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Title	Limitation period on the enforcement of foreign judgments in the context of the 2018 draft Convention	
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Objective	To examine how the limitation period on the recognition and enforcement of foreign judgments is dealt with under national law, HCCH Conventions and other international and regional instruments, taking into account whether and how the principles of "non-discrimination" or "good faith" are reflected in this matter	
Annex	Annex I: excerpts of the provisions dealing with the limitation period in international and regional instruments	
Related documents	n.a.	

Introduction¹

1. Limitation periods serve a variety of overlapping policies, including the promotion of efficient litigation and prompt enforcement of substantive law, the reduction of uncertainty, and the deterrence of unmeritorious claims.² Most jurisdictions distinguish limitation periods within which a party must initiate legal proceedings against another party to assert a claim (such limitation periods have great importance for the adjudication of the claim) from limitation periods within which a party must apply for the enforcement of a judgment. Given the general agreement reached at the meetings of the Special Commission on the Recognition and Enforcement of Foreign Judgments (hereinafter, “Special Commission”) that limitation periods are imposed upon the enforcement of foreign judgments rather than the recognition of their *res judicata* effects,³ this Note will deal with limitation periods within which a party must apply for the enforcement of a judgment.

2. Limitation periods are implicitly dealt with in the draft Convention⁴ in two ways. First, in Article 4(3), which prescribes that a judgment shall be enforced only if it is enforceable in the State of origin.⁵ Accordingly, if the limitation period in the State of origin expires, the judgment will not be entitled to circulation under the draft Convention.⁶ Secondly, in Article 14(1), which provides that the law of the requested State governs the procedure for “recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment”.⁷

3. This Note explains, in Section I, the narrow circumstances in which limitation periods would become contentious under the draft Convention. It also raises two distinct issues that remain to be considered by the Diplomatic Session: 1) should the draft Convention permit the court addressed to refuse enforcement on the basis that the (shorter) limitation period under its law has lapsed, and if so, how?; and 2) should the draft Convention explicitly prevent discrimination against foreign judgments on the basis of shorter limitation periods for their enforcement? Section II explores the history of discussions concerning limitation periods in past meetings of the Special Commission. Sections III and IV set out the treatment of limitation periods for enforcement of foreign judgments under various national laws, and international instruments, respectively. Finally, Section V draws upon the analysis in Sections III and IV to propose possible ways to address the two issues identified in Section I.

¹ The Permanent Bureau (PB) is grateful to the *co-Rapporteurs* Professors G. Saumier and F. Garcimartín, as well as Professors T. Domej, K. Takeshita and T.M. Yeo, for their assistance in the preparation of this Note.

² For further discussion, see T.T. Ochoa and A.J. Wistrich, “The Puzzling Purposes of Statutes of Limitation”, *Pacific Law Journal*, Vol. 28, 1997, pp. 453 – 514.

³ Minutes of the First Meeting of the Special Commission on the recognition and enforcement of foreign judgments (1-9 June 2016) (hereinafter, “June 2016 SC Minutes”) (available on the Secure Portal of the HCCH website at <www.hcch.net> under “Special Commission meetings”, then “Special Commission on the Judgments Project”), Minutes No 13, paras 59-60.

⁴ For ease of discussion, the term “draft Convention” is used to refer to the 2018 draft Convention on the recognition and enforcement of foreign judgments in civil or commercial matters (hereinafter, “draft Convention”) (available on the HCCH website at <www.hcch.net> under “22nd Diplomatic Session”). Where it is appropriate, other draft versions of the Convention will be specifically identified.

⁵ “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.”

⁶ Nevertheless, such enforcement is still possible under the law of the requested State. The draft Convention does not prevent the requested State from doing so under its own national law (Art. 16).

⁷ Article 14 - Procedure

“1. The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously...”

This provision was introduced in earlier versions of the draft Convention and has remained the same throughout different versions: see Art. 12(1) of the 2016 preliminary draft Convention, Art. 15(1) of the February 2017 draft Convention and Art. 14(1) of the November 2017 draft Convention (available on the HCCH website at <www.hcch.net> under “22nd Diplomatic Session”, then “Previous Special Commission meetings”).

I. Issues under the draft Convention concerning limitation periods

4. Limitation periods under the draft Convention can only be put in issue before the court addressed when three concurrent circumstances arise: there is a limitation period under the law of the requested State that prescribes the time to commence proceedings for the enforcement of a judgment;⁸ such limitation period is *shorter* than the limitation period concerning enforcement in the State of origin;⁹ and it must have lapsed,¹⁰ while the limitation period in the State of origin is ongoing. In these circumstances, two distinct issues arise under the draft Convention concerning limitation periods.

5. **First issue:** Should the draft Convention allow the court addressed to refuse enforcement on the basis that the (shorter) limitation period under its law has lapsed, and if so, how? It appeared from discussions at the past Special Commission meeting that the court addressed should be allowed to refuse enforcement due to the expiration of a limitation period in accordance with its own law.¹¹ In light of this and based on the fact that refusal is only permitted on the grounds specified in the draft Convention,¹² it becomes necessary to determine how the draft Convention (or the Explanatory Report) should make it clear that the court addressed may refuse enforcement on the basis of a lapsed limitation period.

6. This issue may become complex for those States considering limitation periods as a matter of substance. Currently, the revised draft Explanatory Report describes limitation periods as an aspect of procedural law governed by the law of the requested State under Article 14 (Procedure).¹³ The lapse of a limitation period therefore provides a ground for refusal in States that consider limitation periods to be a matter of procedure. However, Article 14 leaves it open to the court addressed to treat limitation periods as a substantive matter, because the “reference [in Article 14] to the law of the requested State includes its private international law rules”.¹⁴ While this provides a solution for States that treat limitation periods as substantive, the path to it is unclear. The substantive choice is still located within Article 14 which deals with “Procedure”. It is less clear that the lapse of a substantive limitation period supports a ground for refusal.

7. **Second issue:** Should the draft Convention explicitly prevent discrimination against foreign judgments on the basis of shorter limitation periods for their enforcement? Within their domestic law, some States discriminate against foreign judgments by prescribing a shorter limitation period for their enforcement than the period applied to its domestic judgments. Where this is the case, asymmetrical limitation periods may erode principles of non-discrimination and good faith that are upheld elsewhere under the draft Convention.¹⁵

⁸ The form of the limitation period may be peculiar to the enforcement of foreign judgments, or may simply be the period applicable to claims before the court addressed (e.g., recognition and enforcement under the common law is by way of a fresh proceeding on the underlying cause of action, or by a common law action for debt). This distinction becomes relevant for issue 2 at *infra* para. 7.

⁹ There is no practical issue where the limitation period in the requested State is longer than that in the State of origin. That is because the lapse of the limitation period in the State of origin (whether or not another limitation period is ongoing in the court addressed) renders the judgment unenforceable under the draft Convention, and thereby incapable of circulation (Art. 4(3)).

¹⁰ Thereby, placing a limitation period in issue.

¹¹ Minutes of the Fourth Meeting of the Special Commission on the recognition and enforcement of foreign judgments (24-29 May 2018) (hereinafter, “May 2018 SC Minutes”) (see path indicated in note 3), Minutes No 5, para. 63. See also *Aide memoire* of the Chair of the Special Commission of May 2018 (hereinafter, “*Aide memoire* of May 2018”) (see path indicated in note 3), para. 27.

¹² Art. 4(1).

¹³ “Judgments Convention: revised draft Explanatory Report”, Prel. Doc. No 1 of November 2018 for the attention of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019) (hereinafter, “revised draft Explanatory Report”) (see path indicated in note 4), para. 355.

¹⁴ *Ibid.*, para. 355, note 252. See also June 2016 SC Minutes (*op. cit.* note 3), Minutes No 12, paras 24 and 27.

¹⁵ E.g., Art. 15(1).

8. A brief description of the history of negotiations (Section II) and the national and international limitation periods applicable to the enforcement of foreign judgments (Sections III and IV, respectively) could help to understand the issues raised above.

II. General background discussion of limitation periods under the draft Convention

9. Before proceeding with the discussion, it would be useful to clarify the term “enforcement” used in the draft Convention. In this regard, the revised draft Explanatory Report makes a distinction between, on the one hand, a declaration of enforceability or registration for enforcement and, on the other hand, enforcement (execution).¹⁶ 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.¹⁷ The enforcement of a foreign judgment presupposes a declaration of enforceability or a registration for enforcement, and such proceedings, including also enforcement / execution, are governed by the domestic procedural law of the requested State, pursuant to Article 14(1).

10. Limitation periods have been discussed throughout the meetings of the Special Commission and several proposals have been submitted.

11. An Explanatory Note prepared by the Permanent Bureau¹⁸ suggested adopting whichever is the longer limitation period, that of the law of the State of origin or the law of the requested State, which follows Article 32(5)¹⁹ of the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (hereinafter, “2007 Child Support Convention”).²⁰ The Explanatory Note also suggested including a non-discrimination provision requiring the court addressed to apply a limitation period no less favourable than the limitation period applied to domestic judgments.²¹ The Explanatory Note explained that this would facilitate “at least the same range of enforcement methods for judgments enforceable under the Convention as are available in domestic cases”.²²

12. Proposals were made during the Special Commission meetings suggesting three different approaches:

¹⁶ 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), thus not extending to “enforcement / execution”.

¹⁷ Revised draft Explanatory Report (*op. cit.* note 13), para. 354.

¹⁸ “Explanatory Note providing background on the proposed draft text and identifying outstanding issues”, drawn up by the Permanent Bureau, Prel. Doc. No 2 of April 2016 for the attention of the Special Commission of June 2016 on the recognition and enforcement of foreign judgments (hereinafter, the “Explanatory Note”) (see path indicated in note 3), para. 204.

¹⁹ 2007 Child Support Convention, Art. 32(5): “[a]ny limitation on the period for which arrears may be enforced shall be determined either by the law of the State of origin or by the law of the State addressed, whichever provides for the longer limitation period.” See also the Explanatory Report on the 2007 Child Support Convention, drawn up by A. Borrás and J. Degeling with the assistance of W. Duncan and P. Lortie (hereinafter, “Borrás/Degeling Report”) (available on the HCCH website at <www.hcch.net> under the “Child Support” Section), paras 578 -579.

²⁰ Explanatory Note (*op. cit.* note 18), para. 204.

²¹ *Ibid.*

²² *Ibid.*, para. 221. It was suggested that the following could be added into Art. 4 or as a separate provision: “A judgment which is declared enforceable under this Convention shall be enforced as if it were given by a court of the requested State. The requested State shall provide at least the same range of enforcement methods for judgments enforceable under the Convention as are available in domestic cases.” See also the 2007 Child Support Convention, Art. 33.

- a) inserting in Article 14 that the law of the requested State determines limitation periods (hereinafter, the "first approach");²³
- b) inserting in Article 7(1) that the expiry of a limitation period is a ground for refusal of enforcement (hereinafter, the "second approach");²⁴ and
- c) retaining the current text that does not expressly refer to limitation periods but stating in the Explanatory Report that the law of the requested State shall determine the limitation period (hereinafter, the "third approach").²⁵

13. The proponents of the first and second approaches considered that their concerns can be addressed by the Explanatory Report and did not pursue their proposals further at the Special Commission meetings.²⁶ However, for convenience of reference, the first and second proposals are briefly outlined below.

14. As regards the first approach, the Special Commission considered two proposed clauses:

"The statute of limitations for recognition and enforcement shall be determined by the law of the requested State";²⁷ and

"Proceedings to enforce a judgment under the Convention must be brought within the time limits laid down by the national law of the requested State".²⁸

15. This approach helped to clarify that the law of the requested State determines the limitation period, but it does not generally solve the question of whether Article 14 was sufficient to enable the court addressed to refuse enforcement on the basis that the time for enforcement of a judgment had expired. In addition, this approach presupposes that the limitation periods issue is a matter of procedure.

16. As regards the second approach, a suggested ground for refusal in Article 7(1) of the draft Convention was: "[I]n accordance with the law of the requested State, the limitation period for enforcement of a judgment has expired."²⁹ This would allow the court addressed to refuse an application where the limitation period for enforcement had expired under the law of the requested State, notwithstanding that the limitation period had not yet expired in the State of origin. This approach, which does not identify limitation periods either as a matter of procedure or substance, helps to reconcile the fact that some States consider limitation periods as substantive.³⁰

17. The third approach considered it sufficient to deal with the matter of limitation periods in the draft Explanatory Report.³¹ The revised draft Explanatory Report specifies that the "law of the

²³ June 2016 SC Minutes (*op. cit.* note 3), Minutes No 11, paras 98-99.

²⁴ May 2018 SC Minutes (*op. cit.* note 11), Minutes No 5, para. 51. See also June 2016 SC Minutes (*op. cit.* note 3), Minutes No 13, para. 46.

²⁵ Revised draft Explanatory Report (*op. cit.* note 13), para. 355. See also June 2016 SC Minutes (*op. cit.* note 3), Minutes No 12, para. 27.

²⁶ June 2016 SC Minutes (*op. cit.* note 3), Minutes No 12, paras 24-27.

²⁷ Work. Doc. No 50, "Proposal of the delegation of Israel" (Special Commission on the recognition and enforcement of foreign judgments (1-9 June 2016)) (see path indicated in note 3).

²⁸ Work. Doc. No 56, "Proposal of the delegation of Australia" (Special Commission on the recognition and enforcement of foreign judgments (1-9 June 2016)) (see path indicated in note 3).

²⁹ Work. Doc. No 193, "Proposal of the delegation of the United States of America" (Special Commission on the recognition and enforcement of foreign judgments (13-17 November 2017)) (see path indicated in note 3). See also Work. Doc. No 75, "Proposal of the delegations of Argentina, Australia and the United States of America" (Special Commission on the recognition and enforcement of foreign judgments (1-9 June 2016)) (see path indicated in note 3).

³⁰ June 2016 SC Minutes (*op. cit.* note 3), Minutes No 13, para. 46.

³¹ May 2018 SC Minutes (*op. cit.* note 11), Minutes No 5, para. 62; and Minutes No 6, para. 32. See also revised draft Explanatory Report (*op. cit.* note 13), para. 355.

requested State" includes its rules of private international law. Thus, the private international law rules of the requested State could, for example, refer back to the limitation period prescribed by the State of origin.³²

18. At its various meetings, the Special Commission proceeded on the basis that the text of the draft Convention would not be changed, and the Explanatory Report would clarify that limitation periods would be determined by the law of the requested State, including its private international law rules.³³ The Special Commission also noted the desire to allow the requested State to refuse enforcement on the ground of an expired limitation period.³⁴ At its Fourth and last meeting, the Special Commission concluded that no amendment should be made to the draft Convention, as limitation periods were adequately addressed by Article 14 and the accompanying draft Explanatory Report.³⁵

19. Regarding the principle of non-discrimination, a proposal was made for the inclusion in the Explanatory Report that "there must be non-discrimination in the application of the limitations period between internal and external judgments".³⁶ The Special Commission proceeded on the basis that the principle of non-discrimination could be referred to in the Explanatory Report to guard against national laws prescribing a shorter limitation period for foreign judgments.³⁷ The revised draft Explanatory Report states that "judgments given in other States, if they are recognised and enforced, are to be treated in the same manner as domestic judgments".³⁸ This explanation could also extend to the length of the applicable limitation period. The *co-Rapporteurs* also refer to the obligation set out in the *Vienna Convention of 1969 on the Law of Treaties* that a treaty should 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."³⁹

20. This Note now turns to examine the national and international laws concerning the limitation periods applicable to the enforcement of foreign judgments.

III. Limitation periods for the enforcement of foreign judgments under national laws

21. This Section briefly describes the limitation periods that prescribe the (recognition and) enforcement of foreign judgments in Australia, Canada, China, Japan, Singapore, Switzerland and the Russian Federation. Amongst other aspects, it highlights the following features of limitation periods: whether they are treated as procedural or substantive; whether a specific limitation period applies to the enforcement of foreign judgments (or whether the limitation period is the same as for the enforcement of domestic judgments), and the length of the relevant limitation period.

³² Revised draft Explanatory Report (*op. cit.* note 13), para. 355 and note 252.

³³ June 2016 SC Minutes (*op. cit.* note 3), Minutes No 12, para. 27.

³⁴ May 2018 SC Minutes (*op. cit.* note 11), Minutes No 5, para. 63.

³⁵ *Aide memoire* of May 2018 (*op. cit.* note 11), para. 27.

³⁶ Work. Doc. No 75 (*op. cit.* note 29).

³⁷ June 2016 SC Minutes (*op. cit.* note 3), Minutes No 13, paras 46-62; May 2018 SC Minutes (*op. cit.* note 11), Minutes No 6, paras 29-41.

³⁸ *Ibid.*

³⁹ *Vienna Convention of 1969 on the Law of Treaties*, Art. 31(1). See also revised draft Explanatory Report (*op. cit.* note 13), para. 355.

1. Australian law

22. Australian law considers limitation periods to be substantive.⁴⁰

23. The limitation period for an application to recognise or enforce a foreign judgment in Australia depends on the means by which the judgment should be recognised or enforced. The common law generally governs the recognition and enforcement of foreign judgments; however, it has been displaced in relation to foreign judgments that are registrable under the *Foreign Judgments Act 1991* (Cth) and to judgments from New Zealand registrable under the *Trans-Tasman Proceedings Act 2010* (Cth).

24. Under the common law, the enforcement of a foreign judgment is done by way of a fresh proceeding on the underlying cause of action, or by a common law action for debt. It must be commenced within the statutory limitation period prescribed by the jurisdiction in which enforcement is sought. The periods differ between 12 or 15 years, depending on the state or territory,⁴¹ and apply as part of the substantive law governing the application.⁴² This means of enforcing foreign judgments is different to the intra-state system of enforcing judgments from the various Australian states and territories, which simply requires lodgement and registration of judgments.⁴³

25. The *Foreign Judgments Act 1991* (Cth) sets up a special process for recognising foreign judgments through registration and is only available to foreign judgments from particular foreign States, or one or more of their territorial units,⁴⁴ with which Australia has reciprocal relations for recognition and enforcement. Under this regime, the foreign judgment must be registered within six years after either the date of the judgment, or the date of the last appeal judgment.⁴⁵ Importantly, the judgment will not be registered if it cannot be enforced in the State of the original court,⁴⁶ suggesting that the expiration of a relevant limitation period in the State of origin may present difficulties for registration in Australia.

26. Under the *Trans-Tasman Proceedings Act 2010* (Cth), an application to register a registrable New Zealand judgment must also be made within six years after the day the judgment (or last appeal judgment) was given,⁴⁷ unless an entitled person applies for a longer limitation period. In that case, the court may determine a longer period it considers appropriate.⁴⁸

2. Canadian law (Quebec and Ontario)

27. In Canada, limitation periods for recognition and enforcement of a judgment are regulated differently in different jurisdictions. In Quebec, prescription periods, *i.e.*, limitation periods, “are a

⁴⁰ *John Pfeiffer Pty Ltd v. Rogerson* [2000] HCA 36, paras 97-100. The position is sometimes enshrined in legislation, for example *Limitation of Actions Act 1938* (SA), s 38A; *Limitation Act 1969* (NSW), 78(2); *Limitation of Actions Act 1974* (Qld), 43A(2); *Limitation Act 1985* (ACT), s 56; and *Limitation Act 1974* (Tas), s 32C.

⁴¹ In NSW, Queensland, Northern Territory, the Australian Capital Territory and Tasmania, 12 years from when the judgment became enforceable: *Limitation Act 1969* (NSW), s 17; *Limitation of Actions Act 1974* (Qld), s 17(4); *Limitation Act 1981* (NT), s 15; *Limitation Act 1985* (ACT), s 14(1); *Limitation Act 1974* (Tas), s 4(4). In Victoria and South Australia, 15 years from when the judgment became enforceable: *Limitation of Actions Act 1956* (Vic), s 5(4); *Limitation of Actions Act 1936* (SA), s 34. In Western Australia, the general limitation period of six years applies: *Limitation Act 2005* (WA), s 13(1).

⁴² *I.e.*, they do not apply as an aspect of the state or territory court’s procedural law.

⁴³ *Service and Execution of Process Act 1992* (Cth), s 105.

⁴⁴ *Foreign Judgments Regulations 1992* (Cth), Schedule.

⁴⁵ *Foreign Judgments Act 1991* (Cth), s 6(1).

⁴⁶ *Foreign Judgments Act 1991* (Cth), s 6(6)(b).

⁴⁷ *Trans-Tasman Proceedings Act 2010* (Cth), s 67(5)(c)(i)-(ii).

⁴⁸ *Trans-Tasman Proceedings Act 2010* (Cth), s 67(5)(c)(iii).

matter of substance”, “as is often the case in civil law systems”.⁴⁹ The Quebec Court of Appeal indicated in *Minkoff v. Society of Lloyd’s* that prescription periods are a matter of substance under Article 3131 of the CCQ, and therefore the prescription period relevant to enforcement of the judgment will be that supplied by the law of the State of origin.⁵⁰ However, if the foreign prescription period is not pleaded, then the Quebec court will apply the relevant Quebec prescription period. In that regard, the CCQ does not provide specific rules on limitation periods for the enforcement of foreign judgements.

28. In Ontario, a foreign judgment is regarded as a simple contract debt and is subject to a general two-year limitation period.⁵¹ Domestic judgments are treated differently, and their enforcement is not subject to a period of limitation.⁵² In *Independence Plaza 1 Associates, L.L.C v. Figlioli*, the Court of Appeal for Ontario summarises the different limitation periods applicable to foreign judgment proceedings and to domestic judgments in other provinces.⁵³

3. Chinese law

29. In the People’s Republic of China (hereinafter, “PRC”), a Judicial Interpretation of the *PRC Civil Procedure Law*⁵⁴ by the Supreme People’s Court extended the two-year limitation period applicable for the execution of domestic judgments,⁵⁵ to applications for the recognition and enforcement of foreign judgments. The period runs from the last day of the period of performance specified in the judgment.⁵⁶ If enforcement of a foreign judgment is not applied for at the same time as an application for recognition, the limitation period for a subsequent application for enforcement will

⁴⁹ *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19, [2010] 1 S.C.R. 649, para. 16; *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022, p. 1069. See also *Civil Code of Quebec*, Art. 3131 (hereinafter, “CCQ”): “Prescription is governed by the law applicable to the merits of the dispute”.

⁵⁰ 2004 CanLII 964 (QC CA).

⁵¹ *Limitations Act, 2002*, SO 2002, c 24, Sch B; s 4: “Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered”. In *Independence Plaza 1 Associates, L.L.C. v. Figliolini*, 2017 ONCA 44, the Court of Appeal for Ontario held that the two-year limitation period for a claim on a foreign judgment only commences from the date on which “the time to appeal the judgment in the foreign jurisdiction has expired” or the date on which “all appeal remedies have been exhausted” (para. 77), *i.e.* the date of an appeal decision (para. 59), and “until such time as the judgment creditor knew or ought to have known that the judgment debtor had exigible assets in Ontario and could be served with process” (para. 82). This is to deter a multiplicity of unnecessary proceedings that results if the debt obligation underlying the Ontario claim is later overturned on appeal in the State of origin (para. 80). It is only once these avenues are exhausted that the judgment creditor is taken to “have reasonably known that a proceeding in Ontario would be an appropriate means to seek to remedy its loss” (para. 83).

⁵² *Limitations Act, 2002*, SO 2002, c 24, Sch B; s 16(1)(b).

⁵³ *Independence Plaza 1 Associates, L.L.C. v. Figliolini*, 2017 ONCA 44, para. 61: “It is also noteworthy that several provinces have subjected foreign judgment proceedings to a special limitation period that is distinct from the one that applies to proceedings on domestic judgments. British Columbia’s Limitation Act subjects “local” judgment proceedings to a ten year limitation period in s. 7, but it deals with “extraprovincial judgments” separately. Section 2(1)(l) of Manitoba’s The Limitation of Actions Act, C.C.S.M., c L150, treats “Canadian judgments” differently from other judgments. Newfoundland sets a six-year limitation period on an action “to enforce a foreign judgment” and a ten-year period on actions to enforce a judgment of a court in the province: see *Limitations Act*, S.N.L. 1995, c. L-16.1, s. 6(1)(g). And Prince Edward Island’s Statute of Limitations, R.S.P.E.I. 1988, c. S-7, s. 2(1)(f) distinguishes between “extraprovincial judgments” and other judgments.”

⁵⁴ *Interpretation of the Supreme People’s Court on the Application of the Civil Procedure Law of the People’s Republic of China*, issued on 30 January 2015, Art. 547: “The time limit set forth for a party to apply for recognition and enforcement of an effective judgment/ruling rendered by a foreign court or a foreign arbitration award shall be governed by Article 239 of the Civil Procedure Law.”

⁵⁵ *Chinese Civil Procedure Law (2017 Revision)*, Art. 239 (hereinafter, “Chinese CPL”).

⁵⁶ Chinese CPL, Art. 239. Where a judgment requires performance in instalments, the two-year period runs for each instalment from the last day of the specified performance period for that instalment. If a period of performance is not specified in the judgment, it runs from the effective date of the judgment.

run from the date on which the ruling of the Supreme People's Court comes into effect.⁵⁷ As such, for applications for recognition and enforcement of a foreign judgment, a Chinese court would refuse the application if the limitation period of two years has expired.⁵⁸

30. A recently concluded Arrangement between Mainland China and the Special Administrative Region of Hong Kong on mutual recognition and enforcement of judgments addresses limitation periods.⁵⁹ Article 10 of the Arrangement provides that: "the time limits, procedures and manner for making an application for recognition and enforcement of a judgment shall be governed by the law of the requested place". Thus, the limitation period shall be governed by the law of the jurisdiction of the court addressed. Accordingly, where a judgment of a Hong Kong court is sought to be enforced in Mainland China, the two-year limitation period stated in the Chinese CPL will apply.

4. Japanese law

31. Under Japanese law, it is not clear whether limitation periods are considered as a procedural or substantive matter. If limitation periods are considered to be substantive, the law applicable to the right in dispute will also supply the limitation period for an application for recognition and enforcement.

32. Article 174-2(1) of the *Civil Code 1896*⁶⁰ contains a specific limitation period which provides that:

"the period of prescription of any right established in an unappealable judgment shall be ten years even if any period of prescription shorter than ten years is provided. The same shall apply to any right which is established in a settlement in a court proceeding or conciliation, or any other action which has the effect equivalent to that of the unappealable judgment."

33. This period will be applicable to domestic judgments that ruled on rights which are governed by Japanese law according to the Japanese private international law rule. If a domestic judgment ruled on a right which is governed by a foreign law, the foreign law (applicable law to the right) will govern the limitation periods for the enforcement of the domestic judgments.

34. On the other hand, if limitation periods are considered to be procedural, then the limitation period applicable to domestic enforcement proceedings under Article 174-2(1) of the Civil Code applies.

5. Singapore law

35. Applications to recognise and enforce foreign judgments may be made under common law rules, the *Reciprocal Enforcement of Foreign Judgments Act* (hereinafter, the "REFJA"),⁶¹ the *Reciprocal Enforcement of Commonwealth Judgments Act* (hereinafter, the "RECJA"),⁶² or the *Choice of Court Agreements Act 2016* (hereinafter, the "2016 Act").⁶³

⁵⁷ *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China* (op. cit. note 54), Art. 547.

⁵⁸ Y. Guo, "Country Report - The People's Republic of China", in A. Chong (ed.), *Recognition and Enforcement of Foreign Judgments in Asia*, Singapore, Asia Business Law Institute, 2017.

⁵⁹ *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and Hong Kong Special Administrative Region 2019* (hereinafter, "Arrangement"), not yet in force.

⁶⁰ *Civil Code*, Act No 89 of 27 April 1896.

⁶¹ *Reciprocal Enforcement of Foreign Judgments Act* (Cap 265, 2001 Rev Ed).

⁶² *Reciprocal Enforcement of Commonwealth Judgments Act* (Cap 264, 1985 Rev Ed).

⁶³ *Choice of Court Agreements Act 2016*.

36. Under common law rules, a foreign judgment is regarded as “an implied debt” and is subject to a six-year limitation period.⁶⁴ Under the REFJA and the RECJA, enforcement of foreign judgments may only be sought after registration.⁶⁵ In that respect, an application for registration has to be commenced within six years under the REFJA⁶⁶ and within 12 months under the RECJA.⁶⁷ The court enjoys a general discretion to extend these periods.⁶⁸ Once the judgment is registered, it will be enforceable as if it had been issued by a Singaporean court.⁶⁹ The REFJA and the RECJA do not apply where the foreign judgment is enforceable under the 2016 Act.⁷⁰

37. Under the 2016 Act, and once its requirements are satisfied, the procedure for recognition and enforcement of a foreign judgment is the same as for domestic judgments.⁷¹ Indeed, Section 13(1) of the 2016 Act reads as follows: “An application may be made to the High Court for a foreign judgment to be recognised, or to be recognised and enforced, in the same manner and to the same extent as a judgment issued by the High Court.” However, a judgment may only be recognised in Singapore if it is effective in the State of origin, and may only be enforced if it is enforceable in the State of origin.⁷² The 2016 Act is silent as to limitation periods. It is understood that an application for the recognition and enforcement of a foreign judgment may be made at any time, as long as the judgment has effect and is enforceable in the State of origin.⁷³

6. Swiss law

38. The limitation period for an application to enforce a judgment is a matter of substantive law under Swiss law.⁷⁴

39. For enforcement proceedings, Article 137(3) of the *Federal Act on the Amendment of the Swiss Civil Code (Part 5: The Code of Obligations)* (hereinafter, “Code of Obligations”) provides that a claim “confirmed by a court judgment” is subject to “the new limitation period” which “is always ten years”.⁷⁵ However, given that limitation periods are treated as substantive, the Code of Obligations does not contain specific provisions for foreign judgments. It is unclear whether Article 137(3) applies where Swiss law is not applicable to the underlying claim according to Swiss choice of law rules. It is also unclear whether the limitation period applies where there is a foreign judgment on a claim to which Swiss law applies.

40. Enforcement procedures are regulated under different statutes. For money claims, the procedure contained in the *Federal Act on Debt Enforcement and Insolvency* (hereinafter, “Debt

⁶⁴ *Limitation Act* (Cap 163, 1996 Rev Ed), s 6(1)(a). See *Poh Soon Kiat v. Desert Palace Inc (trading as Caesars Palace)* [2009] SGCA 60, paras 49 and 54.

⁶⁵ REFJA, s 7 provides: “No proceedings for the recovery of a sum payable under a foreign judgment being a judgment to which this Part applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in Singapore.”

⁶⁶ REFJA, s 4(1)(a).

⁶⁷ RECJA, s 3(1).

⁶⁸ RECJA, s 3(1).

⁶⁹ A. Chong, “Country Report - Singapore”, A. Chong (ed.) (*op. cit.* note 58), p. 176; *Poh Soon Kiat v. Desert Palace Inc*, (*op. cit.* note 64), paras 41 and 44.

⁷⁰ REFJA, s 2A; RECJA, s 2A.

⁷¹ A. Chong, “Country Report – Singapore”, in A. Chong (ed.) (*op. cit.* note 58), p. 176.

⁷² *Ibid.* See also the 2016 Act, s 13(2)(a)-(b).

⁷³ X. Tan, M. Mak, “Singapore: Enforcement of Foreign Judgments 2019”, *Enforcement of Foreign Judgments Laws and Regulations*, London, Global Legal Group, 2019, para. 2.13. Available at the following address: <https://iclg.com/practice-areas/enforcement-of-foreign-judgments-laws-and-regulations/singapore> (last consulted on 22 May 2019).

⁷⁴ P. Engel, *Traité des obligations en droit suisse: dispositions générales du CO*, 2nd edition, Bern, Staempfli, 1997, p. 799; *Swiss Code of Civil Procedure* (SR 210) (*Schweizerisches Zivilgesetzbuch, Code civil suisse*), Art. 341(3).

⁷⁵ *Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations)* (SR 220) (*Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht); Loi fédérale complétant le Code civil Suisse (Livre cinquième: Droit des obligations)*).

Enforcement Act”) applies.⁷⁶ For the enforcement of other obligations, such as specific performance or injunctive relief, the Code of Civil Procedure applies. Other prerequisites for recognition and enforcement of foreign judgments, and grounds for refusal, are contained in Articles 25 to 29 of the *Federal Act on Private International Law* (hereafter, “PIL Act”).⁷⁷ Neither the Debt Enforcement Act, the PIL Act, nor the Code of Civil Procedure contain limitation periods for applications to enforce a judgment.

7. Russian Federation law

41. In the Russian Federation, pursuant to section 409(3) of Article 45 of the *Civil Procedure Code*, the default limitation period for recognition and enforcement of foreign judgments is three years.⁷⁸ The courts may allow requests for recognition and enforcement of foreign judgments after the expiration of the three-year limitation period, provided a valid reason for the delay in filing the request is proven, in accordance with section 112 of the Russian CPC.⁷⁹ Expiration of the limitation period constitutes one of the grounds for refusing recognition and enforcement of foreign judgments.⁸⁰ It is of note that the limitation period is the same for enforcement of domestic judgments.⁸¹

8. Summary

42. As outlined above, the treatment of limitation periods for the enforcement of foreign judgments provided by national laws is diverse. First, the length of limitation periods for enforcement varies from two years (*e.g.*, Chinese law and Ontario law) to up to 15 years (*e.g.*, some Australian states). Secondly, the time from which limitation periods are to be calculated can differ: from the last day of the period of performance specified in the judgment (under Chinese law), to the time from which all remedies, or the right to appeal, have been exhausted (under Ontario law). Thirdly, under laws of certain States, different limitation periods are imposed on the enforcement of foreign judgments on the one hand, and on domestic judgments on the other. This divergence echoes certain issues that the draft Convention may still need to address, as laid down in Section I.

IV. Limitation periods under international or regional instruments

43. This Section reviews whether, and, if so, how limitation periods for the recognition and enforcement of foreign judgments are dealt with in international and regional instruments, and whether the principles of “good faith”, “equal treatment” or “non-discrimination” play a role in this matter. The following HCCH Conventions are examined in sub-section A: the 2007 Child Support Convention, the 2005 Choice of Court Convention,⁸² the 2000 Protection of Adults Convention,⁸³ the 1996 Child Protection Convention⁸⁴ and the 1958 Maintenance Obligations Convention.⁸⁵ Sub-

⁷⁶ *Federal Act of 11 April 1889 on Debt Enforcement and Bankruptcy* (SR 281.1) (*Bundesgesetz über Schuldbetreibung und Konkurs* (SchKG); *Loi fédérale sur la poursuite pour dettes et la faillite* (LP)).

⁷⁷ *Federal Act of 18 December 1987 on Private International Law* (SR 291) (*Schweizerisches Bundesgesetz über das Internationale Privatrecht* (IPRG); *Loi fédérale suisse sur le droit international privé* (LDIP)).

⁷⁸ *Civil Procedure Code of the Russian Federation No 138-Fz of November 14, 2002* (hereinafter, “Russian CPC”).

⁷⁹ Russian CPC, Section 409(3), Art. 45.

⁸⁰ Russian CPC, Section 412, Art. 43.

⁸¹ Russian CPC, Section 196, Art. 12.

⁸² *HCCH Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, “2005 Choice of Court Convention”).

⁸³ *HCCH Convention of 13 January 2000 on the International Protection of Adults* (hereinafter, “2000 Protection of Adults Convention”).

⁸⁴ *HCCH 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”).

section B examines other international or regional instruments: the Brussels I Recast Regulation,⁸⁶ the Lugano Convention,⁸⁷ the Minsk Convention,⁸⁸ the Las Leñas Protocol,⁸⁹ the Riyadh Agreement,⁹⁰ the Kiev Convention,⁹¹ and the Commonwealth Model Law.⁹²

A. HCCH Conventions⁹³

1. 2007 Child Support Convention

44. Under the 2007 Child Support Convention, the law of the requested State applies to the enforcement of decisions concerning international recovery of child support and other forms of family maintenance.⁹⁴ This is different for the enforcement of arrears where the limitation period of the requested State or the State of origin shall apply, whichever is longer.⁹⁵

2. 2005 Choice of Court Convention

45. Neither the 2005 Choice of Court Convention⁹⁶ nor the Explanatory Report⁹⁷ deals with limitation periods. If limitation periods are considered to be a matter of procedure, Article 14 of the 2005 Choice of Court Convention provides that procedural matters are subject to the law of the requested State.

⁸⁵ *HCCH Convention of 1958 concerning the Recognition and Enforcement of Decisions relating to Maintenance Obligations* (hereinafter, "1958 Maintenance Obligations Convention").

⁸⁶ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (hereinafter, "Brussels I Recast Regulation").

⁸⁷ *Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (hereinafter, "Lugano Convention").

⁸⁸ *Convention of 22 January 1993 on legal aid and legal relations in civil, family and criminal cases (as amended 28 March 1997)* (hereinafter, "Minsk Convention").

⁸⁹ *Protocol of 27 May 1992 on cooperation and judicial assistance in civil, commercial, labour and administrative matters* (hereinafter, "Las Leñas Protocol").

⁹⁰ *Riyadh Arab Agreement for Judicial Cooperation of 1983* (hereinafter, "Riyadh Agreement").

⁹¹ *Convention on Procedure for Settling Disputes Related to Commercial Activities of 20 March 1992* (hereinafter, "Kiev Convention"). The Kiev Convention entered into force on 19 December 1992, and is in force in Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Russian Federation, Turkmenistan, Tajikistan, Ukraine, and Uzbekistan.

⁹² *Commonwealth Model Law on the Recognition and Enforcement of Foreign Judgments* (hereinafter, "Commonwealth Model Law").

⁹³ For the purposes of this Note, the 39 HCCH Conventions, Protocols and Principles (available on the HCCH website at <www.hcch.net>, under "Instruments" and "Conventions") have been reviewed. Apart from the Conventions mentioned under para. 43, there are no other HCCH Conventions referring to the principles of "good faith" or "non-discrimination" in connection with the issue of limitation periods. However, the following articles subjecting the recognition and enforcement procedure to the law of the Requested State should be noted for information: Art. 13 of the *HCCH Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*; Art. 14 of the *HCCH Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*; Art. 8 of the *HCCH Convention of 25 November 1965 on the Choice of Court*; Art. 7 of the *HCCH Convention of 5 October 1961 concerning the power of authorities and the law applicable in respect of the protection of infants*; and Art. 6 of the 1958 Maintenance Obligations Convention.

⁹⁴ 2007 Child Support Convention, Art. 32(1).

⁹⁵ 2007 Child Support Convention, Art. 32(5).

⁹⁶ Explanatory Note (*op. cit.* note 18), para. 204.

⁹⁷ "Explanatory Report on the 2005 Hague Choice of Court Convention", drawn up by T. Hartley and M. Dogauchi, in *Proceedings of the Twentieth Session*, Tome III, *Choice of Court Agreements*, Antwerp-Oxford-Portland, Intersentia, 2010, pp. 784 to 862, paras 215 and 216.

3. 2000 Protection of Adults Convention and 1996 Child Protection Convention

46. Although these two Conventions make no express mention of limitation periods, the law of the requested State governs the recognition, declaration of enforceability, and registration for enforcement.⁹⁸

47. In addition, they contain the following principle on equal treatment:

"Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law [...]"⁹⁹

4. 1958 Maintenance Obligations Convention

48. The 1958 Maintenance Obligations Convention does not deal with limitation periods directly. However, it prescribes that the "law of the State of the enforcement authority" is applicable to the procedure for a declaration of enforceability.¹⁰⁰

B. Other international or regional instruments

1. Brussels I Recast Regulation

49. Under the Brussels I Recast Regulation, a decision that is enforceable in the State of origin may be directly enforced in another Member State.¹⁰¹ The law of the requested State shall determine, *inter alia*, the applicable limitation period.¹⁰² Article 41(1) specifies that "the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed." The provision further states that the foreign judgment shall be enforced "under the same conditions as a judgment given in the Member State addressed".

50. In a recent judgment, the Court of Justice of the European Union (hereinafter, the "CJEU")¹⁰³ ruled that the Brussels I Regulation does not preclude an EU Member State from placing a legislative time limit upon the enforcement of a preventive attachment order of another EU Member State where that order has been declared enforceable in that other EU Member State.

51. The CJEU found that the Brussels I Regulation does not deal with enforcement procedures in the strict sense, and that enforcement is governed by the procedural law of the Member State in which enforcement is sought.¹⁰⁴ EU Member States remain free to impose time limits upon the enforcement of foreign judgments which they have recognised and declared to be enforceable within their jurisdiction.¹⁰⁵ As the CJEU found:

⁹⁸ 2000 Protection of Adults Convention, Arts 23 and 25(1); 1996 Child Protection Convention, Arts 24 and 26(1).

⁹⁹ 2000 Protection of Adults Convention, Art. 27; 1996 Child Protection Convention, Art. 28.

¹⁰⁰ 1958 Maintenance Obligations Convention, Art. 6 [translation by the Permanent Bureau].

¹⁰¹ Brussels I Recast Regulation, Arts 39–44; A. Dickinson, E. Lein (eds.), *The Brussels I Regulation recast*, Oxford, Oxford University Press, 2015, para. 13.160.

¹⁰² *Ibid.*, para. 13.216.

¹⁰³ Judgment of 4 October 2018, *Società Immobiliare Al Bosco Srl*, C-379/17, EU:C:2018:806.

¹⁰⁴ *Ibid.*, paras 33 and 36.

¹⁰⁵ *Ibid.*, para. 34. However, the CJEU seemed to reserve the application of "the procedural rules of the Member State in which enforcement is sought" if it "impair[s] the effectiveness of the scheme laid down by the regulation as regards enforcement orders, by frustrating the principles laid down in that regard, whether expressly or by implication, by the regulation itself" (para. 26).

“once that judgment is incorporated into the legal order of the Member State in which enforcement is sought, national legislation of that Member State relating to enforcement applies in the same way as to judgments delivered by national courts [...] The procedural rules of the Member State in which enforcement is sought alone are applicable”.¹⁰⁶

52. Although the judgment related to the enforcement of a foreign provisional order, which would not circulate under the draft Convention by virtue of Article 3(1)(b),¹⁰⁷ the outcome and the reasoning of the CJEU may remain relevant to the operation of the draft Convention and, in particular, to the imposition of a domestic limitation period upon a foreign judgment on the merits once the decision has been declared enforceable in the court addressed.

53. Under the Brussels I Recast Regulation, the principles of “non-discrimination” and “equal treatment” prohibit any discrimination between the enforcement of foreign and domestic judgments.¹⁰⁸ The law of the Member States cannot place additional requirements upon the enforcement of foreign judgments or render it more difficult, unless expressly provided in the Regulation.¹⁰⁹

54. These two principles have already been asserted by the European Court of Justice under the Brussels I Regulation¹¹⁰ and the Brussels Convention.¹¹¹

2. Lugano Convention

55. Foreign judgments shall be recognised *ipso jure* in any other Contracting State to the Lugano Convention.¹¹² Article 33(1) provides that “a judgment given in a State bound by this Convention shall be recognised in the other States bound by this Convention without any special procedure being required”.

56. As regards the enforcement of judgments, the Lugano Convention, unlike the Brussels I Recast Regulation, requires a party to obtain a declaration of enforceability from the requested State prior to enforcement in the court addressed. It is the law of the requested State that lays down “the means of enforcement and terms of attachment” insofar as the Convention does not determine those issues.¹¹³

57. The Lugano Convention does not explicitly prescribe a limitation period, nor does it refer to the principle of “non-discrimination” in the enforcement of foreign judgments.

¹⁰⁶ *Ibid.*, paras 35-36.

¹⁰⁷ Which provides “an interim measure of protection is not a judgment”.

¹⁰⁸ A. Dickinson and E. Lein (eds.) (*op. cit.* note 101), para. 13.207; Brussels I Recast Regulation, recital 30: “A party challenging the enforcement of a judgment given in another Member State should, to the extent possible and in accordance with the legal system of the Member State addressed, be able to invoke, in the same procedure, in addition to the grounds for refusal provided for in this Regulation, the grounds for refusal available under national law and within the time-limits laid down in that law.”

¹⁰⁹ *Ibid.*, para. 13.210.

¹¹⁰ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. On this point, see Judgment of 13 October 2011, *Prism Investments BV v. Jaap Anne van der Meer*, C-139/10, EU:C:2011:653, para. 40 and references.

¹¹¹ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. On this point, see Judgment of 4 February 1988, *Horst Ludwig Martin Hoffmann v. Adelheid Krieg*, C-145/86, EU:C:1988:61, paras 27 to 29.

¹¹² A. Bucher (ed.), *Loi sur le droit international privé ; Convention de Lugano*, Basel, Helbing Lichtenhahn, 2011, p. 2011, para. 1.

¹¹³ A. Bucher (*op. cit.* note 112), p. 2035, paras 6 and 7.

3. Minsk Convention

58. Recognition and enforcement of foreign judgments is governed by Section III of the Minsk Convention. The grounds for refusing recognition or enforcement of a foreign judgment include the expiration of the limitation period according to the law of the requested State.¹¹⁴

59. The Minsk Convention requires equal treatment of the citizens from the Contracting States regarding access to justice and performance of procedural acts.¹¹⁵

4. Las Leñas Protocol

60. The Las Leñas Protocol designates the procedural law of the requested State to govern the recognition and enforcement of foreign judgments.¹¹⁶

61. Chapter III of the Protocol, entitled "[e]quality of procedural treatment", requires equal treatment in the context of access to justice. The courts of one Member State must consider and treat the citizens and permanent residents of the other Member States like their own.¹¹⁷

5. Riyadh Agreement

62. Under the Riyadh Agreement, the procedure for recognition and enforcement is governed by the law of the requested State.¹¹⁸ The Riyadh Agreement also contains a general principle of non-discrimination of citizens or legal persons among the Contracting States.¹¹⁹

6. Kiev Convention

63. The Kiev Convention refers to the expiry of a three-year limitation period as a ground for refusal in Article 9(e). Execution may only be refused upon the request of the party against whom the enforcement is sought, and only if that party provides the competent court of the requested State with evidence that the three-year limitation period for enforcement has expired. This approach is different from other international or regional instruments, as it prescribes a specific limitation period in the text.

64. The Kiev Convention also provides that commercial actors of each Contracting State are entitled to "plead, bring forward motions, to file claims, and to perform other procedural acts on the territories" of other Contracting States, and are entitled to equal legal and judicial protection of their proprietary rights and legitimate interests.¹²⁰

¹¹⁴ Minsk Convention, Art. 55(f): the recognition of a decision not requiring registration pursuant to Art. 52] "may be refused if: ... (f) the term of the coercive execution stipulated by the legislation of the Contracting Party, whose court executes the order, has expired".

¹¹⁵ Minsk Convention, Art. 1(2): "The nationals of each Contracting Party and persons residing on its territory...may... bring suits and fulfill other procedural activities on the same conditions as native citizens".

¹¹⁶ Las Leñas Protocol, Art. 24: "Proceedings, including the competence of the respective judicial bodies, for the purposes of the recognition and execution of judgments or arbitral awards, shall be governed by the laws of the requested State".

¹¹⁷ Las Leñas Protocol, Art. 3.

¹¹⁸ Riyadh Agreement, Art. 31(b): "Procedures pertaining to the recognition of a judgement or the execution thereof shall be subject to the laws of the requested [State] party if not otherwise governed by the provisions of this Agreement".

¹¹⁹ Riyadh Agreement, Art. 3, "Citizens of the contracting parties shall enjoy within the borders of each party the right of litigation before legal bodies to demand and defend their rights; and it is specifically prohibited to subject them to any form of security, personal or in kind, if they do not carry the nationality of the contracting party concerned or because they do not have a domicile or place of residence within the borders of the state where the litigation takes place. The provisions of the preceding paragraph shall apply to legal persons established or licensed in accordance with the laws of each of the contracting parties."

¹²⁰ Kiev Convention, Art. 3.

7. Commonwealth Model Law

65. The Commonwealth Model Law proposes that an application to enforce both monetary and non-monetary foreign judgments should be subject to the limitation period under the law of the State of origin, or 10 years after the day when the judgment becomes enforceable in the State of origin, whichever is earlier.¹²¹

66. The Commonwealth Model Law is designed to assist Commonwealth countries to modernise their approach to the recognition and enforcement of foreign judgments. It does not propose rules in relation to the principles of "non-discrimination" and "good faith".

8. Summary

67. Most instruments above do not explicitly address limitation periods. They designate the law of the requested State to govern procedural issues relating to the recognition and enforcement of foreign judgments. However, they do not specify whether limitation periods are matters of procedure or not.

68. The instruments that do touch upon limitation periods address them in different ways. First, one instrument identifies the applicable limitation period as whichever is longer, be that the one provided in the law of the requested State or the one of the State of origin (regarding enforcement of arrears: the 2007 Child Support Convention). Secondly, another designates the law of the State of origin or a period of 10 years, whichever is earlier (the Commonwealth Model Law). Thirdly, others formulate the expiration of a limitation period as a ground for refusal. Here, the limitation period is either governed by the law of the requested state (the Minsk Convention) or is specifically prescribed in the instrument (the Kiev Convention).

69. It should however be noted that none of these different ways of dealing with limitation periods may be suitable for the draft Convention, because the operation of the draft Convention requires the judgment to be enforceable in the State of origin. If the judgment is no longer enforceable in the State of origin, whether the period in the requested State is longer or not is irrelevant, as the judgment cannot circulate under the draft Convention altogether by virtue of Article 4(3). This is, for instance, distinct from the 2007 Child Support Convention, which permits the law of the State of origin and the law of the requested State to govern limitation periods (whichever is longer). In addition, it might not be suitable for the draft Convention, as a global instrument, to set forth a specific time limit, as it falls outside the mandate of the Hague Conference on Private International Law (hereinafter, "HCCH") of harmonising private international law rules.

70. The principles of "non-discrimination" or "equal treatment" are generally reflected in these instruments. Several of them require foreign judgments to be treated in the same way as domestic judgments, such as the Brussels I Recast Regulation. However, these principles do not apply explicitly to limitation periods.

V. Conclusion

71. Based on the foregoing analysis, different solutions are proposed to address the two issues raised in Section I, where a shorter (Issue 1) or shorter and discriminatory (Issue 2) limitation period potentially applies to the enforcement of the foreign judgment in the requested State.

72. **Issue 1:** Whether, and, if so, how the draft Convention should permit the court addressed to refuse enforcement on the basis that a limitation period under the law of the requested State has

¹²¹ Commonwealth Model Law, Art. 16(4).

lapsed, with particular attention to States which consider limitation periods to be a matter of substance.

73. *Option A:* introduce a specific “Limitation Periods” Article into the draft Convention. The Article would specify that the court addressed may refuse enforcement due to the expiration of a limitation period applicable to the enforcement of foreign judgments under the law of the requested State. Under this option, the applicable limitation period would be determined by the law of the requested State, and the lapse of the limitation period under its law would constitute a basis for refusal (consistent with Art. 4(1)). The legal certainty as to what the law of the requested State is in this regard could be further enhanced by requiring States, when joining the draft Convention, to submit a description of their laws and procedures concerning the limitation periods for enforcement of foreign judgments (a “Country Profile”). The approach of requiring the submission of a Country Profile was adopted in the 2007 Child Support Convention.¹²²

74. *Option B:* introduce a ground for refusal under Article 7(1) of the draft Convention based on the expiration of the limitation period in accordance with the law of the requested State. This Option has been proposed by several States in the Special Commission. It clearly identifies the lapse of a limitation period as a ground for refusal (consistent with Art. 4(1)) and the law which determines the applicable limitation period. It is neutral as to the nature of limitation periods, thereby providing a practical solution for States which consider limitation periods to be substantive (the limitation period will simply apply as determined by the law of the requested State). However, Article 7 addresses refusal for both recognition and enforcement. Since there was agreement in previous Special Commission meetings that recognition should not be subject to limitation periods, placing limitation periods under Article 7 (Refusal of recognition or enforcement) may not be appropriate.

75. *Option C:* change the title of Article 14 and identify limitation periods within Article 14(1), which could read:

“Article 14 Procedure and Limitation Periods

The procedure for recognition, declaration of enforceability or registration for enforcement, the enforcement of the judgement, **and the time within which enforcement must be sought**, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.”

Identifying limitation periods within Article 14(1) clarifies that limitation periods are to be governed by the law of the requested State and the court addressed can refuse enforcement when the period has expired. This option is pragmatic in the sense that the solution is provided within the current text of the draft Convention instead of creating a new provision, as proposed in Option A. It also avoids introducing a new ground for refusal, as proposed in Option B, which could also complicate the use of the term “recognition”. Changing the title of Article 14 to “**Procedure and Limitation Periods**” also

¹²² 2007 Child Support Convention, Art. 57:

“Provision of information concerning laws, procedures and services

- (1) A Contracting State, by the time its instrument of ratification or accession is deposited or a declaration is submitted in accordance with Article 61 of the Convention, shall provide the Permanent Bureau of the Hague Conference on Private International Law with –
 - a) a description of its laws and procedures concerning maintenance obligations;
 - b) a description of the measures it will take to meet the obligations under Article 6;
 - c) a description of how it will provide applicants with effective access to procedures, as required under Article 14;
 - d) a description of its enforcement rules and procedures, including any limitations on enforcement, in particular debtor protection rules and limitation periods;
 - e) any specification referred to in Article 25(1) b) and (3).
- (2) Contracting States may, in fulfilling their obligations under paragraph 1, utilise a country profile form recommended and published by the Hague Conference on Private International Law.
- (3) Information shall be kept up to date by the Contracting States.”

indicates that limitation periods are to be determined by the court addressed, whether or not they are applied as a matter of substance or procedure.

76. Since any Option proposed above may be seen as a departure from the approach under the 2005 Choice of Court Convention, and may prompt divergent interpretations on this regard, it may be advisable for the Explanatory Report to clarify the option and the intended policy consideration.

77. **Issue 2:** how to prevent the application of (shorter) limitation periods prescribed by the law of the requested State which discriminates against foreign judgments.

78. *Option D:* follow the current approach and further highlight in the Explanatory Report the importance of “non-discrimination” against foreign judgments, particularly in the context of limitation periods. The revised draft Explanatory Report broadly addresses the principle of non-discrimination; however, it could further highlight that the limitation periods applicable to foreign judgments should not diverge from those applicable to domestic judgments.

79. *Option E:* alternative to *Option D*, introduce the principle of “non-discrimination” as a fundamental principle in the Preamble of the draft Convention. The Preamble could adopt similar language to Recital 26 of the Brussels I Recast Regulation and describe non-discrimination as an essential element to ensure the effectiveness of the draft Convention. The principle could encourage the court addressed to interpret the Convention in a manner that prevents it from applying a discriminatory limitation period to foreign judgments. Introducing this principle in the Preamble could also be useful in the interpretation and operation of the draft Convention in other aspects of recognition and enforcement. It should be noted, however, that some States’ law may not give effect to the Preamble nor rely on it for interpretation purposes.

80. *Option F:* introduce the principle of “non-discrimination” in the text of the draft Convention, either in Article 4, 14 or in a separate article. This seems to be a more effective solution in comparison with Option D or E above. The non-discrimination principle could be tailored specifically to address only the matter of limitation periods, prescribing equal treatment of foreign and domestic judgments. The main advantage of this option is that it establishes clear obligations for the requested State when dealing with the enforcement of foreign judgments, thus providing further legal certainty.

ANNEX

Name of the Instruments	Relevant Provisions
<u>2007 HCCH Child Support Convention</u>	Article 32(5) “(5) Any limitation on the period for which arrears may be enforced shall be determined either by the law of the State of origin of the decision or by the law of the State addressed, whichever provides for the longer limitation period.”
	Article 33 “The State addressed shall provide at least the same range of enforcement methods for cases under the Convention as are available in domestic cases.”
<u>2005 HCCH Choice of Court Convention</u>	Article 14 “The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.”
<u>2000 HCCH Protection of Adults Convention</u>	Article 27 “Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law.”
<u>1996 HCCH Child Protection Convention</u>	Article 28 “Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child.”

<u>1958 HCCH Maintenance Obligations Convention</u>	<p>Article 6</p> <p>"The procedure for declaration of enforceability shall be governed, unless this Convention provides otherwise, by the law of the State of the enforcement authority. Any decision ruled to be enforceable shall have the same authority and the same effects as if it were issued by a competent authority of the State where enforcement is sought."</p>
<u>Brussels I Recast Regulation</u>	<p>Article 41(1)</p> <p>"1. Subject to the provisions of this Section, the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed. A judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgment given in the Member State addressed."</p>
	<p>Recital 26</p> <p>"(26) Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure. In addition, the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed. As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed."</p>
<u>Minsk Convention</u>	<p>Art. 55(f)</p> <p>"The recognition of a judgment [...] may be refused if: [...] the period of limitation applicable to enforcement according to the legislation of the Contracting State addressed has expired."</p>
	<p>Art. 1(2)</p> <p>"The nationals of each Contracting State [...] perform other procedural acts on the same conditions with its own nationals".</p>

<u>Kiev Convention</u>	Article 9(e) The courts of the requested State may refuse to enforce a foreign judgment, if “the three-year limitation period for filing the judgment for enforcement has expired.”
<u>Commonwealth Model Law</u>	Article 9(4) “(4) A money-judgment registered under this Act may be enforced in [...] only within the period provided by the law of the state of origin, or within [10] years after the day on which the foreign judgments becomes enforceable in that state, whichever is earlier.”
	Article 16(4) “(4) A non-monetary judgment may be enforced in [...] only within the period provided by the law of the state of origin, or within [10] years after the day on which the foreign judgments becomes enforceable in that state, whichever is earlier.”