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Arnt Nielsen, Peter

Document Version

Accepted author manuscript

Published in:

Journal of Private International Law

DOI:

[10.1080/17441048.2020.1759854](https://doi.org/10.1080/17441048.2020.1759854)

Publication date:

2020

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Citation for published version (APA):

Arnt Nielsen, P. (2020). The Hague 2019 Judgments Convention: From Failure to Success? *Journal of Private International Law*, 16(2), 205-246. <https://doi.org/10.1080/17441048.2020.1759854>

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The Hague 2019 Judgments Convention

From Failure to Success?

Peter Arnt Nielsen*

The author discusses the Convention on Recognition and Enforcement of Judgments in Civil and Commercial Matters adopted on 2 July 2019 by the Hague Conference on Private International Law. After tracing the history of the Convention, the author discusses its scope of application, and concludes that although the scope is relatively narrow, it will in return improve the possibility of a more widespread acceptance of the Convention. The author also finds that the rules of indirect jurisdiction are likely to be acceptable globally. Although most provisions have been inspired by civil law, common law concepts have had a significant impact. The author stresses that the Convention together with the Hague Choice of Court Convention of 30 June 2005 should be taken as “a package”. The author finds that the provisions on recognition and enforcement by and large are uncontroversial, as they to a large extent have been copied from the 2005 Convention. In relation to the possibilities under the Convention for States to deposit declarations and reservations, and to make use of the Convention’s flexible bilateralization mechanism, the author concludes that the Convention is based on political realism making the likelihood of success for the Convention feasible.

Keywords: Recognition and enforcement of foreign judgments; Hague Convention; civil or commercial matters.

A. Introduction: The Hague Conference and civil and commercial judgments

On 2 July 2019, after more than eight years of work, the Hague Conference on Private International Law (the Hague Conference) adopted the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the 2019 Convention).¹

The 2019 Convention:

* The author (pan.law@cbs.dk) is Professor at the Copenhagen Business School and represented Denmark at the Special Commissions and the Diplomatic Conference on the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. All views expressed are the author’s personal views.

¹ Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, available at:
<https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>

seeks to promote access to justice globally through enhanced judicial cooperation. This will reduce risks and costs associated with cross-border legal relations and dispute resolution. As a result, implementation of the Convention should facilitate rule-based multilateral trade and investment, and mobility.²

In other words, the purpose of the Convention is to create “free movement” globally of judgments in civil and commercial matters.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) from 1958, with 159 Contracting States, has for decades made recognition and enforcement of arbitral awards in commercial matters a global reality.³ Within the EU, free movement of judgments has existed for more than 50 years with the Brussels Convention from 1968. Today, in the EU the free circulation of judgments in civil and commercial matters is governed by the Brussels Ia Regulation.⁴ A global convention for recognition and enforcement of judgments in civil and commercial matters is therefore strongly needed.

Actually, the 2019 Convention is the third Convention adopted by the Hague Conference in an attempt to ensure global recognition and enforcement of commercial judgments. A forerunner was adopted in 1971, but that Convention (the 1971 Convention) is a failure as it after almost 50 years of existence has only five Contracting States.⁵ The second Hague Convention is the Convention of 30 June 2005 on Choice of Court Agreements (the 2005 Convention), which clearly is more successful than the 1971 Convention, see Section A.1.

The main reason for the failure of the 1971 Convention is probably that it has a cumbersome bilateralization mechanism in Articles 21-23 that requires States to enter into a separate Supplementary Agreement for the Convention to be binding between two states that are Parties to the Convention. The 2019 Convention also has a provision on bilateralization. However, it is easy to activate, and it will be discussed in Section E.5.

1. The Hague Conference’s Judgments Project

² See the Preamble to the Convention and the *Draft Explanatory Report September 2019*, para. 10 (hereinafter *Draft Report*). The *Draft Report*, which is well-structured and clear, has been written by Professors Francisco Garcimartín, Universidad Autónoma de Madrid, Spain and Geneviève Saumier, McGill University, Canada. The final version is expected in the first part of 2020.

³ Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, available at:

https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards.

⁴ Brussels Convention of 19 September 1968 Jurisdiction and the Recognition and enforcement of Judgments in Civil and Commercial Matters. EU Regulation No 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and enforcement of Judgments in Civil and Commercial Matters (recast) (the Brussels Ia Regulation), available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012R1215&from=EN>.

⁵ Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. The Contracting states are Albania, Cyprus, Kuwait, the Netherlands, and Portugal, available at:

<https://www.hcch.net/en/instruments/conventions/full-text/?cid=78>.

The 2019 Convention is part of the Hague Conference's "Judgments Project", which began in 1992, when it was proposed that the Conference should work on uniform rules on jurisdiction and recognition and enforcement of judgments in civil and commercial matters.

Initially, most Member States of the Hague Conference wanted a broad and double Convention harmonising both the rules on international jurisdiction and the rules on recognition and enforcement of judgments. The intention was to have an instrument similar to the Brussels Convention. However, it soon became clear that a double Convention was not feasible, and it was decided to change the structure to that of a mixed Convention. A mixed Convention is more flexible than a double Convention, because it, unlike a double Convention, permits the application of national rules on both jurisdiction and recognition and enforcement in so-called "Grey Areas", while also setting up uniform rules on jurisdiction and recognition and enforcement.

However, during the negotiations from 1999 to 2001, consensus could not be reached on a number of issues, in particular in relation to jurisdiction for internet and e-commerce cases, activity-based jurisdiction, jurisdiction on consumer and employment contracts, intellectual property, the relationship with other instruments and bilateralization. Consequently, it was decided to continue to work only in areas where consensus seemed possible. In hindsight, it is not surprising that consensus on a broad mixed instrument could not be achieved at the global level.

This realism led to the adoption of the 2005 Convention. The 2005 Convention aims at ensuring the effectiveness of exclusive choice of court agreements in civil and commercial matters and to ensure recognition and enforcement of judgments resulting from proceedings based on such an agreement. The Convention only applies to civil or commercial cases involving an exclusive choice of court agreement, and it therefore has a much narrower scope than the intended double or mixed Convention would have had. The 2005 Convention's structure and content was inspired by the New York Convention.

The 2005 Convention entered into force on 1 October 2015. Mexico, Singapore, Montenegro, the United Kingdom and all Member States of the EU are Contracting States to this Convention, bringing the number of Contracting States to 31.

The 2005 Convention is a double instrument, because it governs both jurisdiction and recognition and enforcement of judgments. First, its rules on jurisdiction ensure: 1) that exclusive choice of court agreements are accepted by the courts of the State, whose courts have exclusive jurisdiction under such an agreement, and 2) that courts of States, whose courts are not designated in the choice of court agreement, dismiss proceedings instituted in that State. Second, the 2005 Convention obliges Contracting States to recognize and enforce judgments given by a court which had exclusive jurisdiction under an exclusive choice of court agreement.⁶

In 2011, the Hague Conference decided to consider the feasibility of a new global instrument in the shape of a simple Convention and to set up a Working

⁶ A bibliography for the 2005 Convention can be found at:

<https://www.hcch.net/en/instruments/conventions/publications1/?dtid=1&cid=98>.

Group to prepare a draft Convention. A simple Convention only sets up uniform rules on recognition and enforcement of judgments. It does not harmonise the rules of direct jurisdiction.

A simple Convention only indirectly regulates jurisdiction, as it will contain a list of rules of jurisdiction prescribing the necessary connection to the State of origin for a judgment to be recognised under the Convention. These rules of indirect jurisdiction can be seen as “jurisdictional filters” that permit a judgment to circulate under the Convention.

In 2015, the Hague Conference’s Working Group completed its work and presented a Draft Convention. During 2016-2019, four Special Commissions were held, and the Draft Convention was finalised at the Diplomatic Session in June 2019 and adopted on 2 July 2019. Uruguay signed the Convention on the same date.⁷

2. Relationship with the 2005 Convention

The 2019 Convention is closely related to the 2005 Convention. Whereas the latter applies to cases where the parties have entered into an exclusive choice of court agreement, the former applies to the cases where there is no exclusive choice of court agreement between the parties to a dispute.⁸ Thus, the 2019 Convention seeks to extend the benefits of mutual recognition and enforcement of judgments to a broader range of cases. The two Conventions can and should indeed be seen as a “package”, where the two instruments supplement and complement each other.⁹ However, a State may still decide to join only one of the two Conventions.

Many of the provisions of the two Conventions are identical or almost identical. However, for political and technical reasons, a number of provisions of the two instruments differ substantially, for instance on the issue of bilateralization, where the 2019 Convention, unlike the 2005 Convention, provides for such a possibility, see E.5 below.

⁷ For literature on the project, see, for instance, Paul Beaumont & Lara Walker, ‘Recognition and enforcement of judgments in civil and commercial matters in the Brussels I Recast and some lessons from it and the recent Hague Conventions for the Hague Judgments Project’ (2015) 11 *Journal of Private International Law* 31-63; Andrea Bonomi, ‘Courage or Caution? A Critical View of the Hague Preliminary Draft on Judgments’ (2015/2016) *Yearbook of Private International Law* 1-31; Louise Ellen Teitz, ‘Another Hague Judgments Convention? Bucking the Past to provide for the Future’ (2019) *Duke Journal of Comparative & International Law* 491-511, Ronald A. Brand, ‘The Circulation of Judgments Under the Draft Hague Judgments Convention’ *Pittsburgh University, Faculty of Law, Legal Studies Research Paper Series*, Working paper No. 2019-02, 1-35, Hans van Loon, ‘Towards a global Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters’ *Collection of Papers of the Faculty of Law*, Niš, No 82, 2019, 15-36, and Hans van Loon, ‘Le Brexit et les conventions de La Haye’ (2019) *Revue critique de droit international privé* 331-342.

⁸ The 2019 Convention can also apply where there is an exclusive choice of court agreement, if one of the filters in Arts 5 or 6 would cover the case, so the party seeking recognition or enforcement does not need to rely on the agreement. Furthermore, the 2019 Convention can apply to exclusive choice of court agreements when Art 7(1)(d) is used to refuse to recognize a foreign judgment. This can be seen as plugging a gap in the 2005 Convention.

⁹ *Draft Report*, para 18.

3. Overview of the 2019 Convention

The 2019 Convention provides for the recognition and enforcement of judgments from other Contracting States that meet the requirements set out in Article 5 in a list of bases of jurisdiction. Furthermore, in Article 7, the instrument sets out the only grounds on which recognition and enforcement of such judgments may be refused. In order to facilitate the circulation of judgments, the Convention does not prevent recognition and enforcement of judgments in a Contracting State under national law or under other treaties, see Articles 15 and 23, subject to one provision, Article 6, relating to an exclusive base for recognition and enforcement for a judgment that ruled on rights *in rem* in immovable property.

The 2019 Convention is divided into four chapters. Chapter I deals with its scope and contains a few definitions (Articles 1-3).

Chapter II (Articles 4-15), the core of the Convention, establishes the general principle of circulation of judgments among the Contracting States in Article 4.

Article 5 sets out the bases for recognition and enforcement of a judgment in the form of jurisdictional grounds against which the judgment from the State of origin is to be assessed by the State where recognition or enforcement is sought. These grounds are limited by the exclusive jurisdictional base in Article 6.

Article 7 lists exhaustively the grounds for refusal to recognise or enforce a judgment under the Convention.

Chapter II also regulates specific issues such as preliminary questions (Article 8), severability (Article 9), damages, including punitive damages (Article 10), and judicial settlements (Article 11).

Finally, Chapter II addresses matters on documents to be produced (Article 12), procedure (Article 13) and costs of proceedings (Article 14).

Chapter III of the 2019 Convention contains general clauses on transitional questions (Article 16), declarations (Articles 17-19), uniform interpretation (Article 20), review of the Convention (Article 21), non-unified legal systems (Article 22) and relationship with other instruments (Article 23).

Chapter IV sets out the final clauses on the ratification process (Articles 24-27), entry into force and bilateralization (Articles 28 and 29), manner of declarations (Article 30), denunciation (Article 31) and notifications (Article 32).

The 2019 Convention sets up uniform rules on recognition and enforcement of judgments in civil and commercial matters. However, if the Convention is to work efficiently in practice, these rules should also be applied in the same manner in all Contracting States. For that purpose, Article 20 provides that in the interpretation of the Convention regard must be had to its international character and to the need to promote uniformity in its application. Article 20, thus, requires judges to interpret the provisions and the legal concepts of the

Convention in an international manner in order to promote uniformity of application.¹⁰

In the following sections, the scope of application of the 2019 Convention is discussed in Section B. The jurisdictional filters are presented in Section C. The fundamental rules on recognition and enforcement and refusal of recognition and enforcement are the subject of Section D. A few of the general and final clauses will be discussed in Section E, before the prospects of success of the Convention are considered in Section F.

B. Scope of application of the 2019 Convention

According to Article 1(1) of the 2019 Convention, it applies to the recognition and enforcement of judgments in civil or commercial matters, and it shall not extend in particular to revenue, customs or administrative matters. The 2005 Convention has the same scope of application, see its Article 1(1). Furthermore, the 2019 Convention applies to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State, see Article 1(2). On the other hand, a number of civil or commercial matters are excluded from the scope of the Convention. These exclusions are listed in Article 2.

1. Civil or commercial matters

In the 2019 Convention, clearly the concept “civil or commercial matters” should be regarded as a uniform concept, which courts of Contracting States should interpret in the same manner under Article 20 of the Convention by reference to the objectives of the Convention and its international character. The concept should also be applied consistently across other Hague Conventions, in particular the 2005 Convention.¹¹ The concept is also well-known in the EU from the Brussels Ia Regulation, Article 1(1).

The Explanatory Report emphasises that whether a judgment relates to civil or commercial matters is determined by the nature of the claim or action that is the subject of the judgment, and that the nature of the court of the State of origin is not a decisive factor. For instance, a civil claim brought before a criminal court is covered by the Convention. Furthermore, the nature of the parties, ie, whether they are legal or natural persons, private or public, does not matter. Indeed, as stated in Article 2(4) of the Convention, a judgment is not excluded from the scope of application by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings in the State of origin.¹²

The concept of “civil or commercial matters” is used to distinguish between public and criminal law, where the State acts in its sovereign capacity. Administrative matters and criminal matters are examples of the exercise of sovereign powers and thus excluded from the scope of the 2019 Convention. Unlike the 2005 Convention, Article 1 (1) of the 2019 Convention states that the latter

¹⁰ *Draft Report*, para. 352. Therefore, under the Convention, judges can take account of foreign decisions and writings.

¹¹ *Draft Report*, para. 30.

¹² *Draft Report*, para. 28.

does not apply “in particular, to revenue, customs or administrative matters”.¹³ This enumeration is not exhaustive, and other matters of public law, eg constitutional matters, are also excluded from the scope of the Convention.

In order to determine whether a case concerns a public matter a court should:¹⁴

identify the legal relationship between the parties to the dispute and (...) examine the legal basis of the action brought before the court of origin to establish whether the judgment relates to civil or commercial matters. If the action derives from the exercise of public powers (or duties), the Convention does not apply.

2. Exclusions from scope

Article 2(1) of the 2019 Convention lists 17 matters that are excluded from the scope of the Convention despite their civil or commercial nature. In comparison, the 2005 Convention, Article 2(2), lists 16 exclusions from its scope, but adds in Article 2(1) consumer cases and employment contracts as excluded matters.

Apart from consumer and employment cases, most of the exclusions of the two Conventions are the same. However, the 2019 Convention also contains some exclusions that may be superfluous. Both the 2019 and the 2005 Convention exclude arbitration and related proceedings. The scope of the 2019 Convention is broader than the that of the 2005 Convention, as the former unlike the latter also covers consumer and employment contracts, personal injuries, damage to tangible property, rights *in rem*, and leases of immovable property, and some anti-trust/competition matters. In comparison, the Brussels Ia Regulation has only 6 exclusions from its scope of application, including arbitration, see its Article 1(2).

The difference in relation to the scope of application between the EU instrument on the one hand, and the two Hague Conventions on the other hand illustrates the difficulties in obtaining consensus in a global context compared to a regional setting such as that of the EU. While the rationale for some exclusions in the 2019 Convention is that those matters are already governed by other instruments, other matters are excluded because they are matters of particular sensitivity for many States.¹⁵

Both the 2019 and the 2005 Conventions state that “nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property”, see the 2019 Convention, Article 2(5), and the 2005 Convention, Article 2(6).

A matter is only excluded from the scope of the 2019 Convention if that matter was an object of the proceedings. A judgment is not excluded from the scope of the Convention where a matter to which the Convention does not apply, arose merely as a preliminary question in the proceedings in which the judgment was given. In particular, the mere fact that such a matter arose by way of defence does not exclude a judgment from the Convention if that matter

¹³ Even though the 2005 Convention does not contain these words, no differences are intended between the scopes of application of the two Conventions, *Draft Report*, para. 32, note 14.

¹⁴ *Draft Report*, para. 33.

¹⁵ *Draft Report*, para. 42.

was not an object of the proceedings, see Article 2(2) of the 2019 Convention. The 2005 Convention has a substantively identical provision in Article 2(3).¹⁶

The matters excluded from the 2019 Convention can be divided into four categories.

The first category contains the following non-contentious exclusions:

(a) the status and legal capacity of natural persons; (b) maintenance obligations; (c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; (d) wills and succession; (e) insolvency, composition, resolution of financial institutions, and analogous matters.

The Brussels Ia Regulation contains the same exclusions. Another type of non-contentious exclusion was for some cases that are exclusive jurisdictions in some countries but not necessarily in all and not necessarily with the same connecting factor:

(i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs; (j) the validity of entries in public registers.

The second category excludes matters that are covered by other instruments and/or are highly specialised fields.¹⁷ These are:

(f) the carriage of passengers and goods; (g) transboundary marine pollution, marine pollution in areas beyond national jurisdiction, ship-source marine pollution, limitation of liability for maritime claims, and general average; (h) liability for nuclear damage.

The third category excludes matters where there was no consensus on whether the subject matter should be covered by the Convention or not. These are:

(k) defamation; (l) privacy; (m) intellectual property; (p) anti-trust (competition) matters, except where the judgment is based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the State of origin.

The fourth category contains exceptions that probably are largely superfluous to include, as they concern activities of a State acting *jure imperii*.¹⁸ These are:

(n) activities of armed forces, including the activities of their personnel in the exercise of their official duties; (o) law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties; (q) sovereign debt restructuring through unilateral State measures.¹⁹

¹⁶ Refusal of recognition and enforcement of rulings on preliminary questions and matters to which the Convention does not apply is regulated in Art 8 (see Section D.2.f).

¹⁷ *Draft Report*, para. 42.

¹⁸ As pointed out by Paul Beaumont, 'Judgments Convention: Application to Governments' (2020) *Netherlands International Law Review*, forthcoming, Section 4, Art 2(1)(n) and (o) may seem to simply confirm that activities of armed forces and law enforcement activities do not constitute 'civil or commercial matters', but the two exceptions may take some matters that are within the scope of the Convention, such as public procurement of weapons, outside the scope of the Convention.

¹⁹ In the judgment of the Court of Justice of the European Union in Case C-308/17, *Greece v Kuhn*, the Court held that the term "civil and commercial matters" in Art 1(1) of the Brussels Ia Regulation does not cover a situation where a State following a serious financial crisis through legislation unilaterally and retroactively amended its sovereign bonds, because these measures were a manifestation of public authority of the Greek State. On the negotiations on

C. Acceptable bases of jurisdiction

Article 5 of the 2019 Convention contains a list of jurisdictional bases that are defined as legitimate for the purpose of recognition and enforcement of judgments under the Convention. These bases of jurisdiction define whether or not there is a sufficient connection to the State of origin for the judgment to be recognised and enforced in the requested State.

Article 5 does not harmonise the national rules of jurisdiction of the Contracting States, because the Convention is a simple Convention. Therefore, direct jurisdiction is governed by national law in all Contracting States. However, if a judgment is to be recognised under the Convention, one of the prescribed connections to the forum state listed in Article 5 must have been present at the relevant time. The actual rule of jurisdiction applied by the court of origin is irrelevant. The key issue is whether the connection with the court of origin is met as a question of fact. Thus, for example, the court of origin may have based its jurisdiction on an exorbitant rule of jurisdiction, eg the nationality of the claimant or the service of the defendant in the State of origin; however, insofar as one of the connecting factors laid down by Article 5 or 6 is met, eg, the judgment was on tort and the place where the act causing the harm occurred was in the State of origin, the judgment will be recognized and enforced under the Convention. Furthermore, the requested court is not allowed to assess the connection to the State of origin by comparing the applied rule of jurisdiction in the State of origin with its own jurisdictional rules.

Article 5(1) lists 13 rules of jurisdiction. Paragraph (2) concerns judgments rendered against consumers or employees and modifies or excludes the application of certain rules of jurisdiction listed in paragraph (1). Article 6 contains a rule on exclusive jurisdiction for rights *in rem* in immoveable property.

1. The bases of jurisdiction

The 13 bases of jurisdiction in Article 5(1) are based either on connections with the defendant, consent to jurisdiction or connections between the claim and the State of origin. It is sufficient that the connection of the court of origin satisfies one of the 13 bases of jurisdiction, and there is no hierarchy between them.²⁰ Most of these rules will be examined in the following sections.²¹

(a) Habitual residence and principal place of business

Two bases of jurisdiction in Article 5(1) apply habitual residence and the principal place of business respectively of the person against whom recognition or enforcement of the judgment is sought as the proper connecting factor.

The first rule, Article 5(1)(a), provides that a judgment is eligible for recognition and enforcement if:

and the interpretation of Art 2(1)(q), see Paul Beaumont, 'Judgments Convention: Application to Governments' (2020) *Netherlands International Law Review*, forthcoming, Section 5.

²⁰ *Draft Report*, para. 136.

²¹ Art 5(1)(j) on contractual obligations secured by a right *in rem* in immovable property, Art 5(1)(k) on trust matters, and Art 5(1)(l) on counterclaims will not be presented.

the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin.

This general rule of jurisdiction is universally recognised; *actor sequitur forum rei*. The home forum is always fair and reasonable.²² But the rule of the Convention goes slightly further, because it applies regardless of the procedural status of the person in question, ie whether that person was the claimant or the defendant in the proceedings. It may be the claimant who lost the case, and the defendant, who is now seeking recognition and enforcement of the judgment against the claimant.

The connecting factor is habitual residence, which is consistent with modern Hague Conventions. The concept for natural persons, which is:

a more fact-based connecting factor than either domicile or nationality, expresses a close connection between a person and his or her socio-economic environment, and is less likely to give rise to conflicting assessments by courts.²³

For legal persons, Article 3(2) provides that:

an entity or person other than a natural person shall be considered to be habitually resident in the State: (a) where it has its statutory seat; (b) under the law of which it was incorporated or formed; (c) where it has its central administration; or (d) where it has its principal place of business.

For example, a mining company may have its statutory seat in the UK and its principal place of business in South Africa.

The second rule, Article 5(1)(b), determines that a judgment is entitled to recognition and enforcement if:

the natural person against whom recognition or enforcement is sought had its principal place of business in the State of origin at the time that person became a party to the proceedings in the court of origin and the claim on which the judgment is based arose out of the activities of that business.

This provision is based on the same principle as Article 5(1)(a), but it is “targeted” at natural persons engaged in business or exercising a profession. A natural person may be habitually resident in one State and carry on business in another State, for instance in border cities. In such a case, this provision determines that there is sufficient connection with a State of origin for the purposes of recognition and enforcement if a natural person’s principal place of business is in that State, provided that the claim arose from these business activities. Litigation on such a claim in that State is consistent with the legitimate expectations of the parties.²⁴

Habitual residence and principal place of business in Article 5(1)(a) and (b) respectively are to be assessed at the time the person against whom recognition or enforcement is sought became a party to the proceedings in the court of origin. The fact that the person, natural or legal, moves to another State after this point in time does not change the connection to the court of origin for the

²² In probably all States and in the Brussels Ia Regulation, this is the general rule of jurisdiction.

²³ *Draft Report*, para 141. The reference in the 2005 Convention is to residence, not habitual residence. For natural persons these concepts are not defined in the two conventions. However, for non-natural persons both concepts are defined in the same way in both Conventions, see Art 4(2) of the 2005 Convention and Art 3(2) of the 2019 Convention.

²⁴ *Draft Report*, para 147.

purpose of assessing the base of jurisdiction. If that had been the case, the defendant could unilaterally escape jurisdiction of the court of origin by moving to another State after the proceedings had been instituted in the State of origin.

(b) Bringing a claim in a State

Article 5(1)(c) provides that a judgment is eligible for recognition and enforcement if:

the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based.

This provision expresses the idea that if a person brings a claim in a State, he has accepted that court's jurisdiction, and he therefore must accept recognition and enforcement against him of any judgment on that claim. This provision does not apply to counterclaims, as this is dealt with in Article 5(1)(l).

(c) Branch, agency or other establishment

According to Article 5(1)(d), a judgment is eligible for recognition and enforcement under the Convention if:

the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment.

In the Convention, a "defendant" is defined rather broadly compared to a traditional understanding of the concept, because a defendant is a person against whom the claim or counterclaim was brought in the State of origin, see Article 3(1)(a).

"Branch jurisdiction" is applied in several legal systems, for instance in Article 7(5) of the Brussels Ia Regulation. The philosophy of such provision is that a business setting up a branch, agency or other establishment in another State must accept the jurisdiction of the courts of that State on claims concerning the activities of that branch, agency or establishment, since the business controls the establishment, and it is consistent with the legitimate expectations of the parties. In addition, since this jurisdiction is limited to disputes that arose from the activities of the branch, it is justified by the close connection between the dispute and the court called upon to hear it.²⁵

The 2019 Convention does not define the concept of "branch, agency or other establishment", but it implies a stable physical presence of the defendant in the State of origin where such defendant carries out an economic activity. The provision is expressly limited to establishments without legal personality separate from the defendant. This criterion excludes subsidiaries and any other part of a commercial organisation that is constituted as a separate legal entity.

Furthermore, it is required that there is a link between the claim and the activities of the branch, agency or establishment in the State of origin. It is not sufficient that the claim arises from the defendant's business activities generally; it must arise out of the activities of the branch or establishment in the State of origin. In a contractual dispute, for example, the contract must have

²⁵ *Draft Report*, para 155.

been concluded through the establishment in the State of origin or this establishment must be responsible for its performance. A mere remote or incidental connection is not sufficient.²⁶

(d) Express or implied consent to jurisdiction

Article 5(1)(e) and (f) determine that a judgment can be recognised and enforced against defendants who expressly or implicitly consented to the jurisdiction of the court of origin. Such rules of jurisdiction are also widely accepted internationally. The provisions apply because of the consent; no connection to the State of origin is required. Article 5(1)(e) and (f) do not deal with express choice of court agreements, as they are regulated by Article 5(1)(m).

Thus if:

the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given

the judgment will be recognised and enforced according to (e). Under (f), this is also the case, if:

the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law.

(e) Contract jurisdiction

Article 5(1)(g) provides that a judgment is eligible for recognition and enforcement if:

the judgment ruled on a contractual obligation and it was given by a court of the State in which performance of that obligation took place, or should have taken place, in accordance with

- (i) the agreement of the parties, or
- (ii) the law applicable to the contract, in the absence of an agreed place of performance,

unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State.

A provision on contract jurisdiction is probably indispensable in a Convention on civil or commercial matters. Indeed, most States accept contract jurisdiction based on the performance of one or more of the obligations under the contract, see, for instance the Brussels Ia Regulation, Article 7(1). On the other hand, some States prefer to apply a rule of this kind subject to certain qualifications to ensure a minimum degree of connection to the State of origin. Article 5(1)(g) is a compromise reflecting these two approaches.

Under Article 5(1)(g), the connecting factor is the place of performance of the contractual obligation the judgment ruled on. This raises two questions: 1) How is this obligation determined? 2) How is the place of performance of this obligation determined?

The relevant obligation depends on the source of dispute between the parties and the obligation forming the basis of the judgment. If the judgment is for a contractual obligation to pay for goods delivered, the provision will recognise jurisdiction of a court at the place where payment was to

²⁶ Draft Report, para 157.

be carried out. If the judgment is for damages for destroyed goods, the provision will accept the jurisdiction of the courts at the place of delivery.²⁷

The place of performance of the relevant obligation can be determined in two ways. Either it follows from the parties' agreement, or, in the absence of such an agreement, it follows from the law governing the contract.

It is common for businesses to agree on the place of delivery, as most standard terms or individually negotiated contracts contain clauses on the place of delivery. If that is the case, this will be decisive in respect of Article 5(1)(g), even if the factual delivery took place in another State.

In other cases, the place of performance of the obligation forming the basis of the judgment will have to be determined under the law governing the contract. The Convention does not specify how that law is to be identified, but the requested court shall apply the law of the requested State, including its rules of private international law. This solution is suggested in the *Draft Report*.²⁸

Article 5(1)(g) is inapplicable:

if the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State.

This qualification, which is inspired from US and Canadian case law, and may have counterparts in other instruments or national laws, was agreed, because:²⁹

the place of performance designated by the requested State's choice of law rules may point to a place that is arbitrary, random or insufficiently related to the transaction between the parties. Recognising the jurisdiction of the State of such a place might be considered unfair to the defendant. For example, in the case of contracts performed online the connection with the State of origin may be merely virtual and therefore insufficient to justify circulation of the judgment under the Convention. Accordingly, the Convention allows the defendant to resist recognition or enforcement of a judgment rendered in the State of the place of performance on the basis that the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State.

²⁷ Art 7(1)(a) of the Brussels Ia Regulation adopts this approach, whereas its Art 7(1)(b) relies on a single connecting factor, the place of delivery of goods or the place of provision of services, as defined by the Court of Justice in a series of judgments.

²⁸ *Draft Report*, para 184.

²⁹ *Draft Report*, para 188. The burden of proof is on the judgment debtor and the threshold is high ("clearly did not constitute"). The Fourteenth Amendment of the US Constitution provides in Section 1, that no state shall "deprive any person of life, liberty, or property, without due process of law". This provision has been interpreted to limit the jurisdiction of courts to situations in which the state in which the court is located has a connection with the defendant sufficient to justify the exercise of the court's authority over that defendant, see also, inter alia, the US judgments *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (minimum contacts), *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), *Daimler AG v. Bauman*, 571 U.S. (2014), *BNSF Railway Co. v. Tyrrel*, 581 U.S. (2017). Canada also applies a "real and substantial connection" test, see *Moran v Pyle National (Canada) Ltd*, [1975] 1 SCR 393, *Morguard Investments Ltd. v. De Savoye* [1990] 3 SCR 1077, *Hunt v. T&N plc*, [1993] 4 SCR 289, *Beals v. Saldanha*, [2003] 3 SCR 416, 2003 SCC 72, *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 SCR 572, *Muscutt et al. v. Courcelles et al.* 60 O.R. (3d) 20, and *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, 2015 CSC 42.

This qualification is justified, because in some cases jurisdiction under Article 5(1)(g) may indeed point to a jurisdiction, where the geographical links applied in reality may be arbitrary, random or insufficiently related to the transaction between the parties.

(f) Lease/tenancies of immovable property

According to Article 5(1)(h), a judgment is eligible for recognition and enforcement if:

the judgment ruled on a lease of immovable property (tenancy) and it was given by a court of the State in which the property is situated.

This provision is a compromise between two conflicting views in relation to tenancies over immovable property. In some jurisdictions, tenancies over immovable property are treated in the same way as rights *in rem* and claims regarding them are subject to the exclusive jurisdiction of the State where the property is situated. In other jurisdictions, tenancies are treated as contracts (ie, rights *in personam*) without the accompanying exclusivity accorded to the courts of the State where the immovable property is located for claims related to the tenancy. Thus, this provision takes the second view as its starting point. However, the provision does not exclude the application of other jurisdictional filters, for example the habitual residence of the defendant in Article 5(1)(a). Consequently, a judgment given by the courts of the State where the defendant was habitually resident will be recognised and enforced, even if it ruled on a non-residential tenancy over an immovable property located in another State.³⁰

Article 5(1) does not apply to a judgment that ruled on a residential lease of immovable property (tenancy) or ruled on the registration of immovable property. Such a judgment is eligible for recognition and enforcement only if it was given by a court of the State where the property is situated, see Article 5(3).

(g) Tort jurisdiction

One of the most common rules of jurisdiction is found in Article 5(1)(j) on torts. A similar, but broader provision exists in the Brussels Ia Regulation, Article 7(2).

Under Article 5(1)(j), a judgment shall be recognised and enforced if:

the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred.

³⁰ *Draft Report*, para 191. Art 5(1)(i) provides that a judgment is recognizable and enforceable, if “the judgment ruled against the defendant on a contractual obligation secured by a right *in rem* in immovable property located in the State of origin, if the contractual claim was brought together with a claim against the same defendant relating to that right *in rem*.” See *Draft Report*, paras 192 and 193.

The Convention does not define “non-contractual obligation”, but it should be interpreted in an autonomous manner in accordance with Article 20 to promote uniformity in the application of the Convention.³¹ Article 5(1)(j), however, is limited in its scope, because it only covers physical injury to persons and damage to or loss of tangible property.

Article 5(1)(i) accepts jurisdiction at the place where the harmful act or omission occurred. In most cases the place where this happens and where the direct damage materialises, are in the same State. However, sometimes these two elements are in different States. For such cases, Article 5(1)(i) only accepts jurisdiction in the State, where the harmful act or omission occurred. This is different from many national systems and, for instance, the Brussels Ia Regulation, Article 7(2), which would give jurisdiction to both places.

(h) Choice of court agreements

One of the most broadly accepted rules of jurisdiction in commercial cases is jurisdiction based on an express agreement on jurisdiction through a choice of court agreement. Thus, Article 5(1)(m) provides that a judgment is eligible for recognition and enforcement if:

the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement.

Article 5(1)(m) only covers choice of court agreements that are not exclusive, which at first sight may seem odd. For the purposes of (m):

an “exclusive choice of court agreement” means an agreement concluded by two or more parties that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction of any other courts.

This definition is copied from the 2005 Convention, Article 3(a).

The rationale behind this limitation is that the 2005 Convention provides for the recognition and enforcement of “exclusive choice of court agreements” and the recognition and enforcement of judgments resulting from a court deriving its jurisdiction from such an agreement. In order to avoid an overlap between the 2005 and the 2019 Conventions, it was decided to exclude exclusive choice of courts agreement from the scope of the latter Convention. It was also agreed that the two Conventions together should be seen as a “package”.

According to *The Explanatory Report*, agreements covered by Article 5(1)(m) can take various forms. The agreement may provide for a list of courts in different States among which the claimant can or must choose. It may merely indicate that the parties agree not to object to jurisdiction if the claim is brought before a designated court. The agreement may instead be “asymmetrical”, meaning that it is exclusive for one party only, and non-exclusive for the other.³²

³¹ *Draft Report*, para 195.

³² *Draft Report*, paras 216 and 217. *The Report* lists the following agreements:

“The courts of State A shall have non-exclusive jurisdiction to hear proceedings under this contract.”

Oral agreements that are not documented in writing are not covered by Article 5(1)(m).

2. Consumer and employment cases

In contrast to the 2005 Convention, the 2019 Convention applies to consumer and employment contracts. However, the 2019 Convention protects consumers and employees primarily by limiting the list of available bases of jurisdiction in such cases. These protective rules only apply to recognition or enforcement of a judgment against a consumer or employee, but not to recognition or enforcement of a judgment by the consumer or employee against the commercial party or the employer. Protection of consumers and employees is widespread in national and international systems. The Brussels Ia Regulation, for instance, protects certain consumers and all employees both in terms of jurisdiction and in relation to recognition and enforcement.³³

Article 5(2) provides that if “recognition or enforcement is sought against a consumer in matters relating to a consumer contract, or against an employee in matters relating to the employee’s contract of employment,” Article 5(1)(e) “applies only if the consent was addressed to the court, orally or in writing,” and Article 5(1)(f), (g) and (m) do not apply.

Article 5(2) does not create special jurisdictional filters for consumer and employment cases, so these are subject to the general rules of paragraph (1) with certain limitations.

A consumer is defined in Article 5(2) as “a natural person acting primarily for personal, family or household purposes”, and this definition is identical to the definition in Article 2(1)(a) of the 2005 Convention.

Employment contracts are not defined under the Convention. However, the provision is intended to cover salaried workers at any level and not persons carrying on independent professional activity. Furthermore, the reference to “matters relating to the employee’s contract of employment” signals that the provision is intended to apply to any claim between an employer and an employee based on the legal framework applicable to that relationship, including labour law or collective bargaining agreements. Conversely, disputes arising from a collective bargaining agreement between a trade union and an employer or an association of employers are not covered by Article 5(2).³⁴

Article 5(2) provides two kinds of protection to consumers and employees. First, it limits the effect of Article 5(1)(e) in relation to express consent given in the course of proceedings. For such persons, the consent must have been “addressed to the court, orally or in writing”. If not, the filter is inapplicable.

“Proceedings under this contract may be brought before the courts of State A, but this shall not preclude proceedings before the courts of any other State having jurisdiction under its law.”

“Proceedings under this contract may be brought before court X in State A or court Y in State B, to the exclusion of all other courts.”

“Proceedings against x may be brought exclusively at X’s residence in State A; proceedings against Y may be brought exclusively at Y’s residence in State B.”

³³ Brussels Ia Regulation, Arts 17-19 and 20-23 (jurisdiction) and Art 45(1)(e)(i) (recognition and enforcement).

³⁴ *Draft Report*, para 224.

Second, the jurisdictional filters in Article 5(1)(f), (g) and (m) do not apply to consumers and employees. Thus, jurisdiction based on implicit jurisdiction, contract jurisdiction and choice of court agreements is prohibited in relation to consumers and employees.

3. Rights in rem in immoveable property

Article 6 of the 2019 Convention establishes an exclusive indirect jurisdiction for recognition and enforcement of judgments on rights *in rem* in immovable property. It provides that:

Notwithstanding Article 5, a judgment that ruled on rights *in rem* in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin.

It follows from the reference “notwithstanding Article 5” that judgments on such matters given by the courts of other States must not be recognised or enforced either under the Convention or under national law.

Similar provisions exist in probably all national systems and, for instance, in the Brussels Ia Regulation, Article 24. Such provisions on exclusive jurisdiction are often based on the fact that the courts of the State where the property is situated are best situated in terms of procedural proximity to deal with rights in the property. Furthermore, the choice of law for rights *in rem* are often made in favour of the *lex situs*, and many of those rules are mandatory or internationally mandatory. Finally, such cases often involve registration with public registers in the *situs* State.³⁵

The term “immovable property” is not defined under the 2019 Convention. However, it should at least be taken to include:

land, benefits or improvements to land, and fixtures (as opposed to chattels), including things embedded, attached, or affixed to the earth, or permanently fastened to anything embedded, attached, or affixed to the earth.³⁶

Article 6 applies to proceedings which have as their object rights *in rem*, ie rights that directly concern an immovable property and are enforceable “against everybody (*erga omnes*)”. Rights *in rem* includes in particular:

ownership, mortgages, usufructs or servitudes, and the provision covers actions seeking to determine the existence of those rights, their extent and content, and to provide the holders with the protection of the powers attached to their entitlements. Conversely, actions based on rights *in personam* merely connected with immovable property are not included within the scope of this provision.³⁷

D. Recognition and enforcement

³⁵ *Draft Report*, para 233.

³⁶ *Draft Report*, para 236.

³⁷ It is probably more nuanced than this. A right *in rem* under Art 6 is a right in relation to immovable property that under the law of the place of the immovable property is a right against everybody. A mortgage is only a right *in rem* if it is enforceable against everybody in the law of the place where the property is situated. The non-exhaustive list is from the *Draft Report*, para 235, where it is mentioned that a personal action for the delivery of an immovable property based on a contract for sale (ie, where the issue is the defendant’s personal obligation to carry out all acts necessary to transfer and hand over the property) or an action in tort for damages to an immovable property are not covered by this provision.

Chapter II of the 2019 Convention contains the provisions on recognition and enforcement of judgments. The fundamental rule is Article 4(1), which states that:

A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter.³⁸

Furthermore, recognition or enforcement “may be refused only on the grounds specified in the Convention.”³⁹

The conditions for recognition and enforcement is governed by Article 4. The exceptions to recognition and enforcement are set up in Articles 7, 8 and 10, whereas the procedure for recognition and enforcement is regulated by Articles 12-14.

1. The Concept of Recognition and Enforcement

Article 4(1) of the 2019 Convention states the fundamental obligation under the Convention for Contracting States to recognise and enforce judgments from other Contracting States. It is a condition that the judgment has effect in the State of origin and that it is enforceable in that State, see Article 4(3). This principle raises a number of issues in relation to both the status of the judgment, the effect of the judgment, adaption of remedies, and to what extent the judgment may be reviewed. Finally, the principle also raises the issue whether recognition and enforcement is possible under national law in spite of the Convention.

(a) The status of the judgment

The 2019 Convention does not require that the judgment be “final and conclusive”, because there is no uniform definition of this status. Instead, according to Article 4(3), it is sufficient for recognition of a judgment that the judgment has “effect”, and for enforcement that it is “enforceable”, under “the law of the State of origin”. This solution protects the interests of the judgment creditor. However, this provision could result in a judgment already recognised or enforced in the requested State subsequently being reversed or set aside in the State of origin. For such cases, Article 4(4) provides that:

Recognition or enforcement may be postponed or refused if the judgment referred to under paragraph 3 is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 4(3) and (4) of the 2019 Convention are identical to Article 8(3) and (4) of the 2005 Convention.

³⁸ Under Art 9, recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or where only part of the judgment is capable of being recognised or enforced under this Convention.

³⁹ According to Art 3(1)(b) of the 2019 Convention, “judgment” means any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses of the proceedings by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment. The Convention also applies to judicial settlements that are enforceable in the State of origin, see Art 11.

(b) Effect of the judgment

During the Special Commissions it was discussed whether the recognising court should give the same effects to the judgment as the judgment has in the State of origin. Indeed, earlier versions of the draft Convention confirmed this principle, which applies, for instance under the Brussels Ia Regulation. However, this provision was deleted, because several delegations expressed concern about its practical consequences, and because the 2005 Convention does not contain such a provision. Consequently, the Convention does not regulate the effect of recognition and enforcement of a judgment. The *Draft Report* concludes that:⁴⁰

the silence of the Convention on this issue must be interpreted in a uniform manner in accordance with its objectives. The obligation to recognise a foreign judgment under the draft Convention implies that the same claim or cause of action cannot be re-litigated in another State. Thus, if the foreign judgment determines rights or obligations asserted in a claim, these rights or obligations shall not be subject to further litigation in the courts of the requested State.”

(c) Adaption of remedies

Another question in relation to recognition and enforcement is how to adapt remedies granted under the judgment eligible for recognition and enforcement that do not exist or are not similar in the State of recognition and enforcement. For instance, Article 54(1) of the Brussels Ia Regulation provides that if a judgment contains a measure or an order which is not known in the law of the Member State addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests. Such adaptation shall not result in effects going beyond those provided for in the law of the Member State of origin.

Former versions of the draft Convention had a provision on this issue, but it was deleted, because the 2005 Convention does not have such a provision. Consequently:⁴¹

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

(d) No review of the judgment

The 2019 Convention, Article 4(2) provides that:

There shall be no review of the merits of the judgment in the requested State. There may only be such consideration as is necessary for the application of this Convention.

This provision prohibits a substantive review of the judgment.

⁴⁰ *Draft Report*, para 120.

⁴¹ *Draft Report*, para 125, which restates the wording on the question of adaption of the *Explanatory Report to the 2005 Convention*, 49, written by Trevor Hartley and Masato Dogauchi.

A similar prohibition exists in the 2005 Convention, Article 8(2), however with a significant difference, because Article 8(2) provides that the court of the requested State is bound by findings of fact on which the court of origin had based its jurisdiction. This provision makes sense in the 2005 Convention, as it is a double Convention harmonising the rules on direct jurisdiction for exclusive choice of court agreements. In contrast, the 2019 Convention does not harmonise the rules on direct jurisdiction; it only sets up a list of bases of jurisdiction that define the required connection to the State of origin under the Convention. Thus, a rule like Article 8(2) does not exist in the 2019 Convention, and a court may under this Convention examine the judgment also in respect of facts relating to a rule of jurisdiction in Article 5 or 6.⁴²

The prohibition against substantive review of a judgment is an indispensable requirement in a Convention on recognition and enforcement of judgments. As stated in the *Draft Report*:⁴³

There would be little purpose to the Convention if the court of the requested State could review the underlying factual or legal basis upon which the court of origin reached its decision. In practice, this would imply that the parties may be forced to re-litigate the same case in the requested State. Accordingly, the court addressed is not to examine the substantive correctness of that judgment: it may not refuse recognition or enforcement if it considers that a point of fact or law has been wrongly decided. In particular, the court addressed cannot refuse recognition or enforcement solely on the ground that there is a discrepancy between the legal rule applied by the court of origin and that which would have been applied by the court addressed.

Article 4(2) does not preclude such examination of the judgment as is necessary for the application of the 2019 Convention. Consequently, in order to apply the relevant rules of the Convention, especially the rules on indirect jurisdiction in Articles 5 and 6 and the rules on refusal of recognition and enforcement in Article 7, examination of the judgment may be necessary.

One example could be given in relation to Article 5(1)(g) on contract jurisdiction. Here, a court being asked to recognise a foreign judgment will have to decide whether the court of origin would have had jurisdiction in accordance with Article 5(1)(g). Thus, the court of the requested State must examine whether the performance of the obligation took place, or should have taken place, in the State of origin. That inquiry may require a consideration of legal questions, such as the place of performance of the contract under the applicable law.

Another example is the application of Article 10, where the court addressed may need to consider whether the judgment awards damages that do not compensate a party for the “actual loss or harm suffered”.

A third example is in relation to Article 1, where the application of the Convention may require the court in the requested State to examine whether or not the judgment of the court of origin is on a matter that can be characterised as a civil or commercial matter and thus within the scope of application of the Convention.

⁴² *Draft Report*, para 114.

⁴³ *Draft Report*, para 111.

(e) Recognition and enforcement under national law

According to Article 15, the 2019 Convention, subject to Article 6, does not prevent the recognition or enforcement of judgments under national law. This provision incorporates the *favour recognitionis* principle. If, for instance, a judgment does not comply with one of the rules of jurisdiction in Article 5, the judgment holder may nevertheless apply for recognition and enforcement under the national law of the requested State. Thus, the Convention sets a minimum standard for recognition and enforcement. The only limitation is cases covered by Article 6 on exclusive indirect jurisdiction for rights *in rem* over immoveable property.

The 2005 Convention does not contain a provision similar to Article 15 of the 2019 Convention because it is a double Convention.

2. Refusal of Recognition and Enforcement

The 2019 Convention, Article 7 deals with refusal of recognition or enforcement. It is a discretionary provision modelled on Article 9 of the 2005 Convention.⁴⁴ Most of the grounds for refusing recognition and enforcement are also identical, or similar, to the provisions of the Brussels Ia Regulation, Article 45(1).⁴⁵

Under the 2019 Convention, the court addressed is not obliged to refuse recognition and enforcement even if one of the provisions of Article 7 is satisfied. The national law of the requested State may provide for recognition or enforcement in these circumstances or give discretion to the court addressed to do so, and national law may require recognition or enforcement of judgments in some of those circumstances.

Article 7(1)(a)–(f) contains five grounds for denying recognition and enforcement. The list is exhaustive.⁴⁶ Art. 7(2) deals with parallel proceedings and the possibility of denying recognition and enforcement in such situations.⁴⁷ Article 8 regulates recognition and enforcement of preliminary questions. Finally, Article 10 addresses denial of recognition and enforcement of judgments awarding punitive damages.

(a) Service of the writ and the right to a defence

Under Article 7(1)(a), a judgment may be denied recognition and enforcement if:

⁴⁴ Art 7(1)(a), (b), (c), (e), and (f) of the 2019 Convention corresponds to Art 9(c), (d), (e), (f), and (g) of the 2005 Convention.

⁴⁵ Art 7(1)(a) of the 2019 Convention resembles to some extent Art 45(1)(b) of the Brussels Ia Regulation, whereas Art 7(1)(b) and (c) of the 2019 Convention are covered by Art 45(1)(a) of the Brussels Ia Regulation. Art 7(1)(d) of the 2019 Convention does not have a parallel in the Brussels Ia Regulation. Art 7(1)(e) and (f) of the 2019 Convention are identical to Art 45(1)(c) and (d) of the Brussels Ia Regulation.

⁴⁶ *Draft Report*, para 243. However, Art 8 adds one ground for denying recognition and enforcement of a judgment.

⁴⁷ The 2019 Convention, Art 8 regulates preliminary questions and is modelled on Art 10 of the 2005 Convention.

the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim -

- (i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or
- (ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents.

This provision contains two defences relating to the manner in which the defendant was notified of the claim brought in the State of origin.

The purpose of the first defence, Article 7(1)(a)(i), is to protect the interests of the defendant by ensuring “the most basic principle of procedural justice: the right to be heard” and thus to “guarantee that the defendant was notified of the elements of the claim and had the opportunity to arrange for their defence”.⁴⁸ Therefore, under this provision the defendant must have been notified of the document instituting the proceedings both in sufficient time and in such a way as to enable the defendant to defend himself. It depends on a factual test whether these two conditions have been fulfilled.⁴⁹ The document must also contain the essential elements of the claim.

Article 7(1)(a)(i) can only be invoked to refuse recognition and enforcement, if the judgment was given by default. If, however, the defendant entered an appearance and presented his case in the court of origin without contesting notification, the defence based on improper notification will not be available in the requested State.⁵⁰

The aim of the second defence, Article 7(1)(a)(ii), is to protect the interests of the requested State when notification of the proceedings in the State of origin took place in the requested State. Some States consider service of documents instituting proceedings a sovereign act. Thus, for service to be effective in such a State, service must have been given through an international agreement. If not, the service was unauthorised and therefore an infringement of that State’s sovereignty. Article 7(1)(a)(ii) protects the interests of such States by providing that the court addressed may refuse recognition or enforcement if the defendant was served in the requested State in a manner that was incompatible with fundamental principles of that State concerning service of documents. The provision can only be applied to service of documents in the requested State, not the State in which service actually was effected.

The service carried out must have been incompatible with “fundamental principles of the requested State concerning service of documents”. The Convention neither lists nor defines these principles, which, on the one hand seems to suggest that it is up to national law in each Contracting State to define the concept. On the other hand, it follows from Article 20 of the Convention

⁴⁸ *Draft Report*, paras 249 and 247 emphasizing that compliance with this basic condition would allow the defendant to prepare a procedural strategy.

⁴⁹ *Draft Report*, para 249.

⁵⁰ This condition ensures that notification is contested at the first opportunity and before the court best capable of addressing any deficiencies in notification, such as by granting an adjournment. Where the law in the State of origin does not permit objections to notification, the condition does not apply, see *Draft Report*, para 249.

emphasising the need for uniform interpretation that these principles should be interpreted with regard to the international character of the Convention and the need to promote uniform application. It is therefore assumed that this defence can only be applied where the sovereignty or security of the requested State has been at stake.⁵¹

(b) Fraud

According to Article 7(1)(b), a judgment may be denied recognition and enforcement if:

the judgment was obtained by fraud.

Fraud can either be substantive or procedural. Procedural fraud may be cases where either party seeks to corrupt a judge, juror or witness, or deliberately conceals key evidence. While in some legal systems procedural fraud may be considered as falling in the scope of the public policy provision, this is not true for all legal systems.⁵² Therefore, Article 7(1)(a) clarifies that fraud can bar a judgment from recognition and enforcement. However, unlike Article 9(d) of the 2005 Convention, Article 7(1)(b) of the 2019 Convention covers substantive as well as procedural fraud.⁵³

(c) Public policy

Article 7(1)(c) provides that a judgment may be denied recognition and enforcement if:

recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State.

Article 7(1)(c) of the 2019 Convention refers to infringements of sovereignty or security of the state as a situation in which recognition and enforcement may be manifestly incompatible with public policy. This part of the provision does not exist in the 2005 Convention, Article 9(e). However, no substantive changes have been intended with the addition of these words.⁵⁴

Article 7(1)(c) does not cover punitive or exemplary damages as they are dealt with in Article 10, see below, Section D.2.h.

Public policy is the last resort against recognition and enforcement. It can only be applied on an exceptional basis. Under the 2019 Convention, public policy should be regarded as a national concept, because Article 7(1)(c) refers to the public policy *of the requested State*. Thus, as stated in the *Draft Report*, there is “no expectation of uniformity as to the content of public policy in each

⁵¹ *Draft Report*, para 253. The Report refers to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Indeed, in that Convention it follows from Art 13, that the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security. The Convention is in force in 73 States.

⁵² *Draft Report*, para 254.

⁵³ *Draft Report*, paras 256 and 257.

⁵⁴ *Draft Report*, para 264, where it is stated that “The addition simply reflects the greater potential for issues involving infringements of security or sovereignty of the State to arise in the context of this Convention than under the 2005 Choice of Court Convention.”

State”, and “it remains up to each State to define the public policy defence.” Nevertheless, it is also clear that public policy only can be applied when:⁵⁵

Recognition or enforcement of the judgment in question would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.

Thus, the threshold for applying public policy is governed by this guideline as a matter of uniform interpretation of the Convention while it also is clear that it is for each State to determine what are its fundamental rights and what is essential to its legal order. In this sense, public policy could be seen as an international minimum standard. Public policy would, for instance, cover cases where the foreign court enforced a contract to commit an illegal act (smuggling), where the foreign judgment impinged on constitutionally guaranteed fundamental rights such as freedom of speech, and where the foreign judgment enforced a gambling debt.⁵⁶

(d) Choice of court agreements

Under the 2019 Convention, Article 7(1)(d), a judgment may be denied recognition and enforcement if:

the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court of a State other than the State of origin.

The purpose of Article 7(1)(d) is to respect choice of court agreements at the level of recognition and enforcement. Thus, a judgment from a court that disregarded or set aside a choice of court agreement when it took jurisdiction, will not be recognised and enforced under the 2019 Convention. Article 7(1)(d) is applicable even if the choice of court agreement validly excluded the jurisdiction of the court of origin, and it covers both exclusive and non-exclusive choice of court agreements.⁵⁷ However, Article 7(1)(d) will probably not apply to a choice of court agreement that on a non-exclusive basis adds a forum to the existing fora, because it would not be contrary to such an agreement to sue in one of the existing fora.

(e) Conflicting judgments

The 2019 Convention is a simple Convention. Therefore, it neither harmonises the rules on jurisdiction nor contains a mandatory rule on *lis pendens* unlike,

⁵⁵ *Draft Report*, paras 264 and 259. The Rapporteurs refer to the *Explanatory Report by Professor Fausto Pocar to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007*, [2009] OJ C 319/01. The quoted criteria originate from the judgment of the Court of Justice of the European Union in Case 7/98, *Krombach v Bamberski*. See on public policy in an EU context, Peter Arnt Nielsen, ‘Libel Tourism’ (2013) 9 *Journal of Private International Law* 269-288.

⁵⁶ *Draft Report*, para 266.

⁵⁷ *Draft Report*, paras 267 and 269.

eg, the Brussels Ia Regulation, Article 29.⁵⁸ Article 29 avoids the continuation of parallel proceedings by stopping one of these proceedings and thus eliminating the possibility of a conflicting judgments. However, in the absence of such a provision in the 2019 Convention, proceedings between the same parties may be brought in two Contracting States and, at the end of the day, result in two conflicting judgments. This situation raises the question which of these two judgments should be recognised and enforced?⁵⁹

Article 7(1)(e) and (f) deal with such situations by giving precedence to one of the two judgments. Whereas (e) regulates the conflict between a judgment holder's judgment and a judgment given in the requested State, (f) concerns the conflict between the judgment holder's judgment and a judgment given in another State. These provisions are identical to Article 9(f) and (g) of the 2005 Convention.

According to Article 7(1)(e), a judgment may be denied recognition and enforcement, if:

the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties.

It does not matter which judgment was delivered first, but the provision requires that the two judgments must be between the same parties. These judgments are "inconsistent" when it is not possible to act in accordance with one without violating the other in whole or in part.⁶⁰ Article 7(1)(e) expresses the principle that a court in case of a conflict between a foreign judgment and a national judgment is entitled to give precedence to the latter.

Article 7(1)(f) applies when the two conflicting judgments are from other States than the requested State. Article 7(1)(f) provides that a judgment may be denied recognition and enforcement if:

the judgment is inconsistent with an earlier judgment given by a court of another State between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

Like Article 7(1)(e), Article 7(1)(f) requires that the two judgments must be between the same parties and be inconsistent with each other. However, (f) sets up three additional conditions. First, the judgment to be given precedence is the judgment that was given first. Second, both judgments must concern the same subject matter, which means that the "central or essential issue (*Kernpunkt*)" must be the same in both judgments.⁶¹ Third, the judgment given first must be eligible for recognition or enforcement in the requested State. It does not matter whether the judgment given first is from a Contracting State or not, as long as it is entitled to recognition or enforcement in the requested State.

⁵⁸ Art 29(1) and (3) of the Brussels Ia Regulation provides that where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. Where the jurisdiction of the court first seised is established, any court other than the court first seised *shall* decline jurisdiction in favour of that court.

⁵⁹ Art 7(2) of the Convention contains a rule on parallel proceedings, see D.2.f below, but the application of that provision is only discretionary.

⁶⁰ *Draft Report*, para 271.

⁶¹ *Draft Report*, para 272. The 2005 Convention has more restrictive approach, as Art 9(g) demands that the two conflicting judgments are on "the same cause of action".

(f) Parallel proceedings

Article 7(2) of the 2019 Convention also deals with the issue of parallel litigation and recognition and enforcement. Unlike Article 7(1)(e) and (f), which concern parallel proceedings where these proceedings have ended and resulted in conflicting judgments, Article 7(2) regulates the situation where proceedings are still pending in the requested State when recognition or enforcement of a judgment given in another State is sought. The 2005 Convention does not contain a similar provision.

Once again, a provision of this kind is appropriate, because the 2019 Convention is a simple convention and therefore does not contain a mandatory provision on *lis pendens*, which normally would avoid the continuation of parallel proceedings by stopping one of these proceedings and thus eliminate the possibility of conflicting judgments.

Article 7(2) permits, but does not require, a Contracting State to refuse or postpone recognition and enforcement of a judgment:

if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –

(a) the court of the requested State was seised before the court of origin; and

(b) there is a close connection between the dispute and the requested State.

The policy behind Article 7(2)(a) is that the requested State should be permitted to proceed with the case instituted before it assuming that the court of origin should have yielded to the priority of the court first seised and thus dismissed or refused the commencement of the proceedings, because the case was instituted first in the requested State.⁶²

The purpose of Article 7(2)(b) is to prevent strategic or opportunistic behaviour. An example of such behaviour that the condition is designed to prevent is where, a potential defendant in one State could move to another State and sue the other party there on the basis of an exorbitant rule on jurisdiction, seeking a negative declaration in order to try to prevent the future recognition or enforcement of the foreign judgment.

The requirement of a “close connection” between the dispute and the requested State is not defined in the Convention, but the requirement is fulfilled, if the jurisdiction of the court in the requested State is based on any of the indirect rules of jurisdiction in Article 5. On the other hand, the mere nationality of the claimant or his domicile in the requested State do not suffice.⁶³

Like Article 7(1)(f), Article 7(2) requires that the parallel proceedings must be between the same parties and on the same subject matter. If the conditions in Article 7(2)(a) and (b) are met, recognition or enforcement may be postponed or refused.

In the second sub-paragraph of Article 7(2), it is clarified that a refusal under the first sub-paragraph of Article 7(2):

does not prevent a subsequent application for recognition or enforcement of the judgment.

⁶² *Draft Report*, para 274.

⁶³ *Draft Report*, para 275.

Sub-paragraph 2 deals with the situation where proceedings in the requested State conclude without a judgment on the merits or with a decision on the merits which is consistent with the foreign judgment.⁶⁴

(g) Preliminary questions and matters outside the Convention

Article 8 of the 2019 Convention deals with preliminary questions (paragraph 1) and matters to which the Convention does not apply (paragraph 2) in relation to recognition and enforcement.⁶⁵

A preliminary question is a legal issue that the court must address before being able to decide on the main issue or the object of the proceedings. Under the 2019 Convention, Article 2(2), judgments that include rulings on preliminary questions concerning excluded matters are not, for that reason alone, excluded from the scope of the Convention. Furthermore, under national law, a judgment that ruled on a preliminary question will normally be binding in future proceedings in respect of that preliminary question. However, Article 8(1) of the 2019 Convention provides that States cannot recognize or enforce a ruling on a preliminary question under the Convention if the ruling is on a matter to which this Convention does not apply.⁶⁶ For example, if a judgment on a breach of contract ruled, as a preliminary question, on the legal capacity of a natural person to enter into such a contract, the ruling on this preliminary question would not be recognized under the Convention, because capacity for natural persons is excluded from the scope of the Convention under Article 2(1)(a).⁶⁷

Under Article 8(2) of the Convention:

Recognition or enforcement of a judgment may be refused if and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply.⁶⁸

This provision is a further ground for non-recognition and non-enforcement to those listed in Article 7 of the Convention. Thus, a court of a requested State may refuse recognition of a judgment on the nullity of a contract, if and to the extent that, it was based on a ruling on the lack of capacity of a natural person to enter into such a contract.⁶⁹

(h) Punitive damages

The 2019 Convention, Article 10 deals with punitive and exemplary damages known, for instance, in the US. The provision is modelled on Article 11 of the 2005 Convention.

⁶⁴ *Draft Report*, para 276.

⁶⁵ The provision is a consequence of Art 2(2), see B.2 above.

⁶⁶ Art 8(1) also applies to a ruling on a matter referred to in Art 6 on which a court of a State other than the State referred to in that Article ruled. However, States may recognize and enforce such rulings under national law, see *Draft Report*, para 282.

⁶⁷ The example is from the *Draft Report*, para 283.

⁶⁸ Art 8(2) also applies to a ruling on a matter referred to in Art 6 on which a court of a State other than the State referred to in that Article ruled.

⁶⁹ This example is from the *Draft Report*, para 285.

Punitive and exemplary damages are intended to punish the defendant and to deter him from doing something similar in the future, whereas compensatory damages are intended to compensate the plaintiff for the loss suffered. Article 10(1) provides that:

Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.

Some States may be reluctant to recognise judgments awarding damages that go beyond the actual loss of the claimant. However, this concern cannot always be addressed by means of the public policy exception since some jurisdictions have a very narrow concept of public policy. Article 10 accommodates these concerns by explicitly providing that punitive or exemplary damages that go beyond the loss actually suffered need not be recognised and enforced. When assessing the nature of the damages:

The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

3. Procedure for recognition and enforcement

Articles 12-14 of the 2019 Convention regulate the procedure for recognition and enforcement under the Convention.⁷⁰ Articles 12 and 13 are by and large similar to Articles 13 and 14 of the 2005 Convention. The 2005 Convention does not have a provision on costs of the proceedings.

Under Article 13(1) of the 2019 Convention:

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

A question discussed at some length at the Diplomatic Conference was whether the reference in Paragraph (1) to the law of the requested State includes possible statutory limitations for seeking enforcement of the foreign judgment. The starting point of the Convention is a principle of non-discrimination; judgments given in other States, if they are recognised and enforced, are to be treated in the same manner as domestic judgments. However, it was agreed that the law of the requested State may place an additional and shorter time limit on enforcement, even if the judgment is still enforceable under the law of the State of origin. For example, if the law of the State of origin provides that the judgment remains enforceable for 10 years, but the law of the requested State establishes a shorter period, the latter is decisive. The law of the

⁷⁰ Art 12 determines which documents the party seeking recognition and enforcement shall produce to the requested court. Art 14(1) provides that: "No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given by a court of another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought." Furthermore, under para 2: "An order for payment of costs or expenses of proceedings, made in a Contracting State against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 or of the law of the State where proceedings have been instituted, shall, on the application of the person entitled to the benefit of the order, be rendered enforceable in any other Contracting State." A State may declare that it will not apply para 1.

requested State also determines the manner of calculating this period. The reference to the law of the requested State includes its private international law rules, and therefore this law may refer back to the statute of limitations of the law of the State of origin.⁷¹

E. Declarations and bilateralization

The 2019 Convention's Chapters III and IV contain general and final clauses. The Convention enters into force when two States have deposited their instruments of ratification, acceptance, approval or accession, see Article 28(1). The 2005 Convention contains a similar provision in Article 31.

The 2019 Convention has no retroactive effect on proceedings commenced prior to its entry into force as it, according to Article 16, applies only to the recognition and enforcement of judgments if, at the time the proceedings were instituted in the State of origin, the Convention had effect between that State and the requested State. The purpose of this provision is to provide certainty and enable the parties from the commencement of their dispute to determine whether the future judgment will circulate under the Convention or not and thus to prepare their procedural strategies accordingly.⁷² In comparison, the 2005 Convention, Article 16(2), provides that the Convention shall not apply to proceedings instituted before its entry into force for the State of the court seised, and, according to Article 16(1), that the Convention shall apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court.

1. Declarations in general

The 2019 Convention allows Contracting States to issue different declarations limiting or excluding the application of the Convention in various ways.

As in the 2005 Convention's Article 20, Article 17 of the 2019 Convention allows a State to declare that it will not apply the Convention to what can be considered purely national cases. Furthermore, under Article 18 of the 2019 Convention, a State may declare that it will not apply the Convention to a specific matter. This provision is identical to Article 21 of the 2005 Convention.

The 2019 Convention also provides for two types of declarations that do not exist in the 2005 Convention. The first of these concerns judgments pertaining to a State (Article 19), whereas the second relates to the establishment of relations pursuant to the Convention (Article 29). Article 29 is a provision on bilateralization.

According to Article 30(1), declarations referred to in Articles 14, 17, 18, 19 and 25 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time. Declarations, modifications and withdrawals shall be notified to the depositary, see paragraph 2. Article 30(3) determines that a declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of the Convention for the State concerned.

⁷¹ *Draft Report*, paras 310 and 311.

⁷² *Draft Report*, para 328.

A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months following the date on which the notification is received by the depositary, see Article 30(4). Finally, a declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall not apply to judgments resulting from proceedings that have already been instituted before the court of origin when the declaration takes effect. This provision shall hinder a Contracting State in making “a tactical” declaration in respect of ongoing proceedings in another Contracting State. It will also ensure greater predictability in the operation of the Convention for all parties to the proceedings.⁷³

2. Declarations limiting recognition and enforcement

According to Article 17 of the 2019 Convention, a State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if:

the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the court of origin, were connected only with the requested State.

The relevant time to determine whether these conditions are met is the time when the proceedings were instituted in the State of origin. In such a case, the declaring State will not be obliged to recognize and enforce the judgment. Nevertheless, the judgment will indeed circulate in other Contracting States not having deposited an Article 17 declaration.

Naturally, the 2019 Convention applies only to international cases. Under the Convention that criteria is met when a judgment is from another State than the State in which recognition and enforcement of it is sought, see Article 1(2). However, in some cases the parties may have “engineered” the internationality of the case in order to ensure that the judgment is covered by the Convention. In other situations, the case may be wholly domestic apart from the fact that the judgment is from another State.⁷⁴ Given the definition of “internationality” such judgments are covered by the Convention. That may be problematic for some States, and therefore Article 17 makes it possible for a State to declare that it will not apply the Convention to cases that fulfil the abovementioned two conditions.

None of the Parties to the 2005 Convention have notified a declaration under Article 20, which is identical to Article 17 of the 2019 Convention, so the risk of such declarations under the 2019 Convention may be small.

3. Declarations with respect to specific matters

Article 18(1) of the 2019 Convention states:

Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

⁷³ *Draft Report*, para 423.

⁷⁴ *Draft Report*, para 332.

The purpose of Article 18(1) is to make the 2019 Convention flexible for States that have specific subject matter concerns and may not become a Party to the Convention for this reason. Thus, the provision will more broadly enhance the general purpose of the Convention and get more States “on board”.⁷⁵

In order to protect the interests of other Contracting States and the fundamental objectives of the Convention, such a declaration can only be made subject to certain safeguards.⁷⁶ A State can only make a declaration under Article 18 if it has “compelling reasons and the declaration should meet the proportionality principle”, because the declaration should not be broader than necessary. The exclusion may be a specific subject matter such as “contracts over immovable property”, “consumer contracts”, “labour contracts”, “environmental damage” or “antitrust”. It can also be narrower by adding certain criteria, for instance “contracts over immovable property situated in the requested State”, or “injunctions in antitrust matters”.⁷⁷ Article 18 requires that the exclusion is clearly and precisely defined.

A declaration made under Article 18 has no retroactive effect. If it is made at the time the Convention comes into force in the requested State, it will take effect simultaneously, see Article 30(3). A declaration made after the Convention comes into force for the requested State will take effect on the first day of the month following the expiration of the three months following the date on which the notification is received by the depositary, see Art. 30(4). According to Article 30(4), such a declaration shall not apply to judgments resulting from proceedings that have already been instituted before the court of origin when the declaration takes effect.⁷⁸

It follows from Article 18(2) that if an Article 18 declaration is deposited:

with regard to that matter, the Convention shall not apply -

(a) in the Contracting State that made the declaration;

(b) in other Contracting States, where recognition or enforcement of a judgment given by a court of a Contracting State that made the declaration is sought.

In other words, a declaration has reciprocal effect.

Only the EU and Denmark have made a declaration under the 2005 Convention, Article 21, which is the counterpart of Article 18 of the 2019 Convention. This declaration excludes certain types of insurance contracts from the scope of the 2005 Convention to protect certain policyholders, insured parties and beneficiaries who, according to internal EU law, receive special protection.⁷⁹

4. Declarations with respect to judgments pertaining to a State

Article 19 of the 2019 Convention has no counterpart in 2005 Convention. Admittedly, it is a peculiar provision, but it was necessary in order to reach an

⁷⁵ *Draft Report*, para 336.

⁷⁶ *Draft Report*, para 336.

⁷⁷ *Draft Report*, para 337.

⁷⁸ This time-period ensures legal certainty, because the parties will be able to determine, when the proceedings are instituted, whether or not the future judgment will be affected by this declaration, see *Draft Report*, para 423.

⁷⁹ See the full text of the EU and Danish declaration at:

<https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1044&disp=resdn>.

overall compromise. In some States, many businesses are owned or controlled by the State.

Article 19 permits Contracting States to make a declaration excluding the application of the Convention to judgments which arose from proceedings to which such a State was a party, even where the judgment relates to civil or commercial matters. This is an exception to Article 2(4), which provides that a judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings.

Two concerns lie behind the introduction of this exception. First, some delegations found that the limitation of the scope of the Convention to civil and commercial matters “could be challenging to apply with regard to a State party, in particular with respect to whether a State party was exercising sovereign powers.”⁸⁰ Second, it was argued “that the preservation of immunities in Article 2(5) is insufficient to protect State interests.”⁸¹

Article 19 provides that:

1. A State may declare that it shall not apply the Convention to judgments arising from proceedings to which any of the following is a party –

(a) that State, or a natural person acting for that State; or

(b) a government agency of that State, or a natural person acting for such a government agency.

The State making such a declaration shall ensure that the declaration is no broader than necessary and that the exclusion from scope is clearly and precisely defined. The declaration shall not distinguish between judgments where the State, a government agency of that State or a natural person acting for either of them is a defendant or claimant in the proceedings before the court of origin.

2. Recognition or enforcement of a judgment given by a court of a State that made a declaration pursuant to paragraph 1 may be refused if the judgment arose from proceedings to which either the State that made the declaration or the requested State, one of their government agencies or a natural person acting for either of them is a party, to the same extent as specified in the declaration.

The parties covered by Article 19(1) must have “authority to exercise sovereign power, whether directly or in a delegated manner, generally or in a specific field. For example, an entity charged with the enforcement of competition or consumer law would fall within paragraph 1, regardless of whether it is integrated within the government structure or established as an autonomous and independent entity.”⁸² And the declaration can only be made in respect of that entity’s public functions.⁸³

Article 19 contains the same safeguards as Article 18. Consequently, the declaration shall be no broader than necessary, and the exclusion from scope

⁸⁰ *Draft Report*, para 344.

⁸¹ *Ibid.*

⁸² *Draft Report*, para 345.

⁸³ According to *Draft Report*, para 345, a State making a declaration under Art 20 should identify which governmental agencies are covered by its declaration, and if relevant, which persons acting on their behalf are included, or the circumstances under which they would be included. The *Draft Report* on Art 19 should be read with some caution, because the comments made in it are on an earlier version of Art 19, see Paul Beaumont, ‘Judgments Convention: Application to Governments’ (2020) *Netherlands International Law Review*, forthcoming, Section 6.

must be clearly and precisely defined. Furthermore, an Article 19 declaration has no retroactive effect, and a declaration made after the Convention enters into force for the State making it, will take effect on the first day of the month following the expiration of three months following the date on which the notification is received by the depositary, see Article 30(4). According to Article 30(4), such a declaration shall not apply to judgments resulting from proceedings that have already been instituted against the State party, or to which the State party has already been added, before the court of origin when the declaration takes effect.

5. *Establishment of relations pursuant to the Convention*

A politically difficult question during the negotiations on the 2019 Convention was whether the Convention should be fully open or have a bilateralization mechanism. At the end of the day, this is a question of mutual trust between Contracting States, which is fundamental when it comes to recognition and enforcement of foreign judgments. Thus:

a limited opt-out mechanism was considered fundamental for some States and consensus to include such a mechanism was reached with a view to reducing obstacles to adherence in individual States and to maximize the reach of the Convention.⁸⁴

Generally, the Conventions of the Hague Conference differ significantly on bilateralization clauses or opt-out mechanisms. They can be divided into nine categories ranging from being fully open to totally closed Conventions. The 2005 Convention, for instance, is fully open, because it is open for signature by all States, and it is open for accession by all States. At the other end of the spectrum is the 1971 Convention that requires States to enter into a Supplementary Agreement on recognition and enforcement for the establishment of Treaty obligations between two States.⁸⁵

Some of the older Hague Conventions are only open for signature for States represented at the Diplomatic Conference where the Convention was adopted and have unrestricted accession subject to “veto” (objection) from one or more of the states that have ratified the Convention.⁸⁶ The Conventions from the early 1970s have restricted signature and restricted accession subject to explicit acceptance.

“Restricted accession” often covers any State which has become a Member of the Hague Conference on Private International Law after the date of the adoption of the Convention in question, or which is a Member of the United Nations or of a specialised agency of that Organisation, or a Party to the Statute

⁸⁴ *Draft Report*, para 410.

⁸⁵ Art 21 of that Convention provides that decisions rendered in a Contracting State shall not be recognised or enforced in another Contracting State in accordance with the provisions of the preceding Articles unless the two States, being Parties to this Convention, have concluded a Supplementary Agreement to this effect.

⁸⁶ Convention of 1 March 1954 on Civil Procedure, Arts 27 and 31; Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations towards Children, Arts 7 and 10; Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, Arts 18 and 20; Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Arts 26 and 28; and Convention of 25 November 1965 on the Choice of Court, Arts 16 and 18.

of the International Court of Justice. "Subject to explicit acceptance" means that the accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession.⁸⁷

Other Hague Conventions have restricted signature and unrestricted accession subject to explicit acceptance.⁸⁸ Many Conventions have restricted signature and restricted or unrestricted accession subject to tacit acceptance, which means that the accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession within typically twelve months.⁸⁹ A few Conventions have restricted signature and restricted accession.⁹⁰ A number of Conventions have restricted signature and unrestricted accession.⁹¹ Four Conventions are fully open, ie unrestricted signature and unrestricted accession.⁹²

⁸⁷ Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations, Arts 26 and 28; Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, Arts 37 and 39; and Convention of 4 May 1971 on the Law Applicable to Traffic Accidents, Arts 16 and 18.

⁸⁸ Convention of 15 April 1958 on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods, Arts 11 and 13; Convention of 15 April 1958 Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children, Arts 15 and 17; Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, Arts 19-21; and Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Arts 37 and 38.

⁸⁹ Convention of 1 June 1956 Concerning the Recognition of the Legal Personality of Foreign Companies, Associations and Institutions, Arts 10 and 13; Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, Arts 10 and 12; Convention of 25 October 1980 on International Access to Justice, Arts 31 and 32; Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, Arts 27 and 28; Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, Arts 43 and 44; Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Arts 57 and 58; Convention of 13 January 2000 on the International Protection of Adults, Arts 53 and 54; and Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, Art 58.

⁹⁰ Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations, Arts 20 and 21; and Convention of 2 October 1973 on the Law Applicable to Products Liability, Arts 17 and 18.

⁹¹ Convention of 15 June 1955 on the Law Applicable to International Sales of Goods, Arts 8 and 11; Convention of 15 June 1955 Relating to the Settlement of the Conflicts Between the Law of Nationality and the Law of Domicile, Arts 9 and 12; Convention of 15 April 1958 on the Law Governing Transfer of Title in International Sales of Goods, Arts 11 and 14; Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, Arts 14 and 16; Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, Arts 22 and 23; Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages, Arts 24 and 25; Convention of 14 March 1978 on the Law Applicable to Agency, Arts 23 and 24; and Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons, Arts 25 and 26.

⁹² Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods, Art 25; Convention of 30 June 2005 on Choice of Court Agreements, Art 27; Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, Art 17; and Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, Art 23.

Hitherto, it has been characteristic for Hague Conventions with unrestricted accession subject to “veto” (an objection), Conventions with restricted accession subject to explicit acceptance, and Conventions with unrestricted accession subject to tacit acceptance that the right to object only belongs to existing Contracting States, not acceding States. In other words, hitherto, only existing Parties can object to new Parties, new Parties cannot object to existing Parties.

The overall conclusion during the negotiations at the Diplomatic Session on the 2019 Convention was that any solution that would establish consensus, would technically be both permissible and possible under the framework and practice of the Hague Conference. However, it was also clear that a bilateralization clause should be easy to apply and administer, as the cumbersome bilateralization mechanism of the 1971 Convention probably was one of the main reasons for the failure of that Convention, see A above.

It was discussed during the Diplomatic Conference whether the bilateralization clause should be broad or narrow. A narrow clause only allows for declarations at the time a State becomes a Contracting State to the Convention, whereas a broad clause would also allow Contracting States to submit a declaration at any time thereafter. A broad clause, thus, would be useful eg where the legal system in a Contracting State has collapsed after a *coup d'état* or a civil war. However, this possibility proved to be too far-reaching. Therefore, consensus was reached on a narrow bilateralization clause allowing for declarations only at the time when a State becomes a Contracting State to the Convention.

Furthermore, the compromise adopted consists of unrestricted signature and unrestricted accession subject to tacit acceptance. Thus, Article 24(1) and (2) provides that the Convention shall be open for signature by all States, and that it shall be open for accession by all States. However, Article 29 on the establishment of relations pursuant to the Convention, contains the objection or bilateralization mechanism. Unlike any other earlier mechanism of this kind in Hague Conventions, this provision grants the right of objection to both existing Contracting States and Acceding States. This change is convenient in a global context.

Accordingly, Article 29(1) determines that the Convention shall have effect between two Contracting States only if neither of them has notified the depositary regarding the other in accordance with Paragraph (2) or (3). In the absence of such a notification, the Convention has effect between two Contracting States from the first day of the month following the expiration of the period during which notifications may be made.

Compared to the cumbersome bilateralization mechanism of the 1971 Convention, which requires conclusion of a Supplementary Agreement for the Convention to enter into force between two Contracting States, Article 29(1) sets up a much simpler model, because only a declaration is required to ensure the intended effect.

For Contracting States the right of veto follows from Article 29(2), under which a Contracting State may notify the depositary, within 12 months after the date of the notification by the depositary referred to in Article 32(a), that the ratification, acceptance, approval or accession of another State shall not

have the effect of establishing relations between the two States pursuant to this Convention.

For acceding States, the veto right is laid down in Article 29(3), because a State may notify the depositary, upon the deposit of its instrument pursuant to Article 24(4), that its ratification, acceptance, approval or accession shall not have the effect of establishing relations with a Contracting State pursuant to this Convention.

Notifications made under Article 29(2) or (3) may at any time be withdrawn. If so, the withdrawal shall take effect on the first day of the month following the expiration of three months following the date of notification.

F. Failure or success?

The Hague Conference took a realistic approach, when in 2011 it decided to continue the Judgments Project on the basis of a simple Convention, because the negotiations in 1996-2001 proved that neither a double nor a mixed Convention were feasible at the global level. Thus, the adoption of the 2019 Convention is to be welcomed.

Although the scope of the 2019 Convention is civil and commercial matters, it has been reduced significantly by the many exceptions in Article 2(1), some of which seem rather illogical or redundant. In principle, this is regrettable, but it may nevertheless be better at the global level to have a Convention with a narrow scope of application rather than a broad one with complex provisions, for instance on intellectual property rights, because a such a broad Convention would in all likelihood have less chance of success than a narrow Convention.

The rules of indirect jurisdiction listed in Articles 5 and 6 of the 2019 Convention are likely to be broadly acceptable. Although most provisions have been inspired by civil law traditions, common law concepts have had a significant impact, too, especially in relation to Article 5(1)(g) on contract jurisdiction, which is likely to be of substantial importance in practice. Although it is strange that Article 5 of the 2019 Convention does not cover exclusive choice of court agreements, the Convention will work in this respect if it is accepted together with the 2005 Convention on such agreements as “a package”.

The 2019 Convention’s provisions on recognition and enforcement are very good and largely uncontroversial, as they by and large have been copied from the 2005 Convention. Furthermore, similar provisions exist in the Brussels Ia Regulation.

In principle, declarations and reservations should be avoided in any Convention in order to enhance uniformity. However, a more realistic approach is to accept such mechanisms, as they increase the potential number of Contracting States and thus, at the end, serve uniformity too. Therefore, the different declarations States may make under the 2019 Convention are likely to make the Convention more acceptable to a number of States.

Finally, in respect of the 2019 Convention’s bilateralization mechanism, it seems that a realistic and fair compromise has been reached. The existence of this mechanism will probably make it easier for a number of States to ratify the Convention or accede to it. In addition, the bilateralization mechanism is

flexible, fair and simple to apply for existing States and States that would like to join the Convention as it only requires a declaration to that effect.

In conclusion, the 2019 Convention is reasonably coherent and well-structured with the sufficient degree of flexibility. As such the necessary legal framework for a worldwide Convention on free movement of judgments in civil and commercial matters has come into existence, especially if the 2019 Convention and the 2005 Convention are regarded as “a package”. Whether the Convention will become a success depends on the political willingness to join the Convention(s). Time will tell whether this will be the case.