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PART I. PREFACE

[TBI]

1. This draft Convention is a private international law instrument in civil and commercial matters. It deals with one of the three classical areas of private international law, namely the recognition and enforcement of foreign judgments. In so doing, it furthers one of the main goals of private international law, which is international judicial co-operation, with a view to enhancing predictability and justice in cross-border legal relations in civil and commercial matters. The draft Convention does not deal with the other two traditional areas of private international law relating to court jurisdiction to adjudicate disputes in cross-border cases or rules determining the law applicable to such cases. Those matters continue to be governed by national law and are not affected by the draft Convention.

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 uniform rules on both jurisdiction of courts and the recognition and enforcement of judgments in cross-border cases in civil and commercial matters. Between 1992 and 2001, progress was made which resulted in a draft Convention on those two areas of private international law.¹ However, at the conclusion of the First part of the Diplomatic Session in 2001, a number of important areas remained where consensus could not be reached. In particular, there was no agreement on the following areas: internet and e-commerce, activity-based jurisdiction, jurisdiction on consumer and employment contracts, intellectual property, the relationship with other instruments and bilateralisation.²

3. The Hague Conference then decided to consider separately the areas for which it seemed likely that a consensus-based instrument could be achieved. This eventually led to the development of an instrument limited to choice of court agreements, including both jurisdictional rules and a regime for the recognition and enforcement of judgments. This work took place between 2002 and 2005 and concluded with the adoption of the *Hague Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, “2005 Choice of Court Convention”).³ 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 2015.⁴

4. In 2011, the Hague Conference agreed to consider the feasibility of a global instrument on matters relating to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. 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. Following that meeting, the Hague Conference agreed that work on the

¹ “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, in *Proceedings of the Twentieth Session*, Tome II, *Judgments*, Cambridge – Antwerp – Portland, Intersentia, 2013, pp. 191-313, (hereinafter, “Nygh/Pocar Report”).

² See “Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference”, Prel. Doc. No 16 of February 2002, in *Proceedings of the Nineteenth Session*, Tome I, *Miscellaneous Matters*, Koninklijke Brill NV, 2008, pp. 429 and 431, para. 5.

³ 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, “Hartley/Dogauchi Report”). See the *Proceedings of the Twentieth Session*, Tome III, *Choice of Court Agreements*, Antwerp – Oxford – Portland, 2010, pp. 785 and 787.

⁴ At the time of writing, Mexico, the European Union, all European Union Member States, Singapore and Montenegro are Contracting Parties to the Convention. The Convention was also signed by the United States of America on 19 January 2009 and by the People’s Republic of China on 12 September 2017. The status table of the Convention is available on the Hague Conference website at < www.hcch.net > under “Choice of Court Section”.

Judgments Project should proceed and established a Working Group to prepare proposals on the recognition and enforcement of judgments in civil and commercial matters.⁵ 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.

5. The Working Group completed its work on a Proposed draft Text for a Convention on the recognition and enforcement of judgments in civil and commercial matters at its fifth meeting in October 2015. Since then, the Hague Conference has convened four 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. At the Second Meeting 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 November 2017 draft Convention”), published as Working Document No 236 Revised. In May 2018, the Special Commission met for the fourth time to discuss issues that required further deliberation arising from the Third meeting. This final Special Commission meeting produced the 2018 draft Convention (hereinafter, “the 2018 draft Convention”) that was published as Working Document No 262 Revised. The draft Explanatory Report is prepared based on the 2018 draft Convention.

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

6. **Objective.** This draft Convention seeks to promote access to justice globally through enhanced judicial cooperation. This will reduce risks and costs associated with cross-border legal relations and dispute resolution. As a result, implementation of the draft Convention should facilitate international trade, investment and mobility.

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

8. First, and most importantly, the draft Convention will 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 a successful party can obtain meaningful relief. Access to justice is frustrated if a wronged party obtains a judgment which cannot be enforced in practice because the other party and / or the other party’s assets are in another State where the judgment is not readily enforceable.

9. Secondly, the draft Convention 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.

10. Thirdly, the draft Convention 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.

⁵ The Hague Conference also established an Experts’ Group to further study and discuss the desirability and feasibility of making provisions in relation to jurisdiction. In February 2013, the Working Group and the Experts’ Group each met in The Hague. At the conclusion of the two meetings, it was decided that the Groups needed to consider whether work for the Experts’ Group and Working Group could be progressed simultaneously. Following extensive consultations, it was recommended that the work of the Working Group should be advanced first and that the discussions of the Experts’ Group be resumed at a later stage.

11. Fourthly, the draft Convention 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.

12. 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.

13. 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. No other global instrument exists that has the potential represented by the draft Convention to meet those objectives.

14. **Relationship with the 2005 Choice of Court Convention.** The 2005 Choice of Court Convention pursued the same 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.

15. **Outline.** The draft Convention is designed to provide an efficient system for the recognition and enforcement of foreign judgments in civil or commercial matters and 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 (Arts 16, 24), subject to one provision relating to exclusive bases for recognition and enforcement (Art. 6).

16. **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 on which multilateral consensus cannot readily be achieved. Article 3 provides definitions of “judgment” and “defendant” as well as for the habitual residence of legal persons.

17. 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 sets out the bases for recognition and enforcement of a judgment in the form of jurisdictional 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.

18. Chapter II also deals with specific issues of interpretation and application: preliminary questions (Art. 8), severability (Art. 9), damages, including punitive damages (Art. 10), and judicial settlements (Art. 12). Finally, Chapter II addresses procedural matters to facilitate access to the mechanism of the

draft Convention: documents to be produced (Art. 13), procedure (Art. 14) and costs of proceedings (Art. 15).

19. Chapter III deals with general clauses: transitional provision (Art. 17), allowable declarations (Arts 18-20), uniform interpretation (Art. 21), non-unified legal systems (Art. 23) and relationship with other instruments (Art. 24).

20. Chapter IV provides for final clauses on the ratification process (Arts 25-28), entry into force (Art. 29), manner of declarations (Art. 30), denunciation (Art. 31) and notifications (Art. 32).

PART III. ARTICLE-BY-ARTICLE COMMENTARY

Chapter I – Scope and definitions

Article 1 – Scope

21. **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 excludes certain matters, and Article 19, which allows Contracting States (“States”)⁶ to make declarations excluding further 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

22. **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. Whether a judgment relates to civil or commercial matters is determined by the nature of the claim or action that is the subject of the judgment. The nature of the court of the State of origin or the mere fact that a State was a party to the proceedings are not determinative factors.

23. 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.⁷ Thus, for example, the draft Convention applies to a judgment on civil claims brought before a criminal court where that court had jurisdiction to hear the matter under its own procedural law.

24. Application of the draft Convention is not affected by 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)).

25. Furthermore, the characterisation of an action does not change by the mere fact that the claim is transferred to another person, such as by assignment, succession or assumption of the obligation by

⁶ 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.

⁷ Nygh/Pocar Report, para. 27. See “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.

another person. Transfer of a claim from a private body to a State would not preclude the claim being characterised as civil or commercial. The same holds in cases of subrogation, *i.e.*, when a governmental agency is subrogated to the rights of a private party.

26. **Autonomous meaning.** The application of the draft Convention requires that the courts of the requested State decide whether a judgment relates to civil or commercial matters. In making this determination, courts should consider the need to promote uniformity in the application of the draft Convention. Accordingly, 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, and not by reference to national law.⁸ This ensures a uniform interpretation and application of the draft Convention (see *infra* Art. 21). Furthermore, the interpretation of those terms should be applied consistently across other Hague instruments, in particular the 2005 Choice of Court Convention.

27. **Civil versus commercial matters.** The use of the terms “civil” and “commercial” matters is mostly relevant for legal systems where “civil” and “commercial” are regarded as separate and mutually exclusive categories, although the use of both terms is not incompatible with legal systems in which commercial proceedings are a sub-category of civil proceedings.⁹ While other international instruments used the terms “civil and commercial matters”,¹⁰ 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.

28. **Civil or commercial matters versus public law.** The concept of “civil or commercial matters” is used to distinguish public and criminal law, where the State acts in its sovereign capacity.¹¹ Unlike the 2005 Choice of Court Convention, Article 1 (1) clarifies that the draft Convention does not apply, “[...] in particular, to revenue, customs or administrative matters”. This enumeration is not exhaustive and other matters of public law, *e.g.*, constitutional matters are also excluded from the scope of the draft Convention. The enumeration is intended to facilitate the application of the draft Convention in States where there is no established distinction between private and public law.¹²

29. The key element distinguishing public law matters from “civil or commercial” matters is whether one of the parties is exercising governmental or sovereign powers that are not enjoyed by ordinary persons.¹³ It is therefore 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 to establish whether the judgment relates to civil or commercial matters. If the action derives from the exercise of public powers (or duties), the draft Convention does not apply. A typical example of public power 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

⁸ Nygh/Pocar Report, para. 27; Hartley/Dogauchi Report, para. 49; Prel. Doc. No 4, para. 5.

⁹ Nygh/Pocar Report, paras 23-26; Hartley/Dogauchi Report, para. 49.

¹⁰ See Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition of judgments in civil and commercial matters (hereinafter, “Brussels I Regulation”), Art. 1.

¹¹ Hartley/Dogauchi Report, para. 49; Prel. Doc. No 4, para. 40.

¹² 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 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.

¹³ Hartley/Dogauchi Report, para. 85; Prel. Doc. No 4, para. 40.

requirements.¹⁴ Nor does it apply to judgments on judicial actions brought either to enforce or appeal such orders (see also *infra* para. 70). 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.

30. 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 public authority seeks to punish a person for conduct proscribed by criminal law, including by pecuniary penalties that do not compensate the State or those for whom it acts for losses resulting from the conduct at issue.¹⁵

31. Conversely, if neither of the parties is exercising public powers, the draft Convention applies. [Thus, for example, it applies to private claims for harm caused by anti-competitive conduct (see, however, *infra* paras 61-62).¹⁶] 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)).

32. **Joining of actions.** If a judgment involves more than one action, one of which is “civil or commercial” and another which is not, the principle of severability applies (see, *infra*, Art. 9). The draft Convention only applies to the civil or commercial actions and not to the others. In some cases, the public law matter may arise as a preliminary question rather than the main action, *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

33. **Territorial scope.** Paragraph 2 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. 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 4(5) and (6) (“common courts” *infra* paras 122-142) and 23 (“Non-unified legal systems” *infra* paras 396-409).

34. **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 the draft Convention at that moment for the draft Convention to apply (see *infra* Art. 17).

35. **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. 30(5)), 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 State of origin, *e.g.*, the filing of the documents instituting the proceedings with the court, or if that document has to be served before filing, the reception by the authority responsible for service.¹⁷

¹⁴ Prel. Doc. No 4, para. 41.

¹⁵ 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)).

¹⁶ Prel. Doc. No 4, para. 41.

¹⁷ See Nygh/Pocar Report, para. 264, explaining the reasons for this option in the *lis pendens* rule of the 1999 preliminary draft Convention.

Article 2 – Exclusions from scope

36. **Introduction.** Article 2 refines the scope of application of the draft Convention set forth in Article 1(1). First, it excludes certain matters despite their civil or commercial nature (para. 1). Secondly, it provides 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 (para. 3). Finally, it provides 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 the privileges and immunities enjoyed by States or international organisations are unaffected (paras 4 and 5). In applying these provisions, courts of the requested State are not bound by the decision of courts of the State of origin whether the judgment relates to an excluded matter.

Paragraph 1

37. **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, 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. 64).

38. **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,¹⁸ 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].

39. **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 includes 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 (see also *infra* para. 41).¹⁹ Judgments ruling on the name or nationality of natural persons are captured under this exclusion as well. Maintenance obligations and other family matters are excluded under sub-paragraph (b) or (c).

40. **Maintenance obligations.** Sub-paragraph (b) excludes maintenance obligations. This exclusion encompasses any maintenance obligations deriving from family relationships, parentage, marriage or

¹⁸ Nygh/Pocar Report, para. 29; Hartley/Dogauchi Report, para. 53.

¹⁹ 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 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* (hereinafter, “1996 Child Protection Convention”); and (ii) protection of adults, with Art. 3 of the *Hague Convention of 13 January 2000 on the International Protection of Adults* (hereinafter, “2000 Protection of Adults Convention”).

affinity.²⁰ Because both maintenance obligations and matrimonial property regimes are excluded, there is no need to draw an exact definitional boundary between them.²¹

41. **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.²² 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.²³ In general terms, this exclusion 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 encompasses 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.²⁴ The term “similar relationships” covers relationships between unmarried couples, *e.g.*, registered partnerships, to the extent that they are given legal recognition.²⁵ It may be debatable whether issues such as parental responsibility or measures for the protection of children are covered by sub-paragraph (a), status and legal capacity of natural persons, or by sub-paragraph (c), under the terms “other family matters”.²⁶ However, as with sub-paragraph (b), since both are excluded from the scope of the draft Convention, there is no need to draw an exact definitional boundary between them.

42. **Wills and succession.** Sub-paragraph (d) excludes wills and succession from the scope of the draft Convention.²⁷ 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.²⁸ In relation to trusts created by testamentary disposition, judgments on the validity and interpretation of the will creating the trust are excluded. But 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.²⁹

43. **Insolvency, composition, resolution of financial institutions, and analogous matters.** Sub-paragraph (e) excludes insolvency, composition, resolution of financial institutions, and analogous matters. The term “insolvency” covers bankruptcy of both individuals and legal persons. It includes the winding-up or liquidation of corporations in insolvency proceedings, while the winding-up or liquidation of corporations for reasons other than insolvency is dealt with by sub-paragraph (i).³⁰ The term “composition” refers to proceedings whereby the debtor may enter into an agreement with his

²⁰ 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, “2007 Child Support Convention”).

²¹ Nygh/Pocar Report, para. 32.

²² See the *Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*.

²³ Nygh/Pocar Report, para. 33; Hartley/Dogauchi Report, para. 55.

²⁴ Nygh/Pocar Report, para. 35.

²⁵ *Ibid.*; Hartley/Dogauchi Report, para. 55.

²⁶ See Work. Doc. No 242 of May 2018, “Proposal of the delegation of Uruguay” (Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018)).

²⁷ 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).

²⁸ Nygh/Pocar Report, para. 36.

²⁹ *Ibid.*

³⁰ *Ibid.*; Hartley/Dogauchi Report, para. 56.

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.³¹ 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.³²

44. 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 to prevent the failure of financial institutions.³³ 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.³⁴ It is true that most of these measures are outside the scope of application of the draft Convention because they are administrative matters rather than civil or commercial matters. But at the Second Meeting of the Special Commission, many delegations considered an explicit reference to this new framework in subparagraph (e) appropriate to prevent any ambiguity or loophole in the text.³⁵

45. **Insolvency-related judgments.** Sub-paragraph (e) excludes judgments directly concerning insolvency.³⁶ This exclusion applies if the right or the obligation which was the legal basis of the action in the State of origin was based in rules pertaining specifically to insolvency proceedings, rather than general rules of civil or commercial law. If the action derives from insolvency rules, the exclusion would preclude the circulation of the judgment under the draft Convention, but if the action derives from civil or commercial law, the judgment may circulate (see, however, *infra* para. 47). Courts of the requested State may consider the following criteria when deciding whether the judgment was based on insolvency rules, in particular: whether the judgment was given on or after the commencement of the insolvency proceedings, whether the proceedings from which the judgment derived 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.³⁷ Thus, the draft Convention does not apply, for example, to judgments opening insolvency proceedings, concerning their conduct and closure, approving a restructuring plan, setting aside transactions detrimental to the general body of creditors or on the ranking of claims.³⁸

46. The draft Convention does, however, apply to judgments on actions based on general rules of 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.³⁹ 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

³¹ *Ibid.*

³² 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.

³³ This framework has been established under the auspices of the Financial Stability Board, an international body set up after the G20 London summit, in April 2009, that monitors and makes recommendations about the global financial system.

³⁴ See Financial Stability Board, *Key Attributes of Effective Resolution Regimes for Financial Institutions*, 15 October 2014.

³⁵ Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017), Minutes No 2, paras 30-50.

³⁶ Hartley/Dogauchi Report, para. 57.

³⁷ 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)).

³⁸ *Ibid.*

³⁹ *Ibid.*; Hartley/Dogauchi Report, para. 57.

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.

47. Note, however, that the application of the draft Convention will be of limited effect in cases where the judgment debtor is in insolvency proceedings. 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); and the effect of commencing insolvency proceedings on individual enforcement actions is not governed by the draft Convention. Accordingly, 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. The judgment creditor (B) may seek recognition and enforcement 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. In this sense, the foreign judgment must be treated in the same way as a domestic judgment, but no better. Likewise, the judgment creditor (B) may seek recognition and enforcement of the judgment in other States different from the State where insolvency proceedings are commenced, but the enforcement of the judgment may be affected by the commencement of the insolvency proceedings if those 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.

48. **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.⁴⁰ 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.

49. **Maritime matters.** Sub-paragraph (g) excludes five maritime matters: marine pollution, limitation of liability for maritime claims, general average, emergency towage and emergency salvage. This exclusion was introduced by the 2005 Choice of Court Convention because maritime law is a highly specialised field and not all States have adopted the relevant international instruments. 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.⁴¹

50. **Nuclear damage.** Sub-paragraph (h) excludes liability for nuclear damage. The explanation for this exclusion in the Hartley/Dogauchi Report is that nuclear damage is the subject of various international Conventions providing that the State where the nuclear accident takes place has exclusive jurisdiction over actions for damages for liability resulting from the accident.⁴² In some cases, Article 24 of the draft Convention might give those instruments priority over this draft Convention.

⁴⁰ Hartley/Dogauchi Report, para. 58.

⁴¹ 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 of 9 October 1978 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, "Schlosser Report"), paras 124-130.

⁴² Hartley/Dogauchi Report, para. 64 (notes omitted).

There are, however, some States with nuclear power plants that are not parties to any of the nuclear liability Conventions. Such States might be reluctant to recognise judgments given in another State by virtue of one of the jurisdictional grounds laid down by Article 5 of the draft Convention. Where the 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 for a uniform resolution of liability and an equitable distribution of a limited fund among the victims. This exclusion addresses nuclear accidents and therefore does not cover tortious medical claims regarding nuclear medicine (including radiation therapy, for example).

51. **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.⁴³ Judgments on these matters were excluded from the scope of the draft Convention because they are not usually recognised and enforced in other States.⁴⁴ 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.

52. **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.⁴⁵ Public registers are kept by public authorities and imply the exercise of a sovereign power and actions on validity of entries must usually be brought against the public authority keeping the register. This includes, for example, cases where registration is refused or amended by the Registrar and the applicant appeals against the decision. This litigation usually takes place between the applicant and the Registrar. Accordingly, in principle, entries in public registers are administrative matters outside the scope of the draft Convention. Article 2(1)(j) prevents doubt.

53. The exclusion does not extend, however, to the legal effects of the entries.⁴⁶ 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 excluded. By the same token, an action against a private person based on the invalidity of the conveyance of ownership over an immovable property 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.

54. **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).

⁴³ Nygh/Pocar Report, para. 170.

⁴⁴ Hartley/Dogauchi Report, para. 70.

⁴⁵ 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.” *Ibid.*, para. 82.

⁴⁶ Nygh/Pocar Report, para. 172.

55. **[Privacy.** Sub-paragraph (l) excludes privacy. As with defamation, privacy involves a delicate balance between fundamental or constitutional rights and 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. For the purposes of this exclusion, an intrusion upon privacy may be defined as *an unauthorised public disclosure of information relating to private life*.⁴⁷ 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*, *e.g.*, not authorised by the relevant person in the context of a contract or by a competent authority. The application of this condition may require courts in the requested State to review the merits of the judgment granted by the court of origin. And *thirdly*, it only applies to natural persons since legal 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. The exclusions cover privacy-based claims for compensation or to prevent public disclosure of private information.]

56. **[Intellectual Property rights.**⁴⁸ 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 excluded judgments concerning IP matters. Others preferred 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 found in the term “analogous matters”, which captures a broad range of issues that are considered intellectual property rights according to certain national laws but not others, such as traditional knowledge, genetic resources and traditional cultural expressions. The term was, however, put into square brackets for further consultation as discussions continued about what it covers, whether it should be further defined, and whether it is the best description for what it is intended to achieve.⁴⁹ It should be noted that a similar term, “analogous right”, is included in Article 5(3).

57. 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 by other bilateral or multilateral instruments concluded by the States with regard to recognition and enforcement. Nevertheless, the draft Convention will still play a role through the application of Article 8(3). 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.⁵⁰ In such disputes, the invalidity of an intellectual property right requiring grant or registration could be raised as a defence (and thus as a preliminary question). In

⁴⁷ 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.

⁴⁸ Due to the diverging views expressed, the Special Commission decided to include two mutually exclusive alternatives: on the one hand, provisions reflecting the exclusion of intellectual property matters (Art. 2(1)(m)) and, on the other hand, provisions reflecting the inclusion of those matters (Arts 5(3), 6(a), 7(1)(g), 8(3) and 11), with all provisions in square brackets to indicate that no agreement was reached. The commentaries in this Report cover both alternatives. See also Background Document of May 2018, “Treatment of Intellectual Property-Related Judgments under the November 2017 draft Convention” (available on the Hague Conference website at < www.hcch.net >, under the “Judgments Section”, then “Special Commission on the Judgments Project”).

⁴⁹ 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.

⁵⁰ See Hartley/Dogauchi Report, para. 76.

this context, Article 8(3) will be relevant to courts in the requested State in determining whether to recognise or enforce the judgment on the contractual dispute (see *infra* paras 323-330).]

58. **[Activities of armed forces.** Sub-paragraph (n) excludes judgments related to the activities of armed forces, including the activities of their personnel in the exercise of their official duties (see also *infra* Art. 20⁵¹). In principle, these judgments will be excluded under Article 1(1) because they are not judgments on civil and commercial matters. In addition, the persons who carry out such activities will benefit from jurisdictional immunity under international law, which is unaffected by the draft Convention (Art. 2(5); see *infra* paras 73-76). But there are no uniform or standard definitions for *acta iure imperii* and *acta iure gestionis*, so States may have different views on this issue. Accordingly, this exclusion is included to provide greater certainty. It clarifies that activities of armed forces are in any event outside the scope of the Convention and Contracting States are not obliged to recognise or enforce judgments on these matters, irrespective of whether those activities qualify as *acta iure imperii* in the State of origin or in the requested State. This exclusion also ensures consistency with other bilateral or multilateral treaties that provide for exclusive dispute resolution mechanisms for certain private law claims against armed forces.⁵²

59. The exclusion covers judgments related to the activities of armed forces as such and the activities of their personnel “in the exercise of their official duties”. Thus, any judgment against (or in favour of) the armed forces is excluded, whereas a judgment concerning their personnel is only excluded if it rules on a dispute arising from the exercise of their official duties. Thus, for example, a judgment on a civil claim against a soldier deriving from his or her personal activities, such as a purchase of a private vehicle or a car accident during a holiday trip, is covered by the draft Convention. Conversely, if the accident occurs in the context of a military exercise, any judgment against the individual soldier will be excluded.]

60. **[Law enforcement activities.** Sub-paragraph (o) excludes judgments related to law enforcement activities, including the activities of law enforcement personnel in the exercise of their duties. This exclusion is closely linked to the exclusion in sub-paragraph (n) and follows the same formulation, with an important difference. To avoid definitional dispute about whether a particular agency is a law enforcement entity, the exclusion refers to “law enforcement activities” rather than a person or entity, like the armed forces. It typically covers bodies that carry out law enforcement activities, such as the police force or border control officers.]

61. **[Antitrust/competition.** Sub-paragraph (p) excludes judgments on anti-trust matters. This exclusion, which is also contained in the 2005 Choice of Court Convention (see Art. 2(1)(h)),⁵³ is phrased as “anti-trust (competition) matters” because different terms are used in different States and legal systems for rules of similar substantive content. Thus, for example, the standard term in the United States is “anti-trust law”, while in Europe it is “competition law”. Therefore, both terms are used in the draft Convention.

62. The provision excludes, for example, actions in tort for damages for breach of anti-trust / competition law. Likewise, it excludes actions in contract where the claimant argues the contract is void because of its anti-competitive character, or when a buyer seeks repayment of excessively high prices paid to the seller as a result of the seller’s abuse of its dominant position. On the other hand, if a person sues under a contract, and the defendant claims that the contract is void

⁵¹ Note that, for some States, this new provision may supersede the need for a declaration under Art. 20.

⁵² If a court in one State ignored these mechanisms and rendered a judgment, this might give rise to a request under the draft Convention to recognise and enforce such a judgment, which would undercut the integrity of those bilateral or multilateral treaties.

⁵³ See also Work. Doc. No 198 of October 2017, “Proposal of the delegation of the Republic of Korea” (Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017)), providing additional reasons for this exclusion.

because it infringes anti-trust / competition law, the judgment is not excluded because antitrust / competition matters arise merely as a preliminary question and are not the object of the proceedings. In this context, Article 8(2) will be relevant to courts in the requested State determining whether to recognise or enforce the judgment on the contractual dispute. Sub-paragraph (p) does not cover what is sometimes called “unfair competition” (in French, *concurrency déloyale*); for example, misleading advertising or passing one’s goods off as those of a competitor.^{54]}

Paragraph 2

63. **Preliminary questions.** Paragraph 2 clarifies that a judgment is not excluded where one of the excluded matters arises merely as a preliminary issue, and in particular where it is raised by way of defence. Preliminary questions are legal issues that must be addressed before the plaintiff’s claim can be decided but are not the main object or principal issue of the proceedings.⁵⁵ This paragraph recognises that legal issues within a judgment may be separate from one another but considered sequentially, with a decision on the principal issue predicated on a decision on another, preliminary issue. Thus, for example, [in an action for damages for breach of an intellectual property licensing contract (main object), the court might first have to rule on whether the intellectual property right is valid (preliminary question); or] in an action for damages for breach of a sales contract (main object), the court might first have to decide on the capacity of a party to enter into such a contract (preliminary question), or in an action seeking the payment of corporate dividends (as the main object), it might have to rule on the decision of the shareholders’ meeting approving such payment (as a preliminary issue). Preliminary questions are usually, but not always, introduced by the defendant by way of defence.

64. 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 the court of origin falls within the scope of the draft Convention, as is the case in the examples mentioned above, this instrument applies. The key question is whether the final judgment depends on the answer given to the preliminary question, irrespective of whether the decision on such preliminary issues is formally part of the final judgment. This provision has to be read in conjunction with Article 8, which deals with the consequences of a ruling on a preliminary issue, including whether a judgment that rules on such matters may circulate under the draft Convention (see *infra* paras 313-328).

65. Article 2(2) of the draft Convention refers to any matter “to which this Convention does not apply”. It therefore applies in relation to any matter excluded under Article 1(1) or Article 2(1). Thus, for example, a judgment on private damages that was based on a prior decision of an administrative authority, which would otherwise be excluded under Article 1(1), is not excluded from the scope of the draft Convention, although its recognition and enforcement may be refused under Article 8 (see *infra* paras 313-330).

Paragraph 3

66. **Arbitration.** Paragraph 3 excludes 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.⁵⁶ The exclusion covers both

⁵⁴ See Hartley/Dogauchi Report, para. 60.

⁵⁵ “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 194. The terms “incidental questions” and “principal issue” are used in the Nygh/Pocar Report, para. 177.

⁵⁶ The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 1958 (hereinafter, “1958 New York Convention”); see also Hartley/Dogauchi Report, para. 84.

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.*, declaring 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.⁵⁷

67. The exclusion of arbitration and related proceedings also covers the effects that an arbitration agreement or an arbitral award may have on the application of other Articles in 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 the State of origin were contrary to an arbitration agreement, even if the court of origin ruled on the validity of the arbitration agreement as a preliminary question.⁵⁸ 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. However, if the defendant appeared before the court of origin and argued on the merits without contesting jurisdiction by invoking the arbitration agreement, the judgment would not, in principle, be contrary to the arbitration agreement and should therefore not be excluded from scope under this provision.⁵⁹

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

69. **Alternative dispute resolution.** Paragraph 3 does not, however, 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 (as an alternative to 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* paras 342-343).

Paragraph 4

70. **States and other governmental bodies.** Paragraphs 4 and 5 deal with the application of the draft Convention to disputes involving States and other governmental bodies. Paragraph 4 makes it clear 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 has the same effect as the scope of application defined in Article 1(1), where the nature of the dispute is determinative, rather than the nature of the parties or the courts (see *supra* paras 22-23). Paragraph 4 is thus a mere clarifying rule. It must be read, however, in conjunction with Article 20, which permits States to exclude the application of the draft Convention to judgments from proceedings where they were a party (see *infra* paras 384-392).

71. Unless a declaration under Article 20 is made, the draft Convention applies when a State or a governmental agency is acting as a private person, *i.e.*, without exercising sovereign powers, and

⁵⁷ Hartley/Dogauchi Report, para. 84.

⁵⁸ In the case of arbitration, Arts 2(2) and 8 do not apply. These provisions refer to “matters” in the sense of subject matters, whilst the exclusion of arbitration is a different nature and included in a separate provision.

⁵⁹ See Art. II (3) of the 1958 New York Convention.

regardless of whether the public entity is the judgment creditor or the judgment debtor. Three core criteria are relevant to determining the application of the draft Convention to disputes involving government parties:⁶⁰

- (i) the conduct upon which the claim is based is conduct in which a private person can engage;
- (ii) the injury alleged is injury which can be sustained by a private person;
- (iii) 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.

72. Unlike paragraph 5, this provision does not make an explicit reference to “international organisations”. Nevertheless, a judgment is not excluded by the mere fact that an international organisation was a party to the proceedings insofar as it was acting as a private person and not exercising any extraordinary powers.

Paragraph 5

73. **Privileges and immunities.** Paragraph 5 provides that 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 is a “nil-effect clause” intended to prevent the misinterpretation of paragraph 4.⁶¹ It also covers the privileges and immunities of State officials, including those persons entitled to diplomatic and consular immunity.⁶²

74. In principle, there is no conflict between the scope of the draft Convention set down in Article 1(1) and the privileges and immunities of States or international organisations. Because these privileges and immunities are usually linked to the exercise of State authority (*acta iure imperii*), matters involving these privileges and immunities will not be civil or commercial matters and the draft Convention will not apply. Accordingly, even if a State waives 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.⁶³

75. In exceptional cases, the immunities of States and governmental bodies may be implicated in “civil or commercial matters”, *e.g.*, if the immunity covers a tort claim against a governmental body (a diplomatic agent) deriving from *acta iure gestionis*. In such a case, the effect of paragraph 5 will be that the draft Convention does not apply unless the State waives its immunity and submits itself to the jurisdiction of the court of the State of origin.⁶⁴

76. Although the scope of privileges and immunities of States or of governmental agencies is mainly determined by public international law, paragraph 5 may also cover privileges and immunities under domestic law. 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 that State’s rules on privileges and immunities.⁶⁵

⁶⁰ See Nygh/Pocar Report, para. 43; Prel. Doc. No 4, para. 40.

⁶¹ Nygh/Pocar Report, para. 46; Hartley/Dogauchi Report, para. 87.

⁶² Nygh/Pocar Report, para. 46.

⁶³ See Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (1-9 June 2016), Minutes No 8, para. 59.

⁶⁴ Prel. Doc. No 4, para. 42.

⁶⁵ *Ibid.*

Article 3 – Definitions

77. **Definitions.** Article 3 defines “defendant” and “judgment” (para. 1) and 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. 21).

Paragraph 1

78. **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. In the context of a counterclaim, the term refers to the initial claimant or any other counterclaim defendant.⁶⁶ 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, “defendant” must be interpreted as referring to the third party against whom this claim was made.

79. **Subrogation, assignment or succession.** Because sub-paragraph (a) focuses on a person against whom the claim or the counterclaim was *brought*, the “defendant” may be different from the person against whom the judgment was rendered. Further, a “defendant” may even be different from the person against whom recognition and enforcement is sought in the requested State if, *e.g.*, the claim is transferred to another person 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 152-154).

80. **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 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 that 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.

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

82. **A decision on the merits.** “A decision on the merits” implies some kind of contentious judicial proceedings in which a court disposes of the claim (for judicial settlements, see *infra* Art. 12). Insofar as it involves a disposition of a claim, it includes money and non-money judgments, judgments given by default (see, however, Arts 7(1) and 13(1)(b), see also *infra* para. 87),⁶⁷ and judgments in collective actions. Conversely, procedural rulings, different from orders determining costs or expenses, are excluded from the definition of judgments.⁶⁸ Thus, for example, decisions ordering the disclosure of documents or the hearing of a witness are not judgments. Similarly, *ex parte* orders for payment concerning uncontested pecuniary claims, which may be issued by a court in some jurisdictions, do not qualify as a judgment.⁶⁹ 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

⁶⁶ The terms “plaintiff” and “claimant” are used interchangeably in this Report.

⁶⁷ Judgments by default are included within the scope of the draft Convention irrespective of the process giving rise to the judgment under the law of the State of origin, including whether the judgment is entered or recorded by an officer of the court or by a judge.

⁶⁸ Hartley/Dogauchi Report, para. 116.

⁶⁹ 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.

the draft Convention (*exequatur sur exequatur ne vaut pas*). Likewise, enforcement orders, such as garnishee orders or orders for seizure of property, do not qualify as judgments.

83. **Non-monetary judgments.** Judgments that order the debtor to perform or refrain from performing a specific act, such as an injunction or an order for specific performance of a contract (final non-monetary or non-money judgments) fall within the scope of the draft Convention (see however Art. 11). In some legal systems, non-monetary judgments sometimes include pecuniary penalties (in French, *astreintes*) to “reinforce” the main part of the judgment. Such judgments contain a non-monetary primary obligation – to perform, or not to perform, an act – and a monetary “penalty” as a conditional secondary obligation in anticipation of non-compliance and to encourage compliance. The legal regimes governing these pecuniary penalties vary significantly.

84. Inclusion of these pecuniary “penalties” was thoroughly discussed during the last Meeting of the Special Commission,⁷⁰ but no definitive conclusion was reached and the issue will require further reflection.⁷¹ Three factors may be relevant to the application of the draft Convention to these pecuniary “penalties”. In relation to the process, in some jurisdictions these penalties are ordered by the court that renders the non-monetary judgment, but in others they are ordered by a different authority in an enforcement procedure. In relation to their content, in some cases these pecuniary penalties may be a fixed sum or a periodic penalty, *e.g.*, a sum of money for each day of delay. Finally, in relation to the beneficiary of the order, in some jurisdictions these pecuniary penalties are payable to the courts or State authorities (civil fines), but in others they are payable to the judgment creditor even though they are not truly compensatory.

85. **Decision on costs.** The definition of judgment in 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 it relates to a decision on the merits which may be recognised and enforced under the draft Convention (see also *infra* Art. 15(2)). The determination on 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 linked to the decision on the merits. If the decision on the merits 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. For recognition and enforcement of a determination of costs, it is sufficient that the decision on the merits “may be” recognised or enforced in the requested State, and not that it already has been. Even if, under such a condition, the decision on costs should be recognised and enforced under the draft Convention, Article 7 also applies. Thus, in exceptional cases, 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)).

86. It follows that any costs order in connection with interim measures of protection cannot be recognised or enforced because interim measures of protection are not eligible for recognition and enforcement (see *infra* para. 87).⁷²

⁷⁰ See Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018), Minutes No 6, paras 42-51.

⁷¹ Under the Brussels I Regulation (recast), for example, judgments which order a payment by way of a penalty shall be enforceable “only if the amount of the payment has been finally determined by the court of origin” (see Art. 55). A similar rule is contained in the 2007 Lugano Convention (see Art. 49). The European Court of Justice has concluded that the Regulation applies to a pecuniary penalty that must be paid to the State insofar as it is related to a dispute between two private persons (see ECJ Judgment of 18 October 2011, *Realchemie Nederland vs Bayer*, C-406/09).

⁷² Note that it is only the self-standing interim order and any stand-alone cost award associated with it will not circulate under the draft Convention.

87. **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. “Interim measure of protection” covers measures that serve two main purposes: providing a preliminary means of securing assets out of which a final judgment may be satisfied, or maintaining the *status quo* pending determination of an issue at trial.⁷³ Thus, for example, an order freezing the defendant’s assets, an interim injunction or an interim order for payment cannot be recognised and enforced under the draft Convention. Naturally, they may still be recognised and enforced under national law (Art. 16).

88. **Court.** 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 “court”. The Hartley/Dogauchi Report mentions that it includes “a patent office exercising quasi-judicial functions”.⁷⁴ 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”.⁷⁵

89. The proposal was not adopted because it was difficult to articulate an appropriate definition, but there was some support for the idea.⁷⁶ In principle, the term “court” must be interpreted autonomously and refers to 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),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. 4(5) and (6)).

Paragraph 2

90. **Habitual residence.** Paragraph 2 deals with the “habitual residence” of entities or persons other than natural persons. 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.⁷⁸ The term “habitually resident” is used in Article 5(1)(a). Articles 15 and 18 only use the term “resident” (without any qualification), and Article 23(1)(b), the term “habitual residence”.

⁷³ On the definition of interim measures, see Nygh/Pocar Report, paras 178-180.

⁷⁴ Hartley/Dogauchi Report, note 146.

⁷⁵ 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)).

⁷⁶ 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.

⁷⁷ 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.

⁷⁸ 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 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.

91. The provision will typically apply to corporations, but include legal persons and 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 being a party to proceedings.

92. **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 other constituent documents. The nearest equivalent term in English law 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.⁷⁹ In practice, both criteria, the statutory seat and the place of incorporation, will usually coincide in the same State.

93. **Central administration and principal place of business.** 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 the entity’s economic activities.⁸⁰ 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.⁸¹

94. Both sub-paragraphs use the possessive pronoun “its” and therefore refer to the central administration or the principal place of business of the entity or person referred to in the chapeau of paragraph 2, and not to its subsidiary or another entity with legal personality.

95. The four criteria in paragraph 2 are alternatives and there is no hierarchy among them. The criteria are also not mutually exclusive. If the defendant is habitually resident in two or more different States concurrently, in terms of the paragraph 2 criteria, 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.

CHAPTER II – RECOGNITION AND ENFORCEMENT

Article 4 – General provisions

96. 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 effect 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

97. **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

⁷⁹ Nygh/Pocar Report, para. 63; Hartley/Dogauchi Report, para. 120.

⁸⁰ Nygh/Pocar Report, paras 65 and 66; Hartley/Dogauchi Report, para. 120.

⁸¹ Hartley/Dogauchi Report, para. 120.

in another State (requested State) in accordance with the provisions of Chapter II. This obligation presupposes three positive 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.

98. 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.

Paragraph 2

99. **No review on the merits.** Paragraph 2 expressly states an important point that is implicit in paragraph 1. A court deciding on recognition and enforcement of a judgment may not review 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 necessary 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 case in the requested State.⁸² 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.

100. Paragraph 2 clarifies that the principle of “no review on the merits” does not preclude such examination of the judgment as is necessary for the application of the draft Convention. Examination of the judgment may be necessary to apply Articles 5 and 6, which define which judgments are eligible for recognition and enforcement, or Article 7, which provides grounds for refusal. The application of those criteria may require some form of examination of the decision of the court of origin.

101. Under Article 5, for example, the court addressed must determine that the judgment is eligible for recognition and enforcement on the basis of the connection between the case and the State of origin. That determination requires consideration of the legal and factual bases of connection to the State of origin. For example, application of Article 5(1)(g) to a judgment that ruled on a contractual obligation would require the court of the requested State to examine whether the performance of the obligation took place, or should have taken place, in the State of origin. That inquiry may require a consideration of legal questions, 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 determine 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 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 case of Article 7, for example, the court addressed may need to consider whether the judgment awards damages that do not compensate a party for the actual loss or harm suffered. Finally, the application of the draft Convention itself may also require the court in the requested State to examine the judgment of the court of origin, such as the characterisation of a dispute as a civil or commercial matter (see *supra* para. 36).

⁸² Nygh/Pocar Report, para. 347.

102. **Differences with the wording of the 2005 Choice of Court Convention.** There are two differences between the wording of Article 4(2) of the draft Convention and the parallel provision in the 2005 Choice of Court Convention (Art. 8(2)). The first difference is simply an improvement of the text, with no intention to change its substance. Unlike the parallel provision of the 2005 Choice of Court Convention, Article 4(2) commences by stating the principle, *i.e.*, “no review on the merits”, and then includes the clarification that this principle does not preclude an examination of the decision as is necessary for the application of the draft Convention. The word “examination” instead of “review” (as in the 2005 Choice of Court Convention) is more precise and prevents any misinterpretation. Also, the reference to the “Convention” instead of “this Chapter” (as in the 2005 Choice of Court Convention) prevents any *a contrario* interpretation since the determination of the scope of application of the draft Convention may also require a certain examination of the foreign judgment.

103. The second difference is substantive. Following Article 8(2) of the 2005 Choice of Court Convention, Article 4(2) of the draft Convention originally provided that the court of the requested State was bound by findings of fact 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, the equivalent provision only applies to “jurisdiction” under the 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 rules on jurisdiction. The First Meeting of the Special Commission therefore concluded that it would be preferable not to include such a proviso in the Article dealing with review on the merits in this draft Convention.⁸³ Thus, as stated in Article 4(2), the court of the requested State may examine the judgment for any purpose relevant to the application of the draft Convention, irrespective of whether it relates to fact or law.

Paragraph 3

104. **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.

105. **Recognition versus Enforcement.** The text of the provision reflects the distinction often drawn 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 also its enforceability. But recognition and enforcement are treated as separate concepts in the draft Convention and therefore recognition may be defined as covering all effects of a judgment except those relating to its enforcement.

106. **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 of a legal relationship between the parties, the court of the requested State accepts that judgment as determining the issue.⁸⁴ Such determination of legal rights is binding on the parties in subsequent litigation. Thus, if the foreign judgment is recognised, it could be invoked, for example, to prevent proceedings between the same parties and

⁸³ 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.

⁸⁴ Hartley/Dogauchi Report, para. 170. See also Nygh/Pocar Report, para. 303.

having the same subject matter (*res judicata* or issue preclusion defence) in the requested State and the defendant would not be burdened with defending the same claim twice.

107. **Res judicata.** Earlier versions of the draft Convention provided that recognition of a judgment would require the court of the requested State to give it “the same effects” it had in the State of origin.⁸⁵ This entailed that the scope of the *res judicata* effect was determined by the law of the State of origin rather than the law of the requested State. The same applied to similar effects of the judgment, 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.

108. The Third Meeting of the Special Commission deleted this provision since the 2005 Choice of Court Convention was silent on this issue and several delegations were concerned 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 estoppel doctrines.⁸⁶ But the draft Convention does not require 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 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.⁸⁷

109. **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 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 enable the judgment creditor to obtain the money owed by the judgment debtor through an enforcement procedure. Because 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.⁸⁸ Enforcement may also be needed in case of injunctive relief through the court of the requested State requiring the defendant to meet the obligations to do or refrain from doing something deriving from the judgment (see *supra* paras 83-84 and *infra* paras 353-354).

110. In contrast, recognition need not be accompanied or followed by enforcement.⁸⁹ For example, if the court of origin held that the defendant did not owe any money to the plaintiff, the court of the requested State may simply recognise this finding by dismissing a subsequent claim on the same issue.

⁸⁵ 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”.

⁸⁶ 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.

⁸⁷ See Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017), Minutes No 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.

⁸⁸ 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.

⁸⁹ *Ibid.*

111. 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.⁹⁰ Having effect means that the judgment is legally valid and operative. Thus, if the judgment does not have effect in the State of origin, it should not be recognised under the draft Convention in any other State. Moreover, if the judgment ceases to have effect in the State of origin, it should not thereafter be recognised under the draft Convention in other States.

112. 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, a judgment that is no longer enforceable in the State of origin because, for example, it has been overturned on appeal should not thereafter be enforceable in another State under the draft Convention.⁹¹

113. **Adaptation of remedies.** Former versions of the draft Convention contained a rule on adaptation of remedies.⁹² The Third Meeting of the Special Commission decided to delete this provision since the 2005 Choice of Court Convention was 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

114. Paragraph 4 deals with judgments subject to review (or appeal) in the State of origin or where the time limit for seeking ordinary review has not expired. In such a situation, the court addressed has three options. It may (i) grant recognition or enforcement; (ii) postpone its decision; or (iii), refuse recognition or enforcement. Paragraph 4 applies to judgments “referred to in paragraph 3”. That is, paragraph 4 only applies to judgments enforceable under the law of the State of origin (see *supra* para. 111).

115. **Rationale.** The impact of review or appeal mechanisms on the effectiveness or enforceability of judgments varies across legal systems and there is no uniform position on 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.⁹³ 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 for seeking ordinary review has expired.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² 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.”

⁹³ Nygh/Pocar Report, para. 304.

116. Accordingly, the draft Convention does not require that the judgment be “final and conclusive”, as there is no uniform definition of this status. 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 a judgment may be recognised and enforced under the draft Convention even though it may not be considered to be final either in the State of origin or under the law of the requested State. This solution protects the interest of the judgment creditor and simplifies the application of the draft Convention insofar as the concepts of “final and conclusive judgment” or “*res judicata* effect” have no uniform meaning.⁹⁴ But the lack of a requirement that a judgment be final and conclusive could result in a judgment already recognised or enforced in the requested State subsequently being reversed or set aside in the State of origin. Accordingly, paragraph 4 addresses this problem by providing for an exception to the obligation to recognise and enforce a judgment in circumstances where there is a pending appeal or the time for seeking ordinary review has not expired.

117. **Review in the State of origin and unexpired time limit for review.** The court of the requested State is not obliged to grant recognition or enforcement if the judgment is the subject of review in the State of origin or the time limit for seeking ordinary review has not expired. Being “the subject of review” implies that proceedings for the review of the judgment are already pending in the State of origin. This phrase does not differentiate between ordinary and extraordinary review. Non-expiry of the time limit for seeking ordinary review implies that review of the judgment has not yet been sought, but the time limit for review has not expired. This phrase only applies to *ordinary* review. The draft Convention does not define “ordinary review”. In principle, it includes any review that (i) may result in change to the judgment; (ii) is part of the normal course of an action and therefore a step any party must reasonably expect; and (iii) under the law of the State of origin, can only happen before the expiry of a period of time which starts to run by virtue of the judgment whose recognition or enforcement is sought.⁹⁵

118. **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 of the requested State has three options and a discretion to decide which is most appropriate.⁹⁶ The consequences for both parties of each option will be a key factor for the court to consider. The court might also consider a *prima facie* assessment of the chance that the party against whom recognition or enforcement is sought will succeed in the review procedure, if it is in a position to form a view on this issue.

119. **Granting recognition and enforcement.** First, the court addressed may grant recognition or enforcement of the foreign judgment. The court may grant 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.⁹⁷ If the court decides to make enforcement conditional upon a security, the amount and nature of this security is also determined by the court.

⁹⁴ *Ibid.*, paras 306-311.

⁹⁵ See, on the differentiation between “ordinary” and “extraordinary” review, Schlosser Report (*op. cit.* note 41), paras 195-204; also referred to in the Hartley/Dogauchi Report, para. 173, note 209.

⁹⁶ 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.

⁹⁷ 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.

120. **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 prevent the court addressed taking protective measures, during the period the decision is suspended, to ensure the future enforcement of the judgment, in accordance with its national law.

121. **Refusing recognition or enforcement.** Finally, the court addressed may 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 ongoing in the State of origin, or the time limit for seeking ordinary review has not expired. For this reason, the Article clarifies that a refusal under sub-paragraph (c) does not prevent a subsequent application for recognition or enforcement. Here, refusal means dismissal without prejudice.⁹⁸ Once the judgment becomes final, the judgment creditor may again seek its recognition and enforcement. 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. A decision of the court addressed to refuse recognition or enforcement on such other grounds will prevent a subsequent application for recognition or enforcement.

[Paragraphs 5 and 6]

122. **[Introduction.** Paragraphs 5 and 6 of Article 4 address the application of the draft Convention to judgments given by courts common to two or more States. This issue has been thoroughly discussed in the Special Commission and several approaches have been explored.⁹⁹ Article 4 of the draft Convention sets out two alternative ways of addressing this issue. Both options provide for a declaration mechanism according to which a Contracting State may declare that judgments given by designated common courts are deemed to be judgments of that State's courts and therefore within the scope of the draft Convention (para. 5). This mechanism includes specific conditions governing the application of the jurisdictional filters for such judgments. Under the second option (para. 6), recognition and enforcement of judgments of common courts identified in such a declaration depends on the willingness of other Contracting States to recognise and enforce those judgments. There are two sub-options: either Contracting States other than the ones having made a declaration under paragraph 5 may 'opt-out' by declaring that they will not recognise or enforce judgments from common courts identified in such a declaration (variant 1) or recognition or enforcement of judgments from designated common courts depends on each other Contracting State 'opting in' by express acceptance of a declaration made under paragraph 5 (variant 2).

123. **Common courts.** The concept of "common courts" is not defined in the draft Convention, nor in other Hague instruments. In the context of the draft Convention, the term presupposes an agreement between two or more States to invest a common court with powers to (i) exercise jurisdiction over matters including those that come within the scope of application of the draft Convention, *i.e.*, civil and commercial matters; and (ii) deliver decisions on the merits including decisions that qualify as "judgments" under Article 3(1)(b). Under such agreements, States transfer or delegate their judicial power to a common court, *i.e.*, a court which exercises jurisdiction on behalf of those States, vested with either exclusive or concurrent power in relation to national courts. The creation of common courts usually, but not necessarily, responds to the interest of different States to ensure a uniform interpretation and application of harmonised substantive law, *e.g.*, unitary IP rights. Furthermore, common courts may have only an appellate function or both first instance and appellate functions.

⁹⁸ Hartley/Dogauchi Report, para. 174.

⁹⁹ See Work. Doc. No 254 of May 2018, "Working Group 5 on Common Courts – Final Report" (Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018)), paras 15-20.

124. **Examples.** There are examples of common courts that can be clearly characterised as such: the Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law (CCJA); the Caribbean Court of Justice (CCJ); the Eastern Caribbean Supreme Court (ECSC); the Court of Justice of the Andean Community (TJCA); the Judicial Committee of the Privy Council (JCPC); the Benelux Court of Justice; or the future Unified Patent Court.¹⁰⁰ Conversely, international courts, such as the International Court of Justice (ICJ), the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (CIDH) or the World Trade Organisation (WTO) Appellate Body do not qualify as common courts for the purpose of Article 4(5). These courts deal with public international law disputes, not with civil and commercial matters, and accordingly do not exercise jurisdiction *of* the States but *over* the States as subjects of international law. Similarly, courts established under Bilateral Investment Treaties (BIT) to deal with investor-State disputes do not qualify as common courts because they exercise jurisdiction *over* the State as a subject of international law.¹⁰¹ The case of the European Court of Justice (ECJ) (including the Court of First Instance) is debatable, since it may have a double-function: as an institution of the European Union it is a supra-national court, but it also exercises jurisdiction on civil and commercial matters regarding certain EU intellectual property right disputes. The ECJ also has jurisdiction to adjudicate in cases related to contractual and non-contractual disputes between the European Union and private persons. However, since the European Union as a Regional Economic Integration Organisation (hereinafter, “REIO”) may become a party to the draft Convention and qualify as a Contracting State (see Art. 27(4)), there are reasons to conclude that the ECJ is the court of a Contracting State, and not a court common to two or more Contracting States.¹⁰²

First alternative: Paragraph 5

125. **Introduction.** The current version of the draft Convention contains two alternatives to deal with common courts. The first alternative is to add only one new paragraph to Article 4, paragraph 5. According to this paragraph, judgments given by a court common to two or more States qualify as judgments for the purpose of the draft Convention if: (i) the Contracting State has identified the common court in a declaration to that effect; and (ii) certain conditions are met.

126. The first requirement means that judgments given by common courts do not automatically fall within the scope of the draft Convention: a positive declaration by the Contracting State(s) on behalf of which such a common court exercises jurisdiction is needed. This will provide clarity and transparency for other Contracting States.

127. Additionally, sub-paragraphs (a) and (b) of Article 4(5) clarify the application of the jurisdictional filters established by Articles 5 and 6 to judgments of common courts. This is necessary because some of the filters in Articles 5 and 6 are based on links between a judgment and a specific Contracting State, *i.e.*, the State of origin, whereas common courts exercise jurisdiction on behalf of two or more States. The application of those filters does not give rise to difficulties when all of the States on behalf of which the common courts exercise jurisdiction are Contracting States. But if only some of them are

¹⁰⁰ 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); 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), and Work. Doc. No 254 of May 2018, “Working Group 5 on Common Courts – Final Report” (Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018)).

¹⁰¹ As common courts are an evolving concept, it cannot be completely ruled out that in the future there might be cases in which these courts function as common courts. The *co-Rapporteurs* invite examples on this point.

¹⁰² See also Hartley/Dogauchi Report, para. 17: “It follows from this that a choice of court agreement designating ‘the courts of the European Community’ or referring specifically to ‘the Court of Justice of the European Communities (Court of First Instance)’ would be covered by the Convention.”

Contracting States, the application of the jurisdictional filters must be subject to additional controls to prevent the so-called “free rider problem”: that non-Contracting States may use common courts to access the draft Convention system. Sub-paragraphs (a) and (b) provide these controls and prevent the problem. Without these additional controls, States which are party to the agreement establishing the common court, but not party to the draft Convention, could benefit from the recognition and enforcement of judgments under the draft Convention without having to adhere to any of the obligations.

128. Jurisdictional filters based on consent: Article 4(5)(a). The first sub-paragraph (a) deals with cases where the jurisdictional filter is based on consent rather than a geographical connection to the territory of the State of origin: Article 5(1)(c), judgments against the person that brought the claim; Article 5(1)(e), defendant’s express consent to the jurisdiction of the court of origin; Article 5(1)(f), the defendant argued on the merits without contesting jurisdiction; Article 5(1)(l), judgments on a counterclaim; and Article 5(1)(m) non-exclusive choice of court agreements.¹⁰³ Judgments of common courts covered by these jurisdictional filters will not be recognised or enforced under the draft Convention unless all of the State members of the common court are Contracting States because it is not possible to connect such judgments to a specific State.

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

130. Example. Suppose that there is a common court established by States X, Y and Z. States X and Y are parties to the draft Convention and made a declaration under Article 4(5), but State Z has not become a party to the draft Convention. In this case, a judgment given by that common court will not circulate under the draft Convention if the only applicable jurisdictional filter is that the defendant argued on the merits before the common court without contesting jurisdiction (see Art. 5(1)(f)) or that the defendant’s habitual residence was in State Z. Conversely, such a judgment will circulate if the defendant’s habitual residence was in State X or Y. These outcomes ensure that State Z will not derive any benefit from the draft Convention even though State Z is a member of the common court.

131. Intellectual property rights. The application of paragraph 5 to the jurisdictional filters laid down by Articles 5(3) and 6(1) is not as straightforward. First, it depends on whether the common court has jurisdiction over national and/or unitary intellectual property rights. If the common court has jurisdiction over national intellectual property rights, *i.e.*, rights granted or registered for each member State, then the Article 4(5)(b) conditions may be met if the intellectual property right was granted for the territory of a State that is party to the draft Convention.

132. In the case of unitary intellectual property rights *i.e.*, when the intellectual property right is granted or registered for the entire territory of the States on behalf of which that common court

¹⁰³ The *co-Rapporteurs* note that sub-para. (k) is also based on consent but is however not included in Art. 5(1)(a). It is true that it refers to the “State of origin” but when the common courts have jurisdiction on trusts matters, the clause will usually refer to those common courts and letter (k) should be interpreted accordingly.

exercises jurisdiction, the question is more complex. As regards judgments on [registration or] validity, all of those States must be a party to the draft Convention to meet the conditions laid down by Article 4(5)(b). But in relation to judgments on infringement, the draft Convention may be interpreted in two different ways.

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

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

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

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

137. **Appellate functions.** As a matter of principle, if the common courts only have appellate functions, paragraph 5 should apply based on the Contracting State where the proceedings at first instance were instituted. Thus, if the first instance court where the proceedings were instituted was a court of a Contracting State that had made the declaration under Article 4(5), appeal judgments from that common court would be entitled to recognition and enforcement under the draft Convention if either of the two conditions set out by this provision are met.¹⁰⁴

138. **Common courts as requested courts.** Contracting States are obliged to recognise and enforce judgments in accordance with the draft Convention. This obligation is not affected when the question of recognition arises in proceedings before a common court performing judicial functions on behalf of a Contracting State.¹⁰⁵ The same is true for enforcement, though it will be rare for questions of enforcement to arise before a common court.¹⁰⁶ Therefore, common courts must implement the draft Convention and recognise and enforce judgments in accordance with its provisions. This obligation

¹⁰⁴ The *co-Rapporteurs* invite consideration of the following issue: the text of the draft Convention does not provide a different rule for courts that exercise exclusively appellate functions. As a result, one of the two conditions in Art. 4(5) must be met for such judgments to circulate even though the rationale for these jurisdictional limitations is not present where the first-instance judgment comes from a Contracting State that has made a declaration regarding the common appellate court.

¹⁰⁵ See also Work. Doc. No 254, “Working Group 5 on Common Courts – Final Report” (Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018)), paras 13-14.

¹⁰⁶ In particular, execution measures are usually strictly territorial and most likely to remain within the exclusive jurisdiction of individual States.

exists irrespective of whether the Contracting States on behalf of which the common courts exercise jurisdiction have made the declaration envisaged by Article 4(5). The obligation to recognise or enforce foreign judgments by common courts may however give rise to some difficulties when not all members of a common court are Contracting States to the draft Convention. Such possible conflicts between the draft Convention and the instrument establishing the common courts should be solved under the general Law of Treaties.

Second alternative: Paragraphs 5 and 6

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

140. **Opting-out system (negative declaration).** Under the opting-out system, if the State of origin of the judgment has made a declaration to include judgments given by common courts within the scope of the draft Convention, any other Contracting State may declare that it shall not recognise or enforce such judgments in respect of any of the matters covered by that declaration. The opting-out may be comprehensive or focused on specific matters.¹⁰⁷

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

142. **Opting-in system (positive declaration).** The opting-in system is based on reciprocal declarations. A State's declaration to include judgments given by its common courts within the scope of the draft Convention will only have effect between that State and other States that have expressly accepted that declaration. Positive declarations must be deposited at the Ministry of Foreign Affairs of the Netherlands, which will forward a certified copy to each of the Contracting States through diplomatic channels.^{108]}

Article 5 – Bases for recognition and enforcement

143. **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 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

¹⁰⁷ The *co-Rapporteurs* invite consideration of the following issue: it is not clear from the text whether a Contracting State may make a declaration to only exclude the recognition and enforcement of judgments given by a court with a purely appellate function, in circumstances where the first instance judgment from a court of a Contracting State qualifies for recognition and enforcement under the draft Convention.

¹⁰⁸ The *co-Rapporteurs* invite consideration of the following point: procedural requirements for making declarations are mentioned in Arts 30 and 32. If this variant is adopted in the final Convention, this duplicative text could be removed.

defines the perimeter of “eligible judgments”, *i.e.*, judgments that circulate under the draft Convention.

144. **Direct versus indirect jurisdiction.** The grounds listed in Article 5 are only *indirect* jurisdictional bases. They do not concern the basis for the jurisdiction of the court of the State of origin – the *direct* jurisdictional bases.¹⁰⁹ Direct jurisdiction remains to be determined by national law and is irrelevant for the purposes of the draft Convention. The grounds listed in Article 5 are those that a court of a requested State will accept as legitimate grounds for the purpose of recognition or enforcement. They are *indirect* in the sense that they are considered by the court of the requested State in its assessment of connections with the State of origin. In considering whether a foreign judgment meets the threshold jurisdictional conditions of Article 5 or 6, the requested State does not evaluate the State of origin’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.

145. Article 5 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 and excludes the application of all connections listed in the first paragraph.

Paragraph 1

146. This paragraph contains thirteen jurisdictional grounds belonging to three traditional jurisdictional categories: jurisdiction based on connections with the defendant, jurisdiction based on consent, and jurisdiction based on connections between the claim and the State of origin. Many of the grounds listed in paragraph 1 are found in national laws, but may be formulated more precisely or narrowly in the draft Convention. There is no hierarchy present in paragraph 1 and no ground is more legitimate than another for the purpose of recognition or enforcement under the draft Convention. Moreover, as expressly stated in paragraph 1, satisfaction of a single jurisdictional ground is sufficient.

Sub-paragraph (a)

147. **Introduction.** This sub-paragraph is a general rule based on the idea of the “natural” or “home State” forum. Living, *i.e.*, being habitually resident, in the State of origin is a reasonable basis 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 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.

148. 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.

149. **“Person against whom recognition or enforcement is sought”.** The draft Convention deals only with bases for indirect jurisdiction, focusing on the relationship between the State of origin and the person against whom the judgment was rendered. 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. It may be that the claimant lost the case and the defendant seeks recognition and enforcement against

¹⁰⁹ This terminology is used only in some legal systems.

that person in the requested State. To capture this, sub-paragraphs (a), (b) and (c) use 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, depending on whether the basis for jurisdiction could apply to anyone other than a defendant. When that issue does not arise, “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).

150. **“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 21.¹¹⁰ 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 State of origin had jurisdiction if any one of the four potential connecting factors listed in Article 3(2) is satisfied.

151. **“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 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.¹¹¹ It is not necessary that this person still be habitually resident in the 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.

152. **Subrogation, assignment or succession.** The wording of sub-paragraph (a) assumes 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 against a person other than the person who was a party to the proceedings in the State of origin, provided the person against whom recognition or enforcement is sought has “assumed” the obligations of the person who was party to the proceedings in the State of origin. Obligations could be assumed 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*. Whether there has been a “valid succession” is governed by the law of the requested State, including its private international law rules.

153. **Example 1.** A brings a claim against B in State X, where B is habitually resident. A judgment is rendered against B. 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

¹¹⁰ 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”.

¹¹¹ 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.

her heir. In this case, the judgment is eligible for recognition and enforcement under sub-paragraph (a) since B had her habitual residence in the State of origin and the person against whom recognition or enforcement is sought has validly succeeded to the obligations of B. Naturally, the habitual residence of the heir is irrelevant in this case.

154. **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). In both cases, 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)

155. **Introduction.** This sub-paragraph is targeted at natural persons engaged in business or in the exercise of a profession and is based on the same principle as sub-paragraph (a). 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 there will be sufficient connection with a State of origin for the purposes of recognition and enforcement if a natural person's principal place of business is in that State, but only where the claim arose from the activities of that business.

156. **Rationale.** Natural persons carrying on business activities are analogous to legal persons with respect to jurisdictional connections. A business that is a legal person will be considered to be habitually resident, *inter alia*, at its principal place of business under Article 3(2). But 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), despite the two situations being analogous but for the juridical status of the business. Sub-paragraph (b) recognises that the location of the principal place of business of a natural person is a legitimate connection to any claims made against that natural person arising from their 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.

157. **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. This is a more limited jurisdiction than the general jurisdiction 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.

158. **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.¹¹² Conversely, when the claim derives from the personal or family activities of A, sub-paragraph (b) will not apply.

159. 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)

160. **Introduction.** Bringing a civil or commercial claim to a court typically indicates acceptance of the jurisdiction of that court, even though a claimant may have limited or no choice about where proceedings can be initiated, which will be determined by the direct jurisdiction rules of each State.¹¹³ This reasoning does not apply to people other than the claimant, such as the defendant, who may have no choice but to respond to the proceedings or risk a default judgment. 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.

161. **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 other Contracting State. Furthermore, if B wants to enforce the cost award against A in State X,¹¹⁴ the jurisdiction of the court of origin, in State Z, would be validated by reference to Article 5(1)(c).

162. **Relationship with other provisions.** If the claimant was habitually resident in the State of origin when 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 sub-paragraph (c) does not apply to counterclaims, which are dealt with specifically in sub-paragraph (l).

Sub-paragraph (d)

163. **Introduction.** This sub-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 of courts in the State where the branch itself is located. This “branch jurisdiction” is found in several legal systems.¹¹⁵ The draft Convention

¹¹² The courts in State Z would also be considered competent under the draft Convention, as the courts in the State where the contract was performed, under para. 5(1)(g), discussed below.

¹¹³ For example, in cases involving exclusive jurisdictional bases, there may be only one State where the plaintiff can bring the claim.

¹¹⁴ This cost award is considered to be a judgment under the draft Convention as per Art. 3(1)(b).

¹¹⁵ 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, “Brussels I Recast Regulation”), Art. 7(5); Civil Code of Québec, Art. 3168(2).

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.

164. **Rationale.** A person who sets up an establishment in another State must accept the jurisdiction of the courts of that State on claims concerning the activities of that establishment because the person controls the establishment. This is consistent with the legitimate expectations of the parties. Furthermore, since this jurisdiction is limited to disputes that arose from the activities of the branch, it is further justified by the close connection between the dispute and the court called upon to hear it, in particular to ascertain the facts.

165. **Branch, agency or other establishment.** The provision refers to “branch, agency or other establishment without separate legal personality”.¹¹⁶ 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.¹¹⁷ The provision is expressly limited to establishments without legal personality separate from the defendant. This criterion excludes subsidiaries and any other part of a commercial organisation that is constituted as a separate legal entity.¹¹⁸

166. **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, in a contractual dispute, the contract must have been concluded through the establishment in the State of origin or this establishment must be responsible for its performance. A mere remote or incidental connection is not sufficient.

167. 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.¹¹⁹ It might therefore overlap with other sub-paragraphs dealing with contractual (sub-para. (g)) and non-contractual obligations (sub-para. (j)).

Sub-paragraphs (e) and (f)

168. **Introduction.** These two sub-paragraphs deal with judgments rendered against defendants who consented to the jurisdiction of the court of origin. Consent of the defendant is widely accepted as a legitimate basis for international jurisdiction. Article 5(1) envisages three forms of consent – 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 219-225). Any one of these forms of consent meets the jurisdictional requirement under Article 5(1), regardless of the absence of any other connections with the State of origin.

169. As will be seen below, specific limitations apply to consent-based jurisdiction where judgments are rendered against defendants who are consumers or employees, as per paragraph 2.

¹¹⁶ This terminology does not exclude natural persons, but this inclusion may complicate the scope of application of Art. 5(1)(b), which is limited to natural persons.

¹¹⁷ Nygh/Pocar Report, para. 127.

¹¹⁸ In applying Art. 7(5) of the Brussels I Recast Regulation, the 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 9 December 1987, *SAR Schotte GmbH v. Parfums Rothschild SARL*, C-218/86, EU:C:1987:536.

¹¹⁹ Nygh/Pocar Report, para. 134.

Sub-paragraph (e)

170. **Express consent in the course of the proceedings.** The jurisdictional requirement in Article 5(1) is satisfied where a defendant expressly consents to the jurisdiction of the court of origin during the course of proceedings. The existence of express consent is a question of fact to be determined by the court of the requested State. Sub-paragraph (e) does not prescribe the form or substance of this express consent, *i.e.*, it could be oral or in writing. However, other provisions of the draft Convention should be considered to interpret the concept of “express consent”. First, a separate provision deals with implied consent (sub-para. (f)). The scope for express consent is therefore narrowed and should require a positive action (orally or in writing) as opposed, for example, to a failure to raise an objection or the mere withdrawal of a challenge to jurisdiction of the court of origin. Second, unlike paragraph (a), this sub-paragraph does not require that 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.

171. This manner of consenting may not be known or recognised in all procedural systems. This is not, however, an impediment to the assessment of such consent by the requested State. 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 likely include rules on consent. Rather, the requested State is verifying whether one of the criteria for *indirect jurisdiction* is satisfied, regardless of the basis for jurisdiction in the court of origin.

172. **Examples.** The following scenarios illustrate how express consent in the sense of sub-paragraph (e) might present itself in fact:

- (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.
- (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.¹²⁰
- (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)

173. **Introduction.** Unlike the express consent contemplated in sub-paragraph (e), the consent in sub-paragraph (f) is implied, typically from the defendant arguing on the merits and failing to contest the jurisdiction of the court of origin. By failing to object to the jurisdiction of the court of origin, the defendant is taken to have accepted that the claim brought against it will be decided by that court. In practice, in considering submission to jurisdiction under sub-paragraph (f), recall that paragraph 1 includes numerous indirect jurisdictional grounds, only *one* of which need be satisfied. Submission is thus only relevant when there is no other available jurisdictional basis under paragraph 1.

¹²⁰ This scenario might also be considered to fall within sub-para. (m) if the clause within the settlement agreement is interpreted as the “designation of a court”.

174. **Rationale.** Consent, either express or implied, is a legitimate basis of jurisdiction in most States. The concept of 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 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.

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

176. **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 that response 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 may then be able to circulate under the draft Convention. In such a case, however, jurisdiction will not be recognised on the basis of submission and would thus have to be based on another ground listed in paragraph 1.

177. 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, rather than a procedural, issue. The question is whether the defendant engaged in any action or procedure in the proceedings before the court of origin that involved contestation of the merits of the dispute. Any different rules governing submission to jurisdiction under the law of the court of origin are irrelevant. 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 (see *infra* para. 393).

178. 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.¹²¹ 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 submission by ensuring that an objection to jurisdiction has been made before the court of origin.

179. **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 for a defendant to object to jurisdiction. This might be either in terms of days from a certain point, such as notice of the claim,

¹²¹ 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.

or in terms of sequence, 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 will not avoid submission. 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.

180. **Objection to jurisdiction would not have succeeded.** 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. Sub-paragraph (f) reflects this assumption by framing the rule in terms of a challenge to jurisdiction.

181. 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 implied consent or submission. The jurisdictional criterion for recognition or enforcement based on submission will not be met in such a case.

182. 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.

183. **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 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.

184. **Objection to the exercise of jurisdiction.** Submission to jurisdiction also extends to the defendant's failure to request that the court of origin decline to exercise jurisdiction, a possibility in States where the doctrine of *forum non conveniens* allows a defendant to request that a court decline to exercise its jurisdiction.

185. In most States where *forum non conveniens* is available, it is distinguished from jurisdiction *per se*. The doctrine allows a court to *decline to exercise jurisdiction*, and thus does not involve any admission by the court that it is *without jurisdiction*. In such States it is not uncommon for the defendant to first contest jurisdiction and second, in the alternative, should the court reject that challenge, request that the court decline to exercise its jurisdiction. Defendants may even *concede* jurisdiction and only request that the court decline to exercise it.

186. The language used in sub-paragraph (f) requires that a defendant raise all possible challenges to the jurisdiction of the court of origin or to its exercise of jurisdiction in order to avoid submission. A defendant will have submitted to the jurisdiction of the court of origin if the defendant had the opportunity to challenge the jurisdiction of a court but chose not to, or had the opportunity to request

that a court decline to exercise its jurisdiction and failed to do so, or fails to show that such requests would have had no chance of success.

187. **Scenarios.** Suppose that in the State of origin, where the doctrine of *forum non conveniens* is available, a defendant only invoked *forum non conveniens* without also contesting jurisdiction *per se*. Unless the defendant can show, before the requested State, that jurisdiction *per se* was not challenged because it had no chance of success, the defendant will be considered to have submitted to the jurisdiction of the court of origin, even though the defendant asked the court to decline jurisdiction. Similarly, if a defendant did not contest jurisdiction *and* did not request that the court of origin decline to exercise its jurisdiction, the defendant will have to show that neither option had a chance of success to avoid a finding of submission under sub-paragraph (f).

188. In all of these scenarios, it does not matter whether the failure to contest jurisdiction or to request that the court decline to exercise jurisdiction amounts to submission under the law of the court of origin. The draft Convention contains only indirect jurisdictional grounds. Accordingly, 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. To avoid a finding of submission as a ground for indirect jurisdiction under the draft Convention, the defendant must resist being subjected to the jurisdiction of the court of origin in every manner available before the court of origin, either explicitly before that court, or later before the court addressed, by showing that it did not do so because it had no chance of success. Such actions or arguments by a defendant will, of course, not bar circulation of the judgment if there is another applicable jurisdictional basis under Article 5 or 6. In other words, a defendant cannot simply raise a jurisdictional objection or request that the court of origin decline to exercise its jurisdiction and expect that this will prevent circulation of the judgment under the draft Convention.

Sub-paragraph (g)

189. **Introduction.** This sub-paragraph recognises a jurisdictional link for judgments on contractual obligations. The rule is the result of a compromise between two approaches. On the one hand, some States consider that the place of performance is a sufficient basis for jurisdiction, without further qualifications. On the other hand, some States 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.¹²²

190. **Place of performance as a starting point.** The starting point of sub-paragraph (g) represents the first approach where the place of performance of a contractual obligation is a basis for recognition and enforcement of a judgment. 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. But 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 Recast Regulation, that, for certain types of contract, posit a single contractual forum that does not vary depending on the obligation forming the basis of the claim.¹²³

191. **The place of performance of the contractual obligation: parties’ agreement.** The draft Convention envisages two ways to identify the place of performance of contractual obligations: the contract itself, or the applicable law. If the contract specifies the place for performance of the obligation, a judgment rendered by a court at that place will satisfy the jurisdictional requirement in

¹²² 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.

¹²³ See Art. 7(1) of the Brussels I Recast Regulation.

sub-paragraph (g)(i), irrespective of whether performance actually took place in that location. In other words, the parties' agreement as to the place of performance is determinative. In practice, it is very common that the place of performance is included among the general contractual conditions of one or both parties. The validity of such contractual conditions will be determined by the law of the requested State, including its private international law rules.

192. A case where 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 might fit within either sub-paragraph (i) or (ii). Arguably, "the parties agreement" includes an agreement on the applicable law, which will then identify the place of performance of the relevant obligation. But the draft Convention does not establish 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-paragraph (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 would be preferable to limit sub-paragraph (g)(i) to cases where the terms of the contract specify the place of performance directly.

193. **Applicable law.** The second situation arises where there is no agreement on the place of performance or where 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.

194. **Example.** A brings a claim against B in State X. The basis of the claim is B's failure to pay 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.

195. **Safeguard: "purposeful and substantial connection to the State of origin"**. 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. For example, in the case of contracts performed online the connection with the State of origin may be merely virtual and therefore insufficient to justify circulation of the judgment under the draft Convention. Accordingly, 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 burden of proof is on the defendant ("unless") and a high threshold ("clearly did not constitute").

196. This clause has no counterpart in other instruments or national laws, although it reflects concerns in some systems about the fairness afforded to foreign defendants or to their due process rights.¹²⁴ The terms "purposeful and substantial" are meant to avoid jurisdiction being based on geographical links that are arbitrary, random or insufficiently related to the transaction between the parties.¹²⁵ 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 a single disputed obligation, sub-paragraph (g) will allow

¹²⁴ For information of the concept of "Purposeful and Substantial Connection" and of the relevant laws and practice in the United States of America, 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 47).

¹²⁵ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), especially Brennan J. at pp. 478-479.

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)

197. **Tenancy of immovable property.** This provision is a compromise between two conflicting views in relation to tenancies over immovable 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, 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.

198. 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 (more than six months), and only where the law of the State where the immovable is situated considers that it has exclusive jurisdiction over the matter (see *infra* paras 268-272).

Sub-paragraph (i)

199. **Contractual obligations secured by rights *in rem*.** This provision recognises that it is efficient to allow a claim on a contractual obligation secured by a right *in rem* to be joined with a claim relating to that right *in rem* in the same proceeding.¹²⁶ Under Article 6(b), only the State where the immovable 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)).

200. **Example.** D, habitually resident in State X, purchases an immovable 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)

201. **Introduction.** This sub-paragraph defines the jurisdictional condition for recognition or enforcement of judgments in matters concerning non-contractual obligations. Again, this connection is not necessary 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

¹²⁶ Combining these two claims in a single proceeding is to be expected in jurisdictions where the realisation of a security on an immovable is judicially administered. Where realisation can be unilaterally effected by the creditor, that is, where extrajudicial 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.

likely to occur, assuming the defendant is found liable and ordered to pay compensation.

202. 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. 21). The application of this sub-paragraph is, however, limited to certain types of harm suffered.

203. **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. Even within these categories, the provision is limited to physical injury (including death) for individuals, and to tangible property (damage or loss). This provision will not apply where the claim is based on losses that are not connected to a physical injury or to damage to tangible property.

204. **The place where the act or omission causing the harm occurred.** The draft Convention has adopted a narrow basis for indirect jurisdiction for non-contractual obligations: it is limited to the place of the act (or omission) directly causing the harm. This differs from national and regional legal systems that also recognise jurisdiction exercised by the court in the State where the harm occurred.¹²⁷ This restriction to a single jurisdictional connection, and the limitation on the types of harm noted above, may reduce interpretive difficulties that have 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 or 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. It is possible that claims by dependents pursuant to wrongful death will not be covered by sub-paragraph (j) because that provision excludes non-physical injuries and deals only with harm directly caused. 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.¹²⁸

205. On the other hand, the wording of sub-paragraph (j) eliminates any question 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.¹²⁹ 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”. Other interpretive difficulties relating to the exclusion of the place of injury in sub-paragraph (j) may still arise. For example, a judgment brought against a foreign manufacturer in the State where a physical injury allegedly occurred may not 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.¹³⁰ If the location of the 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.¹³¹

¹²⁷ Of course this is only relevant if this place is different from the place of the act or omission. See Brussels I Recast Regulation, Art. 7(2) as interpreted by the ECJ; see also Nygh/Pocar Report, paras 135-149.

¹²⁸ It is a matter of interpretation, which should be guided by uniform interpretation.

¹²⁹ See *Club Resorts v. Van Breda*, 2012 SCC 17, at para. 89 (Supreme Court of Canada).

¹³⁰ 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.

¹³¹ 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. It is a matter of interpretation, which should be guided by uniform interpretation.

Sub-paragraph (k)

206. **Introduction.** This sub-paragraph applies to judgments concerning the validity, construction, effects, administration or variation of a trust.¹³² As specified in the final part of sub-paragraph (k), only judgments dealing with disputes 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.

207. **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. It is, however, 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.¹³³ That definition will be instructive if any question of definition arises because it recites the attributes of a trust according to existing common law concepts.¹³⁴

208. This sub-paragraph applies to a trust created voluntarily and evidenced in writing whether between living persons or by testament.¹³⁵ 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). Art. 2(1)(d) excludes 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. 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).¹³⁶

209. **Designation of a State for determination of listed issues.** Sub-paragraph (k) envisages two alternative bases of jurisdiction depending on the instrument creating the trust. The first option 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. 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 later modification of the designation will not bar recognition of the eventual judgment at a later date.

210. **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. If that State is the State of origin, the jurisdictional criterion is met. As with the first option above, the designation must exist at the time the proceedings are instituted. Later variation of the designation will not retroactively extinguish the connection at the moment of recognition or enforcement of the judgment.

211. These options are alternatives and a judgment rendered by a State that is designated in either manner will satisfy the jurisdictional criterion in sub-paragraph (k).¹³⁷

¹³² 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.

¹³³ At the time of writing 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.

¹³⁴ Nygh/Pocar Report, para. 150.

¹³⁵ This is also the limit of application of the 1985 Trusts Convention (see Art. 3).

¹³⁶ See, for a similar exclusion, the 1985 Trusts Convention (Art. 4).

¹³⁷ In the case of sub-para. (k)(ii), it should be noted that recognition and enforcement of such judgment may nevertheless be refused under Art. 7(1)(d).

212. **Internal aspects.** The final sentence of the sub-paragraph (k) limits jurisdiction to disputes that are internal to the trust, *i.e.* disputes between persons within the trust relationship (such as the settlor, the trustee and the beneficiaries), and not persons external to the trust. The use of “*are or were* within the trust relationship” preserves jurisdiction over a person who was within the trust relationship but was no longer in such a position at the time of recognition or enforcement. 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)

213. **Introduction.** This sub-paragraph establishes indirect 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, called a counterclaim.¹³⁸ 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 does not need to 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 and in certain circumstances, it may even be compulsory for the defendant to bring its own claim as a counterclaim or that claim is considered waived and cannot be brought later in a separate proceeding.¹³⁹

214. 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.

215. **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. Therefore, there is no jurisdictional exception to circulation where the counterclaim is successful. 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. The original claimant consented to the jurisdiction of the court of origin by voluntarily bringing a claim before that court. 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.

216. 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” to emphasise that the facts on which the counterclaim is based need not be identical and may arise out of a broader, but still related, set of circumstances.¹⁴⁰

¹³⁸ 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.

¹³⁹ For example, under Rule 13 of the US Federal Rules of Civil Procedure.

¹⁴⁰ Nygh/Pocar Report, para. 200. Contrast the narrower formulation of Art. 8(3) of the Brussels I Recast Regulation which contains the phrase “the same contract or facts on which the original claim was based”.

217. **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 the counterclaimant implicitly consented to the jurisdiction of the court of origin by bringing the counterclaim. Since the defendant is essentially a claimant with respect to the counterclaim, this jurisdictional criterion may replicate sub-paragraph (c). But the above rationale presupposes that the counterclaimant voluntarily brought the 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. In those circumstances, the losing counterclaimant would not be prevented from instituting the same claim elsewhere.

218. Importantly, 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)

219. **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 recognition and 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.

220. **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). 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 but not where that designation excludes all other courts. In this latter case, only the 2005 Choice of Court Convention will apply.¹⁴¹

221. **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 that the draft Convention applies to any agreement "other than an exclusive choice of court agreement". Furthermore, the 2005 Choice of Court Convention contains a presumption that 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 expressly provided otherwise (Art. 3(b)). In principle, the approach followed by the draft Convention prevents any gaps between the two instruments.

222. 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

¹⁴¹ For more details on the relationship between the 2005 Choice of Court Convention and the draft Convention, see *infra* paras 420-425.

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.¹⁴² 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.”

223. The draft Convention, like the 2005 Choice of Court Convention, limits 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.¹⁴³ Oral agreements, therefore, do not benefit from this sub-paragraph.

224. **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. 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 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 unless there is some other basis for jurisdiction under paragraph 1.

225. 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

226. **Introduction.** Paragraph 2 provides exceptions to the general rules in paragraph 1 with respect to consumer and employment contracts. These only apply to recognition or enforcement against a

¹⁴² Hartley/Dogauchi Report, paras 32, 106 and 249.

¹⁴³ See, on this formal requirement, Hartley/Dogauchi Report, paras 110-114.

consumer or employee, and not to recognition or enforcement sought by a consumer or employee. These exceptions are consistent with the protection accorded to consumers or employees within the contractual sphere by many legal systems, whether in domestic or private international law. 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 (sub-paras (e), (f) and (m)) and to sub-paragraph (g) that deals with jurisdiction on contractual obligations.

227. 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 *Vienna Convention of 1980 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 Recast Regulation (Art. 17(1)) and Rome I Regulation¹⁴⁴ (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 rationale for the exclusion of such contracts from scope of the 2005 Choice of Court Convention.¹⁴⁵

228. Employment contracts. Employment contracts are not defined under the draft Convention but it is clear from the phrase “contract of employment” that the provision is intended to cover salaried workers at any level and not people carrying on independent professional activity.¹⁴⁶

229. Collective bargaining agreements. The reference to “matters relating to the employee’s contract of employment” indicates 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 between an employer and an employee based on the legal framework applicable to that relationship, including labour law or collective bargaining agreements.¹⁴⁷ 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.

230. 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) (see *supra* paras 170-172), 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)).¹⁴⁸ With respect to consumers and employees, neither form of consent is treated as sufficient. In other words, a judgment 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

¹⁴⁴ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16.

¹⁴⁵ Hartley/Dogauchi Report, para. 50.

¹⁴⁶ Nygh/Pocar Report, para. 117.

¹⁴⁷ In the 2005 Choice of Court Convention, Art. 2(1)(b) excludes choice of court agreements “relating to contracts of employment, including collective agreements”.

¹⁴⁸ 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).

type. Of course, paragraph 1(a) will be satisfied where the employee or consumer was habitually resident in the State of origin.

231. 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) which concerns place of performance of contractual obligations. A judgment will not be recognised or enforced against a consumer or employee if the only basis for jurisdiction is that the State of origin was the place of performance of the relevant contractual obligation. In practice, this means only judgments against a consumer or employee given in the State of that person's habitual residence will circulate under the draft Convention, absent express consent to the jurisdiction of another court by the consumer or employee and directed at that court.

[Paragraph 3]

232. [Introduction.] Paragraph 3 provides that the bases for jurisdiction listed in paragraph 1 do not apply to judgments that ruled on intellectual property rights or analogous rights.¹⁴⁹ These claims are subject to a separate regime established under paragraph 3. Judgments of this kind are only eligible for recognition and enforcement if one of the bases of jurisdiction established by paragraph 3 is met.

233. 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 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).

234. In this sense, Article 5(3) establishes "exclusive" bases for jurisdiction within the draft Convention for judgments on intellectual property right or analogous rights. 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. In the case of 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. 259).

235. Rationale: the territoriality principle. The draft Convention's approach to intellectual property rights is the result of a compromise. Intellectual property rights are included within the scope of the draft Convention, but are subject to a strict application of the territoriality principle. Intellectual property rights are territorial. 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 existence and content of an intellectual property right can only be determined by the law of the State granting it, as with 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. The territoriality of these rights has a clear impact on the conflict of laws dimension. 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 (for the territoriality principle in the context of online intellectual property infringement, see paras 245-246).

¹⁴⁹ See *supra* note 48.

236. The draft Convention mirrors this principle at the recognition and enforcement level. A judgment on intellectual property related matters may only circulate 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*). This applies to both judgments on the validity of an intellectual property right and on infringement of such right. These limitations ensure jurisdiction is parallel to the applicable law. From a comparative law perspective, disputes on the validity of an intellectual property right granted by the substantive law of State X are currently only subject to the jurisdiction of the courts of such State. But some States assume jurisdiction to hear claims about infringement of foreign intellectual property rights, applying the relevant foreign intellectual property law. Such judgments would not circulate under the draft Convention. Thus, in principle, under the draft Convention the State of origin of the judgment will coincide with the *lex loci protectionis*. This solution responds to several delegations' concern that application of the jurisdictional bases in paragraph 1, such as habitual residence of the defendant or branch jurisdiction, to intellectual property matters would allow for a consolidation of litigation relating to intellectual property rights protected under the law of other States. The application of that paragraph would entail the recognition and enforcement of judgments in cases where the court of origin would have to apply a foreign law. Legal and technical aspects are closely intertwined in intellectual property rights litigation, and those delegations were concerned that the court of origin might either apply its own law also to the foreign intellectual property rights or a foreign law wrongly. The guarantee that the State of origin of the judgment applied the "proper law" is further strengthened by Article 7(1)(g), which allows States to refuse recognition and enforcement if a different law was applied (see *infra* para. 303).

237. **Intellectual property rights or analogous rights.** The *chapeau* of paragraph 3 refers to intellectual property rights or "analogous rights". It is an open list. Those terms include intellectual property rights that are universally recognised based on TRIPS agreements or WTO membership, but also 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-paragraphs (a) to (c), are laid down as semi-closed lists. 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 or semi-closed lists of sub-paragraphs (a) to (c) 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.

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

Sub-paragraph (a)

239. **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) provides an exception to the above criteria as a safeguard mainly aimed at dealing with infringement through digital media: 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.

240. 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).¹⁵⁰ The difference between these two provisions is that only the latter excludes recognition or enforcement under national law (see *infra* para. 259).

241. 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, though it may be recognised or enforced 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 either the draft Convention or national law.

242. Registered intellectual property rights. Sub-paragraph (a) covers registered intellectual property rights such as patents, registered trademarks, registered industrial designs,¹⁵¹ granted plant breeders' rights (also known as plant variety rights),¹⁵² registered or listed geographical indications, supplementary protection certificates extending the term of protection of a patent,¹⁵³ utility models (petty patents), etc. 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 the law of both the State of origin and 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 because such rights are not "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.

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

¹⁵⁰ Note however that there is a difference with the formulation, the reference to "the right concerned" is not included in Art. 6(a).

¹⁵¹ 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).

¹⁵² 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 States 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").

¹⁵³ "Supplementary protection certificates", which are protected under EU law and in the European Economic Area, 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" which would also be included.

international or regional instrument. The phrase “deemed to have taken place under the terms of an international or regional instrument” addresses situations where grant or registration of the right is obtained by one registration procedure for one or more States in accordance with an international or regional instrument. This is the case, for example, for a European Patent under the Munich Convention.¹⁵⁴ 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.*, 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.¹⁵⁵ [For supranational rights and common courts see *supra* Art. 4(5) and (6).]

244. 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.¹⁵⁶ 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 prior to the actual grant or registration. The inclusion of the word “deposit” was discussed at the First and Second Special Commission meetings but eventually rejected.¹⁵⁷ Nevertheless, sub-paragraph (a) also applies to jurisdictions where registration is not always subject to prior examination. “Registered rights” or “rights required to be registered” should therefore be interpreted as including rights that come into existence through formalities that involved public administrative authorities, which may include deposit (or application).¹⁵⁸

245. 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 2011.¹⁵⁹

¹⁵⁴ 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”).

¹⁵⁵ 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*.

¹⁵⁶ 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)).

¹⁵⁷ See Minutes of the Special Commission on Recognition and Enforcement of Foreign Judgments (1-9 June 2016), Minutes No 10, paras 62 to 79. It should be noted, however, that it is not clear whether a “deposit” is always followed by a record in a register. This should be clarified in the final version of the Explanatory Report; see Background Document of May 2018 (see path indicated in note 48).

¹⁵⁸ See Minutes of the Special Commission on Recognition and Enforcement of Foreign Judgments (16-24 February 2017), Minutes No 5, para. 37.

¹⁵⁹ 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

246. 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 activity “cannot reasonably be seen as having been targeted at that State”. Whether the defendant’s activity cannot reasonably be seen as having been targeted at that state must be assessed by the court of the requested State taking into account all elements of the defendant’s activities, from an objective perspective.

247. **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)

248. **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.¹⁶⁰ 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.¹⁶¹ The list of intellectual property rights in sub-paragraphs (b) and (c) is closed because different national laws may provide for different unregistered rights, and new unregistered rights may emerge in the future. In the absence of mandatory registration or other similar act of State, preceded by some examination or opposition procedures, it may be very difficult for the requested State to determine – *e.g.*, from a money judgment – whether a certain type of intellectual property right actually exists under the laws of other Contracting States, and problems might arise in particular if the intellectual property right is not known under the law of the requested State. For example, views are divided on the question of whether trade secrets (*i.e.*, undisclosed business information) are “IP rights”. While the TRIPS Agreement defines “intellectual property” in Article 1, it does not define what an intellectual property right is. Therefore, a closed list of some universally recognised unregistered

“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 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).

¹⁶⁰ 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, “Berne Convention”).

¹⁶¹ See Hartley/Dogauchi Report, para. 73, with further references to the TRIPS Agreement.

intellectual property rights would provide greater transparency and foreseeability to litigants as concerns the applicability of the filters in Article 5(3)(b) and (c).

249. Sub-paragraphs (b) and (c) apply to judgments ruling on the *validity*[, *subsistence or ownership*] of those intellectual property rights and judgments ruling on an *infringement* of those rights respectively. The connecting factor is the same for both, *i.e.*, the unregistered intellectual property right must be governed by the law of the State of origin. But the draft Convention distinguishes between these two categories because the latter category requires a safeguard to protect the defendant in cases of ubiquitous infringements.

250. **Infringements.** Sub-paragraph (b) provides that judgments ruling on an *infringement* of copyright or related rights, unregistered trademarks and unregistered industrial designs will be eligible for recognition and enforcement if given by a court in the State for which the protection was claimed.

251. **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.

252. 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.¹⁶² Furthermore, the words “the State for which protection was claimed” conform more broadly to private international law instruments.¹⁶³

253. **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 245-247).

254. **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.

255. The term “validity” is commonly associated with trademarks and industrial designs whereas “subsistence” and “ownership” are commonly associated with copyright and related rights.¹⁶⁴ 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. In some legal systems, for example, where an employee creates a work during the course of his or her employment, 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.¹⁶⁵ For example, in cases of succession in some States, heirs may be entitled to, but may not yet be owners of a work. This provision is intended to capture such cases

¹⁶² See Minutes of the Special Commission on Recognition and Enforcement of Foreign Judgments (16-24 February 2017), Minutes No 5, para. 37.

¹⁶³ See, *e.g.*, Art. 8(1), Rome II Regulation (Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations).

¹⁶⁴ See Work. Doc. No 77 (*supra* note 156), para. 23.

¹⁶⁵ See Art. 2:205 CLIP Principles.

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 367-369). Non-registered rights are not included in the provision dealing with exclusive bases of jurisdiction (see *infra* Art. 6).^{166]}

Article 6 – Exclusive bases for recognition and enforcement

256. Article 6 contains three exclusive bases for recognition and enforcement. This provision has both a positive and negative effect. Judgments of the kind described in Article 6 that meet the bases of jurisdiction it provides are eligible for recognition and enforcement. Judgments of the kind described that do not meet the bases of jurisdiction shall not be recognised or enforced, either under the draft Convention or under national law. 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 “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.

257. 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)]

258. **[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. These 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.

259. **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 239-247). 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. 243). 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.¹⁶⁷ They also differ in the fact that only Article 6(a) excludes recognition and enforcement of judgments under national law.

¹⁶⁶ See also Nygh/Pocar Report, para. 174.

¹⁶⁷ 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 Recast Regulation, the term validity does not encompass the question of who must be regarded as the proprietor of a registered IP right (Judgment of the 5 October 2017, *Hanssen Beleggingen*, C-341/16, EU:C:2017:738: Art. 22(4) Brussels I Recast 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 intellectual property rights would not circulate under the draft Convention.

260. The words “registration or” are placed in square brackets because delegations in the Special Commission were divided as to whether “validity” subsumes “registration”.¹⁶⁸ Some experts explained that both terms can occur in tandem in some other instruments, so they are closely related though not the same thing, whereas other experts thought that “validity” entirely subsumes “registration”.

261. **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 52-53). As explained above, this exclusion covers disputes between the applicant (or an interested third party) and the administrative authority in charge of the register. These disputes normally arise in the context of an application for registration, such as when registration is refused or amended and the applicant challenges 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. For example, where a patent is registered and a party brings a claim against the registered owner challenging the validity of the patent. Such a claim could be, for example, based upon expiration of the time of protection.¹⁶⁹

262. **Consequences.** Sub-paragraph (a) establishes an exclusive basis for recognition and enforcement for judgments ruling on the registration or validity of registered intellectual property rights. This has both a positive and a negative effect, expressed by the phrase “*if and only if*”. The positive effect 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.¹⁷⁰ The negative effect is that a judgment ruling on registration or validity of a registered right given by a court from a State other than the State of registration *shall not be* recognised or enforced under national law. For this reason, Article 16 starts by saying “Subject to Article 6” (see *infra* paras 367-369).¹⁷¹

263. 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)

264. **Rights *in rem* in immovable property.** Sub-paragraph (b) establishes an exclusive basis for recognition and enforcement of 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 property 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.

¹⁶⁸ 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, Judgment of the 5 October 2017, *Hanssen Beleggingen BV v. Tanja Prast-Knippling*, C-341/16, EU:C:2017:738.

¹⁶⁹ Naturally, the administrative authority may intervene in these proceedings.

¹⁷⁰ Naturally, recognition or enforcement may be refused under Art. 7 of the draft Convention.

¹⁷¹ 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 intellectual property registered rights, the terms “Notwithstanding Article 5” in the chapeau of Art. 6 do not have any particular meaning as regards Art. 6(a).

265. **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 and 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 public registers or other public documents.¹⁷²

266. **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*)”.¹⁷³ The concept of rights *in rem* includes, for example, ownership, mortgages, usufructs or servitudes. Sub-paragraph (b) 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 not included in the scope of application of this Article.

267. **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.

Sub-paragraph (c)

268. **Introduction.** Sub-paragraph (c) provides an exclusive basis for jurisdiction for tenancies longer than six months (“long-term tenancies”), but only if the law of the State where the immovable property is situated establishes such exclusive jurisdiction. Essentially, this rule recognises and gives effect to the policy of certain States in favour of exclusive jurisdiction for tenancies.

269. **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 under sub-paragraph (b) covers both matters. This is often the case in jurisdictions where tenancy contracts are subject to a special, mandatory regime 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. (see *supra* para. 198)

270. **Conditions for application.** According to this provision, a judgment that rules on a tenancy of immovable property for a period of more than six months 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. First, the provision only applies to “long-term

¹⁷² For the arguments in favour of this basis for jurisdiction, see Nygh/Pocar Report, para. 164.

¹⁷³ Nygh/Pocar Report, para. 164.

tenancies”, *i.e.*, tenancies 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 State Y, its courts have exclusive jurisdiction over that matter.

271. Sub-paragraph (c) of Article 6 is different from the other two limbs of this provision. It does not provide a harmonised basis of exclusive jurisdiction, but instead refers to the national law of the State where the immovable property is situated. Furthermore, it only applies if this State is a Contracting State. 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). Finally, sub-paragraph (c) does not contain a positive basis of jurisdiction (which is found in Art. 5(3)(a) and (b)) but only a negative basis: it prohibits recognition or enforcement of certain judgments if the conditions for its application are met.

272. **Long-term tenancies.** Sub-paragraph (c) only applies to tenancies of immovable property for a period of more than six months.¹⁷⁴ It includes any tenancy irrespective of its nature, *i.e.*, for a professional, commercial or personal purpose. Furthermore, the provision covers 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

273. 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 grounds a judgment debtor can invoke to avoid recognition or enforcement 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

274. **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.¹⁷⁵ 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) concern the effect that recognition or enforcement would have in the requested State. Finally, sub-paragraph (f) takes account of judgments rendered in a third State.

275. Article 7 establishes that States “*may*” refuse recognition or enforcement if one or more grounds are met. But this provision is addressed to States. States can (i) adopt domestic legislation that does not provide for refusal in some of these circumstances or provide for refusal in all these circumstances;

¹⁷⁴ The *co-Rapporteurs* note that the text does not require the “six months” to be consecutive and invite consideration of this point.

¹⁷⁵ Art. 9 of the 2005 Choice of Court Convention.

(ii) require recognition and enforcement in some of these circumstances, or (iii) specify additional criteria that are relevant to the exercise of the discretion.

Sub-paragraph (a)

276. **Introduction.** The first defence to recognition or enforcement refers to the manner in which the defendant¹⁷⁶ was notified of the claim brought in the State of origin (sub-para. (a)). Essentially, it provides that a lack of proper notification to the defendant will justify non-recognition or enforcement.

277. **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.¹⁷⁷ Moreover, the document must contain the “essential elements of the claim” to allow the defendant to make a reasonable decision on a procedural strategy.

278. The sub-paragraph (a) provides two circumstances in which the notification process may justify a refusal to recognise and enforce a judgment. The first is concerned with the interests of the defendant and the second with the interests of the requested State when notification occurred in the requested State.¹⁷⁸

279. **Protection of the defendant.** Under sub-paragraph (a)(i), the issue is whether the defendant was made aware 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.¹⁷⁹ The test for appropriate notification is factual rather than technical.¹⁸⁰ Whether a defendant can rely on sub-paragraph (a)(i) 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. If the 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.¹⁸¹ This condition ensures that notification is contested at the first opportunity and before the court best capable of addressing any deficiencies in notification, such as by granting an adjournment. Where the law in the State of origin does not permit objections to notification, the condition does not apply.

280. **Service by public notice.** In principle, whether the document instituting proceedings was duly served on a defendant must be determined in the light of the provisions of the draft Convention. Sub-paragraph (a)(i) does not require personal service on the defendant and other methods of service may suffice. For example, a notification on certain persons other than the defendant, *e.g.*, an employee of the defendant, or even by public notice. As to the adequacy of public notice, some courts have

¹⁷⁶ See the definition of defendant in Art. 3(1)(a) of the draft Convention.

¹⁷⁷ This recognises the variety of means by which procedural law determines how claims are started.

¹⁷⁸ Hartley/Dogauchi Report, para. 185.

¹⁷⁹ 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).

¹⁸⁰ Hartley/Dogauchi Report, para. 186, esp. note 225.

¹⁸¹ This recalls the jurisdictional basis of submission under Art. 5(1)(f). The different expressions used (“argued on the merits” and “entered an appearance and presented his case”) indicate that the possible actions by the defendant under Art. 7(1)(a)(ii) are conceived more broadly. An appearance coupled with an objection to jurisdiction, for example, will suffice to exclude an objection based on insufficient notification, even though the defendant is not considered to have argued on the merits.

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.¹⁸²

281. Protection of the requested State. Under sub-paragraph (a)(ii), the issue is whether the defendant was notified in a manner that is incompatible with fundamental principles of the requested State concerning service of documents. 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.¹⁸³ Nor does it allow the requested State to assess notification in the requested State according merely to the general law of that State, *i.e.*, the *lex fori*. Sub-paragraph (a)(ii) restricts the reference to the “*fundamental principles [...] concerning service of documents*” in the requested State.¹⁸⁴

282. Rationale. Many States do not object to service of a foreign document instituting proceedings on their territory without participation of their authorities, and would recognise such service as effective.¹⁸⁵ Other States consider service of documents instituting proceedings a sovereign act and unauthorised service of foreign documents an infringement their sovereignty and ineffective service unless permission has been given through a multilateral agreement.¹⁸⁶ Sub-paragraph (a)(ii) takes account of this latter point of view by providing that the court addressed may refuse recognition or enforcement 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.

283. The draft Convention does not define “fundamental principles concerning service of documents”. The reference in sub-paragraph (a)(ii) to the principles *of that requested State*, suggests that no uniform or autonomous meaning is required (nevertheless, interpretation must always take into account the call for uniform interpretation in Art. 21). 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.¹⁸⁷ While the language in the two instruments is different, the objective – to ensure the protection of fundamental principles of the requested State with regard to notification of foreign proceedings in that State – is equivalent.

¹⁸² ECJ, judgment of the 15 March 2012, *G v. Cornelius de Visser*, C-292/10, EU:C:2012:142.

¹⁸³ 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.

¹⁸⁴ 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).

¹⁸⁵ Hartley/Dogauchi Report, para. 187.

¹⁸⁶ The *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (hereinafter, “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.

¹⁸⁷ 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.

Sub-paragraph (b)

284. **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), others treat fraud as a self-standing defence to recognition and enforcement.¹⁸⁸

285. The equivalent provision in the 2005 Choice of Court Convention specifies that it applies to fraud “in matters related to procedure”.¹⁸⁹ 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”.¹⁹⁰ 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”.¹⁹¹ These examples relate to the fundamental principles of procedural fairness, including the right to be heard by an impartial and independent tribunal.¹⁹² They concern fraud perpetrated by one party to the proceedings to the detriment of the other party.

286. The draft Convention does not include the limitation to fraud “in matters related to procedure”. There was general consensus that substantive fraud should also justify a refusal to enforce. Moreover, many national laws and bilateral agreements do not qualify or restrict the use of fraud as a defence to enforcement. The situation under the 2005 Choice of Court Convention can be distinguished on the ground that it is limited to parties who have chosen the rendering court whereas the draft Convention is much broader in scope, and judgment debtors should be afforded defences commensurate with that scope.

287. 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).¹⁹³

Sub-paragraph (c) – public policy

288. **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

¹⁸⁸ 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.

¹⁸⁹ Art. 9(d) of the 2005 Choice of Court Convention.

¹⁹⁰ Hartley/Dogauchi Report, note 228.

¹⁹¹ *Ibid.*, para. 188.

¹⁹² 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)).

¹⁹³ Hartley/Dogauchi Report, note 228, states that “[f]raud as to the substance could fall under the public policy exception in Art. 9(e)”.

Conventions for decades¹⁹⁴ and is found in the 1958 New York Convention. The text in the draft Convention replicates the formulation used in the 2005 Choice of Court Convention.¹⁹⁵

289. **Manifestly incompatible with public policy.** The public policy defence is a final safeguard against recognition or enforcement of a foreign judgment that is considered to be “manifestly incompatible with the public policy of the requested State”. 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”.¹⁹⁶ 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”.¹⁹⁷

290. “Manifestly” is a high threshold, intended to ensure judgments of States are recognised and enforced by other States unless there is a compelling public policy reason not to do so in a particular case. 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 recognition and enforcement would lead to an “intolerable result”.¹⁹⁸

291. **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 Report¹⁹⁹ 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.²⁰⁰ 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

¹⁹⁴ 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 1996 *Child Protection Convention*, at Arts 22 and 23; the 2000 *Protection of Adults Convention*, 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.

¹⁹⁵ Art. 9(e) of the 2005 *Choice of Court Convention*. See also Hartley/Dogauchi Report, paras 189-190.

¹⁹⁶ See *Sheriff Court of Lothian and Borders at Selkirk*, 2012 S.L.T. (Sh Ct) 189, [with regard to Art. 22 of the 2000 *Protection of Adults Convention*], “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.”

¹⁹⁷ 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.

¹⁹⁸ 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.

¹⁹⁹ Hartley/Dogauchi Report, para. 190.

²⁰⁰ 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.

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.²⁰¹

292. **Content of public policy.** 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 above, 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.

293. 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.

294. 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 described in the previous paragraphs, it remains up to each State to define the public policy defence. The provision refers to infringements of sovereignty or security of the state as a situation in which recognition and enforcement may be manifestly incompatible with public policy. Despite this addition, the scope of this provision is no different from the scope of the equivalent provision in the 2005 Choice of Court Convention. The addition simply reflects the greater potential for issues involving infringements of security or sovereignty of the State to arise in the context of this draft Convention than under the 2005 Choice of Court Convention.

295. **Damages.** The draft Convention 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 Article 10 addresses punitive or exemplary damages, however, the public policy defence in sub-paragraph (c) should not be used to address challenges to the recognition or enforcement of judgments on that basis.²⁰² This further narrows the scope of the public policy defence under the draft Convention.

296. 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.²⁰³ Examples where it has succeeded include: where the foreign court enforced a contract to commit an illegal act (smuggling),²⁰⁴ where the foreign judgment impinged on

²⁰¹ See, for example, Hartley/Dogauchi Report, para. 153, on the exclusion of procedural fraud from the public policy defence in some States.

²⁰² 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.

²⁰³ 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.

²⁰⁴ See *Soleimany v. Soleimany (id.)*. 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.

constitutionally guaranteed fundamental rights (freedom of speech),²⁰⁵ and where the foreign judgment enforced a gambling debt.²⁰⁶

Sub-paragraph (d)

297. 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 uphold 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).

298. **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.²⁰⁷

299. This sub-paragraph applies wherever the choice of court agreement validly excluded the jurisdiction of the court of origin, irrespective of whether the agreement is exclusive or non-exclusive. 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.

Sub-paragraphs (e) and (f)

300. **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 brought 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 exist, 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.

²⁰⁵ 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).

²⁰⁶ 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.

²⁰⁷ 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.

301. 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. There are two conditions: the judgments must be “inconsistent” and the judgment from the requested State must be “in a dispute between the same parties”.²⁰⁸ It does not need to have been rendered prior to the competing judgment, nor does it need to be based on the same cause of action. Sub-paragraph (e) is therefore wider than sub-paragraph (f) and paragraph 2 of Article 7 because it does not require that the two judgments involve the same subject matter.²⁰⁹ 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.

302. Inconsistency with a judgment given in another State. In the second case, sub-paragraph (f) applies where the conflicting judgments are both from foreign States, which may be a Contracting or a non-Contracting State. It specifies that a judgment from the State of origin can be refused recognition or enforcement where it is inconsistent with an earlier judgment given in another State. Three further conditions must be met for sub-paragraph (f) to apply. First, the judgment from the third State must have been given *prior to* the judgment from the State of origin, irrespective of which court was first seised. The first-in-time judgment has priority. Secondly, both judgments must concern the same parties and the same subject matter. This is narrower than the condition under sub-paragraph (e) but parallel to the *lis pendens* ground formulated in paragraph 2.²¹⁰ 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”. That standard was considered too demanding in an international instrument given the variety of causes of action in different States. The key element is that the “central or essential issue” (*Kernpunkt*) must be the same in both judgments. Thirdly, the earlier judgment must be eligible for recognition or enforcement in the requested State, whether or not that recognition or enforcement has been sought yet.²¹¹

[Sub-paragraph (g)]

303. [Examination of the law applied by the court of origin in intellectual property matters.] Sub-paragraph (g) provides that 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. Article 4(1) and (2) establish that judgments

²⁰⁸ 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. 79).

²⁰⁹ In the context of the Brussels I Regulation, this difference has been illustrated in the Judgment of the 4 February 1988, *Hoffmann v. Krieg*, C-145/86, EU:C:1988:61, where the ECJ 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.

²¹⁰ See the 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.”

²¹¹ Obviously, if the earlier judgment comes from a non-Contracting State of the draft Convention, this provision is still relevant as long as the judgment is eligible for recognition or enforcement under the national law of the requested State.

shall be recognised and enforced without a review of the merits (unless such review is necessary for the application of the draft Convention). This 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. Unlike other paragraphs of Article 7, sub-paragraph (g) 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].

304. **Rationale.** This ground for refusal of recognition safeguards the territoriality principle, and in particular the application of the *lex loci protectionis* by the courts of the State of origin (see *supra* paras 235-236). However, it is questionable whether Article 7(1)(g) is necessary because only intellectual property related judgments given by the Contracting State underwhose law the intellectual property right is protected may circulate under the draft Convention. No consensus has been reached on this issue yet.

305. This provision only applies to judgments on the infringement of intellectual property rights. The square brackets around “right / infringement” reflect the need for further consideration. In some jurisdictions, different choice of law rules apply to the separate legal issues of ownership and infringement in cases of copyright infringement. Under the law of most States, the *lex loci protectionis* is the choice of law rule for such cases. Some States, however, apply the *lex originis* (the law of the State of origin, *i.e.*, the law of the State where the work was first published) to the question of initial ownership. Different choice of law rules may lead to the application of different national laws. The choice between “right” or “infringement” determines the law applicable to the initial ownership of the copyright. Thus, if the court of origin applied the *lex loci protectionis* to both the initial ownership and the infringement, *i.e.*, its own law, the judgment could circulate under the draft Convention regardless of which term is chosen. Conversely, if the term “right” is chosen in Article 7(1)(g), and the court of origin applied the *lex originis* to the initial ownership issue, for example the law of the State where the book was first published, which is not its own law, the recognition and enforcement of the judgment could be refused under that provision, even if the infringement issue was decided by the *lex loci protectionis*. If, however, “infringement” is chosen here, no matter which law was applied to the initial ownership issue, the judgment could circulate under the draft Convention if the infringement was adjudicated according to the law of the State of origin.

306. **Example 1.** 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.

307. **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. The court of origin applies to such infringement its own law, but to the initial ownership issue it applies the law of State Y. In this case, if sub-paragraph (g) retains the term “right” instead of “infringement”, Contracting States may refuse recognition or enforcement of that judgment.]

308. **Internal law.** Article 7(1)(g) uses the term “internal law” of the State of origin in order to clarify that the law applied to the intellectual property right infringement should be the substantive law of the State of origin. Application of the choice of law rules of the State of origin would allow for the refusal of recognition and enforcement if these rules refer to the substantive law of another State.

Paragraph 2

309. **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), discussed above, deal 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.²¹² *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.

310. **First condition.** According to paragraph 2(a), the court of the requested State must have been the court first seised. This ground for refusal may therefore only be invoked if the proceedings in the requested State commenced before the proceedings in the State of origin. The rationale is that the requested State should be allowed to proceed on the basis that the court of origin should have yielded to the priority of the court first seised and 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. 35).

311. **Second condition.** Mere priority is, however, not sufficient. According to paragraph 2(b), there must also be a close connection between the dispute and the requested State. This condition is to prevent strategic or opportunistic behaviour. For example, without the condition, a potential defendant in one State could move to another State and sue 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 ground. 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 non-contractual disputes. Conversely, the mere nationality of the claimant or his or her domicile in the requested State would not be sufficient.²¹³

312. **Consequences.** If those three conditions are met, recognition and enforcement of the judgment may be postponed or refused. Paragraph 2 clarifies that a refusal under this paragraph does not prevent a subsequent application for recognition and enforcement. This provision addresses situations where 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

313. **Introduction.** Article 8 deals with matters ruled as preliminary or “incidental” questions. Preliminary questions are legal issues that must be addressed before the plaintiff’s claim can be decided but are not the main object or principal issue of the proceedings.²¹⁴ Thus, conceptually, Article 8 recognises that legal issues within a judgment may be separate from one another but considered sequentially (*i.e.*, that a decision on the principal issue is predicated on a decision on another, preliminary issue). Thus, for example, in an action for damages for breach of an intellectual property licensing contract (main object), the court might first have to rule on whether the intellectual property right is valid (preliminary question); or in an action for damages for breach of a sale contract (main object), the court might first have to decide on the capacity of a party to enter into such a

²¹² The 1999 preliminary draft Convention contained a parallel provision (see Art. 28(1)(a)).

²¹³ 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.

²¹⁴ “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.

contract (preliminary question). These preliminary questions are usually, but not always, introduced by the defendant by way of defence.

314. Under Article 2(2), judgments including preliminary rulings on excluded matters are not, for that reason alone, excluded from the scope of the draft Convention (see paras 63-65). Article 8 deals with recognition and enforcement of judgments that rule on preliminary questions dealing with excluded matters. Article 8 also addresses judgments that rule on a preliminary matter addressed by Article 6 (exclusive bases of jurisdiction) where the court of origin is not the court referred to in that Article, *e.g.*, the State of origin is different from the State in which the intellectual property right is registered.²¹⁵

315. **Structure of Article 8.** This provision contains three rules dealing with rulings on preliminary questions. Paragraph 1 excludes rulings on certain preliminary questions from recognition and enforcement under the draft Convention. Paragraph 2 allows the requested court to refuse to recognise or enforce judgments that are based on rulings on certain preliminary questions. Finally, paragraph 3 qualifies the application of paragraph 2 to judgments ruling on the validity of a registered intellectual property right as a preliminary question.

Paragraph 1

316. **Introduction.** Paragraph 1 provides that 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 the preliminary question is not recognised or enforced. States are not precluded from recognising and enforcing those rulings under national law.²¹⁶

317. The general principle is that the application 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 or 6 if it meets any of the jurisdictional filters laid down in that provision as regards the *main object* of the proceedings. If the court of origin has also ruled on a preliminary question, that ruling may have effects in future proceedings according to the law of that State. For example, under the doctrine of issue estoppel, collateral estoppel or issue preclusion, rulings on preliminary questions must be recognised in future proceedings.²¹⁷ The purpose of paragraph 1 is to clarify that the recognition of these effects is not provided for under the draft Convention.²¹⁸

318. **Matters excluded from the scope of the draft Convention.** Paragraph 1 refers to those rulings on matters to which the draft Convention “does not apply”. This covers matters that do not qualify as

²¹⁵ The *co-Rapporteurs* note 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. 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.

²¹⁶ The *co-Rapporteurs* wish to note that whether or not the prohibition under Art. 16 would extend to the rulings on preliminary matters under Art. 6 requires consideration by the Diplomatic Session.

²¹⁷ See Hartley/Dogauchi Report, paras 195-196.

²¹⁸ 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. 257) 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).

civil or commercial under Article 1(1), matters expressly excluded under Article 2, and also matters excluded by a declaration made by the requested State under Article 19. Rulings on matters to which the draft Convention does not apply should not benefit from its application, whether they arise as preliminary questions or as principal issues.

319. **Examples.** 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 because such a matter is beyond scope of the draft Convention under Article 2(1)(a). Or, 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 because such a matter is beyond scope of the draft Convention under Article 2(1)(i). However, the judgment on the main object would benefit from recognition and enforcement under the draft Convention, subject to paragraph 2 which is discussed below. Thus, for example, suppose a judgment ruled that a party is entitled to receive compensation for breach of contract. The judgment contained a ruling, as a preliminary issue, on the legal capacity of a natural person to enter into that same contract. The judgment's ruling on its main object, the order for damages, could be recognised and enforced under the draft Convention (again, subject to Art. 8(2)), but not the decision on the preliminary question of capacity. It follows, therefore, that this judgment may not prevent commencement of proceedings in the requested State concerning the legal capacity of the natural person (or, in the second example, the validity of a decision of the shareholders meeting). It would be for the law of the requested State to solve the possible conflict of judgments in such a case. It may be that the effects of the foreign judgment are revised when a new judgment on the "preliminary question" is given in the requested State but this time as main object.

320. **Matters falling under Article 6.** Paragraph 1 refers to preliminary rulings on matters mentioned in Article 6 from a court other than the court referred to in that Article. 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 because courts of the State where immovable property is located have exclusive jurisdiction to rule on ownership (Art. 6(b), see *supra* paras 264-267). The judgment from State X may not prevent new proceedings in State Y to rule on the right *in rem* over the immovable property, as explained in the preceding paragraph referring to proceedings in the requested State about the legal capacity of a natural person or the validity of the decision of the shareholders meeting. Or, if a judgment for damages 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. The court of the requested State is required to recognise and enforce the main decision, *i.e.*, the ruling on damages (unless para. 2 applies), in accordance with the draft Convention, but not the ruling on the preliminary question. Again, as explained in this and the preceding paragraphs, this implies that the draft Convention does not prevent 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

321. **Judgments based on preliminary questions.** Paragraph 2 allows a court to refuse recognition or enforcement of a judgment if it is based on rulings on preliminary questions on the same matters dealt with by paragraph 1. 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), or a judgment awarding damages for breach

of 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).

322. 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. The question is whether a different ruling on the preliminary question would have led to a different judgment on the main object of the proceedings. 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.²¹⁹ For example, if the court of origin declares the nullity of a contract because of the absence of legal capacity and the existence of fraud, the ruling of legal capacity is not necessary to the judgment since fraud would have been sufficient on its own to nullify the contract. The Hartley/Dogauchi Report clarifies that this exception should be used only where the court of the requested State would have decided the preliminary question in a different way,²²⁰ and therefore the decision on the main object would also have been different.²²¹

[Paragraph 3]

323. [Paragraph 3 qualifies the application of paragraph 2 to intellectual property rights. Under 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.

324. **Sub-paragraphs.** Article 8(3) contains two sub-paragraphs. Sub-paragraph (a), provides that 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.²²² This may be a Contracting State or a non-Contracting State as the draft Convention also protects the exclusive jurisdiction of non-Contracting States in this area. Sub-paragraph (a) 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 relevant 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.²²³

325. Sub-paragraph (b) allows recognition or enforcement of the judgment to 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 allows the court of the requested State to either refuse recognition or enforcement,²²⁴ 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. Recognition or enforcement of the judgment may not be refused under sub-paragraph (b) if the courts or authorities of the State of registration hold the patent valid. If those courts or authorities hold the patent invalid, recognition or enforcement may be refused.

²¹⁹ Hartley/Dogauchi Report, para. 200.

²²⁰ *Ibid.*, para. 197.

²²¹ The *co-Rapporteurs* wish to note that given that this is a substantive requirement, it may be preferable for it to be explicitly mentioned in the text.

²²² In this first case, there is no reason to postpone the decision on recognition or enforcement.

²²³ Note that Art. 7(1)(f) may partially overlap with this provision.

²²⁴ 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.

326. Paragraph 3 restricts the scope of application of paragraph 2 and therefore limits 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 of the intellectual property right are pending in that State. Conversely, if the defendant whose defence was disregarded in the original proceedings did not even attempt to have the intellectual property right declared invalid in the “proper forum”, *i.e.*, the State of registration, he or she will be bound to the judgment and exposed to its recognition and enforcement under the draft Convention.

327. **Application in practice.** The application of this provision will, in practice, be limited to judgments on contractual disputes (licensing agreements) because the draft Convention has established a *quasi* exclusive base for jurisdiction on *infringements* of registered intellectual property rights (see *supra* paras 239-247). 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, cannot exist in such cases. Conversely, Article 5(1) does apply to judgments on license contracts (see *supra* paras 189-196) and in these cases Article 8(3) may become relevant.

328. **Example 1.** Imagine a judgment given in State X, where the defendant is habitually resident, which orders the defendant to pay royalties under a patent-licensing agreement. The judgment also ruled on the validity of a patent granted in State Y as a preliminary question. 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 ruling on this preliminary question of validity would not be recognised under the draft Convention, pursuant to Article 8(1). But the court of the requested State has to recognise and enforce the main decision, *i.e.*, the order for the defendant to pay the royalties.

329. If, however, the defendant 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, the courts of the requested State (may not be State Y) may refuse to recognise or enforce the judgment awarding damages given in State X in accordance with Article 8(3).²²⁵

330. **Judgment on infringement.** This provision is not relevant to judgments regarding the infringement of a registered intellectual property right where the invalidity of the right was raised as a defence. As discussed above, Article 8(3) applies to cases where the State of origin of the judgment is different from the State of registration of the intellectual property right. However, the draft Convention establishes a *quasi* exclusive basis for the recognition and enforcement of judgments on *infringements* of registered intellectual property rights (Art. 5(3)(a)), requiring the State of origin to be the State in which the right concerned is registered. This jurisdictional basis coincides with the exclusive jurisdictional filter laid down in Article 6(a). Accordingly, only the courts of States of registration / States of origin will rule on infringements of registered intellectual property rights and these courts will resolve the invalidity defence when determining the infringement. As a consequence, Article 8(3) will not be relevant because the court of the State of origin and State of registration are one and the same.]

Article 9 – Severability

331. 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.²²⁶ Examples would include situations where parts of the judgment would not be

²²⁵ 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.

²²⁶ This Article replicates Art. 15 of the 2005 Choice of Court Convention. See also Hartley/Dogauchi Report, para. 217.

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 is a judgment on several contractual obligations where the jurisdictional criterion of Article 5(1)(g) is only satisfied in relation to one of them.²²⁷

332. In order to be severable, a part of a judgment 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. If severability raises issues of law, they will have to be determined according to the law of the requested State.²²⁸

Article 10 – Damages

333. Article 10 allows a court 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. The compensatory portion of the judgment remains enforceable if it is severable.

334. “Exemplary” and “punitive” damages 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, their primary objective is to repair the actual loss suffered. 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 caused harm.

335. The text of Article 10 replicates the equivalent provision in the 2005 Choice of Court Convention.²²⁹ 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:²³⁰

“(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.

²²⁷ This example assumes that there is no other jurisdictional basis available under Art. 5(1).

²²⁸ Nygh/Pocar Report, para. 374.

²²⁹ Also Art. 11 of the 2005 Choice of Court Convention.

²³⁰ 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 Article 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.

(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 addressed 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."

336. This statement is equally applicable to the draft Convention.

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

337. **[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 [recognition and] enforcement under the draft Convention. The provision applies to both registered and unregistered intellectual property rights. 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. 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. 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.

338. **Non-monetary judgments.** Article 11 excludes judgments granting 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. For intellectual property rights these remedies include, for example, injunctions prohibiting the production or marketing of goods, the use of protected manufacturing processes, or orders to surrender and deliver infringing goods.²³¹

339. **Rationale.** Monetary and non-monetary judgments can involve different forms of enforcement. In some legal systems, personal undertakings are enforced by a penalty payment or other sanctions for contempt, *i.e.*, measures to encourage the defendant to behave consistently with the order (see *supra* para. 83). Non-personal undertakings may also be enforced by an award of damages for the expense of obtaining performance from someone other than the defendant. Common law States in particular have traditionally considered foreign non-monetary judgments unenforceable, although there is a clear trend to depart from this approach.²³² The foundations for this approach are both historical and practical. Difficulties can arise in interpreting the duties imposed by, and territorial scope of, foreign non-monetary orders, or where equivalent non-monetary remedies do not exist in the requested State.

340. **Intellectual property rights.** Article 11 only excludes non-monetary judgments on an infringement in intellectual property matters. This provision includes an additional limitation to the recognition and enforcement of a monetary judgment: the judgment must be “in relation to harm suffered in the State of origin”. This condition may be unnecessary because of the jurisdictional filters established by Article 5(3)(a) and (b) (see *supra* paras 239-255). Its only purpose is to strengthen the principle of territoriality in intellectual property matters (see *supra* para. 235). [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.²³³]

Article 12 – Judicial settlements (transactions judiciaires)

341. **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

²³¹ See, on the remedies to violations of intellectual property rights, Arts 44-48 of the TRIPS Agreement.

²³² See, for example, *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52 (Canada).

²³³ 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.

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.

342. **Judicial settlements.** The English term “judicial settlements” is used in this Article as equivalent to the French term *transaction judiciaire*. Judicial settlements, a common institution in civil law States, are an agreement concluded before, or approved by, the court in which the parties settled their dispute, usually by making mutual concessions.²³⁴ 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.²³⁵ 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. Consent orders are used in common law States for similar purposes, but constitute judgments that must be recognised and enforced under Article 4.²³⁶

343. Article 12 covers both “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 States), and “out-of-court” settlements, *i.e.*, agreements concluded by the parties outside judicial proceedings, which are subsequently approved or confirmed by a court.²³⁷ Thus, for example, settlements concluded as a result of mediation are covered by Article 12 if they are subsequently approved by a court.²³⁸ This possibility arises from the distinction drawn in the text 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.

344. **Enforcement versus recognition.** Article 12 provides for the enforcement of judicial settlements, but not their recognition.²³⁹ Therefore a judicial settlement from another State may not be invoked in the requested State as, for example, a procedural defence to a new claim.²⁴⁰ The Nygh/Pocar Report explains that in some jurisdictions, judicial settlements do not have the force of *res judicata* and therefore they cannot be recognised in another State.²⁴¹ 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”,²⁴² but “the Convention

²³⁴ See Hartley/Dogauchi Report, para. 207. The Brussels I Recast 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”.

²³⁵ Nygh/Pocar Report, para. 379, note 201, referring to the ECJ case *Solo Kleinmotoren GmbH v. E. Boch*, Judgement of the 2 June 1994, C-414/92, EU:C:1994:221.

²³⁶ Nygh/Pocar Report, para. 379; Hartley/Dogauchi Report, para. 207.

²³⁷ For a different interpretation of the equivalent provision in the 2005 Choice of Court Convention, see Hartley/Dogauchi Report, para. 207. The *co-Rapporteurs* note that the interpretation provided in this draft Explanatory Report is consistent with the language of the provision in both instruments whereas the narrower interpretation in the Hartley/Dogauchi Report is not clearly reflected in the text of the 2005 Choice of Court Convention. The interpretation proposed in the draft Explanatory Report raises a substantive point that should be considered at the Diplomatic Session.

²³⁸ This interpretation does not overlap with the 2018 UNICTRAL Convention on International Settlement Agreements Resulting from Mediation or the Model Law of the same name. Both of those instruments expressly exclude mediated settlements that are either approved by courts or concluded in the course of court proceedings.

²³⁹ This limitation to enforcement is an exception to the general principle that enforcement of a judgment presupposes that it can be recognised. (see *supra* para. 111, in relation to Art. 4(3)).

²⁴⁰ Hartley/Dogauchi Report, paras 208-209 (with an example).

²⁴¹ *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.

²⁴² *Ibid.*, para. 209.

does not preclude a court from treating the settlement as a contractual defence to the claim on the merits".²⁴³

345. The grounds for refusing enforcement of judicial settlements are the same as those applicable to judgments. But issues of jurisdiction will not arise because settlements are essentially consensual. Likewise, 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 public policy.

Article 13 – Documents to be produced

346. 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.²⁴⁴ In legal systems in which there is no special procedure for recognition (see *infra* para. 353), the party requesting recognition may have to produce those documents when he or she seeks to rely on the foreign judgment, for example by way of defence.²⁴⁵

347. Paragraph 1(a) requires production of a complete and certified copy of the judgment. A "judgment" includes, where applicable, the court reasoning and not only the final order (*dispositif*).²⁴⁶ 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. For judicial settlements, paragraph 1(d) 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* paras 342-343). This certificate may be issued by a court other than the court involved in the settlement.²⁴⁷

348. The Hartley/Dogauchi Report clarifies two issues with regard to paragraph 1. First, the law of the requested State determines the consequences of the failure to produce the required documents. Secondly, excessive formalism should be avoided. If the judgment debtor was not prejudiced, the judgment creditor should be allowed to rectify omissions.²⁴⁸

349. 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.

350. 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 on Private

²⁴³ *Id.*

²⁴⁴ 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.

²⁴⁵ 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.

²⁴⁶ Hartley/Dogauchi Report, para. 211.

²⁴⁷ The *co-Rapporteurs* would like to note that unlike para. 3, the certification mentioned in sub-para. (d) does not refer to an officer of the court. The reason for this distinction is not clear and this discrepancy should be brought to the attention of the Diplomatic Session.

²⁴⁸ Hartley/Dogauchi Report, para. 211.

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 form is not compulsory. If it is used, the court addressed may rely on information contained in the form in the absence of challenge. But even if there is no challenge, the information is not conclusive: the court addressed can decide the matter based on all the evidence before it.²⁴⁹

351. Paragraph 4 deals with the language of the documents referred to in Article 13. It provides that if the documents 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.

352. 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

353. 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 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.²⁵⁰

354. 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.²⁵¹ 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 (or competent authorities) of the requested 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.

355. **Statute of limitations.** The reference in paragraph 1 to the law of the requested State includes the statute of limitations for seeking enforcement of the foreign judgment.²⁵² Thus, even 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. 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.²⁵³

²⁴⁹ *Ibid.*, para. 213.

²⁵⁰ *Ibid.*, para. 215; Nygh/Pocar Report, para. 355.

²⁵¹ 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).

²⁵² This reference to the law of the requested State includes its private international law rules, and therefore this law may refer back to the statute of limitations of the law of the State of origin.

²⁵³ 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.

However, the reference to the law of the requested State is not a blanket reference. In accordance with Article 31(1) of the *Vienna Convention of 1969 on the Law of Treaties* (hereinafter, “Vienna Convention of 1969”), a treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. An essential element to ensure the effectiveness of the draft Convention is the principle of non-discrimination: judgments given in other States, if they are recognised and enforced, are to be treated in the same manner as domestic judgments.

356. 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.²⁵⁴ States should consider provisions to avoid unnecessary delays.²⁵⁵

357. **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 providing for applications to *refuse* recognition or enforcement. Thus, States may provide for a judgment debtor to 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.

358. **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 the draft Convention on the ground that recognition or enforcement should be sought in another State. This prevents a court refusing on the basis that, for example, there is an alternative forum where recognition or enforcement of the judgment is more appropriate and convenient.

359. Under the draft Convention, the judgment creditor may seek recognition or enforcement of the judgment in any State. Even if it entails more costs, a judgment creditor may have a legitimate interest in seeking the enforcement of a judgment in more than one State, such as in cases of worldwide injunctions, or in cases of monetary judgments against a party with assets in different States but which are each alone insufficient to satisfy the judgment.

360. In many legal systems, enforcement or declaration of enforceability (*exequatur*) does not require a basis of jurisdiction, *i.e.* a special connection between the judgment debtor and the requested State, such as the presence of the debtor’s assets in that State or that there is no more appropriate State for enforcement. 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 later, in the context of execution, that the presence of assets in the requested State may become relevant.

361. 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 or the presence of the judgment-debtor’s assets in the requested 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. Such disputes 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 the requested 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 prevents

²⁵⁴ Nygh/Pocar Report, para. 355; Hartley/Dogauchi Report, para. 216.

²⁵⁵ Hartley/Dogauchi Report, para. 216.

reliance on the doctrine of *forum non conveniens* as a ground to refuse recognition or enforcement. In paragraph 2, the term “enforcement” includes a declaration of enforceability or registration for enforcement.

Article 15 – Costs of proceedings

362. Article 15 deals with what security may be required in order to guarantee payment of the costs of proceedings, including recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment. The provision reflects a compromise. Some States supported a “no-security rule”. Others preferred to leave this question to national law. The first approach is reflected in the first and second paragraphs, while the second approach is reflected in the third paragraph by means of an opting-out mechanism.

363. **No-security rule.** The first paragraph of Article 15 mirrors 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 residence or domicile in another State.²⁵⁶ Only requirements for security based solely on that ground are prohibited. A requirement for security is therefore permissible 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 a national of another Contracting State or of a third State (or whether they have their residence / domicile in another Contracting State or in a third State).

364. The second paragraph of Article 15 is a corollary to the “no-security rule”. It protects the judgment debtor when recognition or enforcement of the judgment is refused and an order for payment of costs or expenses is issued against the judgment creditor. According to paragraph 2, such an order falls within the scope of application of the draft Convention and is enforceable in any other State. This exceptional provision is required because such a cost order would not otherwise be considered to be a judgment for the purposes of the draft Convention. Under Article 3(1)(b), only orders for payment of costs or expenses that relate to a *decision on the merits which may be recognised or enforced under the draft Convention* are entitled to enforcement under the draft Convention. A decision on recognition or enforcement of a foreign judgment is not a “decision on the merits” in the sense of Article 3(1)(b). Although the enforcement of an order for payment of costs or expenses is authorised under Article 15(2), it may be refused on the grounds contained in Article 7 of the draft Convention.²⁵⁷

365. **Declaration.** Finally, the third paragraph of this provision lays down a declaration mechanism to opt-out from the no-security rule. A Contracting State may declare that it shall not apply paragraph 1 in some or all of its courts. Thus, it is possible to exclude the application of paragraph 1 to certain courts, *e.g.*, to federal courts but not state courts.

366. Article 15 does not clarify whether and how the reciprocity principle would apply when a State makes a declaration under paragraph 3. If the origin of the judgment is taken as a reference (see Art. 19(3)), a judgment given by the courts of the State that made the declaration, or by the specific courts designated in such a declaration, shall not benefit from the no-security rule in paragraph 1. In any case, the second paragraph shall not apply to orders for payment of costs given by a court of the State that made the declaration.

²⁵⁶ Nygh/Pocar Report, para. 356.

²⁵⁷ The *co-Rapporteurs* invite consideration of the following point: Art. 15 (2) provides for circulation of a cost award where it was granted against a party who was *exempted from security by virtue of Art. 15(1)*. In Contracting States that do not impose security for costs based solely on nationality/domicile/residence, there is no exemption from security by virtue of Art. 15(1), and thus costs orders granted in those States would not circulate under Art. 15(2). This result is inconsistent with the policy against the imposition of security for costs based solely on nationality/domicile/residence underlying Art. 15(1).

Article 16 – Recognition or enforcement under national law

367. Article 16 deals with how the draft Convention relates to 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, a 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.

368. If a judgment is not eligible for recognition or enforcement under the draft Convention, the national law of the requested State determines whether a 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.²⁵⁸

369. However, Article 6 prevents national law being invoked to grant recognition or enforcement of a judgment that infringes any exclusive basis of jurisdiction in that provision.

Article 17 – Transitional provision

370. Article 17 deals with the application in time of the draft Convention. This question is different from its entry into force (see *infra* Art. 29). Since the draft Convention will only 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 to a particular judgment.

371. The draft Convention has no retroactive effects on proceedings commenced prior to its entry into force. 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. The court addressed must verify (i) the date when the proceedings were instituted in the State of origin (see *supra* para. 35); and (ii) whether at that time the Convention was in force in *both* the State of origin *and* the requested State. This solution provides legal certainty. All parties will be able to determine, from the commencement of the dispute, whether the future judgement will circulate under the draft Convention and prepare their procedural strategies accordingly.

Article 18 – Declarations limiting recognition and enforcement

372. **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 from the 2005 Choice of Court Convention (see Art. 20).

²⁵⁸ 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)).

373. **Rationale.** Article 18 deals with situations that are, from the point of view of the requested State, wholly domestic. It allows a Contracting State 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, for the purposes of recognition and enforcement, a case is always international if the judgment was given by a court in a State other than that in which recognition or enforcement is sought. Yet there could be scenarios where the internationality of the case has been engineered by the parties. Some of the jurisdictional filters 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), (l), 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. Article 18 recognises that such a case may not be a true international case, and that, on a proper analysis of the connecting elements of the dispute, the dispute ought to have been heard in the requested State. Contracting States may make a declaration to address such scenarios.

374. **Relevant time.** The relevant time to determine whether a situation is wholly domestic 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.

375. **Example.** The parties are resident in State X and all other relevant elements are connected only with that State. 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

376. **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 do so.

377. **Rationale.** 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.²⁵⁹ 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.

378. **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”; or (ii) a particular type of

²⁵⁹ See also Hartley/Dogauchi Report, para. 236.

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”.²⁶⁰

379. 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.²⁶¹ Under Article 32, any declaration made under Article 19 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.

380. The draft Convention does not require any particular form for the declarations. Thus, for example, a Contracting State may make a declaration stating that the draft Convention does not apply to matters within its exclusive jurisdiction and including a clear and precise list of such matters.²⁶²

381. **Non-retroactivity.** A declaration under Article 19 made at the time the Convention comes into force in the requested State will take effect simultaneously. But a declaration made *after* the Convention comes into force for the requested State will take effect on the first day of the month following the expiration of the six months following the date on which the notification is received by the depositary (see Art. 30(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. 30(4)). This ensures legal certainty as the parties will be able to determine, when the proceedings are instituted, whether or not the future judgment will be affected by this declaration.

382. **Reciprocity.** Paragraph 2 establishes reciprocity for declarations made under Article 19(1). With regard to the matter excluded by a declaration, the draft Convention shall not apply (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. This, however, does not prevent the recognition or enforcement of the judgment under national law (see Art. 16).

383. **Review of declarations.** Article 22 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]

384. **[Introduction.** This provision was introduced in the Third Meeting of the Special Commission,²⁶³ and it permits Contracting States to make a declaration excluding the application of the draft Convention to judgments which arose from proceedings to which such a State was a party, even where the judgment relates to civil or commercial matters.

²⁶⁰ 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, available on the Hague Conference website at < www.hcch.net > under “Choice of Court Section” then “Status table”).

²⁶¹ 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.

²⁶² 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. 23.

²⁶³ *Ibid.*, paras 29-31; Work. Doc. No 179, “Proposal of the delegation of the Russian Federation”, and Work. Doc. No 186, “Proposal of the delegations of Israel and the United States of America” (Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017)).

385. **Rationale.** The draft Convention does not exclude judgments from its scope merely because a State was a party to the proceedings (Art. 2(4)). Several delegations were reluctant to include judgments involving State parties within the scope of the draft Convention. While the draft Convention expressly applies only to civil or commercial matters (Art. 1(1)), some delegations remain concerned that this limitation could be challenging to apply with regard to a State party, in particular with respect to whether a State party was exercising sovereign powers. A further concern was that the preservation of immunities in Article 2(5) is insufficient to protect State interests. Article 20 responds to these concerns by allowing Contracting States to make a declaration excluding the application of the draft Convention to judgments which arose from proceedings to which such a State was a party.

386. **Scope – Parties.** Paragraph 1 identifies the parties who can be included in the declaration. According to paragraph 1(a) and (b), these include the State itself, a government agency of that State, or a person acting on behalf of either.²⁶⁴ The reference to a person includes a natural or a legal person. In all cases, paragraph 1 identifies parties who have the authority to exercise sovereign power, whether directly or in a delegated manner, generally or in a specific field. For example, an entity charged with the enforcement of competition or consumer law would fall within paragraph 1, regardless of whether it is integrated within the government structure or established as an autonomous and independent entity. In essence, an Article 20 declaration can only be made in relation to a party whose functions are of a public nature even though it may also engage in commercial activities. The definitions are broad to capture the diversity of government structures and procedural definitions of juridical personality or capacity among the Contracting States. But the last sentence of paragraph 1 requires that the declaration be no broader than necessary and that the exclusion from scope be clearly and precisely defined. As a result, a State making a declaration under Article 20 should identify which governmental agencies are covered by its declaration, and if relevant, which persons acting on their behalf are included, or the circumstances under which they would be included.

387. **Scope – Enterprise owned by a State.** Paragraph 2 specifies that the declaration under Article 20 shall not extend to judgments arising from proceedings to which an enterprise owned by a State is a party. An entity primarily engaged in commercial activities will not fall within the parties described in paragraph 1 merely because it is wholly or partly owned by a State.

388. But an enterprise owned by the State that also performs some distinct public functions may fall within paragraph 1 in relation to those functions.²⁶⁵ A declaration under Article 20 could thus target an enterprise owned by a State but only with respect to its distinct public functions. The declaration should be very specific and precise in such cases.

389. **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 than necessary (see *supra* para. 378) and that the exclusion from scope is clearly and precisely defined (see *supra* para. 379). For example, the declaration may refer to any proceedings, in civil or commercial matters or to only certain categories of proceedings. The declaration may be limited to certain subject matters and additional criteria may be specified to narrow down its scope, *e.g.*, certain government agencies, a particular link of the subject matter with the requested State or certain types of remedies (see *supra* para. 378). In any event, the exclusion from scope applies whether the State is the judgment creditor or the

²⁶⁴ These descriptions are consistent with the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (not in force).

²⁶⁵ The *co-Rapporteurs* note that it is difficult to reconcile the text of Art. 20 with this interpretation. Indeed, Art. 20 refers to “parties” and not to functions or activities. However, this interpretation follows from the May 2018 Special Commission meeting, that a “common understanding that the declaration would extend to a State-owned enterprise in respect of any public functions it carried out, even if it mainly carried out commercial activities and only conducted some activities on behalf of the State” (see para. 32 of Minutes No 2 of the Fourth Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018)).

judgment debtor. Furthermore, the application of Article 20 is not temporally limited to cases where the State (as defined) was a party to the proceeding when they were instituted in the State of origin.

390. **Non-retroactivity.** As in Article 19, a declaration made *after* the Convention enters into force for the State making it will take effect on the first day of the month following the expiration of six months following the date on which the notification is received by the depositary (see *infra* Art. 30(4)). Such a declaration shall not apply to judgments resulting from proceedings that have already been instituted against the State party, or to which the State party has already been added, before the court of origin when the declaration takes effect (see *infra* Art. 30(4)).

391. **Reciprocity.** Also, as in Article 19, paragraph 3 establishes reciprocity for declarations made under Article 20(1). When a declaration is made under Article 20, the draft 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).²⁶⁶

392. **Review of declarations.** Article 22 envisages that the operation of declarations under Article 20 may be considered from time to time.]

Article 21 – Uniform interpretation

393. Article 21 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 provision requires courts applying the draft Convention to interpret it in an international spirit to promote uniformity of application. Where reasonably possible, foreign decisions and writings should be taken into account. It should also be kept in mind that concepts and principles that are 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.²⁶⁷

394. This Article has to be read jointly with Article 22 below (Review of operation of the Convention) because both Articles have the objective of a proper and uniform application of the draft Convention.

Article 22 – Review of operation of the Convention

395. Article 22 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 Articles [4], 15, 18, 19[, 20, 24], 26 and 28 and to consider whether each of them was still required.

²⁶⁶ 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.

²⁶⁷ This clause is also present in the *Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* (Art. 13) and the 2007 Child Support Convention (Art. 53).

Article 23 – Non-unified legal systems

396. Article 23 is concerned with potential difficulties that result from the fact that some States are composed of two or more territorial units, each with its own judicial or legal system. This may refer to States where individual territorial units have separate courts and civil procedure (non-unified judicial system) or distinct substantive law rules (non-unified legal system) such that the references to “courts of State X” or the “law of State X” are either meaningless or insufficiently precise. Some States may exhibit both of these “non-unified” characteristics.

397. This 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. In these cases, the question may arise whether references to a State in the draft Convention is to the State as a whole (“State” in the international sense) or whether it is to a particular territorial unit within that State.

398. **Interpretive rule.** Article 23(1) provides 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 23(1) serves as an interpretive guide to 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.

399. The words “where appropriate” in the four paragraphs of Article 23(1) do not indicate that any discretion on the issue is accorded to the court in the requested State. Rather it refers to the fact that the reference to the territorial unit rather than to the Contracting State will only occur where such a reference is appropriate because of the non-unified characteristic of the Contracting State that is relevant in the particular circumstances.

400. The interpretive rule in Article 23(1) will be mostly relevant in the application of the jurisdictional filters in Articles 5 and 6 but is not limited to those provisions. The use of the words “where appropriate” ensures that reliance on the interpretive rule is restricted to those situations where the non-unified characteristic of the State is relevant.

401. **Example of habitual residence or branch.** 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 23, 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 23(1)(b). The same result would follow in relation to Article 5(1)(d) that refers to the location of a branch in the State of origin. For example, where enforcement of a judgment from California is sought, it will not be sufficient to show that the judgment debtor was habitually resident, or that its branch was located, somewhere in the United States (the Contracting State); only residence or a branch in California (the appropriate territorial unit given its distinct judicial system)²⁶⁸ would qualify under Article 5(1)(a) or (d).

402. **Example of place of performance.** 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, as indicated in Article 23(1)(d). For example, where enforcement of a judgment from

²⁶⁸ Admittedly this would only be strictly correct if the judgment came from a California state court. The United States has separate judicial systems for state and federal courts. Judgments in civil and commercial matters can arise from either but are more likely to arise from federal courts in international cases. Still, even before the federal courts, jurisdictional connections will refer to contacts with the particular state within which the federal court is sitting.

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 appropriate territorial unit given its distinct legal system within Canada),²⁶⁹ and not in some other territorial unit within Canada (the Contracting State).

403. **Example of implied consent.** An example involving Article 23(1)(a) is provided by the jurisdictional filter concerning implied consent (Art. 5(1)(f)) which refers to contesting jurisdiction within the timeframe provided by the law of the State or origin. Here again, if civil procedure is non-unified in a Contracting State, it would be appropriate to refer to the procedural law of the territorial unit since only that law could determine whether the jurisdictional filter was satisfied.

404. **Example of situation of an immovable.** Similarly, for judgments dealing with rights *in rem*, in a State with a non-unified legal system across its territorial units in relation to such rights, it would be appropriate to interpret the reference to the situation of the immovable property in the State of origin in Article 6(b) as a reference to the relevant territorial unit where the immovable was located.

405. **Example under Article 7 – parallel proceedings.** Under Article 7(2), recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State. The interpretive rule in Article 23(1)(c) justifies a restrictive reading of this provision by limiting its application to parallel proceedings before a court of the territorial unit, if this is the appropriate consequence of the non-unified judicial system of the Contracting State. Without Article 23(1)(c), it might be open to the court of a territorial unit to refuse to enforce a judgment because of parallel proceedings before the courts of a different territorial unit within the Contracting State, even though this would not normally be an option available within its domestic law. This in turn reinforces the general principle of the draft Convention that foreign judgments be treated in the same manner as domestic judgments when the relevant criteria for recognition and enforcement are met.

406. **Recognition between territorial units.** Article 23(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.

407. This is consistent with Article 2 of the draft Convention that defines the scope of the draft Convention in terms of recognition and enforcement 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.

408. **Recognition across territorial units.** Article 23(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 or enforced in Ontario, Canada. This is a natural consequence of the scope of the draft Convention, as defined in Article 1(2), but it is explicitly addressed in Article 23(3) to avoid confusion.

409. **Regional Economic Integration Organisation.** Finally, Article 23(4) indicates that these special rules applying to non-unified legal systems do not apply to a REIO, which is instead governed by its own rules in Articles 27 and 28 (see below).

²⁶⁹ There is no uniform federal substantive law in Canada on most civil and commercial matters; for example, there is no Canadian law of contract, but only contract law for each individual territorial unit (province), which can, and do, differ. Canada is also mostly non-unified in terms of its judicial system.

Article 24 – Relationship with other international instruments²⁷⁰

410. **Introduction.** The relationship between the draft Convention and other international instruments is one of the most difficult questions dealt with in the draft Convention.²⁷¹ 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 of 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 24 of this draft Convention specifies four cases (paras 2 to 5 of Art. 24) in which another treaty or international instrument will prevail over it, including the particular question of conflicts between the draft Convention and the rules of a REIO that is a Party to the draft Convention. The draft includes square bracketed text that reflects different options that have been discussed for addressing these issues.

411. The problem of conflicting instruments arises only if two conditions are fulfilled. First, 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 24(1) reflects this approach.

412. The second condition is that the State of the court addressed 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 24 is, therefore, addressed to States that are Parties to both the draft Convention and to another legally binding international instrument that conflicts with it.

413. **Vienna Convention on the Law of Treaties.** Articles 30 and 41 of the Vienna Convention of 1969 codify the rules of public international law with regard to treaties relating to the same subject matter.²⁷² The rules in Article 24 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 24, therefore, is to provide that, in the cases specified, the draft Convention will give way to the other instrument, insofar 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.

414. **Interpretation.** The first paragraph of Article 24 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 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.

²⁷⁰ In other Hague Conventions, provisions of this type refer to “international instruments” or “treaties”, or use both expressions. See for *e.g.*, 2005 Choice of Court Convention (Art. 26), 2007 Child Support Convention (Art. 51), 2000 Protection of Adults Convention (Art. 49). In all cases, the reference is intended to refer to agreements that are legally binding under international law. (The *co-Rapporteurs* wish to draw attention that this is not consistent in the draft Convention, as para. 1 does not mention the term “other international instruments”).

²⁷¹ 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 of 1969 (at paras 36 *et seq.*)

²⁷² 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.

415. **Compatibility with *earlier* instruments.** Where two instruments are not compatible in their application to a concrete situation, Article 24(2) allows for the *earlier* instrument to prevail. Article 24(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 yet in force, no possible incompatibility may arise. This specificity in Article 24(2) avoids any uncertainty in the timing element. [Moreover, Article 24(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.]

416. **Example.** This first example will have three variations to best illustrate how Article 24(2) is intended to function. The following elements are common to all of the variations. Assume the existence of a treaty on the enforcement of mediated settlements, concluded prior to the entry into force of the draft Convention. Assume further that a court judgment is presented for enforcement under the draft Convention and that the judgment debtor objects on the grounds that it conflicts with a mediated settlement between the same parties.

417. Version 1: The State of origin and the requested State are Contracting States of the treaty on mediated settlements and the draft Convention. The judgment is enforceable under the draft Convention and the mediated settlement is enforceable under the other treaty. This is a straightforward situation and according to Article 24(2), the other treaty should prevail and the judgment should not be enforced under the draft Convention.

418. Version 2: The State of origin and the requested State are Contracting States of the draft Convention. A third State, which is the State of residence of one of the parties to the mediated settlement and the litigation, is also a Contracting State of the draft Convention. However, this third State and the requested State are bound by the treaty on mediated settlements, which is applicable because of the residency in those two States of the parties to the mediated settlement. Assuming that the judgment from the State of origin is enforceable under the draft Convention, can the requested State refuse to enforce it on the basis that the treaty with the third State takes precedence under Article 24(2)? On the understanding that all three States owe each other obligations under the draft Convention, it would be difficult to argue that the treaty on mediated settlements could take precedence over the draft Convention in this scenario. Such a result would unduly affect the interests of the State of origin under the draft Convention, which is equally binding on the other two States, despite their distinct bilateral agreement. [The inclusion of the words “as between Parties to that instrument” is intended to reflect this result.]

419. Version 3: This scenario is identical to the previous one except that the third State is not a Contracting State to the draft Convention. In such a case, that third State has no international obligations towards the State of origin. Moreover, if the requested State enforces the judgment under the draft Convention, this will concretely affect the interests of the third State under the other treaty, since one of its residents will lose the benefit of an otherwise enforceable mediated settlement which the requested State is bound by treaty to enforce. Under this version, therefore, Article 24(2) could be invoked to give precedence to the other treaty, and justify a refusal to enforce the judgment in the requested State.

420. **Relationship with the 2005 Choice of Court Convention.** Since the 2005 Choice of Court Convention was concluded in 2005, and involves recognition and enforcement of foreign judgments, it is useful to mention it specifically in relation to Article 24(2). 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,²⁷³ including under other treaties.

421. **Examples.** Reference to the previous example is of assistance. Turning first to version 1, where there are only two States, both of which are bound by the draft Convention and the 2005 Choice of Court Convention. Where, 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. This 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 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.

422. 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.

423. 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. 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. Where the judgment of the non-chosen court was the earlier judgment, the court addressed is not compelled to enforce either judgment.²⁷⁴

424. The answers would be similar even in situations such as those in versions 2 and 3 of the example given above. Returning to version 2 but using the 2005 Choice of Court Convention as the “other instrument”, all three States involved are subject to the draft Convention but only the requested State and the third State are subject to the 2005 Choice of Court Convention. Assume that the court in the State of origin, which is not a party to the 2005 Choice of Court Convention, heard the case on a jurisdictional basis listed in Article 5 of the draft Convention but did so despite the presence of choice-of-court agreement designating the courts of the third State. Can the requested State refuse to enforce the judgment? Yes: such a ground for refusal is permitted under Article 7(1)(d) of the draft Convention. It is therefore not even necessary to refer to Article 24 as there is no inconsistency between the two instruments.

²⁷³ The only limitation to enforcement under national law in the draft Convention refers to matters in Art. 6, but these matters are excluded from the scope of the 2005 Choice of Court Convention, thereby avoiding any risk of inconsistencies on that point.

²⁷⁴ Whether it should be left to the national law of the court addressed remains to be addressed in the draft Convention.

425. Regarding version 3, the scenario would be that only the State of origin and the requested State are Parties of the draft Convention while the requested State and the third State are bound by the 2005 Choice of Court Convention. The result remains the same as in the previous versions because of the permissive ground for refusal in Article 7(1)(d) that expressly refers to choice of court agreements. A Contracting State to the draft Convention will therefore never be in violation of its international obligations to other Contracting States if it refuses to enforce a judgment on the basis of Article 7(1)(d), which allows it to respect its obligations under the 2005 Choice of Court Convention. There is no inconsistency between the two Conventions which would need to rely on the precedence rule of Article 24(2).

426. **Compatibility with *later* instruments.** Article 24(3) provides for the situation where a Contracting State enters into a treaty dealing with the recognition and enforcement of judgments with another Contracting State, *after* this Convention comes into force for those States. In such a case, and unlike under Article 24(2), this *later* treaty may prevail over the draft Convention. 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 to Contracting States that are not parties to the later instrument. This ensures the protection of the exclusive jurisdictional bases listed in Article 6 for all Contracting States.]

427. **Examples.** Assume that States A and B are both Contracting States to the draft Convention. They later conclude a bilateral treaty on enforcement of judgments. This treaty provides for, among other things, recognition and enforcement of judgments on claims involving rights *in rem* related to immovable property situated in either State. The treaty provides that such judgments can originate either from courts in the State where the immovable is situated or in the State of the defendant's habitual residence. Under the draft Convention, the latter judgment could *not* be recognised, even under national law, as a result of Article 6(a). This would produce a conflict with the later bilateral treaty. In such a case, the later treaty may prevail under Article 24(3), and justify enforcement of the judgment under that treaty.

428. 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. Under the law of State A, the courts of State A have exclusive jurisdiction in such matters. 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(c). Nor can Article 16 of the draft Convention be invoked to allow enforcement under national law because Article 16 is made subject to Article 6. However, assuming that the judgment would be enforceable under the bilateral treaty, an inconsistency would arise, bringing Article 24(3) into play. Does the later treaty prevail? As was discussed in relation to version 2 of the example given for Article 24(2), the bilateral treaty should not be given precedence on these facts, even though it is a later treaty dealing with enforcement of judgments which Article 24(3) allows to prevail. Indeed, because all three States involved are Contracting States to the draft Convention, such a result would constitute a breach of the international obligations that States B and C owe to State A under the draft Convention. States B and C cannot deny the benefits of the draft Convention to State A by their bilateral agreement. [This consequence is made explicit by the last sentence in Article 24(3).]

429. **Regional Economic Integration Organisation.** Article 24(4) deals with the situation where a REIO becomes a Party to the draft Convention. If this occurs, it is possible that the rules (legislation) adopted by the REIO might conflict with the draft Convention. Article 24(4) contains a priority rule that applies in such a situation, irrespective of whether the rule of the REIO is adopted before or after the Convention. The underlying principle is that where a case is purely "regional", the draft Convention gives way to the regional instrument. As such, this provision would not be applicable in situations such

as those described in the examples given previously for Article 24(2) and (3) should the judgment involved be given from a State outside the REIO.

430. **[Other international instruments.** Article 24(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 legally binding in the Contracting State in question, will have precedence over the draft Convention.]

Article 25 – Signature, ratification, acceptance, approval or accession

431. 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 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). 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 of 1969).

432. Whatever method is adopted by a State, the result is the same.²⁷⁵ 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 Session 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.

433. 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 32 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 29.

Article 26 – Declarations with respect to non-unified legal systems

434. The draft Convention deals with “non-unified legal systems” in two different provisions, Articles 23 and 26. The former determines how the draft Convention must be construed and interpreted in those cases (see *supra* paras 396-400). 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.

435. **Non-unified legal systems.** Article 26, like Article 23, 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.²⁷⁶ 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.).

²⁷⁵ 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.

²⁷⁶ See Hartley/Dogauchi Report, para. 258.

436. **Declaration.** Article 26(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 29 (see *infra* para. 446).

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

438. Finally, paragraph 4 establishes that this provision does not apply to a REIO. Article 26 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 next two Articles.

Article 27 – Regional Economic Integration Organisations

439. Articles 27 and 28 enable REIOs to become a Party to the draft Convention. An REIO, which is constituted solely by sovereign States, may sign, accept, approve or accede to the draft 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 Convention.²⁷⁷ 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.

440. The draft Convention contemplates the REIO and its Member States becoming Parties (Art. 27) or the REIO alone becoming a Party (Art. 28).

441. Article 27 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).

442. 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. 27(2)).

443. 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 28(1), that its Member States will not be Parties to it.

444. **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 27 or under Article 28, any reference in the Convention to “Contracting State” or to “State” applies equally, where appropriate, to the REIO. This provision parallels Article 23(1). Its effect has already been discussed (see *supra* paras 398-400). It should be

²⁷⁷ 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.

noted, however, that Article 24(4) is a *lex specialis* to Articles 27 and 28 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 24(4), it is not possible to use Article 27 or 28 to justify the application of the instrument instead of the Convention.

Article 28 – Accession by a Regional Economic Integration Organisation without its Member States

445. Article 28 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 29 – Entry into force

446. **Entry into force.** Article 29 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 REIO that subsequently becomes a Party to it, and for a territorial unit to which it has been extended under Article 26.

447. **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 of 1969).

Article 30 – Declarations

448. **Timing of declarations.** The declarations referred to in Articles [4], 15, 18, 19, [20,] [24] 26 and 28 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).

449. **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.

450. **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 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 31 – Denunciation

451. Article 31 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 32 – Notifications by the depositary

452. Article 32 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.