).

151 Hartley/Dogauchi Report, para. 186, esp. note 225.

defendant "entered an appearance and presented his case" in the court of origin without contesting notification, the defence based on improper notification will not be available in the requested State.[152] This condition ensures that the contestation of notification is done at the first opportunity, before the court best capable of addressing any deficiencies in notification, such as granting an adjournment. Where the law in the State of origin does not permit objections to notification, the condition does not apply.

248. **Service by public notice**. In principle, the question of whether the document instituting proceedings was duly served on a defendant must be determined in the light of the provisions of the draft Convention.[153] Sub-paragraph (a)(i) does not require personal service on the defendant. Other methods of service may satisfy that condition. For example, a notification on certain persons other than the defendant, *e.g.*, an employee of the defendant, or even by public notice. In particular, with regard to this second situation, some courts have concluded that the right to be heard is not violated if the requested court is satisfied that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant without success.[154]

249. **Protection of the requested State**. Second, under sub-paragraph (a)(ii), the issue is whether notification was effected in accordance with fundamental principles of the requested State. This sub-paragraph *only* applies where notification of the defendant took place *in the requested State*. It is thus of very limited application and does not allow the requested State to assess notification in another State according to the law of the requested State or even under the law of the State where service was effected. Nor does it allow the requested State to assess notification in the requested State according merely to the *lex fori*. Indeed, sub-paragraph (a)(ii) restricts the reference to the *fundamental principles* […] *concerning service of documents* in the requested State.[155]

250. **As explained in the Hartley/Dogauchi Report (para. 187)**: "Many States, including the major common-law countries, have no objection to the service on their territory, without any participation of their authorities, of a foreign document instituting proceedings. They see it simply as a matter of conveying information. Thus if a foreign lawyer wants to notify a defendant in England, she can fly to London, take a taxi to the defendant's home, knock on the door and hand over the document." Both English law and the law of the State of origin may consider this to be permissible and effective notification. But, "[s]ome countries take a different view. They consider the service of a document initiating proceedings to be a sovereign act (official act) and they consider that it infringes their sovereignty for such a document to be served on their territory without their permission. Permission would normally be given through a multilateral agreement laying down the procedure to be followed.[156] Such States would be unwilling to recognise a foreign judgment if the document was served in a way that they regarded as an infringement of their sovereignty." Sub-paragraph (a)(ii) takes account of this point of view by providing that the court addressed may refuse to recognise or

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152 This recalls the jurisdictional basis of submission under Art. 5(1)(f). It might be useful to consider adjusting the language in sub-para. (a)(ii) to make it more consistent with the language in Art. 5(1)(f).

153 Sub-para. (a) is concerned solely with whether or not the court addressed may refuse to recognise or enforce the judgment. The court of origin will have applied its own procedural law, including international conventions on the service of documents which are in force for the State in question and are applicable on the facts of the case. These rules, which might require service to be effected in conformity with the law of the State in which it takes place, are not affected by sub-para. (a). However, except to the limited extent provided in sub-para. (a)(ii), the court addressed may not refuse to recognise or enforce the judgment merely on the ground that service did not comply with the law of the State in which it took place, with the law of the State of origin or with international conventions on the service of documents. Hartley/Dogauchi Report, note 224.

154 ECJ, judgment of the 15 March 2012, *G v. Cornelius de Visser*, C-292/10, EU:C:2012:142.

155 This provision also overlaps with sub-para. (c) which specifically refers to fundamental principles of procedural fairness. As noted above, sub-para. (a) can thus be understood as a specific application of sub-para. (c) in relation to notification, with its own conditions, which should, arguably, exclude recourse to sub-para. (c) on questions falling within sub-para. (a).

156 The *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (hereinafter, the "1965 Service Convention") is the most important example. See also Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), pp. 79–120.

enforce the judgment if the defendant was served in the requested State in a manner that was incompatible with fundamental principles of that State concerning service of documents.

251. The draft Convention does not define "fundamental principles concerning service of documents" and the text of sub-paragraph (a)(ii), by referring to the principles *of that requested State*, suggests that no uniform or autonomous meaning is required (but must always take into account the call for uniform interpretation in Art. 22). The 1965 Service Convention, in force in 73 Contracting States, provides that notification under that instrument can only be refused if compliance would infringe the sovereignty or security of the requested State.[157] While the language in the two instruments is different, the objective is equivalent, viz. to ensure the protection of fundamental principles of the requested State with regard to notification of foreign proceedings in that State.

Sub-paragraph (b)

252. **Introduction**. Sub-paragraph (b) provides that fraud in obtaining the judgment is a ground for refusing recognition or enforcement. Fraud refers to behaviour that deliberately seeks to deceive in order to secure an unfair or unlawful gain or to deprive another of a right. While most States would subsume this defence within the public policy defence in sub-paragraph (c), some States treat fraud as a self-standing defence to recognition and enforcement.[158]

253. The equivalent provision in the 2005 Choice of Court Convention specifies that it applies to fraud "in matters related to procedure".[159] The Hartley/Dogauchi Report states that this additional specificity in the 2005 Choice of Court Convention is present as "there may be some legal systems in which public policy cannot be used with regard to procedural fraud".[160] That report provides the following examples for the application of the defence: where a party deliberately "serves the writ […] on the wrong address", "gives the wrong information as to the time and place of the hearing", "seeks to corrupt a judge or witness" or "conceals key evidence".[161] These examples relate to the fundamental principles of procedural fairness, including the right to be heard by an impartial and independent tribunal.[162] They concern fraud perpetrated by one party to the proceedings to the detriment of the other party.

254. The draft Convention does not include the limitation "in matters related to procedure". The origin of the deletion was a proposal presented by Israel,[163] and the rationale was summarised in the following terms:

> "An expert from Israel explained the basis for departing from the corresponding provision in the 2005 Choice of Court Convention. He stated that in many national laws and bilateral agreements, there is no qualification or restriction on the issue of fraud. This may be distinguished from the situation where there is a choice of court agreement, which may indicate that parties are more comfortable with the court

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157 Art. 13(1). This assumes that the request for notification otherwise complies with the other requirements of the Convention. For a discussion of the very sparse jurisprudence on this provision, see Permanent Bureau of the Hague Conference on Private International Law, *Practical Handbook on the Operation of the Service Convention*, 4th ed., The Hague, 2016, paras 220-224. The limitation based on "sovereignty or security" is also included in the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters* (Art. 12(1)(b)). See Permanent Bureau of the Hague Conference on Private International Law, *Practical Handbook on the Operation of the Evidence Convention*, 3rd ed., The Hague, 2016, para. 310.

158 These are mainly States in the common law tradition such as the UK, the USA and Canada. For a discussion on the fraud defence in negotiations for the 1999 preliminary draft Convention, see C. Kessedjian, "Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters", Prel. Doc. No 9 of July 1998, in *Proceedings of the Twentieth Session (2005)*, Tome II, *Judgments*, Cambridge/Antwerp/Portland, Intersentia, 2013, pp. 109-143, paras 40–45.

159 Art. 9(d) of the 2005 Choice of Court Convention.

160 Hartley/Dogauchi Report, note 228.

161 *Ibid.*, para. 188.

162 See, for example, the 1966 *United Nations International Covenant on Civil and Political Rights* (Art. 14) and the *European Convention on Human Rights* (Art. 6(1)).

163 See Work. Doc. No 24 of June 2016, "Proposal of the delegation of Israel" (Special Commission on the Recognition and Enforcement of Foreign Judgments (1-9 June 2016)).

rendering the judgment. He stressed that refusal of recognition or enforcement must be possible even if the fraud is not in relation to a matter of procedure."[164]

255. Sub-paragraph (b) therefore has a wider scope of application than the corresponding provision in the 2005 Choice of Court Convention and covers fraud in substantive matters. This could potentially increase the overlap between this sub-paragraph and sub-paragraph (c) (public policy).[165]

Sub-paragraph (c) – public policy

256. **Introduction**. The public policy defence to recognition and enforcement of foreign judgments is widely admitted across legal systems. Internationally, it has been included in relevant Hague Conventions for decades[166] and is found in the 1958 New York Convention.[167] The text in the draft Convention replicates the formulation used in the 2005 Choice of Court Convention.[168]

257. **Manifestly incompatible with public policy**. The public policy defence is meant as a final safeguard against the recognition or enforcement of a foreign judgment that is considered to be "manifestly incompatible with the public policy of the requested State". The term "manifestly" is intended to set a high threshold. It is widely accepted that the concept of public policy must be "interpreted strictly" and recourse thereto "is to be had only in exceptional cases".[169] That is, the recognition or enforcement of the judgment in question "would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order".[170]

258. It is apparent that the word "manifestly" has been used in previous cases to discourage the overuse of the public policy exception and to limit its use to situations where the recognition and enforcement of the relevant judgment would lead to an "intolerable result".[171] In other words, the use of "manifestly" is intended to ensure that the judgments of States are recognised and enforced by other States to the greatest extent possible.

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164 See Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (1-9 June 2016), Minutes No 6, para. 93.

165 Hartley/Dogauchi Report, note 228, states that "[f]raud as to the substance could fall under the public policy exception in Art. 9(e)".

166 See, *e.g.*, the *Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children*, at Art. 2; the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants*, at Art. 16; the *Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*, at Art. 10; the *Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*, at Arts 5 and 14; the 1985 Trusts Convention, at Art. 18; the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, at Art. 24; the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, at Arts 22 and 23; the *Convention of 13 January 2000 on the International Protection of Adults*, at Arts 21 and 22; the 2005 Choice of Court Convention, at Arts 6 and 9, and the 2007 Child Support Convention, at Art. 22. It is noted that some of these Conventions refer to the public policy exception in the context of determining the applicable law to the dispute.

167 Art. V(2).

168 Art. 9(e) of the 2005 Choice of Court Convention. See also Hartley/Dogauchi Report, paras 189-190.

169 See Sheriff Court of Lothian and Borders at Selkirk, 2012 S.L.T. (Sh Ct) 189, [with regard to Art. 22 of the Convention of 13 January 2000 on the International Protection of Adults], "the use of the word 'manifestly' suggests circumstances in which recognition of an order would be repellent to the judicial conscience of the court."; W v. W (Foreign Custody Order: Enforcement), 2005 WL 2452746, [Applying the Brussels II Regulation (EC No 1347/2000)], "the court has held that this provision must be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention. With regard, more specifically, to recourse to the public policy clause the court has made it clear that such recourse is to be had only in exceptional cases."

170 See the *Explanatory Report by Professor Fausto Pocar to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, signed in Lugano on 30 October 2007 (hereinafter, "Pocar Report to the 2007 Lugano Convention"), OJ 2009/C 319/01.

171 See Permanent Bureau of the Hague Conference on Private International Law, *Practical Handbook for Caseworkers under the 2007 Hague Child Support Convention*, The Hague, 2014; see also *Chaudhary v. Chaudhary*, Court of Appeal, [1985] 2 W.L.R. 350.

259. **Principles of procedural fairness**. The formulation of the defence in sub-paragraph (c) is more specific than the one found in previous Hague instruments save for the 2005 Choice of Court Convention. Under sub-paragraph (c), public policy expressly includes "situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness" of the requested State. The Hartley/Dogauchi Report[172] explains that in some States, fundamental principles of procedural fairness (also known as due process of law, natural justice or the right to a fair trial) are constitutionally mandated.[173] In such States, it might be unconstitutional to recognise a foreign judgment obtained in proceedings in which a fundamental breach of these principles occurred. The reference in sub-paragraph (c) overlaps with procedural safeguards and fundamental principles regarding notification in sub-paragraph (a) and concerns regarding procedural fairness in the face of fraud in sub-paragraph (b). This should ensure that adequate procedural protection is provided to parties facing recognition and enforcement proceedings regardless of the particular way in which those issues are dealt with in the requested State.[174]

260. The content of the public policy defence is notoriously difficult to define. However, its scope in the draft Convention should be understood in relation to other provisions in the text. As mentioned in the previous sub-paragraph, other defences under paragraph 1 overlap with the public policy defence and that defence should be interpreted accordingly, extending beyond the specifics of the particular defences only where doing otherwise would be a "manifest" contradiction with essential policies of the requested State.

261. The exceptional character of the public policy defence means that it is not sufficient for the party opposing recognition or enforcement to point to a mandatory rule of the law of the requested State that the foreign judgment fails to uphold. Indeed, this mandatory rule may be considered imperative for domestic cases but not for international situations. The public policy defence of sub-paragraph (c) should be triggered only where such a mandatory rule reflects a fundamental value whose violation would be manifest if enforcement of the foreign judgment was permitted. In this sense, the defence relates to "international public policy" and not to domestic public policy.

262. Sub-paragraph (c) does specify that it refers to the public policy *of the requested State*. This means that there is no expectation of uniformity as to the content of public policy in each State. While the general purpose of the draft Convention to facilitate the circulation of judgments should limit recourse to this defence, as should the narrow scope of its application as described in the previous paragraphs, it remains up to each State to define the contours of the public policy defence as it will apply in its courts. Thus, should a court in a requested State find that the sovereignty or security of that State would be manifestly imperilled by the recognition or enforcement of a specific foreign judgment, the public policy defence under sub-paragraph (c) would provide a mechanism to refuse to give effect to such a judgment as it expressly indicated in the text. Despite these additional words, the scope of this provision is in no way different from the scope of the provision in the 2005 Choice of Court Convention but reflects the fact that situations involving infringements of security or sovereignty of the State arise more acutely in the context of this draft Convention than under the 2005 Choice of Court Convention.

263. **Damages**. The draft Convention also includes a provision dealing with damages that allows a requested State to refuse to enforce a judgment to the extent that it involves an award of punitive or exemplary damages (Art. 10). In some States where punitive or exemplary damages are not typically allowed, refusals to enforce such awards have been assessed under the public policy defence. Because of the existence of Article 10 within the scheme of the draft Convention, however, the public policy defence in sub-paragraph (c) should not be used to address challenges to the recognition or enforcement of judgments that

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172 Hartley/Dogauchi Report, para. 190.

173 For Europe, see Art. 6 of the *European Convention on Human Rights*; for the United States of America, see the Fifth and Fourteenth Amendments to the United States Constitution. Many other States have similar provisions.

174 See, for example, Hartley/Dogauchi Report, para. 153, on the exclusion of procedural fraud from the public policy defence in some States.

include punitive or exemplary damages.[175] This further narrows the scope of the public policy defence under the draft Convention.

264. Although the availability of the public policy defence is widely accepted, it is rarely successful as a means of denying recognition or enforcement to a foreign judgment, particularly in civil or commercial matters.[176] Examples where it has succeeded include: where the foreign court enforced a contract to commit an illegal act (smuggling),[177] where the foreign judgment impinged on constitutionally guaranteed fundamental rights (freedom of speech),[178] and where the foreign judgment enforced a gambling debt.[179]

Sub-paragraph (d)

265. This sub-paragraph allows the requested court to refuse to give effect to a judgment rendered by a court when the proceedings in the State of origin were contrary to a choice of court agreement or a designation in a trust instrument. Its rationale is to protect the effectiveness of the agreement or the designation, and therefore to respect party autonomy. Recourse to this sub-paragraph would only be necessary where the court of origin was considered to have had jurisdiction under Article 5. Indeed, if the judgment did not satisfy one of the jurisdictional bases, the judgment could not be considered for recognition or enforcement under the draft Convention (save under national law as permitted under Art. 16).

266. **Examples**. A brings a contractual claim against B in State X, where the contractual obligation on which the claim was based had to be performed. The parties, however, had agreed to submit such claim to the exclusive jurisdiction of the courts of State Y. B appears before the court of origin and contests jurisdiction on the basis of the choice of court agreement, but this defence is dismissed. The judgment on the merits is favourable to A. The recognition or enforcement of this judgment may, however, be refused under sub-paragraph (d) since the proceedings in State X were contrary to the choice of court agreement. Note that if B appeared before the courts of State X and argued on the merits without contesting jurisdiction, sub-paragraph (d), in principle, will not apply.[180]

267. This sub-paragraph applies irrespective of the nature of the choice of court agreement, be it exclusive or non-exclusive, insofar as the agreement validly excluded the jurisdiction of the court of origin. It also applies irrespective of whether the court chosen by the parties or designated in the trust instrument was the court of a Contracting State or a third State. The validity and effectiveness of the agreement or the designation is governed by the law of the requested State, including its private international law rules.

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175 The possibility of severing the punitive damages component from the compensatory component, and only recognising the latter, is further supported by Art. 9 of the draft Convention.

176 In a 1998 decision of the England and Wales Court of Appeal, only three refusals to enforce on public policy grounds were noted, two of which were in family law matters, excluded under the draft Convention (see *Soleimany v. Soleimany*, [1998] EWCA Civ 285. In the most recent edition of the *Jurisclasseur de droit international*, almost all of the examples of refusal by French courts arise in family law matters (divorce, filiation and adoption) – see Fascicule 584-40.

177 See *Soleimany v. Soleimany*, [1998] EWCA Civ 285. Although this case involved an arbitration award rather than a foreign judgment, the court asserted that it would clearly have refused to enforce the award had it been a judgment rendered by a foreign court.

178 See *Bachchan v. India Abroad Publ'n Inc.*, 154 Misc. 2d 228, 235 (N.Y. sup. Ct. 1992), where an English libel judgment was refused recognition in New York. See, however, the discussion on public policy and freedom of speech in *Yahoo! v. LICRA*, 433 F.3d 1199 (9th Cir. 2006).

179 See *Sporting Index Limited v. John O'Shea* [2015] IEHC 407 (Irish High Court); *The Ritz Hotel Casino Ltd v. Datuk Seri Osu Haji Sukam*, [2005] 6 Malayan Law Journal 760 (High Court of Malaysia). But other courts have rejected this use of public policy if gambling was legal where the debt was incurred: see for example *Boardwalk Regency Corp. v. Maalouf* (1992), 6 O.R. (3d) 737 (Ontario C.A.); *G.N.L.V. Corp. v. Wan*, [1991] B.C.J. No. 3725 (British Columbia S.C.); *Liao Eng Kiat v. Burswood Nominees Ltd*, [2004] 4 S.L.R. 690 (Singapore C.A.). For the diversity of approaches to gambling debts see Z.S. Tang, "Cross-Border Enforcement of Gambling Contracts: A Comparative Study", *International Journal of Private Law*, Vol. 7 (1) 2014.

180 Submission by the defendant may be considered as an implicit derogation of the choice of court agreement and therefore the judgment would not be contrary to it.

Sub-paragraphs (e) and (f)

268. **Introduction**. These two sub-paragraphs reflect the fact that in international situations, more than one court may have jurisdiction over a dispute and parallel or multiple proceedings may be engaged in these courts, leading to more than one judgment. The *lis pendens* rule is aimed at preventing this situation at the jurisdictional stage but it is not universally recognised. When conflicting judgments are given, a question of hierarchy arises: which judgment should be given precedence? Article 7(1) distinguishes between two situations. First, where the competing judgment was given by a court in the requested State and, second, where the competing judgment was given in another State (other than the State of origin). These provisions are identical to the ones found in the 2005 Choice of Court Convention (Art. 9(f) and (g)). Article 7(2), in turn, deals with cases where the proceedings in the requested State are still pending when recognition or enforcement is sought.

269. **Inconsistency with a judgment given in the requested State**. In the first case, sub-paragraph (e) specifies that the judgment from the State of origin can be refused recognition or enforcement where that judgment is inconsistent with a judgment from the requested State. The required conditions are twofold: that the judgments be "inconsistent" and that the judgment from the requested State be "in a dispute between the same parties".[181] It need not have been rendered prior to the competing judgment nor have been based on the same cause of action. Sub-paragraph (e) is therefore wider than sub-paragraph (f) and paragraph 2 of Article 7 since it does not require that the two judgments involve the same subject matter.[182] The two judgments will be "inconsistent" when the findings of fact or conclusions of law in relation to the same issues on which they are based are mutually exclusive.

270. **Inconsistency with a judgment given in another State**. In the second case, sub-paragraph (f) imposes additional conditions to justify a refusal to recognise or enforce a judgment from a State of origin that conflicts with a judgment from a third State, which may be a Contracting or a non-Contracting State; in other words, where both judgments are from foreign States. The first condition is that the judgment from the third State was given *prior to* the judgment in the State of origin, irrespective of which court was first seised. Priority is thus accorded to the first-in-time judgment. The second condition is that both judgments concerned the same parties and the same subject matter.[183] This is narrower than the condition under sub-paragraph (e) but parallel to the *lis pendens* ground formulated in paragraph 2.[184] The French version uses the expression *ayant le même objet* to refer to same "subject matter". The 2005 Choice of Court Convention, in turn, uses the expression "cause of action". These expressions are considered equivalent under the draft Convention and are meant to exclude the requirement that the two judgments involve exactly the same "cause of action", which is considered too demanding in an international instrument given the variety of causes of action in different States. The key element is that "central or essential issue"

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181 Hartley/Dogauchi Report, note 231, states: "The requirement regarding the parties will be satisfied if the parties bound by the judgments are the same even if the parties to the proceedings are different, for example where one judgment is against a particular person and the other judgment is against the successor to that person." (see *supra* para. 72).

182 In the context of the Brussels I Regulation, this difference has been illustrated in the Case C-145/86, 4 February 1988, EU:C:1988:61, where the Court decided that a foreign judgment ordering a person to make maintenance payments to his spouse arising from his obligation under a marriage that had not been terminated was irreconcilable with a national judgment pronouncing the divorce of the spouses. Note, however, that the draft Convention does not apply to maintenance obligations.

183 The French version uses the expression *ayant le même objet* to refer to same "subject matter". These two expressions are considered equivalent under the draft Convention and are meant to exclude the requirement that the two judgments involve the same "cause of action", which is considered too demanding in an international instrument given the variety of causes of action in different States.

184 According to Pocar Report to the 2007 Lugano Convention, para. 139: "In cases of this kind the fact that the judgments are irreconcilable prevents recognition of the later one, but only if the judgments were delivered in disputes between the same parties and have the same subject-matter and the same cause of action, always provided of course that they satisfy the tests for recognition in the State addressed. If the subject-matter or the cause of action are not the same, the judgments are both recognised, even if they are irreconcilable with one another. The irreconcilability will then have to be resolved by the national court before which enforcement is sought, which may apply the rules of its own system for the purpose, and may indeed give weight to factors other than the order in time of the judgments, such as the order in which the proceedings were instituted or the order in which they became *res judicata*, which is not a requirement for recognition under the Convention."

(*Kernpunkt*) must be the same in both judgments. The final condition is that the earlier judgment fulfils the conditions necessary for its recognition or enforcement in the requested State, whether or not any procedure to that end has been instituted in the requested State.

[Sub-paragraph (g)]

271. **[Review of the law applied by the court of origin**. Article 4(1) and (2) establishes that a judgment given in a State shall be recognised and enforced in another State, without a review of the merits (unless such review is necessary for the application of the draft Convention). This provision prevents, for example, the requested court from refusing recognition or enforcement on the sole ground that the court of origin applied a law other than that which would have been applied under the conflict of law rules of the requested State. Sub-paragraph (g) contains an exception to Article 4(2) for intellectual property rights. According to that provision, recognition and enforcement may be refused if the judgment ruled on an infringement of an intellectual property right and the court of origin applied to that right/infringement a law other than the internal law of the State of origin. Unlike other paragraphs of Article 7, this provision only applies to judgments on the infringement of intellectual property rights. Additionally, it only applies to infringements of such rights but not to judgments on validity [ownership or subsistence].

272. **Rationale**. In principle, and even if it covers both registered and non-registered intellectual property rights, the purpose of this ground for refusal of recognition is to safeguard the territoriality principle, and in particular the application of the *lex loci protectionis* by the courts of the State of origin (see *supra* paras 204-205). However, since the draft Convention only guarantees the recognition and enforcement of a judgment given by a court of (i) the State of registration, with regard to registered intellectual property rights, or (ii) the State for which protection is sought, with regard to non-registered intellectual property rights, the application of this provision will be marginal.

273. **Example 1**. A brings a claim against B in State X, for an infringement of an intellectual property right registered in that State. The court of origin, however, applies to such infringement the law of State Y. In this case, sub-paragraph (g) allows the other Contracting States to refuse recognition or enforcement of that judgment.

274. **Example 2.** A brings a claim against B in State X, for an infringement of a copyright over a poem in that State. The poem, however, had already been published in State Y, and the court of origin applies to such infringement the law of State Y. In this case, sub-paragraph (g) allows the other Contracting States to refuse recognition or enforcement of that judgment.]

Paragraph 2

275. ***Lis pendens* in the requested State.** The draft Convention does not contain rules on direct jurisdiction and thus does not include a rule on *lis pendens*. Therefore, parallel proceedings, between the same parties on the same subject matter, may take place in different States. Article 7 establishes three rules to address how judgments are dealt with in these situations. Paragraph 1(e) and (f) deals with cases where the parallel proceedings have concluded and the judgments are inconsistent. Paragraph 2 deals with cases where proceedings are still pending in the requested State when recognition or enforcement of a judgment given in another State is sought.[185] *Lis pendens* in another State cannot be invoked to refuse recognition or enforcement. Furthermore, the proceedings pending in the requested State must be "between the same parties on the same subject matter". In these cases, recognition or enforcement may be postponed or refused if two cumulative conditions are met.

276. **First condition**. According to paragraph 2(a), the court of the requested State must have been the court first seised. That is, this ground for refusal may only be invoked if the proceedings in the requested State commenced before the proceedings in the State of origin. The rationale is that, in this scenario and from the point of view of the requested State, the

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185 The 1999 preliminary draft Convention contained a parallel provision (see Art. 28(1)(a)).

court of origin should have yielded to the priority of the court first seised: it should have suspended or refused the commencement of the proceedings since the same dispute was already pending in another State (with regard to the moment when a court is seised, see *supra* para. 34).

277. **Second condition**. Mere priority is, however, not sufficient. According to paragraph 2(b), there must be a close connection between the dispute and the requested State. The rationale of this condition is to prevent strategic or opportunistic behaviour by one of the parties. For example, that a potential defendant in a State moves to another State and sues the other party there, seeking a so-called "negative declaration" just to prevent the future recognition or enforcement of the foreign judgment and on the basis of an exorbitant jurisdictional basis. The draft Convention does not determine which bases of jurisdiction meet the "close connection" condition. In principle, any of the bases of jurisdiction listed in Article 5 satisfies this condition but there may be others that do so as well, *e.g.*, the place where the harm was directly suffered in tort disputes. Conversely, the mere nationality of the claimant or his or her domicile in the requested State would not be sufficient.[186]

278. **Consequences**. If those three conditions are met, recognition and enforcement of the judgment given in another State may be postponed or refused. Paragraph 2 clarifies that a refusal under this paragraph does not prevent a subsequent application for recognition and enforcement of the foreign judgment. This provision addresses those situations where the proceedings in the requested State conclude without a judgment on the merits (*e.g.*, for procedural reasons) or with a decision on the merits which is consistent with the foreign judgment.

Article 8 – Preliminary questions

279. **Introduction**. Article 8 deals with matters ruled as preliminary or "incidental" questions, *i.e.*, questions that are not the main object or "principal issue" of the proceedings, but that are necessarily to be addressed before a decision on the plaintiff's claim can be given.[187] Thus, conceptually, Article 8 recognises that legal issues within a judgment may be both severable (*i.e.*, separate from one another) but considered sequentially (*i.e.*, that a decision on the principle issue is predicated on a decision on another, preliminary issue). Thus, for example, in an action for damages in a patent (main object), the court might first have to rule on whether the patent is valid (preliminary question); or in an action for damages for breach of contract (main object), the court might first have to decide on the capacity of a party to enter into such a contract (preliminary question). These preliminary questions are usually, but not always, introduced by the defendant by way of defence.

280. Article 8 deals with the recognition and enforcement of judgments ruling on preliminary questions, but only where these preliminary questions refer to either (i) a matter outside the scope of application of the draft Convention, or (ii) matters envisaged by Article 6 (exclusive bases of jurisdiction) and the court of origin is not the court referred to in that Article, *i.e.*, the State of origin is different from the State in which the intellectual property right is registered.[188,189]

281. **Structure of Article 8**. This provision dictates that the application of the rules of the draft Convention is, in principle, determined by the main object of the proceedings, and not

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186 Art. 18 of the 1999 preliminary draft Convention ("prohibited grounds of jurisdiction") must be a reference for identifying which grounds of jurisdiction do not satisfy the test of the close connection.

187 "Object" is intended to mean the matter with which the proceedings are directly concerned, and which is mainly determined by the plaintiff´s claim; see Hartley/Dogauchi Report, paras 77 and 149. The terms "incidental questions" and "principal issue" are used in the Nygh/Pocar Report, para. 177.

188 [Rapporteurs raised that it is not easy to make sense of para. 1 of Art. 8 and the Drafting Committee could consider putting a comma after the word "ruled" to make it clear that there are two possibilities.]

189 Furthermore, we understand that the application of this provision requires that the State of origin is different from the State in which the intellectual property right concerned is registered. Note that Art. 8 uses the expression "a court other than the court referred to in that Article", *i.e.*, Art. 6. However, Art. 6 does not refer to any court, but to a State - the State of registration. Thus, the application of Art. 8, with regard to intellectual property rights, implies that the judgment was given by the court of a State different from the State referred to in Art. 8.

by preliminary questions. Therefore, the general rule is that a judgment is eligible for recognition and enforcement under the draft Convention if, with regard to its main object, it meets any of the jurisdictional filters laid down by Article 5. The mere fact that a matter excluded from the scope of the draft Convention or falling under Article 6 arises as a preliminary question does not exclude the ensuing judgment from recognition and enforcement under the draft Convention, where the main object of the judgment is within scope. Pursuant to this general principle, Article 8 contains three rules dealing specifically with preliminary questions. Paragraph 1 sets forth that the recognition and enforcement of the judgment does not extend to the preliminary question, if this refers to a matter excluded from the scope of the draft Convention or is subject to the exclusive jurisdiction of other courts under Article 6. Paragraph 2 nuances this general rule, *i.e.*, the recognition and enforcement of the judgment as regards the main object, if and to the extent that the judgment was based on a ruling on the preliminary question. And, finally, paragraph 3 qualifies the application of this latter provision with regard to judgments ruling on the validity of a registered intellectual property right as a preliminary question.

Paragraph 1

282. **Introduction.** Paragraph 1 excludes decisions on certain preliminary questions from the rules on recognition and enforcement of the draft Convention. According to this provision, where a matter to which the draft Convention does not apply arose as a preliminary question, or where a matter referred to in Article 6 arose as a preliminary matter in a court other than the court referred to in that Article, the ruling on that question is not recognised or enforced under the draft Convention. Naturally, this provision does not preclude States from recognising and enforcing those rulings under national law.

283. This provision is based on two assumptions. First, the general principle, as explained above, is that the application of the rules of the draft Convention is determined by the object of the proceedings, and not by the preliminary question (see also, *supra*, Art. 2(2)). Therefore, a judgment is eligible for recognition and enforcement under Article 5 if it meets any of the jurisdictional filters laid down in that provision as regards the *main object* of the proceedings. And second, that the court of origin has also ruled on a preliminary question and, according to its law, this ruling has effects in future proceedings. For example, under the doctrine of issue estoppel, collateral estoppel or issue preclusion, rulings on preliminary questions must be recognised in future proceedings.[190] The purpose of paragraph 1 is to clarify that the recognition of these effects is not required under the draft Convention.[191]

284. **Matters excluded from the scope of the draft Convention**. Paragraph 1 only refers to the recognition of rulings on certain preliminary questions. *First*, those rulings on matters to which the draft Convention does not apply. This covers both matters that do not qualify as civil or commercial under Article 1(1), and matters expressly excluded under Article 2, but also those matters excluded by a declaration made by the requested State under Article 19. If the draft Convention does not apply to these matters, even if they arise as preliminary questions, rulings on them should not benefit from the application of the draft Convention.

285. **Examples**. Thus, for example, if a judgment on a breach of contract ruled, as a preliminary issue, on the legal capacity of one of the parties (a natural person) to enter into such a contract, the ruling on this preliminary issue would not be recognised under the draft Convention (as such a matter is beyond scope of the draft Convention under Art. 2(1)(a)). Or,

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190 See Hartley/Dogauchi Report, paras 195-196.

191 Since the draft Convention does not require the recognition of rulings as preliminary questions (as explained in the Hartley/Dogauchi Report, *ibid.,* "…the Convention never requires the recognition or enforcement of such rulings, though it does not preclude Contracting State from recognizing them under their national law", para. 195), Art. 8(1) may be unnecessary. This explains why the draft Convention is silent on those cases where the preliminary question does not fall under either of the two categories referred to in Art. 8. For example, in an action for damages to a movable asset (main object), the court might have to decide on the ownership of that asset (preliminary question). In principle, the part of the judgment ruling on a preliminary question will not circulate under the draft Convention (see *supra* para. 226) and, therefore, Art. 8(1) should not be interpreted *a contrario*. However, "in the case of rulings on matters outside the scope of the Convention […] the question is so important that it was thought desirable to have an express provision", Hartley/Dogauchi Report, para. 196).

if a judgment on directors' liability ruled, as a preliminary issue, on the validity of a decision of the shareholders' meeting, the ruling on this preliminary issue would not be recognised under the draft Convention (as such a matter is beyond scope of the draft Convention under Art. 2(1)(i)). However, the judgment on the main object would benefit from recognition and enforcement under the draft Convention. Thus, for example, in the case of a judgment containing a ruling, as a preliminary issue, on the legal capacity of a natural person to enter into a contract, which rules in relation to its main object that a party is entitled to receive payment for breach of that same contract, the order for damages would be recognised and enforced under the draft Convention, but not the decision on the preliminary question of capacity (see also Art. 2(2)). It follows that, therefore, such judgment may not prevent the commencement of proceedings in the requested State, where the main object of those proceedings is the capacity of a natural person (or, in the second example, the validity of a decision of the shareholders meeting): in such a case, it would be for the law of the requested State to solve the possible conflict of judgments, *e.g.*, if the effects of the foreign judgment may be revised when a new judgment on the "preliminary question" is given in the requested State but this time as main object.

286. **Matters falling under Article 6**. *Secondly*, paragraph 1 also covers those matters mentioned in Article 6 on which a court other than the court referred to in that Article ruled. Thus, for example, if a judgment on damages given in State X, on the basis of the defendant's residence, ruled as a preliminary issue on the ownership of an immovable property situated in State Y, the ruling on this preliminary issue would not be recognised under the draft Convention. Or, if a judgment on a license contract given in State X ruled as a preliminary issue on the validity of a patent registered in State Y, the ruling on this preliminary issue would not be recognised under the draft Convention. Naturally, the court of the requested State has to recognise and enforce the main decision, *i.e.*, the ruling on damages, in accordance with the draft Convention, but not the preliminary question. As explained immediately above, this implies that the foreign judgment may not prevent (under issue estoppel or a similar doctrine) new proceedings in the State whose courts have exclusive jurisdiction on those matters to rule on the right *in rem* over the immovable property or on the validity of the concerned patent.

Paragraph 2

287. **Judgments based on preliminary questions**. Paragraph 2 does not deal with the recognition or enforcement of rulings on preliminary questions, but with the reasons for the non-recognition or enforcement of judgments. This provision adds an additional ground for non-recognition to those contained in Article 7. Recognition or enforcement of a judgment may be refused *if, and to the extent that*, the judgment was based on (i) a ruling on a matter to which the draft Convention does not apply, or (ii) on a matter referred to in Article 6 on which a court other than a court referred to in that Article ruled. Thus, for example, under paragraph 2, the court of the requested State may refuse recognition of a judgment on the nullity of a contract (main object), *if and to the extent that*, it was based on a ruling on the lack of capacity of a natural person to enter into such a contract (preliminary question). As explained above, paragraph 2 is also relevant when the judgment given in another State was contrary to an arbitration agreement: the requested State may refuse recognition and enforcement of a judgment given in another State if the proceedings in this State were contrary to an arbitration agreement (see *supra* para. 60).

288. The practical application of this provision requires the court of the requested State to examine the content of the foreign judgment and verify, "if and to the extent that", the decision on the main object of the proceedings is based on the ruling on the preliminary question, *i.e.*, whether a different ruling on this preliminary question would have led to a different judgment. In other words, the court of the requested State must verify whether the ruling on the preliminary question provides a necessary premise on which the judgment is based.[192] Furthermore, the Hartley/Dogauchi Report clarifies that this exception should be used only where the court of the requested State would have decided the preliminary

[192] Hartley/Dogauchi Report, para. 200.

question in a different way,[193] and therefore the decision on the main object would also have been different.

[Paragraph 3]

289. [Paragraph 3 sets out a qualification to paragraph 2 in the field intellectual property rights. In accordance with paragraph 3, when a judgment is based on a ruling on the validity of a registered intellectual property right, recognition or enforcement of such a judgment may be refused under paragraph 2 or postponed *only* where certain conditions are met. This qualification does not apply with respect to rulings on matters excluded from the scope of application of the draft Convention as preliminary questions.

290. **Sub-paragraphs**. Article 8(3) contains two sub-paragraphs. In accordance with sub-paragraph (a), recognition or enforcement of a judgment may be refused if, and to the extent that, the ruling on the validity of the registered intellectual property right as a preliminary question is inconsistent with a judgment or a decision of a competent authority (*e.g.*, a patent office) given in the State where such a right is registered or deemed to be registered.[194] This may be a Contracting State or a non-Contracting State, since the draft Convention also protects the exclusive jurisdiction of non-Contracting States in this area. This provision gives preference to the decisions of the courts (or authorities) of the State of registration but only insofar as (i) there is already a decision on the validity of the concerned intellectual property right in that State and (ii) this decision is inconsistent with the ruling given by the court of origin on the same issue but as a preliminary question.[195]

291. In accordance with sub-paragraph (b) recognition or enforcement of the judgment may be refused or postponed if proceedings on the validity of the registered intellectual property right are pending in the State of registration, *i.e.*, in the State where such right is registered or deemed to be registered. This State may also be a Contracting State or a non-Contracting State. This provision gives the court of the requested State the power to either refuse recognition or enforcement,[196] or to suspend the decision to await the judgment of the courts (or competent authorities) which have exclusive jurisdiction on the validity of the intellectual property right in question. If these latter courts hold the patent valid, recognition or enforcement of the judgment may not be refused under sub-paragraph (b); otherwise, they may.

292. Note that paragraph 3 restricts the scope of application of paragraph 2 and, therefore, reduces the possibility of a strategic use of the invalidity of the registered intellectual property right by way of defence. The defendant may only benefit from paragraph 3 if a favourable judgment on the invalidity of the registered intellectual property right was rendered in the State of registration or if, at least, proceedings on the validity or invalidity of the intellectual property right are pending in that State.

293. **Application in practise.** Since, however, the draft Convention has established a *quasi* exclusive base for jurisdiction on *infringements* of registered intellectual property rights (see *supra* paras 208-216), the application of this provision will, in principle, be limited to judgments on contractual disputes (licensing agreements). Judgments on an infringement of a registered intellectual property right only circulate under the draft Convention if the State of origin is the State in which the right concerned is registered. Therefore, the condition for application of this provision, *i.e.,* that the State of origin is different from the State of registration, does not hold in these cases. Conversely, Article 5(1) does apply to judgments on license contracts (see *supra* paras 158-164) and in these cases Article 8(3) may become relevant.

294. **Example**. Imagine a judgment ordering the payment of royalties under a patent-licensing agreement given in State X, where the defendant is habitually resident, that ruled

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193 *Ibid.*, para. 197.

194 In this first case, there is no reason to postpone the decision on recognition or enforcement.

195 Note that Art. 7(1)(f) may partially overlap with this provision.

196 In this case, a refusal does not prevent the judgment creditor from bringing new proceedings once validity has been confirmed by the courts of the State of registration, as set forth in para. 3.

on the validity of a patent registered in State Y as a preliminary issue. The ruling holds that the patent is valid, and as a consequence, the judgment orders the defendant to pay royalties to the judgment creditor. The defendant in State X then brings proceedings in State Y on the validity of the patent as the main object, and the courts of State Y deliver a judgment declaring the patent invalid. In accordance with sub-paragraph (a), the courts of the requested State (which may be State Y or another Contracting State) may refuse to recognise or enforce the judgment given in State X.[197]]

Article 9 – Severability

295. Article 9 provides for the recognition and enforcement of a severable part of a judgment where this is applied for, or where only part of the judgment is capable of being recognised or enforced under the draft Convention.[198] For example, if the portion of a judgment awarding punitive damages is not enforced by reason of Article 10, the remainder of the judgment must be enforced if it satisfies the other requirements of the draft Convention. Other examples would include situations where parts of the judgment would not be subject to recognition or enforcement because they involve matters that fall outside the scope of the draft Convention, are contrary to public policy, or because they are interim orders which do not have the effect of *res judicata* or are not as yet enforceable in the State of origin. In the latter case, however, the requested State may prefer to postpone the decision on recognition and enforcement as permitted under Article 4(4)(b). A further example would arise where a judgment rules on several contractual obligations but where the jurisdictional criterion of Article 5(1)(g) is only satisfied in relation to one of them.[199]

296. In order to be severable, the part in question must be capable of standing alone: this would normally depend on whether enforcing only that part of the judgment would significantly change the obligations of the parties. In so far as this raises issues of law, they will have to be determined according to the law of the State addressed.[200]

Article 10 – Damages

297. Article 10 allows the court addressed to refuse recognition or enforcement of a judgment if, and to the extent that, the award of damages does not compensate the plaintiff for actual loss or harm suffered.

298. The provision refers to exemplary and punitive damages. These two terms mean the same thing and reflect the fact that these damages have an expressly punitive, as opposed to a primarily compensatory objective. While it is generally accepted that compensatory damages can have a deterrent effect, this is not the primary objective of compensatory damages which is rather to repair the actual loss suffered by the party to whom they are awarded. Punitive or exemplary damages, on the other hand, are typically awarded to express condemnation of particularly egregious behaviour on the part of the person who has caused the harm.

299. The text of Article 10 replicates the equivalent provision in the 2005 Choice of Court Convention.[201] To assist with better understanding of the source and scope of the rule, the Explanatory Report on that Convention included the following detailed statement that had been adopted at the Diplomatic Session:[202]

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197 Note that, in this example, Art. 7(1)(f) would not apply since the judgment in State Y was rendered after the judgment in State X.

198 This Art. replicates Art. 15 of the 2005 Choice of Court Convention. See also Hartley/Dogauchi Report, para. 217.

199 This example assumes that there is no other jurisdictional basis available under Art. 5(1).

200 Nygh/Pocar Report, para. 374.

201 Also Art. 11 of the 2005 Choice of Court Convention.

202 Only those parts of the statement that are relevant to the draft Convention are included. Portions of the statement that refer to previous versions of the Art. on damages have been omitted. For the full statement as it appears in the Explanatory Report of the 2005 Choice of Court Convention, see Hartley/Dogauchi Report, paras 203-205.

"(a) Let us start with a basic and never disputed principle: judgments awarding damages are within the scope of the Convention. So a judgment given by a court designated in an exclusive choice of court agreement which, in whole or in part, awards damages to the plaintiff, will be recognised and enforced in all Contracting States under the Convention. As such judgments are not different from other decisions falling within the scope of the Convention, Article 8 applies without restriction. This means both the obligation to recognise and enforce and all the grounds for refusal.

(b) During the negotiations, it has become obvious that some delegations have problems with judgments awarding damages that go far beyond the actual loss of the plaintiff. Punitive or exemplary damages are an important example. Some delegations thought that the public policy exception in Article 9 e) could solve those problems, but others made it clear that this was not possible under their limited concept of public policy. Therefore it was agreed that there should be an additional ground for refusal for judgments on damages. This is the new Article 11. As in the case of all other grounds for refusal, this provision should be interpreted and applied in as restrictive a way as possible.

(c) Article 11 is based on the undisputed primary function of damages: they should compensate for the actual loss. Therefore the new Article 11(1) says that recognition and enforcement of a judgment may be refused if, and to the extent that, the damages do not compensate a party for actual loss or harm suffered. It should be mentioned that the English word 'actual' has a different meaning from the French 'actuel' (which is not used in the French text); so future losses are covered as well.

(d) This does not mean that the court addressed is allowed to examine whether it could have awarded the same amount of damages or not. The threshold is much higher. Article 11 only operates when it is obvious from the judgment that the award appears to go beyond the actual loss or harm suffered. In particular, this applies to punitive or exemplary damages. These types of damages are therefore explicitly mentioned. But in exceptional cases, damages which are characterised as compensatory by the court of origin could also fall under this provision.

(e) This provision also treats as compensation for actual loss or harm damages that are awarded on the basis of a party agreement (liquidated damages) or of a statute (statutory damages). With regard to such damages, the court ad dressed could refuse recognition and enforcement only if and to the extent that those damages are intended to punish the defendant rather than to provide for a fair estimate of an appropriate level of compensation.

(f) It would be wrong to ask whether the court addressed has to apply the law of the State of origin or the law of the requested State. Article 11 contains an autonomous concept. It is of course the court addressed which applies this provision, but this application does not lead to a simple application of the law of the requested State concerning damages.

(g) Recognition and enforcement may only be refused to the extent that the judgment goes beyond the actual loss or harm suffered. For most delegations, this might already be a logical consequence of the limited purpose of this provision. However, it is useful to state this expressly. This avoids a possible 'all or nothing approach' some legal systems apply to the public policy exception.

(h) [...] Article 11 only provides for a review whether the judgment awards damages not compensating for actual loss; it does not allow any other review as to the merits of the case. Like all other grounds of refusal, it will only apply in exceptional cases. Any over- drafting with respect to those cases would have given them too much political weight.

(i) Article 11 does not oblige the court to refuse recognition and enforcement. This is obvious from its wording – the court may refuse – and it is consistent with the general approach in Article 9 [on refusal to enforce or recognise]. So the provision in no way

limits recognition and enforcement of damages under national law or other international instruments, and it allows (but does not require) recognition and enforcement under the Convention. Once again, the Working Group felt that an express provision would have been an over-drafting giving too much weight to the issue of damages.

(j) […] Under Article 11(1), it could be argued that damages intended to cover the costs of proceedings were not compensating for an actual loss. This would of course be wrong from a comparative perspective. But it is nevertheless reasonable to have an express reference to this problem within the provision. This reference does not contain a hard rule; the fact that damages are intended to cover costs and expenses is only to be taken into account."

300. This statement retains its meaningfulness and usefulness as regards the draft Convention.

[Article 11 – Non-monetary remedies in intellectual property matters]

301. [**Introduction**. Article 4(1) lays down the main rule of the draft Convention: the obligation to recognise and enforce a judgment given by a court in a State (State of origin) in another State (requested State). Article 11, however, excludes non-monetary judgments in intellectual property matters from that obligation as regards [recognition and] enforcement. A judgment ruling on an infringement in intellectual property matters shall *only* be [recognised and] enforced under the draft Convention to the extent that it rules on a monetary remedy in relation to harm suffered in the State of origin. Conversely, a judgment on an infringement of an intellectual property right granting non-monetary remedies will not circulate under the draft Convention. Naturally, this provision does not preclude its [recognition and] enforcement under national law.

302. **Non-monetary judgments**. Article 11 excludes judgments granting non-monetary remedies, remedies other than the payment of a fixed or ascertainable sum of money. These remedies typically include injunctions to do or refrain from doing something, or orders for specific performance. In the field of intellectual property rights, they cover, for example, injunctions prohibiting the production or marketing of goods, the use of protected manufacturing processes, or orders to surrender and deliver infringing goods.[203] The [recognition and] enforcement of judgments granting these remedies does not benefit from the application of the draft Convention. By the same token, judgments ruling on an action for declaration of non-infringement will also be excluded from [recognition and] enforcement under the draft Convention. Contrariwise, judgments ruling on a monetary claim in relation to harm suffered in the State of origin will circulate under the draft Convention, even when they dismissed the claim.

303. **Rationale**. The difference between monetary and non-monetary judgments entails important consequences with respect to the means of enforcement. The regime for enforcement may be different depending on whether the non-monetary judgment orders a personal or a non-personal undertaking. Personal undertakings are often enforced, in some legal systems, by means of a penalty payment or other sanctions for contempt, *i.e.*, measures to encourage the defendant to behave in a particular way and thus to ensure that the order is effective (see *supra* para. 76). Non-personal undertakings may also be enforced by an award of damages for the expense of obtaining performance from someone other than the defendant. Some jurisdictions, in particular common law countries, have traditionally considered that foreign non-monetary judgments are unenforceable, although there is a clear trend to depart from this approach.[204] However, in addition to the historical foundations of the rule, there may also be practical reasons. In particular, difficulties may arise as regards the meaning of the foreign judgment, *i.e.*, the determination of the rights, duties or obligations the foreign order imposes on the defendant, or its territorial scope. Difficulties may also arise when an equivalent non-monetary relief is not available in the requested State.

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203 See, on the remedies to violations of intellectual property rights, Arts 44-48 of the TRIPS Agreement.

204 See, for example, *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52 (Canada).

304. **Intellectual property rights**. Article 11 only excludes non-monetary judgments on an infringement in intellectual property matters. In this field, it covers both registered and unregistered intellectual property rights. This provision includes an additional limitation to the recognition and enforcement of a monetary judgment, that this judgment must be "in relation to harm suffered in the State of origin". This condition may be unnecessary in view of the jurisdictional filters established by Article 5(3)(a) and (b) (see *supra* paras 208-224). Its only purpose is to strengthen the principle of territoriality in intellectual property matters (see *supra* para. 204*)*. [Furthermore, only enforcement of non-monetary judgments is excluded, but not recognition. Thus, a foreign judgment declaring the violation of an intellectual property right and granting a non-monetary remedy will have, for example, *res judicata* or preclusive effects in other States under the draft Convention.[205]]]

Article 12 – Judicial settlements (transactions judiciaires)

305. **Introduction.** Article 12 extends the scope of application of the draft Convention to include judicial settlements (*transactions judiciaires*). According to this provision, settlements which a court of a State has approved, or which have been concluded in the course of the proceedings before a court of a State, and which are enforceable in the State of origin, are to be enforced under the draft Convention in the same manner as a judgment.

306. **Judicial settlements**. The English term "judicial settlements" is used in this Article as equivalent to the French term *transaction judiciaire*. This is a common institution in civil law countries, which consists of an agreement concluded before, or approved by, the court in which the parties settled their dispute usually by making mutual concessions.[206] The force of these settlements derives from the agreement of the parties, not the authority of the court which does not rule on the points settled.[207] In this sense, such agreements have some, or even all, of the effects of a final judgment. A judicial settlement must be distinguished from a consent order, *i.e.*, an order made by the court with the consent of both parties, used in common law countries for this purpose, since consent orders are judgments that must be recognised and enforced under Article 4.[208]

307. Article 12 does not only cover "in-court" settlements, *i.e.*, settlements approved or concluded before a court in the course of the proceedings (as is usually the case in most civil law countries), but also "out-of-court" settlements, *i.e.*, agreements concluded by the parties outside judicial proceedings, which are subsequently approved or confirmed by a court.[209] Thus, for example, settlements concluded as a result of mediation are covered by Article 12 if they are subsequently approved by a court. This is articulated in the text by the distinction drawn between settlements "approved by a court" and settlements "concluded in the course of the proceedings before a court". In both cases, the judicial settlement must be enforceable, in the same manner as a judgment, in the State of origin. To prove this, the party seeking enforcement must produce the certificate referred to in Article 13(1)(d), *i.e.*, a certificate of a court of the State of origin confirming that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.

308. **Enforcement *versus* recognition**. Article 12 provides for the enforcement of judicial settlements, but not their recognition. Therefore, under the draft Convention, a judicial settlement from another State may not be invoked in the requested State as, for example, a

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205 The question of whether *recognition* of the *res judicata* effects of non-monetary judgments was discussed during the Third Meeting of the Special Commission; see Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017), Minutes No 6, paras 20-27; eventually, the word "recognition" was maintained but between brackets.

206 See Hartley/Dogauchi Report, para. 207. The Brussels I *bis* Regulation defines a court settlement as "a settlement which has been approved by a court of a Member State or concluded before a court of a Member State in the course of the proceedings".

207 Nygh/Pocar Report, para. 379, note 201, referring to the ECJ case *Solo Kleinmotoren GmbH v E. Bach,* C-414/92, of 2 June 1994 [1994] ECR I-2237.

208 Nygh/Pocar Report, para. 379; Hartey/Dogauchi Report, para. 207.

209 See Work. Doc. No. 146 of February 2017, "Proposal of the delegation of Singapore" (Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017)); for a different view, see Hartley/Dogauchi Report, para. 207.

procedural defence to a new claim.[210] The reason given in the Nygh/Pocar Report is that in some jurisdictions, judicial settlements do not have the force of *res judicata* and therefore they cannot be recognised in another State.[211] The Hartley/Dogauchi Report adds that the 2005 Choice of Court Convention does not provide for the recognition of judicial settlements "mainly because the effects of settlements are so different in different legal systems".[212]

309. The grounds for refusing enforcement of judicial settlements are the same as those applicable to judgments. However, since settlements are essentially consensual, issues of jurisdiction will not arise. The same holds for other grounds for refusal set out in Article 7, *e.g.*, defective notification. In practice, the most relevant ground for refusing enforcement will be the public policy clause.

Article 13 – Documents to be produced

310. Article 13 contains a list of the documents to be produced by the party seeking recognition or enforcement of a judgment under the draft Convention.[213] In legal systems in which there is no special procedure for recognition (see *infra* para. 317), the party requesting recognition may have to produce those documents when he or she intends to give effect to the foreign judgment.[214]

311. Paragraph 1(a) requires the production of a complete and certified copy of the judgment. The reference to "the judgment" includes, where applicable, the court reasoning and not only the final order (*dispositif*).[215] Paragraph 1(b) requires, if the judgment was given by default, the production of the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party. Conversely, if the judgment was not given by default, it is assumed that the defendant was notified unless he or she produces evidence to the contrary (see Art. 7(1)(a)). Paragraph 1(c) requires the production of any document necessary to prove that the judgment has effect or, where applicable, is enforceable in the State of origin. Finally, paragraph 1(d), with regard to judicial settlements, requires the production of a certificate of a court of the State of origin that the settlement or a part of it is enforceable in the same manner as a judgment in the State of origin (see *supra* para. 307). This certificate may be issued by a court other than the court that approved the settlement or before which the settlement was concluded. It is not clear, however, if the certificate may be issued by an officer of the court (see para. 3).

312. The Hartley/Dogauchi Report clarifies two issues with regard to paragraph 1. First, that the law of the requested State determines the consequences of the failure to produce the required documents. And secondly, that excessive formalism should be avoided: if the judgment-debtor was not prejudiced, the judgment-creditor should be allowed to rectify omissions.[216]

313. Paragraph 2 provides that the court addressed may require the production of additional documents to verify whether the conditions of Chapter II of the draft Convention have been satisfied. This indicates that the list of documents contained in paragraph 1 is not exhaustive. Unnecessary burdens on the parties should, however, be avoided.

314. Paragraph 3 allows a person seeking recognition or enforcement of a judgment under the draft Convention to use a form recommended and published by the Hague Conference of

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210 Hartley/Dogauchi Report, paras 208-209 (with an example).

211 *Ibid.*, para 123. Note, however, that under the 1999 Preliminary draft Convention, in order to be recognised, judgments must have the effect of *res judicata* in the State of origin (Art. 25(2)). This condition is not contained in this draft Convention.

212 *Ibid.,* para. 209.

213 This provision is essentially similar to Art. 13 of the 2005 Choice of Court Convention and to Art. 29(1) of the 1999 Preliminary draft Convention.

214 Hartley/Dogauchi Report, para. 210, limits this requirement to circumstances where "the other party disputes the recognition of the judgment". This, however, does not preclude third parties or local authorities (for example, a register) to request those documents.

215 Hartley/Dogauchi Report, para. 211.

216 *Ibid*.

Private International Law. The form, which may be issued by a court of the State of origin or by an officer of the court, is set out in an annex to the draft Convention, but may be changed by a meeting of the Special Commission of the Hague Conference on Private International Law. The use of this form, however, is not compulsory. If it is used, the information contained in it may be relied on by the court addressed in the absence of challenge. But even if there is no challenge, the information is not conclusive: the court addressed can decide the matter in the light of all the evidence before it.[217]

315. Paragraph 4 deals with the language of the documents. It provides that if the documents referred to in Article 13 are not in an official language of the requested State, they must be accompanied by a certified translation into an official language, unless the requested State provides otherwise. This State may, therefore, provide that a translation is not necessary at all or that a non-certified translation is sufficient.

316. The certification of foreign legal documents (*i.e.,* legalisation or apostille) is governed by the rules of the requested State, including the international conventions ratified by that State.

Article 14 – Procedure

317. Paragraph 1 provides that the procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless the draft Convention provides otherwise. Thus, the law of the requested State determines whether recognition is automatic or requires a special self-standing procedure. Where the law of the requested State does not require a special procedure for the recognition of a foreign judgment, a judgment will be recognised automatically, *i.e.*, by operation of law, based on Article 4 of the draft Convention.[218]

318. With regard to enforcement, Article 14 makes a distinction between, on the one hand, declaration of enforceability or registration for enforcement and, on the other hand, enforcement.[219] The first terms refer to the so-called *exequatur* proceedings, *i.e.*, the special proceedings by which the competent authority of the requested State confirms or declares that the foreign judgment is enforceable in that State. The second term refers to the legal procedure by which the courts of the requested State (or any other competent authority in this State) ensure that the judgment-debtor obeys the foreign judgment; it includes measures such as seizure, confiscation, attachment etc. The enforcement of the foreign judgment presupposes a declaration of enforceability or a registration for enforcement. According to paragraph 1, both types of proceedings are governed by the domestic procedural law of the requested State.

319. **Statute of limitations**. The reference in paragraph 1 to the law of the requested State also covers the statute of limitations for seeking enforcement of the foreign judgment.[220] Thus, if the judgment remains enforceable under the law of the State of origin (see Art. 4(3)), the law of the requested State may nevertheless place an additional and shorter time limit on enforcement of the foreign judgment. For example, if according to the law of the State of origin (State A) the judgment remains enforceable for 15 years but the law of the requested State (State B) establishes a shorter period, the latter will prevail. That is, once this latter period has expired, the judgment given in State A will no longer be enforceable in State B. The law of the requested State also determines the manner of calculating this period.[221] However, an essential principle to ensure the effectiveness of the draft Convention is that judgments given in other States are to be treated in the same manner as domestic

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217 *Ibid*., para. 213.

218 *Ibid*., para. 215; Nygh/Pocar Report, para. 355.

219 Note, however, that in other provisions of the draft Convention, the term “enforcement” is used with the meaning of “declaration of enforceability or registration for enforcement” (see *e.g.*, Art. 5 or 7).

220 This reference to the law of the requested State includes its private international law rules, and therefore this law may refer back the statute of limitations to the law of the State of origin.

221 In theory, the *dies a quo* may be the moment when the judgment became enforceable in the State of origin or when it was declared enforceable in the requested State.

judgments. Accordingly, the law of the requested State may not lay down a shorter statute of limitations for foreign judgments than for domestic judgments.[222]

320. Paragraph 1 also provides that in all proceedings covered by this provision, the courts (or the competent authorities) of the requested State must act expeditiously. This means that the court must use the most expeditious procedure available to it.[223] States should consider ways in which provision can be made to ensure unnecessary delays are avoided.[224]

321. **Application for refusal**. Article 14 only refers to a procedure for recognition, declaration of enforceability or registration for enforcement. However, it does not preclude States from envisaging the possibility of applications *for refusing* recognition or enforcement. Thus, States may envisage that the judgment-debtor may request a declaration of non-recognition (or non-enforceability) of a judgment given in another State on the basis that the judgment is not eligible for recognition under Article 5 or on one of the grounds referred to in Article 7.

322. **Jurisdiction for recognition and enforcement**. Paragraph 2 provides that the court of the requested State shall not refuse the recognition or enforcement of a judgment under this draft Convention on the ground that recognition or enforcement should be sought in another State, *i.e.*, that there is an alternative forum where recognition or enforcement of the corresponding judgment is more appropriate and convenient.

323. The starting point of the draft Convention is that the judgment-creditor may seek recognition or enforcement of the judgment in any State. Even if it entails more costs, the judgment-creditor may have a legitimate interest in seeking the enforcement of a judgment in more than one State; for example, in cases of worldwide injunctions or in cases of monetary judgments when the judgment-debtor has assets in different States and in each of them the assets are insufficient to satisfy the judgment.

324. In many legal systems, the *exequatur* of a foreign judgment does not require a basis of jurisdiction, *i.e.*, it is not conditioned upon a special connection between the judgment-debtor and the requested State, such as the presence of the debtor's assets in that State or the fact that there is no other State where the enforcement of the judgment is more appropriate. The mere interest of the judgment-creditor is sufficient: if they seek recognition or enforcement in a particular State, it is because they believe that they will obtain some kind of satisfaction in that State. It is only at a later stage, in the context of the enforcement proceedings, where the presence of assets in the requested State may become relevant.

325. Conversely, in other legal systems, the *exequatur* of a foreign judgment does require a basis of jurisdiction, such as the domicile of the judgment-debtor in the requested State or the presence of the judgment-debtor's assets in this State. Furthermore, in some of these legal systems, the judgment-debtor may even oppose to the *exequatur* on the basis of the *forum non conveniens* doctrine, *i.e.*, arguing that the recognition or enforcement should be sought in another, more appropriate and convenient, State. In these jurisdictions, the dispute about the existence of a more convenient forum may delay the proceedings and become very cumbersome for the judgment-creditor. Paragraph 2 is addressed to this group of legal systems and establishes an exception to paragraph 1. Although the procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State, the courts of this State cannot refuse the recognition or enforcement of a judgment under the draft Convention on the ground that they should be sought in another State. In practice, this implies that the doctrine of *forum non conveniens* may not be used as a ground to refuse recognition or enforcement under the draft Convention. In paragraph 2, the term "enforcement" includes declaration of enforceability or registration for enforcement.

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222 See *e.g.*, Art. 33 of the 2007 Child Support Convention.

223 Nygh/Pocar Report, para. 355; Hartley/Dogauchi Report, para. 216.

224 Hartley/Dogauchi Report, para. 216.

[Article 15 – Costs of proceedings]

326. [Article 15 deals with the question of the security which may be required in order to guarantee payment of the costs of the proceedings, including recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment. It reflects a traditional view that no security, bond or deposit may be required from the applicant for the sole reason that he or she is a national of another State or has his or her habitual residence or domicile in another State.[225] The possibility of a security payment being required is not entirely removed, but only when the *sole ground* for requiring such security is any of those circumstances. A security payment is therefore possible on other grounds, *e.g.*, that the judgment-creditor has no assets in the requested State. The clause applies to both natural and legal persons, and irrespective of whether they are national of another Contracting State or a third State (or whether they have their habitual residence / domicile in another Contracting State or in a third State).

327. The second paragraph of Article 15 is a corollary to the "no-security rule" laid down by the first paragraph. It is aimed at protecting the judgment-debtor when the recognition or enforcement of the judgment is refused and an order for payment of costs or expenses is issued against the judgment-creditor by a court (including an officer of the court) of the requested State. According to paragraph 2, such order falls within the scope of application of the draft Convention and therefore is to be rendered enforceable in any other State. This provision is needed, since Article 3(1)(b) only covers orders for payment of costs or expenses when they relate to a *decision on the merits which may be recognised or enforced under the draft Convention*, and a decision on recognition or enforcement of a foreign judgment does not qualify as such. Naturally, the enforcement of an order for payment of costs or expenses under paragraph 2 may be refused on the grounds contained in Article 7 of the draft Convention.]

Article 16 – Recognition or enforcement under national law

328. Article 16 deals with the relation between the draft Convention and national law. According to this provision, and subject to Article 6, the draft Convention does not prevent the recognition or enforcement of judgments under national law. This provision is based on a *favor recognitionis* principle. If a judgment may not be recognised or enforced under the draft Convention, because, *e.g.*, it is not eligible according to Article 5, the interested party may still seek recognition or enforcement under national law. In other words, the draft Convention sets out a minimum standard for mutual recognition or enforcement of judgments, but States may go further than that standard.

329. The national law of the requested State determines whether, if the judgment is not eligible for recognition or enforcement under the draft Convention, the interested party may resort to national law "as a whole" or may combine provisions from both systems. Thus, it is possible that in accordance with national law, the judgment-creditor may benefit from the jurisdictional filters laid down by national law, if they are more generous than those contained in Article 5 of the draft Convention, but benefit from the grounds for refusal set out by the draft Convention, if they are more liberal than those contained in national law.[226]

330. The application of national law is, however, subject to Article 6 of the draft Convention. Therefore, national law cannot be invoked to grant recognition or enforcement of a judgment that has infringed the exclusive bases of jurisdiction set out in that provision.

Article 17 – Transitional provision

331. Article 17 deals with the application in time of the draft Convention. This question is different from its entry into force (see *infra* Art. 30). Since the draft Convention will only

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225 Nygh/Pocar Report, para. 356.

226 In some systems, for example, the defendant must be "duly served" with the documents instituting the proceedings and a notification "in such a way as to enable him to arrange for his defence" is not sufficient (see Art. 7(1)(a)(ii)).

operate between two Contracting States (see *supra* Art. 1(2)), Article 17 presupposes that the draft Convention already be in force in both the State of origin and the requested State. The provision considers which moment in time those States need to be a Party to the draft Convention for it to apply between them.

332. The approach taken by this provision is based on a strict non-retroactivity principle. The draft Convention shall apply if, at the time the proceedings were instituted in the State of origin, it was in force in that State and in the requested State. That is, the court addressed must verify (i) the date when the proceedings were instituted in the State of origin (on this concept, see *supra* para. 34); and (ii) whether at that time the Convention was already in force in *both* the State of origin *and* the requested State. The draft Convention, thus, has no retroactive effects on proceedings commenced prior to its entry into force. This solution provides legal certainty to the parties since the claimant as well as the defendant will know, from the commencement of the dispute, whether the future judgement will circulate under the draft Convention or not, and they will therefore be able to prepare their procedural strategies taking this into account.

Article 18 – Declarations limiting recognition and enforcement

333. **Introduction**. Article 18 provides that a State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the court of origin, were connected only with the requested State. This provision is taken from the 2005 Choice of Court Convention (see Art. 20 of this instrument).

334. **Rationale**. Article 18 deals with wholly domestic situations from the point of view of the requested State, and its purpose is to allow a Contracting State to make a declaration to relieve itself from the obligation to recognise or enforce a judgment under the draft Convention in these cases. Traditionally, Hague instruments have only applied in international cases. However, in a convention on recognition and enforcement of judgments a case is always international: it applies to judgments given by a court other than that in which recognition or enforcement is sought. Yet there could be scenarios where the internationality of the case has been purposefully created by the mere willingness of the parties. In such a scenario, this provision will recognise that this may not in fact be a true international case, and that, as such, on a proper analysis of the connecting elements of the dispute, the dispute ought to be heard in the requested State, rather than in the State of origin. Furthermore, it should also be noted that some of the grounds for recognition and enforcement laid down by Article 5 may be met in a wholly domestic situation, in particular those based on submission or express consent (see Art. 5(1)(c), (e), (f), (k), (i), or (m)). A judgment given in the above cases may ordinarily circulate under the draft Convention even if the dispute had no additional connections with the State of origin. What Article 18 does is to allow Contracting States to change this by making a declaration to the contrary, *i.e.*, it permits a Contracting State to declare that it will not recognise or enforce a judgment if the case would have been wholly domestic to it, if the original proceedings had been brought before its courts.

335. **Relevant time**. The relevant time to determine whether a situation is wholly domestic or not is the time when the proceedings were instituted in the State of origin. Thus, if the requested State has made the declaration envisaged by Article 18, the court addressed must verify if, at the time when the proceedings were instituted in the State of origin, the parties were resident in the requested State, and their relationships and all other relevant elements were also connected (only) with the requested State. Only in such a case may the court addressed refuse the recognition or enforcement of the judgment under Article 18.

336. **Example.** The parties are resident in State X and all other relevant elements are connected only with that State. Let us assume that one of the parties brings proceedings before a court in State Y, and the defendant argues on the merits without contesting jurisdiction. If the court of State Y gives a judgment on the merits, that judgment will circulate under the draft Convention (see Art. 5(1)(f)). However, if State X has made the declaration envisaged by Article 18, it will not be required to recognise or enforce that judgment. Other States, however, may not invoke the declaration made by State X to refuse recognition or enforcement of the judgment.

Article 19 – Declaration with respect to specific matters

337. **Introduction**. Article 19 permits Contracting States to extend the list of matters excluded from the scope of the draft Convention beyond those enumerated in Article 2(1), by making a declaration to that effect. It provides that where a State has a strong interest in not applying the draft Convention to a specific matter, it may declare that it will not apply the draft Convention to that matter.

338. **Rationale.** The rationale of this provision is to facilitate the ratification of the draft Convention by "relaxing" its scope of application. If such opt-outs were not possible, some States might not be able to become Parties to the draft Convention.[227] However, this policy must be balanced against the interests of the other Contracting States and the fundamental objectives of the draft Convention itself, *i.e.*, to enhance the cross-border effectiveness of judgments in civil and commercial matters. To achieve this balance, Article 19 contains certain safeguards.

339. **Safeguards**. First, a Contracting State should not make a declaration without compelling reasons and the declaration should meet the proportionality principle, *i.e.*, the scope of the declaration should not be broader than necessary. In accordance with this principle, the exclusion may be defined by a reference to a specific subject matter, *e.g.*, "contracts over immovable property", "consumer contracts", "labour contracts", "environmental damage" or "antitrust". But it may also be narrowed down by additional criteria, such as (i) a particular link of that subject matter with the requested State, *e.g.*, "contracts over immovable property situated in the requested State";[228] or (ii) a particular type of remedy in that subject matter, *e.g.*, "injunctions in antitrust matters". This is consistent with the policy underpinning this provision since it ensures that the declaration "is no broader than necessary".[229]

340. Secondly, the specific matter excluded must be clearly and precisely defined. This ensures that the parties and other Contracting States are able to easily identify the scope and reach of the declaration.[230] Furthermore, under Article 33, any declaration made under Article 18 must be notified to the depositary (the Ministry of Foreign Affairs of the Kingdom of the Netherlands), which will inform the other States. The declarations will also be posted on the website of the Hague Conference on Private International Law to ensure transparency.

341. **Non-retroactivity**. If a declaration under Article 19 is made at the time the Convention comes into force in the requested State, it will take effect simultaneously with the entry into force of the Convention. If the declaration is made *after* the Convention comes into force for the State making it, it will take effect on the first day of the month following the expiration of the [three] [six] months following the date on which the notification is received by the depositary (see Art. 31(4)). Such a declaration shall not apply to judgments resulting from proceedings that have already been instituted before the court of origin when the declaration takes effect (see Art. 31(4)). This ensures legal certainty, since the parties may determine, when the proceedings are instituted, whether the future judgment will be affected by such declaration or not.

342. **Reciprocity**. Paragraph 2 states the consequence of a declaration made under Article 19(1). With regard to the matter excluded under this provision, the draft Convention shall not apply (i) in the Contracting State that made the declaration; (ii) in other Contracting

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227 See also Hartley/Dogauchi Report, para. 236.

228 This alleviates the concern of some delegations to protect the exclusive jurisdiction of their courts in certain subject matters; see *Aide memoire* of the Chair of the Special Commission (Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017)), paras 23 and 24.

229 Note that the Hartley/Dogauchi Report, at para. 235, seems to follow a different interpretation of the parallel provision in the 2005 Choice of Court Convention. The Contracting States' practice, however, is more consistent with the interpretation argued in this Report (see Declaration of the European Union, under Art. 21 of the 2005 Choice of Court Convention, of 11 June 2015, accessible at <http://www.hcch.net>.

230 The Hartley/Dogauchi Report, at note 274, points out that where the Contracting State making the declaration so wished, the declaration would first be sent in draft to the Secretary General of the Hague Conference for circulation to the other Contracting States for their comments.

States where recognition or enforcement of a judgment given in a Contracting State that made the declaration is sought. This is based on a reciprocity principle, if a Contracting State is not prepared to grant the benefits of the Convention to other Contracting States, it cannot expect to benefit from the Convention itself. This, however, does not prevent the recognition or enforcement of the judgment under national law (see Art. 16).

343. **Review of declarations.** Article 23 envisages that the operation of declarations under Article 19 may be considered from time to time, either at review meetings to be convened by the Secretary General of the Hague Conference on Private International Law, or, as a preparatory step, at a meeting of the Council on General Affairs and Policy of the Hague Conference on Private International Law.

[Article 20 – Declarations with respect to judgments pertaining to governments]

344. **[Introduction**. This provision was introduced in the Third Meeting of the Special Commission, [231] and it permits Contracting States to make a declaration excluding the application of the Convention to judgments which arose from a proceeding to which such a State (or any of its governmental agencies or any person acting on their behalf) was a party.

345. This provision must be read in conjunction with Articles 1(1) and 2(4) and (5). According to these Articles, the draft Convention applies to judgments relating to civil or commercial matters, irrespective of the nature of the parties or the courts. Thus, the mere fact that a State, including a government, a state-owned enterprise, a governmental agency or any person acting for a State, was a party to the proceedings in the State of origin does not exclude a judgment from the scope of the draft Convention. The draft Convention applies when the State or a governmental agency is acting as a private person, *i.e.*, without exercising sovereign powers. In turn, Article 2(5) clarifies that the draft Convention shall not affect privileges and immunities of States or international organisations.

346. **Rationale**. Despite the foregoing, the rationale for this Article is derived from a reluctance expressed by several delegations to include States within the scope of the draft Convention, in particular since it may be difficult for a State to determine whether another State is exercising sovereign powers or not. Article 20 meets this concern and allows Contracting States to exclude the application of the draft Convention in those cases by making a declaration to that effect.

347. **Scope**. The declaration may only encompass judgments which arose from a proceeding to which the State making the declaration is a party, or to which any of its governmental agencies or any person acting of behalf to such governmental agency is a party. It may not include State-owned enterprises engaged in civil or commercial activities.

348. The declaration may refer to any proceedings, in civil or commercial matters, to which a State is a party, or only certain categories of proceedings. That is, the State making the declaration may specify its scope, and in this case the exclusion of application of the draft Convention will only take effect "to the extent specified in the declaration". It seems clear that the declaration may be limited to certain subject matters, but even additional criteria may be specified to narrow down its scope, *e.g.*, certain governmental agencies, a particular link of the subject matter with the requested State or certain types of remedies (see *supra* para. 339). In any event, the exclusion from scope applies irrespective of whether the State is the judgment creditor or the judgment debtor. Furthermore, the application of Article 20 is not temporally limited to cases where the requested States (or its governmental agencies or persons acting on behalf of them) were a party to the proceeding *when they were instituted in the State of origin*.

349. **Safeguards**. The structure and content of Article 20 is parallel to Article 19. As in Article 19, the State making such declaration shall ensure that the declaration is no broader

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[231] See *Aide memoire* of the Chair of the Special Commission (Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017)), paras 29-31; Work. Docs Nos 179 and 186.

than necessary (see *supra* para. 339) and that the exclusion from scope is clearly and precisely defined (see *supra* para. 340).

350. **Non-retroactivity**. As in Article 19, if the declaration is made *after* the Convention enters into force for the State making it, it will take effect on the first day of the month following the expiration of the [three] [six] months following the date on which the notification is received by the depositary (see *infra* Art. 31(4)). Such a declaration shall not apply to judgments resulting from proceedings that have already been instituted before the court of origin when the declaration takes effect (see *infra* Art. 31(4)).

351. **Consequences**. Also, as in Article 19, paragraph 2 details the consequences of a declaration made under Article 20(1). In this regard, when a declaration is made under Article 20, the Convention shall not apply to judgments which arise from the excluded proceedings as specified in the declaration: (i) in the Contracting State that made the declaration; (ii) in other Contracting States, where recognition or enforcement of a judgment given in a Contracting State that made the declaration is sought. In theory, a declaration made under this provision does not prevent the recognition or enforcement of the judgment under national law (see *supra* Art. 16).[232]

352. **Review of declarations.** Article 23 envisages that the operation of declarations under Article 20 may be considered from time to time, either at review meetings to be convened by the Secretary General of the Hague Conference on Private International Law, or, as a preparatory step, at a meeting of the Council on General Affairs and Policy of the Hague Conference on Private International Law.]

[Article 21 – Declarations with respect to common courts]

353. [Article 21 addresses the application of the draft Convention to judgments given by courts common to two or more States and establishes a declaration mechanism in order to include those judgments within the scope of the draft Convention.

354. **Common courts**. In certain regions or parts of the world, several countries may choose to invest a common court with powers to (i) exercise jurisdiction over matters that come within the scope of application of the draft Convention; and (ii) deliver decisions on the merits that may be characterised as "judgments" under Article 3(1)(b).[233] Article 21 deals with this issue and envisages two different situations. First, when the common court has only an appellate function (Art. 21(1)(b)(i));[234] and secondly, when the common court has both first instance and appellate functions (Art. 21(1)(b)(ii)).

355. **Common courts of appeal.** In the first case, judgments issued by the common court of appeal are covered by the draft Convention if three conditions are met: (i) the subject-matter of the judgment falls within the scope of the draft Convention; (ii) the State concerned has made the relevant declaration under Article 21; and, (iii) the proceedings at first instance were instituted in that Contracting State. In these cases, the judgment of the court of appeal can be "traced back" to an individual Contracting State. Conversely, if the court of first

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232 Thus, for example, in other Contracting States recognition or enforcement of a judgment would make sense when the State making the declaration is the judgment debtor.

233 See, for an exhaustive description, including a list of common courts in existence at the time of writing this Report, "Note on "common courts" in Article 22 of the February 2017 draft Convention", Prel. Doc. No 9 of October 2017 for the attention of the Third Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017) (see path indicated in note 42), and the European Union, "Discussion Document from the European Union on the operation of the future Hague Judgments Convention with regard to Intellectual Property Rights", Info. Doc. No 10 Revised of December 2017 for the attention of the Third Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017) (see path indicated in note 42).

234 Naturally, the word "only" refers to subject matters within the scope of application of the draft Convention. If a common court has an appellate function in those matters it will qualify as such under Art. 21(1)(b)(i), even if it has both functions, *i.e.*, first instance and appellate functions, on subject matters that fall outside the scope of application of the draft Convention. See Prel. Doc. No 9 of October 2017, *ibid.*, para. 28(v).

instance where the proceedings were instituted was a court of a non-Contracting State or of a Contracting State that had not made a declaration under Article 21, the judgment from the common court would not be entitled to recognition or enforcement under the draft Convention. The location of the seat of the court of appeal, *i.e.*, in a Contracting or non-Contracting State, is irrelevant.

356. **Example.** Let us assume there is a common court to States X, Y and Z. This court has appellate functions only on, *e.g.*, [intellectual property rights]. State X and Y have ratified the draft Convention and made a declaration under Article 21, but State Z has not. In this case, a judgment on such rights by that common court will be recognised and enforced under the draft Convention only if the proceedings at first instance were instituted in State X or Y. The same would hold true if State Z had ratified the draft Convention but had failed to make a declaration under Article 21.

357. **Common courts at first instance.** In the second case, the courts are common to several States and act instead of national courts from first instance onwards, *i.e.*, they have both first instance and appellate functions. Since the proceedings at first instance take place before a common court serving several States, the judgment cannot be "traced back" to any individual State. This gives rise to a particular problem if not all of them are a Party to the draft Convention. States party to the agreement establishing the common court may get a "free ride" since they might benefit from the recognition and enforcement of judgments under the draft Convention without having to adhere to any of the obligations of being a Party to it. This "free rider" problem is dealt with by paragraph 2(b), which establishes that those judgments will *only* circulate under the draft Convention if all States that established the common court exercising first instance jurisdiction are Parties to the draft Convention.

358. **Example**. Let us assume there is a common court to States X, Y and Z. This court has both first instance and appellate functions on [unitary intellectual property rights], *i.e.*, [intellectual property rights] granted for the three States. In this case, a judgment by the common court will be recognised and enforced under the draft Convention only if States X, Y and Z have ratified the draft Convention and have also made the declaration envisaged by Article 21.[235]

359. **Application of the jurisdictional filters.** The jurisdictional filters established by Articles 5 and 6 may give rise to certain difficulties insofar as they are applied in the context of common courts, as certain connecting factors refer to a territory, *e.g.*, the habitual residence of the person against whom recognition or enforcement is sought, the place of performance of a contract or the place where the harm occurred.[236] These connecting factors refer to the territory of an individual State (as State of origin) whereas a common court has jurisdiction over the territory of two or more States. In this context, paragraph 4 establishes that the reference to the State of origin in Articles 5 and 6 will be deemed to refer to the entire territory over which that court has jurisdiction in relation to that judgment.

Example. Let us assume a common court is established to serve States X, Y and Z, with jurisdiction on environmental damages. This court has both first instance and appellate functions. In this case, and assuming that States X, Y and Z have ratified the draft Convention and made the declaration envisaged by Article 21, a judgment by the common court will be eligible for recognition and enforcement under, *e.g.*, Article 5(1)(a) if the person against whom recognition or enforcement is sought was habitually resident in any of those States.]

Article 22 – Uniform interpretation

360. Article 22 states that in the interpretation of the draft Convention regard must be had to its international character and to the need to promote uniformity in its application. This

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235 The condition that the three States in the example must have made a declaration under Art. 21 is implicit in this provision.

236 As regards common courts that only have an appellate function, in principle, the application of Art. 5 or 6 does not give rise to any specific problem since their decision can be "traced back" to a particular State and the jurisdictional filters laid down by those provisions are assumed to refer to that particular State.

provision is addressed to courts applying the draft Convention. It requires them to interpret it in an international spirit to promote uniformity of application. Where reasonably possible, therefore, foreign decisions and writings should be taken into account. It should also be kept in mind that concepts and principles that are regarded as axiomatic in one legal system may be unknown or rejected in another. The objectives of the draft Convention can be attained only if all courts apply it in an open-minded way.[237]

361. This Article has to be read jointly with Article 23 below (Review of operation of the Convention) because both Articles have the objective of a proper and uniform application of the draft Convention.

Article 23 – Review of operation of the Convention

362. Article 23 requires the Secretary General of the Hague Conference on Private International Law to make arrangements at regular intervals for the review of the operation of the draft Convention, including any declarations made under it, and for the consideration of the question whether any amendments to it are desirable. One of the major purposes of such review meetings would be to examine the operation of declarations under Article[s] 19[, 20 and 21] and to consider whether each of them was still required.

Article 24 – Non-unified legal systems

363. Article 24 is concerned with the problems that result from the fact that some States are composed of two or more territorial units, each with its own judicial or legal system.[238] It occurs most often in the case of federations – for example, Canada or the United States of America – but can also occur in other States as well – for example, China or the United Kingdom. This can create a problem because one has to decide in any particular case whether the reference is to the State as a whole ("State" in the international sense) or whether it is to a particular territorial unit within that State.

364. **Interpretive rule.** Article 24(1) addresses this problem by providing that, where different systems of law apply in the territorial units with regard to any matter dealt with in the draft Convention, the draft Convention is to be construed as applying either to the State in the international sense or to the relevant territorial unit, whichever is appropriate. Article 25(1) serves as an interpretive guide to the application of those provisions of the draft Convention that require the identification of a geographical or territorial location. It has no implications on the scope of the draft Convention.

365. The interpretive rule in Article 24(1) will be relevant in the application of the jurisdictional filters in Articles 5 and 6. For example, Article 5(1)(a) refers to habitual residence in the State of origin as a connecting factor. Where that State is non-unified in the sense of Article 24, the condition of Article 5(1)(a) will only be met if the habitual residence is within the territorial unit over which the court of origin exercises its jurisdiction; habitual residence anywhere else within the Contracting State will not satisfy the criterion, as indicated in Article 24(1)(b).

366. **Example of habitual residence.** Where enforcement of a judgment from California is sought, it will not be sufficient to show that the judgment creditor was habitually resident somewhere in the United States (the Contracting State); only residence in California (the territorial unit with a distinct judicial system) would qualify under Article 5(1)(a).

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237 This clause is also present in the 2006 Hague Securities Convention (Art. 13) and the 2007 Child Support Convention (Art. 53).

238 This may refer to States where individual territorial units have separate courts and civil procedure (non-unified judicial system) such that the reference to "courts of State X" is either meaningless or insufficiently precise; it may also refer to States where individual territorial units have distinct substantive law rules (non-unified legal system) such that the reference to the "law of State X" is either meaningless or insufficiently precise; some States may exhibit one or both of these "non-unified" characteristics.

367. Similarly, if reliance is placed on the filter in Article 5(1)(g) applicable to contractual claims, a judgment given in a territorial unit different from the unit in which the relevant contractual obligation took place but within the same State would not satisfy the condition.

368. **Example of place of performance.** Where enforcement of a judgment from Quebec is sought, reliance on the filter in Article 5(1)(g) will require the demonstration that the performance of the contractual obligation in question took place in Quebec (the relevant territorial unit), and not in some other territorial unit within Canada (the Contracting State).

369. **Judgments in domestic cases.** Article 24(2) specifies that a Contracting State with two or more territorial units in which different systems of law are applied is not bound to apply the draft Convention to situations involving solely such different territorial units.

370. This is consistent with Article 2 of the draft Convention that defines the scope of the draft Convention in terms of recognition in one Contracting State of judgments rendered in another Contracting State. The recognition and enforcement obligations under the draft Convention only arise with respect to foreign judgments, understood in the international sense.

371. **Recognition between territorial units.** Article 24(3) states that there is no obligation of recognition or enforcement in one territorial unit flowing from the recognition or enforcement of a foreign judgment in another territorial unit of the same Contracting State. Thus, for example, a French judgment recognised under the draft Convention in Quebec (Canada) need not be automatically recognised in Ontario (Canada). This is a natural consequence of the scope of the draft Convention, as defined in Article 1(2), but it bears explicit mention in the portion of the draft Convention dealing with non-unified legal systems to avoid any risk of confusion.

372. **Regional Economic Integration Organisation** Finally, Article 24(4) indicates that these special rules applying to non-unified legal systems do not apply to a Regional Economic Integration Organisation, which is instead governed by its own rules in Articles 28 and 29 (see below).

Article 25 – Relationship with other international instruments

373. This is one of the most difficult questions dealt with in the draft Convention.[239] The starting point must be the normal rules of public international law, which are generally regarded as being reflected in Article 30 of the Vienna Convention on the Law of Treaties, 1969. Article 30(2) of the Vienna Convention provides that where a treaty states that it is subject to another treaty (whether earlier or later), that other treaty will prevail, unless the parties expressly provide otherwise. Article 25 of this draft Convention specifies [three] [four] cases (para. 2 to [4] [5] of Art. 25) in which another [treaty] [international instrument] will prevail over it, including the particular question of conflicts between the draft Convention and the rules of a Regional Economic Integration Organisation that is a Party to the draft Convention.

374. The problem of conflicting instruments arises only if two conditions are fulfilled. The first is that there must be an actual incompatibility between the two instruments. In other words, the application of the two instruments must lead to different results in a concrete situation. Where this is not the case, both instruments can be applied. In some cases, an apparent incompatibility may be eliminated through interpretation. Where this is possible, the problem is solved; Article 25(1) reflects this approach.

375. The second condition is that the State of the court seised must be a Party to both instruments. If that State is a Party to only one, the courts in it will simply apply that one. Article 25 is, therefore, addressed to States that are Parties to both the draft Convention and

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239 For a full discussion, see A. Schulz, "The Relationship between the Judgments Project and other International Instruments", Prel. Doc. No 24 of December 2003 for the attention of the Special Commission of December 2003. See also the discussion of customary international law for Contracting States to the Convention who are not party to the Vienna Convention (at paras 36 *et seq.*)

to another instrument that conflicts with it.

376. **Vienna Convention on the Law of Treaties.** Articles 30 and 41 of the Vienna Convention on the Law of Treaties, 1969, codify the rules of public international law with regard to treaties relating to the same subject matter.[240] The rules in Article 25 of the draft Convention must be read against this background. The draft Convention cannot make itself override other instruments to a greater extent than that permitted by international law. However, international law does permit a treaty to provide that another treaty will prevail over it. The purpose of Article 25, therefore, is to provide that, in the cases specified, the draft Convention will give way to the other instrument, in so far as the two conflict. Where none of these "give-way" rules applies, the draft Convention has effect to the fullest extent permitted by international law.

377. **Interpretation.** The first paragraph of Article 25 contains a rule of interpretation. It provides that the draft Convention must be interpreted, as far as possible, to be compatible with other instruments in force for Contracting States. This applies irrespective of whether or not the other instrument was concluded before or after the draft Convention. Thus, where a provision in the draft Convention is reasonably capable of two meanings, the meaning that is most compatible with the other instrument should be preferred. This does not, however, mean that a strained interpretation should be adopted in order to achieve compatibility.

378. **Compatibility with *earlier* instruments.** Where two instruments are not compatible in their application to a concrete situation, Article 25(2) allows for the *earlier* instrument to prevail. Article 25(2) does not require the earlier instrument to have been in force prior to the entry into force of this draft Convention for the Contracting State in question, but merely to have been concluded. Of course, if the earlier treaty is not in force, no possible incompatibility may arise. This specificity in Article 25(2) avoids any uncertainty in the timing element. [Moreover, Article 25(2) underscores that this rule of precedence, which is an exception to the general rule that later treaties prevail over earlier ones, only applies as between States that are parties to the earlier instrument.]

379. **Example.** Assume that a treaty on the enforcement of mediated settlements is concluded prior to the entry into force of the draft Convention for State A. State A and State B are signatories of that treaty but State C, while a Contracting State of this draft Convention, is not part of that other treaty. A judgment in an action between X, habitually resident in State A, and Y, habitually resident in State B, is rendered in State C. X seeks enforcement of the judgment in State B. In defence, Y invokes the enforcement of a mediated settlement between X and Y that is inconsistent with the judgment from State C. If the earlier treaty requires the enforcement of the mediated settlement, because the parties are resident in Contracting States, and the draft Convention also requires enforcement of the judgment because its conditions are met, the court in State B is faced with incompatible international obligations. Article 25(2) allows precedence to be granted to the treaty and, therefore, to enforcement of the mediated settlement.

380. **Relationship with the 2005 Choice of Court Convention.** In general, there are no tensions or inconsistencies between the 2005 Choice of Court Convention and the draft Convention, as neither instrument restricts or limits recognition and enforcement of judgments under national law, including under other treaties. This can be illustrated in the following examples.

381. **Examples.** The draft Convention applies to the judgment, *i.e.*, the judgment is within its scope application and at least one of the bases under Article 5 applies, and the 2005 Choice of Court Convention does not apply. The judgment will circulate under the draft Convention, subject to the permitted grounds for declining recognition and enforcement under the draft Convention. Since the 2005 Choice of Court Convention does not restrict, or even discourage, the recognition and enforcement of judgments given by other courts, in this example, the 2005 Choice of Court Convention can simply be disregarded, and circulation of

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240 The notion of "same subject-matter" is intended to refer to the treaty as a whole and not any individual article within the treaty. It is to be interpreted narrowly and, in such a case, can give precedence to an older treaty that is more specific rather than to a more recent treaty is more general. See Schulz, *ibid*. at paras 8-14.

the judgment will occur under the draft Convention.

382. However, Article 7(1)(d) of the draft Convention provides a ground for refusal for the court addressed to decline recognition and enforcement of the resulting judgment, if proceedings in the court of origin were contrary to an agreement or designation in a trust agreement (see *supra* paras 265-267). This ground for refusal is internal to the draft Convention and provides for recognition or enforcement to be declined in a wider range of circumstances than where there is an exclusive choice of court agreement; it would also apply for example if the proceedings in the court of origin were contrary to a non-exclusive choice of court agreement.

383. In a situation where the 2005 Choice of Court Convention applies while the draft Convention does not, there is also no inconsistency between the two instruments. The mere fact that the draft Convention does not apply is not an issue because the basic architecture of the draft Convention does not limit recognition and enforcement under any other national or international instrument. Moreover, judgments that fall within Article 6 of the draft Convention (the only positive restriction on circulation of judgments) are all outside scope of the 2005 Choice of Court Convention. As things currently stand, there is a neat dovetailing between the exclusive bases for recognition and enforcement under the draft Convention and the matters excluded from the scope of the 2005 Choice of Court Convention. This restricts any inconsistency from arising in the first place.

384. Where both the 2005 Choice of Court Convention and the draft Convention would apply because, for example, the judgment was rendered by the chosen court under an exclusive choice of court agreement and the State of origin was also the habitual residence of the person against whom recognition and enforcement is sought, there should, in principle, be no tension between the two instruments. In most systems, the party seeking recognition and enforcement can rely on either instrument, or on both instruments, in the alternative. There may be a ground for refusal under one instrument that does not exist under the other, which would be the case if the grounds for refusal under the draft Convention diverge significantly from the grounds for refusal under Article 9 of the 2005 Choice of Court Convention. The result of such a situation would be that the State addressed must still recognise and enforce the judgment under the instrument that does not permit refusal. This is because the grounds for refusal under both instruments are permitted grounds for refusal, not mandated grounds for refusal. There is therefore no requirement to refuse recognition or enforcement under the instrument that permits refusal. If there is an obligation to recognise and enforce under the 2005 Choice of Court Convention – or national law – then they will apply and there will be no inconsistency with the draft Convention.

385. It should also be noted that the procedure under one instrument could be more favourable than the procedure under the other instrument. The applicant seeking recognition and enforcement would then be entitled to use the more favourable process for recognition and enforcement. In this context, the Special Commission may need to identify whether there is a need for clarification.

386. A further example might involve two judgments: one by the chosen court under an exclusive choice of court agreement and the other by another court, which rendered a judgment falling within one of the bases for recognition and enforcement under Article 5 of the draft Convention, with the result that both judgments might have a claim for recognition and enforcement in a third Contracting State under the two instruments. In such circumstances Article 7(1)(d) of the draft Convention would apply, giving priority to the judgment rendered by the chosen court. The court addressed is then required to recognise and enforce the judgment of the chosen court unless the other judgment was given first, in which case recognition or enforcement could be refused under Article 9(g) of the 2005 Choice of Court Convention. The court addressed is not required to enforce the other judgment, whether or not it was the earlier judgment, under Article 7(1)(d) of the draft Convention. In circumstances where the judgment of the non-chosen court was the earlier judgment, the

court addressed is not compelled to enforce either judgment: national law will determine which (if any) will be recognised and enforced.[241]

387. **Compatibility with *later* instruments.** Article 25(3) provides for the situation where a Contracting State enters into a treaty *after* this Convention comes into force for that State. In such a case, and unlike under Article 25(2), this *later* treaty may prevail but only if it deals with the recognition and enforcement of judgments. This rule is thus narrower than the one under Article 25(2) since it is limited to later treaties that deal specifically with recognition and enforcement of judgments. The general requirement of incompatibility between the two instruments continues to apply. [This rule of priority for later instruments does not affect the obligations under Article 6 of the draft Convention owed by Contracting States that are not parties to the later instrument. This ensures the protection of the exclusive jurisdictional bases listed in Article 6].

388. **Example**. Assume that States A, B and C are all Contracting States to the draft Convention. States B and C subsequently conclude a bilateral treaty according to which judgments on long-term tenancies in immovable property are mutually enforced even if the immovable property is situated in a third State, as long as the tenant and the owner are habitually resident in either State B or State C. A court in State B renders such a judgment relating to an immovable in State A, owned by a resident of C and leased to a resident of B. The judgment is brought for enforcement in State C. Under the draft Convention, this judgment cannot be enforced because it does not satisfy the jurisdictional rule in Article 6; nor can Article 17 of the draft Convention be invoked to allow enforcement under national law because Article 17 is made subject to Article 6. However, the judgment could be enforced under the bilateral treaty, given that Article 25(3) allows for it to prevail, it being *subsequent* to the draft Convention and in relation to enforcement of judgments. [The judgment could not be enforced in State A, even under its national law, because of Article 6.]

389. **Regional Economic Integration Organisation.** Article 25(4) deals with the situation where a Regional Economic Integration Organisation (REIO) becomes a Party to the draft Convention. If this occurs, it is possible that the rules (legislation) adopted by the Regional Economic Integration Organisation might conflict with the draft Convention. Article 25(4) contains a priority rule that applies in such a situation, irrespective of whether the rule of the Regional Economic Integration Organisation is adopted before or after the draft Convention. The underlying principle is that where a case is purely "regional", the draft Convention gives way to the regional instrument.

390. [**Other international instruments**. Article 25(5) allows Contracting States to declare that other international instruments, which may not have the status of treaties under international law, but that nevertheless are considered binding in the Contracting State in question, will have precedence over the draft Convention. This would obviously only apply between parties to such other international instruments.]

Article 26 – Signature, ratification, acceptance, approval or accession

391. This provision is concerned with the ways in which a State may become a Party to the draft Convention. It provides two methods, either (i) by signature followed by ratification, acceptance or approval (paras 1 and 2), or (ii) alternatively by accession (para. 3). The mere signing of the draft Convention obliges the State to refrain from acts which would defeat the object and purpose of the draft Convention (see Art. 18 of the *Vienna Convention of 1969 on the Law of Treaties*). The deposit of the instrument of ratification, acceptance, approval or accession constitutes, in each case, an international act whereby a State is bound by the draft Convention (see Art. 2(1)(b) of the Vienna Convention).

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241 The Rapporteurs would like to have an indication from the Special Commission on this point.

392. Whatever method is adopted by a State, the result is the same.[242] Furthermore, both methods are equally available to Member States and non-Member States of the Hague Conference on Private International Law. Also, the provision makes no distinction between States that participated at the Diplomatic Conference at which the text was adopted and those that did not. States are free to choose which method is most convenient for them to become a Party, which facilitates widespread adherence to the Convention.

393. The relevant instruments are deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands. The depositary then notifies those indicated in Article 33 of any signature, ratification, acceptance, approval or accession under this Article. The entry into force of the Convention, both on an international level and for a specific Contracting State, is governed by Article 30.

Article 27 – Declarations with respect to non-unified legal systems

394. The draft Convention deals with "non-unified legal systems" in two different provisions, Articles 24 and 27. The former determines how the draft Convention must be construed and interpreted in those cases (see *supra* paras 364-366). The latter envisages a declaration mechanism to extend the application of the draft Convention to all the territorial units or only one or more of them.

395. **Non-unified legal systems.** Article 27, like Article 24, refers to States that have two or more territorial units in which different systems of law apply in relation to matters dealt with in this draft Convention. Since the draft Convention deals with procedural matters (recognition and enforcement of judgments), such a definition really means States that are composed of two or more territorial units, each with its own judicial system.[243] This is the case for federal States, *e.g.*, Canada or the United States of America, but it may occur in others States as well, *e.g.*, China or the United Kingdom. REIOs, however, are not covered by this Article (see para. 4 of this Art.).

396. **Declaration**. Article 27(1) permits States to declare that the draft Convention shall extend to all their territorial units or only to one or more of them. This declaration may be made at the time of signature, ratification, acceptance, approval or accession; and may also be modified, by submitting another declaration, at any time afterwards. These declarations shall be notified to the depositary and shall state expressly the territorial unit or units to which the draft Convention applies. The entry into force and the application in time of the draft Convention in these cases are addressed by Article 30 (see *infra* para. 407).

397. If a State to which this Article applies makes no declaration, the Convention shall extend to all territorial units of that State (see para. 3 of this Art.).

398. Finally, paragraph 4 establishes that this provision does not apply to a REIO. Article 27 only applies to States (in the international sense) and territorial units *within a State* in which different systems of law apply. Conversely, REIOs are constituted by two or more sovereign States and are dealt with in the following Article.

Article 28 – Regional Economic Integration Organisations

399. Articles 28 and 29 enable REIOs to become a Party to the Convention. An REIO, which is constituted solely by sovereign States, may sign, accept, approve or accede to the Convention (the absence of the term *ratify* is intentional, as only States ratify conventions), but only to the extent that it has competence over matters covered by the draft

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242 The Hartley/Dogauchi Report points out that in other Hague Conventions, an acceding State is in a less favourable position than a ratifying State, since accession to those Conventions is subject to the agreement of the States that are already parties. This is not the case either with the 2005 Choice of Court Convention or with this draft Convention.

243 See Hartley/Dogauchi Report, para. 258.

Convention.[244] REIOs do not qualify as non-unified legal systems within the meaning of the draft Convention and therefore it is necessary to include a provision permitting them to become a Contracting Party.

400. The draft Convention envisages two possibilities in Articles 28 and 29 respectively. The first is where both the REIO and its Member States become Parties. The second possibility is where the REIO alone becomes a Party.

401. Article 28 is concerned with the first possibility, *i.e.*, where both the REIO and its Member States become Parties to the draft Convention. This may occur if they enjoy concurrent external competence over the subject matter of the draft Convention (joint competence), or if some matters fall within the external competence of the REIO and others within that of the Member States (which would result in shared or mixed competence for the draft Convention as a whole).

402. In view of the importance of this matter, REIOs are to notify the depositary in writing of the matters covered by this Convention in respect of which competence has been transferred to that organisation by its Member States. The notification has to be made at the time of signature, acceptance, approval or accession. Furthermore, REIOs must *promptly* notify the depositary in writing of any changes to their competence as specified in the most recent notice (Art. 28(2)).

403. Where the number of States is relevant for the purposes of the entry into force of the Convention, paragraph 3 provides that any instrument deposited by an REIO shall not be counted unless it declares, in accordance with Article 29(1), that its Member States will not be Parties to it.

404. **Meaning of "State".** A Contracting REIO has, within the limits of its competence, the same rights and duties as a Contracting State. Thus, paragraph 4 provides that where an REIO becomes a Party to the Convention, whether under Article 28 or under Article 29, any reference in the Convention to "Contracting State" or to "State" applies equally, where appropriate, to the REIO. This provision parallels Article 24(1). Its effect has already been discussed (see *supra* paras 365-366). It should be noted, however, that Article 25(4) is a *lex specialis* to Articles 28 and 29 as far as the application of legal instruments of an REIO is concerned. Where the Convention does not give way to such an instrument under Article 25(4), it is not possible to use Article 28 or 29 to justify the application of the instrument instead of the Convention.

Article 29 – Accession by a Regional Economic Integration Organisation without its Member States

405. Article 29 deals with the second possibility mentioned above, *i.e.*, where the REIO alone becomes a Party. This may occur where it has exclusive external competence over the subject matter of the Convention. In such a case, the REIO may declare that its Member States shall be bound by the Convention by virtue of the agreement of the REIO. As in the former case, any reference to "Contracting State" or "State" under the Convention shall apply equally, where appropriate, to the Member States of the REIO.

Article 30 – Entry into force

406. **Entry into force.** Article 30 specifies when the Convention will enter into force. This will be on the first day of the month following the expiration of [three] [six] months after the deposit of the second instrument of ratification, acceptance, approval or accession. Similar rules are laid down for when it comes into force for a given State or Regional Economic

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[244] The Hartley/Dogauchi Report, at note 351, explains that REIOs should have an autonomous meaning (not depending on the law of any State) and that it should be interpreted flexibly to include sub-regional and trans-regional organisations as well as organisations whose mandate extends beyond economic matters.

Integration Organisation that subsequently becomes a Party to it, and for a territorial unit to which it has been extended under Article 27.

407. **Reservations.** The draft Convention does not contain any provision prohibiting reservations. This means that reservations are permitted, subject to the normal rules of customary international law (as reflected in Art. 2(1)(d) and Arts 19-23 of the *Vienna Convention on the Law of Treaties*, 1969).

Article 31 – Declarations

408. **Timing of declarations.** The declarations referred to in Articles 18, 19, [20,] [21,] [25(5),] 27 and 29 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time. They are made to the depositary (the Ministry of Foreign Affairs of the Netherlands).

409. **Entry into effect of declarations at the time of signature.** A declaration made at the time of signature, ratification, acceptance, approval or accession takes effect simultaneously with the entry into force of the Convention for the State concerned.

410. **Entry into effect of declarations made at a subsequent time.** A declaration made at a subsequent time, and any modification or withdrawal of a declaration, takes effect on the first day of the month following the expiration of [three] [six] months following the date on which the notification is received by the depositary. [However, such a declaration shall not apply to judgments resulting from proceedings that have already been instituted before the court of origin when the declaration takes effect. As a result, declarations will not have any retroactive effect in terms of their application to proceedings that have been instituted prior to the coming into effect of the declaration. This ensures greater predictability in the operation of the Convention for all parties to the proceedings.]

Article 32 – Denunciation

411. Article 32 provides that a Contracting State may denounce the Convention by a notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which the Convention applies. The denunciation takes effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period, after the date on which the notification is received by the depositary.

Article 33 – Notifications by the depositary

412. Article 33 requires the depositary to notify the Members of the Hague Conference on Private International Law, and other States and REIOs which have signed, ratified, accepted, approved or acceded to the Convention, of various matters relevant to the Convention, such as signatures, ratifications, entry into force, declarations and denunciations.