EXÉCUTION DES JUGEMENTS
ENFORCEMENT OF JUDGMENTS

Note d'information
Background note

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HccH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

NOTE D'INFORMATION

établie par le Bureau Permanent

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BACKGROUND NOTE

drawn up by the Permanent Bureau

Document à l'intention du Groupe d'experts
(réunion du 12-14 avril 2012)

Document for the attention of the Expert Group
(meeting of 12-14 April 2012)

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Contents

Introduction*

1. The purpose of this background note is to assist the Expert Group in carrying out its mandate to "explore the background of the Judgments Project and recent developments with the aim to assess the possible merits of resuming the Judgments Project".[1]

2. In view of the discussions at the Council on General Affairs and Policy of the Conference of April 2011 ("Council"),[2] the Permanent Bureau anticipates that the Expert Group will focus on the following two key issues:

a. whether there is sufficient *interest* among States to pursue a future instrument on cross-border litigation in civil and commercial matters; and

b. whether there is sufficient *willingness* among States to invest the resources needed for the development of a future instrument.

3. In this regard, the Expert Group may wish to determine if, and to what extent, an assessment of the merits requires an analysis of the type and model of a possible future instrument, bearing in mind that it remains for the Council to decide what further work (if any) is to be undertaken on this topic. The Expert Group should also be mindful of the directive given by the Council that any future work on the Judgments Project should not interfere with the ongoing efforts to promote the entry into force of the *Hague Convention of 30 June 2005 on Choice of Court Agreements* ("Choice of Court Convention").

4. This background note is structured as follows:

a. Part I sets the scene for the Expert Group by presenting the background of the Judgments Project against the current international litigation landscape as well as the evolved membership of the Hague Conference;

b. Part II presents a brief survey of recent developments within regional and bilateral judgments schemes and other international news;

c. Part III elaborates on options for future work with a primary focus on the type and model of a possible instrument; and

d. Part IV reflects on the possible outcomes of the Expert Group meeting.

Part I – Setting the scene

1. The background of the Judgments Project

5. The "Judgments Project" refers to the work undertaken by the Hague Conference since 1992 on two key aspects of private international law in cross-border litigation: international jurisdiction and the recognition and enforcement of foreign judgments. A chronology of the Judgments Project is set out in a new specialised section of the Hague Conference website (< www.hcch.net >), which the Permanent Bureau launched in

* The Permanent Bureau acknowledges with gratitude the assistance of Alexander Kunzelmann (Legal Officer), Melissa Hanks (intern from Australia), Mahbuba Mammadova (intern from Azerbaijan), Yuji Matson (intern from Canada/Japan) and Francisco Suárez (intern from Venezuela).

[1] See Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (5-7 April 2011), para. 15, available on the Hague Conference website at < www.hcch.net >, under "Work in Progress", then "General Affairs".

[2] At the meeting, an expert from the United States of America indicated that the Expert Group should consist of predominantly government officials. This approach, which was accepted by the Council, underscores the political nature of the Expert Group's mandate: see "Report of Meeting No 4", Item IV, part 3, in "Report of the Council on General Affairs and Policy of the Conference of 5 to 7 April 2011", Prel. Doc. No 1 of September 2011 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference, pp. 45-6, 58-9.

December 2011.[3] For ease of reference, this chronology, complete with links to relevant documentation, is reproduced at **Annex II**.

6. An appreciation of the background of the Judgments Project is important; as the Council of April 2010 noted, the "valuable work which has been done in the course of the Judgments Project […] could possibly provide a basis for further work". It is equally important not to dwell on past experiences of the Judgments Project. For one, the difficulties in reaching consensus at the Nineteenth Session should not disguise the fact that Members unanimously confirmed shortly thereafter "the great importance they attach to harmonising rules on jurisdiction, recognition and enforcement of judgments in civil and commercial matters on a worldwide basis".[4] Nor should one downplay the support given by Members for the Hague Conference "to continue to pursue common solutions for these issues in the area of private international law, especially given the increasing need for finding solutions in this difficult arena".[5]

7. A decade has passed since the Hague Conference decided to discontinue work on a general instrument on cross-border litigation in civil and commercial matters. Against this backdrop, the Council determined in 2011 that the background of the Judgments Project needs to be examined in the context of recent developments. As a first step, it might be useful for the Expert Group to step back and reflect on the continued need for common solutions.

2. Continued need for common solutions

8. Cross-border litigation is more prevalent than ever. Despite the absence of general statistics on the volume of international cases before national courts, as much may be deduced from the continued globalisation of trade and commerce and corresponding increase in cross-border transactions that could give rise to disputes.[6] It may also be inferred from the expansion of litigation practice groups within global law firms, and the growth in international litigation support services.[7] Indeed, the financial downturn that is currently affecting a number of national economies has borne witness to a surge in cross-border litigation led by insolvency proceedings.[8]

9. Parties involved in cross-border litigation face a number of particular barriers as a result of the restrictive or conflicting rules of States involved governing the forum for litigation (*i.e.*, rules on jurisdiction), and the international circulation of the resulting judgment (*i.e.*, rules on recognition and enforcement).[9] These difficulties are exemplified by a number of recent cases that have been brought to the attention of the Permanent

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[3] The section may be accessed directly at < http://www.hcch.net/index_en.php?act=text.display&tid=149 > (in English) and < http://www.hcch.net/index_fr.php?act=text.display&tid=149 > (in French).

[4] See "Commission I on General Affairs and Policy held on 22-24 April 2002 (Summary prepared by the Permanent Bureau)", available on the Hague Conference website at < www.hcch.net >, under "Specialised Sections", "Judgments Project", then "Focus on international litigation involving choice of court agreements" ("Conclusions of Commission I of the XIXth Diplomatic Session of April 2002").

[5] *Ibid*.

[6] For some figures on the increase in international transactions, see "Ongoing work on international litigation and possible continuation of the Judgments Project", Prel. Doc. No 5 of February 2012 for the attention of the Council of April 2012, para. 15, available on the Hague Conference website at < www.hcch.net >, under "Work in Progress", then "General Affairs" (hereinafter "2012 note").

[7] See, for example, M. Byrne "Focus: The litigation top 50 – Wars of the world", available at < http://www.thelawyer.com/focus-the-litigation-top-50-wars-of-the-world/1010539.article > (consulted 27 February 2012).

[8] For a general overview of trends in the current international litigation landscape, see R. Lloyd, "In Disputes", *Legal Business*, February 2011, pp. 48-54.

[9] For a previous discussion on the barriers facing litigants in a cross-border context, see C. Kessedjian, "International jurisdiction and foreign judgments in civil and commercial matters", Prel. Doc. No 7 of April 1997 for the attention of the Special Commission of June 1997 on the question of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters, in particular paras 14-15, available on the Hague Conference website at < www.hcch.net >, under "Specialised Sections", "Judgments Project" then "Preparation of a preliminary draft convention". For more recent commentary, see G. Tu, *A Study on a Global Jurisdiction and Judgments Convention*, 2009, para. 4.19.

Bureau.[10] There are undoubtedly others, which the Permanent Bureau hopes will be reported by the experts.

10. Reducing the barriers to cross-border litigation through the clear allocation of jurisdiction and a facilitative scheme for the recognition and enforcement of foreign judgments offers benefits not only to businesses that engage in international transactions, but also to the States involved insofar as it helps them to establish a regulatory environment conducive to international trade and investment.[11] This much is confirmed in the Preamble to the Choice of Court Convention, which expresses a desire to "promote international trade and investment through enhanced judicial co-operation", which is in turn "enhanced by uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters". Moreover, according to a 2010 World Bank report, effective public institutions and efficient dispute resolution processes are important for encouraging foreign direct investment.[12] While other dispute resolution mechanisms such as arbitration remain popular in the context of cross-border agreements, in some specific sectors and transactions, litigation presents the best option for securing a reliable and efficient settlement of disputes.[13] Moreover, small and medium enterprises, which conduct a significant share of cross-border trade,[14] are particularly vulnerable to the costs of resolving cross-border disputes.[15]

[10] 2012 note (*op. cit.* note 6), para. 17. As an extreme example of delays in cross-border dispute resolution in the absence of uniform rules on the recognition and enforcement of foreign judgments, proceedings before a Japanese court in 1987 to enforce a costs order issued by a German court took six years to complete: Nagoya District Court, Judgment, 6 February 1987; Hanrei Jiho (1236) 113 [1987].

[11] For a recent account of the links between legal frameworks for cross-border litigation in civil and commercial matters and international trade and investment, see Hon. R. McClelland MP and M. Keyes, "International civil legal co-operation", *Commonwealth Law Bulletin*, 2011, Vol. 37(4), p. 661. See also D. Goddard QC, "Rethinking the Hague Judgments Convention: A Pacific Perspective", *Yearbook of Private International Law*, 2001, p. 27, in which the author confirms that an instrument dealing with the recognition of foreign judgments would provide greater legal certainty for businesses wishing to transact internationally; M.-L. Niboyet, "La globalisation du procès civil international (dans l'espace judiciaire européen et mondial)", *Journal du droit international (Clunet)*, Vol. 133, 2006, p. 937; Y.-C. Choong, "Enforcement of Foreign Judgments: The Role of the Courts in Promoting (or Impeding) Global Business", *World Academy of Science, Engineering and Technology*, Vol. 30, 2007, p. 92; J. Dammann and H. Hansmann, "Globalizing commercial litigation", *Cornell Law Review*, Vol. 94(1), 2008, p. 1; p. 937; Hon. J.J. Spigelman, "The Hague Choice of Court Convention and International Commercial Litigation", *Australian Law Journal*, Vol. 83, 2009, p. 386. See also M.P. Ramaswamy, "Hong Kong as a Conduit of Commerce between China and United States: The Role of Private International Law with a Specific Reference to Jurisdictional Issues", *US-China Law Review*, Vol. 8(4), 2011, pp. 297-9, in which the author discusses the benefits that an efficient enforcement regime brings for jurisdictions such as Hong Kong that act as intermediaries between trading partners.

[12] "Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies", Investment Climate Advisory Services, World Bank Group, available online at < http://iab.worldbank.org/ > (consulted 20 February 2012). The report specifically discusses the importance of clear and accessible arbitration procedures in promoting foreign investment and the need for national courts to facilitate and support such procedures. Note that the role of domestic courts in complementing arbitration regimes is also recognised by a number of authors; see for example: G.A. Bermann, "The 'Gateway' Problem in International Commercial Arbitration", *The Yale Journal of International Law*, Vol. 37, 2012, pp. 1-50; C. Whytock, "Domestic Courts and Global Governance", *Tulane Law Review*, Vol. 84(67), 2009-2010, p. 67.

[13] See, for example, C. Drahozal and S.J. Ware, "Why do businesses use (or not use) arbitration clauses?", *Ohio State Journal on Dispute Resolution*, Vol. 25(2), 2010, p. 433; Dammann and Hansmann, "Globalizing commercial litigation" (*op. cit.* note 11); Whytock, "Domestic Courts and Global Governance" (*op. cit.* note 12), pp. 111-114.

[14] For statistics on SMEs in cross-border trade and investment in Asia and the Pacific, see United Nations Economic and Social Commission for Asia and the Pacific, "Globalization of Production and the Competitiveness of Small and Medium-sized Enterprises in Asia and the Pacific: Trends and Prospects", 2009, esp. Table 13, available online at < http://www.unescap.org/tid/publication/tipub2540.pdf > (consulted 8 March 2012). For statistics on SMEs in the European Union engaged in international business activities beyond the internal market, see European Commission, "Internationalisation of European SMEs", Figure 2, available online at < http://ec.europa.eu/enterprise/policies/sme/market-access/files/internationalisation_of_european_smes_final_en.pdf > (consulted 8 March 2012).

[15] European Business Test Panel (EBTP), "Commercial disputes and cross border debt recovery: Final Report", available online at < http://ec.europa.eu/yourvoice/ebtp/consultations/2010/cross-border-debt-recovery/index_en.htm > (consulted 8 March 2012).

3. Evolution in the membership of the Hague Conference

11. Since 2001 (*i.e.*, the year the Nineteenth Session negotiated the Preliminary Draft Convention[16]), over 20 States have become new Members of the Hague Conference, including Brazil, India, the Russian Federation, and South Africa. As a result, the current membership of the Hague Conference represents greater diversity of legal traditions and systems as well as all but two G20 members.[17] Another significant development is the competence shift in the area of jurisdiction and recognition and enforcement of foreign judgments from EU Member States to the European Union, which entails a co-ordinated approach of 28 Hague Conference Members to any project in this area.

12. This complex environment needs to be accounted for when developing new instruments.[18]

Part II – Recent developments

13. The following sections provide a brief survey of some of the recent developments with regard to cross-border litigation that the Permanent Bureau has been tracking. Experts are encouraged to share their own experiences with other similar developments.

1. Bilateral and regional schemes

a. <u>The Americas</u>

14. In a study conducted during the preparation of the Choice of Court Convention, the Permanent Bureau identified and examined a range of American instruments dealing with international jurisdiction and the recognition and enforcement of foreign judgments, particularly those concluded under the auspices of the Organisation of American States (OAS) and the Common Southern Market (MERCOSUR).[19] Key instruments include the *Inter-American Convention of 8 May 1979 on extraterritorial validity of foreign judgments and arbitral awards* ("Montevideo Convention") and the *Las Leñas Protocol of 27 June 1992 on Jurisdictional Co-operation and Assistance in Civil, Commercial, Labour and Administrative Matters* ("Las Leñas Protocol"). Recent practice in the application of these instruments should reveal aspects that work well and which could possibly serve as inspiration for a future global instrument. Based on very preliminary research, there is relevant case law on the Montevideo Convention and the Las Leñas Protocol in at least some of the respective Contracting States.[20]

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[16] Preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, text contained in P. Nygh and F. Pocar, "Report on the preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters", Prel. Doc. No 11 of August 2000 for the attention of the Nineteenth Session of June 2001, available on the Hague Conference website at < www.hcch.net >, under "Specialised Sections", "Judgments Project" then "Preparation of a preliminary draft convention" (hereinafter "Nygh / Pocar Report").

[17] New Members since 2001: 2001: Belarus, Bosnia & Herzegovina, Brazil, Georgia, Jordan, Lithuania, Peru, Russian Federation, Serbia and Sri Lanka; 2002: Albania, Malaysia, New Zealand, Panama and South Africa; 2003: Iceland and Ukraine; 2005: Paraguay; 2007: Ecuador, European Union and Montenegro; 2008: India; 2010: Philippines; 2011: Mauritius and Costa Rica. Of the G20 members, only Indonesia and Saudi Arabia are not Members of the Hague Conference.

[18] *Cf.* "The Hague Conference on Private International Law Strategic Plan", drawn up by the Permanent Bureau, April 2002, para. 3.1.1, available on the Hague Conference website at < www.hcch.net >, under "Work in Progress", "General Affairs" then "Strategic Plan of the Hague Conference (April 2002)".

[19] "The American Instruments on Private International Law: A Paper on their Relation to a Future Hague Convention on Exclusive Choice of Court Agreements", Prel. Doc. No 31 of June 2005 for the attention of the Twentieth Session of June 2005, available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention No 37" then "Preliminary Documents".

[20] In Colombia, foreign judgments have been enforced under the Montevideo Convention, albeit with varying interpretations of its requirements: see, for example, Civil Cassation Chamber of the Supreme Court of Justice Judgments on cases Nos 2011 00234 00 of 24 October 2011, 2011 00773 00 of 8 September 2011, 2009 0193000 of 30 September 2010, all available at < www.cortesuprema.gov.co > then "Exequatur 1934-2011. Sala de Casación Civil Relatoría" (consulted 29 February 2012). A similar situation exists in Venezuela: see, for example, Civil Cassation Chamber of the Supreme Court of Justice, Judgments Nos 476 of 1 November 2010, 469 of 29 October 2010, 162 of 17 May 2010 and 26 of 12 February 2010; and Political and Administrative Chamber of the Supreme Court of Justice, Judgments Nos 1209 of 11 May 2006, 741 of 22 March 2006, 6468 of 7 December 2005, and 2581 of 5 May 2005. In Argentina, there is at least one Supreme Court judgment

15. Any future instrument should operate in harmony with existing American instruments, as well as other regional and bilateral schemes.[21] In this regard, it is worth noting that at a 2010 seminar jointly organised by the Brazilian Ministry of Justice, as President *pro tempore* of MERCOSUR, and the Permanent Bureau, a group of experts, composed of government officials, judges, and academics, highlighted "the relevance of the [Choice of Court] Convention, as well as its consistencies with the solutions already established under the various instruments in force at the regional and inter-American level, and in the MERCOSUR Contracting and Associated States".[22]

b. Europe

16. Within the European Union, work is ongoing on revising Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation"). The Commission's proposal officially launched a legislative process which will eventually lead to a Regulation to be adopted by the European Parliament and the Council in the future.[23]

17. The proposal is particularly relevant to the Judgments Project so far as it concerns the extension of the jurisdiction rules (which currently only apply to defendants domiciled in the European Union) to disputes involving non-EU defendants (effectively harmonising the national rules of the various EU Members States which currently apply). The proposal also adds two new grounds of jurisdiction that apply solely to non-EU defendants: one subsidiary rule based on the place where property belonging to the defendant is located, and the other based on the doctrine of *forum necessitatis*.

18. If the Brussels I Regulation is revised in line with the Commission's proposal, it is likely that these new outward-looking jurisdiction rules would be the basis upon which the EU would approach a new project at the Hague Conference. Conversely, the proposal leaves untouched the recognition and enforcement of non-EU judgments, which remain a matter for national law of EU Member States, and therefore perhaps greater room for multilateral action.

19. Another significant development in Europe is the entry into force of a revised judgments convention between the EU and States of the European Free Trade Association (EFTA) (*Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, the "Lugano Convention"*).* This Convention contains rules on international jurisdiction and the recognition and enforcement of foreign judgments that are aligned with the scheme currently in place under the Brussels I Regulation.[24] The revised Convention entered into force on 1 January 2010 and has attracted the interest of some States outside the EFTA.[25] It is important to note that the 2007 Lugano Convention is open to accession by

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(refusing *exequatur*) on the basis of the Montevideo Convention (Supreme Court, 15 October 1996, judgment No 95-062, *Rioplar S.R.L. c/Transportes Fluviales Argenrío S.A*). On the other hand, no Brazilian decision applying the Montevideo Convention has been reported (information kindly confirmed by Milton Feuillade (Argentina) and Nadia de Araujo, Boni de Moares Soares and Fabricio Polido (Brazil)).

[21] The relationship between a future instrument and other instruments is addressed at para. 54 below.

[22] "Concluding Statement adopted by the Joint Seminar during the Brazilian Presidency of MERCOSUR: Choice of Court in International Litigation", 8 November 2010, available at < http://www.hcch.net/upload/temp/brazsemstm_e.pdf > (consulted 27 February 2012).

[23] In accordance with the "ordinary legislative procedure", set out in Art. 294 of the Treaty on the Functioning of the European Union. Under this procedure, the European Parliament's position is key to the outcome of this ongoing review. While negotiations at the Council are progressing, a plenary sitting of the European Parliament to consider the proposal is currently scheduled for July 2012.

[24] The full text and current status are available at < http://www.dfae.admin.ch/eda/fr/home/topics/intla/intrea/chdep/miscel/cvlug2.html > (consulted 27 February 2012). The Convention is currently in force between the European Union, Denmark, Island, Norway and Switzerland.

[25] For example, the Australian Law Reform Commission has recommended that the Australian Government "review, as an issue for reform, the practicality of Australia seeking to become a party to the Lugano Convention"; "Legal Risk in International Transactions: Report No 80", recommendation 22, available at < http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC80.pdf > (consulted 26 February 2012). Two commentators have more recently renewed the call for lawmakers in Australia to prioritise the exploration

any State outside the EFTA, subject to the unanimous agreement of Contracting Parties.[26] So far, no State outside the EFTA has acceded to the Lugano Convention, and it remains to be seen how far the existing Contracting Parties would be willing to expand its coverage to States of differing legal traditions, should third States be interested in joining the Lugano scheme.[27]

c. Commonwealth of Independent States

20. The Permanent Bureau has previously conducted a study identifying and examining a variety of instruments between members of the Commonwealth of Independent States that deal with international jurisdiction and the recognition and enforcement of foreign judgments.[28] As with the American instruments (discussed at paras 14 to 15 above), recent practice in the application of these instruments could reveal aspects that work well and which could possibly serve as inspiration for a future global instrument.

d. Trans-Tasman Agreement

21. The 2008 *Agreement on Trans-Tasman court proceedings and regulatory enforcement* ("Trans-Tasman Agreement") is expected to enter into force between Australia and New Zealand in the very near future.[29] The Agreement, which applies to a broad range of "civil proceedings",[30] provides a facilitative scheme for the recognition and enforcement of judgments between the two States.[31] At the same time, the Agreement deals with jurisdiction insofar as it sets out common criteria that the courts in each State must "have regard to" when deciding whether or not to exercise jurisdiction.[32]

e. Arab States

22. There has recently been renewed focus on cross-border litigation within the League of Arab States as part of the development of a mechanism to improve the implementation of the 1983 *Riyadh Arab Agreement for Judicial Co-operation* ("Riyadh Arab Agreement).[33] This Agreement, which contains rules for the recognition and

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of the possibility of accession to the Lugano Convention should progress on a multilateral instrument remain slow: C. R. Einstein and A. Phipps, "Trends in International Commercial Litigation, Part II: The Future of Foreign Judgment Enforcement Law", at < http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_einsteinjulyaugust2005 > (consulted 27 February 2012).

[26] Art. 72. For a commentary, see A. Bucher (ed.), *Commentaire romand. Loi sur le droit international privé et Convention de Lugano*, Basel, Helbing Lichtenhahn, 2011, p. 2095.

[27] In this regard, one commentator has expressed the view that the Hague Conference would be the more appropriate forum to develop a global instrument: see A. Borrás, "The 1999 Preliminary Draft Hague Convention on Jurisdiction, Recognition and Enforcement of Judgments: Agreements and Disagreements", in F. Pocar and C. Honorati (eds), *The Hague Preliminary Draft Convention on Jurisdiction and Judgments*, Cedam, Milan, 2005, p. 70. See also M. Jametti Greiner, "L'espace judiciaire européen en matière civile: la nouvelle Convention de Lugano", in A. Bonomi, E. Cahin Ritaine, G.P. Romano (eds), *La Convention de Lugano: Passé, présent et devenir*, 2007, Zurich, Schulthess, p. 21.

[28] "The Relationship between the Judgments Project and Certain Regional Instruments in the Arena of the Commonwealth of Independent States", Prel. Doc. No 27 of April 2005 for the attention of the Twentieth Session of June 2005, available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention No 37" then "Preliminary Documents".

[29] The full text is available at < http://www.austlii.edu.au/au/other/dfat/treaties/notinforce/2008/12.html > (consulted 27 February 2012). According to Art. 16(2), the Agreement will enter into force 30 days after each Party has notified the other, through diplomatic channels, of the completion of their respective domestic procedures for the entry into force of this Agreement. Australia and New Zealand are currently putting in place regulations and amending court rules to complete the domestic implementation process.

[30] Art. 3(1).

[31] Art. 5.

[32] Art. 8.

[33] Endorsed by the Council of Arab Ministers of Justice on 6 April 1983 and signed by all Member States of the League of Arab States; entry into force on 30 October 1985. The Agreement has been ratified by Algeria, Bahrain, Djibouti, Egypt, Iraq, Jordan, Kuwait, Libya, Mauritania, Morocco, Oman, Palestine, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, UAE and Yemen. The full text in Arabic is available at < http://www.arableagueonline.org/las/arabic/details_ar.jsp?art_id=328&level_id=199 > (consulted 1 March 2012) and an English translation is available at < http://www.unhcr.org/refworld/docid/3ae6b38d8.html > (consulted 27 February 2012). The Permanent Bureau understands that a draft mechanism, prepared by an expert group representing the Councils of Arab Justice and Interior Ministers, was adopted by the Council of

enforcement of judgments modelled in part on the *Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* ("Enforcement Convention"),[34] is relevant to all 22 Members of the League, which comprises three Members of the Hague Conference (Egypt, Jordan and Morocco). Similar instruments have subsequently been concluded among sub-regional groups, such as the *1995 Protocol on the Enforcement of Judgments, Letters Rogatory and Judicial Notifications* ("GCC Protocol") between Member States of the Cooperation Council for the Arab States of the Gulf (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates).

f. Asia

23. The Permanent Bureau is unaware of any regional treaty in force among States in Asia on cross-border litigation.

24. In recent years, plans to develop international investment and arbitration frameworks and to improve judicial co-operation in civil and commercial matters have been endorsed by the Law Ministers of the Association of Southeast Asian Nations (ASEAN) as a means to promoting greater regional integration.[35] So far, however, no concrete plans have been announced to develop an instrument dealing specifically with cross-border litigation.[36]

25. In 2000, SAARCLAW, an association of legal communities of the South Asian Association for Regional Cooperation, undertook to "review and amend existing laws and / or to generate consensus, draft and implement a comprehensive treaty for the enforcement and execution of foreign judgments and arbitral awards effectively and expeditiously in the region" through the Kathmandu Declaration.[37] The Permanent Bureau is unaware of any further steps taken towards this goal.

2. Other relevant developments

a. The Commonwealth

26. The Commonwealth Secretariat is currently preparing model legislation on the recognition and enforcement of foreign judgments, which is due to be considered by Commonwealth Law Ministers at their next meeting in 2014.[38] The model legislation, which will require enactment in the various Member States before having effect, is designed to update existing arrangements between Member States, and possibly expand the grounds for recognition and enforcement. In doing so, the Commonwealth Secretariat has indicated that it will take into account the work of the Hague Conference over the

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Arab Justice Ministers at its 27th Session on 15 February 2012. See Decision no 878 in "Decisions of the 27th Session of the Council of Arab Ministers of Justice", available in Arabic only at < http://www.arableagueonline.org > (consulted 26 February 2012).

[34] H. M. S. Al Mulla, "Conventions of Enforcement of Foreign Judgments in the Arab States", *Arab Law Quarterly*, Vol. 14(1), 1999 , p. 48.

[35] The statements issued by past ASEAN Law Ministers Meetings are available at < http://www.asean.org/19533.htm > (consulted 27 February 2012).

[36] One commentator has called for the establishment of a convention for the mutual recognition and enforcement of judgments among ASEAN States; P.M.C. Koh, "Foreign Judgments in ASEAN – A Proposal", *International and Comparative Law Quarterly*, Vol. 45, 1996, p. 844. Another commentator, however, has questioned the appropriateness of this model for ASEAN States; P. Satayanurug, "Rethinking the Harmonization of Choice-of-Court Rules: A Reconciled Approach towards Potential Judicial Cooperation on Recognition and Enforcement of Judgments in Asia", working paper submitted to the AsianSIL 3rd Biennial Conference "Asia and International Law: A New Era", 27-28 August 2011, Beijing, China, available at < http://a10014931063.oinsite.cn/_d271634076.htm > (consulted 27 February 2012). See also J.J. Spigelman, "International commercial litigation: An Asian perspective"; *Australian Business Law Review*, Vol. 35, 2007, p. 335.

[37] The full text of the Kathmandu Declaration is available at < http://www.saarclaw.org/reports_detail.php?rid=1008 > (consulted 27 February 2012).

[38] "Communiqué", Meeting of Senior Officials of Commonwealth Law Ministries, 18-20 October 2010, para. 10, [copy available on request from the Permanent Bureau].

course of the Judgments Project[39] as well as related work of governments and law reform agencies in various Commonwealth States.[40] The model law will not address direct grounds of jurisdiction.[41]

b. International Law Association

27. Since 2000, the International Law Association (ILA) has adopted a number of resolutions relating to various aspects of cross-border litigation, including:

a. international jurisdiction over corporations;[42]
b. the management of concurrent proceedings;[43] and
c. mass claims.[44]

28. Work is also ongoing within the ILA on the private international law aspects of intellectual property disputes (discussed further in para. 71 below).

29. These resolutions, together with accompanying background studies, provide a reference point for possible common solutions in a future instrument. For instance, earlier work of the ILA on provisional and protective measures was taken into account in developing the Preliminary Draft Convention.[45]

c. International Association of Judges

30. In 2011, the Second Study Commission of the International Association of Judges[46] considered the topic "cross-border issues in the face of increasing globalization". In preparation for its meeting in Istanbul in September 2011, a questionnaire was circulated to the Study Commission members, which addressed (among other things) the operation of domestic law and international treaties in the field of international jurisdiction and the recognition and enforcement of foreign judgments.

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[39] See "The Recognition and Enforcement of Foreign Judgments", paper of June 2010 by the Commonwealth Secretariat for the attention of the meeting of Senior Officials of Commonwealth Law Ministries, 18-20 October 2010, SOLM(10)10, [copy available on request from the Permanent Bureau].

[40] At the Commonwealth Law Ministers Meeting in Accra, the Commonwealth Secretariat was asked in particular to take account of "work already done on this topic by Governments and law reform agencies in a number of member countries", see "Communiqué", Meeting of Commonwealth Law Ministers, Accra, Ghana, 17-20 October 2005, available at < http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/2A07BB49-003F-4916-8B21-C368B0DE486C_FINAL-LMM-COMMUNIQUE.pdf > (consulted 27 February 2012).

[41] See generally, Commonwealth Secretariat, The Recognition and Enforcement of Foreign Judgments (*op. cit.* note 39).

[42] Resolution No 4/2002, also known as the *Paris / New Delhi Principles on Jurisdiction over Corporations*, available at < http://www.ila-hq.org/en/committees/index.cfm/cid/18 > (consulted 12 January 2012).

[43] Resolution No 1/2000, also known as the *Leuven / London Principles on declining and referring jurisdiction in civil and commercial matters*, available at < http://www.ila-hq.org/en/committees/index.cfm/cid/18 > (consulted 12 January 2012). The development of the Leuven / Leuven Principles cross-fertilised earlier work of the Hague Conference on Judgments: see ILA Committee on International Civil and Commercial Litigation, London 2000 Conference Report, , para. 35, available at < http://www.ila-hq.org/en/committees/index.cfm/cid/18 > (consulted 16 March 2012).

[44] See also Resolution No 1/2008, containing the *Paris-Rio Guidelines of Best Practices for Transnational Group Actions*, available online at < http://www.ila-hq.org/en/committees/index.cfm/cid/1021 > (consulted 12 January 2012).

[45] See "Note on provisional and protective measures in private international law and comparative law", Prel. Doc. No 10 of October 1998 for the attention of the Special Commission of November 1998 on the question of jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters, available on the Hague Conference website at < www.hcch.net >, under "Specialised Sections", "Judgments Project" then "Preparation of a preliminary draft convention".

[46] The International Association of Judges ("IAJ") is a non-governmental organisation comprised of national associations of judges or representative groups from 78 States. Relevantly, the objects of the IAJ are, among other things to "increase and perfect the knowledge and the understanding of Judges by putting them in touch with Judges of other countries, and by enabling them to become familiar with the nature and functioning of foreign organisations, with foreign laws and, in particular, with how those laws operate in practice" and to "study together judicial problems, whether these are of regional, national or universal interest, and to arrive at better solutions to them": see Art. 3 of the IAJ Constitution, available on its website < http://www.iaj-uim.org > (consulted 15 March 2012).

31. Responses from members representing 23 States were received, and a comparative summary was prepared and distributed to the Study Commission.[47] On the basis of this summary, the Study Commission convened and made a number of observations.[48] First, the Study Commission noted an emergence of similarities among State systems regarding the eligibility of foreign judgments for recognition and enforcement, and grounds for refusal (although it acknowledged differences regarding the requirement for reciprocity). Second, the Study Commission acknowledged the desirability of free circulation of judgments, but recognised that achieving mutual trust among judges would not be an easy process. Third, the Study Commission considered that harmonising rules on jurisdiction would be a useful forerunner to the development of rules on the circulation of judgments.

3. Preliminary observations on recent developments

32. The foregoing survey underscores the interest of States involved in addressing the need for common solutions in the area of cross-border litigation. By the same token, it could be argued that the States involved are now less motivated to pursue common solutions at a global level. However, as trade and investment continue to take on global dimensions beyond the limits of bilateral and regional schemes, it is arguable that developing a global scheme remains a valuable target.

33. Furthermore, recent developments throw up new solutions and shed light on existing models developed over the course of the Judgments Project. They also give an indication as to areas where consensus might be building, although it is important to keep in mind that some facilitative schemes at the regional or bilateral level are underpinned by close economic, cultural and legal ties among the participating States.[49] All in all, it is open to the Expert Group to determine whether the relationship between these developments and a future global instrument is such that they impact on the feasibility of such an instrument, and therefore on the willingness of Members to invest the resources needed to develop it.

34. Finally, the Permanent Bureau notes that rules on jurisdiction and the recognition and enforcement of judgments continue to be the subject of reform at a national level, whether by way of new legislation,[50] new case law[51] or studies conducted by law reform bodies.[52] At a glance, these developments appear to be directed towards reducing the

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[47] A copy of the questionnaire, responses, and summary are available on request from the Permanent Bureau. The Permanent Bureau wishes to thank Judge Zila Zfat, President of the Second Study Commission, for kindly sharing these materials with the Permanent Bureau.

[48] "Second Study Commission – 2011: Summary and conclusions", available at < http://www.iaj-uim.org/site/modules/mastop_publish/files/files_4ecab770368a2.pdf > (consulted 27 February 2012).

[49] It seems unlikely that the facilitative scheme under the Trans-Tasman Agreement could be exported to a global instrument. The main reason for this is that both parties to the agreement have close cultural and legal ties that underpin the confidence each party has in the other's legal procedures. See generally R. Mortensen, "The Hague and the Ditch: The Trans-Tasman Judicial Area and the Choice of Court Convention", *Yearbook of Private International Law*, Vol. 10, 2009, p. 213.

[50] For example: Private International Law Act of Macedonia (*Official Gazette of the Republic of Macedonia no 87, 2007*); The Enforcement of Foreign Judgments Act of Saskatchewan (S.S. 2005, c. E-9.121, in force 19 April 2006), the first province in Canada to implement the Uniform Enforcement of Foreign Judgments Act adopted in 2003 by the Uniform Law Conference of Canada. In Japan, amendments to the Code of Civil Procedure have recently been enacted to establish a list of grounds of accepted international jurisdiction against which foreign judgments are to be reviewed for the purposes of their recognition and enforcement in Japan. These amendments, which are expected to enter into force in May 2012, replace the current system under which the courts have to rely on case law in determining the accepted grounds of jurisdiction. In November 2011, a draft bill on international litigation was presented to the Peruvian Congress, details of which are available at < http://interamericanbarfoundation.org/Peru.html#_ftn1 > (consulted 2 March 2012).

[51] See, for example, Higher Regional Court of Berlin, 18 May 2006, IPRax 2011, 565 and commentary by S. Dreißer, as well as the recent decision of the Supreme Arbitrazh Court of the Russian Federation in *Rentpool B.V. v. OOO Podyemnye Tekhnologii*, discussed at note 63 below.

[52] American Law Institute, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* (2006); Singapore Academy of Law, *Report of the Law Reform Committee on Enforcement of Foreign Judgments* (June 2005). At a meeting of the American Society on Private International Law (ASADIP) on 25 November 2011, there was clear consensus to support the development of a new global instrument in the model of a simple convention with a broad scope of application ("civil and commercial matters") and a marginal

barriers to cross-border litigation, and demonstrate the continued significance of the topic for policy makers. Nevertheless, national reform remains fragmentary at best and does not offer the co-ordinated approach that is warranted to respond to the needs of litigants.

Part III – Options to consider

35. In its note to the Council of April 2010 (hereinafter "2010 note"), the Permanent Bureau presented three options for resuming work on the Judgments Project:[53]

a. continuing with a convention dealing both with direct grounds of jurisdiction and recognition and enforcement of foreign judgments (*i.e.*, a "double" convention);[54]

b. continuing with a convention dealing only with recognition and enforcement of foreign judgments (*i.e.*, a "simple" convention);[55] and

c. continuing with a non-binding instrument dealing with direct grounds of jurisdiction and / or recognition and enforcement of foreign judgments.

36. It is within the Expert Group's mandate to prepare the discussions at the 2012 Council meeting by reflecting on the feasibility of a future instrument. Consideration may need to be given to the type (*i.e.*, convention or non-binding instrument) and model (*i.e.*, "simple" or "double") of any future instrument. This may, in turn, raise questions on the substantive scope of a future instrument (*i.e.*, the specific sectors of civil and commercial activity to which it will apply). While all these questions are relevant to assessing the merits of resuming the Judgments Project,[56] it is hoped that the discussions during the Expert Meeting will at this stage focus on the type and model of a feasible instrument. Issues of substantive scope and other technical issues may be addressed at a later stage, provided that the Council adds this topic to the work programme of the Hague Conference.

1. Type of instrument: convention or non-binding instrument?

37. The primary means by which the Hague Conference achieves its purpose[57] is through the conclusion of international conventions. These conventions, once accepted by a State, create binding obligations on that State under public international law. However, the Hague Conference may use[58] – and is indeed increasingly using[59] – other

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control of the jurisdiction of the court of origin: see "Draft report ASADIP discussion on HCCH work", available at < http://asadip.files.wordpress.com/2011/12/asadipcrreport-e.pdf > (consulted 2 March 2012).

[53] "Continuation of the Judgments Project", Prel. Doc. No 14 of February 2010 for the attention of the Council of April 2010, paras 9-17, available on the Hague Conference website at < www.hcch.net >, under "Work in Progress", then "General Affairs".

[54] In this Background Note, the "double" model connotes both a "complete" double convention and a "mixed" convention. See *infra* para. 40 below and accompanying notes.

[55] Also known as "single" convention. Of course, there is no reason why a "simple" convention could not deal only with international jurisdiction (and not with recognition and enforcement of foreign judgments). However, as one commentator has explained, such an instrument is "rarely discussed": R Michaels, "Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions", in E. Gottschalk, R. Michaels, G. Ruhl and J. von Hein (eds) *Conflict of Laws in a Globalized World*, Cambridge, 2007, p. 39.

[56] **Annex I** sets out a flowchart (a "mindmap") which shows the interface between the various issues for consideration.

[57] "The purpose of the Hague Conference is to work towards the progressive unification of the rules of private international law", Statute of the Hague Conference, Art. 1.

[58] The Fourteenth Session, recognising that the use of certain methods of less binding effect than international conventions is in certain cases of a kind to promote the easier adoption and more wide-spread diffusion of common solutions, granted that "the Conference, while maintaining as its principal purpose the preparation of international conventions, may nevertheless use other procedures of less binding effect, such as recommendations or model laws, where, having regard to the circumstances, such procedures appear to be particularly appropriate", Final Act of the Fourteenth Session, Part D, Decision 4, in *Actes et documents de la Quatorzième session (1980)*, Tome I, *Miscellaneous matters*, p. I-63.

[59] A prominent example of this is the current project to develop the Hague Principles on Choice of Law in International Commercial Contracts. Other examples include the Guides to Good Practice on the 1980 Child

procedures of less binding effect to achieve its purpose. After all, such procedures may facilitate the adoption and more widespread diffusion of common solutions. For the purposes of the continuation of the Judgments Project, a non-binding instrument might improve the prospect of Members reaching consensus on these solutions.

38. An attempt by the Hague Conference at its Fifth Session in 1925 to elaborate a non-binding instrument on the recognition and enforcement of judgments (in the form of a model convention) met with little success.[60] Forty years later, the drafters of the Enforcement Convention, faced with concerns about whether a traditional multilateral convention would ever be received among a growing number and diversity of participating States, considered it preferable to adopt a novel and complex system of bilateralisation[61] rather than to proceed with a model convention.

39. Despite the experience of the Hague Conference in this field, there might be renewed support for a non-binding instrument in the form of a model law. Such a project would be similar to that being developed by the Commonwealth Secretariat (see para. 26 above), except that it would also deal with direct grounds of jurisdiction.[62] Admittedly, issues of reciprocity would arise, assuming that the scheme would apply to judgments as between States that have implemented the model law into domestic legislation. Similarly, it would need to take account of national rules that require an applicable international convention to be in force before a foreign judgment will be recognised.[63] In any case, future work on a non-binding instrument would be able to draw on past experience of the Hague Conference in developing non-binding instruments in other fields, along with similar experiences of other international organisations, particularly its sister organisations, UNCITRAL and UNIDROIT.

2. Model of instrument: simple, reinforced simple or double?

40. From the outset, the Judgments Project had the ambition of harmonising rules on international jurisdiction as well as the recognition and enforcement of foreign judgments (*i.e.*, a double model).[64] A related issue was whether the specified direct grounds of

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Abduction Convention and the 1993 Intercountry Adoption Convention, and the Practical Handbook on the Operation of the Hague Service Convention.

[60] Ch.N. Fragistas, Explanatory Report on the 1971 Hague Judgments Convention, in *Actes et documents de la Session extraordinaire (1966), Exécution des Jugements*, pp. 362-363 (hereinafter "Explanatory Report on the Enforcement Convention"); see also for a discussion, K. Lipstein, "One Hundred Years of Hague Conferences on Private International Law", *International and Comparative Law Quarterly*, Vol. 42, 1993, pp. 570-572.

[61] For further details on bilateralisation, see para. 45 below.

[62] In a paper delivered in Wellington on 26 November 2011 on "Forum allocation and Judgments – Next Steps" [copy available on request from the Permanent Bureau], Goddard noted the potential value in a non-binding framework regarding the recognition of foreign judgments and suggested that the "experience of the UNCITRAL Model Law on Commercial Arbitration suggests that in the field of cross-border dispute resolution a great deal can be achieved by work on a non-binding instrument". Note also his comments regarding the possibility of an "*à la carte* convention" which would effectively allow participants to sign up to optional grounds of jurisdiction.

[63] For example, absent an international convention or, where applicable, supranational legislation, a foreign judgment is, at least generally speaking, not recognisable or enforceable in States such as Finland, Norway. Sweden or the Netherlands. See the respective national reports in G. Walter and S.P. Baumgartner (eds), *Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions*, 2000, Kluwer Law International. In the Netherlands, Art. 431(1) of the Code of Civil Procedure provides that no foreign judgment may be enforced in the Netherlands, except where provided for by law or treaty. Nevertheless, the Dutch courts have interpreted this provision to allow some degree of recognition for foreign judgments: see N. Rosner, *The Requirements for Execution of Foreign Money Judgments in the Netherlands Absent a Treaty*, 2 January 2003, available at < http://www.llrx.com/features/norel.htm > (consulted 1 March 2012). Similarly, in the Russian Federation, pursuant to Art. 241 of the Arbitrazh (Commercial) Procedure Code, a foreign judgment arising out of a commercial dispute will be recognised and enforced where provided for by an international treaty. Until recently, this requirement had been interpreted as requiring the presence of a specific international treaty. However, in a string of recent cases, the courts in the Russian Federation have displayed a less restrictive approach. In particular, by judgment dated 7 December 2009, the Supreme Arbitrazh Court upheld a decision of the Moscow Regional Arbitrazh Court that found that a foreign judgment could be recognised and enforced in the Russian Federation on the basis of internationally recognised concepts of reciprocity and comity of nations: *Rentpool B.V. v. OOO Podyemnye Tekhnologii* (Ruling No BAC-13688/09).

[64] The Working Group convened in October 1992 to consider the original US proposal unanimously agreed on the desirability of negotiating a new convention on *jurisdiction* and recognition and enforcement of foreign judgments; see "Conclusions of the Working Group meeting on enforcement of judgments", drawn up by the Permanent Bureau, Prel. Doc. No 19 of November 1992, *Proceedings of the Seventeenth Session (1993)*, Tome

jurisdiction should be exhaustive (*i.e.*, a "complete" double convention along the lines of the Brussels I Regulation and the Lugano Convention), or whether courts should instead be free to exercise jurisdiction based on other grounds provided for under their national law (*i.e.*, a "mixed convention", a form conceived of by Arthur von Mehren[65]). In the end, the Preliminary Draft Convention was in the form of a "mixed convention".[66]

41. With the benefit of hindsight, it is possible to say that achieving consensus on a comprehensive double instrument is more difficult than achieving consensus on an instrument dealing only with the recognition and enforcement of foreign judgments (*i.e.*, a simple model). This much is clear from the outcome of negotiations at the Nineteenth Session, and has been corroborated by several commentators.[67]

42. In this light, it would seem appropriate to start evaluating a possible future instrument along the lines of a less ambitious simple model.[68] It would then be open for the Expert Group to consider the feasibility of supplementing the instrument with:

a. additional mechanisms to reinforce the recognition and enforcement scheme (thereby developing what this background note refers to as a "reinforced simple" instrument); and / or

b. direct grounds of jurisdiction (thereby developing a "double" instrument).

These three models are considered separately below.

a. <u>The simple model</u>[69]

The Enforcement Convention as a basis

43. The Hague Conference has previously concluded a simple convention dealing with recognition and foreign judgments: the *Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* ("Enforcement Convention"). The Enforcement Convention was finalised in April 1966 and completed in October 1966 by a Supplementary Protocol. The Enforcement Convention remains the first and only Hague Convention dealing with the recognition and enforcement of foreign judgments in civil and commercial matters *in general*. It currently has five Contracting States.[70]

I, *Miscellaneous matters*, p. 256, at 263, also available on the Hague Conference website at < www.hcch.net >, under "Specialised Sections", "Judgments Project" then "The originating proposal".

[65] For a discussion of the background behind the "mixed convention", see P. Nygh, "Arthur's Baby: The Hague Negotiations for a World-Wide Judgments Convention" in J. Nafzinger and S. Symeonides (eds) *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren*, New York, Transnational Publishers, 2002, p. 154.

[66] See Art. 17 of the Preliminary Draft Convention, and the Nygh / Pocar Report (*op. cit.* note 16), pp. 27-30.

[67] See, for example, S. Baumgartner, "The proposed Hague Convention on Jurisdiction and Foreign Judgments: Where we are and the road ahead", *European Journal of Law Reform*, Vol. 4, 2002, No 1, p. 242; Y. Oestreicher, "'We're on a Road to Nowhere' – Reasons for the Continuing Failure to Regulate Recognition and Enforcement of Foreign Judgments", *International Lawyer*, Vol. 42(1), 2008, p. 61; comments by P. Mayer in A.F. Lowenfeld and L.J. Silberman (eds), *The Hague Convention on Jurisdiction and Judgments*, 2001, Juris, p. 76, and the separate comments by P. Mayer and A. Bonomi in F. Pocar and C. Honorati (eds), *The Hague Preliminary Draft Convention on Jurisdiction and Judgments* (*op. cit.* note 27), pp. 93 and 175 respectively.

[68] This approach reflects the position taken by the Permanent Bureau in May 1992 in its initial reaction to the US proposal; see "Some reflections of the Permanent Bureau on a general convention on enforcement of judgments", Prel. Doc. No 17 of May 1992 for the attention of the Special Commission of June 1992 (hereinafter "1992 note"), in *Proceedings of the Seventeenth Session (1993)*, Tome I, *Miscellaneous matters*, p. 237, also available on the Hague Conference website at < www.hcch.net >, under "Specialised Sections", "Judgments Project" then "The originating proposal".

[69] Much of this section is based upon a concept paper presented by Marta Pertegás at the NZCPL/AU/ANZIL Symposium "Innovative Models in International Commercial Dispute Resolution", Wellington, New Zealand, 26 November 2011 (copy available on request from the Permanent Bureau).

[70] For an up-to-date status table of the Convention, see the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention No 16" then "Status table".

44. The Enforcement Convention establishes uniform rules on the recognition and enforcement of foreign judgments,[71] but does not directly regulate the assumption of jurisdiction by the court of origin. It does, however, catalogue the grounds of jurisdiction on which a foreign judgment must be based for it to be eligible for recognition and enforcement in the State addressed (used in this sense, the grounds are known as "indirect grounds of jurisdiction").[72] In addition, the Supplementary Protocol specifies grounds of jurisdiction on which a foreign judgment must be refused recognition and enforcement in the State addressed (known as "exorbitant" or "prohibited" grounds of jurisdiction).[73]

45. The operation of the Enforcement Convention is based on a system of *bilateralisation* whereby the recognition and enforcement scheme only applies between those Contracting States that have concluded a "Supplementary Agreement", which is intended to refine, modify or exclude certain aspects of the scheme.[74] However, no Supplementary Agreement has ever been concluded,[75] and therefore the Enforcement Convention has effectively remained inoperative.

46. The Permanent Bureau has expressed the view that the lack of success of the Enforcement Convention is not due to its substance, but rather to the following two factors:[76]

a. its unusual and complex form (Convention – Supplementary Protocol – Supplementary Agreements); and

b. the success of regional instruments on the recognition and enforcement of judgments.

47. Indeed, a review of regional and bilateral instruments concluded thereafter reveals broad similarities with the recognition and enforcement scheme of the Enforcement Convention.[77]

48. Accordingly, it seems appropriate for the substance of the Enforcement Convention to form the basis of new negotiations towards a new simple convention.

Taking into account more recent schemes

49. The innovative recognition and enforcement schemes set out in subsequent Hague Conventions, such as the Choice of Court Convention and the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* ("Child Support Convention"), could inspire reflection on other features that might influence discussions on a new simple instrument.[78] It goes without saying that the considerable advances made by the Nineteenth Session on the Preliminary Draft Convention (documented in an "Interim Text"[79]) should also be taken

[71] The Enforcement Convention uses the term "decision", which is defined to include judgments. In subsequent instruments developed by the Hague Conference, reference is made to the term "judgment" or the term "decision". For the sake of consistency, this paper will use "judgment" as a catch-all term.
[72] Arts 10 and 11.
[73] Art. 4.
[74] See, in general, Chapter V of the Convention.
[75] Or at least communicated to the Depositary, as required by Art. 32(1).
[76] See, for example, the 1992 note (*op. cit.* note 68), p. 231; see also the 2010 note (*op. cit.* note 53), para. 4.
[77] See G. Droz, *Regards sur le droit international privé compare :* Cours général de droit international privé, *Rec. Cours*, 1991, p. 107. These instruments include not only the *Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters* ("Brussels Convention"), Lugano Convention, and *Copenhagen Convention of 11 October 1977 on the recognition and enforcement of judgments in civil matters*, which were directly influenced by the Enforcement Convention, but also the Montevideo Convention, the Riyadh Arab Agreement, the Las Leñas Protocol, and the GCC Protocol.
[78] 2010 note (*op. cit.* note 53), para. 14.
[79] "Interim Text – Summary of the outcome of the discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001", prepared by the Permanent Bureau and the co-Reporters, available on the Hague Conference website at < www.hcch.net >, under "Specialised Sections", "Judgments Project" then "Response to the preliminary draft convention".

into account in view of the fact that its rules on the recognition and enforcement of foreign judgments received "broad agreement" at the Nineteenth Session.[80]

50. The following paragraphs describe the key features of these schemes. For convenience, a comparison of the recognition and enforcement schemes set out in the Enforcement Convention, Interim Text, Choice of Court Convention and Child Support Convention is set out in **Annex IV**.

The Interim Text

51. In some respects, the recognition and enforcement scheme set out in the Interim Text is similar to that set out in the Enforcement Convention. For instance, Article 28 of the Interim Text substantially mirrors the grounds for refusal specified in Articles 5 and 8 of the Enforcement Convention. It also retains the prohibition on review of the merits, and reaffirms the binding effect of the court of origin's findings of fact for the purpose of verifying the jurisdiction of the court of origin (including the exception for default judgments).

52. In other respects, the Interim Text refines the scheme set out in the Enforcement Convention. For instance, it prohibits a review of the law applied by the court addressed.[81] It also treats the reviewability of the foreign judgment in the State of origin as a discretionary ground for postponement (or refusal) rather than an eligibility criterion for recognition and enforcement, thereby bringing foreign judgments within scope.[82] Moreover, it develops a new discretionary ground of refusal where the defendant was not notified of the proceedings, a ground that is mandatory in the Enforcement Convention.[83] Finally, and significantly, the Interim Text underlines the importance of speedy processes for recognition and enforcement.[84]

The Choice of Court Convention

53. If the recognition and enforcement scheme set out in the Interim Text did not achieve full consensus at the Nineteenth Session, it is fair to say that subsequent negotiations on the Choice of Court Convention resolved a number of outstanding issues.[85]

In and of itself, the recognition and enforcement scheme set out in the Choice of Court Convention is significant in that it establishes an *exhaustive* list of discretionary grounds for refusing to recognise and enforce foreign judgments[86] and contains no mandatory grounds for refusal.

54. Moreover, the Choice of Court Convention illustrates how some of the (often sensitive) technical and structural issues that were left outstanding in the Interim Text might be resolved in a future instrument. This is particularly the case for the issues of bilateralisation and the relationship with other instruments:

a. *Bilateralisation* – The Choice of Court Convention operates between all Contracting States without the need for supplementary agreements, or any

[80] Summary of Commission I on General Affairs and Policy (April 2002) (*op. cit.* note 4). It is interesting to note that the minutes of Commission I show no discussion about pursuing a simple convention based on the rules on recognition and enforcement of foreign judgments set out in the Interim Text.
[81] Compare with Art. 7 of the Enforcement Convention, which provides that the court addressed may still review the law applied on preliminary questions relating to certain excluded matters.
[82] Art. 25(4). Compare with Art. 4(2) of the Enforcement Convention.
[83] Art. 28(1). Compare with Art. 6 of the Enforcement Convention.
[84] Art. 30.
[85] For example, Art. 25 of the Interim Text contains a number of alternative formulations that were settled in Art. 8 of the Choice of Court Convention. As Nielsen comments (*op. cit.* note 66), p. 118, "the provisions on recognition and enforcement of judgments in the Convention are fine examples of what can be achieved internationally".
[86] Art. 8(1) provides: "Recognition or enforcement may be refused *only* on the grounds specified in this Convention" [emphasis added]. This issue did not reach consensus in the Interim Text.

special acceptance procedure. This supports an earlier observation by the Permanent Bureau that the techniques of permitting refusal of recognition or enforcement of foreign judgments are "so well advanced that it should be possible to negotiate a convention system which would leave control over foreign judgments to the judiciary [and not to the administration], as would be the case where supplementary agreements were involved".[87]

b. *Relationship with other instruments* – Article 26 of the Choice of Court Convention serves as a precedent for how to balance the operation of a future instrument with the operation of existing or future instruments, particularly those at regional and bilateral levels.[88]

55. Admittedly, the recognition and enforcement scheme set out in the Choice of Court Convention applies within the framework of a double convention and then only in respect of a relatively clearly-defined class of civil and commercial matters (*i.e.*, international cases involving a choice of court agreement). From this perspective, it is not certain how the experience of the Choice of Court Convention might affect the feasibility of a simple instrument dealing with other classes of civil and commercial matters, particularly pending any further discussion on substantive scope.

The Child Support Convention

56. The Child Support Convention is innovative in that it establishes a two-track application procedure for recognition and enforcement of maintenance orders.[89] Each track is designed to streamline proceedings in the State addressed and thereby overcome delays. The primary procedure, which is set out in Article 23, is notable insofar as:

a. it restricts the review of the foreign judgment by the court addressed to applying the public policy ground for refusing recognition and enforcement *ex officio*[90] (*i.e.*, the court addressed, without submissions of the applicant or the respondent, may only verify whether recognition and enforcement of the decision is "manifestly incompatible with the public policy of its own State") – this feature is not available in the Enforcement Convention, the Interim Text, or the Choice of Court Convention. The most that can be said for these instruments is that the onus of establishing that the court of origin did not have jurisdiction or that a ground of refusal applies rests on the party opposing the recognition or enforcement of the judgment.[91] A proposal to apply *ex officio* review was discussed during the Judgments Project, where it received the support of some experts. Others, however, deemed that the review of the foreign judgment could not be left entirely in the hands of the court because major delays may ensue.[92]

b. it postpones *inter partes* hearings before the court addressed; only once the parties are notified of the declaration or registration may a challenge or an appeal be lodged, and then only on specified grounds and within a

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[87] 1992 note (*op. cit.* note 68), p. 239.

[88] Reaching consensus on this provision is significant in itself; as T. Hartley and M. Dogauchi remark, the relationship between the Convention and other instruments was "one of the most difficult questions dealt with in the Convention": Explanatory Report on the 2005 Hague Choice of Court Agreements Convention, para. 25 available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention No 37" then "HCCH Publications" (hereinafter "Explanatory Report on the Choice of Court Convention").

[89] Art. 23 and Art. 24. See generally W. Duncan, "The New Hague Maintenance Convention and Protocol", *Yearbook of Private International Law*, Vol. 10, 2008, p. 313.

[90] See Art. 23(4) of the Child Support Convention.

[91] Nygh / Pocar Report (*op. cit.* note 16), p. 109.

[92] "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 for the attention of the Special Commission of November 1998 on the question of jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters, p. 28, available on the Hague Conference website at < www.hcch.net >, under "Specialised Sections", "Judgments Project" then "Preparation of a preliminary draft convention".

specified timeframe)[93] – a proposal to harmonise or even standardise certain procedural elements was favoured by some experts during the Judgments Project.[94] At the same time, experts were mindful that the mechanism would need to avoid unnecessarily overburdening existing national procedures that may already provide streamlined procedures in this regard. In the end, it was considered too difficult to devise such a mechanism[95] and the Interim Text instead reverted to the law of the State addressed. The issue was not raised again in the development of the Choice of Court Convention.

57. A Contracting State may opt out of this procedure, and instead apply an alternative procedure set out in Article 24,[96] which permits the prior notification of the defendant and the opportunity for both parties to be heard prior to the decision on recognition and enforcement. To date, the only Contracting State to the Child Support Convention, Norway, has opted to apply this alternative procedure.

58. It remains to be seen whether, and to what extent, the substance of the streamlined procedures established by the Child Support Convention could offer an acceptable solution in the context of a broader instrument on foreign judgments in civil and commercial matters. For the time being, however, its two-track approach provides an example of a flexible mechanism that might be discussed in the context of broader instruments.

A provisional synthesis

59. A common feature of simple conventions is the inclusion of indirect grounds of jurisdiction, which ultimately allows the court addressed to review *ex post facto* the jurisdiction of the court of origin.

60. Limiting the review of jurisdiction could enhance the international circulation of judgments by avoiding delays that may result from enquiries into the circumstances of the judgment, which may in turn be complicated by access to information as well as divergence in the content and format of judgments.[97]

61. Some regional instruments have dispensed with a general review of jurisdiction.[98] However, all of these instruments are based on a "complete" double model,[99] whereby dispensing with the ability of the court addressed to verify jurisdiction is premised on the court of origin being under an obligation to observe the grounds of jurisdiction in the first place (and having confidence that this will be done correctly). Such a premise does not exist in instruments based on a simple model. Indeed, all major regional instruments

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[93] Art. 23(5) to (8).
[94] Synthesis of the Work of the Special Commission of March 1998 (*op. cit.* note 92), pp. 26-27.
[95] Nygh / Pocar Report (*op. cit.* note 16), p. 116.
[96] By declaration in accordance with Art. 63 of the Convention.
[97] Concern about such divergence has previously been raised during the Judgments Project: See Synthesis of the Work of the Special Commission of March 1998 (*op. cit.* note 92), pp. 19-20. It should be noted, however, that in both the Enforcement Convention and the Interim Text, the court addressed is bound by the court of origin's findings of the facts on which it based its jurisdiction. For commentary on this issue, see A. Reed, "A New Model of Jurisdictional Propriety for Anglo-American Foreign Judgment Recognition and Enforcement: Something Old, Something Borrowed, Something New?", *Loyola of Los Angeles International and Comparative Law Review*, Vol. 25(2), 2003, p. 243; see also J.J. Spigelman (*op. cit.* note 36), pp. 336-7.
[98] See, for example, Brussels I Regulation, the Lugano Convention, and the *Minsk Convention of 22 January 1993 on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters* ("Minsk Convention"). Note, however, that even in these instruments, automatic recognition does not exclude the basic duty of the court addressed to consider whether the rules on recognition of the convention were applicable in the first place: see H. Muir Watt, "Jurisdiction and Judgments within Europe", in *Global Law of Jurisdiction and Judgments: Lessons from The Hague*, 2002, p. 255. Specifically on the Minsk Convention, see "The convention on legal assistance and legal relations in civil, family and criminal matters", Info. Doc. No 1 of April 2005 submitted by the Delegation of the Russian Federation for the attention of the Twentieth Session of June 2005 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention No 37" then "Preliminary Documents", p. 5.
[99] See definition of "complete" double instruments at para. 38 above.

based on a simple model provide for a control of jurisdiction, whether against specified indirect grounds of jurisdiction,[100] or against such grounds as are accepted by the law of the State addressed.[101] A similar trend can be observed at a bilateral level.[102]

62. If the Expert Group considers that indirect grounds of jurisdiction would need to be included in a future simple instrument, it is likely that this issue will be a focal point of negotiations. In this regard, a convenient reference point would be the grounds specified in the Enforcement Convention. Admittedly, it remains to be seen how useful the work done over the course of the Judgments Project will be, given that the grounds specified in the Interim Text were developed with a double convention in mind (*i.e.*, as *direct* grounds of jurisdiction). Nevertheless, it appears that if some or all of these grounds were to serve as a basis for a future simple instrument (*i.e.*, as *indirect* grounds of jurisdiction alone), consensus would be more readily achieved.[103] It may also be useful to examine some of the ideas underlying the bases of jurisdiction listed in Article 20 of the Child Support Convention.[104]

63. Finally, the Expert Group may find it necessary to consider prohibited grounds of jurisdiction (as defined in para. 44 above). The experience of the Hague Conference suggests that reaching consensus on such grounds would be more challenging than reaching consensus on indirect grounds of jurisdiction.[105]

b. <u>The reinforced simple model</u>

64. It is conceivable that the simple convention described so far might be complemented by additional mechanisms aimed at improving the cross-border circulation of judgments (without going as far as prescribing direct grounds of jurisdiction).

65. At the jurisdiction stage, a reinforced simple convention could include a *lis pendens* rule permitting or requiring the court of origin to suspend / dismiss proceedings in the event of parallel proceedings. Such a rule was included in Article 20 of the Enforcement Convention, according to which the court of one Contracting State is permitted to dismiss proceedings if parallel proceedings were already before the court of another State, and those proceedings may result in a judgment capable of recognition in the first State in accordance with the recognition scheme set out in the Convention. A more sophisticated rule was included in the Interim Text, which goes further by *requiring* the court to suspend (and eventually dismiss) the proceedings.[106] This provision, on which there was at least in-principle agreement at the Nineteenth Session,[107] could provide an effective way of promoting the circulation of judgments while reducing the time and expense of

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[100] See, for example, Art. 1(A) of the GCC Protocol, Art. 25(b) of the Riyadh Arab Agreement, and Art. 20(c) of the Las Leñas Protocol. It appears likely that a planned model law among Commonwealth countries will also make provision for the court addressed to verify the jurisdiction of the court of origin: see Commonwealth Secretariat, "The Recognition and Enforcement of Foreign Judgments" (*op. cit.* note 39).

[101] Under Art. 2(d) of the Montevideo Convention, a foreign judgment can be enforced in other Contracting States if the court of origin is "competent in the international sphere to try the matter and to pass judgment on it" in accordance with the law of the State addressed. It should be noted, however, that the Montevideo Convention has been supplemented by the *Inter-American Convention of 24 May 1984 on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments* ("La Paz Convention"), which sets out select grounds of jurisdiction. If a judgment is rendered in accordance with these grounds, the requirement of competence in the international sphere under Art. 2(d) of the Montevideo Convention is deemed to be satisfied.

[102] See, for example, the 1984 *Ottawa Convention providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters* between Canada and the United Kingdom.

[103] See Nygh / Pocar Report (*op. cit.* note 16), p. 27. For a comparison of the grounds of indirect jurisdiction specified in the Enforcement Convention and those specified in the Interim Text as direct grounds of jurisdiction, see **Annex III**.

[104] See **Annex IV**.

[105] The lack of agreement on prohibited grounds of jurisdiction was one of the reasons why an Extraordinary Session had to be convened in 1966 to conclude the Enforcement Convention: See the Explanatory Report on the Enforcement Convention (*op. cit.* note 60), pp. 360-388. For further reflections of the Permanent Bureau on this matter, see 1992 note (*op. cit.* note 68), p. 235 and 2010 note (*op. cit.* note 53), para. 15.

[106] Art. 21.

[107] 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 for the attention of Commission I (General Affairs and Policy of the Conference) of the XIXth Diplomatic Session – April 2002, para. 7, in *Proceedings of the Nineteenth Session (2001/2002)*, Tome I, *Miscellaneous matters*, at p. 429.

parallel proceedings. Similar provisions have also been included in a number of recent international projects.[108]

66. A reinforced simple convention could include other provisions that regulate the outflow of judgments at the jurisdiction stage, for instance, a rule that places the onus on the court of origin to consider whether the judgment sought is likely to require enforcement abroad, and if so, to only exercise jurisdiction if it is expected that the judgments will be capable of enforcement under the convention.[109] Such a rule might assist in promoting awareness of potential hurdles in enforcing judgments abroad and motivate the court of origin to provide a more comprehensive summary of the reasons for its decision to exercise jurisdiction.

67. A reinforced simple convention could also include rules that facilitate judicial communication between the court addressed and the court of origin to support the orderly rendition of judgments as well as their recognition and enforcement abroad. This mechanism, which was suggested early on in the Judgments Project by the Permanent Bureau,[110] and which has more recently gained significant support in the field of child abduction cases,[111] would aim at promoting the orderly rendition and recognition of judgments. Judicial communication is possible at both the jurisdiction stage (for example, to support the court of origin in deciding to suspend proceedings on grounds of *lis pendens* or clearly inappropriate forum) and the recognition and enforcement stage (for example, to support the court addressed in verifying the jurisdiction of the court of origin).

c. The double model

Including direct grounds of jurisdiction

68. Pursuing a new double convention would involve addressing direct grounds of jurisdiction. The past experience of the Hague Conference reveals the challenges of reaching consensus on a comprehensive list of grounds, as evidenced by the range of issues left unresolved in Chapter II of the Interim Text.[112]

69. A starting point for any future work on a double instrument might therefore be to concentrate on select grounds of jurisdiction that met with broad agreement by the close of the Nineteenth Session. Such a "bottom up" approach was in fact recommended by

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[108] See Art. 4.1 of *Leuven / London Principles* (*op. cit.* note 43); Art. 2.6 of the ALI / UNIDROIT Principles of Transnational Civil Procedure, available at: < http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf > (consulted 8 March 2012); Art. 2:701 of the "Principles for Conflict of Laws in Intellectual Property" by the CLIP Group (Max Planck Group on Conflict of Laws in Intellectual Property), final text of 31 August 2011; available online at < http://www.cl-ip.eu/en/pub/home.cfm > (consulted 21 February 2012); and ss. 221-223 of "Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes", American Law Institute, 14 May 2007. For a comprehensive analysis, see C. McLachlan, *Lis Pendens in International Litigation*, *Rec. Cours*, 2008, Vol. 336, pp. 508 *et seq.*

[109] *Cf.* Art. 22(2) *d)* of the Interim Text.

[110] 1992 note (*op. cit.* note 68), p. 237. Similar suggestions have been made more recently by commentators such as Spigelman (*op. cit.* note 36), pp. 335-336.

[111] See the Child Abduction Section of the Hague Conference website at < www.hcch.net >. The Hague Conference also supports the International Hague Network of Judges which currently includes 67 judges worldwide. Recently, the Special Commission on the Practical Operation of the 1980 and 1996 Conventions gave its "general endorsement" for the "Emerging Guidance and General Principles for Judicial Communications"; see "Conclusions and Recommendations", adopted by the Special Commission on the Practical Operation of the 1980 and 1996 Conventions (1-10 June 2011), Conclusion No. 68, available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention". See also "Emerging rules regarding the development of the International Hague Network of Judges and draft general principles for judicial communications, including commonly accepted safeguards for direct judicial communications in specific cases, within the context of the International Hague Network of Judges", Prel. Doc. 3 A of March 2011 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, available on the Hague Conference website *ibid.* ("Preliminary Documents / Information Documents"). For more information see "The International Hague Network of Judges" in the same Section of the Hague Conference website.

[112] For an analysis of several areas in respect of which a lack of consensus created obstacles to progress, see Some reflections on negotiations on the Judgments Project (*op. cit.* note 107).

Commission I on General Affairs and Policy (now the Council) in 2002 as a way to advance work on the Judgments Project following the Nineteenth Session. Commission I identified the following grounds, which called for an Informal Working Group to explore:[113]

a. jurisdiction based on a choice of court agreement (which is now elaborated in the Choice of Court Convention);

b. jurisdiction based on the defendant's forum;

c. jurisdiction based on the defendant's branches;

d. jurisdiction based on the defendant's consent / waiver / submission;

e. jurisdiction for counter-claims;

f. jurisdiction for trusts; and

g. jurisdiction for physical injury torts.

70. The work of the Informal Working Group, which met on three occasions in 2002 and 2003, was based on a Reflection Paper prepared by Andrea Schulz.[114] This paper addressed four of the grounds identified by Commission I: choice of court agreements, consent / waiver / submission, defendant's forum, and counter-claims. It did not, however, address the other identified grounds relating to specific classes of civil and commercial matters: trusts and physical injury torts.[115]

71. The specific sectors that did not attract broad agreement by the close of the Nineteenth Session (such as contracts,[116] economic torts and intellectual property) are also open to reconsideration in light of recent developments (including those discussed in Part II above). Indeed, some of the obstacles to consensus, which were identified either at the Nineteenth Session or later by the Informal Working Group, may be at least partly overcome by virtue of advances that have subsequently been made within other international forums, for example:

a. *E-commerce* – In the lead-up to the Nineteenth Session, anxiety was building around the impact of e-commerce on the appropriateness of certain direct grounds of jurisdiction, particularly that relating to contracts.[117] Since then, targeted work in this area, particularly within the OAS and UNCITRAL, has highlighted the peculiarities of dispute resolution relating to e-commerce.[118] In the course of this work, it has been observed that only a small number of disputes in this area attract litigation, due to

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[113] Summary of Commission I on General Affairs and Policy (April 2002) (*op. cit.* note 4). See also Goddard (*op. cit.* note 11) pp. 27-62, in which a number of priority areas of jurisdiction from a Pacific perspective are addressed.

[114] Former First Secretary of the Permanent Bureau; see "Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters", Prel. Doc. No 19 of August 2002 for the attention of the meeting of the Informal Working Group of October 2002, available on the Hague Conference website at < www.hcch.net >, under "Conventions", "Convention No 37" then "Preliminary Documents" (hereinafter "Reflection Paper").

[115] At the time, these other grounds were reserved for a possible follow-up paper. As it happened, such a follow-up paper was not required as the Informal Working Group came to the conclusion early on that work should focus solely on choice of court agreements.

[116] Assessing the merits of any instrument containing a set of grounds of jurisdiction for contract disputes would take into account the complementary effect of the Choice of Court Convention, which would apply to disputes arising out of those contracts to which a choice of court agreement applies.

[117] Some reflections on negotiations on the Judgments Project (*op. cit.* note 107), para. 7; see Explanatory Report on the Choice of Court Convention (*op. cit.* note 88), p. 16.

[118] For ongoing work of UNCITRAL, see generally < http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html > (consulted 1 March 2012); for OAS, see < http://www.oas.org/dil/CIDIP-VII_consumer_protection_united_states.htm > (consulted 1 March 2012).

the fact that most e-commerce disputes are "high volume-low value" claims and, accordingly, do not justify the relatively high cost of litigation.[119] Nonetheless, the need for adequate dispute resolution mechanisms for complex or high value claims arising from e-commerce transactions remains, and it is in this context that possible future work of the Hague Conference along the lines of a double instrument might complement the promising initiatives already underway.

b. *Intellectual property* – A sensitive subject matter that emerged over the course of the Judgments Project was jurisdiction over intellectual property disputes.[120] In recent years, significant progress has been made within a number of non-governmental organisations in formulating principles of jurisdiction over cross-border intellectual property disputes. Examples include projects undertaken by the American Law Institute, the CLIP Group, and members of the Private International Law Association of Korea and Japan.[121] The emerging set of rules is now the subject of ongoing work within the ILA.[122] The work of these organisations could provide a valuable reference point for common solutions in a future global instrument dealing with cross-border intellectual property disputes.[123]

c. *Defendant's forum* – Difficulties surrounding the inclusion of a direct ground of jurisdiction based on the defendant's forum surfaced in the deliberations of the Informal Working Group,[124] where preference was split between the terms "habitual residence" and "domicile". Discussions on a future instrument that includes a direct ground of jurisdiction based on the defendant's forum might benefit from the experience of instruments such as the UNCITRAL Model Law on Cross-Border Insolvency[125] or the EC Regulation on Insolvency Proceedings.[126] These instruments instead use the term "centre of main interests" ("COMI") for the purposes of determining the defendant's forum. The term COMI is not defined in either instrument, so its interpretation along with considerations to be taken into account when determining whether to exercise jurisdiction are left to the court to determine on a case-by-case basis.[127] Further investigation into case law on the interpretation of COMI by the courts of different legal traditions might be helpful to determine whether the use of such a term in a future instrument might be a possible way of avoiding the difficulties experienced in the past.

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[119] "Possible future work on online dispute resolution in cross-border electronic commerce transactions", UNCITRAL, 43rd Session, A/CN.9/706, distributed 10 April 2010, para. 31, available at < http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html > (consulted 1 March 2012); "Building a Practical Framework for Consumer Protection", available at < http://www.oas.org/dil/CIDIP-VII_consumer_protection_united_states_presentation.pdf > (consulted 1 March 2012).

[120] See Oestreicher (*op. cit.* note 67), pp. 72-75.

[121] "Commentary on Principle of Private International Law on Intellectual Property Rights", 14 October 2010, available online at: < http://www.globalcoe-waseda-law-commerce.org/activity/pdf/28/08.pdf > (consulted 21 February 2012). References to the ALI and CLIP Principles are available *supra* note 112.

[122] For information about the ILA Committee currently considering intellectual property and private international law, see < http://www.ila-hq.org/en/committees/index.cfm/cid/1037 > (consulted 21 February 2012).

[123] As noted at para. 36, the issue of the substantive scope of a possible future instrument, such as the inclusion of intellectual property disputes, may be addressed at a later stage. Any future work on this issue could include representatives from the World Intellectual Property Organisation, which has been involved in previous work on the Judgments Project.

[124] See Report of Second Meeting, p. 19.

[125] UNCITRAL Model Law on Cross Border Insolvency, 30 May 1997, available online at: < http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html > (consulted 21 February 2012).

[126] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, available online at: < http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33110_en.htm > (consulted 21 February 2012).

[127] See commentary by Judge L.M. Clark, "'Centre of Main Interests' finally becomes the Centre of Main Interests in case law", *Texas International Law Journal Forum*, Vol. 24, 2008, p. 14.

72. Any future work on a double instrument would certainly benefit from a structured step-by-step approach similar to that outlined in the Reflection Paper. Such an approach could also benefit from the advances made by the Choice of Court Convention on the need for bilateralisation and the relationship with other instruments (as discussed at para. 54 above), as well as new thinking on the need for prohibited grounds of jurisdiction (as discussed at para. 63 above and applied *mutatis mutandis* in the context of widely accepted *direct* grounds of jurisdiction).

Part IV – Expected outcomes

73. The Expert Group will reflect on the merits of resuming the Judgments Project, with the aim of facilitating the deliberation on this matter at the 2012 Council meeting.

74. The findings of the Expert Group will be consolidated in a set of conclusions and recommendations that will be submitted to the Council as a Working Document.

75. It is hoped that the Expert Group will arrive at a clear position concerning the merits of resuming the Judgments Project. Provided there is sufficient interest in engaging in further work in this area, the Council would benefit from any further recommendations that the Expert Group could make on the type and model of a future instrument. After all, the feasibility of any future instrument in this area is very much linked to the targeted goal and the procedure leading up to its successful conclusion.[128]

76. With regard to the type and model of a possible future instrument, it would seem, in light of the Hague Conference's tradition, that the conclusion of a non-binding instrument should only be considered once options for a new convention have been exhausted.[129] Turning therefore to a possible binding instrument as the appropriate starting point, it seems likely that any future work would be able to build on the broad consensus achieved during the Judgments Project on rules on recognition and enforcement. It remains to be seen, however, what degree of consensus is achievable on indirect grounds of jurisdiction (assuming they are included), or how applicable the innovative schemes set out in the Choice of Court and Child Support Conventions are to a broader scope of civil and commercial matters.

77. It also remains to be seen whether there is sufficient interest among Members to pursue a simple convention given that it does not directly regulate jurisdiction. For this reason, the 1992 Working Group on Judgments found that a simple convention would, at that time, "fall short of meeting present needs", and therefore recommended the development of a double convention.[130] Nevertheless, a simple convention might still have some effect on jurisdiction, as the Permanent Bureau has previously hypothesised:

> "It would seem that a global Convention defining positively for the purposes of recognition and enforcement the circumstances under which the court of origin would be considered to have jurisdiction, would by itself in due course provide an important incentive to litigate in courts whose judgements would, under the Convention, qualify for recognition and enforcement."[131]

78. Despite the predictability and relative efficiency of a double convention, consensus on a broad list of direct grounds of jurisdiction might be too tall an order given the Judgments Project background.[132] Consensus on select grounds, on the other hand, may

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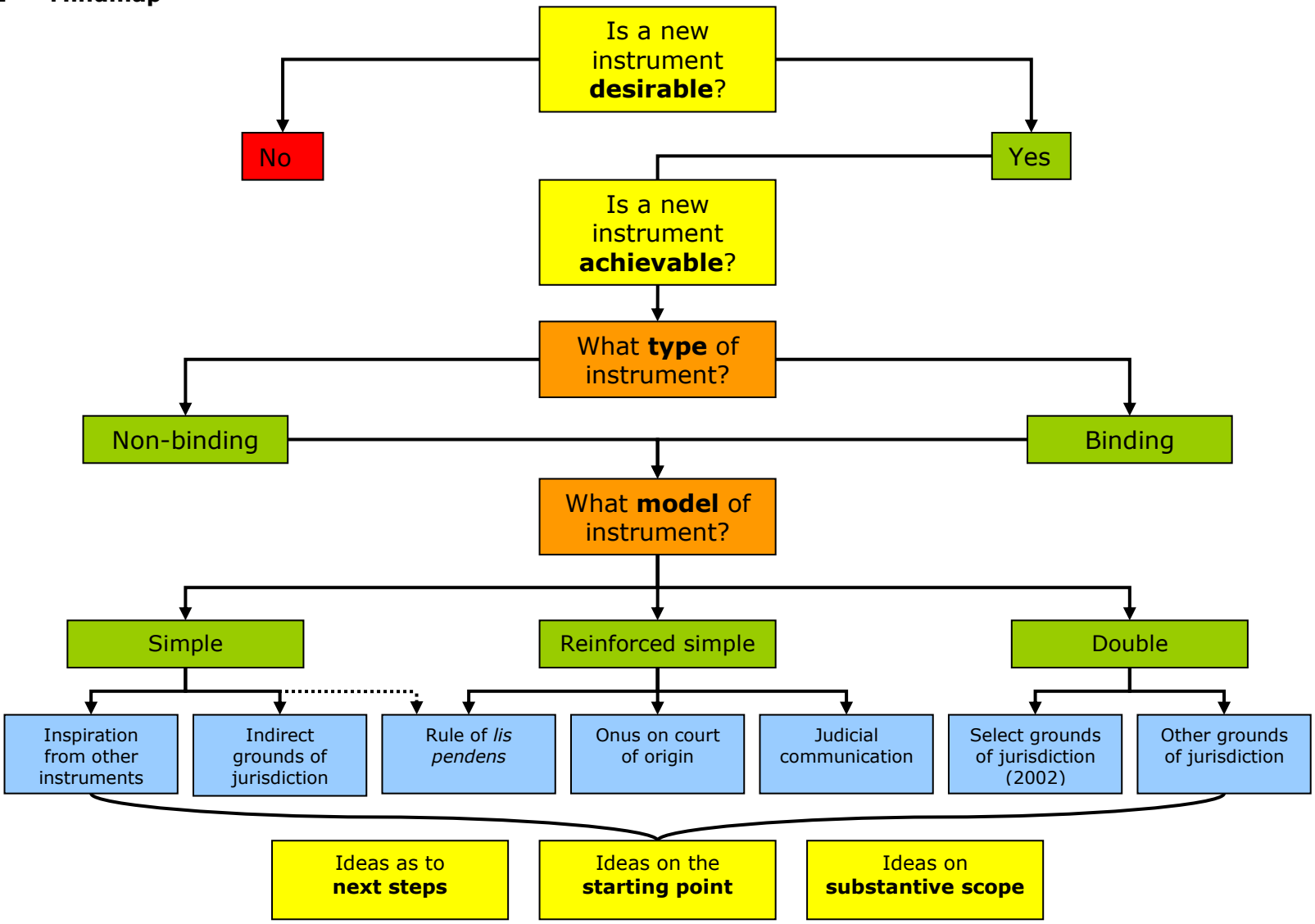
[128] 2012 note (*op. cit.* note 6), paras 36-38.
[129] See 2010 note (*op. cit.* note 53).
[130] See "Conclusions of the Working Group meeting on enforcement of judgments" (*op. cit.* note 64); see also Nygh / Pocar Report (*op. cit.* note 16), p. 28, which recounts that the Special Commission convened to prepare the Preliminary Draft Convention "accepted the Working Group's conclusion that a "single Convention" would not be useful".
[131] 2010 note (*op. cit.* note 53), para. 15; see also similar remarks in the 1992 note (*op. cit.* note 68), p. 237.
[132] See the comments by M. Bogdan at the Milan Seminar in 1995: "Nobody here believes that the efforts to achieve a world-wide convention on recognition and enforcement of foreign judgments will stop here. It is like climbing to the top of Mount Everest: new attempts were made all the time until one day somebody succeeded. I think there is a social, economic and commercial need for a convention and this will give rise to renewed

be more achievable, particularly in view of recent developments. In that regard, it remains to be seen whether a double instrument with limited substantive scope would arouse sufficient interest and motivation among States.

efforts"; in F. Pocar and C. Honorati (eds), *The Hague Preliminary Draft Convention on Jurisdiction and Judgments* (*op. cit.* note 27), p. 113.

Annex I – "Mindmap"



Annex II – Chronology of the Judgments Project

The following information is extracted from the new "Judgments Project" section of the Hague Conference website.

Year	Stage	Relevant documentation
1. Recent developments (2010-2011)		
2011	**Permanent Bureau invites the Council on General Affairs and Policy to reconsider further work on the Judgments Project** In a report to the Council on General Affairs on activities undertaken to promote the Choice of Court Convention, the Permanent Bureau suggests that the Council may wish to reconsider convening a group of experts to examine current developments in the area of international litigation and the feasibility of a new global instrument.	"Review of the Activities of the Conference in regard to the Convention on Choice of Court Agreements" (Prel. Doc. No 12 of March 2011)
	Council on General Affairs and Policy agrees to consider further work on Judgments Project At its meeting from 5-7 April, the Council on General Affairs stresses that any future work in this area should not interfere with the ongoing efforts to promote the entry into force of the Choice of Court Convention. Nevertheless, the Council concludes that "a small expert group should be set up to explore the background of the Judgments Project and recent developments with the aim to assess the possible merits of resuming the Judgments Project". The Council asks the Permanent Bureau to report back in 2012 on progress.	Conclusions and Recommendations adopted by the Council (see paragraph 15)
2010	**Permanent Bureau invites the Council on General Affairs and Policy to consider continuing the Judgments Project** Three options for future work are presented for consideration: ○ continuing with a convention dealing both with primary grounds of jurisdiction and recognition and enforcement of judgments; ○ continuing with a convention on recognition and enforcement of judgments (*i.e.* without direct grounds of jurisdiction); and ○ continuing with a model agreement.	"Continuation of the Judgments Project" (Prel. Doc. No 14 of February 2010)

	The Permanent Bureau proposes as a first step convening a group of experts to advise on the areas where it might be feasible to resume work on judgments, and where consensus might be possible.	
	Council on General Affairs and Policy decides to postpone further consideration of the Judgments Project until after entry into force of Choice of Court Convention At its meeting from 7-9 April, the Council notes the suggestions made by the Permanent Bureau and recalls the valuable work that has been done in the course of the Judgments Project. The Council concludes that "such exploratory work, including the appointment of an expert group, will be further considered only following the entry into force of the 2005 Choice of Court Convention".	Conclusions and Recommendations adopted by the Council (extract only)
2. Focus on international litigation involving choice of court agreements (2002-2003)		
2002-2003	**Part II of the 19th Session of the Hague Conference recommends a "bottom-up" approach to advance negotiations** Meeting from 22-24 April 2002 as Commission I on General Affairs and Policy, delegates unanimously reconfirm the "great importance they attach to harmonising rules on jurisdiction, recognition and enforcement of judgments in civil and commercial matters on a worldwide basis". They also encourage the Hague Conference to "continue to pursue common solutions for these issues in the area of private international law, especially given the increasing need for finding solutions in this difficult arena". In view of the outcome of Part I of the 19th Session (see here), Commission I recommends proceeding with an informal process starting with a discussion of a "core area" of possible grounds of jurisdiction (namely choice of court agreements, defendant's forum, counter-claims, branches, submission, trusts and physical injury torts), as well as the existing provisions on recognition and enforcement upon which there is broad agreement. Notwithstanding this broad agreement, there is no discussion at this stage about limiting the project to a simple convention.	Conclusions of Commission I of the XIXth Diplomatic Session of April 2002 "The impact of the Internet on the Judgments Project: Thoughts for the future" (Prel. Doc. No 17 of February 2002)

	Informal Working Group meets to examine the core area of possible grounds of jurisdiction. Meeting on three occasions (22-25 October 2002, 6-9 January 2003, 25-28 March 2003), the Informal Working Group recommends that negotiations proceed on a convention focusing on choice of court agreements in business-to-business cases and prepares a draft to this end. In its second meeting, the Informal Working Group considers some of the other grounds of jurisdiction foreshadowed by Commission I, but ultimately decides not to include these in its draft.	Documents relating to the Informal Working Group and the subsequent preparatory work of the Choice of Court Convention can be found on the Choice of Court Section. A number of documents drawn up or submitted as part of this preparatory work (available here) are nevertheless relevant to international jurisdiction and the recognition and enforcement of foreign judgments generally.
3. Response to the Preliminary Draft Convention (2000-2001)		
2000-1	**Special Commission on General Affairs and Policy recommends a series of informal meetings to resolve substantive and technical issues arising from the preliminary draft convention** The Special Commission emphasises the "need to adopt a Hague Convention on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters". It recommends that the series of informal meetings be held prior to the 18th Session with a view to advancing the consideration and drafting of proposals for resolving important substantive and technical issues identified. It also recommends that the 18th Session be divided into two sessions: the first session to discuss any proposals on the draft and to seek to "achieve consensus on certain issues"; the second to proceed in the normal way for Diplomatic Conferences.	"Conclusions of the Special Commission of May 2000" (Prel. Doc. No 10 of June 2000)
	A series of informal meetings takes place: ○ Washington DC, United States of America (30 October to 1 November 2000) – informal meeting of Government delegates to "take stock of the difficulties that have been raised about the October 1999 preliminary draft text of the convention, and to consider together how to move forward"; ○ The Hague, the Netherlands (11-12 December 2000) – joint conference of OECD, International Chamber of Commerce and the Hague Conference on	See generally "Informational note on the work of the informal meetings held since October 1999 to consider and develop drafts on outstanding items" (Prel. Doc. No 15 of May 2001) A report of the Hague meeting is available on the OECD website.

	alternative means of dispute resolution; ○ Basel, Switzerland (13-15 December 2000); ○ Geneva, Switzerland (1 February 2001) – experts meeting on the intellectual property aspects of the future convention; ○ Ottawa, Canada (26 February to 2 March 2001) – experts meeting on the specific requirements of electronic commerce; and ○ Edinburgh, United Kingdom (23-26 April 2001) – working group on intellectual property.	For the report of the Geneva meeting, see "Report of the experts meeting on the intellectual property aspects of the future Convention on jurisdiction and foreign judgments in civil and commercial matters" (Prel. Doc. No 13 of April 2001)
	Part I of the 19th Session of the Hague Conference is unable to reach consensus on the preliminary draft convention Meeting from 6-20 June 2001 as Commission II, delegates discuss the preliminary draft contention in light of developments since its adoption by the Special Commission in November 1999 (see here). No consensus is reached on the following areas: ○ the internet and e-commerce; ○ activity-based jurisdiction; ○ jurisdiction for consumer contracts and employment contracts; ○ jurisdiction for intellectual property; ○ the relationship with other instruments, particularly regional instruments; and ○ bilateralisation. However, there is at least in-principle agreement on the following areas: ○ the scope of the Convention; ○ jurisdiction based on the defendant's forum and choice of court agreements; ○ lis pendens and exceptional circumstances for declining jurisdiction; and ○ most of the chapter on recognition and enforcement. The status of the draft convention at the outcome of Part I of the 19th Session is	"Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6 – 20 June 2001: Interim Text" "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) "Comments on the preliminary draft Convention, adopted by the Special Commission on 30 October 1999, and on the Explanatory Report by Peter Nygh and Fausto Pocar" (Prel. Doc. No 14 of April 2001)

	documented in an "Interim Text" prepared by the Permanent Bureau.	
4. Preparation of a Preliminary Draft Convention (1997-1999)		
1997-9	**Special Commission convened to prepare a preliminary draft convention** The Special Commission meets on five occasions (17-27 June 1997, 3-13 March 1998, 10-20 November 1998, 7-18 June 1999 and 25-30 October 1999). In preparation for the Special Commission, the Permanent Bureau draws up a report on international jurisdiction and foreign judgments in civil and commercial matters. In this report, it is submitted that a substantial reason underlying the lack of success of the 1971 Enforcement Convention is the absence of rules on direct international jurisdiction. The Permanent Bureau therefore expresses the view that the focus of discussions during the Special Commission should be on the issue of direct jurisdiction rather than the recognition and enforcement of judgments.	"International Jurisdiction and Foreign Judgments in Civil and Commercial Matters" (Prel. Doc. No 7 of April 1997)
	At its first meeting, the Special Commission focuses on grounds of jurisdiction, with the goal of developing a complete double convention.	"Synthesis of the work of the Special Commission of June 1997 on international jurisdiction and the effects of foreign judgments in civil and commercial matters" (Prel. Doc. No 8 of November 1997)
	At its second meeting, the Special Commission focuses on: ○ the recognition and enforcement regime; ○ the scope of the convention; ○ specific grounds of jurisdiction (in more depth than at the first meeting); and ○ exceptions to the exercise of jurisdiction (*lis pendens* and*forum non conveniens*).	"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)
	At its third meeting, the Special Commission focuses on: ○ the scope of the convention; ○ jurisdiction based on defendant's forum, choice of court, appearance of defendant, contract, intellectual property disputes, tort, provisional and	"Note on provisional and protective measures in private international law and comparative law" (Prel. Doc. No 10 of October 1998) "Preliminary draft out line to assist in the

	protective measures; ○ prohibited grounds of jurisdiction; ○ the regime for recognition and enforcement of foreign judgments; ○ grounds for refusal to recognise or enforce; ○ lis pendens and forum non conveniens; ○ uniform interpretation; and ○ form of the convention (mixed convention or double convention). To assist experts in consolidating their discussions into a text, the Permanent Bureau prepares a preliminary draft outline, which synthesises the working documents proposed during the first two Special Commissions. A working document is also distributed at the start of the meeting by co-reporters addressing the issue of uniform interpretation. The outcome of discussions is documented in a proposal by the Drafting Committee, which is distributed at the end of the meeting.	"preparation of a convention on international jurisdiction and the effects of foreign judgments in civil and commercial matters" (Info. Doc. No 2 of September 1998) "Document submitted by the co reporters on the uniform interpretation of the proposed convention on the jurisdiction, recognition and the enforcement of judgments in civil and commercial matters"(Work. Doc. No 94) "Proposal by the Drafting Committee" (Work. Doc. No 144)
	At its fourth meeting, the Special Commission discusses the preliminary draft using as a basis the proposal by the Drafting Committee distributed at the end of the third meeting. The Special Commission concedes that the convention will need to allow for courts to exercise jurisdiction based on their national law, albeit within limits (*i.e.*, movement towards a mixed convention). The outcome of discussions is documented in a draft text that is provisionally adopted by the Special Commission at the end of the meeting.	"Issues paper for the agenda of the Special Commission of June 1999", prepared by the Permanent Bureau in preparation for the fourth meeting of the Special Commission
	At its fifth and final meeting, the Special Commission adopts a preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. The preliminary draft provides for three kinds of jurisdiction (a mixed convention): ○ required jurisdiction (the "white list") – the court of origin may exercise jurisdiction on certain grounds listed in the convention, and if it does, the resulting judgment is entitled to recognition and enforcement in other Contracting States; ○ prohibited jurisdiction (the "black list") – the court of origin may not exercise	"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) "Electronic Commerce and International Jurisdiction" (Prel. Doc. No 12 of August 2000)

	a judgment based on certain other grounds listed in the convention, but if it does, the resulting judgment is not to be recognised; ○ undefined area (the "grey area") – in all other cases, the court of origin may exercise jurisdiction on grounds under its national law, and if it does, the resulting judgment may be recognised and enforced in accordance with the national law of the court addressed. In adopting the preliminary draft, the Special Commission queries whether its provisions meet the needs of e-commerce and decides that the matter will be further examined by a group of experts. A group of experts subsequently meets (28 February – 1 March 2000) and agrees that it would be unwise to exclude electronic commerce from the substantive scope of the Convention.	See also "Electronic Data Interchange, Internet and Electronic Commerce" (Prel. Doc. No 7 of April 2000, in particular Chapter III.C)
5. Preliminary work (1992-1996)		
1996	**18th Session decides to include "the question of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters" in the Agenda**	*Final Act of the Eighteenth Session*, Part B, No 1 (extract only)
1994-1996	**Special Commission convened to study further the problems involved in drafting a new convention and to make proposals with respect to the work which might be undertaken.** The Special Commission meets on two occasions (22-24 June 1994 and 4-7 June 1996). In preparation for the first meeting, the Permanent Bureau draws up an annotated checklist of issues to be discussed, which addresses the nature and scope of a possible convention, and grounds of jurisdiction that might be admitted and excluded, and recognition and enforcement. The annex to this checklist contains a diagram explaining the different models of conventions (*i.e.*, "simple convention", "mixed convention" and "double convention").	"Annotated checklist of issues to be discussed at the meeting of the Special Commission on jurisdiction and enforcement of judgments" (Prel. Doc. No 1 of May 1994)
	At its first meeting, the Special Commission favours a double convention with a list of bases for assuming jurisdiction and a list of bases, the utilisation of which is prohibited. A consensus also emerges in favour of the court addressed being able to verify (or control) the court of origin's jurisdiction.	"Conclusions of the Special Commission of June 1994 on the question of the recognition and enforcement of foreign judgments in civil and commercial matters" (Prel. Doc. No 2 of

		December 1995)
	At its second meeting, the Special Commission examines the following questions in more detail based on notes drawn up by the Permanent Bureau: ○ declining jurisdiction on the basis of *forum non conveniens*; and ○ recognition and enforcement of judgments, in particular those awarding punitive or excessive damages. The Special Commission also considers a case note submitted by the Swiss delegation which highlights the need for a new convention. Subsequent discussions show substantial agreement among experts on the application of *forum non conveniens* only in exceptional circumstances, and the inclusion of a clause dealing with excessive damages. The Special Commission also reaffirms the need for the court addressed to be able to verify (or control) the judgment of the court of origin.	"Conclusions of the second Special Commission meeting on the recognition and enforcement of foreign judgments in civil and commercial matters" (Prel. Doc. No 6 of August 1996) "Note on the question of *forum non conveniens* in the perspective of a double Convention in judicial jurisdiction and the enforcement of decisions" (Prel. Doc. No 3 of April 1996) "Note on the recognition and enforcement of decisions in the perspective of a double convention with special regard to foreign judgments awarding punitive or excessive damages"(Prel. Doc. No 4 of May 1996) "A Case for The Hague" (Prel. Doc. No 5 of June 1996)
1993	**17th Session requests Special Commission to study further the problems involved in drafting a new convention and make proposals with respect to the work which might be undertaken.**	*Final Act of the Seventeenth Session*, Part B, No 2
1992	**Working Group unanimously agrees on the desirability of negotiating a new general convention on jurisdiction and recognition and enforcement of foreign judgments** Meeting from 29-31 October 1992, the Working Group considers that a simple convention would not meet present needs. It expresses a preference for an approach in the direction of a "double convention", but acknowledges that a complete double convention (*i.e.*, one which lists exhaustively the grounds of jurisdiction) would be "overly ambitious in the context of the broad Hague Conference membership".	"Conclusions of the Working Group meeting on enforcement of judgments" (Prel. Doc. No 19 of November 1992 in *Proceedings of the Seventeenth Session (1993)*, Vol. I, 257)

6. Preliminary work		
1992	**United States of America proposes a new convention on jurisdiction, and the recognition and enforcement of foreign judgments** The proposal is novel insofar as it calls for the new convention to harmonise only certain grounds of jurisdiction, allowing each Contracting State to determine other grounds of jurisdiction in accordance with its own law, provided that these grounds are not prohibited by the convention. This model is to be referred to as a "mixed convention".	Letter from the Department of State to the Permanent Bureau dated 5 May 1992 (copy available online)
	Permanent Bureau suggests "simple convention" as starting point The Permanent Bureau responds to the US proposal by recommending a convention on recognition and enforcement as a starting point for discussions. In its response, the Permanent Bureau acknowledges the lack of success of the *Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* ("Enforcement Convention") and its *Supplementary Protocol*, which it attributes to the subsequent success of regional instruments and the unusual and complex form of the Enforcement Convention.	"Some reflections of the Permanent Bureau on a general convention on enforcement of judgments (Prel. Doc. No 17 of May 1992 in *Proceedings of the Seventeenth Session (1993)*, Vol. I, 231)
	Special Commission on General Affairs and Policy refers proposal to a Working Group for further consideration	"Conclusions of the Special Commission of June 1992 on general affairs and policy of the Conference" (Prel. Doc. No 18 of August 1992 in *Proceedings of the Seventeenth Session (1993)*, Vol. I, 245)

Annex III – Comparison of the grounds of jurisdiction in the Enforcement Convention and the Interim Text

	Enforcement Convention Art. 4(1) – "A decision[i] rendered in one of the Contracting States shall be entitled to recognition and enforcement in another Contracting State under the terms of this Convention […] if the decision was given by a court considered to have jurisdiction within the meaning of this Convention […]" (see Arts 10 and 11)	**Interim Text** Art. 25(1) – "A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognised or enforced under this Chapter."
1. Jurisdiction based on connection between the court of origin and the parties / claim		
Habitual residence of defendant	**Art. 10(1)** The defendant had, at the time when the proceedings were instituted, his habitual residence/seat *etc*. in the State of origin.	**Art. 3** Defendant is [habitually] resident in State of origin.
Location of business establishment of defendant	**Art. 10(2)** The defendant had, in the State of origin, at the time when the proceedings were instituted, a commercial, industrial or other business establishment, or a branch office, and was cited there in proceedings arising from business transacted by such establishment or branch office.	**Art. 9** A branch, agency or any other establishment of the defendant is situated [or the defendant carried on regular commercial activity by other means] in State of origin, provided that the dispute relates directly to the activity of that branch, agency or other establishment [or to that regular commercial activity].
Location of immovable property	**Art. 10(3)** The action had as its object the determination of an issue relating to immovable property situated in the State of origin.	**Art. 12(1)** The proceedings have as their object rights *in rem* in immovable property, or tenancies of immovable property, situated in the State of origin, except in proceedings which have as their object tenancies of immovable property [concluded for a maximum period of six months] and the tenant is habitually resident in a different State.]

[i] See note 71.

	Enforcement Convention Art. 4(1) – "A decision[i] rendered in one of the Contracting States shall be entitled to recognition and enforcement in another Contracting State under the terms of this Convention […] if the decision was given by a court considered to have jurisdiction within the meaning of this Convention […]" (see Arts 10 and 11)	**Interim Text** Art. 25(1) – "A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognised or enforced under this Chapter."
		This ground of jurisdiction is *exclusive*
Relationship with trust	*No jurisdictional ground*	**Art. 11(2)** Absent a choice of court agreement: • the principal place of administration of the trust is situated in the State of origin • the applicable law of the trust is that if the State of origin • the trust has the closest connection for the purpose of the proceedings with the State of origin • the settler (if living) and all living beneficiaries are habitually resident in the State of origin.
Place and/or effect of a tort	**Art. 10(4)** In the case of injuries to the person or damage to tangible property, the facts which occasioned the damage occurred in the State of origin, and the author of the injury or damage was present in that territory at the time when those facts occurred.	**Art. 10(1)** In an action in tort [or delict]: • the act or omission that caused injury occurred in the State of origin; or • the injury arose in the State of origin, unless the defendant establishes that the person claimed to be responsible could not reasonably foresee that the act or omission could result in an injury of the same nature in that State. This ground of jurisdiction is qualified by Articles 10(2) to (5).
Counterclaim	**Art. 11** The court of origin has jurisdiction under Art. 10 to try the principal claim and the counterclaim arises out of the contract or out of the facts on which the	**Art. 15** The court of origin has jurisdiction to determine the original claim under the provisions of the Convention *and* the counterclaim arises out of the transaction or

	Enforcement Convention Art. 4(1) – "A decision[i] rendered in one of the Contracting States shall be entitled to recognition and enforcement in another Contracting State under the terms of this Convention […] if the decision was given by a court considered to have jurisdiction within the meaning of this Convention […]" (see Arts 10 and 11)	**Interim Text** Art. 25(1) – "A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognised or enforced under this Chapter."
	principal claim is based.	occurrence on which the original claim is based [unless the court would be unable to adjudicate such a counterclaim against a local plaintiff under national law].
Place of contract performance or of related business activity of defendant	*No jurisdictional ground*	**Art. 6** ALTERNATIVE A – Business activity The defendant has conducted frequent [and] [or] significant activity in the State of origin [or into which the defendant has directed frequent [and] [or] significant activity] *provided that* the claim is based on a contract directly related to that activity [and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State] *except where* the defendant has taken reasonable steps to avoid entering into or performing an obligation in that State. ALTERNATIVE B – Place of performance • In matters relating to the supply of goods, the goods were supplied in whole or in part in the State of origin • In matters relating to the supply of services, the services were provided in whole or in part in the State or origin • In matters relating both to the supply of *goods and services*, performance of the principal obligation took place in whole or in part in the State of origin

	Enforcement Convention Art. 4(1) – "A decision[i] rendered in one of the Contracting States shall be entitled to recognition and enforcement in another Contracting State under the terms of this Convention […] if the decision was given by a court considered to have jurisdiction within the meaning of this Convention […]" (see Arts 10 and 11)	**Interim Text** Art. 25(1) – "A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognised or enforced under this Chapter."
2. Jurisdiction based on upholding party autonomy		
Choice of court agreement	**Art. 10(5)** The parties agreed to submit to the jurisdiction of the court of origin disputes which have arisen or which may arise in respect of a specific legal relationship.	**Art. 4** The parties have agreed that [a court or] the courts of the State of origin shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship. This ground of jurisdiction is *exclusive* except where the parties agree otherwise
Appearance of the defendant	**Art. 10(6)** The defendant has argued the merits without challenging the jurisdiction of the court or making reservations thereon; nevertheless such jurisdiction shall not be recognised if the defendant has argued the merits in order to resist the seisure of property or to obtain its release, or if the recognition of this jurisdiction would be contrary to the law of the State addressed because of the subject matter of the dispute.	*No jurisdictional ground* However, Art. 5 of the *Preliminary Draft Convention* did include this jurisdictional ground. For further discussion on issues arising from this ground, see "Reflection Paper" (*op. cit.* note 114), p. 24.
3. Jurisdiction based on interests of weaker party		
Habitual residence of consumer	*No jurisdictional ground*	**Art. 7** In [proceedings][an action in contract], the plaintiff is a consumer and is habitually resident in the State of origin provided *that* the contract arises out of activities, including promotion or negotiation of contracts, which the other party conducted in the

	Enforcement Convention Art. 4(1) – "A decision[i] rendered in one of the Contracting States shall be entitled to recognition and enforcement in another Contracting State under the terms of this Convention […] if the decision was given by a court considered to have jurisdiction within the meaning of this Convention […]" (see Arts 10 and 11)	**Interim Text** Art. 25(1) – "A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognised or enforced under this Chapter."
		State of origin except where: • the consumer took the steps necessary for the conclusion of the contract in another State;[and • the goods or services were supplied to the consumer while the consumer was present in the other State.]
4. Jurisdiction based on territorial sovereignty		
Legal persons governed by law of State of origin	*No jurisdictional ground*	**Art. 12(2)** In proceedings which have as their object the validity, nullity, or dissolution of a legal person, or the validity or nullity of the decisions of its organs, the law governing the legal person is that of the State of origin. This ground of jurisdiction is *exclusive*.
Public registers	*No jurisdictional ground*	**Art. 12(3)** In proceedings concerning the validity of entries in public registers (other than IPR registers) the register is kept in the State of origin. This ground of jurisdiction is *exclusive*.
Intellectual property rights established by law of State of origin	*No jurisdictional ground*	**Art. 12(4)-(7)** In proceedings in which the relief sought is a judgment on the grant, registration, validity, abandonment, revocation [or infringement] of a patent or a mark, the patent or mark is granted or

	Enforcement Convention Art. 4(1) – "A decision[i] rendered in one of the Contracting States shall be entitled to recognition and enforcement in another Contracting State under the terms of this Convention […] if the decision was given by a court considered to have jurisdiction within the meaning of this Convention […]" (see Arts 10 and 11)	**Interim Text** Art. 25(1) – "A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognised or enforced under this Chapter."
		registered in the State of origin. In proceedings in which the relief sought is a judgment on the validity, abandonment, [or infringement] of an unregistered mark [or design], the mark [or design] arose in the State of origin. [In this Article, other registered industrial property rights [(but not copyright or neighbouring rights, even when registration or deposit is possible)] shall be treated in the same way as patents and marks] This grounds of jurisdiction is *exclusive*.

Annex IV – Comparison of the recognition and enforcement schemes in various Hague Conventions

	Enforcement Convention	**Interim Text** * Variants proposed # Agreement reached	**Choice of Court Convention**	**Child Support Convention**
1. Eligibility for recognition and enforcement				
Acceptable jurisdiction	The judgment is based on an acceptable ground of jurisdiction (Arts 4(1), 10 & 11), provided that it does not conflict with the exclusive jurisdiction of the court addressed (Art. 12) *In regards to the acceptable grounds of jurisdiction*, see **Annex III**.	The judgment is based on, or consistent with, an acceptable ground of jurisdiction from an exhaustive list specified in the Convention (Art. 25(1)) *In regards to judgments conflicting with the exclusive jurisdiction of the court addressed, see mandatory grounds of refusal* *In regards to the acceptable grounds of jurisdiction*, see **Annex III**.	The court of origin was designated in an exclusive choice of court agreement (Art. 8(1))	The decision is based on an acceptable ground of jurisdiction (Art. 20(1)), although the State addressed may make a reservation in respect of certain of these grounds (Art. 20(2))
No review	The judgment is no longer subject to ordinary forms of review in the State of origin (Art. 4(2))	*See discretionary grounds of refusal*	*See discretionary grounds of refusal*	*See discretionary grounds of refusal*
Status in State of origin	For the purposes of enforcement, the judgment is enforceable in the State of origin (Art. 4(3))	For the purposes of recognition, the judgment has effect in the State of origin (Art. 25(2))* For the purposes of	For the purposes of recognition, the judgment has effect in the State of origin (Art. 8(3)) For the purposes of	For the purposes of recognition, the judgment has effect in the State of origin (Art. 20(5)) For the purposes of

	Enforcement Convention	Interim Text * Variants proposed # Agreement reached	Choice of Court Convention	Child Support Convention
		enforcement, the judgment is enforceable in the State of origin (Art. 25(3))*	enforcement, the judgment is enforceable in the State of origin (Art. 8(3))	enforcement, the judgment is enforceable in the State of origin (Art. 20(5))
2. Discretionary grounds for refusal				
Public policy	Recognition and enforcement is manifestly incompatible with the public policy of the State addressed (Art. 5(1))	Recognition and enforcement would be manifestly incompatible with the public policy of the State addressed (Art. 28(1) *f)*)#	Recognition or enforcement would be manifestly incompatible with the public policy of the State addressed (Art. 9 *e)*)	Recognition and enforcement is manifestly incompatible with the public policy of the State addressed (Art. 22 *a)*)
Due process	The judgment results from proceedings incompatible with the requirements of due process of law, or in the circumstances, either party had no adequate opportunity to present their case (Art. 5(1))	• The defendant was not notified in sufficient time and in such a way as to enable him to arrange a defence, unless the defendant appeared without contesting notification (Art. 28(1) *d)*) • The defendant was not notified in accordance with an applicable international convention or the law of the State in which notification occurred, unless the defendant appeared without contesting notification (Art. 28(1) *d)*)*	• The defendant was not notified in sufficient time and in such a way as to enable him to arrange a defence, unless the defendant appeared without contesting notification (Art. 9 *c) i)*) • The defendant was not notified in the State addressed in a manner that is incompatible with fundamental principles of the State addressed (Art. 9 *c) ii)*)	Where the defendant neither appeared nor was represented and: • if the law of the State of origin provides for notice of proceedings, the defendant did not have proper notice and did not have an opportunity to be heard (Art. 22 *e) i)*) • if the law of the State of origin does not provide for notice of proceedings, the defendant did not have proper notice and an opportunity to challenge or appeal (Art. 22 *e) ii)*)
Fraud	The judgment was obtained by fraud in the procedural	The judgment was obtained by fraud in connection with	The judgment was obtained by fraud in connection with	The judgment was obtained by fraud in connection with

	Enforcement Convention	**Interim Text** * Variants proposed # Agreement reached	**Choice of Court Convention**	**Child Support Convention**
	sense (Art. 5(2))	a matter of procedure (Art. 28(1) *e)*)[#]	a matter of procedure (Art. 9 *d)*)	a matter of procedure (Art. 22 *b)*)
Lis pendens	Parallel proceedings, commenced earlier are pending before a court of the State addressed (Art. 5(3) *a)*)	Parallel proceedings, commenced earlier are pending before a court of the State addressed (Art. 28(1) *a)*)[#]		Parallel proceedings, commenced earlier are pending before an authority of the State addressed (Art. 22 *c)*)
Conflicting domestic judgment	A judgment resulting from parallel proceedings has already been rendered by a court of the State addressed (Art. 5(3) *b)*)	The judgment is inconsistent with a judgment rendered in the State addressed (Art. 28(1) *b)*)[#]	The judgment is inconsistent with a judgment rendered in the State addressed in a dispute between the same parties (Art. 9 *f)*)	The judgment is incompatible with a judgment rendered in the State addressed resulting from parallel proceedings (Art. 22 *d)*)
Conflicting foreign judgment	A judgment resulting from parallel proceedings has already been rendered by a court in another State which would be entitled to recognition and enforcement under the law of the State addressed (Art. 5(3) *c)*)	The judgment is inconsistent with a judgment rendered in another State that is capable of being recognised or enforced in the State addressed (Art. 28(1) *b)*)[#]	The judgment is inconsistent with an earlier judgment rendered in another State resulting from parallel proceedings that fulfils the conditions necessary for its recognition in the State addressed (Art. 9 *g)*)	The judgment is incompatible with a judgment rendered in another State resulting from parallel proceedings that fulfils the conditions necessary for its recognition and enforcement in the State addressed (Art. 22 *d)*)
Law applied by court of origin	In specified excluded matters, the court of origin decided a question the result of which differs from that which would have followed by applying the PIL rules of the State addressed (Art. 7(2))			
No review		The judgment is the subject	The judgment is the subject	

	Enforcement Convention	Interim Text * Variants proposed # Agreement reached	Choice of Court Convention	Child Support Convention
		of review in the State of origin, or the time limit for seeking review has not expired (Art. 25(4))	of review in the State of origin, or the time limit for seeking review has not expired (Art. 8(4))[i]	
Excessive damages		The extent to which the judgments awards grossly excessive damages (Art. 33(2)	The extent to which the judgment awards non-compensatory damages (Art. 11(1)) [ii]	
3. Mandatory grounds for refusal				
Unacceptable jurisdiction of court of origin	The judgment is based solely on a prohibited ground of jurisdiction (Arts 2 & 4 of the Supplementary Protocol)	The judgment is based on a ground of jurisdiction which conflicts with an exclusive or prohibited ground of jurisdiction (Art. 26)[#]		
Due process	For default judgments, the defaulting party was not notified of the proceedings in accordance with the law of the State of origin in sufficient time to enable a defence (Art. 6)			

[i] Note that the Choice of Court Convention includes a specific ground for refusal as follows:
"*Validity of the choice of court agreement*
(i) The choice of court agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid.
(ii) A party lacked the capacity to conclude the agreement under the law of the State addressed."
Note that the Child Support Convention includes a specific ground for refusal as follows:
"*Violation of limit on proceedings*
The judgment violates the limit on proceedings set out in Article 18 of the Convention (Art. 22 f))."

[ii] For a comparison of the provisions relating to excessive damages in the Choice of Court Convention and the Interim Text (as substantially reflected in an earlier draft of the Convention), see para. 203-205 of the Explanatory Report on the Choice of Court Convention (op. cit. note 88).