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Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

Text adopted by the Twenty-Second Session

Explanatory Report by

Francisco Garcimartín & Geneviève Saumier

Explanatory Report

on the

Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

(HCCH 2019 Judgments Convention)

by

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Foreword

It is my great pleasure to introduce the Explanatory Report on the *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (HCCH 2019 Judgments Convention).

The legal community has long acknowledged the need for a global framework that would allow for the cross-border "movement" of judgments. The increasing movement of people, information, and assets, together with the growth in cross-border trade, commerce, and investment, has made this need all the more apparent. These developments, amplified by the internet and new technologies, all require the support of an effective and efficient dispute resolution mechanism. In the absence of an effective mechanism for the global circulation of judgments to date, those engaged in cross-border activities have faced significant risks. Successful litigants have been deprived of rights and remedies, often forcing them to relitigate in another State, such as where the judgment debtor resides or has assets, simply in order to obtain relief to which they had already proven entitlement. Not only does this situation give rise to additional costs and delays, but successful litigants are faced with considerable uncertainty regarding the outcome of the new proceedings.

It is in this context that the HCCH 2019 Judgments Convention provides a much-needed and long-awaited piece of the "puzzle" that is cross-border dispute resolution. The Convention establishes a common framework for the global circulation of judgments in civil or commercial matters. In doing so, it offers legal certainty and predictability as to whether, and to what extent, a judgment delivered by a court of one Contracting State in a civil or commercial matter will be recognised and / or enforced in another Contracting State. The Convention thus reduces the risks, legal costs, and timeframes ordinarily associated with the recognition and enforcement of judgments abroad. It simultaneously enhances effective access to justice and facilitates cross-border trade, investment, and mobility.

The effective promotion of the Convention, its sound implementation and practical operation (incl. uniform interpretation pursuant to Art. 20), rest on the availability and accessibility of supporting tools. This Explanatory Report, prepared by the *co-Rapporteurs* Professors Francisco Garcimartin (Spain) and Geneviève Saumier (Canada), is *the* preeminent tool for anyone involved in the assessment, implementation, or application of the Convention: government officials, members of the judiciary, practitioners, scholars, and private persons.

The Report comprises three parts: the Preface (Part I) contains a brief description of the origin of the Convention; the Overview (Part II) provides a useful outline of the Convention, explaining the aim, architecture and structure of the Convention, and emphasising the function and interaction of the different provisions; and the Article-by-Article Commentary (Part III) provides a full analysis of the Convention text, complemented by various examples to illustrate the operation of the provisions.

The swift and smooth approval of the Explanatory Report by HCCH Members demonstrates not only the importance attached to the Convention, it is also a reflection of the excellent work of the *co-Rapporteurs*. On behalf of the HCCH and its Permanent Bureau, and of course in my own personal capacity, I would like to thank the *co-Rapporteurs* wholeheartedly for their extraordinary contribution to this important project. Their commitment, dedication, and tireless efforts have yielded an outstanding and invaluable tool to complement the Convention. I would also like to thank the HCCH Members for their constructive engagement throughout the revision process. Finally, I wish to acknowledge the excellent assistance provided by the staff of the Permanent Bureau during the drafting, revision, and finalisation of the Report. In particular, First Secretary (Diplomat Lawyer) Dr João Ribeiro-Bidaoui, who oversaw and managed the finalisation of the Report, liaising with Members on

behalf of the Permanent Bureau; Senior Legal Officer Dr Ning Zhao, who was in constant contact with the *co-Rapporteurs*, effectively supporting their work throughout the entire drafting and revision process over a period of four years; Graphic Designer / Publications Officer, Ms Lydie de Loof, who was in charge of the design and layout of the Report and also assisted with the finalisation of the French text of the Report; and Mme Christine Mercier, who produced the French version of the text. The quality of the final product is testament to the expertise of all those involved in producing this excellent Explanatory Report.

As I have said on previous occasions, the HCCH 2019 Judgments Convention is undoubtedly a true "gamechanger" for cross-border dispute resolution and private international law more broadly. I am confident that with its widespread acceptance by the international community, the Convention will have an important practical impact on access to justice for individuals and businesses around the world.

Dr Christophe Bernasconi
Secretary General

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Convention

For ease of reference, the English and French official versions of the text of the Convention are reproduced side by side in this publication.

Convention sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale

Les Parties contractantes à la présente Convention,
Désireuses de promouvoir un accès effectif de tous à la justice et de faciliter, à l'échelon multilatéral, le commerce et l'investissement fondés sur des règles, ainsi que la mobilité, par le biais de la coopération judiciaire,

Estimant que cette coopération peut être renforcée par la mise en place d'un ensemble uniforme de règles essentielles sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale, afin de faciliter la reconnaissance et l'exécution effectives de ces jugements,

Convaincues que cette coopération judiciaire renforcée nécessite notamment un régime juridique international offrant une plus grande prévisibilité et sécurité en matière de circulation des jugements étrangers à l'échelle mondiale, qui soit complémentaire de la *Convention du 30 juin 2005 sur les accords d'élection de for*,

Ont résolu de conclure la présente Convention à cet effet et sont convenues des dispositions suivantes :

CHAPITRE I – CHAMP D'APPLICATION ET DÉFINITIONS

Article premier *Champ d'application*

1. La présente Convention s'applique à la reconnaissance et à l'exécution des jugements en matière civile ou commerciale. Elle ne recouvre notamment pas les matières fiscales, douanières ou administratives.
2. La présente Convention s'applique à la reconnaissance et à l'exécution, dans un État contractant, d'un jugement rendu par un tribunal d'un autre État contractant.

Article 2 *Exclusions du champ d'application*

1. La présente Convention ne s'applique pas aux matières suivantes :
 - (a) l'état et la capacité des personnes physiques ;
 - (b) les obligations alimentaires ;
 - (c) les autres matières du droit de la famille, y compris les régimes matrimoniaux et les autres droits ou obligations découlant du mariage ou de relations similaires ;
 - (d) les testaments et les successions ;
 - (e) l'insolvabilité, les concordats, la résolution d'établissements financiers, ainsi que les matières analogues ;
 - (f) le transport de passagers et de marchandises ;
 - (g) la pollution marine transfrontière, la pollution marine dans les zones ne relevant pas de la juridiction nationale, la pollution marine par les navires, la limitation de responsabilité pour des demandes en matière maritime, ainsi que les avaries communes ;
 - (h) la responsabilité pour les dommages nucléaires ;
 - (i) la validité, la nullité ou la dissolution des personnes morales ou des associations entre personnes physiques ou personnes morales, ainsi que la validité des décisions de leurs organes ;
 - (j) la validité des inscriptions sur les registres publics ;
 - (k) la diffamation ;

Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters

The Contracting Parties to the present Convention,
Desiring to promote effective access to justice for all and to facilitate rule-based multilateral trade and investment, and mobility, through judicial co-operation,
Believing that such co-operation can be enhanced through the creation of a uniform set of core rules on recognition and enforcement of foreign judgments in civil or commercial matters, to facilitate the effective recognition and enforcement of such judgments,
Convinced that such enhanced judicial co-operation requires, in particular, an international legal regime that provides greater predictability and certainty in relation to the global circulation of foreign judgments, and that is complementary to the *Convention of 30 June 2005 on Choice of Court Agreements*,
Have resolved to conclude this Convention to this effect and have agreed upon the following provisions –

CHAPTER I – SCOPE AND DEFINITIONS

Article 1

Scope

1. This Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters. It shall not extend in particular to revenue, customs or administrative matters.
2. This Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State.

Article 2

Exclusions from scope

1. This Convention shall not apply to the following matters –
 - (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;
 - (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;
 - (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;
 - (k) defamation;

- (l) le droit à la vie privée ;
 - (m) la propriété intellectuelle ;
 - (n) les activités des forces armées, y compris celles de leur personnel dans l'exercice de ses fonctions officielles ;
 - (o) les activités relatives au maintien de l'ordre, y compris celles du personnel chargé du maintien de l'ordre dans l'exercice de ses fonctions officielles ;
 - (p) les entraves à la concurrence, sauf lorsque le jugement porte sur un comportement qui constitue un accord anticoncurrentiel ou une pratique concertée entre concurrents réels ou potentiels visant à fixer les prix, procéder à des soumissions concertées, établir des restrictions ou des quotas à la production, ou diviser des marchés par répartition de la clientèle, de fournisseurs, de territoires ou de lignes d'activité, et lorsque ce comportement et ses effets se sont tous deux produits dans l'État d'origine ;
 - (q) la restructuration de la dette souveraine par des mesures étatiques unilatérales.
2. Un jugement n'est pas exclu du champ d'application de la présente Convention lorsqu'une question relevant d'une matière à laquelle elle ne s'applique pas est soulevée seulement à titre préalable et non comme objet du litige. En particulier, le seul fait qu'une telle matière ait été invoquée dans le cadre d'un moyen de défense n'exclut pas le jugement du champ d'application de la Convention, si cette question n'était pas un objet du litige.
3. La présente Convention ne s'applique pas à l'arbitrage et aux procédures y afférentes.
4. Un jugement n'est pas exclu du champ d'application de la présente Convention du seul fait qu'un État, y compris un gouvernement, une agence gouvernementale ou toute personne agissant pour un État, était partie au litige.
5. La présente Convention n'affecte en rien les privilèges et immunités dont jouissent les États ou les organisations internationales, pour eux-mêmes et pour leurs biens.

Article 3 *Définitions*

1. Au sens de la présente Convention :
- (a) le terme « défendeur » signifie la personne contre laquelle la demande ou la demande reconventionnelle a été introduite dans l'État d'origine ;
 - (b) le terme « jugement » signifie toute décision sur le fond rendue par un tribunal, quelle que soit la dénomination donnée à cette décision, telle qu'un arrêt ou une ordonnance, de même que la fixation des frais et dépens de la procédure par le tribunal (y compris par une personne autorisée du tribunal), à condition que cette fixation ait trait à une décision sur le fond susceptible d'être reconnue ou exécutée en vertu de la présente Convention. Les mesures provisoires et conservatoires ne sont pas des jugements.
2. Une entité ou une personne autre qu'une personne physique est réputée avoir sa résidence habituelle dans l'État :
- (a) de son siège statutaire ;
 - (b) selon le droit duquel elle a été constituée ;
 - (c) de son administration centrale ; ou
 - (d) de son principal établissement.

- (l) privacy;
 - (m) intellectual property;
 - (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;
 - (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;
 - (q) sovereign debt restructuring through unilateral State measures.
2. A judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings. 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 was not an object of the proceedings.
3. This Convention shall not apply to arbitration and related proceedings.
4. 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.
5. Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3 *Definitions*

1. In this Convention –
- (a) "defendant" means a person against whom the claim or counterclaim was brought in the State of origin;
 - (b) "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.
2. 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.

CHAPITRE II – RECONNAISSANCE ET EXÉCUTION

Article 4

Dispositions générales

1. Un jugement rendu par un tribunal d'un État contractant (État d'origine) est reconnu et exécuté dans un autre État contractant (État requis) conformément aux dispositions du présent chapitre. La reconnaissance ou l'exécution ne peut être refusée qu'aux motifs énoncés dans la présente Convention.
2. Le jugement ne peut pas faire l'objet d'une révision au fond dans l'État requis. Il ne peut y avoir d'appréciation qu'au regard de ce qui est nécessaire pour l'application de la présente Convention.
3. Un jugement n'est reconnu que s'il produit ses effets dans l'État d'origine et n'est exécuté que s'il est exécutoire dans l'État d'origine.
4. La reconnaissance ou l'exécution peut être différée ou refusée si le jugement visé au paragraphe 3 fait l'objet d'un recours dans l'État d'origine ou si le délai pour exercer un recours ordinaire n'a pas expiré. Un tel refus n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.

Article 5

Fondements de la reconnaissance et de l'exécution

1. Un jugement est susceptible d'être reconnu et exécuté si l'une des exigences suivantes est satisfaite :
 - (a) la personne contre laquelle la reconnaissance ou l'exécution est demandée avait sa résidence habituelle dans l'État d'origine lorsqu'elle est devenue partie à la procédure devant le tribunal d'origine ;
 - (b) la personne physique contre laquelle la reconnaissance ou l'exécution est demandée avait son établissement professionnel principal dans l'État d'origine lorsqu'elle est devenue partie à la procédure devant le tribunal d'origine et la demande sur laquelle se fonde le jugement résultait de son activité professionnelle ;
 - (c) la personne contre laquelle la reconnaissance ou l'exécution est demandée est celle qui a saisi le tribunal de la demande, autre que reconventionnelle, sur laquelle se fonde le jugement ;
 - (d) le défendeur avait une succursale, une agence ou tout autre établissement sans personnalité juridique propre dans l'État d'origine, au moment où il est devenu une partie à la procédure devant le tribunal d'origine, et la demande sur laquelle se fonde le jugement résultait des activités de cette succursale, de cette agence ou de cet établissement ;
 - (e) le défendeur a expressément consenti à la compétence du tribunal d'origine au cours de la procédure dans laquelle le jugement a été rendu ;
 - (f) le défendeur a fait valoir ses arguments sur le fond devant le tribunal d'origine sans en contester la compétence dans les délais prescrits par le droit de l'État d'origine, à moins qu'il ne soit évident qu'une contestation de la compétence ou de son exercice aurait échoué en vertu de ce droit ;
 - (g) le jugement porte sur une obligation contractuelle et a été rendu par un tribunal de l'État dans lequel l'obligation a été ou aurait dû être exécutée, conformément
 - (i) à l'accord des parties, ou

CHAPTER II – RECOGNITION AND ENFORCEMENT

Article 4

General provisions

1. 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. Recognition or enforcement may be refused only on the grounds specified in this Convention.
2. 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.
3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.
4. 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 5

Bases for recognition and enforcement

1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –
 - (a) 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;
 - (b) the natural person against whom recognition or enforcement is sought had their 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;
 - (c) 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;
 - (d) 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;
 - (e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;
 - (f) 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;
 - (g) 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) à la loi applicable au contrat, à défaut d'un accord sur le lieu d'exécution, sauf si les activités du défendeur en relation avec la transaction ne présentaient manifestement pas de lien intentionnel et substantiel avec cet État ;
 - (h) le jugement porte sur un bail immobilier et a été rendu par un tribunal de l'État où est situé l'immeuble ;
 - (i) le jugement rendu contre le défendeur porte sur une obligation contractuelle garantie par un droit réel relatif à un immeuble situé dans l'État d'origine, à condition que la demande contractuelle ait été accompagnée d'une demande portant sur ce droit réel dirigée contre ce défendeur ;
 - (j) le jugement porte sur une obligation non contractuelle résultant d'un décès, d'un dommage corporel, d'un dommage subi par un bien corporel ou de la perte d'un bien corporel et l'acte ou l'omission directement à l'origine du dommage a été commis dans l'État d'origine, quel que soit le lieu où le dommage est survenu ;
 - (k) le jugement porte sur la validité, l'interprétation, les effets, l'administration ou la modification d'un trust constitué volontairement et documenté par écrit, et :
 - (i) au moment de l'introduction de l'instance, l'État d'origine était désigné dans l'acte constitutif du trust comme étant un État dont les tribunaux sont appelés à trancher les litiges relatifs à ces questions ; ou
 - (ii) au moment de l'introduction de l'instance, l'État d'origine était désigné, de façon expresse ou implicite, dans l'acte constitutif du trust comme étant l'État dans lequel est situé le lieu principal d'administration du trust.

Le présent alinéa ne s'applique qu'aux jugements portant sur des aspects internes d'un trust entre personnes étant ou ayant été au sein de la relation établie par le trust ;
 - (l) le jugement porte sur une demande reconventionnelle :
 - (i) dans la mesure où il a été rendu en faveur du demandeur reconventionnel, à condition que cette demande résulte de la même transaction ou des mêmes faits que la demande principale ; ou
 - (ii) dans la mesure où il a été rendu contre le demandeur reconventionnel, sauf si le droit de l'État d'origine exigeait une demande reconventionnelle à peine de forclusion ;
 - (m) le jugement a été rendu par un tribunal désigné dans un accord conclu ou documenté par écrit ou par tout autre moyen de communication qui rende l'information accessible pour être consultée ultérieurement, autre qu'un accord exclusif d'élection de for.

Aux fins du présent alinéa, un « accord exclusif d'élection de for » est un accord conclu entre deux ou plusieurs parties qui désigne, pour connaître des litiges nés ou à naître à l'occasion d'un rapport de droit déterminé, soit les tribunaux d'un État, soit un ou plusieurs tribunaux particuliers d'un État, à l'exclusion de la compétence de tout autre tribunal.
2. Si la reconnaissance ou l'exécution est demandée contre une personne physique agissant principalement dans un but personnel, familial ou domestique (un consommateur) en matière de contrat de consommation, ou contre un employé relativement à son contrat de travail :
- (a) l'alinéa (e) du paragraphe premier ne s'applique que si le consentement a été donné devant le tribunal, que ce soit oralement ou par écrit ;
 - (b) les alinéas (f), (g) et (m) du paragraphe premier ne s'appliquent pas.
3. Le paragraphe premier ne s'applique pas à un jugement portant sur un bail immobilier résidentiel (bail d'habitation) ou sur l'enregistrement d'un immeuble. Un tel jugement est susceptible d'être reconnu et exécuté uniquement s'il a été rendu par un tribunal de l'État où est situé l'immeuble.

- (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;
 - (h) 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;
 - (i) 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*;
 - (j) 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;
 - (k) the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and –
 - (i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or
 - (ii) at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.

This sub-paragraph only applies to judgments regarding internal aspects of a trust between persons who are or were within the trust relationship;
 - (l) the judgment ruled on a counterclaim –
 - (i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim; or
 - (ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;
 - (m) 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.
For the purposes of this sub-paragraph, 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.
- 2. If recognition or enforcement is sought against a natural person acting primarily for personal, family or household purposes (a consumer) in matters relating to a consumer contract, or against an employee in matters relating to the employee's contract of employment –
 - (a) paragraph 1(e) applies only if the consent was addressed to the court, orally or in writing;
 - (b) paragraph 1(f), (g) and (m) do not apply.
- 3. Paragraph 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.

Article 6

Fondement exclusif de la reconnaissance et de l'exécution

Nonobstant l'article 5, un jugement portant sur des droits réels immobiliers n'est reconnu ou exécuté que si l'immeuble est situé dans l'État d'origine.

Article 7

Refus de reconnaissance et d'exécution

1. La reconnaissance ou l'exécution peut être refusée si :
 - (a) l'acte introductif d'instance ou un acte équivalent contenant les éléments essentiels de la demande :
 - (i) n'a pas été notifié au défendeur en temps utile et de telle manière qu'il puisse organiser sa défense, à moins que le défendeur ait comparu et présenté sa défense sans contester la notification devant le tribunal d'origine, à condition que le droit de l'État d'origine permette de contester la notification ; ou
 - (ii) a été notifié au défendeur dans l'État requis de manière incompatible avec les principes fondamentaux de l'État requis relatifs à la notification de documents ;
 - (b) le jugement résulte d'une fraude ;
 - (c) la reconnaissance ou l'exécution est manifestement incompatible avec l'ordre public de l'État requis, notamment dans le cas où la procédure appliquée en l'espèce pour obtenir le jugement était incompatible avec les principes fondamentaux d'équité procédurale de cet État et en cas d'atteinte à la sécurité ou à la souveraineté de cet État ;
 - (d) la procédure devant le tribunal d'origine était contraire à un accord, ou à une clause figurant dans l'acte constitutif d'un trust, en vertu duquel le litige en question devait être tranché par un tribunal d'un État autre que l'État d'origine ;
 - (e) le jugement est incompatible avec un jugement rendu par un tribunal de l'État requis dans un litige entre les mêmes parties ; ou
 - (f) le jugement est incompatible avec un jugement rendu antérieurement par un tribunal d'un autre État entre les mêmes parties dans un litige ayant le même objet, lorsque le jugement rendu antérieurement réunit les conditions nécessaires à sa reconnaissance dans l'État requis.
2. La reconnaissance ou l'exécution peut être différée ou refusée si une procédure ayant le même objet est pendante entre les mêmes parties devant un tribunal de l'État requis lorsque :
 - (a) ce dernier a été saisi avant le tribunal de l'État d'origine ; et
 - (b) il existe un lien étroit entre le litige et l'État requis.

Le refus visé au présent paragraphe n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.

Article 8

Questions préalables

1. Une décision rendue à titre préalable sur une matière à laquelle la présente Convention ne s'applique pas, ou sur une matière visée à l'article 6 par un tribunal d'un État autre que l'État désigné dans cette disposition, n'est pas reconnue ou exécutée en vertu de la présente Convention.

Article 6

Exclusive basis for recognition and enforcement

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.

Article 7

Refusal of recognition and enforcement

1. Recognition or enforcement may be refused if –
 - (a) 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 them to arrange for their defence, unless the defendant entered an appearance and presented their 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;
 - (b) the judgment was obtained by fraud;
 - (c) 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;
 - (d) 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;
 - (e) the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties; or
 - (f) 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.
2. Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, 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.

A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 8

Preliminary questions

1. A ruling on a preliminary question shall not be recognised or enforced under this Convention if the ruling is on a matter to which this Convention does not apply or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.

2. La reconnaissance ou l'exécution d'un jugement peut être refusée si, et dans la mesure où, le jugement est fondé sur une décision relative à une matière à laquelle la présente Convention ne s'applique pas, ou sur une décision relative à une matière visée à l'article 6 qui a été rendue par un tribunal d'un État autre que l'État désigné dans cette disposition.

Article 9
Divisibilité

La reconnaissance ou l'exécution d'une partie dissociable d'un jugement est accordée si la reconnaissance ou l'exécution de cette partie est demandée ou si seule une partie du jugement peut être reconnue ou exécutée en vertu de la présente Convention.

Article 10
Dommages et intérêts

1. La reconnaissance ou l'exécution d'un jugement peut être refusée si, et dans la mesure où, le jugement accorde des dommages et intérêts, y compris des dommages et intérêts exemplaires ou punitifs, qui ne compensent pas une partie pour la perte ou le préjudice réels subis.
2. Le tribunal requis prend en considération si, et dans quelle mesure, le montant accordé à titre de dommages et intérêts par le tribunal d'origine est destiné à couvrir les frais et dépens de la procédure.

Article 11
Transactions judiciaires

Les transactions judiciaires homologuées par un tribunal d'un État contractant, ou qui ont été conclues au cours d'une instance devant un tribunal d'un État contractant, et qui sont exécutoires au même titre qu'un jugement dans l'État d'origine, sont exécutées en vertu de la présente Convention aux mêmes conditions qu'un jugement.

Article 12
Pièces à produire

1. La partie qui requiert la reconnaissance ou qui demande l'exécution doit produire :
 - (a) une copie complète et certifiée conforme du jugement ;
 - (b) si le jugement a été rendu par défaut, l'original ou une copie certifiée conforme du document attestant que l'acte introductif d'instance ou un acte équivalent a été notifié à la partie défaillante ;
 - (c) tout document nécessaire pour établir que le jugement produit ses effets dans l'État d'origine ou, le cas échéant, qu'il est exécutoire dans cet État ;
 - (d) dans le cas prévu à l'article 11, un certificat délivré par un tribunal (y compris par une personne autorisée du tribunal) de l'État d'origine attestant que la transaction judiciaire est exécutoire, en tout ou en partie, aux mêmes conditions qu'un jugement dans l'État d'origine.
2. Si le contenu du jugement ne permet pas au tribunal requis de vérifier que les conditions du présent chapitre sont remplies, ce tribunal peut exiger tout document nécessaire.

2. 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, or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.

Article 9
Severability

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

Article 10
Damages

1. 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.
2. 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.

Article 11
Judicial settlements (transactions judiciaires)

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.

Article 12
Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce –
 - (a) a complete and certified copy of the judgment;
 - (b) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
 - (c) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;
 - (d) in the case referred to in Article 11, a certificate of a court (including an officer of the court) of the State of origin stating that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.
2. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require any necessary documents.

3. Une demande de reconnaissance ou d'exécution peut être accompagnée d'un document relatif au jugement, délivré par un tribunal (y compris par une personne autorisée du tribunal) de l'État d'origine, sous la forme recommandée et publiée par la Conférence de La Haye de droit international privé.
4. Si les documents mentionnés dans le présent article ne sont pas rédigés dans une langue officielle de l'État requis, ils doivent être accompagnés d'une traduction certifiée dans une langue officielle, sauf si le droit de l'État requis en dispose autrement.

Article 13
Procédure

1. La procédure tendant à obtenir la reconnaissance, l'exequatur ou l'enregistrement aux fins d'exécution, et l'exécution du jugement sont régies par le droit de l'État requis sauf si la présente Convention en dispose autrement. Le tribunal de l'État requis agit avec célérité.
2. Le tribunal de l'État requis ne peut refuser de reconnaître ou d'exécuter un jugement en vertu de la présente Convention au motif que la reconnaissance ou l'exécution devrait être requise dans un autre État.

Article 14
Frais de procédure

1. Aucune sûreté ou caution ni aucun dépôt, sous quelque dénomination que ce soit, ne peut être imposé en raison, soit de sa seule qualité d'étranger, soit du seul défaut de domicile ou de résidence dans l'État requis, à la partie qui demande l'exécution dans un État contractant d'une décision rendue par un tribunal d'un autre État contractant.
2. Toute condamnation aux frais et dépens de la procédure, rendue dans un État contractant contre toute personne dispensée du versement d'une sûreté, d'une caution ou d'un dépôt en vertu du paragraphe premier ou du droit de l'État dans lequel l'instance a été introduite est, à la demande du créancier, déclarée exécutoire dans tout autre État contractant.
3. Un État peut déclarer qu'il n'appliquera pas le paragraphe premier ou désigner dans une déclaration lesquels de ses tribunaux ne l'appliqueront pas.

Article 15
Reconnaissance et exécution en application du droit national

Sous réserve de l'article 6, la présente Convention ne fait pas obstacle à la reconnaissance ou à l'exécution d'un jugement en application du droit national.

3. An application for recognition or enforcement may be accompanied by a document relating to the judgment, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.
4. If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 13
Procedure

1. The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court of the requested State shall act expeditiously.
2. The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

Article 14
Costs of proceedings

1. 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.
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.
3. A State may declare that it shall not apply paragraph 1 or designate by a declaration which of its courts shall not apply paragraph 1.

Article 15
Recognition and enforcement under national law

Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.

CHAPITRE III – CLAUSES GÉNÉRALES

Article 16
Disposition transitoire

La présente Convention s'applique à la reconnaissance et à l'exécution de jugements si, au moment de l'introduction de l'instance dans l'État d'origine, la Convention produisait des effets entre cet État et l'État requis.

Article 17
Déclarations limitant la reconnaissance et l'exécution

Un État peut déclarer que ses tribunaux peuvent refuser de reconnaître ou d'exécuter un jugement rendu par un tribunal d'un autre État contractant, lorsque les parties avaient leur résidence dans l'État requis et que les relations entre les parties, ainsi que tous les autres éléments pertinents du litige, autres que le lieu du tribunal d'origine, étaient liés uniquement à l'État requis.

Article 18
Déclarations relatives à des matières particulières

1. Lorsqu'un État a un intérêt important à ne pas appliquer la présente Convention à une matière particulière, il peut déclarer qu'il ne l'appliquera pas à cette matière. L'État qui fait une telle déclaration s'assure que la portée de celle-ci n'est pas plus étendue que nécessaire et que la matière particulière exclue est définie de façon claire et précise.
2. À l'égard d'une telle matière, la Convention ne s'applique pas :
 - (a) dans l'État contractant ayant fait la déclaration ;
 - (b) dans les autres États contractants, lorsque la reconnaissance ou l'exécution d'un jugement rendu par un tribunal d'un État contractant ayant fait la déclaration est demandée.

Article 19
Déclarations relatives aux jugements concernant un État

1. Un État peut déclarer qu'il n'appliquera pas la présente Convention aux jugements issus de procédures auxquelles est partie :
 - (a) cet État ou une personne physique agissant pour celui-ci ; ou
 - (b) une agence gouvernementale de cet État ou toute personne physique agissant pour celle-ci.

L'État qui fait une telle déclaration s'assure que la portée de celle-ci n'est pas plus étendue que nécessaire et que l'exclusion du champ d'application y est définie de façon claire et précise. La déclaration ne peut pas faire de distinction selon que l'État, une agence gouvernementale de cet État ou une personne physique agissant pour l'un ou l'autre est le défendeur ou le demandeur à la procédure devant le tribunal d'origine.

CHAPTER III – GENERAL CLAUSES

Article 16
Transitional provision

This Convention shall apply 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.

Article 17
Declarations limiting recognition and enforcement

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.

Article 18
Declarations with respect to specific matters

1. 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.
2. 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.

Article 19
Declarations with respect to judgments pertaining to a State

1. A State may declare that it shall not apply this 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. La reconnaissance ou l'exécution d'un jugement rendu par un tribunal d'un État qui a fait une déclaration en vertu du paragraphe premier peut être refusée si le jugement est issu d'une procédure à laquelle est partie l'État qui a fait la déclaration ou l'État requis, l'une de leurs agences gouvernementales ou une personne physique agissant pour l'un d'entre eux, dans les limites prévues par cette déclaration.

Article 20
Interprétation uniforme

Aux fins de l'interprétation de la présente Convention, il sera tenu compte de son caractère international et de la nécessité de promouvoir l'uniformité de son application.

Article 21
Examen du fonctionnement de la Convention

Le Secrétaire général de la Conférence de La Haye de droit international privé prend périodiquement des dispositions en vue de l'examen du fonctionnement de la présente Convention, y compris de toute déclaration, et en fait rapport au Conseil sur les affaires générales et la politique.

Article 22
Systèmes juridiques non unifiés

1. Au regard d'un État contractant dans lequel deux ou plusieurs systèmes de droit ayant trait aux questions régies par la présente Convention s'appliquent dans des unités territoriales différentes :
 - (a) toute référence à la loi, au droit ou à la procédure d'un État vise, le cas échéant, la loi, le droit ou la procédure en vigueur dans l'unité territoriale considérée ;
 - (b) toute référence au tribunal ou aux tribunaux d'un État vise, le cas échéant, le tribunal ou les tribunaux de l'unité territoriale considérée ;
 - (c) toute référence au lien avec un État vise, le cas échéant, le lien avec l'unité territoriale considérée ;
 - (d) toute référence à un facteur de rattachement à l'égard d'un État vise, le cas échéant, ce facteur de rattachement à l'égard de l'unité territoriale considérée.
2. Nonobstant le paragraphe premier, un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu d'appliquer la présente Convention aux situations qui impliquent uniquement ces différentes unités territoriales.
3. Un tribunal d'une unité territoriale d'un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu de reconnaître ou d'exécuter un jugement d'un autre État contractant au seul motif que le jugement a été reconnu ou exécuté dans une autre unité territoriale du même État contractant selon la présente Convention.
4. Le présent article ne s'applique pas aux Organisations régionales d'intégration économique.

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.

Article 20
Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 21
Review of operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for review of the operation of this Convention, including any declarations, and shall report to the Council on General Affairs and Policy.

Article 22
Non-unified legal systems

1. In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention –
 - (a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;
 - (b) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;
 - (c) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit;
 - (d) any reference to a connecting factor in relation to a State shall be construed as referring, where appropriate, to that connecting factor in relation to the relevant territorial unit.
2. Notwithstanding paragraph 1, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.
3. A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.
4. This Article shall not apply to Regional Economic Integration Organisations.

Article 23

Rapport avec d'autres instruments internationaux

1. La présente Convention doit être interprétée de façon qu'elle soit, autant que possible, compatible avec d'autres traités en vigueur pour les États contractants, conclus avant ou après cette Convention.
2. La présente Convention n'affecte pas l'application par un État contractant d'un traité conclu avant cette Convention.
3. La présente Convention n'affecte pas l'application par un État contractant d'un traité conclu après cette Convention en ce qui a trait à la reconnaissance ou à l'exécution d'un jugement rendu par un tribunal d'un État contractant qui est également Partie à ce traité. Aucune disposition de l'autre traité n'affecte les obligations prévues à l'article 6 à l'égard des États contractants qui ne sont pas Parties à ce traité.
4. La présente Convention n'affecte pas l'application des règles d'une Organisation régionale d'intégration économique Partie à cette Convention en ce qui a trait à la reconnaissance ou à l'exécution d'un jugement rendu par un tribunal d'un État contractant qui est également un État membre de l'Organisation régionale d'intégration économique lorsque :
 - (a) ces règles ont été adoptées avant la conclusion de la présente Convention ;
ou
 - (b) ces règles ont été adoptées après la conclusion de la présente Convention, dans la mesure où elles n'affectent pas les obligations prévues à l'article 6 à l'égard des États contractants qui ne sont pas des États membres de l'Organisation régionale d'intégration économique.

CHAPITRE IV – CLAUSES FINALES

Article 24

Signature, ratification, acceptation, approbation ou adhésion

1. La présente Convention est ouverte à la signature de tous les États.
2. La présente Convention est sujette à la ratification, à l'acceptation ou à l'approbation par les États signataires.
3. Tout État peut adhérer à la présente Convention.
4. Les instruments de ratification, d'acceptation, d'approbation ou d'adhésion sont déposés auprès du ministère des Affaires étrangères du Royaume des Pays-Bas, dépositaire de la Convention.

Article 25

Déclarations relatives aux systèmes juridiques non unifiés

1. Un État qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par la présente Convention peut déclarer que la Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles. La déclaration indique expressément les unités territoriales auxquelles la Convention s'applique.

Article 23

Relationship with other international instruments

1. This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.
2. This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention.
3. This Convention shall not affect the application by a Contracting State of a treaty concluded after this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. Nothing in the other treaty shall affect the obligations under Article 6 towards Contracting States that are not Parties to that treaty.
4. This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Member State of the Regional Economic Integration Organisation where –
 - (a) the rules were adopted before this Convention was concluded; or
 - (b) the rules were adopted after this Convention was concluded, to the extent that they do not affect the obligations under Article 6 towards Contracting States that are not Member States of the Regional Economic Integration Organisation.

CHAPTER IV – FINAL CLAUSES

Article 24

Signature, ratification, acceptance, approval or accession

1. This Convention shall be open for signature by all States.
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention shall be open for accession by all States.
4. Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 25

Declarations with respect to non-unified legal systems

1. If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may declare that the Convention shall extend to all its territorial units or only to one or more of them. Such a declaration shall state expressly the territorial units to which the Convention applies.

2. Si un État ne fait pas de déclaration en vertu du présent article, la Convention s'applique à l'ensemble du territoire de cet État.
3. Le présent article ne s'applique pas aux Organisations régionales d'intégration économique.

Article 26

Organisations régionales d'intégration économique

1. Une Organisation régionale d'intégration économique constituée seulement par des États souverains et ayant compétence sur certaines ou toutes les matières régies par la présente Convention peut signer, accepter ou approuver cette Convention ou y adhérer. En pareil cas, l'Organisation régionale d'intégration économique aura les mêmes droits et obligations qu'un État contractant, dans la mesure où cette Organisation a compétence sur des matières régies par la présente Convention.
2. Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, l'Organisation régionale d'intégration économique notifie au dépositaire, par écrit, les matières régies par la présente Convention pour lesquelles ses États membres lui ont transféré leur compétence. L'Organisation notifie aussitôt au dépositaire, par écrit, toute modification intervenue dans la délégation de compétence précisée dans la notification la plus récente faite en vertu du présent paragraphe.
3. Aux fins de l'entrée en vigueur de la présente Convention, tout instrument déposé par une Organisation régionale d'intégration économique n'est pas compté, à moins que l'Organisation régionale d'intégration économique déclare, en vertu de l'article 27(1), que ses États membres ne seront pas Parties à cette Convention.
4. Toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, à une Organisation régionale d'intégration économique.

Article 27

Organisation régionale d'intégration économique en tant que Partie contractante sans ses États membres

1. Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, une Organisation régionale d'intégration économique peut déclarer qu'elle a compétence pour toutes les matières régies par la présente Convention et que ses États membres ne seront pas Parties à cette Convention mais seront liés par celle-ci en raison de la signature, de l'acceptation, de l'approbation ou de l'adhésion de l'Organisation.
2. Lorsqu'une déclaration est faite par une Organisation régionale d'intégration économique en conformité avec le paragraphe premier, toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, aux États membres de l'Organisation.

2. If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.
3. This Article shall not apply to Regional Economic Integration Organisations.

Article 26

Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.
2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.
3. For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 27(1) that its Member States will not be Parties to this Convention.
4. Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation.

Article 27

Regional Economic Integration Organisation as a Contracting Party without its Member States

1. At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.
2. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 28
Entrée en vigueur

1. La présente Convention entre en vigueur le premier jour du mois suivant l'expiration de la période pendant laquelle une notification peut être faite en vertu de l'article 29(2) à l'égard du deuxième État qui a déposé son instrument de ratification, d'acceptation, d'approbation ou d'adhésion visé à l'article 24.
2. Par la suite, la présente Convention entre en vigueur :
 - (a) pour chaque État la ratifiant, l'acceptant, l'approuvant ou y adhérant postérieurement, le premier jour du mois suivant l'expiration de la période pendant laquelle des notifications peuvent être faites en vertu de l'article 29(2) à l'égard de cet État ;
 - (b) pour une unité territoriale à laquelle la présente Convention a été étendue conformément à l'article 25 après l'entrée en vigueur de la Convention pour l'État qui fait la déclaration, le premier jour du mois suivant l'expiration d'une période de trois mois après la notification de la déclaration visée par ledit article.

Article 29
Établissement de relations en vertu de la Convention

1. La présente Convention ne produit des effets entre deux États contractants que si aucun d'entre eux n'a transmis de notification au depositaire à l'égard de l'autre conformément aux paragraphes 2 ou 3. En l'absence d'une telle notification, la Convention produit des effets entre deux États contractants dès le premier jour du mois suivant l'expiration de la période pendant laquelle les notifications peuvent être faites.
2. Un État contractant peut notifier au depositaire, dans les 12 mois suivant la date de la notification par le depositaire visée à l'article 32(a), que la ratification, l'acceptation, l'approbation ou l'adhésion d'un autre État n'aura pas pour effet d'établir des relations entre ces deux États en vertu de la présente Convention.
3. Un État peut notifier au depositaire, lors du dépôt de son instrument en vertu de l'article 24(4), que sa ratification, son acceptation, son approbation ou son adhésion n'aura pas pour effet d'établir des relations avec un État contractant en vertu de la présente Convention.
4. Un État contractant peut à tout moment retirer une notification qu'il a faite en vertu des paragraphes 2 ou 3. Ce retrait prendra effet le premier jour du mois suivant l'expiration d'une période de trois mois à compter de la date de notification.

Article 30
Déclarations

1. Les déclarations visées aux articles 14, 17, 18, 19 et 25 peuvent être faites lors de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion ou à tout moment ultérieur et être modifiées ou retirées à tout moment.
2. Les déclarations, modifications et retraits sont notifiés au depositaire.
3. Une déclaration faite au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion prend effet au moment de l'entrée en vigueur de la présente Convention pour l'État concerné.

Article 28
Entry into force

1. This Convention shall enter into force on the first day of the month following the expiration of the period during which a notification may be made in accordance with Article 29(2) with respect to the second State that has deposited its instrument of ratification, acceptance, approval or accession referred to in Article 24.
2. Thereafter this Convention shall enter into force –
 - (a) for each State subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of the period during which notifications may be made in accordance with Article 29(2) with respect to that State;
 - (b) for a territorial unit to which this Convention has been extended in accordance with Article 25 after the Convention has entered into force for the State making the declaration, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 29
Establishment of relations pursuant to the Convention

1. This 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.
2. 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.
3. 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.
4. A Contracting State may at any time withdraw a notification that it has made under paragraph 2 or 3. Such a withdrawal shall take effect on the first day of the month following the expiration of three months following the date of notification.

Article 30
Declarations

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.
2. Declarations, modifications and withdrawals shall be notified to the depositary.
3. A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4. Une déclaration faite ultérieurement, ainsi que toute modification ou tout retrait d'une déclaration, prend effet le premier jour du mois suivant l'expiration d'une période de trois mois après la date de réception de la notification par le depositaire.
5. Une déclaration faite ultérieurement, ainsi que toute modification ou tout retrait d'une déclaration, ne produit pas d'effet à l'égard des jugements rendus à l'issue d'instances déjà introduites devant le tribunal d'origine au moment où la déclaration prend effet.

Article 31
Dénonciation

1. Tout État contractant peut dénoncer la présente Convention par une notification écrite au depositaire. La dénonciation peut se limiter à certaines unités territoriales d'un système juridique non unifié auxquelles s'applique la présente Convention.
2. La dénonciation prend effet le premier jour du mois suivant l'expiration d'une période de 12 mois après la date de réception de la notification par le depositaire. Lorsqu'une période plus longue pour la prise d'effet de la dénonciation est précisée dans la notification, la dénonciation prend effet à l'expiration de la période en question après la date de réception de la notification par le depositaire.

Article 32
Notifications par le depositaire

Le depositaire notifie aux Membres de la Conférence de La Haye de droit international privé, ainsi qu'aux autres États et aux Organisations régionales d'intégration économique qui ont signé, ratifié, accepté ou approuvé la présente Convention ou qui y ont adhéré conformément aux articles 24, 26 et 27 les renseignements suivants :

- (a) les signatures, ratifications, acceptations, approbations et adhésions prévues aux articles 24, 26 et 27 ;
- (b) la date d'entrée en vigueur de la présente Convention conformément à l'article 28 ;
- (c) les notifications, déclarations, modifications et retraits prévus aux articles 26, 27, 29 et 30 ; et
- (d) les dénonciations prévues à l'article 31.

En foi de quoi, les soussignés, dûment autorisés, ont signé la présente Convention.

Fait à La Haye, le 2 juillet 2019, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement du Royaume des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Membres de la Conférence de La Haye de droit international privé lors de sa Vingt-deuxième session ainsi qu'à chacun des autres États ayant participé à cette Session.

4. 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.
5. 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.

Article 31
Denunciation

1. A Contracting State to this Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.
2. The denunciation shall take effect on the first day of the month following the expiration of 12 months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 32
Notifications by the depositary

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded to this Convention in accordance with Articles 24, 26 and 27 of the following –

- (a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 24, 26 and 27;
- (b) the date on which this Convention enters into force in accordance with Article 28;
- (c) the notifications, declarations, modifications and withdrawals referred to in Articles 26, 27, 29 and 30; and
- (d) the denunciations referred to in Article 31.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 2nd day of July 2019, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Members of the Hague Conference on Private International Law at the time of its Twenty-Second Session and to each of the other States which have participated in that Session.

Recommended Form

**RECOMMENDED FORM
UNDER THE CONVENTION OF 2 JULY 2019 ON THE RECOGNITION AND
ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS
("THE CONVENTION")**

Recommended form containing information about the existence, issuance and content of a judgment given by the court of origin for the purposes of recognition and enforcement in another Contracting State under the Convention *

1. DETAILS OF THE COURT OF ORIGIN

Name of Court
City (and state / province, if applicable)
Country

2. COURT OF ORIGIN CASE REFERENCE / DOCKET NUMBER.....

3. PARTIES

3.1 Contact information of the claimant(s)

Claimant(s):
Address:
Telephone:
Fax (if applicable):
E-mail (if applicable):

3.2 Contact information of the defendant(s)

Defendant(s):
Address:.....
Telephone:
Fax (if applicable):
E-mail (if applicable):

4. JUDGMENT

4.1 The proceedings were instituted (Art. 16) on
(dd/mm/yyyy)

4.2 The judgment (Art. 3(1)(b)) was given on
(dd/mm/yyyy)

4.3 The judgment was given by default (Art. 12(1)(b)):

- YES
 NO

* A final determination regarding whether there is an obligation under the Convention should be made based on the provisions of the Convention.

5. THE EFFECT OF THE JUDGMENT

- 5.1 This judgment has effect in the State of origin (Art. 12(1)(c)):
- YES (Art. 4(3)) NO
- YES, but only the following part:
- Unable to confirm
- 5.2 This judgment is enforceable in the State of origin (Art. 12(1)(c)):
- YES (Art. 4(3)) NO
- YES, but only the following part:
- Unable to confirm
- 5.3 If there is more than one person who is held liable, this judgment is enforceable against:
- All of them
- The following person(s):
- 5.4 This judgment (or a part thereof) is currently the subject of review in the State of origin:
- YES (please specify the nature and status of such review) (Art. 4(4)):
- NO
- Unable to confirm
- 5.5 The time limit for seeking ordinary review of this judgment has expired:
- YES (Art. 4(4)) NO
- Unable to confirm

6. JUDICIAL SETTLEMENT (transaction judiciaire) AND THE EFFECT OF THE JUDICIAL SETTLEMENT, WHERE APPLICABLE

- 6.1 The judicial settlement (Art. 11) was approved by the court, or was concluded in the course of proceedings before the court on
(dd/mm/yyyy)
- 6.2 This judicial settlement is enforceable in the same manner as a judgment in the State of origin (Art. 11)
- YES
- YES, but only the following part:
- NO
- Unable to confirm

7. OBLIGATIONS IMPOSED BY THE JUDGMENT (OR THE JUDICIAL SETTLEMENT, WHERE APPLICABLE)

According to the judgment given by the Court (Art. 3(1)(b)) (or where applicable, the judicial settlement approved by the court or concluded in the course of proceedings before the court (Art. 11)),

- 7.1 the following amount of money has to be paid:
- to be paid by:
- to be paid to:
- Where applicable, please indicate any relevant categories of damages, including which are exemplary or punitive damages; the currency of the award; and any prescribed terms of payment of the monetary award such as the date and amount of any instalments:
-

7.2 the following non-monetary relief has to be performed:

7.3 the following costs and expenses relating to the proceedings (Art. 3(1)(b)) have to be paid:

Please specify, where applicable, any amount(s) included within a monetary award but not mentioned explicitly which is / are intended to cover costs and expenses relating to the proceedings:
to be paid by:
to be paid to:

7.4 the following interest has to be paid:
to be paid by:
to be paid to:

Please specify the rate(s) of interest; the portion(s) of the award, including the part awarding cost and expenses, if applicable, to which interest applies; the date from and until which interest is computed; and any further information regarding interest that would assist the court addressed.

7.5 If more than one person has been held liable for one and the same claim, the whole amount may be collected from any one of them.

- YES (please specify to which (part of the) claim this applies to money award, interest, costs and expenses, as applicable, and the corresponding amount):
- NO

8. ANY OTHER RELEVANT INFORMATION

9. Dated this day of, 20..... at

10. Signature and / or stamp by the Court or officer of the Court:

11. CONTACT DETAILS

CONTACT PERSON IN THE COURT OF ORIGIN:
TEL:
FAX:.....
E-MAIL:
CONTACT PERSON COMMUNICATION LANGUAGE(S):

Note that: in accordance with Article 12 of the Convention, parties seeking recognition or applying for enforcement under the Convention shall produce:

- a complete and certified copy of the judgment (Art. 12(1)(a));
- if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party (Art. 12(1)(b));
- any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin (Art. 12(1)(c));
- in the case referred to in Article 11 of the Convention, a certificate of a court (including an officer of the court) of the State of origin stating that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin (Art. 12(1)(d));
- if the above attached documents are not in an official language of the requested State, the party seeking recognition or applying for enforcement of the judgment shall provide a certified translation into an official language of the requested State, unless the law of the requested State provides otherwise (Art. 12(4)).

Garcimartin-Saumier Report

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PART I. PREFACE

Adoption of the Convention

1. The text of the Convention was drawn up at the Twenty-Second Session of the Hague Conference on Private International Law (hereinafter, "HCCH") by its Commission I on Judgments from 18 June to 2 July 2019. The Final Act was adopted by the Plenary Session on 2 July 2019 and the Convention was opened for signature on that date.¹

Officers at the Twenty-Second Session

2. Officers at the Twenty-Second Session consisted of: the Chairperson Mr Paul Vlas (the Netherlands); vice-Chairpersons Mr Pieter André Stemmet (South Africa), Mr Hong Xu (People's Republic of China), Mr Andreas Stein (European Union), Mr Mikhail L. Galperin (Russian Federation), Mr Paul Herrup (United States of America) and Mr Marcos Dotta Salgueiro (Uruguay); Chairperson of Commission I on Judgments Mr David Goddard (New Zealand); vice-Chairpersons of Commission I on Judgments Mr Boni de M. Soares (Brazil), Ms Kathryn Sabo (Canada), Ms Tonje Meinich (Norway) and Ms Elizabeth Pangalangan (the Philippines); *co-Rapporteurs* Ms Geneviève Saumier (Canada) and Mr Francisco Garcimartín (Spain); and Chairperson of the Drafting Committee Mr Fausto Pocar (Italy). The Permanent Bureau, led by Mr Christophe Bernasconi, Secretary General, provided assistance throughout the Session.

Origins of the Convention

3. The origins of the Convention date back to 1992 when a proposal was made for work on uniform rules on both the jurisdiction of courts and the recognition and enforcement of judgments in cross-border cases in civil and commercial matters. Progress between 1992 and 2001 resulted in a draft Convention on those two areas.² However, at the conclusion of the First part of the Nineteenth Session in 2001, consensus had not been reached on a number of important issues.³
4. The HCCH then decided to separately consider areas for which a consensus-based instrument could be achieved. This led to the development of a narrower instrument, limited to exclusive choice of court agreements, including jurisdictional rules and a regime for the recognition and enforcement of judgments. This work, which took

¹ Uruguay is the first signatory, having signed the Convention on the date of its adoption. At the time of writing, Ukraine had also signed the Convention on 4 March 2020. The status table of the Convention is available on the HCCH website at < www.hcch.net > under "Judgments".

² "Preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission and Report by Peter Nygh & Fausto Pocar", Prel. Doc. No 11 of August 2000 drawn up for the attention of the Nineteenth Session of June 2001, in *Proceedings of the Twentieth Session*, Tome II, *Judgments*, Cambridge – Antwerp – Portland, Intersentia, 2013, pp. 191-313 (hereinafter, "Nygh/Pocar Report"). The Nygh/Pocar Report is available on the HCCH website at < www.hcch.net > under "Judgments".

³ See "Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference", Prel. Doc. No 16 of February 2002, in *Proceedings of the Nineteenth Session*, Tome I, *Miscellaneous Matters*, Koninklijke Brill NV, 2008, pp. 429 and 431, para. 5.

place between 2002 and 2005, concluded with the adoption of the HCCH *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "HCCH 2005 Choice of Court Convention"),⁴ which aimed to ensure the effectiveness of choice of court agreements in civil and commercial matters. It entered into force on 1 October 2015.⁵

5. In 2011, the HCCH agreed to reconsider the feasibility of a global instrument on matters relating to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In April 2012, an Experts' Group concluded that further work on cross-border litigation was desirable, provided that it met real, practical needs not met by existing instruments and institutional frameworks. The Experts' Group also determined that further work was essential to identify gaps in the existing framework for resolving cross-border disputes of particular practical significance. The HCCH then agreed that work should proceed and established a Working Group to prepare proposals on the recognition and enforcement of judgments in civil and commercial matters.⁶ From 2013, the Working Group met on five occasions to develop a draft text of core provisions aimed at facilitating the global circulation of judgments.
6. The Working Group completed its work on a Proposed draft Text for a Convention on the recognition and enforcement of judgments in civil and commercial matters at its fifth meeting in October 2015. The HCCH then convened four Special Commission meetings to advance work on this draft Convention. The First Meeting was convened in June 2016 and produced a 2016 preliminary draft Convention, which was published as Working Document No 76 Revised.⁷ At the Second Meeting in February 2017, the Special Commission reconsidered all provisions in the 2016 preliminary draft Convention and discussed general and final clauses, producing a revised draft of the Convention (hereinafter, "the February 2017 draft Convention"), published as Working Document No 170 Revised.⁸ At its Third Meeting in November 2017, the Special Commission reviewed and discussed the square-bracketed matters reflected in Chapters I and II of the February 2017 draft Convention, including a detailed discussion on matters related to intellectual property and general and final clauses. This meeting produced a further revised draft of the Convention (hereinafter,

⁴ More information about the origins of the HCCH 2005 Choice of Court Convention is available in the "Explanatory Report by Trevor Hartley and Masato Dogauchi" (hereinafter, "Hartley/Dogauchi Report"). See the *Proceedings of the Twentieth Session*, Tome III, *Choice of Court Agreements*, Antwerp – Oxford – Portland, Intersentia, 2010, pp. 785 and 787. The Hartley/Dogauchi Report is available on the HCCH website at < www.hcch.net > under "Choice of Court".

⁵ At the time of writing, Mexico, the European Union, Singapore and Montenegro are Contracting Parties to the Convention. The Convention was also signed by the United States of America on 19 January 2009, by Ukraine on 21 March 2016, by the People's Republic of China on 12 September 2017, and by the Republic of North Macedonia on 9 December 2019. The status table of the Convention is available on the HCCH website at < www.hcch.net > under "Choice of Court Section".

⁶ The HCCH also established an Experts' Group to further study and discuss the desirability and feasibility of making provisions in relation to jurisdiction. In February 2013, the Working Group and the Experts' Group each met in The Hague, where they decided to consider whether work for the Experts' Group on jurisdiction and the Working Group on recognition and enforcement could progress simultaneously. Following extensive consultations, it was recommended that the Working Group's activity should advance first and that the discussions of the Experts' Group should be resumed at a later stage. The Experts' Group met for a third time between 18 and 21 February 2020 and recommended to the Council on General Affairs and Policy of the HCCH (hereinafter, "CGAP") that work should continue. At its 2020 meeting, CGAP mandated two further meetings of the Experts' Group to be held before the 2021 CGAP meeting.

⁷ Work. Doc. No 76 REV of June 2016, "2016 preliminary draft Convention" (Special Commission on the Recognition and Enforcement of Foreign Judgments (1-9 June 2016)).

⁸ Work. Doc. No 170 REV of February 2017, "February 2017 draft Convention" (Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017)).

“the November 2017 draft Convention”), published as Working Document No 236 Revised.⁹ In May 2018, the Special Commission met for a fourth time to discuss issues arising from the Third Meeting, producing the 2018 draft Convention (hereinafter, “the 2018 draft Convention”), which was published as Working Document No 262 Revised.¹⁰ The 2018 draft Convention formed the basis of the text considered at the Twenty-Second Session in June and July 2019, where the final text of the Convention was adopted on 2 July 2019.¹¹

Acknowledgments

7. This Explanatory Report (hereinafter, “the Report”) was prepared by Francisco Garcimartin¹² and Geneviève Saumier,¹³ the *co-Rapporteurs* appointed by the First Meeting of the Special Commission. The purpose of the Report is to assist in the interpretation of the Convention, in light of its international character and the need to promote uniformity in its practical operation, by providing an explanation of each provision and examples where appropriate.¹⁴ The *co-Rapporteurs* have endeavoured to reflect the discussion and, where appropriate, consensus reached during Commission I on Judgments of the Twenty-Second Session in 2019. Where provisions were not expressly discussed during that Commission, the Report endeavours to reflect the discussion and, where appropriate, consensus reached during previous meetings of the Special Commission.¹⁵ Drafting of the Report started following the conclusion of the First Meeting of the Special Commission. It was then revised and updated following each subsequent meeting of the Special Commission. Delegations were invited to review the report at various stages of its drafting. The *co-Rapporteurs* endeavoured to take delegations’ views into account before finalising the Report and before its submission to delegations for a silent approval procedure. Unlike the text of the Convention, the Report is not binding in nature.
8. The *co-Rapporteurs* wish to extend their sincere thanks to Ms Ning Zhao, Senior Legal Officer at the Permanent Bureau of the HCCH, for her indispensable contribution to their work. They also wish to express their gratitude for the support provided by Ms Marta Pertegás (former member of the Permanent Bureau; First Secretary during the First and Second Meetings of the Special Commission) and Mr João Ribeiro-Bidaoui (First Secretary as of the Twenty-Second Session). A special word of thanks is also extended to Ms Lydie de Loof, Graphic Designer / Publications Officer at the Permanent Bureau of the HCCH, for her exceptional contribution to the French version of this Report. Finally, they would like to thank the delegations who commented on earlier drafts of the Report. Those comments were of great assistance and have contributed significantly to the final version.

⁹ Work. Doc. No 236 REV of November 2017, “November 2017 draft Convention” (Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017)).

¹⁰ Work. Doc. No 262 REV of May 2018, “2018 draft Convention” (Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018)).

¹¹ All documents relating to the Convention are available on the HCCH website at < www.hcch.net > under “Judgments”.

¹² Professor, Universidad Autónoma de Madrid (Spain).

¹³ Professor and Peter M. Laing Chair, Faculty of Law, McGill University (Canada).

¹⁴ See Art. 32 of the *Vienna Convention of 23 May 1969 on the Law of Treaties* (hereinafter, “Vienna Convention of 1969”).

¹⁵ In the very few instances where interpretive issues were not expressly addressed either in the Special Commission or in Commission I on Judgments of the Twenty-Second Session, the *co-Rapporteurs* have so indicated.

Terminology

The following terminology is used in the Convention:

“court of origin”: the court which granted the judgment;

“State of origin”: the State in which the court of origin is situated;

“court addressed”: the court which is asked to recognise or enforce the judgment;

“requested State”: the State in which the court addressed is situated.

Structure of the Report

9. There are three parts to the Report, including the present part (Part I). Part II (“Overview”) explains the aim, architecture and structure of the Convention, emphasising the function of the different provisions and how they relate to one another. Part III (“Article-by-Article Commentary”) analyses each individual Article to clarify its meaning.

Examples

10. In the examples provided, it is assumed (unless the contrary is stated) that the Convention is in force and that the States mentioned are Parties to it.

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

11. The Convention is a private international law instrument in civil or commercial matters. It deals with one of the three classical areas of private international law, namely the recognition and enforcement of foreign judgments. In so doing, it furthers one of the main goals of private international law: international judicial co-operation, with a view to enhancing predictability and justice in cross-border legal relations in civil or commercial matters. The Convention does not deal with the other two traditional areas of private international law, relating to court jurisdiction to adjudicate disputes in cross-border cases and rules determining the law applicable to such cases. Those matters are not affected by the Convention.
12. **Objective.** This Convention seeks to promote access to justice globally through enhanced judicial cooperation, which 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.
13. These goals will be advanced in a number of ways.
14. First and most importantly, the Convention provides a framework for the recognition and enforcement of foreign judgments in all Contracting States ("States"),¹⁶ thereby enhancing the practical effectiveness of those judgments. Access to justice is frustrated if a wronged party obtains a judgment that cannot be enforced in practice because the other party or the other party's assets are in a State where the judgment is not readily enforceable.
15. Second, the Convention will reduce the need for duplicative proceedings in two or more States; a judgment determining the claim in one State will be effective in other States, without the need to re-litigate the merits of the claim.
16. Third, the Convention will reduce the cost and timeframe of obtaining recognition and enforcement of judgments; access to practical justice will be faster and at lower cost.
17. Fourth, the Convention will improve the predictability of the law; individuals and businesses¹⁷ will be able to more readily ascertain the circumstances in which judgments will circulate among States.
18. Fifth, it will enable claimants to make informed choices about where to bring proceedings, taking into account the ability to enforce the resulting judgment in other States and the need to ensure fairness to defendants.
19. In a globalised and interconnected world, with ever-increasing movement of people, information and assets across borders, the practical importance of achieving these goals is self-evident. The Convention's potential to reach these goals is significant.

¹⁶ For simplicity, the term "States" is used in this Report to refer to "Contracting States". The distinction between Contracting and non-Contracting States is drawn only where relevant.

¹⁷ The English version uses "business" and the French version uses "professionnel" as a noun and an adjective.

20. **Relationship with the HCCH 2005 Choice of Court Convention.** The HCCH 2005 Choice of Court Convention pursues the same objectives by enabling parties to agree on the court that will hear a claim and providing for the recognition and enforcement of a judgment given by the chosen court.¹⁸ But in many cases there is no exclusive choice of court agreement between the parties to a dispute. This Convention seeks to extend the benefits of enhanced access to justice and reduced costs and risks of cross-border dealings to a broader range of cases. It is intended to complement the HCCH 2005 Choice of Court Convention.
21. **Outline.** The Convention is designed to provide an efficient and effective system for recognising and enforcing foreign judgments in civil or commercial matters in largely uncontroversial circumstances. The Convention provides for the recognition and enforcement of judgments that meet certain requirements (Arts 5 and 6) and sets out the grounds on which recognition or enforcement of such judgments may be refused (Art. 7).¹⁹ To facilitate the circulation of judgments, the text does not prevent States from recognising or enforcing judgments under national law or under other treaties (Arts 15, 23), subject to one exclusive basis for recognition and enforcement (Art. 6).
22. **Architecture.** The Convention is divided into four chapters. Chapter I deals with scope and definitions. The scope of the Convention extends to judgments in civil or commercial matters (Art. 1), but excludes certain matters from scope (Art. 2), either because they are covered by other instruments or because multilateral consensus cannot readily be achieved on them. Article 3 defines "judgment" and "defendant", and specifies when a legal person will be considered to be habitually resident in a State.
23. Chapter II is the core of the Convention. Its first article establishes the general principle of circulation of judgments among the States (Art. 4). A judgment given by a court of a State shall be recognised and enforced in another State in accordance with the provisions of Chapter II. The main criterion for circulation is provided in Article 5, which sets out the bases for recognition and enforcement of a judgment in the form of jurisdictional filters 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 one exclusive filter in Article 6. Where a judgment meets the requirements of Articles 4, 5 and 6, the grounds for refusal to recognise or enforce it are provided in Article 7.²⁰ This Article establishes an exhaustive list of grounds for refusal that allow, but do not require, the requested State to refuse recognition or enforcement. It is useful to point immediately to Article 15, which reserves the right of a requested State to recognise or enforce foreign judgments based on national law (subject to Art. 6).
24. Chapter II also deals with specific issues of interpretation and application: preliminary questions (Art. 8), severability (Art. 9), damages including punitive damages (Art. 10), and judicial settlements (Art. 11). Finally, Chapter II addresses procedural matters to facilitate access to the mechanism of the Convention: documents to be produced (Art. 12), procedure (Art. 13) and costs of proceedings (Art. 14).

¹⁸ More information on the HCCH 2005 Choice of Court Convention is available on the HCCH website at < www.hcch.net > under "Choice of Court".

¹⁹ It should be noted that the text of the Convention usually employs the expression "recognition and enforcement" when referring to the positive obligation laid down by Art. 4, and the expression "recognition or enforcement" when referring to the possibility of refusing the fulfilment of this obligation, e.g., under Art. 7. The Explanatory Report follows that formulation where appropriate.

²⁰ It should be noted that Arts 8(2) and 10 also provide grounds for refusal in specific circumstances.

25. Chapter III deals with general clauses: transitional provision (Art. 16), allowable declarations (Arts 17-19), uniform interpretation (Art. 20), non-unified legal systems (Art. 22) and relationship with other instruments (Art. 23).
26. Chapter IV provides final clauses on the process for becoming a Party to the Convention (Arts 24-27), entry into force (Art. 28), establishment of treaty relations (Art. 29), procedure for declarations (Art. 30), denunciation (Art. 31) and notifications (Art. 32).

PART III. ARTICLE-BY-ARTICLE COMMENTARY

Chapter I – Scope and definitions

<p style="text-align: center;">Article 1 Scope</p> <ol style="list-style-type: none">1. This Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters. It shall not extend in particular to revenue, customs or administrative matters.2. This Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State.
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27. Article 1 addresses the scope of the Convention, defining it in substantive and geographic terms. Paragraph 1 defines the substantive scope, providing that the Convention applies to the recognition and enforcement of judgments in civil or commercial matters. This provision must be read in conjunction with Article 2(1), which excludes certain matters. (See also Articles 18 and 19, which allow States to make declarations restricting the scope of application of the Convention.) Paragraph 2 addresses the geographical or territorial application of the Convention, providing that it applies to the recognition and enforcement in one State of a judgment given by the court of another State.

Paragraph 1 – This Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters. It shall not extend in particular to revenue, customs or administrative matters.

28. The Convention applies to judgments in civil or commercial matters. It does not extend, in particular, to revenue, customs or administrative matters. Whether a judgment relates to civil or commercial matters is determined by the nature of the claim or action that is the subject of the judgment. The nature of the court of the State of origin or the mere fact that a State was a party to the proceedings are not determinative factors.
29. The Convention applies whatever the nature of the court, *i.e.*, irrespective of whether the civil or commercial action was brought before a civil, criminal, administrative or labour court.²¹ Thus, for example, the Convention applies to a judgment on civil

²¹ See “Note on Article 1(1) of the 2016 preliminary draft Convention and the term ‘civil or commercial matters’”, drawn up by the *co-Rapporteurs* of the draft Convention and the Permanent Bureau, Prel. Doc. No 4 of December 2016 for the attention of the Special Commission of February 2017 on the Recognition and Enforcement of Foreign Judgments (hereinafter, “Prel. Doc. No 4 of December 2016”), para. 6.

claims brought before a criminal court where that court had jurisdiction to hear the matter under its procedural law.

30. The application of the Convention is not affected by the nature of the parties, *i.e.*, legal or natural persons, private or public. As indicated in Article 2(4), a judgment is not excluded from the scope of the Convention by the mere fact that a State – including a government, a governmental agency or any person acting for a State – was a party to the proceedings in the State of origin (see *infra*, commentary on Art. 2(4)).
31. Furthermore, the characterisation of an action is not affected by the mere fact that the claim is transferred to another person, such as by assignment, succession or assumption of the obligation by another person. Transfer of a claim from a private body to a State does not preclude the claim being characterised as civil or commercial. The same holds in cases of subrogation, *i.e.*, when a governmental agency is subrogated to the rights of a private party.
32. **Autonomous meaning.** The Convention requires that the courts of the requested State decide whether a judgment relates to civil or commercial matters. In making this determination, courts should consider the need to promote uniformity in the application of the Convention. Accordingly, the concept of "civil or commercial matters", like other legal concepts used in the Convention, must be defined autonomously, *i.e.*, by reference to the objectives of the Convention and its international character, and not by reference to national law.²² This requirement supports a uniform interpretation and application of the Convention (see *infra*, Art. 20). Furthermore, the interpretation of those terms should be applied consistently across other HCCH instruments, in particular the HCCH 2005 Choice of Court Convention.
33. The use of the terms "civil" and "commercial" matters is mostly relevant for legal systems where "civil" and "commercial" are regarded as separate and mutually exclusive categories, although the use of both terms is not incompatible with legal systems in which commercial proceedings are a sub-category of civil proceedings.²³ While other international instruments have used the terms "civil *and* commercial matters",²⁴ the Convention follows the HCCH 2005 Choice of Court Convention and refers to "civil *or* commercial matters". Both alternatives must be considered interchangeable.
34. The concept of "civil or commercial matters" is used to differentiate situations where the State acts in its sovereign capacity.²⁵ Unlike the HCCH 2005 Choice of Court Convention, Article 1(1) clarifies that the Convention does not apply, "[...] in particular, to revenue, customs or administrative matters". This enumeration is not exhaustive and other matters of public law, *e.g.*, constitutional and criminal matters, are obviously also excluded from the scope of the Convention. The enumeration is intended to facilitate the application of the Convention in States where there is no

²² Hartley/Dogauchi Report, para. 49; Prel. Doc. No 4 of December 2016, para. 5.

²³ Hartley/Dogauchi Report, para. 49.

²⁴ See Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter, "Brussels Ia Regulation"), Art. 1.

²⁵ Hartley/Dogauchi Report, para. 49; Prel. Doc. No 4 of December 2016, para. 40.

established distinction between private and public law.²⁶ The new terms included in this Convention are not intended as departures from the HCCH 2005 Choice of Court Convention; both instruments must be interpreted in the same way.

35. A key element distinguishing public law matters from "civil or commercial" matters is whether one of the parties is exercising governmental or sovereign powers that are not enjoyed by ordinary persons.²⁷ It is therefore necessary to identify the legal relationship between the parties to the dispute and to examine the legal basis of the action brought before the court of origin to establish whether the judgment relates to civil or commercial matters. If the action derives from the exercise of public powers (including regulatory powers or duties), the Convention does not apply. A typical example of public power is the capacity to enforce a claim by way of administrative proceedings without requiring court action. Thus, for example, the Convention does not apply to orders by governments or governmental agencies such as health and safety authorities or financial supervisors, which seek to ensure compliance or to prevent non-compliance with regulatory requirements.²⁸ Nor does it apply to judgments on judicial actions brought either to enforce or appeal such orders. The Convention does not apply to claims against officials²⁹ who act on behalf of the State or to liability for the acts of public authorities, including the acts of publicly appointed officeholders acting in that capacity.
36. Criminal or penal matters are typical examples involving the exercise of public powers, which are therefore excluded from the scope of the Convention. This exclusion covers actions in which a State or public authority seeks to punish a person for conduct proscribed by criminal law, including by pecuniary sanctions (but see *supra*, para. 29).
37. Conversely, if neither party is exercising public powers, the Convention applies. For example, it applies to private claims for harm caused by non-excluded anti-competitive conduct (see *infra*, para. 69).³⁰ By the same token, when a governmental agency is acting on behalf of private parties, such as consumers or investors, and is not exercising governmental or sovereign powers, the Convention applies (see *infra*, commentary on Art. 2(4)).
38. **Joining of actions.** The principle of severability applies where a judgment involves more than one action, one of which is "civil or commercial" and another which is not (see *infra*, Art. 9). The Convention only applies to the civil or commercial action and not to the others.

²⁶ See Nygh/Pocar Report, para. 23: "[...] the expressions 'civil matters' or 'civil law' are not technical terms in common law countries such as England and the Republic of Ireland and can have more than one meaning. In the widest sense they exclude only criminal law. On that basis, constitutional law, administrative law and tax law are included in the description of 'civil matters'. This is clearly not the intention of the preliminary draft Convention, which in the second sentence of paragraph 1 explains that matters of a revenue, customs or administrative nature are not to be regarded as falling within the scope of 'civil and commercial matters'" (notes omitted). This clarification was considered unnecessary in the HCCH 2005 Choice of Court Convention: see Hartley/Dogauchi Report, para. 49, note 73.

²⁷ Hartley/Dogauchi Report, para. 85; Prel. Doc. No 4 of December 2016, para. 40. The terms "sovereign powers", "governmental powers" and "public powers" are to be considered equivalent for the purposes of this Report (see also *infra*, para. 83 for a further elaboration of these terms).

²⁸ Prel. Doc. No 4 of December 2016, para. 41.

²⁹ References to "officials" in this Report refer both to current and former officials.

³⁰ Prel. Doc. No 4 of December 2016, para. 41.

Paragraph 2 – This Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State.

39. Paragraph 2 defines the geographical or territorial application of the Convention: it applies to the recognition and enforcement in one State of a judgment given by a court of another State. Both the State of origin, being the State in which the court granting the judgment is situated, and the requested State, being the State where recognition and enforcement of that judgment is sought, must be parties to the Convention (Art. 4(1)). This provision must be read with Article 22 ("Non-unified legal systems"), and in particular with Article 29 ("Establishment of relations pursuant to the Convention"); the Convention shall only apply if both the State of origin and the requested State are parties to the Convention, and if neither has objected to the establishment of relations with the other under this provision, *i.e.*, if the Convention has effect between them.
40. **Relevant time.** The relevant time is the date proceedings are instituted in the State of origin. The Convention must have effect between the requested State and the State of origin at that moment for it to apply (see *infra*, Art. 16).
41. **Definition of the time proceedings are instituted.** Although the Convention refers to "the time the proceedings were instituted" in some provisions (*e.g.*, Art. 5(1)(k) or 16), it does not define this concept. The institution of proceedings should focus on the completion of the first procedural act that gives rise to the commencement of the proceedings in the State of origin, *e.g.*, the filing of the document instituting the proceedings with the court, or if that document has to be served before filing, the reception by the authority responsible for service.³¹

³¹ This is consistent with the principle of predictability stated in paras 17, 18 and 328.

Article 2 Exclusions from scope

1. This Convention shall not apply to the following matters –
 - (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;
 - (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;
 - (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;
 - (k) defamation;
 - (l) privacy;
 - (m) intellectual property;
 - (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;
 - (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;
 - (q) sovereign debt restructuring through unilateral State measures.
2. A judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings. 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 was not an object of the proceedings.
3. This Convention shall not apply to arbitration and related proceedings.

4. 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.
5. Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

42. Article 2 refines the scope of the Convention set out in Article 1(1). First, it excludes certain matters (para. 1). Second, it provides that the Convention applies even if a matter excluded from its scope arose as a preliminary question in proceedings in the State of origin (para. 2). Third, it contains a specific provision excluding arbitration and related proceedings (para. 3). Finally, it provides that the mere fact that a State or government body was a party to the proceedings does not exclude a judgment from the scope of the Convention, and the Convention does not affect the privileges and immunities enjoyed by States or international organisations (paras 4 and 5). In applying these provisions, courts of the requested State are not bound by the decision of courts of the State of origin regarding whether the judgment relates to an excluded matter.

Paragraph 1 – This Convention shall not apply to the following matters –

43. Paragraph 1 of Article 2 lists specific matters excluded from the scope of the Convention. However, paragraph 2 explains that these exclusions only apply where a listed matter was the "object" of the proceedings, and not where it arose as a preliminary question, in particular by way of defence (see *infra*, para. 76).
44. **Rationale.** In general terms, the rationale for the exclusions is that (i) the listed matter is already governed by other international instruments, in particular other HCCH Conventions, and it was deemed preferable that these instruments operate without any interference by the Convention,³² (ii) the listed matter is of particular sensitivity for many States and it would be difficult to reach broad acceptance on how the Convention should deal with it, or (iii) it is preferable to expressly list the matter as excluded to avoid any uncertainty based on diverging interpretations under national law. Most matters mentioned in the list are similar to those contained in the parallel provision of the HCCH 2005 Choice of Court Convention but there are significant differences. The scope of the Convention is broader than the scope of the HCCH 2005 Choice of Court Convention. For example, unlike the HCCH 2005 Choice of Court Convention, which is limited to commercial transactions, the Convention applies to employment and consumer contracts, physical injuries, damage to tangible property, rights *in rem* and leases of immovable property, and some anti-trust (competition) matters.

³² Hartley/Dogauchi Report, para. 53.

Sub-paragraph (a) – the status and legal capacity of natural persons;

45. Sub-paragraph (a) excludes the status and legal capacity of natural persons from the scope of the Convention. This exclusion encompasses judgments on divorce, legal separation, annulment of marriage, establishment or contestation of parent-child relationships, adoption, emancipation, and the status and capacity of minors or persons with disabilities. The exclusion also covers judgments on guardianship, curatorship or equivalent measures, as well as measures for the protection of children or the administration, conservation or disposal of children's property (see also *infra*, para. 47).³³ Judgments ruling on the name or nationality of natural persons are also captured under this exclusion. Maintenance obligations and other family matters are excluded under sub-paragraphs (b) and (c).

Sub-paragraph (b) – maintenance obligations;

46. Sub-paragraph (b) excludes maintenance obligations, which encompasses any maintenance obligation deriving from family relationships, parentage, marriage or affinity.³⁴ As both maintenance obligations and matrimonial property regimes are excluded, there is no need to draw an exact definitional boundary between them.

Sub-paragraph (c) – other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;

47. Sub-paragraph (c) excludes matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships.³⁵ As in the HCCH 2005 Choice of Court Convention, "matrimonial property" includes the special rights that a spouse has to the matrimonial home in some jurisdictions.³⁶ In general terms, this exclusion covers judgments on claims between spouses – and exceptionally with third parties – during or after dissolution of the marriage, and which affect rights in property arising out of the matrimonial relationship. The exclusion encompasses rights of administration and disposal of property belonging to the spouses, and matrimonial property agreements by which spouses organise their matrimonial property regime. Conversely, claims between spouses arising under the general law of property, contracts or torts are not excluded from the scope of the Convention.³⁷ The term "similar relationships" covers relationships between unmarried couples, *e.g.*, registered partnerships, to the extent that they are given legal recognition.³⁸ One may have different views on whether issues such as parental responsibility, custody or right of access, or measures for the protection of children are covered by sub-

³³ Nygh/Pocar Report, para. 30, note 16. The exclusion of matters under sub-para. (a) must be consistent with other HCCH instruments, in particular, as regards: (i) parental responsibility and measures for the protection of children, with Art. 3 of the *HCCH Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter, "HCCH 1996 Child Protection Convention"); and (ii) the protection of adults, with Art. 3 of the *HCCH Convention of 13 January 2000 on the International Protection of Adults* (hereinafter, "HCCH 2000 Protection of Adults Convention").

³⁴ See, on maintenance obligations, the *HCCH Convention of 15 April 1958 concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations toward Children*; the *HCCH Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*; and the *HCCH Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (hereinafter, "HCCH 2007 Child Support Convention").

³⁵ See the *HCCH Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*.

³⁶ Hartley/Dogauchi Report, para. 55.

³⁷ Nygh/Pocar Report, para. 35.

³⁸ *Ibid.*; Hartley/Dogauchi Report, para. 55.

paragraph (a) ("status and legal capacity of natural persons") or by sub-paragraph (c) ("other family matters").³⁹ However, as with sub-paragraph (b), there is no need to draw an exact definitional boundary between the categories as both are excluded from the scope of the Convention.

Sub-paragraph (d) – wills and succession;

48. Sub-paragraph (d) excludes wills and succession from the scope of the Convention.⁴⁰ The exclusion refers to succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of voluntary transfer under a disposition of property on death or a transfer through intestate succession. The use of the word "wills" simply indicates that matters concerning the form and material validity of dispositions on death are excluded.⁴¹ In relation to trusts created by testamentary disposition, judgments on the validity and interpretation of the will creating the trust are excluded. But judgments on the effects, administration or variation of the trust between persons who are or were within the trust relationships are included.⁴²

Sub-paragraph (e) – insolvency, composition, resolution of financial institutions, and analogous matters;

49. Sub-paragraph (e) excludes insolvency, composition, resolution of financial institutions, and analogous matters. The term "insolvency" covers bankruptcy of both individuals and legal persons. It includes the winding-up or liquidation of corporations in insolvency proceedings, while the winding-up or liquidation of corporations for reasons other than insolvency is dealt with by sub-paragraph (i).⁴³ The term "composition" refers to proceedings where the debtor enters into an agreement with their creditors to restructure or reorganise a company to prevent its liquidation. These agreements usually imply a moratorium on the payment of debts and a discharge.⁴⁴ Purely contractual arrangements – *i.e.*, voluntary out-of-court agreements – are, however, not covered by the exclusion. The term "analogous matters" is used to cover a wide range of other methods whereby insolvent or financially distressed persons are assisted to regain solvency while continuing to trade.⁴⁵
50. The term "resolution of financial institutions" is not included in the parallel provision of the HCCH 2005 Choice of Court Convention. This is a relatively new concept that refers to the legal framework enacted in many jurisdictions to address the risk of

³⁹ See Work. Doc. No 242 of May 2018, "Proposal of the delegation of Uruguay" (Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018)).

⁴⁰ See the HCCH *Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Disposition*; the HCCH *Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons*; the HCCH *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons* (not yet in force).

⁴¹ Nygh/Pocar Report, para. 36.

⁴² *Ibid.*

⁴³ *Ibid.*; Hartley/Dogauchi Report, para. 56.

⁴⁴ *Ibid.* Note that there is a separate provision on sovereign debt in Art. 2(1)(q).

⁴⁵ Such as Chapter 11 of the United States Bankruptcy Code. See Hartley/Dogauchi Report, para. 56. Some national proceedings may be subsumed under the concept of "composition" or under "analogous matters", but since both are excluded from the scope of the Convention, the distinction is not relevant here.

failure of financial institutions.⁴⁶ A resolution may include liquidation and depositor reimbursement, transfer or sale of assets and liabilities, establishment of a temporary bridge institution, and write-down or conversion of debt to equity.⁴⁷ Most of these measures fall outside the scope of application of the Convention as administrative rather than civil or commercial matters, but many delegations at the Second Meeting of the Special Commission considered an explicit reference to this new framework appropriate to avoid ambiguity.⁴⁸

51. **Insolvency-related judgments.** Sub-paragraph (e) excludes judgments directly concerning insolvency.⁴⁹ This exclusion applies if the right or the obligation that was the legal basis of the action in the State of origin was based on rules pertaining specifically to insolvency proceedings, rather than general rules of civil or commercial law. If the action derives from insolvency rules, the exclusion precludes the circulation of the judgment under the Convention. But if the action derives from civil or commercial law, the judgment may circulate (see, however, *infra*, para. 53). Courts of the requested State may consider the following criteria when deciding whether the judgment was based on insolvency rules: whether the judgment was given on or after the commencement of the insolvency proceedings, whether the proceedings from which the judgment derived served the interest of the general body of creditors, and whether the proceedings from which the judgment derived could not have been brought but for the debtor's insolvency.⁵⁰ Thus, the Convention does not apply, for example, to judgments opening insolvency proceedings, concerning their conduct and closure, approving a restructuring plan, or setting aside transactions detrimental to the general body of creditors or on the ranking of claims.⁵¹
52. The Convention does, however, apply to judgments on actions based on general rules of civil or commercial law, even if the action is brought by or against a person acting as insolvency administrator in one party's insolvency proceedings. Thus, the Convention applies to judgments on actions for the performance of obligations under a contract concluded by the debtor, or actions on non-contractual damages.⁵² For example, where X enters into a sale contract with Y, and X is then declared bankrupt in State A, the Convention will apply to any judgment against Y to perform the contract even if the action was brought by the person appointed as insolvency administrator in X's bankruptcy. By the same token, the Convention will apply if such action was brought by Y against X acting through the person appointed as insolvency administrator in X's bankruptcy.
53. The application of the Convention will, however, be of limited effect in cases where the judgment debtor is in insolvency proceedings. These are collective proceedings that usually prevent individual creditors from enforcing their claims by means of separate enforcement actions (otherwise, the orderly administration and liquidation

⁴⁶ Such national frameworks have been established following guidance provided by the Financial Stability Board, an international body set up after the G20 London summit in April 2009, that monitors and makes recommendations about the global financial system.

⁴⁷ See Financial Stability Board, *Key Attributes of Effective Resolution Regimes for Financial Institutions*, 15 October 2014.

⁴⁸ Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017), Minutes No 2, paras 30-50.

⁴⁹ Hartley/Dogauchi Report, para. 57.

⁵⁰ See Work. Doc. No 104 of February 2017, "Proposal of the delegation of the European Union" (Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017)).

⁵¹ *Ibid.*

⁵² *Ibid.*; Hartley/Dogauchi Report, para. 57.

of the estate or the reorganisation of the debtor would not be feasible), and the effect of commencing insolvency proceedings on individual enforcement actions is not governed by the Convention. Accordingly, if the judgment is favourable to the insolvent debtor's counterparty – Y in the above example – the enforcement of such judgment may be affected by the insolvency proceedings. The judgment creditor (Y) may seek recognition and enforcement of the judgment under the Convention in the jurisdiction where insolvency proceedings are commenced – State A in the example – but will only receive payment through the insolvency process or reorganisation plan. In this sense, the foreign judgment must be treated the same as a domestic judgment, but no better. Likewise, the judgment creditor (Y) may seek recognition and enforcement of the judgment in States other than where insolvency proceedings are commenced, but the enforcement of the judgment may be affected by the commencement of the insolvency proceedings if those proceedings are recognised in the requested State (under the UNCITRAL Model Law or otherwise).

Sub-paragraph (f) – the carriage of passengers and goods;

54. Sub-paragraph (f) excludes contracts for the national or international carriage of passengers or goods, regardless of the means of transport. The exclusion extends to carriage by sea, land and air, or any combination of the three.⁵³ The international carriage of persons or goods is subject to a number of other important conventions, and this exclusion prevents conflicts arising with those instruments. In any event, the exclusion is not limited to commercial contracts for carriage and, therefore, it also covers consumer contracts and contracts between non-professionals, *e.g.*, the Convention does not apply to a judgment for personal injury to a passenger injured in an accident as a result of the driver's negligence. Conversely, this exclusion does not cover damages to third parties, *e.g.*, a victim in an accident who was not a passenger. Nor does it cover complex contracts that combine tourist services, such as transport, accommodation and other services, where the transport alone is not the main object of the contract.

Sub-paragraph (g) – transboundary marine pollution, marine pollution in areas beyond national jurisdiction, ship-source marine pollution, limitation of liability for maritime claims, and general average;

55. Sub-paragraph (g) excludes three maritime matters: marine pollution in three circumstances (transboundary, beyond areas of national jurisdiction and ship-source), limitation of liability for maritime claims, and general average. The maritime matters exclusion was introduced by the HCCH 2005 Choice of Court Convention.⁵⁴ With regard to marine pollution in particular, there are several international marine pollution-related instruments dealing with the recognition and enforcement of foreign judgments; the application of the Convention in this matter might have given rise to problems in terms of the relationships between international instruments.⁵⁵ There was consensus at the Twenty-Second Session to limit this exclusion to the three specific contexts listed in sub-paragraph (g): transboundary (*i.e.*, cross-border) marine pollution, marine pollution in areas beyond national jurisdiction, and ship-

⁵³ Hartley/Dogauchi Report, para. 58.

⁵⁴ See "Note on reconsidering 'marine pollution and emergency towage and salvage' within the scope of the draft Convention on the recognition and enforcement of foreign judgments in civil or commercial matters", Prel. Doc. No 12 of June 2019 for the attention of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019) (available on the HCCH website at < www.hcch.net >, under the "Judgments Section" then "Preparatory Work" and "22nd Diplomatic Session") (hereinafter, "Prel. Doc. No 12 of June 2019"), para. 10.

⁵⁵ *Ibid.*, para. 77.

source marine pollution.⁵⁶ Other judgments involving marine pollution fall within the scope of the Convention. Unlike the HCCH 2005 Choice of Court Convention, the Convention does not exclude emergency towage and emergency salvage, as these matters are not covered by other instruments, and there are strong reasons to encourage the provision of these services, while failure to effectively compensate providers can lead to a diminution in the willingness to take the risks and bear the costs for providing them.⁵⁷ Moreover, subject to the limitation of liability exclusion, other maritime matters, such as marine insurance, shipbuilding or ship mortgages and liens, are also included in the scope of the Convention.⁵⁸

Sub-paragraph (h) – liability for nuclear damage;

56. Sub-paragraph (h) excludes liability for nuclear damage. The explanation for this exclusion in the Hartley/Dogauchi Report is that nuclear damage is the subject of various international conventions providing that the State where the nuclear accident takes place has exclusive jurisdiction over actions for damages for liability resulting from the accident.⁵⁹ In some cases, Article 23 of the Convention might give those instruments priority over this Convention. There are, however, some States with nuclear power plants that are not parties to any of the nuclear liability conventions. Such States might be reluctant to recognise judgments given in another State by virtue of one of the filters laid down by Article 5 of the Convention. Where the operators of the nuclear power plants benefit from limited liability under the law of the State in question, or where compensation for damage is paid out of public funds, a single collective procedure in that State under its internal law would be necessary for a uniform resolution of liability and an equitable distribution of a limited fund among the victims. This exclusion addresses nuclear accidents and therefore does not cover tortious medical claims regarding nuclear medicine (including radiation therapy, for example).

Sub-paragraph (i) – the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs;

57. Sub-paragraph (i) excludes the validity, nullity or dissolution of legal persons, and the validity of decisions of their organs. The exclusion also encompasses "associations of natural or legal persons", *i.e.*, entities without legal personality. These matters are often subject to the exclusive jurisdiction of the State whose law applies to those entities in order to avoid a plurality of fora in this field and to ensure legal certainty.⁶⁰ Judgments on these matters are excluded from the scope of the Convention

⁵⁶ These terms, and specifically "areas of national jurisdiction", are used in international instruments and other documents dealing with maritime matters and are used here to assist with the uniform interpretation of this exclusion from scope. Therefore, a necessary reference for interpreting those terms is international law, in particular the *United Nations Convention on the Law of the Sea* (UNCLOS).

⁵⁷ However, since some emergency towage and salvage are mandatory operations regulated by or conducted under States' authorities, certain judgments will not qualify as civil or commercial matters under Art. 1(1) of the Convention; see PreL Doc. No 12 of June 2019, para. 76.

⁵⁸ Hartley/Dogauchi Report, para. 59. For an explanation of the scope of the terms "limitation of liability for maritime claims", see P. Schlosser, "Report on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice", *Official Journal of the European Communities*, 5.3.1979, No C 59/71, Luxembourg, 1979 (hereinafter, "Schlosser Report"), paras 124-130.

⁵⁹ Hartley/Dogauchi Report, para. 64 (notes omitted).

⁶⁰ Nygh/Pocar Report, para. 170.

because they are not usually recognised and enforced in other States.⁶¹ The exclusion only covers the validity, nullity or dissolution of legal persons and associations, or the validity or nullity of decisions of their organs, *e.g.*, the shareholders' meeting or the board of directors. But the exclusion does not cover other judgments related to company law issues, such as judgments on directors' liability, claims for dividend payments or for payments of members' contributions. Naturally, any contract or tortious matter relating to the activities of a legal person or association remains within the scope of the Convention.

Sub-paragraph (j) – the validity of entries in public registers;

58. Sub-paragraph (j) excludes the validity or nullity of entries in public registers, including land registers, land charges registers and commercial registers.⁶² Public registers are kept by public authorities and imply the exercise of a sovereign power, and actions on validity of entries must usually be brought against the public authority keeping the register.⁶³ This includes, for example, cases where registration is refused or amended by the Registrar and the applicant appeals against the decision. This litigation often takes place between the applicant and the Registrar. Accordingly, in principle, entries in public registers are administrative matters outside the scope of the Convention. Article 2(1)(j) prevents doubt.
59. The exclusion does not extend, however, to the legal effects of the entries. Thus, for example, an action against a third-party purchaser of immovable property based on a right of pre-emption registered in the land register is not excluded. By the same token, an action against a private person based on the invalidity of the conveyance of ownership over an immovable property is not excluded either, even if the defendant's ownership is registered in the land register. This judgment is not on the "validity of the entry" as such, but on the validity of the title (*i.e.*, the contract) that gave rise to that entry.

Sub-paragraph (k) – defamation;

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

⁶¹ Hartley/Dogauchi Report, para. 70.

⁶² The Hartley/Dogauchi Report explains that "some people may not regard this as civil or commercial matters. However, as some international instruments (for instance, Art. 22(3) of the Brussels I Regulation) provide for the exclusive jurisdiction over proceedings that have the validity of such entries as their object, it was thought better to exclude them explicitly in order to avoid any doubts." *Ibid.*, para. 82.

⁶³ These registers may also be established by international treaties and are also covered by this exclusion, *e.g.*, the registries established under the *UNIDROIT Cape Town Convention on International Interests in Mobile Equipment* and its Protocols (these instruments are available at < www.unidroit.org >).

Sub-paragraph (l) – privacy;

61. **Introduction.** Sub-paragraph (l) excludes privacy. As with defamation, privacy involves a delicate balance between fundamental or constitutional rights, in particular freedom of expression, and is a sensitive matter for many States. While this issue could be addressed on a case-by-case basis by way of the public policy exception under Article 7, it was thought preferable to exclude privacy from the scope of the Convention. Privacy law is currently in great flux in many States, and the scope and definition of privacy varies greatly.⁶⁴ The text of the Convention thus avoids defining privacy.
62. **Scope of application.** This exclusion applies to the disclosure of information in any form, including, *e.g.*, text, pictures, audio or video recordings. The core definition of privacy for the purposes of this exclusion refers to situations involving an unauthorised public disclosure of information relating to private life.⁶⁵ Such a definition limits the exclusion to natural persons since legal persons do not have a “private life”. It entails the exclusion of any judgment ruling on a privacy-based claim by a natural person for compensation due to public disclosure of private information or to prevent such disclosure. While there was consensus that privacy includes such cases, the privacy exclusion is not limited to these situations. In considering whether to apply the exclusion to other situations involving privacy, courts should consider the purpose of the exclusion, having regard also to the international character of the Convention and the need to promote uniformity in its application, as provided by Article 20.
63. **Data protection.** There was agreement that the exclusion does not extend to judgments ruling on contracts involving or requiring the protection of personal data in the business-to-business context, for example, a contract between the holder of personal data and a provider of services in relation to the use of that data.⁶⁶

Sub-paragraph (m) – intellectual property;

64. Sub-paragraph (m) excludes intellectual property. The concept of intellectual property is used in a broad sense, covering matters that are internationally recognised as intellectual property,⁶⁷ and other matters that are not internationally recognised as intellectual property but benefit from equivalent protection under certain national laws, such as is currently the case with traditional knowledge or cultural expressions and genetic resources. In the draft Convention prepared by the Special Commission of May 2018, the expression “analogous matters” was used to

⁶⁴ See C. North, “Note on the possible exclusion of privacy matters from the Convention as reflected in Article 2(1)(k) of the February 2017 draft Convention”, drawn up with the assistance of the Permanent Bureau, Prel. Doc. No 8 of November 2017 for the attention of the Third Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017) (available on the HCCH website at <www.hcch.net>, under the “Judgments Section” then “Preparatory Work” and “Meetings of the Special Commission”), para. 51.

⁶⁵ See Minutes of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019), Minutes No 5, paras 39-41 and 43.

⁶⁶ *Ibid.*, Minutes No 8, paras 116-119.

⁶⁷ See *e.g.*, the *Paris Convention for the Protection of Industrial Property*, as revised at Stockholm in 1967 (the “Paris Convention”), the *Convention establishing the World Intellectual Property Organization* (“WIPO”) (as amended 28 September 1979), the *Agreement on Trade related Aspects of Intellectual Property Rights* (“TRIPS”), the *Berne Convention for the Protection of Literary and Artistic Works* (the Berne Convention), or the WIPO Copyright Treaty. As regards the rights and matters covered by those instruments, see in particular the references in Arts 1 and 2 of TRIPS. Of course, this list is not exhaustive.

capture this latter category, to ensure equal treatment of judgements on intellectual property, whether internationally recognised as such or not. However, it was decided during the Twenty-Second Session not to include "analogous matters" in the text of the Convention as this expression is not found in the HCCH 2005 Choice of Court Convention, and in light of concerns expressed by some delegations about the ambiguity of the phrase. The decision to exclude the phrase "analogous matters" has no implications on the scope of the intellectual property exclusion, which is broadly defined as indicated above.

65. The exclusion of intellectual property covers, for example, judgments on validity and registration of intellectual property rights, subsistence of copyright or related rights, and infringement of these rights. However, as regards contracts relating to intellectual property rights, the exclusion is more nuanced, and will depend on whether the dispute is better characterised as contractual. The relevant criterion to define the scope of the exclusion is thus whether the judgment to be recognised or enforced was mainly based on general contract law or on intellectual property law.⁶⁸ On the one hand, there are judgments clearly included within the scope of the Convention, *e.g.*, a judgment on a trademark license agreement that rules on the determination of royalties due or a judgment on a distribution contract, which includes a license of intellectual property right, that rules on the under-reporting of sales. In such cases, the judgment is based on general contract law and only indirectly concerns intellectual property matters. On the other hand, there are judgments clearly excluded from the scope of the Convention, *e.g.*, a judgment on a standard essential patent (SEP) involving a fair, reasonable and non-discriminatory (FRAND) licensing obligation, or a judgment determining the patent ownership of an invention made in the course of an employment relationship. In such cases, where the judgment is directly based on the substantive rules governing intellectual property law as opposed to general contract law, the Convention does not apply. Between these two groups, there are difficult or borderline cases, *e.g.*, when the action is based on general contract law but the intellectual property matter arises as a defence. In principle, these judgments must be addressed case by case under the general criterion; if the defence was ruled out as meritless or frivolous, and therefore the judgment is based on general contract law, the Convention will apply. On the other hand, when the contractual aspect was secondary and the judgment was mainly based on intellectual property matters, the Convention does not apply.

Sub-paragraph (n) – activities of armed forces, including the activities of their personnel in the exercise of their official duties;

66. Sub-paragraph (n) excludes judgments related to the activities of armed forces, including the activities of their personnel in the exercise of their official duties. In principle, these judgments will be excluded under Article 1(1) because they are not judgments on civil or commercial matters. The persons who carry out such activities may also benefit from jurisdictional immunity under international law, which is unaffected by the Convention (Art. 2(5); see *infra*, paras 85-89). However, there are no uniform or standard definitions for *acta iure imperii* and *acta iure gestionis*, so States may have different views on this issue. This exclusion is accordingly included to provide greater certainty. It clarifies that activities of armed forces are in any event outside the scope of the Convention and that States are not obliged to recognise or

⁶⁸ The three Work. Docs presented in the Twenty-Second Session on this issue used the same sentence to define the scope of this exclusion in contractual disputes: "a judgment is excluded if the dispute is better characterized as an intellectual property matter instead of as a contractual matter" (see Work. Docs Nos 75, 80 and 84).

enforce judgments on these matters, irrespective of whether those activities qualify as *acta iure imperii* in the State of origin or in the requested State. This exclusion also ensures consistency with other bilateral or multilateral treaties that provide for exclusive dispute resolution mechanisms for certain private law claims against armed forces (including both contractual and tort claims).⁶⁹ Naturally, this provision must not be interpreted *a contrario*, *i.e.*, it does not imply that the activities of other State authorities are included within the scope of the Convention; insofar as those activities do not qualify as civil or commercial matters, they will be excluded under Article 1(1).

67. Sub-paragraph (n) covers judgments related to the activities of armed forces as such, but it specifically mentions that it includes the activities of their personnel “in the exercise of their official duties”. Thus, any judgment against (or in favour of) the armed forces is excluded, whereas a judgment concerning their personnel is only excluded if it rules on a dispute arising from the exercise of their official duties. Thus, for example, a judgment on a civil claim against a soldier deriving from their personal activities, such as a purchase of a private vehicle or a car accident during a holiday trip, is covered by the Convention. Conversely, if the accident occurs in the context of a military exercise, any judgment against the individual soldier will be excluded. The term “personnel” may also include civilians enrolled or employed by the armed forces, *i.e.*, the relevant element is the activities they are carrying out, not their employment status.

Sub-paragraph (o) – law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties;

68. Sub-paragraph (o) excludes judgments related to law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties. This exclusion is closely linked to the exclusion of the activities of armed forces in sub-paragraph (n) and follows the same formulation– but with an important difference. To avoid definitional disputes about whether an agency is a law enforcement entity, the exclusion refers to “law enforcement activities” rather than a person or entity, such as the armed forces. The exclusion therefore typically covers bodies that carry out law enforcement activities, such as the police force or border control officers, extending not only to investigations, arrests, etc., but also to subsequent prosecutions. It also includes any activities undertaken pursuant to mutual legal assistance treaties or extradition treaties. This difference aside, both the law enforcement and armed forces provisions have many elements in common. As with the activities of armed forces, most judgments regarding law enforcement activities would not fall within the “civil or commercial” scope of the Convention but were specified in Article 2(1) to address potential divergences in interpretation of *acta iure imperii* under national law. The term “personnel” includes any person carrying out official law enforcement activities irrespective of their employment status. And as with the exclusion of the activity of armed forces under sub-paragraph (n), this exclusion has no implications for the rules on privileges and immunities, which are entirely preserved under Article 2(5).

⁶⁹ If a court in one State ignored these mechanisms and gave a judgment, this might give rise to a request under the Convention to recognise and enforce such a judgment, which would undercut the integrity of those bilateral or multilateral treaties.

Sub-paragraph (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;

69. Sub-paragraph (p) excludes judgments on anti-trust (competition) matters but only partially. The boundary of this exclusion is determined by: (i) a material element (the scope of the Convention only includes certain categories of anti-trust conduct expressly); and (ii) a connecting factor (the Convention only applies to these categories of anti-trust conduct where there is a particular connection with the State of origin). The formulation of this exclusion in this way is a compromise between conflicting approaches.⁷⁰ On the one hand, some delegations favoured including this matter without restrictions, arguing that contemporary anti-trust laws largely share the same objectives and have largely common characteristics at a global level, and that the Convention would only cover private enforcement actions, which would promote those objectives, and not public enforcement actions or orders by anti-trust authorities. On the other hand, another group of delegations favoured a complete exclusion of this matter. These delegations argued that there is a strong element of public interest involved in this field – even with regard to private claims – and it might be difficult (or even inappropriate) to distinguish between public and private enforcement, especially but not only with regard to cases brought by public authorities. This group was also concerned about the potential extraterritorial effect: anti-trust (competition) rules are jurisdiction-specific and allowing judgments in such matters to circulate under the Convention might lead to a “spill-over” effect. This sub-paragraph is formulated as a balanced compromise between these two approaches.
70. The exclusion is phrased “anti-trust (competition) matters”, as in the HCCH 2005 Choice of Court Convention (see Art. 2(1)(h)), because different terms are used in different legal systems for rules of similar substantive content. In the United States, for example, the standard term is “anti-trust law”, while in Europe “competition law” is used. Therefore, both terms are used in the English version of the Convention.
71. In relation to its material scope, sub-paragraph (p) excludes 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”. This formulation seeks to include within the scope of the Convention a violation of anti-trust (competition) law on which there appears to be global consensus, *i.e.*, the so-called “hard-core cartels”. The wording is inspired by the 1998 OECD Recommendation,⁷¹ and clarifies that anti-competitive agreements or concerted practices among “potential competitors” (*e.g.*, an agreement not to compete or not to enter the market) are also included.⁷² The term “concerted practice” or “concerted actions” is commonly used in anti-trust (competition) law and refers to cooperative

⁷⁰ For a further analysis of the different views on this matter, see “Report of informal working group V – possible exclusions of anti-trust (competition) matters”, Prel. Doc. No 6 of April 2019 for the attention of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019).

⁷¹ Recommendation of the OECD Council Concerning Effective Action against Hard Core Cartels, adopted on 25 March 1998; now replaced by Recommendation of the OECD Council concerning Effective Action against Hard Core Cartels, adopted on 2 July 2019 (hereinafter “2019 OECD Recommendation”).

⁷² The words “actual or potential” have also been added in the 2019 OECD Recommendation.

actions among undertakings that do not reach the stage of a formal agreement. The OECD Recommendation is a helpful source of guidance when interpreting this provision, indicating, for example, that the limitation on the exclusion in sub-paragraph (p) does not cover agreements, concerted practices, or arrangements that are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies.⁷³ Conversely, the Convention does not apply to other categories of anti-trust (competition) law, in particular, prohibitions or restrictions on the unilateral conduct of market operators (e.g. abuse of dominance) or prohibitions on mergers and acquisitions that restrict competition.

72. In order to address concerns about extraterritoriality, the inclusion of the listed anti-competitive conduct within the scope of the Convention is restricted to cases with a significant link to the State of origin. Per the last sentence of sub-paragraph (p), the Convention applies in cases of listed anti-competitive conduct but only "[...] where such conduct and its effect both occurred in the State of origin". In principle, the term "conduct" refers to the anti-competitive agreement or concerted practice, which must have taken place in the State of origin. The term "effect" refers to the effect in a market of the State of origin. The conduct must have taken place in the State of origin and must have affected the market of this State, irrespective of whether it may have also affected other markets.⁷⁴ This requirement for a connection with the State of origin only pertains to the scope of the Convention. Even within scope, to circulate, a judgment must also meet one of the jurisdictional filters laid down by Article 5 (note however that the filter for non-contractual actions in Art. 5(1)(j) does not cover mere financial or economic injury).
73. In any event, since the Convention only applies in civil or commercial matters, any judgment resulting from anti-trust (competition) authorities exercising governmental or sovereign powers is excluded (see *supra*, para. 35). On the other hand, judgments on contractual or non-contractual claims are included, regardless of the nature of the parties (see *supra*, para 30 and 37, and *infra*, para. 82). The contractual context includes, for example, when a person who is a party to an anti-competitive agreement invokes the nullity of this agreement, or when a buyer seeks repayment of excessively high prices paid to the seller as a result of the latter having engaged in a price-fixing arrangement. A non-contractual example would be a claim by a third party for compensation as a result of price fixing or exclusionary conduct. Such actions are included irrespective of whether or not they are based on a prior decision concerning a violation of competition laws by an anti-trust (competition) authority or by a court on application by the authority, *i.e.*, whether they are brought as stand-alone or as follow-on actions.

Sub-paragraph (q) – sovereign debt restructuring through unilateral State measures.

74. Sub-paragraph (q) excludes sovereign debt restructuring through unilateral State measures. The concept of "sovereign debt restructuring" is taken from the resolutions of the United Nations on this matter, which recognise the right of a sovereign State, in the exercise of its discretion, to design its macroeconomic policy, including

⁷³ See Art. 2(b) of the 1998 OECD Recommendation.

⁷⁴ If the judgment covers anti-competitive effects in States other than the State of origin, the application of the Convention will be limited to the part of the judgment ruling on the effects in the State of origin, if it is severable (see Art. 9).

restructuring its sovereign debt.⁷⁵ The word “unilateral” is included, however, to reduce the scope of the exclusion. It covers compulsory debt restructuring measures adopted by a State, *i.e.* measures that were not provided for in the initial borrowing terms and are adopted without or against the consent of the investors. Conversely, the Convention does not exclude debt restructuring measures adopted in accordance with the borrowing terms or that were freely negotiated with the investors. To a large extent, unilateral measures of sovereign debt restructuring fall outside the scope of the Convention under Article 1(1). But the Twenty-Second Session considered it appropriate to add an express exclusion of those matters to prevent any misinterpretation.⁷⁶

Paragraph 2 – A judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings. 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 was not an object of the proceedings.

75. Preliminary questions are legal issues that must be addressed before the plaintiff's claim can be decided but which are not the main object or principal issue of the proceedings.⁷⁷ This paragraph recognises that legal issues within a judgment may be separate from one another but considered sequentially, with a decision on the principal issue predicated on a decision on another, preliminary question. For example, in an action for damages for breach of a sales contract (main object), the court might first have to decide on the capacity of a party to enter into such a contract (preliminary question), or in an action seeking the payment of corporate dividends (as the main object), the court might have to rule on the decision of the shareholders' meeting approving such payment (as a preliminary question). Preliminary questions are usually, but not always, introduced by the defendant by way of defence. Of course, whether the final judgment can be understood to depend on the answer to the preliminary question can arise irrespective of whether the decision on such a preliminary question is formally part of the final judgment.
76. Paragraph 2 provides that a judgment is not excluded from the scope of the Convention where one of the excluded matters is involved merely as a preliminary question, and in particular where it arises by way of defence. Thus, the application of the Convention is determined by the object of the proceedings. If the object of the proceedings in the court of origin falls within the scope of the Convention, as is the case in the examples mentioned above, this instrument applies. This provision should be read in conjunction with Article 8, which deals with the consequences of a ruling on a preliminary question, including whether a judgment that rules on such matters may circulate under the Convention (see *infra*, paras 277-287).

⁷⁵ See Resolution adopted by the General Assembly on 9 September 2014, 68/304, Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes; Resolution adopted by the General Assembly on 29 December 2014, 69/247, Modalities for the implementation of resolution 68/304; and Resolution adopted by the General Assembly on 10 September 2015, 69/319, Basic Principles on Sovereign Debt Restructuring Processes.

⁷⁶ In fact, the characterisation of sovereign debt restructuring measures as “civil or commercial matters” has been discussed in preliminary rulings by the Court of Justice of the European Union (CJEU). See, in particular, Judgment of 15 November 2018, *Hellenische Republik v. Leo Kuhn*, C-308/17, EU:C:2018:911.

⁷⁷ “Object” is intended to mean the matter with which the proceedings are directly concerned, and which is mainly determined by the plaintiff's claim. See Hartley/Dogauchi Report, paras 77 and 194. The terms “incidental questions” and “principal issue” are used in the Nygh/Pocar Report, para. 177.

77. Article 2(2) of the Convention refers to any matter “to which this Convention does not apply”, which captures matters excluded under Article 1(1), Article 2(1) or Article 18. Thus, for example, a judgment on contractual damages based on a finding that the defendant had the necessary capacity to contract – that finding being a matter that would otherwise be excluded under Article 2(1)(a) – is not excluded from the scope of the Convention, although its recognition or enforcement may be refused under Article 8 (see *infra*, paras 285-286).

Paragraph 3 – This Convention shall not apply to arbitration and related proceedings.

78. Paragraph 3 excludes arbitration and related proceedings. This exclusion should be interpreted widely to prevent the Convention from interfering with arbitration and international conventions on this subject, particularly the 1958 New York Convention.⁷⁸ The exclusion covers both arbitral awards and court decisions relating to arbitration. For example, the Convention does not apply to the recognition and enforcement of arbitral awards, or to the recognition and enforcement of court decisions giving assistance to the arbitral process, *e.g.*, declaring whether the arbitration clause is valid, inoperative or incapable of being performed; ordering parties to proceed to arbitration or to discontinue arbitration proceedings; appointing or dismissing arbitrators; fixing the place of arbitration; or extending the time-limit for making awards.⁷⁹ The exclusion also covers judgments declaring whether an arbitral award should be recognised or enforced, as well as judgments setting aside, annulling or amending an arbitral award.
79. Where the judgment concerns civil or commercial matters, the exclusion of arbitration and related proceedings may affect the application of other Articles in the Convention, such as Article 4(1), which concerns the obligation to recognise and enforce judgments given in another State. Thus, pursuant to the paragraph 3 exclusion of arbitration and related proceedings, the requested State may refuse, under its national law or other international instruments, to recognise or enforce a judgment given in another State if the proceedings in the State of origin were contrary to an arbitration agreement, even if the court of origin ruled on the validity of the arbitration agreement.⁸⁰ Since the purpose of this exclusion is to ensure that the Convention does not interfere with arbitration, it entails that the court of the requested State can also refuse to recognise or enforce a judgment given despite an arbitration agreement even if the validity of this agreement was not addressed by the court of origin, *e.g.*, if it is a default judgment. However, if the defendant appeared before the court of origin and argued on the merits without invoking the arbitration agreement, the judgment would not, in principle, be contrary to the arbitration agreement and should therefore not be excluded from the scope of the Convention under this provision.
80. By the same token, the requested State may refuse, under its national law or other international instruments, to recognise or enforce a judgment given in another State if the judgment is irreconcilable with an arbitral award.

⁷⁸ The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 1958 (hereinafter, “1958 New York Convention”). See also Hartley/Dogauchi Report, para. 84.

⁷⁹ Hartley/Dogauchi Report, para. 84.

⁸⁰ It should be noted that neither Art. 2(2) nor 8(2) are relevant to this issue. Those provisions refer to “matters” in the sense of subject matters, while the exclusion of arbitration is of a different nature and is included in a separate provision.

81. **Alternative dispute resolution.** Paragraph 3 does not, however, cover other forms of alternative dispute resolution (ADR), *e.g.*, conciliation or mediation. Accordingly, the fact that the proceedings in the court of origin were contrary to an agreement on an ADR mechanism (as an alternative to or prior to the court proceedings) is not a basis to refuse recognition or enforcement. Naturally, the Convention does not apply to the recognition and enforcement of ADR settlements since they do not qualify as “judgments” according to Article 3(1)(b) of the Convention, *i.e.*, they are not “decisions on the merits given by a court” (for their possible qualification as “judicial settlements”, see *infra*, paras 295-296).

Paragraph 4 – 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.

82. Paragraphs 4 and 5 deal with the application of the Convention to disputes involving States and other governmental bodies. Paragraph 4 provides that the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings in the State of origin does not exclude a judgment from the scope of the Convention. This paragraph confirms that it is the nature of the dispute that is determinative, rather than the nature of the parties or the courts (Art. 1(1): see *supra*, paras 28-30). Paragraph 4 is thus merely clarificatory. It should, however, be read in conjunction with Article 19, which permits States to declare that they will not apply the Convention to judgments from proceedings where they were a party (see *infra*, paras 343-351), and with Article 2(5), which safeguards the applicable rules on privileges and immunities (see *infra*, para. 86).
83. Declarations under Article 19 aside, the Convention applies when a State or a governmental agency is acting as a private person, *i.e.*, without exercising sovereign powers, and regardless of whether the public entity is the judgment creditor or the judgment debtor. Three core criteria are relevant in determining whether the Convention applies to disputes involving State parties:
- “(i) the conduct upon which the claim is based is conduct in which a private person can engage;
 - (ii) the injury alleged is an injury which can be sustained by a private person;
 - (iii) the relief requested is of a type available to private persons seeking a remedy for the same injury as the result of the same conduct.”⁸¹
84. Unlike paragraph 5, which concerns privileges and immunities, this provision does not explicitly refer to “international organisations”. Nevertheless, a judgment is not excluded by the mere fact that an international organisation was a party to the proceedings insofar as it was acting as a private person.

Paragraph 5 – Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

85. Paragraph 5 provides that nothing in the Convention shall affect privileges and immunities of States or international organisations, in respect of themselves and of their property. It also covers State officials, other persons entitled to diplomatic and

⁸¹ PreL Doc. No 4 of December 2016, para. 40.

consular immunity, and public bodies, such as central banks, to the extent that they have the privileges and immunities to which Article 2(5) refers.⁸²

86. This paragraph is a "nil-effect clause", intended only to prevent the misinterpretation of paragraph 4.⁸³ It does not affect the meaning or scope of privileges or immunities under international law. There are no implications for State claims to jurisdictional immunity before the court of origin, or claims to jurisdictional immunity or immunity from execution before the court of the requested State.⁸⁴
87. In principle, there is no conflict between the scope of the Convention as set down in Article 1(1) and the privileges and immunities of States. As these privileges and immunities are usually linked to the exercise of State authority (*acta iure imperii*), situations involving privileges and immunities will not give rise to judgments in civil or commercial matters. Accordingly, where a judgment is outside the scope of the Convention under Article 1(1), even if a State waives its immunity and submits itself to the jurisdiction of the court of a foreign State, the Convention will not apply to the recognition and enforcement of that judgment.⁸⁵
88. The immunities of States and governmental bodies may be relevant in civil or commercial matters, *e.g.*, if the immunity covers a tort claim against a diplomatic agent deriving from *acta iure gestionis* (see Art. 31 of the *Vienna Convention of 18 April 1961 on Diplomatic Relations*). In such a case, the effect of paragraph 5 will be that the Convention does not apply unless the State waives its immunity and submits itself to the jurisdiction of the court of the State of origin.⁸⁶ Even in such a case, nothing in the Convention itself affects immunity from execution in the requested State.
89. Although the scope of privileges and immunities of States or governmental agencies is determined by public international law, this may be specified in domestic legislation in some States. In such cases, courts will refer to the relevant legislation when applying paragraph 5.

⁸² Nygh/Pocar Report, para. 46.

⁸³ Hartley/Dogauchi Report, para. 87.

⁸⁴ Accordingly, the Convention does not interfere with the right of a State to invoke its privileges and immunities before the court of the requested State as a defence to refuse recognition or enforcement. In such a case, since Art. 2(5) is a "nil-effect clause", there is no need to resort to Art. 7.

⁸⁵ See Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (1-9 June 2016), Minutes No 8, para. 59.

⁸⁶ PreL. Doc. No 4 of December 2016, para. 42.

Article 3 Definitions

1. In this Convention –
 - (a) “defendant” means a person against whom the claim or counterclaim was brought in the State of origin;
 - (b) “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.

2. 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.

90. Article 3 defines “defendant” and “judgment” (para. 1) and specifies how to determine the habitual residence of legal persons (para. 2), supporting a uniform interpretation and application of the Convention (see Art. 20).

Paragraph 1 – In this Convention –

Sub-paragraph (a) – “defendant” means a person against whom the claim or counterclaim was brought in the State of origin;

91. The term “defendant” is used in several provisions of the Convention (Art. 5(1)(d), (e), (f), (g), (i), Art. 7(1)(a) and Art. 19(1)). Article 3(1)(a) defines “defendant” as the person against whom the claim or counterclaim was brought in the State of origin. In the context of a counterclaim, the term refers to the initial claimant or any other counterclaim defendant.⁸⁷ In the context of a third-party claim, *i.e.*, an action brought by the defendant to force a third party to join the proceedings, “defendant” must be interpreted as referring to the third party against whom this claim was made.

92. Because sub-paragraph (a) focuses on a person against whom the claim or the counterclaim was *brought*, the “defendant” may be different from the person against whom the judgment was given. Further, a “defendant” may even be different from the person against whom recognition and enforcement is sought in the requested State (for particular cases of subrogation, assignment or succession, see *infra*, paras 144-146).

⁸⁷ The terms “plaintiff” and “claimant” are used interchangeably in this Report.

Sub-paragraph (b) – “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.

93. Following the HCCH 2005 Choice of Court Convention, sub-paragraph (b) defines “judgment” as any decision on the merits given by a court, including a default judgment, regardless of what that decision is called, such as a decree, order, etc. A “judgment” includes a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits that may be recognised or enforced under the Convention. An interim measure of protection, however, is not a judgment for the purpose of the Convention.
94. This definition contains two main elements: the judgment must be (i) “a decision on the merits” and (ii) given by a “court”.
95. **A decision on the merits.** “A decision on the merits” implies some kind of contentious judicial proceedings in which a court disposes of the claim (for judicial settlements, see *infra*, Art. 11). Insofar as it involves a disposition of a claim, it includes money and non-money judgments, judgments given by default (see, however, Arts 7(1) and 12(1)(b)),⁸⁸ and judgments in collective actions. Conversely, procedural rulings (different from orders determining costs or expenses) are excluded from the definition of judgments.⁸⁹ Thus, for example, decisions ordering the disclosure of documents or the hearing of a witness are not judgments. Similarly, *ex parte* orders for payment concerning uncontested pecuniary claims, which may be issued by a court in some jurisdictions, do not qualify as a judgment.⁹⁰ Finally, decisions on recognition and enforcement of foreign judgments or arbitral awards given by the court of a State cannot be recognised or enforced in another State under the Convention (*exequatur sur exequatur ne vaut*). Likewise, enforcement orders, such as garnishee orders or orders for seizure of property, do not qualify as judgments.
96. **Non-monetary judgments.** Judgments that order the debtor to perform or refrain from performing a specific act, such as an injunction or an order for specific performance of a contract (final non-monetary or non-money judgments) fall within the scope of the Convention. In some legal systems, non-monetary judgments sometimes include pecuniary penalties (in French, *astreintes*) to “reinforce” the main part of the judgment. Such judgments contain a non-monetary primary obligation – to perform or not to perform an act – and a monetary “penalty” as a conditional

⁸⁸ Judgments by default are within the scope of the Convention irrespective of the process giving rise to the judgment under the law of the State of origin, including whether the judgment is entered or recorded by an officer of the court or by a judge.

⁸⁹ Hartley/Dogauchi Report, para. 116.

⁹⁰ Some States have established a simplified procedure for uncontested pecuniary claims. This procedure is based on an initial order for payment issued by the court on the basis of the information provided by the claimant, which gives the defendant the option of paying the amount awarded to the claimant or lodging a statement of opposition. If within a certain time limit no statement of opposition is lodged, the court will then confirm or declare the order for payment enforceable. This latter judgment will fall within the scope of the Convention.

secondary obligation in anticipation of non-compliance and to encourage compliance. The legal regimes governing these pecuniary penalties vary significantly.⁹¹

97. Inclusion of these pecuniary "penalties" was discussed during the Fourth Meeting of the Special Commission but no definitive conclusion was reached.⁹² Three factors may be relevant to the application of the Convention to these pecuniary "penalties". In relation to the process, in some jurisdictions these penalties are ordered by the court that gives the non-monetary judgment, but in others they are ordered by a different authority in a separate enforcement procedure. In relation to their content, in some cases these pecuniary penalties may be for a fixed sum or a periodic penalty, e.g., a sum of money for each day of delay.⁹³ Finally, in relation to the beneficiary of the order, in some jurisdictions these pecuniary penalties are payable to the courts or State authorities (civil fines), but in others they are payable to the judgment creditor even though they are not truly compensatory.⁹⁴ The Twenty-Second Session did not discuss this issue and therefore it is a question that remains open for future development by courts and legal scholars.
98. **Decision on costs.** The definition of judgment in sub-paragraph (b) includes two additional elements. First, a determination of costs or expenses of proceedings by a court,⁹⁵ including an officer of the court,⁹⁶ is also a judgment for the purposes of the Convention, provided it relates to a decision on the merits which may be recognised and enforced under the Convention (see also *infra*, Art. 14(2)). Second, the determination of costs may be included in the same judgment as the decision on the merits or in a separate judgment. In both cases, recognition and enforcement under the Convention is linked to the decision on the merits. If the decision on the merits may not be recognised or enforced under the Convention (for example, because it is outside its scope, it is not eligible for recognition, or a ground for refusal is applicable), then the decision on costs will also not be recognised or enforced. For a costs determination to be recognised and enforced, it is sufficient that the decision on the

⁹¹ For a discussion, see "Treatment of penalty orders that are imposed on the non-compliance with non-monetary judgments under the 2018 draft Convention", Prel. Doc. No. 3 of February 2019 for the attention of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019) (see path indicated in note 54).

⁹² See Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018), Minutes No 6, paras 42-51.

⁹³ Under the Brussels Ia Regulation, for example, judgments that order a payment by way of a penalty shall be enforceable "only if the amount of the payment has been finally determined by the court of origin" (see Art. 55). A similar rule is contained in the *Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (hereinafter, the "2007 Lugano Convention") (see Art. 49).

⁹⁴ The CJEU has concluded that the Brussels I Regulation applies to a pecuniary penalty that must be paid to the State insofar as it is related to a dispute between two private persons (see CJEU, Judgment of 18 October 2011, *Realchemie Nederland vs Bayer*, C-406/09, EU:C:2011:668).

⁹⁵ The words "of the proceedings" were added to "costs or expenses" in the English version only to be in line with the French version of this Convention and of the equivalent provision in the HCCH 2005 Choice of Court Convention. This does not affect the interpretation of "judgment" under either convention.

⁹⁶ The French text uses the expression "une personne autorisée par le tribunal". Unlike the HCCH 2005 Choice of Court Convention, which refers to "le greffier du tribunal", the Convention uses a different term to include whichever court official is authorised in the State of origin to determine the cost of the proceedings.

merits “may be” recognised and enforced in the requested State, and not that it already has been. Even if, under such a condition, the decision on costs should be recognised and enforced under the Convention, Article 7 also applies. Thus, in exceptional cases, the decision on the merits may be recognised and enforced but the determination of costs may not, for example, because it was obtained by fraud (see Art. 7(1)(b)).

99. **Interim measures of protection.** Sub-paragraph (b) provides that an interim measure of protection is not a judgment for the purposes of the Convention. “Interim measure of protection” covers measures that serve two main purposes: providing a preliminary means of securing assets out of which a final judgment may be satisfied, or maintaining the *status quo* pending determination of an issue at trial.⁹⁷ Thus, for example, an order freezing the defendant’s assets, an interim injunction or an interim order for payment cannot be recognised or enforced under the Convention. Naturally, they may still be recognised and enforced under national law.
100. It follows that any costs order relating to interim measures of protection cannot be recognised or enforced because interim measures of protection are not eligible for recognition and enforcement.
101. **Court.** For a decision on the merits to qualify as a judgment under sub-paragraph (b), it must have been given by a “court”. The Convention does not define “court”. A definition was proposed at the Second Meeting of the Special Commission in the following terms:
- “‘court’ means: (i) a tribunal belonging to the Judiciary of a Contracting State at any level, and (ii) any other permanent tribunal that, according to the law of a Contracting State, exercises jurisdictional functions on a particular subject matter, according to pre-established procedural rules, being independent and autonomous.”⁹⁸
102. The proposal was not adopted because it was difficult to articulate a precise definition.⁹⁹ In principle, the term “court” must be interpreted autonomously and refers to authorities or bodies that are part of the judicial branch or system of a State and which exercise judicial functions. It does not include administrative authorities, notaries public or non-State authorities.
103. The Convention is also silent on so-called “common courts” although there was sustained discussion on the topic until the Twenty-Second Session. A common court refers to a court to which a group of States have transferred or delegated their judicial power in one or several matters. For example, common courts have been established

⁹⁷ On the definition of interim measures, see Nygh/Pocar Report, paras 178-180.

⁹⁸ Work. Doc. No 166 of February 2017, “Proposal of the delegations of Ecuador and Uruguay” (Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017)). See also Work. Doc. No 235 of November 2017, “Proposal of the delegations of Ecuador and Uruguay” (Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017)).

⁹⁹ See *Aide memoire* of the Chair of the Special Commission (Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017)), para. 21. This definitional difficulty has been encountered in other international conventions and has resulted in the general absence of a comprehensive definition of the term “court” from instruments such as the HCCH 2005 Choice of Court Convention. It is also worth noting that at the Second Meeting of the Special Commission, experts considered that a court may have further characteristics; see Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017), Minutes No 11, paras 48-56.

for intellectual property matters.¹⁰⁰ The exclusion of intellectual property from the scope of the Convention under Article 2(1)(m) removed the main impetus for including special rules on these courts. This does not mean that judgments given by a common court that is exercising jurisdiction on matters covered by the Convention are not eligible for recognition and enforcement. Such judgments will circulate if the conditions under the Convention are met, including the definition of judgment in Article 3 and the indicia of "court" indicated in the previous paragraph. In the event that a judgment of a common court were to be brought for recognition and enforcement, it will be for the court of the requested State to determine whether this court can properly be considered a court of a Contracting State and, if so, how the filters laid down by Articles 5 and 6 should be applied.¹⁰¹

Paragraph 2 – An entity or person other than a natural person shall be considered to be habitually resident in the State –

104. Paragraph 2 deals with the "habitual residence" of entities or persons other than natural persons. These entities are considered to be habitually resident in the State (i) where they have their statutory seat, (ii) under whose law they were incorporated or formed, (iii) where they have their central administration, or (iv) where they have their principal place of business.¹⁰² The term "habitually resident" is used in Article 5(1)(a).¹⁰³
105. This provision will typically apply to corporations but it also covers legal persons and associations or unincorporated entities, *i.e.*, associations of natural or legal persons that lack legal personality but are capable, under the law that governs them, of being a party to proceedings.

¹⁰⁰ See *e.g.*, Unified Patent Court, Court of Justice of the Andean Community.

¹⁰¹ One issue to consider is whether the common court in question is common exclusively to a group of Contracting States. The application of the filters does not give rise to difficulties when all of the States the common court exercises jurisdiction on behalf of are Contracting States. If this is not the case, the free-rider problem may arise whereby a non-Contracting State could unilaterally benefit from the Convention through its membership in the common court. However, where the applicable filter under Art. 5 points to an objective territorial connection with the State of origin, this risk can be avoided even where the common court membership includes non-Contracting States by accepting only those judgments where the connection is established with a Contracting State. The same approach may be applied if all are Contracting States but with regard to one or more of them a third Contracting State has made a declaration under Art. 29. As part of the extensive discussions on common courts it was accepted that where a court serves more than one State but only has appellate functions, *e.g.*, the Judicial Committee of the Privy Council, it is a court of a Contracting State in relation to any judgment it gives on appeal from a court of a Contracting State.

¹⁰² The Hartley/Dogauchi Report (paras 120-123) explains the rationale underpinning these alternative criteria. Note also that the Hartley/Dogauchi Report explains that "A State or a public authority of a State would be resident only in the territory of that State", see note 148 of Hartley/Dogauchi Report. The same should hold for the purposes of the Convention.

¹⁰³ Arts 14 and 17 only use the term "resident" (without any qualification) to increase flexibility for those two rules.

Sub-paragraph (a) – where it has its statutory seat;

Sub-paragraph (b) – under the law of which it was incorporated or formed;

106. The terms “statutory seat” and the law under which “the entity is incorporated or formed” refer to two different legal circumstances. The former is the “domicile” of the entity as determined by its bylaws or other constituent documents. The nearest equivalent term in English law is “registered office”. The latter refers to the law of the State under which the entity was created, *i.e.*, that gave birth to it and endowed it with legal personality or procedural capacity.¹⁰⁴ In practice, the statutory seat and the place of incorporation will usually coincide in the same State.

Sub-paragraph (c) – where it has its central administration; or

Sub-paragraph (d) – where it has its principal place of business.

107. The terms “central administration” and “principal place of business” refer to two different factual circumstances. The former refers to the place where the head office functions are located, *i.e.*, where the most important decisions about the running of the entity are made. The term concerns the “brain” of the entity. The latter refers to the principal centre of the entity’s economic activities.¹⁰⁵ It concerns the “muscles” of the entity. For example, a mining company may have its headquarters in London but carry out its mining activity in Namibia.¹⁰⁶

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

109. The four criteria in paragraph 2 are alternatives and there is no hierarchy among them. They are also not mutually exclusive. If the defendant is habitually resident in two or more different States concurrently, the defendant may be considered to be habitually resident in any one of them. For example, if Company X is incorporated in State A, has its central administration in State B, and has its principal place of business in State C, a judgment against Company X given by a court of any of those three States will be eligible for recognition and enforcement under Article 5(1)(a).

¹⁰⁴ Hartley/Dogauchi Report, para. 120.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

Chapter II – Recognition and enforcement

Article 4 General provisions

1. 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. Recognition or enforcement may be refused only on the grounds specified in this Convention.
2. 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.
3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.
4. 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.

110. Article 4 establishes the obligation of mutual recognition and enforcement of judgments among States (para. 1), and sets forth the general conditions and consequences of that obligation. A judgment given in another State shall be recognised and enforced in the requested State without reviewing the merits of the decision (para. 2), but only insofar as it has effect and is enforceable in the State of origin (para. 3). Finally, paragraph 4 deals with cases where the judgment is the subject of review in the State of origin or where the time limit for seeking such review has not expired.

Paragraph 1 – 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. Recognition or enforcement may be refused only on the grounds specified in this Convention.

111. Paragraph 1 establishes the central obligation imposed on States by the Convention: the mutual recognition and enforcement of judgments. Under this provision, a judgment given by a court of a State (the State of origin) shall be recognised and enforced in another State (the requested State) in accordance with the provisions of Chapter II. This obligation presupposes three positive conditions: (i) that the judgment falls within the scope of application of the Convention (see Arts 1 and 2); (ii) that it has effect and is enforceable in the State of origin (Art. 4(3)); and (iii) that it is eligible for recognition and enforcement under Article 5 or 6.

112. The second sentence of paragraph 1 provides that, if the Convention applies, recognition or enforcement may be refused only on the grounds specified in the Convention. Thus, if a judgment is eligible for recognition and enforcement within the scope of the Convention, and the criteria laid down in the following provisions of Chapter II are met, it is not open to a State to refuse recognition or enforcement on other grounds under national law.
113. **Recognition.** Recognition usually implies that the court addressed gives effect to the determination of the legal rights and obligations made by the court of origin. For example, if the court of origin held that a plaintiff had (or did not have) a given right, the court of the requested State would accept that this is the case, *i.e.*, it would treat that right as existing (or not existing). Or, if the court of origin gives a declaratory judgment on the existence of a legal relationship between the parties, the court of the requested State accepts that judgment as determining the issue.¹⁰⁷ Such determination of legal rights is binding on the parties in subsequent litigation. Thus, if the foreign judgment is recognised, it could be invoked, for example, to prevent proceedings between the same parties with the same subject matter (*res judicata* or issue preclusion defence) in the requested State and the judgment creditor would not be burdened with arguing the same claim twice.
114. **Res judicata.** Earlier drafts of the Convention provided that recognition of a judgment would require the court of the requested State to give it “the same effects” it had in the State of origin.¹⁰⁸ This wording entailed that the scope of the *res judicata* effect was determined by the law of the State of origin rather than the law of the requested State. The same applied to similar effects of the judgment, such as issue preclusion or collateral estoppel. This approach was based on the so-called “doctrine of extension of effects”: *i.e.*, that recognising a foreign judgment implies *extending* the effects that such judgment has under the law of the State of origin, and not equating it to a domestic judgment of the requested State.
115. The Third Meeting of the Special Commission deleted this provision on the basis that the HCCH 2005 Choice of Court Convention was silent on the issue and several delegations were concerned about its practical consequences, in particular, when the law of the State of origin has a broad approach to the extension of effects based on issue preclusion or collateral estoppel doctrines.¹⁰⁹ But the Convention does not require applying the law of the requested State to determine the effects of a foreign judgment either. The silence of the Convention on this issue must be interpreted consistently with its objectives. The obligation to recognise a foreign judgment under the 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, those rights or obligations shall not be subject to further litigation in the courts of the requested State.¹¹⁰

¹⁰⁷ Hartley/Dogauchi Report, para. 170.

¹⁰⁸ According to Art. 9 (first sentence) of the draft Convention of February 2017, “[a] judgment recognised or enforceable under this Convention shall be given *the same effect* it has in the State of origin”.

¹⁰⁹ See *Aide memoire* of the Chair of the Special Commission (Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017)), para. 33.

¹¹⁰ See Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017), Minutes No 9, para. 28; and Work. Doc. No 195 of October 2017, “Proposal of the delegation of the United States of America” (Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017)). The Hartley/Dogauchi Report makes it clear that the recognition of rulings on preliminary questions on the basis of doctrines such as issue estoppel, collateral estoppel or issue preclusion is not required by the Convention, but may be granted under national law, see para. 195.

116. **Enforcement.** Enforcement means the application of legal procedures by the courts (or any other competent authority) of the requested State to ensure that the judgment debtor obeys the judgment given by the court of origin. Enforcement is usually needed when the foreign judgment rules that the defendant must pay a sum of money (monetary judgment) or must do or refrain from doing something (injunctive relief), and implies the exercise of the State's coercive power to ensure compliance. Thus, if the court of origin rules that the defendant must pay the plaintiff USD 10,000, the court addressed would enable the judgment creditor to obtain the money owed by the judgment debtor through an enforcement procedure and measures of execution. Because this would be legally indefensible if the defendant did not owe USD 10,000 to the plaintiff, a decision to enforce the judgment typically presupposes recognition of the judgment.¹¹¹ Enforcement may also be needed in cases of injunctive relief through the court of the requested State requiring the defendant to meet the obligations to do or refrain from doing something deriving from the judgment (see *supra*, paras 96-97).
117. In contrast, recognition need not be accompanied or followed by enforcement.¹¹² For example, if the court of origin held that the defendant did not owe any money to the plaintiff, the court of the requested State may simply recognise this finding by dismissing a subsequent claim on the same issue.
118. **Adaptation of remedies.** Former drafts of the Convention contained a rule on adaptation of remedies.¹¹³ The Third Meeting of the Special Commission decided to delete this provision since the HCCH 2005 Choice of Court Convention was silent on this issue. This silence should, therefore, be interpreted in the same manner as in the HCCH 2005 Choice of Court Convention. According to the Hartley/Dogauchi Report (para. 89):

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

Paragraph 2 – 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.

119. A court deciding on recognition and enforcement of a judgment is not entitled to review the merits of the judgment given by the court of origin. That is, if a judgment meets the criteria set out by the Convention for recognition and enforcement, the judgment will not be revisited in the requested State. This rule is a necessary corollary of the principle of mutual recognition of judgments; there would be little purpose to the Convention if the court of the requested State could review the

¹¹¹ Because the Convention does not apply to interim measures of protection or to maintenance obligations (and other family matters), any challenge related to the absence of *res judicata* effect of an otherwise enforceable judgment does not arise. See the discussion on this issue in the Nygh/Pocar Report, paras 302-315.

¹¹² *Ibid.*

¹¹³ According to Art. 9 (second sentence) of the draft Convention of February 2017, "If the judgment provides for relief that is not available under the law of the requested State, that relief shall, to the extent possible, be adapted to relief with effects equivalent to, but not going beyond, its effects under the law of the State of origin."

underlying factual or legal basis upon which the court of origin reached its decision. Such a circumstance would imply that the parties may be forced to re-litigate the same case in the requested State.¹¹⁴ Accordingly, as a general matter, 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. Furthermore, the court addressed cannot refuse recognition or enforcement on the ground that there is a discrepancy between the law applied by the court of origin and the law which would have been applied by the court addressed.

120. **Differences with the wording of the HCCH 2005 Choice of Court Convention.** There are several differences between the wording of Article 4(2) of the Convention and the parallel provision in the HCCH 2005 Choice of Court Convention (Art. 8(2)).¹¹⁵ The first difference is simply a change in the structure of the first sentence, with no intention to change its substance, that emphasises the primacy of the “no review of the merits” principle. The second difference is the use of two distinct terms in the Convention – “consideration” and “review” – to add precision and avoid misinterpretation. Also, the reference to the “Convention” instead of “this Chapter” clarifies that any consideration of the scope of the Convention according to Article 1 or 2 is covered by Article 4(2).
121. The final difference is substantive. Article 8(2) of the HCCH 2005 Choice of Court Convention provides that the court of the requested State is bound by findings of fact on which the court of origin has based its jurisdiction, unless the judgment has been given by default. That provision only applies to “jurisdiction” under the HCCH 2005 Choice of Court Convention, *i.e.*, when the court of origin bases its jurisdiction on a choice of court agreement. Such a provision makes sense when the instrument establishes harmonised rules on *direct* jurisdiction. This Convention, however, only contains rules on recognition and enforcement of foreign judgments, and not direct rules on jurisdiction. The First Meeting of the Special Commission therefore concluded that it was preferable not to include such a proviso in the Article dealing with review of the merits.¹¹⁶
122. **Consideration strictly limited.** Paragraph 2 recognises that, while the primary principle is that no review of the merits of the foreign judgment is permitted, applying the Convention may require consideration of legal or factual issues connected to the foreign proceedings or the foreign judgment. This paragraph is worded to strictly constrain such consideration, ensuring respect of the primary obligation not to review the merits of the foreign judgment.
123. Under Article 5, for example, the court addressed must determine that the judgment is eligible for recognition and enforcement on the basis of the connection between the action giving rise to the judgment and the State of origin. That determination may require identifying the legal or factual bases of connection to the State of origin. For example, the application of Article 5(1)(a) may require that the court addressed consider facts relevant for determining where a legal person had its habitual residence (Art. 3(2)) at the time that person became a party to the proceedings in the State of origin. Regardless of what the court of origin may have stated in relation to

¹¹⁴ Nygh/Pocar Report, para. 347.

¹¹⁵ That provision reads: “Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.”

¹¹⁶ Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (1-9 June 2016), Minutes No 3, paras 4-16, and Minutes No 13, paras 3 and 4.

that issue, if it was relevant at all, the court in the requested State makes its own determination for the purpose of applying the Convention. While this should not be understood as a review of the merits,¹¹⁷ Article 4(2) nevertheless implicitly cautions that such an exercise may give the appearance of impugning the foreign judgment and should therefore be limited to what is strictly necessary for the proper application of the Convention. The same holds for consideration of other paragraphs of Article 5 and other provisions of Chapter II, in particular Article 7 (“refusal of recognition and enforcement”) or Article 10 (“damages”) as well as provisions in Chapter I, in particular Article 1 (“civil or commercial”) and Article 2 (“exclusions from scope”).

Paragraph 3 – A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

124. The obligation to recognise and enforce entails conferring on the foreign judgment the authority and effectiveness accorded to it in the State of origin within the judicial and execution system of the requested State. Paragraph 3 contains a corollary to this principle: a judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.
125. Paragraph 3 affirms that a judgment will be recognised only if it has effect in the State of origin.¹¹⁸ Having effect means that the judgment is legally valid and operative. Thus, if the judgment does not have effect in the State of origin, it should not be recognised under the Convention in any other State. Moreover, if the judgment ceases to have effect in the State of origin, it should not thereafter be recognised under the Convention in other States.
126. Likewise, if the judgment is not enforceable in the State of origin, it should not be enforced elsewhere under the Convention. It is possible that a judgment will be effective in the State of origin without being enforceable there, for example, because enforceability has been suspended pending an appeal (either automatically or by an order of the court). Moreover, a judgment that is no longer enforceable in the State of origin – because, for example, it has been overturned on appeal or the limitation period for its enforcement in the State of origin has expired (see *infra*, para. 310) – should not thereafter be enforceable in another State under the Convention.¹¹⁹

¹¹⁷ This is the case whether or not the court addressed comes to a conclusion different from one expressly made in the foreign judgment. Indeed, the court addressed might come to a different conclusion but this relates only to its application of the Convention for the sole purpose of recognition and enforcement of the judgment and is not to be construed as a review of the reasoning or conclusion arrived at by the foreign court in its decision on the merits.

¹¹⁸ Nygh/Pocar Report, paras 302-315.

¹¹⁹ *Ibid.*

Paragraph 4 – 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.

127. Paragraph 4 deals with judgments subject to review (such as by appeal) in the State of origin or where the time limit for seeking ordinary review has not expired. In these specific situations, the court is not obliged to recognise or enforce the judgment. Instead, paragraph 4 allows for the possibility that the court addressed postpone its decision or refuse recognition or enforcement. Paragraph 4 applies to judgments “referred to in paragraph 3”.
128. **Rationale.** The impact of review or appeal mechanisms on the effectiveness or enforceability of judgments varies across legal systems and there is no uniform position on when a decision acquires the effect of *res judicata* or “*autorité de chose jugée*”. In the common law, *res judicata* typically arises when a final judgment is given on issues between the parties which cannot be reconsidered by the same court in ordinary proceedings, even though the decision may potentially or actually be the subject of appeal to a higher court. In contrast, many, if not most, civil law systems take the view that a judgment does not have the status of *res judicata* or “*autorité de chose jugée*” until the decision is no longer subject to ordinary forms of review.¹²⁰ The same holds with regard to enforcement. In some jurisdictions, a judgment is enforceable even if it is the subject of appeal to a higher court. In other jurisdictions, a judgment only becomes enforceable if the time limit for seeking ordinary review has expired.
129. Accordingly, the Convention does not require that the judgment be “final and conclusive”, as there is no uniform definition of this status. Instead, according to paragraph 3, it is sufficient that the judgment has effect or is enforceable under the law of the State of origin. This implies that a judgment may be recognised and enforced under the Convention even though it may not be considered to be final either in the State of origin or under the law of the requested State. This solution protects the interest of the judgment creditor and simplifies the application of the Convention insofar as the concepts of “final and conclusive judgment” or “*res judicata* effect” have no uniform meaning.¹²¹ But the lack of a requirement that a judgment be final and conclusive could result in a judgment already recognised or enforced in the requested State subsequently being reversed or set aside in the State of origin.¹²² Paragraph 4 addresses this problem by providing an exception to the obligation to recognise and enforce a judgment, applicable where there is a pending appeal or where the time for seeking ordinary review has not expired.

¹²⁰ *Ibid.* para. 304.

¹²¹ *Ibid.*, paras 306-311.

¹²² Hartley/Dogauchi Report, para. 174. The Convention does not deal with the issue of how to rescind a foreign judgment that has already been enforced in the requested State but is subsequently annulled or amended in the State of origin. This issue was thoroughly discussed in the First and Second Meetings of the Special Commission, and different solutions were considered. See Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (1-9 June 2016), Minutes No 2, para. 48, Minutes No 3, paras 51-66, Minutes No 6, paras 41-49; Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017), Minutes No 4, paras 76-82, Minutes No 10, paras 6-8. Finally, the Second Meeting of the Special Commission considered it preferable to leave this issue to the procedural law of the requested State.

130. **Review in the State of origin and unexpired time limit for review.** The court of the requested State is not obliged to grant recognition and enforcement if the judgment is the subject of review in the State of origin or the time limit for seeking ordinary review has not expired. Being “the subject of review” implies that proceedings for the review of the judgment are already pending in the State of origin. Non-expiry of the time limit for seeking ordinary review implies that review of the judgment has not been sought but could still be requested. This phrase only applies to *ordinary* review.¹²³ The Convention does not define “ordinary review”. In principle, it includes any review that: (i) may result in change to the judgment; (ii) is part of the normal course of an action and therefore a step any party must reasonably expect; and (iii) under the law of the State of origin, can only happen before the expiry of a period of time, which typically runs from either the date of the judgment or the date of notification of the judgment to the judgment debtor.
131. **Postponing the decision.** Where the conditions set out in paragraph 4 are met, the Convention provides that the decision on recognition and enforcement may be postponed. In this case, the procedure on recognition and enforcement is stayed or suspended until the review is decided or the time limit for seeking it has expired. This provision does not prevent the court addressed from granting protective measures pursuant to its national law while the procedure is suspended, to ensure future enforcement of the judgment.
132. **Refusing recognition or enforcement.** Paragraph 4 also allows for the refusal to recognise or enforce until the review is decided or the time limit for seeking it has expired. In principle, this provision envisages a refusal of recognition or enforcement based merely on the fact that a review is ongoing in the State of origin, or the time limit for seeking ordinary review has not expired. For this reason, the paragraph clarifies that a refusal does not prevent a subsequent application for recognition or enforcement. Here, refusal means dismissal without prejudice.¹²⁴ This provision does not prevent the court addressed from granting protective measures pursuant to its national law while the judgment remains subject to review in the State of origin or while the time for filing such review is yet to expire, to ensure future enforcement of the judgment. Once the judgment becomes final, the judgment creditor may again seek its recognition and enforcement. Naturally, recognition or enforcement might still be denied on other grounds, *e.g.*, that the judgment is not eligible for recognition or enforcement under Article 5 or 6 of the Convention. A decision by the court addressed to deny recognition or enforcement on such other grounds will prevent a subsequent application for recognition and enforcement in the requested State.

¹²³ On the differentiation between “ordinary” and “extraordinary” review, see Hartley/Dogauchi Report, para. 173, note 209.

¹²⁴ Hartley/Dogauchi Report, para. 174.

133. **Granting recognition or enforcement.** Nothing in Article 4(4) prohibits the recognition or enforcement of the foreign judgment in the requested State.¹²⁵ This possibility is indicated by the use of "may" instead of "shall" in Article 4(4). In some legal systems, this language will be sufficient to enable courts to exercise their discretion whether or not to postpone or refuse recognition. In legal systems where this is not the case, national rules on treaty implementation may already provide, or national legislation could be adopted to determine, whether granting recognition or enforcement is still possible and, if not, which of the two options in Article 4(4) is available.¹²⁶ Recognition or enforcement could also be made subject to the provision of security, where appropriate and available under national law, to compensate the judgment debtor if the judgment is eventually annulled or amended following the review process in the State of origin.

¹²⁵ *Ibid.*, para. 173.

¹²⁶ This reflects a general principle of the law of treaties, which is also relevant in Arts 7 (see *infra*, para. 245), 8(2) and 10.

Article 5
Bases for recognition and enforcement

1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –
 - (a) 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;
 - (b) the natural person against whom recognition or enforcement is sought had their 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;
 - (c) 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;
 - (d) 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;
 - (e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;
 - (f) 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;
 - (g) 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;
 - (h) 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;
 - (i) 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;
 - (j) 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;

- (k) the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and –
 - (i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or
 - (ii) at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.

This sub-paragraph only applies to judgments regarding internal aspects of a trust between persons who are or were within the trust relationship;

- (l) the judgment ruled on a counterclaim –
 - (i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim; or
 - (ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;
- (m) 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.

For the purposes of this sub-paragraph, 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.

2. If recognition or enforcement is sought against a natural person acting primarily for personal, family or household purposes (a consumer) in matters relating to a consumer contract, or against an employee in matters relating to the employee's contract of employment –
 - (a) paragraph 1(e) applies only if the consent was addressed to the court, orally or in writing;
 - (b) paragraph 1(f), (g) and (m) do not apply.
3. Paragraph 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.

134. Article 5 is a central provision of the Convention. It identifies the connections with the State of origin that are considered sufficient ("jurisdictional filters") for the judgment to be recognised and enforced under the Convention, as provided for in Article 4. In addition to the exclusive filter in Article 6, Article 5 provides an exhaustive list of jurisdictional filters that trigger the mutual recognition principle embodied in the Convention. States can still recognise foreign judgments on the basis of other filters under national law, as per Article 15, but only those filters listed in Articles 5 and 6 create obligations under the Convention. As such, Article 5 defines the perimeter of "eligible judgments", *i.e.*, judgments that circulate under the Convention.
135. **Direct versus indirect jurisdiction.** In some States, the filters listed in Article 5 are described as *indirect* jurisdictional bases, distinguishing them from the rules determining the jurisdiction of the court of the State of origin under its own law – the so-called *direct* jurisdictional bases. The Convention is not concerned with issues of "direct jurisdiction" which remain to be determined by national law. The jurisdictional filters listed in Article 5 are those that a court of a requested State will apply to determine whether a judgment is entitled to recognition or enforcement. In considering whether a foreign judgment meets the threshold conditions of Article 5 or 6, the court addressed does not evaluate the court of origin's application of that State's own jurisdictional rules. While the Convention does not purport to affect existing national laws on jurisdiction in international cases, judgments from States with direct jurisdictional rules similar to the filters in Articles 5 and 6 will be more likely to circulate under the Convention.
136. Article 5 is divided into three paragraphs. The first paragraph lists the connections with the State of origin that are accepted under the Convention for recognition and enforcement of the judgment in the requested State. The second paragraph deals with judgments given against consumers or employees and modifies or excludes the application of certain connections listed in the first paragraph. The third paragraph establishes the jurisdictional filter applicable to judgment on a residential lease of immovable property (tenancy) or registration of immovable property and excludes the application of all filters listed in the first paragraph.
137. **Plurality of parties.** When a judgment is given against more than one party, the filters laid down by Article 5 must be assessed individually for each party. Thus, if the judgment is given against three jointly and severally liable defendants, the connection with the State of origin required by Article 5 must be verified individually for each of them. The mere fact that only one of them has, for example, their habitual residence in the State of origin (Art. 5(1)(a)) is not sufficient for the other co-defendants to be considered to be habitually resident in that State. In such a case, the judgment will not be eligible for recognition and enforcement against the other two co-defendants unless another Article 5 filter is satisfied.

Paragraph 1 – A judgment is eligible for recognition and enforcement if one of the following requirements is met –

138. This paragraph contains 13 jurisdictional filters belonging to three traditional categories of connections to the State of origin: connections between the State of origin and the defendant, connections established by consent, and connections between the claim and the State of origin. Many of the connections listed in paragraph 1 are found in national laws but may be formulated more precisely or narrowly in the Convention. There is no hierarchy among the filters in paragraph 1; none are more legitimate than any other for the purpose of recognition and enforcement under the Convention. Moreover, satisfaction of a single filter is sufficient, as expressly stated in paragraph 1.

Sub-paragraph (a) – 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;

139. This sub-paragraph sets out a general rule based on the idea of the “natural” or “home State” forum. Living or being established in the State of origin – *i.e.*, being habitually resident there – is a reasonable connection to the State of origin. This principle holds irrespective of the procedural position of that person in the State of origin. Although this sub-paragraph will typically apply to the defendant, it is not limited to the defendant and can include any other person, natural or legal, against whom recognition or enforcement is sought. Recognition or enforcement may be granted against the defendant, the claimant or a third party that was habitually resident in the State of origin at the time that person became a party to the proceedings.
140. Sub-paragraph (a) is the only filter in Article 5 that concerns links solely with the person against whom recognition or enforcement is sought. All the other filters in paragraph 1 relate either to consent or to connections with the dispute giving rise to the judgment.
141. **“Person against whom recognition or enforcement is sought”.** The Convention focuses on the relationship between the State of origin and the person against whom the judgment was given. Because that person may not have been the defendant in the court of origin, it would be too narrow to limit sub-paragraph (a) to that one party. It may be that the claimant lost the case and the defendant seeks recognition and enforcement of the cost order against that person in the requested State. To capture this, sub-paragraphs (a), (b) and (c) use the expression “person against whom recognition or enforcement is sought”. Throughout paragraph 1, the terms “person against whom recognition or enforcement is sought” and “defendant” are used, depending on whether the filter could apply to anyone other than a defendant. When that issue does not arise, “defendant” suffices. While this approach causes some overlap between sub-paragraphs (a) and (c), it captures some situations that would not be caught by sub-paragraph (c) alone.¹²⁷
142. **“Habitual residence” as a connecting factor.** The Convention uses “habitual residence” as a connecting factor, as opposed to other approaches found in national law or uniform law instruments, such as domicile or nationality. This approach is consistent with modern instruments from the HCCH, which have preferred habitual residence. Habitual residence is also a more fact-based connecting factor than either domicile or nationality and expresses a close connection between a person and their socio-economic environment. Admittedly, the absence of a definition of habitual residence for natural persons in the Convention may give rise to divergent national interpretations, although this should be discouraged by Article 20 (“uniform interpretation”). With regard to a person or entity other than a natural person, it should be recalled that the definition of habitual residence in Article 3(2) includes four alternatives. As a result, under sub-paragraph (a), the requested State must consider that the State of origin was connected with an entity or person other than a natural person if any one of the four connecting factors listed in Article 3(2) is satisfied.

¹²⁷ Thus, if costs were awarded to the claimant against a third party, this filter would apply if that third party was habitually resident in the State of origin when it became party to the proceedings.

143. **"At the time" of the proceedings in the court of origin.** The location of a person's habitual residence may change over time, possibly over the course of litigation before the judgment is eventually given or even after the judgment but before recognition or enforcement is sought. For the purposes of sub-paragraph (a), habitual residence is to be assessed at the time the person against whom recognition or enforcement is sought became a party to the proceedings in the court of origin.¹²⁸ It is not necessary that this person still be habitually resident in the State of origin at the moment that the requested State is assessing the connection, so long as the connection at the time the person became a party to the original proceedings is established.
144. **Subrogation, assignment or succession.** The wording of sub-paragraph (a) assumes that the person against whom recognition or enforcement is sought is the same person who was a party to the proceedings in the State of origin. But this provision does not preclude recognition or enforcement against a person other than the person who was a party to the proceedings in the State of origin, provided the person against whom recognition or enforcement is sought has "assumed" the obligations of the person who was a party to the proceedings in the State of origin. Obligations could be assumed by transfer, succession or any other equivalent means, either by consent or by operation of the law. This would be the case, for example, if the party to the proceedings in the State of origin has died and their heirs have assumed their obligations before recognition or enforcement is sought, or if the party to the proceedings in the State of origin was a company that has merged with another company (which has absorbed it) before recognition or enforcement is sought. In these situations, recognition and enforcement may be granted against a person different from that who was a party to the proceedings in the State of origin, *insofar as the former has validly succeeded to the obligations of the latter*. Whether there has been a "valid succession" is governed by the law of the requested State, including its private international law rules.
145. **Example 1.** X brings a claim against Y in State A, where Y is habitually resident. A judgment is given against Y. But during the proceedings in State A or after the judgment is given but before recognition and enforcement is sought, Y dies and her obligations are transferred to her heir. In this case, the judgment is eligible for recognition and enforcement under sub-paragraph (a) since Y had her habitual residence in the State of origin when she became a party to the proceedings in the court of origin and the person against whom recognition or enforcement is sought has validly succeeded to Y's obligations. Naturally, the habitual residence of the heir is irrelevant in this case.
146. **Example 2.** Company X brings a claim against Company Y in State A, where Company Y has its statutory seat. In the course of the proceedings, Company Y merges with Company Z (the acquiring company) and, as a consequence, the former transfers all its assets and liabilities to the latter. In this case, the judgment is given against a person (Company Z) different from the defendant as defined in Article 3(1)(a). Likewise, the merger may take place after the judgment was given in the State of origin but before its recognition and enforcement is sought in the requested State. In this second case, the person against whom recognition or

¹²⁸ As explained, this person may be the plaintiff initiating the proceedings against a single defendant, but this "person" could also be a person added in accordance with the procedural rules of the State of origin subsequent to the initiation of proceedings, such as an additional plaintiff or defendant added through a forced or voluntary joinder mechanism, an intervenor, a third-party, etc. It is therefore more precise to refer to the time a person became a party to the proceedings rather than to the time the proceedings were originally instituted.

enforcement is sought (Company Z) is also different from the person against whom the proceedings were instituted in the State of origin (Company Y). In both cases, the judgment is, however, eligible for recognition and enforcement under sub-paragraph (a) since the defendant had its habitual residence in the State of origin at the time it became a party to the proceedings in the court of origin and the person against whom recognition or enforcement is sought has validly succeeded to such defendant.

Sub-paragraph (b) – the natural person against whom recognition or enforcement is sought had their 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;

147. This sub-paragraph is targeted at natural persons engaged in business or in the exercise of a profession and is based on the same principle as sub-paragraph (a). Natural persons may carry on business or professional activities through establishments located in States other than the State of their habitual residence. This is particularly likely in border towns, but with the ease of personal travel it may also occur beyond this context. The Convention provides that there will be sufficient connection with a State of origin for the purposes of recognition and enforcement if a natural person's principal place of business¹²⁹ was in that State at the time that person became a party to the proceedings in the court of origin, but only where the claim on which the judgment is based arose from the activities of that business.
148. **Rationale.** Natural persons carrying on business activities are analogous to legal persons with respect to connections to a State. A business that is a legal person will be considered to be habitually resident, *inter alia*, at its principal place of business under Article 3(2). If the business is not a legal person separate from the natural person who provides the goods or services, the connection to the State of the principal place of business under sub-paragraph (a) is not established. Nevertheless, from the perspective of a plaintiff, the two situations are analogous but for the legal status of the business. To reflect this equivalence, sub-paragraph (b) establishes that the location of the principal place of business of a natural person is a sufficient connection for the purpose of recognition and enforcement of a judgment on a claim made against that natural person arising from their business activity.
149. **Conditions.** Sub-paragraph (b) includes two conditions. First, the claim on which the judgment is based must have arisen from the activities of the natural person's business. This is a more limited filter than the general filter of habitual residence under sub-paragraph (a). The wording of sub-paragraph (b) indicates that the judgment must be on a claim that arose from "business activities" but does not require that the activities in question were connected specifically to the principal place of business. The very fact that sub-paragraph (b) refers to the "principal" place of business implies that a natural person may carry on business in more than one place, but only one of them will qualify as a "principal" place of business. Of course, these distinctions are more likely to be present in face-to-face rather than online situations.

¹²⁹ The French version refers to "établissement professionnel principal" in Art. 5(1)(b) and "principal établissement" in Art. 3(2)(d), whereas the English version refers to "principal place of business" in both sub-paras. The distinction in the French version was not intentional and therefore should not lead to any differences in interpretation between the two texts.

150. **Example.** X is an accountant who is habitually resident in State A, in a town on the border of States B and C. X's main office is located in a town in State B, where she does most of her business and works on a regular basis. However, she also travels to State C once a week to provide services to her smaller clientele there. Because the price of copier paper is lower in State C, X purchases her weekly supply of copier paper for both offices on Fridays from Y Paper Inc when she is in State C. Should a dispute arise regarding this paper supply, a judgment given against X on such a claim by a court of origin in State B would satisfy sub-paragraph (b) because State B is the State of the principal place of business of X (even though the claim arises out of a transaction that took place in State C), and the claim arises out of the "business activities" of the natural person engaged in those activities. Conversely, when the judgment is on a claim deriving from the personal or family activities of X, sub-paragraph (b) will not apply.
151. The second condition relates to the timing of the claim and the establishment of the principal place of business. Sub-paragraph (b) requires that the natural person's principal place of business be situated in the State of origin at the time that person became a party to the proceedings brought before the court of origin. This requirement of contemporaneity is the same as that in sub-paragraph (a) for habitual residence.

Sub-paragraph (c) – 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;

152. Bringing a civil or commercial claim to a court typically indicates acceptance of the jurisdiction of that court, even though a claimant may have limited or no choice about where proceedings can be initiated, which will be determined by the direct jurisdiction rules of each State. This reasoning does not apply to people other than the claimant, such as the defendant, who may have no choice but to respond to the proceedings or risk a default judgment. Sub-paragraph (c) states that the very fact of bringing a claim in the court of origin makes any judgment on that claim enforceable in the requested State against the person who brought the claim in the court of origin.
153. **Example.** X, habitually resident in State A, travels to State B for a camping holiday, where he encounters Y, habitually resident in State C. Damage is caused to X's camping equipment, which X claims is due to Y's negligence. X decides to bring proceedings before the courts of State C, seeking compensation for the loss allegedly caused by Y's fault. Y successfully defends the claim, and the court declares that Y is not liable for any of X's loss and grants Y an award of costs. If X attempts to start new proceedings on the negligence claim in State B, Y could request recognition of the judgment from State C, referring to Article 5(1)(c). As X initiated the claim in State C, the judgment given by the court in State C is eligible for recognition against X in any other Contracting State. Furthermore, if Y wants to enforce the cost award against X in State A,¹³⁰ a court in State A may rely on Article 5(1)(c) to enforce the judgment.

¹³⁰ This cost award is considered to be a judgment under the Convention as per Art. 3(1)(b).

154. **Relationship with other provisions.** If the claimant was habitually resident in the State of origin when the claim was brought, recognition or enforcement of a judgment against the claimant may also be sought pursuant to sub-paragraph (a). Note also that sub-paragraph (c) does not apply to counterclaims, which are dealt with specifically in sub-paragraph (l).

Sub-paragraph (d) – 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;

155. Where a branch of the defendant is located in the State of origin, a judgment on a claim arising from the activities of that branch will satisfy the filter in sub-paragraph (d), even if the defendant's habitual residence is in another State. The Convention takes a narrow approach by requiring that the judgment against the defendant involve a claim that arose directly from the activities of the branch located in the State of origin, and not from the general activities of the defendant.
156. **Rationale.** A person who sets up an establishment in another State intentionally creates connections with that State. Judgments from that State's courts on claims arising from the activities of that establishment are thus equally connected to the State of origin.
157. **Branch, agency or other establishment.** The provision refers to "branch, agency or other establishment without separate legal personality". The Convention does not define this concept. In principle, an establishment implies a stable physical presence of the defendant in the State of origin where the defendant carries out an 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.¹³¹ This terminology does not exclude natural persons, and therefore may coexist with Article 5(1)(b) when a natural person is, for example, a professional who has a principal place of business in one State and a secondary establishment in another State.
158. **Scope.** For sub-paragraph (d) to apply, there must be a link between the claim on which the judgment is based and the activities of the branch, agency or establishment in the State of origin. In other words, it is not sufficient that the claim arises from the general activities of the defendant; it must arise out of the activities of the branch or establishment in the State of origin. Thus, for example, in a judgment on a contractual dispute, the contract must have been concluded through the establishment in the State of origin or the establishment must be responsible for its performance. A mere remote or incidental connection is not sufficient.

¹³¹ In applying Art. 7(5) of the Brussels Ia Regulation that deals with this type of connection, the CJEU has also included subsidiaries, *i.e.*, establishments with legal personality, under the doctrine of appearance, that is, when they appear *vis à vis* third parties as a mere branch of the foreign defendant. See Judgment of 9 December 1987, *SAR Schotte GmbH v. Parfums Rothschild SARL*, C-218/86, EU:C:1987:536.

159. This activity-based connection is, however, not limited according to the nature of the claim. The judgment may be on a dispute that arises out of the internal management of the branch or from conduct in the course of its operations, and it may relate to any type of action whether in contract or tort. It might therefore partially overlap with other sub-paragraphs dealing with contractual (sub-para. (g)) and non-contractual obligations (sub-para. (j)).

Sub-paragraphs (e) and (f) – consent

160. These two sub-paragraphs deal with connections to the court of origin established by consent. Article 5(1) envisages three forms of consent: unilateral express consent during proceedings (sub-para. (e)), implied consent (sub-para. (f)) and agreement of the parties (sub-para. (m)). Any one of these forms of consent meets the jurisdictional filter under Article 5(1), regardless of the absence of any other connections with the State of origin.
161. As will be seen below, specific limitations apply to the consent-based filters where judgments are given against defendants who are consumers or employees, as per paragraph 2.

Sub-paragraph (e) – the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;

162. The filter in Article 5(1)(e) applies where a defendant expressly consented to the jurisdiction of the court of origin during the course of proceedings in which the judgment is given. The existence of express consent, and whether it was given "in the course of proceedings", is a question of fact to be determined by the court of the requested State. Sub-paragraph (e) does not prescribe the form or substance of this express consent, *i.e.*, it could be oral or in writing. However, other provisions of the Convention should be considered when interpreting the concept of "express consent". First, a separate provision deals with implied consent (sub-para. (f)). The scope for express consent is therefore narrowed and should require a positive act (orally or in writing), as opposed to a failure to raise an objection, for example, or the mere withdrawal of a challenge to jurisdiction of the court of origin. Second, unlike in Article 5(2)(a), this sub-paragraph does not require that the consent be addressed to the court; it may be addressed to the court or to the other party, as long as it is in the course of the proceedings.
163. This manner of consenting may not be known or recognised in all procedural systems. This possibility is not, however, an impediment to the assessment of such consent by the requested State. Indeed, under paragraph 1, the requested State is not assessing whether the court of origin was properly seised under its own rules of *direct* jurisdiction. Rather, the requested State is verifying whether one of the filters in Article 5 is satisfied, regardless of the basis for jurisdiction in the court of origin.
164. **Examples.** The following scenarios illustrate how express consent in the sense of sub-paragraph (e) might present itself:
- (i) X initiates proceedings against Y in State A. Under the procedural law of State A, the court is obligated to verify its jurisdiction *ex officio* in claims against foreign defendants. Noting that there is no connection between the claim and State A, the court asks Y, habitually resident in State B, if she wishes to raise any objections to jurisdiction. Y answers that she accepts the jurisdiction of the court in State A and is prepared to proceed before it.

- (ii) X initiates proceedings against Y in State A. Y reacts by inviting negotiations to resolve the dispute. The parties successfully resolve part of the dispute but are unable to agree on other aspects. As part of the settlement agreement, X expressly agrees to amend the claim brought before the court in State A and Y expressly accepts that this amended claim will be decided by the court in State A.¹³²
- (iii) X initiates proceedings against Y in State A and Y is properly notified. In its email response, Y reminds X that their contract includes an arbitration clause but that the cost of arbitration would be prohibitive given the value of the claim. Y expressly agrees that it will defend in State A in this case but reserves its right to raise the arbitration clause in any future disputes under the parties' contract.

Sub-paragraph (f) – 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;

165. Unlike the express consent contemplated in sub-paragraph (e), the consent in sub-paragraph (f) is implied, typically from the defendant arguing on the merits and failing to contest the jurisdiction of the court of origin. By failing to object to the jurisdiction of the court of origin, the defendant is taken to have accepted that the claim brought against it will be decided by that court.
166. **Rationale.** Consent, either express or implied, is considered to establish a legitimate connection between a court and a defendant. A defendant may accept that the dispute will be adjudicated by the court where the claim was brought, even though there may have been some basis for an objection to that court's jurisdiction. The defendant might wish to avoid the cost and delay of a jurisdictional challenge, or sees no significant advantage in being sued elsewhere, or is unaware that a challenge to jurisdiction is available. Whatever the reason for individual defendants, many States consider that a defendant can implicitly consent to the jurisdiction of their courts.¹³³
167. **Conditions.** The application of sub-paragraph (f) is subject to two conditions. First, the defendant must have argued on the merits before the court of origin. Second, the defendant must have failed to contest jurisdiction, except where it is evident that an objection to jurisdiction would have been unsuccessful.
168. **The defendant argued on the merits.** The first condition for the application of sub-paragraph (f) is that the defendant must have argued on the merits before the court of origin. The Convention does not define the precise contours of arguing on the merits. In certain States, any act by a defendant that goes beyond mere contestation of jurisdiction, such as a request to change counsel, will be considered to fall within "arguing on the merits". Of course, the assessment of "arguing on the merits" under sub-paragraph (f) is not dependant on the way it would be determined under the law of the State of origin. The court addressed must make its own evaluation of whether the defendant took any steps in the proceedings before the court of origin that involved contestation of the merits of the dispute.

¹³² This scenario might also be considered to fall within sub-para. (m) if the clause within the settlement agreement is interpreted as the "designation of a court".

¹³³ This is a very general statement, which is obviously subject to numerous limitations.

169. **The defendant did not contest the jurisdiction of the court of origin.** This is the second condition under sub-paragraph (f). If the defendant is considered to have argued on the merits and did so without having contested the jurisdiction of the court of origin, the filter in sub-paragraph (f) will be satisfied and the resulting judgment will be eligible for recognition and enforcement under the Convention. On the other hand, if a defendant responded to a claim for the sole purpose of objecting to jurisdiction, and the objection was rejected, any ensuing judgment will not satisfy the filter.¹³⁴ Moreover, even if a defendant argues on the merits following an unsuccessful challenge to the jurisdiction of the court of origin, the ensuing judgment will not satisfy the filter. In either case, of course, the judgment may circulate if another filter in Article 5 is satisfied.
170. **Contesting jurisdiction “within the timeframe provided in the law of the State of origin”.** Procedural rules in the law of the State of origin may set a specific timeframe for a defendant to object to jurisdiction. This might be in terms of days from a certain point, such as notice of the claim, or in terms of sequence, such as prior to engaging in any other procedure. Some legal systems may also envisage the inclusion of all defences, procedural and substantive, in the same procedural document. Under sub-paragraph (f), untimely objections will not avoid a conclusion that the filter is satisfied. If the defendant does not abide by the procedural rules of the State of origin to contest jurisdiction, and argues on the merits, the judgment will circulate under sub-paragraph (f).
171. **Objection to jurisdiction would not have succeeded.** The filter in sub-paragraph (f) is based on the premise that the defendant has implicitly agreed that the dispute will be adjudicated by the court where the claim was brought, even though there may have been some basis for an objection to that jurisdiction. It is the failure to raise the objection that grounds the implied consent of the defendant. A major assumption of this filter is that the procedural law in the court of origin allows the defendant to challenge jurisdiction. It is only in such a case that the failure to contest can be interpreted as implied consent. Sub-paragraph (f) reflects this assumption by framing the rule in terms of a challenge to jurisdiction.
172. Sub-paragraph (f) also takes into account whether such a challenge would have had any chance of success given that it would otherwise be unreasonable to require that the defendant have undertaken such a challenge. In other words, the Convention does not impose an unconditional obligation on the defendant to have contested jurisdiction in the court of origin. If the defendant can show, in the requested State, that any attempt to contest the jurisdiction of the court of origin would not have succeeded, the defendant's failure to raise such a challenge before the court of origin will not satisfy the filter.
173. However, to prevent strategic or opportunistic behaviour by the defendant, the Convention sets out a relatively high standard of proof. It must be *evident* that the objection to jurisdiction would not have succeeded under the law of the State of origin.

¹³⁴ This follows whether or not a challenge to jurisdiction is considered to be an argument on the merits. Indeed, the filter makes that issue irrelevant since objecting to jurisdiction is a way to avoid the application of sub-para. (f).

174. **Example.** The court of origin takes jurisdiction on the sole basis that the foreign defendant has property in the jurisdiction even though there is no relation between the claim and that property. Prior decisions in the court of origin indicate that challenges to such jurisdiction are always denied and, as a result, the defendant does not contest jurisdiction in the court of origin. In such a case, the eventual judgment of the court of origin will not be considered to satisfy the filter in sub-paragraph (f) despite the fact that the defendant did not contest jurisdiction before that court and argued on the merits.
175. **Objection to the exercise of jurisdiction.** The wording of sub-paragraph (f) includes not only objections to the jurisdiction of the court of origin but also objections to the exercise of that jurisdiction. This will be relevant where the law in the State of origin includes the doctrine of *forum non conveniens*, which allows a defendant to request that a court decline to exercise its jurisdiction.
176. In most States where *forum non conveniens* is available, it is distinguished from jurisdiction *per se*. The doctrine allows a court to *decline to exercise jurisdiction*, and thus does not involve any admission by the court that it is *without jurisdiction*. Where this doctrine applies, it is not uncommon for the defendant to first contest jurisdiction and then, in the event the court rejects that challenge, to request that the court decline to exercise its jurisdiction. Defendants may even *concede* jurisdiction and only request that the court decline to exercise it.
177. The language used in sub-paragraph (f) requires that a defendant raise all possible challenges to the jurisdiction of the court of origin or to its exercise of jurisdiction in order to avoid the filter applying in the requested State. If a defendant who had the opportunity to challenge the jurisdiction of a court chose not to do so, or had the opportunity to request that a court decline to exercise its jurisdiction and failed to do so, or fails to show that such requests would have had no chance of success, the filter will be satisfied. In such circumstances, if the defendant argued on the merits, the judgment would be eligible for recognition and enforcement under sub-paragraph (f).
178. **Examples.** Suppose that in the State of origin where the doctrine of *forum non conveniens* is available, a defendant only invoked *forum non conveniens* without also contesting jurisdiction *per se*. Unless the defendant can show, before the requested State, that jurisdiction *per se* was not challenged because it had no chance of success, the judgment will be considered to satisfy the filter, even though the defendant asked the court to decline jurisdiction. Similarly, if a defendant did contest jurisdiction but, after this objection was dismissed, did not request that the court decline to exercise its jurisdiction, the defendant must prove that this request had no chance of success. Finally, if the defendant neither contested jurisdiction nor requested that the court of origin decline to exercise its jurisdiction, the defendant will need to show that neither option had a chance of success to avoid a finding that sub-paragraph (f) was satisfied.
179. In all of these scenarios, it does not matter whether the failure to contest jurisdiction or to request that the court decline to exercise jurisdiction amounts to implied consent under the law of the court of origin. The Convention only contains jurisdictional filters for the purpose of determining the eligibility of judgments to circulate. Accordingly, the court in the requested State is not concerned with how the court of origin assesses jurisdiction, but only with whether any one of the filters in Article 5 is satisfied. To avoid the filter in sub-paragraph (f), the defendant must have resisted being subjected to the jurisdiction of the court of origin in every manner available before the court of origin, either explicitly before that court or later before the court addressed by showing that it did not do so in the court of origin because it

had no chance of success in that court. Such actions or arguments by a defendant will, of course, not bar circulation of the judgment if there is another applicable filter under Article 5 or 6. In other words, a defendant cannot simply raise a jurisdictional objection or request that the court of origin decline to exercise its jurisdiction and expect that this will prevent circulation of the judgment under the Convention.

Sub-paragraph (g) – 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;

180. This sub-paragraph provides a filter for judgments on contractual obligations. The rule is the result of a compromise between two approaches. On the one hand, some States consider that the place of performance is a sufficient connection to the State of origin, without further qualifications. On the other hand, some States require a more factual appraisal based on the activities of the defendant in the State of origin. It is worth noting that, because parties to international contracts often include choice of court agreements or arbitration clauses in their contracts, this sub-paragraph may not be invoked frequently at the enforcement stage.¹³⁵
181. **Place of performance as a starting point.** Sub-paragraph (g) represents the first approach where the place of performance of a contractual obligation is a basis for recognition and enforcement of a judgment. This formulation means that the connection may vary according to the source of the dispute between the parties that is the object of the judgment. For example, in a contract for the sale of goods, if the vendor files a claim for payment and the judgment is based on that claim, sub-paragraph (g) will recognise the connection to a court at the place where the payment was due. But if the purchaser files a claim for delayed delivery, sub-paragraph (g) will refer instead to the courts in the place of delivery. This approach differs from that in other instruments, such as the Brussels Ia Regulation, which for certain types of contracts posit a single contractual forum that does not vary depending on the obligation forming the basis of the claim.¹³⁶
182. **The place of performance of the contractual obligation: parties' agreement.** The Convention envisages two sources to identify the place of performance of contractual obligations: the contract itself, or the law governing the contract. If the contract specifies the place of performance of the obligation, a judgment given by a court at that place will satisfy the filter in sub-paragraph (g)(i), irrespective of whether performance actually took place in that location. In other words, the parties' agreement as to the place of performance is determinative. In practice, it is very common that the place of performance is included among the general contractual conditions of one or both parties. The validity of such contractual conditions will be determined by the law of the requested State, including its private international law rules.

¹³⁵ For judgments given by the court designated in an agreement, see sub-para. (m) below. For a discussion on the exclusion of arbitration from the Convention, see Art. 2(3) above.

¹³⁶ See Art. 7(1) of the Brussels Ia Regulation.

183. Where the terms of the contract do not specify the place of performance but the parties have included a choice of law clause in the contract, either sub-paragraph (i) or (ii) may be relevant. Arguably, "the agreement of the parties" could include an agreement on the applicable law, which will then identify the place of performance of the relevant obligation. But the Convention does not establish choice of law rules for contracts. It may be that in a given requested State, no effect or a limited effect would be given to the parties' choice of law clause under sub-paragraph (g)(ii). Thus, to be consistent with the scope of the Convention, which does not intend to set down choice of law rules, it would be preferable to limit sub-paragraph (g)(i) to cases where the terms of the contract specify the place of performance directly.
184. **Applicable law.** The second situation arises where there is no agreement on the place of performance or where the agreement on the place of performance is not valid. In such a case, the place of performance will have to be identified pursuant to the law governing the contract. The Convention does not specify how that law is to be identified and therefore this determination is left to the law of the requested State, including its rules of private international law.
185. **Example.** X brings a claim against Y in State A. The basis of the claim is Y's failure to pay for certain goods delivered to Y in State B. The contract was concluded by telephone and the parties did not designate the place of payment. In this case, if X obtains a favourable judgment based on that claim, it will be recognised and enforced under sub-paragraph (g) if, in accordance with the law governing the contract, the place of payment was State A. The law of the requested State, including its private international law rules, will determine what law governs that contract.
186. **Several places of performance.** Sub-paragraph (g) refers to the place of performance of the contractual obligation on which the judgment ruled. This will usually be the obligation forming the basis of the plaintiff's action. If the same contract contains different and severable obligations for one party, the rule must be applied separately for each of them. For example, if the seller has the obligation to deliver goods in two States, A and B, a judgment given in State A will only circulate under this filter as regards the obligation to deliver goods in this State (Art. 9 on severability may however apply, see *infra*). The application of this rule to negative obligations, *i.e.*, obligations not to do something, was briefly discussed during the Twenty-Second Session but left open for further analysis by courts and legal scholars.
187. **Safeguard: "purposeful and substantial connection to the State of origin".** The place of performance may point to a place that is arbitrary, random or insufficiently related to the transaction between the parties. Recognising the connection to such a place as satisfying the filter 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 provides for recognition or enforcement of a judgment given in the State of the place of performance unless the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State.
188. This clause has no counterpart in other instruments or national laws, although it reflects concerns in some systems about the fairness afforded to non-resident defendants or to their due process rights. The terms "purposeful and substantial" are used to ensure that the sub-paragraph (g) filter is not satisfied by geographical links that are arbitrary, random or insufficiently related to the transaction between the

parties.¹³⁷ Thus, following the example in paragraph 185, Y could raise the safeguard and argue that they clearly did not intend to engage in activities that constitute a purposeful and substantial connection to State A.

Sub-paragraph (h) – 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;

189. Sub-paragraph (h) is a compromise between two conflicting views in relation to leases over immovable property, called tenancies in many States. Leases of immovable property refer to a legal relationship arising from an agreement where one party undertakes to provide the other party with a temporary right of use of an immovable property, or part of it, in exchange for rent. In some States, such leases 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 States, such leases are treated as contracts (*i.e.*, rights *in personam*) without the accompanying exclusivity accorded to the courts of the State where the immovable property is located for claims related to the lease.
190. In accordance with sub-paragraph (h), a judgment that rules on a lease of immovable property (tenancy) is eligible for recognition and enforcement if it was given in the State in which the property is situated. It includes any tenancy irrespective of its nature, *i.e.*, for a professional, commercial or personal purpose (except a residential lease subject to the special rule in para. 3). Furthermore, the provision covers disputes between landlord and tenant including, for example, on the existence or interpretation of the tenancy agreement, eviction, compensation for damages caused by the tenant, or the recovery of rent.
191. This provision does not exclude the application of other filters, such as sub-paragraph (a) (the habitual residence of the defendant). Thus, a judgment given by the courts of the State where the defendant was habitually resident will circulate under the Convention even if it ruled on a tenancy over an immovable property located in another State. In relation to sub-paragraph (g) (contractual obligations), the special rule for tenancies may become relevant when, for example, the payment of the rent by the tenant is to be performed in a State different from the State where the property is located. Paragraph 3 provides a distinct rule for residential leases.

Sub-paragraph (i) – 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*;

192. This provision recognises that it is efficient to allow a claim on a contractual obligation secured by a right *in rem* to be joined with a claim relating to that right *in rem* in the same proceeding.¹³⁸ Under Article 6, only the State where the immovable property is located is considered to fit within the filter with respect to *in rem* claims. Without sub-paragraph (i), it might not be possible to recognise a judgment on the related

¹³⁷ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), especially Brennan J. at pp. 478-479 (the United States of America).

¹³⁸ Combining these two claims in a single proceeding is to be expected in jurisdictions where the realisation of a security on an immovable property is judicially administered. Where realisation can be unilaterally effected by the creditor – that is, where extrajudicial enforcement is permitted – only the claim on the possible deficiency will need to be brought, reducing the relevance of this sub-paragraph for those legal systems.

contractual claim brought in that State where, for example, the debtor was not habitually resident in that State (sub-para. (a)) or if payments were not due in that State (sub-para. (g)).

193. **Example.** Z, habitually resident in State A, purchases an immovable property in State B. The purchase price is financed by a mortgage loan granted by a bank in State C. The mortgage agreement provides that payments are due in State C. Z defaults on the mortgage and the bank takes proceedings in State B to obtain a judicial sale of the property and a judgment against Z for any deficiency resulting from the judicial sale. The property sells for less than the amount remaining on the mortgage. The judgment from the court in State B declaring Z liable for the deficiency will be enforceable in State A under sub-paragraph (i).¹³⁹

Sub-paragraph (j) – 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;

194. This sub-paragraph establishes a filter for recognition and enforcement of judgments in matters concerning non-contractual obligations. Again, this connection is not necessary if the person against whom enforcement is sought was habitually resident in the State of origin at the relevant time (sub-para. (a)). With respect to the defendant in the court of origin, this provision would thus be limited to judgments on claims against foreign defendants in the court of origin.¹⁴⁰ Such cases are, admittedly, the situations where enforcement outside the State of origin is more likely to occur, assuming the defendant is found liable and ordered to pay compensation.
195. The Convention does not define non-contractual obligations, just as it does not define contractual obligations in sub-paragraph (g). In principle, these concepts must be defined by national courts in an autonomous manner, taking into account the international character of the Convention and the need to promote uniformity in its application (see Art. 20). The application of this sub-paragraph is, however, limited to certain types of harm suffered.
196. **Non-contractual obligations arising from death, physical injury, damage to or loss of tangible property.** Not all claims involving non-contractual obligations are covered by this provision. It is limited in scope to judgments on obligations arising from two types of injuries: to persons and to property. Even within these categories, the provision is limited to physical injury (including death) for individuals, and to tangible property (damage or loss). This provision will not apply where the judgment is given on a claim based on losses that are not connected to a physical injury or to damage to tangible property.

¹³⁹ For another example in the context of a similar provision laid down by the Brussels Ia Regulation, see CJEU, Judgment of 14 February 2019, *Anica Miličević v. Raiffeisenbank St. Stefan-Jägerberg-Wolfsberg eGen*, C-630/17, EU:C:2019:123 (an action for a declaration of the invalidity of a credit agreement and of the notarised deed relating to the creation of a mortgage taken out as a guarantee for the debt arising from that agreement).

¹⁴⁰ Where judgments are given against multiple defendants or declare such defendants to be jointly liable, the filters under Art. 5, including sub-para. (j), must be satisfied on an individual basis for the judgment against a particular defendant to circulate under the Convention (see also *supra*, para. 137).

197. **The place where the act or omission causing the harm occurred.** The Convention has adopted a narrow basis for non-contractual obligations: it is limited to the place of the act (or omission) directly causing the harm. This approach differs from some national and regional legal systems that also recognise jurisdiction exercised by the court in the State where the harm occurred.¹⁴¹ This restriction to a single connection, and the limitation on the types of harm noted above, may reduce interpretive difficulties that have arisen in other systems. For example, arguments that some types of injuries are merely "indirect" often arise with respect to non-physical injuries suffered by so-called secondary victims, whose losses arise as a consequence of a physical injury or death suffered by another person. An obvious example is that of a spouse or child claiming for moral or economic loss subsequent to the wrongful death of a spouse or parent. It is possible that judgments on claims by dependents pursuant to wrongful death will not be covered by sub-paragraph (j) because that provision excludes non-physical injuries and deals only with harm directly caused. Alternatively, as sub-paragraph (j) deals with non-contractual obligations *arising* from death, such judgments on claims for dependents may well be included within this filter. This will need to be determined by courts applying the Convention, guided by the Convention's objective of uniform application expressed in Article 20.
198. On the other hand, the wording of sub-paragraph (j) eliminates any question as to whether continuing pain and suffering in the State of origin consequent to a physical injury suffered in another State is sufficient to satisfy the filter. By restricting sub-paragraph (j) to the place where the act or omission causing the harm occurred, there is no room for an alternative connection at the place of the "continuing injury". Other interpretive difficulties relating to the exclusion of the place of injury in sub-paragraph (j) may still arise. For example, a judgment on a claim brought against a foreign manufacturer in the State where a physical injury allegedly occurred may not satisfy the requirements under sub-paragraph (j) if the place of the act (defective design or production) is understood to be in the State where the manufacturer is located. However, if the judgment is on a claim based on an alleged failure to warn, it might be argued that this omission occurred at the place of injury, being where the product was sold or used. If the location of the omission is considered to be a question of law rather than fact in the requested State, the scope of sub-paragraph (j) may vary according to the way in which this question is resolved in the requested State.¹⁴² As in the previous paragraph, this matter will need to be determined by courts applying the Convention, guided by the Convention's objective of uniform application as expressed in Article 20.

Sub-paragraph (k) – the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and –

- (i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or
- (ii) at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.

¹⁴¹ Of course, this is only relevant if this place is different from the place of the act or omission. See Brussels Ia Regulation, Art. 7(2) as interpreted by the CJEU, Judgment of 30 November 1976, *Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace*, C-21/76, EU:C:1976:166.

¹⁴² In other words, the court addressed may look to its domestic law or to the law applicable to the issue according to its choice of law rules.

This sub-paragraph only applies to judgments regarding internal aspects of a trust between persons who are or were within the trust relationship;

199. This sub-paragraph applies to judgments concerning the validity, construction, effects, administration or variation of a trust.¹⁴³ As specified in the final part of sub-paragraph (k), only judgments dealing with disputes internal to the trust are included. Judgments dealing with disputes between the parties to the trust and third parties must be considered under other provisions of Article 5(1).
200. **Trusts.** The term “trust” is not defined in the Convention. It is essentially a common law concept and may not be known in other legal systems. It is, however, defined in Article 2 of the HCCH 1985 Trusts Convention for the purposes of that Convention.¹⁴⁴ That definition will be instructive if any question of definition arises because it recites the attributes of a trust according to existing common law concepts.¹⁴⁵
201. This sub-paragraph applies to a trust created voluntarily and evidenced in writing.¹⁴⁶ It does not include situations under common law where a resulting or constructive trust is imposed by law. Although the trust must be created voluntarily it need not be the product of an agreement; it can be created unilaterally by a trust deed or in a testamentary instrument. The exclusion of wills and succession from the substantive scope of the Convention (Art. 2(1)(d)) does not conflict with the inclusion of testamentary trusts within sub-paragraph (k). Article 2(1)(d) excludes preliminary questions, such as questions as to the validity or interpretation of the will even in so far as they relate to the validity and meaning of the trust. But judgments on other issues arising in the course of the administration of a testamentary trust that has been validly created are covered by sub-paragraph (k) (see also Art. 8(2)).¹⁴⁷
202. **Designation of a State for determination of listed issues.** Sub-paragraph (k) envisages two alternate connections depending on the instrument creating the trust. The first option is where the trust instrument designates the courts of a State for the determination of the validity, construction, effects, administration or variation of the trust. If that State is the State of origin, the filter is met. Sub-paragraph (k)(i) does not require that the designation in the instrument be exclusive. Moreover, the designation must be included in the instrument at the time the proceedings were instituted. If that is the case, any later modification of the designation will not bar recognition of the eventual judgment at a later date.
203. **Designation of the place of administration of the trust.** The second option is where the trust instrument contains an express or implied designation of the State in which the principal place of administration of the trust is situated. If that State is the State of origin, the filter is met. As with the first option above, the designation must exist at the time the proceedings are instituted. A later variation of the designation will not retroactively extinguish the connection at the moment of recognition or enforcement of the judgment.

¹⁴³ According to Art. 8 of the HCCH *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* (hereinafter, the “HCCH 1985 Trusts Convention”), which on this point reflects established common law doctrine, these matters are determined by the law governing the trust.

¹⁴⁴ At the time of writing, this Convention is in force in 14 Contracting States: Australia, Canada, People's Republic of China (Hong Kong SAR), Cyprus, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Paraguay, San Marino, Switzerland and the United Kingdom.

¹⁴⁵ Nygh/Pocar Report, para. 150.

¹⁴⁶ This is also the limit of application of the HCCH 1985 Trusts Convention (see Art. 3).

¹⁴⁷ See, for a similar exclusion, the HCCH 1985 Trusts Convention (Art. 4).

204. **Implied designation.** Sub-paragraph (k)(ii) refers to designation of the trust's principal place of administration in the trust instrument itself. In the absence of an express designation, the task of the court addressed is to identify whether there is an implied designation in the trust instrument by interpreting the terms of that instrument, taken as a whole. The court may consider other circumstances of the case only as an aid to interpreting whether the terms of the trust instrument disclose an implied designation. In each case, the court should determine whether the intentions of the settlor are apparent from the terms of the trust instrument in question, without applying any specific presumptions as to those intentions.
205. To assist with this determination, the following are non-exhaustive examples of terms that might provide evidence as to the implied intentions of the settlor: (i) the trustee or trustees are resident in one State, and their identity was stipulated in the trust instrument itself; (ii) a trustee is a company established in a particular jurisdiction specifically to hold the trust assets; (iii) a trust is established for a particular purpose stipulated in the trust instrument (for instance, to benefit a charity in a particular State); (iv) a clause in the trust instrument stipulates that the trust assets are to be retained or invested in a particular jurisdiction.
206. The options in sub-paragraph (k)(i) and (ii) are alternatives and a judgment given by a State that is designated in either manner will satisfy the filter in sub-paragraph (k). In the case of sub-paragraph (k)(ii), recognition or enforcement of such a judgment may nevertheless be refused under Article 7(1)(d).
207. **Internal aspects.** The final sentence of sub-paragraph (k) limits the filter to judgments on disputes that are internal to the trust, *i.e.*, disputes between persons within the trust relationship (such as the settlor, the trustees and the beneficiaries) and not persons external to the trust. The use of "*are or were* within the trust relationship" ensures that a person who was within the trust relationship but was no longer in such a position at the time of recognition or enforcement remains covered by the filter. Judgments dealing with disputes between the parties to the trust and third parties must be considered under other provisions of paragraph 1.

Sub-paragraph (l) – the judgment ruled on a counterclaim –

- (i) **to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim; or**
 - (ii) **to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;**
208. This sub-paragraph establishes filters for counterclaims. In many legal systems, a defendant may respond to a claim not only by a direct defence against that claim, which would have the effect of wholly or partially extinguishing the plaintiff's claim, but also by making an independent claim of its own that seeks a judgment against the original claimant, called a counterclaim. For example, in a contract for the sale of goods on instalment, if the vendor sues for payment of the remaining part of the price, the purchaser can defend against that claim on the basis that this amount is not due and add a counterclaim for damages on the basis that the goods were delivered late. The counterclaim does not need to arise from the same contract but typically has to be connected to the relationship between the parties. While the counterclaim could have been brought separately in another proceeding, it is considered more efficient to allow it to be advanced within the initial proceeding.

In some jurisdictions and in certain circumstances, it may even be compulsory for the defendant to bring its own claim as a counterclaim; failure to do so entails that the claim is considered waived and cannot be brought later in a separate proceeding.¹⁴⁸

209. Sub-paragraph (l) contains two filters depending on whether the judgment on the counterclaim was for or against the counterclaimant. The differential treatment of successful and unsuccessful counterclaims is included to balance the interests of the parties with regard to the counterclaim and to account for the possibility of compulsory counterclaims under the procedural law in the court of origin.
210. **Judgments in favour of the counterclaimant.** There is no reason to limit circulation where the counterclaim is successful. Indeed, in such a case, any possible prejudice flowing from being forced to bring the counterclaim is balanced by the favourable outcome to the counterclaimant. However, to ensure fairness to the original claimant (the defendant in the counterclaim), the counterclaim must arise out of the transaction or occurrence on which the original claim is based. The original claimant consented to the jurisdiction of the court of origin by voluntarily bringing a claim before that court. It is therefore legitimate that this court may also rule on a counterclaim but only insofar as it derives from the same transaction or occurrence.
211. The word "transaction" is intended to have a wide scope, referring to the parties' relationship. In other words, the counterclaim need not arise out of the actual contract on which the original claim is based; it may arise out of another collateral contract which is part of the wider transaction between the parties. Otherwise, the English word "same occurrence" has been used to represent the French "des mêmes faits" to emphasise that the facts on which the counterclaim is based need not be identical and may arise out of a broader, but still related, set of circumstances.¹⁴⁹
212. **Judgments against the counterclaimant.** Where the counterclaim fails, there is no need to protect the original claimant by imposing a close connection requirement. The interest of the original claimant is precisely to benefit from the Convention, and the counterclaimant implicitly consented to the jurisdiction of the court of origin by bringing the counterclaim. Since the defendant is essentially a claimant with respect to the counterclaim, this filter may replicate sub-paragraph (c). But the above rationale presupposes that the counterclaimant voluntarily brought the counterclaim. Therefore, to account for the possibility that the counterclaim was compulsory under the law of the State of origin, sub-paragraph (l)(ii) protects the counterclaimant in the event the counterclaim fails by not preventing the losing counterclaimant from instituting the same claim elsewhere.
213. Importantly, this provision will not prevent circulation of the judgment on the counterclaim if another filter in paragraph 1 applies. For example, if the counterclaimant is habitually resident in the State of origin, the judgment against that counterclaimant will satisfy sub-paragraph (a) and the exception for compulsory counterclaims in sub-paragraph (l)(ii) will not protect that unsuccessful counterclaimant. Similarly, if the original claimant is habitually resident in the State of origin, the judgment on the successful counterclaim will also satisfy the filter in sub-paragraph (a) even if the counterclaim did not arise out of the same transaction.

¹⁴⁸ *E.g.*, under Rule 13 of the US Federal Rules of Civil Procedure.

¹⁴⁹ Nygh/Pocar Report, para. 200. Contrast the narrower formulation of Art. 8(3) of the Brussels Ia Regulation, which contains the phrase "the same contract or facts on which the original claim was based".

Sub-paragraph (m) – 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.

For the purposes of this sub-paragraph, 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.

214. This sub-paragraph provides a filter based on express consent. Where parties have agreed in advance on the forum to resolve their disputes, adjudication in that forum is considered fair to both parties and will usually satisfy jurisdictional requirements for recognition and enforcement purposes in the requested State. The HCCH 2005 Choice of Court Convention provides for the recognition and enforcement of such agreements and the resulting judgments with respect to exclusive choice of court agreements. The definition of a choice of court agreement in sub-paragraph (m) is drawn from the HCCH 2005 Choice of Court Convention, both with respect to the form of the agreement and to its nature as exclusive or non-exclusive, which should ensure consistency in interpretation across the two instruments.
215. **Relationship with the HCCH 2005 Choice of Court Convention.** The Convention seeks to avoid overlap with the HCCH 2005 Choice of Court Convention. To that end, the Convention only deals with non-exclusive choice of court agreements in sub-paragraph (m). This allows the court in the requested State to consider that the filter is met where the parties’ agreement designated the court of origin as one before which disputes could be brought but not where that designation excludes all other courts. In the latter case, *i.e.*, when the choice of court agreement is exclusive, the judgment may be recognised and enforced under the HCCH 2005 Choice of Court Convention or, when it is not applicable, under national law.¹⁵⁰
216. **Non-exclusive agreements.** The Convention defines non-exclusive agreements in the negative. It includes a definition of an “exclusive choice of court agreement” taken from Article 3(a) of the HCCH 2005 Choice of Court Convention and declares that the Convention applies to any agreement “other than an exclusive choice of court agreement”. Furthermore, the HCCH 2005 Choice of Court Convention contains a presumption that a choice of court agreement that designates the courts of one State, or one or more specific courts of one State, is deemed to be exclusive unless the parties expressly provided otherwise (Art. 3(b)). In principle, the approach followed by the Convention seeks to avoid gaps between the two instruments.
217. Non-exclusive agreements can take various forms. The agreement may provide for a list of courts in different States among which the claimant is invited (or required) to choose. It may merely indicate that the parties agree not to object to jurisdiction if the claim is brought before a designated court. The agreement may instead be “asymmetrical” (or “hybrid”), meaning that it is exclusive for one party but non-exclusive for another. Asymmetrical clauses are not considered exclusive under the

¹⁵⁰ For more details on the relationship between the HCCH 2005 Choice of Court Convention and the Convention, see *infra*, paras 375-378.

HCCH 2005 Choice of Court Convention and therefore fall within the scope of the Convention.¹⁵¹ The Hartley/Dogauchi Report includes the following concrete examples of non-exclusive choice of court agreements:

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

“– 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.”

218. The Convention, like the HCCH 2005 Choice of Court Convention, limits this filter to agreements concluded or documented in writing or by any other means of communication that render information accessible so as to be usable for subsequent reference.¹⁵² Oral agreements, therefore, do not benefit from this sub-paragraph.
219. **Examples.** The written agreement between X (habitually resident in State A) and Y (habitually resident in State B) contains the following clause: “For any disputes arising from this distribution agreement, the parties agree to the jurisdiction of the courts of State C.” Following a dispute that the parties are unable to resolve amicably, Y brings a claim against X before the courts of State C. Judgment is granted in Y's favour and enforcement is sought in State A where X has assets. In such a case, sub-paragraph (m) will apply only if the court in State A finds that the clause is a non-exclusive choice of court agreement. If not, then sub-paragraph (m) does not apply and the judgment will not be eligible to circulate under the Convention unless there is some other applicable filter under paragraph 1. If State A and State C are both party to the HCCH 2005 Choice of Court Convention, such a clause will be presumed to be exclusive, and the judgment would be eligible to circulate under that instrument.
220. The written agreement between X (habitually resident in State A) and Y (habitually resident in State B) contains the following clause: “For any disputes arising from this agreement, the parties resolve to bring claims exclusively to the commercial courts of Capital City, State C.” Following a dispute that the parties are unable to resolve amicably, Y brings a claim against X in State C. Judgment is granted in Y's favour and enforcement is sought in State A where X has assets. Sub-paragraph (m) is not applicable to this case since the clause designating the courts of State C is an exclusive choice of court agreement. Moreover, if no other ground listed in paragraph 1 is applicable, the requested State is not obliged to recognise the judgment under Article 4 of the Convention, although it may recognise it under its national law, as allowed by Article 15. If States C and A are both party to the HCCH 2005 Choice of Court Convention, then the judgment is eligible to circulate under that instrument. That is the intended result as a matter of policy, as the two Conventions are complementary.

¹⁵¹ Hartley/Dogauchi Report, paras 32, 106 and 249.

¹⁵² On this formal requirement, see Hartley/Dogauchi Report, paras 110-114.

Paragraph 2 – If recognition or enforcement is sought against a natural person acting primarily for personal, family or household purposes (a consumer) in matters relating to a consumer contract, or against an employee in matters relating to the employee's contract of employment –

Sub-paragraph (a) – paragraph 1(e) applies only if the consent was addressed to the court, orally or in writing;

Sub-paragraph (b) – paragraph 1(f), (g) and (m) do not apply.

221. **Consumer and employment contracts.** Paragraph 2 provides exceptions to the general rules in paragraph 1 for consumer and employment contracts.¹⁵³ These exceptions only apply to recognition and enforcement against a consumer or employee, and not to recognition and enforcement sought by a consumer or employee. These exceptions are consistent with the protection accorded to consumers or employees within the contractual sphere by many legal systems, whether in domestic or private international law. Paragraph 2 does not create special filters for these two types of contracts, which remain subject to the rules set down in paragraph 1. Instead, paragraph 2 limits or excludes, in favour of the weaker party, reference to the three sub-paragraphs in paragraph 1 that deal with filters based on consent (sub-paras (e), (f) and (m)), and to sub-paragraph (g), which deals with the filter on contractual obligations. In practice, these exceptions are likely to restrict the circulation of judgments against a consumer or employee to those given in the State of that person's habitual residence, absent express consent to the jurisdiction of another court by the consumer or employee directed at that court.
222. **Definition of consumer.** The Convention defines a consumer as "a natural person acting primarily for personal, family or household purposes". This is the same definition found in the HCCH 2005 Choice of Court Convention, which excludes consumer contracts from its scope in Article 2(1)(a). It is also consistent with the definition of consumer found in the *Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods* (Art. 2(a)), and the *HCCH Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods* (Art. 2(c)). The other option would have been the negative formulation found in the Brussels Ia Regulation (Art. 17(1)) and Rome I Regulation¹⁵⁴ (Art. 6(1)): "for a purpose [...] outside his trade or profession [...]". Unlike the European Regulations, the Convention does not specify that the other contracting party must be acting in its trade or professional capacity. This raises the question whether consumer to consumer contracts are included under paragraph 2. As the Twenty-Second Session did not discuss this issue, it will need to be determined by courts applying the Convention, guided by the Convention's objective of uniform application as expressed in Article 20.
223. **Employment contracts.** Employment contracts are not defined under the Convention but it is clear from the phrase "contract of employment" that paragraph 2 is intended to cover salaried workers at any level and not people carrying on independent professional activity.¹⁵⁵

¹⁵³ The HCCH 2005 Choice of Court Convention excludes from its scope choice of court agreements in consumer and employment contracts: Art. 2(1)(a) and (b).

¹⁵⁴ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *Official Journal of the European Union*, 4.7.2008, No L 177, pp. 6-16.

¹⁵⁵ Nygh/Pocar Report, para. 117.

224. **Collective bargaining agreements.** The reference to “matters relating to the employee's contract of employment” indicates paragraph 2 is intended to apply to judgments related to individual employment contracts, *i.e.*, to disputes between employee and employer arising from their labour relationship. This includes any claim between employer and employee based on the legal framework applicable to that relationship, including labour law or collective bargaining agreements.¹⁵⁶ Conversely, disputes arising from a collective bargaining agreement between the parties to this agreement – typically a trade union or a body representative of the employees, on the one hand, and an employer or an association of employers, on the other – are not covered by this paragraph.
225. **Exception to paragraph 1 regarding consent.** Paragraph 2(a) limits the effect of paragraph 1(e), concerning express consent given in the course of proceedings. Where employees and consumers are concerned, the consent must have been “addressed to the court, orally or in writing”. In other words, the second and third examples provided above for paragraph 1(e) (see *supra*, para. 164) would not satisfy paragraph 2(a) but the first would, it being the only situation where the expression of consent was directed at the court and not at the other party. The other modes of consenting recognised in paragraph 1 are implied consent (para. 1(f)) and consent by advance agreement between the parties (para. 1(m)). With respect to consumers and employees, neither form of consent is treated as sufficient. In other words, a judgment against a consumer or an employee will not circulate under the Convention if the connection to the State of origin was based solely on consent of either type. Of course, paragraph 1(a) will be satisfied where the employee or consumer was habitually resident in the State of origin.¹⁵⁷
226. **Exclusion of the filter based on the place of performance of a contractual obligation.** Similar to the above, paragraph 2 excludes recourse to paragraph 1(g), which concerns the place of performance of contractual obligations. A judgment will not be recognised or enforced against a consumer or employee if the only connection to the State of origin was the place of performance of the relevant contractual obligation.

Paragraph 3 – Paragraph 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.

227. Paragraph 3 establishes an exception to the filters in paragraph 1 for residential leases and registration of immovable property. The specific filter in paragraph 3 excludes any other filter in paragraph 1, and accordingly any other filter in paragraph 2.
228. **Residential leases.** A residential lease refers to a contract for the use of living accommodation for personal, family or household purposes in exchange for rent. Sub-paragraph (h) already provides a specific filter for a judgment ruling on a lease of immovable property (tenancy), but such a judgment could also circulate under any other relevant filter in paragraph 1. Many States treat residential leases as a special category of leases and seek to protect the residential lessee – considered vulnerable

¹⁵⁶ In the HCCH 2005 Choice of Court Convention, Art. 2(1)(b) excludes choice of court agreements “relating to contracts of employment, including collective agreements”.

¹⁵⁷ Other filters under Art. 5(1) could also be satisfied.

in the same manner as a consumer or employee – or to facilitate access to housing through exclusive jurisdiction at the place where the immovable property is situated, ensuring that any mandatory regime governing residential leases under the law of that State applies.¹⁵⁸ Paragraph 3 covers judgments on disputes between landlord and tenant, including, *e.g.*, judgments on the existence or interpretation of the tenancy agreement, eviction, compensation for damages caused by the tenant, or the recovery of rent.

229. **Registration of immovable property.** Paragraph 3 also applies to judgments ruling on the registration of immovable property. This provision covers judgments that rule on the act of registration of immovable property and derive from a dispute between two private parties, typically a judgment ordering the registration of a transfer of immovable property in the context of a dispute between the buyer of the property and the seller (*i.e.*, an action *in personam*). Conversely, other contractual disputes based on contracts for the transfer of immovable property are not covered by this provision, *e.g.*, payment of the price or liability of the seller. In turn, judgments on the registration of immovable property based on rights *in rem* fall within the scope of Article 6. And finally, judgments ruling on the validity of entries in public registers are excluded under Article 2(1)(j) (for the meaning of this exclusion, see *supra*, para. 58).
230. Under paragraph 3, a judgment ruling on a residential lease of immovable property or on the registration of immovable property can only be recognised and enforced under the Convention if it was given by a court of the State where the property is situated. No other filter under paragraph 1 will apply. Thus, for example, a judgment given in State A, where the defendant is habitually resident, relating to a residential lease over an immovable property located in State B, will not circulate under the Convention.¹⁵⁹ However, unlike Article 6, Article 5(3) does not prevent recognition or enforcement under national law (Art. 15).

¹⁵⁸ In most States that provide protective regimes for residential leases, these do not extend to temporary vacation rentals for which contracts often include other services in addition to use of living accommodation. Those States will usually not consider that their courts have exclusive jurisdiction over such contracts. While a uniform interpretation of the term "residential lease" should be pursued (under Art. 20), the exceptional nature of para. 3 and its protective purpose should be considered in determining its scope of application in the court of the requested State.

¹⁵⁹ It is debatable whether the first sentence of Art. 5(3), which excludes the application of para. 1, also applies when the immovable property is situated in a non-Contracting State. The rule is formulated in absolute terms and thus, in principle, it covers any judgment ruling on residential leases or registration of immovable property without any territorial limitation. In the 2018 draft Convention prepared by the Special Commission of May 2018 (see *supra*, note 10), Art. 6(c) contained an exclusive basis for recognition and enforcement with regard to tenancies of immovable property, the application of which was limited to cases where the property was located in a Contracting State. As a result of the compromise reached in the Twenty-Second Session, this provision was amended and moved to Art. 5(3), but this particular issue was not discussed (see also *infra* paras 237-243).

Article 6
Exclusive basis for recognition and enforcement

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.

231. Article 6 provides a single exclusive basis for the recognition and enforcement of judgments that rule on rights *in rem* in immovable property. This provision has both a positive and negative effect. Judgments that meet the filter in Article 6 are eligible for recognition and enforcement. Judgments that do not meet the filter must neither be recognised nor enforced, either under the Convention or under national law. Article 6 applies, therefore, “Notwithstanding Article 5”, and provides that such judgments will be enforced “only if” the prescribed connection is present. It lays down an “absolute” exclusive filter for judgments on rights *in rem* over immovable property. Thus, for example, if X brings a claim against Y in State A on a right *in rem* over an immovable property situated in State B, the ensuing judgment shall not be recognised or enforced in any other State. That is why Article 15, which provides that the Convention does not prevent recognition or enforcement under national law, is expressed to be subject to Article 6.
232. Article 6, however, only applies to judgments where a ruling on rights *in rem* over immovable property is the main object of the proceedings. The Convention contains special rules where such a matter arose merely as a preliminary question (see Arts 2(2) and 8).
233. **Rationale.** It is common and largely uncontroversial that a State will consider itself to have exclusive jurisdiction on claims relating to rights *in rem* over immovable property located in that State. The courts of the State where the immovable property is situated are the best placed, for reasons of proximity, to ascertain the facts and apply the rules and practices governing rights *in rem*, which are generally those of the State in which the property is situated. Such proceedings also usually involve public registers or other public documents.¹⁶⁰
234. **Scope: rights in rem.** Article 6 applies to judgments in proceedings that had as their object rights *in rem*, *i.e.*, rights that directly concern an immovable property and are enforceable “against everybody (*erga omnes*)”.¹⁶¹ The notion of a right *in rem* under the Convention should be given an autonomous meaning, focusing on the effects of the right under the law of the State where the immovable property is situated. Any right over an immovable property that has *erga omnes* effect under that law should be considered to fall within the category of rights *in rem* for the purposes of Article 6. In most States this will include, for example, ownership, mortgages, usufructs or servitudes; other States may grant *erga omnes* effect to certain rights of possession or use, or to some types of long-term leases. Judgments on such rights fall under the exclusive rule of Article 6.

¹⁶⁰ For the arguments in favour of this filter, see Nygh/Pocar Report, para. 164.

¹⁶¹ *Ibid.*

235. Article 6 covers judgments on actions that seek to determine the existence of those rights, their extent and content, and to provide the holders with the protection of the powers attached to their entitlements. Conversely, actions based on rights connected with immovable property that do not have *erga omnes* effect are not included within the scope of this provision. For example, an action for the delivery of an immovable property based on a contract for sale (*i.e.*, where the issue is the defendant's obligation to carry out all acts necessary to transfer and hand over the property) or an action in tort for damages to immovable property are not covered by this provision. Rights *in rem* over movable property also do not fall within the scope of this Article.
236. **Immovable property.** The term "immovable property" is not defined under the Convention, but it should be taken to include land, benefits or improvements to land, and fixtures (as opposed to chattels), including things embedded, attached, or affixed to the earth, or permanently fastened to anything embedded, attached, or affixed to the earth. This guidance in relation to immovable property is not exhaustive.
237. **Application vis à vis non-Contracting States.** To understand the application of this provision vis à vis non-Contracting States it is helpful to distinguish three scenarios that vary depending on the location of the immovable property and the State of origin of the judgment.
238. *First scenario: the immovable property is situated in a Contracting State and the State of origin is also a Contracting State.* There is no doubt that Article 6 applies when the immovable property is situated in a Contracting State. In such a case, the judgment will be recognised and enforced *if and only if* the property is situated in the State of origin. Otherwise, the judgment shall neither be recognised nor enforced under the Convention or under national law (see Art. 15). Furthermore, any treaty concluded after this Convention shall not affect this result if the Contracting State where the property is situated is not a party to this later treaty (see Art. 23(3) and (4)).
239. *Second scenario: the immovable property is situated in a non-Contracting State but the State of origin is a Contracting State and one of the filters set out in Article 5 is met.* This scenario requires a more nuanced interpretation.
240. Article 6 begins with "Notwithstanding Article 5 [...]". Thus, it constitutes an exception to the rule that judgments given in a Contracting State are eligible for recognition and enforcement if any of the filters laid down by Article 5 are met. In that sense, therefore, where rights *in rem* over immovable property are concerned, Article 5 is not applicable. Furthermore, Article 6 does not expressly exclude judgments on rights *in rem* over immovable property situated in non-Contracting States.¹⁶² This

¹⁶² To understand this statement, it is important to briefly recall the precedents of this provision. As referred to in note 159, in the 2018 draft Convention (see *supra*, note 10) Art. 6 contained three exclusive bases for recognition and enforcement: (i) one for judgments on validity of registered intellectual property rights; (ii) another for judgments on rights *in rem* in immovable property; and (iii) a third for tenancies of immovable property. As explained in the corresponding version of the revised draft Explanatory Report (Prel. Doc. No 1 of December 2018, "Judgments Convention: revised draft Explanatory Report", para. 271), the first two bases were formulated in absolute terms, whereas the third was limited to cases where the exclusive basis pointed to a Contracting State. As a consequence, Art. 5 did not cover judgments ruling on the validity of an intellectual property right, irrespective of whether this right was registered in a Contracting or non-Contracting State, or on rights *in rem* in immovable property, irrespective of whether the immovable was situated in a Contracting or non-Contracting State (see *ibid.*, para. 263, with an example). Conversely, Art. 5 did cover judgments on tenancies of immovable property when the immovable was situated in a non-Contracting State.

reading of Article 6 would deny circulation of the judgment in the scenario described. This approach would be consistent with national law in many States that deny recognition or enforcement of a foreign judgment given, for example, in the State where the defendant has their habitual residence if it rules on a right *in rem* over immovable property situated in a different State. Following this interpretation, a judgment given in State A, which is a party to the Convention, that rules on a right *in rem* over an immovable property situated in State B, which is not a party, does not circulate under the Convention. The other Contracting States would therefore not be obliged to recognise or enforce that judgment under the Convention, even if a filter in Article 5(1) is met and there is no ground for refusal under Article 7 or 8.

241. However, Article 6 does not create an obligation toward non-Contracting States. It does not seem reasonable to hold that Contracting States have voluntarily restrained their sovereignty in this way. As a result, there is no reason to understand that, in the example above, the other Contracting States are prevented from recognising or enforcing the judgment given in State A over an immovable property situated in a non-Contracting State, either under their national law (notwithstanding Art. 15) or under another international instrument. This conclusion may be drawn from the wording of Article 23(3) and (4), which refer to “[...] the obligations under Article 6 towards Contracting States [...]” (emphasis added).
242. Thus, the preferable interpretation appears to be that Contracting States are not obliged to recognise or enforce a judgment given in another Contracting State on immovable property situated in a non-Contracting State. Under this view, the Convention does not prevent such recognition or enforcement either under national law or under another international instrument.
243. *Third scenario: the immovable property is situated in a Contracting State and the State of origin is a non-Contracting State.* The Convention does not apply to the recognition and enforcement of judgments given in non-Contracting States and therefore does not address this scenario. National law will govern and, as mentioned above, most national laws would deny recognition in such cases anyway. But if national law did not do so, it may not be coherent for a Contracting State to recognise and enforce such a judgment, given the policy and objectives of the Convention.

Article 7
Refusal of recognition and enforcement

1. Recognition or enforcement may be refused if –
 - (a) 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 them to arrange for their defence, unless the defendant entered an appearance and presented their 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;
 - (b) the judgment was obtained by fraud;
 - (c) 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;
 - (d) 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;
 - (e) the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties; or
 - (f) 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.

2. Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, 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.

A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

244. The Convention provides a framework for the recognition and enforcement of judgments. To that end, Article 4 sets forth the general obligation with respect to recognition and enforcement of judgments, with filter requirements set out in Articles 5 and 6, and specific defences in Article 7. These defences are grouped into two categories. The first, in paragraph 1, lists grounds that *allow*, but do not require, the requested State to refuse recognition or enforcement based either on the way the proceedings took place in the State of origin or on the nature or content of the judgment itself. As confirmed in Article 4(1), this is an exhaustive list, which limits the grounds a judgment debtor can invoke to avoid recognition or enforcement in the requested State and what a court in the requested State can do. The second category deals with the particular situation of international *lis pendens* and is covered by paragraph 2.

Paragraph 1 – Recognition or enforcement may be refused if –

245. This paragraph includes seven grounds that can lead to the refusal to recognise or enforce a judgment in the requested State. They largely replicate the equivalent provision in the HCCH 2005 Choice of Court Convention.¹⁶³ The grounds in sub-paragraphs (a), (b) and (d) relate to the way in which proceedings were instituted and conducted in the State of origin. Grounds in sub-paragraphs (c) and (e) concern the effect that recognition or enforcement would have in the requested State. Finally, sub-paragraph (f) takes account of earlier judgments given in a third State.
246. Article 7 establishes that States “*may*” refuse recognition or enforcement if one or more grounds are met. This provision is addressed to States. States can (i) adopt domestic legislation that does not provide for refusal in some of these circumstances or provide for refusal in all these circumstances, (ii) require recognition and enforcement in some of these circumstances, (iii) specify additional criteria that are relevant to the exercise of the discretion, or (iv) leave everything to the discretion of the court.

Sub-paragraph (a) – 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 them to arrange for their defence, unless the defendant entered an appearance and presented their 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;
247. The first defence to recognition or enforcement refers to the manner in which the defendant was notified of the claim brought in the State of origin. Essentially, it provides that a lack of proper notification to the defendant will justify non-recognition or non-enforcement.

¹⁶³ Art. 9 of the HCCH 2005 Choice of Court Convention.

248. **Document instituting the proceedings.** The document that must be notified to the defendant is the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim. This provision aims to ensure that the defendant was notified of the elements of the claim and had the opportunity to arrange for their defence. Thus, the concept of the document instituting the proceedings includes any document that, under the law of the State of origin, initiates proceedings in a manner that enables the plaintiff to obtain a judgment that may circulate under the Convention.¹⁶⁴ Moreover, the document must contain the "essential elements of the claim" to allow the defendant to make a reasonable decision on a procedural response.
249. Sub-paragraph (a) defines two circumstances in which the notification process may justify a refusal to recognise or enforce a judgment. The first concerns the interests of the defendant while the second concerns the interests of the requested State when notification occurred in that State.¹⁶⁵
250. **Protection of the defendant.** The ground for refusing recognition or enforcement under sub-paragraph (a)(i) is when the defendant was not made aware in a timely manner of the claim brought in the State of origin. This ground ensures the most basic principle of procedural justice: the right to be heard.¹⁶⁶ The test for appropriate notification is factual rather than technical.¹⁶⁷ Whether a defendant can rely on sub-paragraph (a)(i) depends on that defendant's behaviour in the State of origin. If the defendant did not enter an appearance in the court of origin and the judgment was given by default, the defence based on improper notification could be invoked to refuse recognition or enforcement. If the defendant "entered an appearance and presented their case" in the court of origin without contesting notification, the defence based on improper notification will not be available in the requested State.¹⁶⁸ 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.
251. **Notification.** Sub-paragraph (a)(i) does not specify the means of the notification. In particular, it does not require personal service on the defendant and other methods of service may suffice, such as, notification on certain persons other than the defendant, e.g., an employee of, or a relative living with, the defendant, or even by public notice. The Convention only requires that notification be sufficient to enable

¹⁶⁴ This recognises the variety of means by which procedural law determines how claims are started.

¹⁶⁵ Hartley/Dogauchi Report, para. 185.

¹⁶⁶ As such, this overlaps with sub-para. (c), which specifically refers to fundamental principles of procedural fairness. Sub-para. (a) can thus be understood as a specific application of sub-para. (c) in relation to notification, with its own conditions that should, arguably, exclude recourse to sub-para. (c) on questions falling within sub-para. (a).

¹⁶⁷ Hartley/Dogauchi Report, para. 186, esp. note 225.

¹⁶⁸ This recalls the filter in Art. 5(1)(f). The different expressions used ("argued on the merits" and "entered an appearance and presented their case") indicate that the possible actions by the defendant under Art. 7(1)(a)(i) are conceived more broadly. An appearance coupled with an objection to jurisdiction, for example, will suffice to exclude an objection based on insufficient notification at the stage of recognition and enforcement under the Convention, even though the defendant is not considered to have argued on the merits.

the defendant to arrange their defence. As to the adequacy of public notice, some courts have concluded that the right to be heard is not violated if the court addressed is satisfied that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant albeit without success.¹⁶⁹

252. **Protection of the requested State.** Under sub-paragraph (a)(ii), the issue is whether the defendant was notified in a manner incompatible with fundamental principles of the requested State concerning service of documents. This sub-paragraph only applies where notification of the defendant took place in the requested State. It is thus of very limited application and does not allow the requested State to assess notification in another State according to the law of the requested State or even under the law of the State where service was effected.¹⁷⁰ Nor does it allow the requested State to assess notification in the requested State according merely to the general law of that State, *i.e.*, the *lex fori*; sub-paragraph (a)(ii) restricts the reference to the “fundamental principles [...] concerning service of documents” in the requested State.¹⁷¹
253. **Rationale.** Many States do not object to service of a foreign document instituting proceedings on their territory without participation of their authorities, and would recognise such service as effective.¹⁷² Other States consider service of documents instituting proceedings to be a sovereign act and unauthorised service of foreign documents an infringement of their sovereignty and ineffective service unless permission has been given through an international agreement.¹⁷³ Sub-paragraph (a)(ii) accounts for this latter point of view by providing that the court addressed may refuse recognition or enforcement if the defendant was served in the requested State in a manner that was incompatible with fundamental principles of that State concerning service of documents.
254. The Convention does not define “fundamental principles concerning service of documents”. The reference in sub-paragraph (a)(ii) to the principles of the requested State, suggests that no uniform or autonomous meaning is required (nevertheless, interpretation must always take into account the call for uniform interpretation in Art. 20). The HCCH 1965 Service Convention, in force in 78 Contracting States at the time of writing of this Report, provides that notification under that instrument can only be refused if compliance would infringe the sovereignty or security of the requested

¹⁶⁹ CJEU, Judgment of 15 March 2012, *G v. Cornelius de Visser*, C-292/10, EU:C:2012:142.

¹⁷⁰ Sub-para. (a) is concerned solely with whether or not the court addressed may refuse to recognise or enforce the judgment. The court of origin will have applied its own procedural law, including international conventions on the service of documents that are in force for the State in question and applicable on the facts of the case. These rules, which might require service to be effected in conformity with the law of the State in which it takes place, are not affected by sub-para. (a). However, except to the limited extent provided in sub-para. (a)(ii), the court addressed may not refuse to recognise or enforce the judgment merely on the ground that service did not comply with the law of the State in which it took place, with the law of the State of origin, or with international conventions on the service of documents. Hartley/Dogauchi Report, note 224.

¹⁷¹ This provision also overlaps with sub-para. (c), which specifically refers to fundamental principles of procedural fairness (see *supra*, note 166).

¹⁷² Hartley/Dogauchi Report, para. 187.

¹⁷³ The HCCH *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (hereinafter, “HCCH 1965 Service Convention”) is the most important example. See also Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents).

State.¹⁷⁴ While the two instruments apply in different contexts, the protection resulting from their respective grounds for refusal is similar, *i.e.*, of fundamental principles of the requested State with regard to notification of foreign proceedings in that State.

Sub-paragraph (b) – the judgment was obtained by fraud;

255. Sub-paragraph (b) provides that fraud in obtaining the judgment is a ground for refusing recognition or enforcement. Fraud refers to behaviour that deliberately seeks to deceive in order to secure an unfair or unlawful gain or to deprive another of a right. While some states subsume a defence based on fraud within the public policy defence, others treat fraud as a self-standing defence to recognition and enforcement.¹⁷⁵
256. The equivalent provision in the HCCH 2005 Choice of Court Convention specifies that it applies to fraud "in connection with a matter of procedure".¹⁷⁶ The Hartley/Dogauchi Report states that the additional specificity in the HCCH 2005 Choice of Court Convention is because "there may be some legal systems in which public policy cannot be used with regard to procedural fraud".¹⁷⁷ That report provides the following examples for the application of the defence: where a party deliberately "serves the writ [...] on the wrong address", "gives the wrong information as to the time and place of the hearing", "seeks to corrupt a judge or witness" or "conceals key evidence".¹⁷⁸ These examples relate to the fundamental principles of procedural fairness, including the right to be heard by an impartial and independent tribunal.¹⁷⁹ They concern fraud perpetrated by one party to the proceedings to the detriment of the other party.
257. Unlike the HCCH 2005 Choice of Court Convention, this Convention does not include the limitation that fraud be "in connection with a matter of procedure". This presupposes that substantive fraud may also justify a refusal to enforce. While sub-paragraph (b) is not drafted as narrowly as the corresponding provision in the HCCH 2005 Choice of Court Convention, the Hartley/Dogauchi Report indicates that "fraud as to the substance could fall under the public policy exception".¹⁸⁰ As a result, the difference between these two Conventions is unlikely to have an impact in practice.

¹⁷⁴ Art. 13(1). This assumes that the request for notification otherwise complies with the other requirements of the Convention. For a discussion of the very sparse jurisprudence on this provision, see Permanent Bureau of the HCCH, *Practical Handbook on the Operation of the Service Convention*, 4th ed., The Hague, 2016, paras 220-224. The limitation based on "sovereignty or security" is also included in the HCCH *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters* (Art. 12(1)(b)). See Permanent Bureau of the HCCH, *Practical Handbook on the Operation of the Evidence Convention*, 3rd ed., The Hague, 2016, para. 310.

¹⁷⁵ These are mainly States in the common law tradition. For a discussion on the fraud defence in negotiations for the 1999 preliminary draft Convention, see C. Kessedjian, "Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters", Prel. Doc. No 9 of July 1998, in *Proceedings of the Twentieth Session (2005)*, Tome II, *Judgments*, Cambridge – Antwerp – Portland, Intersentia, 2013, pp. 109-143, paras 40-45.

¹⁷⁶ Art. 9(d) of the HCCH 2005 Choice of Court Convention.

¹⁷⁷ Hartley/Dogauchi Report, note 228.

¹⁷⁸ *Ibid.*, para. 188.

¹⁷⁹ See, *e.g.*, the 1966 *United Nations International Covenant on Civil and Political Rights* (Art. 14) and the *European Convention on Human Rights* (Art. 6(1)).

¹⁸⁰ Hartley/Dogauchi Report, note 228.

Sub-paragraph (c) – 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;

258. The public policy defence to recognition or enforcement of foreign judgments is widely admitted across legal systems. Internationally, it has been included in relevant HCCH Conventions for decades¹⁸¹ and is found in the 1958 New York Convention. The text in the Convention largely follows the formulation used in the HCCH 2005 Choice of Court Convention.¹⁸²
259. **Manifestly incompatible with public policy.** The public policy defence is a final safeguard against recognition or enforcement of a foreign judgment that is considered to be “manifestly incompatible with the public policy of the requested State”. It is widely accepted that the concept of public policy must be “interpreted strictly” and recourse thereto “is to be had only in exceptional cases”.¹⁸³ 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”.¹⁸⁴
260. “Manifestly” is a high threshold, intended to ensure that judgments of States are recognised and enforced by other States unless there is a compelling public policy reason not to do so in a particular case. The word “manifestly” has been used in previous cases to discourage the overuse of the public policy exception and to limit its use to situations where recognition or enforcement would lead to an “intolerable result”.¹⁸⁵
261. **Principles of procedural fairness.** The formulation of the defence in sub-paragraph (c) is more specific than the one found in previous HCCH instruments, save for the HCCH 2005 Choice of Court Convention. Under sub-paragraph (c), public policy expressly includes “situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness” of

¹⁸¹ See, e.g., the *Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children*, at Art. 2; the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants*, at Art. 16; the *Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*, at Art. 10; the *Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*, at Arts 5 and 14; the HCCH 1985 *Trusts Convention*, at Art. 18; the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, at Art. 24; the HCCH 1996 *Child Protection Convention*, at Arts 22 and 23; the HCCH 2000 *Protection of Adults Convention*, at Arts 21 and 22; the HCCH 2005 *Choice of Court Convention*, at Arts 6 and 9; and the HCCH 2007 *Child Support Convention*, at Art. 22. It is noted that some of these conventions refer to the public policy exception in the context of determining the applicable law to the dispute.

¹⁸² Art. 9(e) of the HCCH 2005 *Choice of Court Convention*. See also Hartley/Dogauchi Report, paras 189-190.

¹⁸³ See “Note on Article 7(1)(c) of the 2016 Preliminary Draft Convention”, drawn up by the *co-Rapporteurs* of the draft Convention and the Permanent Bureau, Prel. Doc. No 5 of December 2016 for the attention of the Special Commission of February 2017 on the Recognition and Enforcement of Foreign Judgments (hereinafter, “Prel. Doc. No 5 of December 2016”), para. 28.

¹⁸⁴ See the *Explanatory Report by Professor Fausto Pocar to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, (hereinafter, “Pocar Report to the 2007 Lugano Convention”), *Official Journal of the European Union*, 23.12.2009, No C 319/01.

¹⁸⁵ See Prel. Doc. No 5 of December 2016, para. 29.

the requested State. The Hartley/Dogauchi Report¹⁸⁶ explains that in some States, fundamental principles of procedural fairness (also known as due process of law, natural justice or the right to a fair trial) are constitutionally mandated.¹⁸⁷ In such States, it might be unconstitutional to recognise a foreign judgment obtained in proceedings where a fundamental breach of these principles occurred. The reference in sub-paragraph (c) overlaps with the procedural safeguards and fundamental principles regarding notification in sub-paragraph (a), and with the concerns regarding procedural fairness in the face of fraud in sub-paragraph (b). This overlap should ensure that adequate procedural protection is provided to parties facing recognition and enforcement proceedings regardless of the particular way in which those issues are dealt with in the requested State.¹⁸⁸

262. **Content of public policy.** The content of the public policy defence is notoriously difficult to define. Its scope in the Convention should, however, be understood in relation to other provisions in the text. As mentioned above, other defences under paragraph 1 overlap with the public policy defence, which should be interpreted accordingly, extending beyond the specifics of the particular defences only where doing otherwise would be a “manifest” contradiction with essential policies of the requested State.
263. The exceptional character of the public policy defence means that it is not sufficient for the party opposing recognition or enforcement to point to a mandatory rule of the law of the requested State that the foreign judgment fails to uphold. Indeed, this mandatory rule may be considered imperative for domestic cases but not for international situations. The public policy defence of sub-paragraph (c) should be triggered only where such a mandatory rule reflects a fundamental value, the violation of which would be manifest if enforcement of the foreign judgment was permitted. In some jurisdictions, this is referred to as “international public policy” as distinguished from “internal public policy”.¹⁸⁹
264. Sub-paragraph (c) does specify that it refers to the public policy *of the requested State*, indicating that there is no expectation of uniformity as to the content of public policy in each State. While the general purpose of the Convention to facilitate the circulation of judgments should limit recourse to this defence, as should the narrow scope of its application described in the previous paragraphs, it remains up to each State to define the public policy defence. The provision refers to infringements of the sovereignty or security of the State as situations where recognition and enforcement

¹⁸⁶ Hartley/Dogauchi Report, para. 190.

¹⁸⁷ For some States in Europe, see Art. 6 of the *European Convention on Human Rights*; for the United States of America, see the Fifth and Fourteenth Amendments to the United States Constitution. Many other States have similar provisions.

¹⁸⁸ See, for example, Hartley/Dogauchi Report, para. 153, on the exclusion of procedural fraud from the public policy defence in some States.

¹⁸⁹ A proposal to include the term “international public policy” in the text of Art. 7(1)(c) was discussed during the negotiations of the Convention. See Work. Doc. No 136 of February 2017, “Proposal of the delegation of Uruguay” and the related discussion in the Minutes of the Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017), Minutes No 7, paras 91-105. During the discussions, while the proposal received some support, some delegations noted that they were unfamiliar with the term “international public policy” and expressed concerns in respect of its inclusion in the text of the Convention.

may be manifestly incompatible with public policy. Despite this addition, the scope of this provision is no different from the scope of the equivalent provision in the HCCH 2005 Choice of Court Convention. The addition simply reflects the greater potential for issues involving infringements of security or sovereignty to arise in the context of this Convention than under the HCCH 2005 Choice of Court Convention.

265. **Damages.** The Convention includes damages awards within its scope but allows a requested State to refuse to enforce a judgment to the extent that it involves an award of punitive or exemplary damages (Art. 10). In some States, where punitive or exemplary damages are not typically allowed, refusals to enforce such awards have been assessed under the public policy defence. However, because Article 10 addresses punitive or exemplary damages, the public policy defence in sub-paragraph (c) should not be used to address challenges to the recognition or enforcement of judgments on that basis.¹⁹⁰ This further narrows the scope of the public policy defence under the Convention.
266. Although the availability of the public policy defence is widely accepted, it is rarely successful as a means of denying recognition or enforcement of a foreign judgment, particularly in civil or commercial matters.¹⁹¹ Examples where it has succeeded include: where the foreign court enforced a contract to commit an illegal act (smuggling),¹⁹² where the foreign judgment impinged on constitutionally guaranteed fundamental rights (freedom of speech),¹⁹³ and where the foreign judgment enforced a gambling debt.¹⁹⁴

Sub-paragraph (d) – 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;

267. This sub-paragraph allows the court addressed to refuse to give effect to a judgment given by a court when the proceedings in the State of origin were contrary to a choice of court agreement or a designation in a trust instrument. Its rationale is to uphold the agreement or the designation, and therefore to respect party autonomy. Recourse to

¹⁹⁰ The possibility of severing the punitive damages component from the compensatory component, and only enforcing the latter, is further supported by Art. 9 of the Convention.

¹⁹¹ In a 1998 decision of the England and Wales Court of Appeal, only three refusals to enforce on public policy grounds were noted, two of which were in family law matters, excluded under the Convention (see *Soleimany v. Soleimany*, [1998] EWCA Civ 285). In the most recent edition of the *Jurisclasseur de droit international*, almost all of the examples of refusal by French courts arise in family law matters (divorce, filiation and adoption) - see Fascicule 584-40.

¹⁹² See *Soleimany v. Soleimany (id.)*. Although this case involved an arbitration award rather than a foreign judgment, the court asserted that it would clearly have refused to enforce the award had it been a judgment given by a foreign court.

¹⁹³ See *Bachchan v. India Abroad Publ'n Inc.*, 154 Misc. 2d 228, 235 (N.Y. sup. Ct. 1992) (the United States of America), where an English libel judgment was refused recognition in New York. See, however, the discussion on public policy and freedom of speech in *Yahoo! v. LICRA*, 433 F.3d 1199 (9th Cir. 2006) (the United States of America).

¹⁹⁴ See *Sporting Index Limited v. John O'Shea* [2015] IEHC 407 (Irish High Court); *The Ritz Hotel Casino Ltd v. Datuk Seri Osu Haji Sukam*, [2005] 6 *Malayan Law Journal* 760 (High Court of Malaysia). But other courts have rejected this use of public policy if gambling was legal where the debt was incurred: see for example *Boardwalk Regency Corp. v. Maalouf* (1992), 6 O.R. (3d) 737 (Ontario C.A.); *G.N.L.V. Corp. v. Wan*, [1991] B.C.J. No 3725 (British Columbia S.C.); *Liao Eng Kiat v. Burswood Nominees Ltd*, [2004] 4 S.L.R. 690 (Singapore C.A.).

this sub-paragraph would only be necessary where the judgment satisfied a filter under Article 5. Indeed, if the judgment did not satisfy one of the filters, the judgment could not be considered for recognition and enforcement under the Convention (save under national law as permitted under Art. 15).

268. **Examples.** X brings a contractual claim against Y in State A, where the contractual obligation on which the judgment was based had to be performed. The parties, however, had agreed to submit such a claim to the exclusive jurisdiction of the courts of State B. Y appears before the court of origin and contests jurisdiction on the basis of the choice of court agreement, but this defence is dismissed. The judgment on the merits is favourable to X. Recognition or enforcement of this judgment may, however, be refused under sub-paragraph (d) since the proceedings in State A were contrary to the choice of court agreement. Note that if Y appeared before the courts of State A and argued on the merits without contesting jurisdiction, sub-paragraph (d), in principle, will not apply.¹⁹⁵
269. This sub-paragraph applies wherever the choice of court agreement validly excluded the jurisdiction of the court of origin, irrespective of whether the agreement is exclusive or non-exclusive. It also applies irrespective of whether the court chosen by the parties or designated in the trust instrument was the court of a Contracting State or a third State. The validity and effectiveness of the agreement or the designation is governed by the law of the requested State, including its private international law rules.

Sub-paragraphs (e) and (f) – inconsistent judgments

270. These two sub-paragraphs reflect the fact that in international situations, more than one court may have jurisdiction over a dispute and parallel or multiple proceedings may be brought in these courts, leading to more than one judgment. When conflicting judgments exist, a question of hierarchy arises: which judgment should be given precedence? Article 7(1) distinguishes two situations: first, where the competing judgment was given by a court in the requested State and, second, where the competing judgment was given in another State (other than the State of origin). These provisions are identical to the ones found in the HCCH 2005 Choice of Court Convention (Art. 9(f) and (g)). Article 7(2), in turn, deals with cases where proceedings in the requested State are still pending when recognition or enforcement is sought.

Sub-paragraph (e) – the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties; or

271. In the first case, sub-paragraph (e) specifies that the judgment from the State of origin can be refused recognition or enforcement where that judgment is inconsistent with a judgment from the requested State. There are two conditions: the judgments must be "inconsistent" and the judgment from the requested State must be "in a dispute between the same parties".¹⁹⁶ The judgment does not need to have been given prior

¹⁹⁵ Such conduct may be considered as implicitly derogating from the choice of court agreement and therefore the judgment would not be contrary to it.

¹⁹⁶ Hartley/Dogauchi Report, note 231, states: "The requirement regarding the parties will be satisfied if the parties bound by the judgments are the same even if the parties to the proceedings are different, for example where one judgment is against a particular person and the other judgment is against the successor to that person." (see *supra*, para. 92).

to the competing judgment, nor does it need to be based on the same cause of action. Sub-paragraph (e) is therefore wider than sub-paragraph (f) and paragraph 2 of Article 7 because it does not require that the two judgments involve the same subject matter.¹⁹⁷ The two judgments will be “inconsistent” when it is not possible to act in accordance with one without violating the other in whole or in part.

Sub-paragraph (f) – 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.

272. In the second case, sub-paragraph (f) applies where the conflicting judgments are both from foreign States. It specifies that a judgment from the State of origin can be refused recognition or enforcement where it is inconsistent with an earlier judgment given in another State, irrespective of whether it is a Contracting State or not. Three further conditions must be met for sub-paragraph (f) to apply. First, the judgment from the third State must have been given *prior to* the judgment from the State of origin, irrespective of which court was first seised. The first judgment in time has priority. Second, both judgments must concern the same parties and the same subject matter. This is narrower than the condition under sub-paragraph (e) but parallel to the *lis pendens* ground formulated in paragraph 2.¹⁹⁸ The French version uses the expression *ayant le même objet* to refer to the “same subject matter”. These expressions are considered equivalent under the Convention and are meant to exclude the requirement that the two judgments involve exactly the same “cause of action”, as is required in the HCCH 2005 Choice of Choice Convention. That approach was considered too restrictive in this Convention given the variety of causes of action in different States. The key element is that the “central or essential issue” must be the same in both judgments. Third, the earlier judgment must be eligible for recognition and enforcement in the requested State, whether or not recognition or enforcement has been sought yet.¹⁹⁹

¹⁹⁷ In the context of the Brussels Ia Regulation, this difference has been illustrated in the Judgment of 4 February 1988, *Hoffmann v. Krieg*, C-145/86, EU:C:1988:61, where the CJEU decided that a foreign judgment ordering a person to make maintenance payments to his spouse arising from his obligation under a marriage that had not been terminated was irreconcilable with a national judgment pronouncing the divorce of the spouses. Note, however, that the Convention does not apply to maintenance obligations. In any event, the application of this provision should not encourage strategic or opportunistic behaviour by the judgment debtor, as might be the case when the proceedings in the requested State are instituted while the declaration of enforceability (*exequatur*) is already pending. Thus, a reasonable rule may be to suspend those proceedings until the decision on the *exequatur* is made. The Convention, however, does not impose such a rule.

¹⁹⁸ See the Pocar Report to the 2007 Lugano Convention, para. 139: “In cases of this kind the fact that the judgments are irreconcilable prevents recognition of the later one, but only if the judgments were delivered in disputes between the same parties and have the same subject-matter and the same cause of action, always provided of course that they satisfy the tests for recognition in the State addressed. If the subject-matter or the cause of action are not the same, the judgments are both recognised, even if they are irreconcilable with one another. The irreconcilability will then have to be resolved by the national court before which enforcement is sought, which may apply the rules of its own system for the purpose, and may indeed give weight to factors other than the order in time of the judgments, such as the order in which the proceedings were instituted or the order in which they became *res judicata*, which is not a requirement for recognition under the Convention.”

¹⁹⁹ Obviously, if the earlier judgment comes from a non-Contracting State, the question of whether the judgment is eligible for recognition and enforcement will be determined under the national law of the requested State.

Paragraph 2 – Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –

273. It may occur that parallel proceedings, between the same parties on the same subject matter, take place in different States. Article 7 establishes three rules to address how judgments are dealt with in these situations. Paragraphs 1(e) and (f), discussed above, deal with cases where the parallel proceedings have concluded and the resulting judgments are inconsistent. Paragraph 2 deals with cases where proceedings are still pending in the requested State when recognition or enforcement of a judgment given in another State is sought.²⁰⁰ *Lis pendens* in another State cannot be invoked to refuse recognition or enforcement. Furthermore, the proceedings pending in the requested State must be "between the same parties on the same subject matter". In these cases, recognition or enforcement may be postponed or refused if two cumulative conditions are met.

Sub-paragraph (a) – the court of the requested State was seised before the court of origin; and

274. **First condition.** According to paragraph 2(a), the court of the requested State must have been the court first seised. This ground for refusal may therefore only be invoked if the proceedings in the requested State commenced before the proceedings in the State of origin. The rationale for this condition is that the requested State should be allowed to proceed on the basis that the court of origin should have yielded to the priority of the court first seised and suspended or refused the commencement of the proceedings since the same dispute was already pending in another State (with regard to the moment when a court is seised, see *supra*, para. 41).

Sub-paragraph (b) – there is a close connection between the dispute and the requested State.

275. **Second condition.** Mere priority is, however, not sufficient. According to paragraph 2(b), there must also be a close connection between the dispute and the requested State. This condition is to prevent strategic or opportunistic behaviour. For example, without the condition, a potential defendant in one State could move to another State and sue the other party there, seeking a so-called "negative declaration" just to prevent the future recognition or enforcement of the foreign judgment and on the basis of an exorbitant jurisdictional ground. The Convention does not determine which bases of jurisdiction meet the "close connection" condition. In principle, any of the filters listed in Article 5 satisfy this condition, but there may be others that do so as well, e.g., the place where the harm was directly suffered in non-contractual disputes. Conversely, the mere nationality of the claimant or their domicile in the requested State would not be sufficient.

²⁰⁰ The 1999 preliminary draft Convention contained a parallel provision (see Art. 28(1)(a)).

A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

276. **Consequences.** If the proceedings are pending between the same parties on the same subject matter in the requested State and the above two conditions are met, recognition or enforcement of the judgment may be postponed or refused. Paragraph 2 clarifies that a refusal under this paragraph does not prevent a subsequent application for recognition and enforcement. This provision addresses situations where proceedings on the same subject matter in the requested State conclude without a judgment on the merits (*e.g.*, for procedural reasons) or with a decision on the merits that is consistent with the foreign judgment.

Article 8
Preliminary questions

1. A ruling on a preliminary question shall not be recognised or enforced under this Convention if the ruling is on a matter to which this Convention does not apply or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.
2. 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, or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.

277. Article 8 deals with preliminary questions, which are legal issues that must be addressed before the plaintiff's claim can be decided but are not the main object or principal issue of the proceedings.²⁰¹ Article 8 recognises that, conceptually, legal issues within a judgment may be separate from one another but considered sequentially, *i.e.*, that a decision on the principal issue is predicated on a decision on another, preliminary question. For example, in an action for damages for breach of a sale contract (main object), the court might first have to decide on the capacity of a party to enter into such a contract (preliminary question). These preliminary questions are usually, but not always, introduced by the defendant by way of defence.

278. Under Article 2(2), judgments that include preliminary rulings on excluded matters are not, for that reason alone, excluded from the scope of the Convention (see *supra*, paras 75-77). Article 8 deals with a separate issue, which is the recognition and enforcement of judgments that rule on preliminary questions dealing with excluded matters. Article 8 also addresses judgments that rule on a preliminary question referred to in Article 6: where the court of origin is not a court of the State where the immovable property is situated.

279. **Structure of Article 8.** This provision contains two rules concerning rulings on preliminary questions. Paragraph 1 excludes rulings on certain preliminary questions from recognition or enforcement under the Convention. Paragraph 2 allows the court addressed to refuse to recognise or enforce judgments that are based on rulings on certain preliminary questions.

²⁰¹ As pointed out in *supra*, note 77, "object" is intended to mean the matter with which the proceedings are directly concerned, and which is mainly determined by the plaintiff's claim; see Hartley/Dogauchi Report, paras 77 and 149. The terms "incidental questions" and "principal issue" are used in the Nygh/Pocar Report, para. 177.

Paragraph 1 – A ruling on a preliminary question shall not be recognised or enforced under this Convention if the ruling is on a matter to which this Convention does not apply or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.

280. Paragraph 1 provides that where a matter to which the Convention does not apply arose as a preliminary question, the ruling on the preliminary question shall not be recognised or enforced under the Convention. The same result follows where a preliminary question arose with regard to a matter referred to in Article 6 in a court other than a court of the State where the immovable property is situated.
281. The general principle is that the application of the Convention is determined by the object of the proceedings, and not by the preliminary question (see *supra*, Art. 2(2)). Therefore, a judgment is eligible for recognition and enforcement if it meets any of the filters laid down in Article 5 or 6 as regards the *main object* of the proceedings. If the court of origin has also ruled on a preliminary question, that ruling may have effects in future proceedings according to the law of that State. For example, under the doctrine of issue estoppel, collateral estoppel or issue preclusion, rulings on preliminary questions must be recognised in future proceedings.²⁰² The purpose of paragraph 1 is to clarify that the recognition of these effects is not provided for under the Convention.²⁰³
282. **Matters excluded from the scope of the Convention.** Paragraph 1 refers to those rulings on matters to which the Convention “does not apply”. This covers matters that do not qualify as civil or commercial under Article 1(1), matters expressly excluded under Article 2(1), and matters excluded by a declaration made by the requested State under Article 18. Rulings on matters to which the Convention does not apply should not benefit from its application, whether they arise as preliminary questions or as principal issues. States are not precluded from recognising and enforcing those rulings under national law.
283. **Examples.** If a judgment on a breach of contract ruled, as a preliminary question, on the legal capacity of one of the parties (a natural person) to enter into such a contract, the ruling on this preliminary question would not be recognised under the Convention because such a matter is beyond the scope of the Convention under Article 2(1)(a). Or, if a judgment on directors’ liability ruled, as a preliminary question, on the validity of a decision of the shareholders’ meeting, this ruling would not be recognised under the Convention because such a matter is beyond its scope under Article 2(1)(i). However, the judgment on the main object would benefit from recognition and enforcement under the Convention, subject to paragraph 2, discussed below. Thus, for example, where a judgment ruled that a party is entitled to receive compensation for breach of contract, but contained a ruling on a preliminary question of legal capacity of the co-contracting natural person to enter

²⁰² See Hartley/Dogauchi Report, paras 195-196.

²⁰³ Since the Convention does not require the recognition of rulings on preliminary questions, Art. 8(1) may be unnecessary, (as stated in the Hartley/Dogauchi Report, *id.*, “[...] the Convention never requires the recognition or enforcement of such rulings, though it does not preclude Contracting States from recognising them under their national law”, para. 195). This explains why the Convention is silent on those cases where the preliminary question does not fall under either of the two categories referred to in Art. 8. For example, in an action for damages to a movable asset (main object), the court might have to decide on the ownership of that asset (preliminary question). In principle, the part of the judgment ruling on a preliminary question will not circulate under the Convention and, therefore, Art. 8(1) should not be interpreted *a contrario*. However, “in the case of rulings on matters outside the scope of the Convention [...] the question is so important that it was thought desirable to have an express provision”, Hartley/Dogauchi Report, para. 196.

into the contract, the ruling on the judgment's main object – the order for damages – could be recognised and enforced under the Convention (subject to Art. 8(2)). The Convention, however, does not require recognition of the ruling on the preliminary question in subsequent proceedings in the requested State concerning or involving that question. It follows, for example, that the judgment on damages may not prevent proceedings being commenced in the requested State on the legal capacity of the natural person (or, in the second example, on the validity of a decision of the shareholders meeting).²⁰⁴

284. **Matters falling under Article 6.** Paragraph 1 also refers to rulings on preliminary questions concerning a matter referred to in Article 6 from a court of a State other than the State referred to in this provision, *i.e.*, the State where the immovable property is situated. For example, if a judgment on damages given in State A, on the basis of the defendant's residence, ruled as a preliminary question on the ownership of an immovable property situated in State B, the ruling on this preliminary question would not be recognised under the Convention because courts of the State where immovable property is located have exclusive jurisdiction to rule on ownership (Art. 6). The judgment from State A may not prevent new proceedings in State B to rule on the right *in rem* over the immovable property, as explained in the preceding paragraph referring to proceedings in the requested State about the legal capacity of a natural person or the validity of the decision of the shareholders' meeting.

Paragraph 2 – 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, or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.

285. Paragraph 2 allows a court to refuse recognition or enforcement of a judgment if it is based on rulings on preliminary questions on the same matters dealt with by paragraph 1. This provision adds an additional ground for non-recognition to those contained in Article 7. Recognition or enforcement of a judgment may be refused *if, and to the extent that*, the judgment was based on a ruling on a matter (i) to which the Convention does not apply, or (ii) referred to in Article 6 on which a State other than the State where the immovable property is situated ruled. Thus, for example, under paragraph 2, the court of the requested State may refuse recognition of a judgment on the nullity of a contract (main object), or a judgment awarding damages for breach of contract (main object), if and to the extent that, it was based on a ruling on the lack of capacity of a natural person to enter into such a contract (preliminary question).
286. The practical application of this provision requires the court of the requested State to examine the content of the foreign judgment and verify if, and to what extent, the decision on the main object of the proceedings is based on the ruling on the preliminary question. The question is whether a different ruling on the preliminary question would have led to a different judgment on the main object of the proceedings. In other words, the court of the requested State must verify whether the ruling on the preliminary question provides a necessary premise on which the judgment is based.²⁰⁵ For example, if the court of origin declares the nullity of a contract because of the absence of legal capacity and the existence of fraud, the

²⁰⁴ If the rulings are incompatible, it would be for the law of the requested State to determine the consequences. It may be that the effects of the foreign judgment are revised when a new judgment on the "preliminary question" is given in the requested State but this time as the main object.

²⁰⁵ Hartley/Dogauchi Report, para. 200.

ruling of legal capacity is not necessary to the judgment since fraud would have been sufficient on its own to nullify the contract. The Hartley/Dogauchi Report clarifies that this exception should be used only where the court of the requested State would have decided the preliminary question differently,²⁰⁶ such that the decision on the main object would also have been different. The Twenty-Second Session confirmed that this condition is also required when applying Article 8(2) of Convention. This could arise with a judgment that orders the payment of damages for breach of contract, as the main object, but on the basis of a preliminary decision on the capacity of a natural person to enter into that contract. In such a case, the court addressed may only refuse recognition or enforcement if that court would have decided the question of capacity in a different way,²⁰⁷ and this would also have led to a different judgment on the obligation to pay damages.

287. **Difference with the HCCH 2005 Choice of Court Convention.** The parallel provision in the HCCH 2005 Choice of Court Convention contains a third paragraph dealing with judgments ruling on the validity of an intellectual property right other than copyright or a related right as a preliminary question (Art. 10(3)). According to this provision, recognition or enforcement of the judgment may only be refused if, and to the extent that, the ruling on the validity of the intellectual property right is inconsistent with a judgment, or a decision of a competent authority, given in the State under the law of which the intellectual property right arose, or if proceedings concerning the validity of the intellectual property right are pending in that State. The main purpose of this rule is to limit the strategic use of the invalidity of a registered intellectual property right by way of defence.
288. This provision has not been included in the Convention. The Twenty-Second Session decided to depart from the solution of the HCCH 2005 Choice of Court Convention for two main reasons. First, when the jurisdiction of the court of origin is based on the agreement of the parties, it may be reasonable to limit the defendant's option to invoke the invalidity of a registered intellectual property right by way of defence. The defendant voluntarily assumed this risk. But this is not the case in relation to most of the filters laid down by Article 5 of the Convention. And second, the scope of the exclusion of intellectual property matters in the Convention requires a granular analysis that may vary depending on the circumstances of the case, especially in the context of contracts relating to those matters (see *supra*, para. 65). The inclusion of a parallel provision may have prejudiced the interpretation of that exclusion; in particular, it may have invited an interpretation according to which all contractual disputes relating to intellectual property rights would fall within the scope of the Convention.²⁰⁸ Because of this deletion, and assuming that the Convention applies to the main object of the judgment, Article 8 will apply to intellectual property matters in the same way as it applies to any other excluded matter.

²⁰⁶ *Ibid.*, para. 197.

²⁰⁷ This is to be determined under the law of the requested State, including its private international law rules.

²⁰⁸ See, Hartley/Dogauchi Report, paras 199-200.

Article 9 Severability

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

289. Article 9 provides for the recognition and enforcement of a severable part of a judgment where this is applied for, or where only part of the judgment is capable of being recognised or enforced under the Convention.²⁰⁹ Examples include situations where parts of the judgment would not be subject to recognition or enforcement because they involve matters that fall outside the scope of the Convention, are contrary to public policy, or are not as yet enforceable in the State of origin. A further example is a judgment on several contractual obligations where the criterion of Article 5(1)(g) is only satisfied in relation to one of them.²¹⁰
290. In order to be severable, the part of a judgment must be capable of standing alone. This would normally depend on whether enforcing only that part of the judgment would significantly change the obligations of the parties. If severability raises issues of law, they will have to be determined according to the law of the requested State.²¹¹

²⁰⁹ This Art. replicates Art. 15 of the HCCH 2005 Choice of Court Convention. See also Hartley/Dogauchi Report, para. 217.

²¹⁰ This example assumes that there is no other filter available under Art. 5(1).

²¹¹ Nygh/Pocar Report, para. 374.

Article 10 Damages

1. 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.
2. 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.

291. Article 10 allows a court to refuse recognition or enforcement of a judgment if, and to the extent that, the award of damages does not compensate the plaintiff for actual loss or harm suffered. The compensatory portion of the judgment remains enforceable.

292. “Exemplary” and “punitive” damages mean the same thing and reflect the fact that these damages have an expressly punitive, as opposed to a primarily compensatory objective. While it is generally accepted that compensatory damages can have a deterrent effect, their primary objective is to repair the actual loss suffered. Punitive or exemplary damages, on the other hand, are typically awarded to express condemnation of particularly egregious behaviour on the part of the person who caused harm.

293. The text of Article 10 replicates the equivalent provision in the HCCH 2005 Choice of Court Convention.²¹² To clarify the source and scope of the rule, the Explanatory Report on that Convention included the following detailed statement that had been adopted at the Twentieth Session:²¹³

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

²¹² Art. 11 of the HCCH 2005 Choice of Court Convention.

²¹³ Only those parts of the statement that are relevant to the Convention are included. Portions of the statement that refer to previous versions of the Article on damages in the HCCH 2005 Choice of Court Convention have been omitted. The omissions have been indicated by [...]. For the full statement as it appears in the Explanatory Report of the HCCH 2005 Choice of Court Convention, see Hartley/Dogauchi Report, paras 203-205.

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

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

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

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

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

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

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

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

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

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

294. This statement is equally applicable to the Convention.

Article 11
Judicial settlements (transactions judiciaires)

Judicial settlements (transactions judiciaires) which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.

295. The Convention applies to judicial settlements (*transactions judiciaires*). According to Article 11, settlements which a court of a State has approved, or which have been concluded in the course of the proceedings before a court of a State, and which are enforceable in the State of origin, are to be enforced under the Convention in the same manner as a judgment.
296. **Judicial settlements.** The English term “judicial settlements” is used in this Article as equivalent to the French term *transaction judiciaire*. Judicial settlements, a common institution in civil law jurisdictions, are an agreement concluded before, or approved by, the court in which the parties settled their dispute, usually by making mutual concessions.²¹⁴ Such agreements have some, or even all, of the effects of a final judgment. A judicial settlement is typically distinguished from a “consent order” or “consent judgment” (*jugement d’accord*) granted by the court with the consent of both parties. Such consent orders or consent judgments are dealt with under Article 4 and not Article 11.²¹⁵
297. Article 11 covers both “in-court” settlements, *i.e.*, settlements approved or concluded before a court in the course of the proceedings (as is usually the case in most civil law jurisdictions), and “out-of-court” settlements, *i.e.*, agreements concluded by the parties outside judicial proceedings, which are subsequently approved or confirmed by a court.²¹⁶ Thus, for example, settlements concluded as a result of mediation are covered by Article 11 if they are subsequently approved by a court.²¹⁷ This possibility arises from the distinction drawn in the text between settlements “approved by a court” and settlements “concluded in the course of the proceedings before a court”.

²¹⁴ See Hartley/Dogauchi Report, para. 207. The Brussels Ia Regulation defines a court settlement as “a settlement which has been approved by a court of a Member State or concluded before a court of a Member State in the course of the proceedings”.

²¹⁵ Nygh/Pocar Report, para. 379; Hartley/Dogauchi Report, para. 207.

²¹⁶ The HCCH 2005 Choice of Court Convention contains an equivalent provision on judicial settlements (Art. 12). The Hartley/Dogauchi Report does not expressly address the treatment of out of court agreements subsequently approved by a court (see, para. 207). Interpretation provided in this Explanatory Report is consistent with the language of the provision in both instruments.

²¹⁷ This interpretation does not overlap with the *UNICTRAL Convention on International Settlement Agreements Resulting from Mediation* or the Model Law of the same name. Both instruments expressly exclude mediated settlements that are either approved by courts or concluded in the course of court proceedings.

In both cases, the judicial settlement must be enforceable, in the same manner as a judgment, in the State of origin. To prove this, the party seeking enforcement must produce the certificate referred to in Article 12(1)(d), *i.e.*, a certificate of a court of the State of origin stating that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.

298. **Enforcement versus recognition.** Article 11 provides for the enforcement of judicial settlements, but not their recognition.²¹⁸ Therefore, under the Convention, a judicial settlement from another State may not be invoked in the requested State as, for example, a procedural defence to a new claim.²¹⁹ The Nygh/Pocar Report explains that in some jurisdictions, judicial settlements do not have the force of *res judicata* and therefore cannot be recognised in another State.²²⁰ The Hartley/Dogauchi Report adds that the HCCH 2005 Choice of Court Convention does not provide for the recognition of judicial settlements "mainly because the effects of settlements are so different in different legal systems",²²¹ but "the Convention does not preclude a court from treating the settlement as a contractual defence to the claim on the merits" to prove that the matter has already been resolved.²²² Likewise, the Convention does not preclude a court from granting *res judicata* effect to a foreign judicial settlement under national law.
299. The grounds for refusing enforcement of judicial settlements are the same as those applicable to judgments. But issues of jurisdiction will not arise because settlements are essentially consensual; the same holds for other grounds for refusal set out in Article 7, *e.g.*, defective notification. In practice, the most relevant ground for refusing enforcement will be public policy.

²¹⁸ See *supra*, paras 113-117.

²¹⁹ Hartley/Dogauchi Report, paras 208-209 (with an example).

²²⁰ Nygh/Pocar Report, para. 123. Note, however, that under the 1999 preliminary draft Convention, in order to be recognised, judgments must have the effect of *res judicata* in the State of origin (Art. 25(2)). This condition is not contained in the Convention.

²²¹ Hartley/Dogauchi Report, para. 209.

²²² *Ibid.*

Article 12
Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce
 - (a) a complete and certified copy of the judgment;
 - (b) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
 - (c) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;
 - (d) in the case referred to in Article 11, a certificate of a court (including an officer of the court) of the State of origin stating that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.
2. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require any necessary documents.
3. An application for recognition or enforcement may be accompanied by a document relating to the judgment, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.
4. If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

300. Article 12 lists the documents to be produced by the party applying for recognition or enforcement of a judgment under the Convention.²²³ In legal systems without a special procedure for recognition (see *infra*, para. 308), the party requesting recognition may have to produce those documents when they seek to rely on the foreign judgment, e.g., by way of defence.²²⁴

²²³ This provision is essentially similar to Art. 13 of the HCCH 2005 Choice of Court Convention and to Art. 29(1) of the 1999 preliminary draft Convention.

²²⁴ Hartley/Dogauchi Report, para. 210, limits this requirement to circumstances where “the other party disputes the recognition of the judgment”. This, however, does not preclude third parties or local authorities (for example, a Registrar) from requesting those documents.

Paragraph 1 – The party seeking recognition or applying for enforcement shall produce

Sub-paragraph (a) – a complete and certified copy of the judgment;

Sub-paragraph (b) – if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;

Sub-paragraph (c) – any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;

Sub-paragraph (d) – in the case referred to in Article 11, a certificate of a court (including an officer of the court) of the State of origin stating that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.

301. Paragraph 1(a) requires production of a complete and certified copy of the judgment. A "judgment" includes, where applicable, the court reasoning and not only the final order (*dispositif*).²²⁵ If the judgment was given by default, paragraph 1(b) requires the production of the original or a certified copy of a document establishing that the document that instituted the proceedings or an equivalent document was notified to the defaulting party. Conversely, if the judgment was not given by default, it is assumed that the defendant was notified unless they produce evidence to the contrary (see Art. 7(1)(a)). Paragraph 1(c) requires the production of any document necessary to prove that the judgment has effect or, where applicable, is enforceable in the State of origin. In principle, this will be stated by the court of origin in the Recommended Form prepared by the Permanent Bureau of the HCCH (see para. 3). Other means of proof may also be used in accordance with the procedural rules of the requested State, e.g., official statements or legal opinions.²²⁶ For judicial settlements, paragraph 1(d) requires the production of a certificate from a court of the State of origin, including an officer of the court,²²⁷ stating that the settlement or a part of it is enforceable in the same manner as a judgment in the State of origin (see *supra*, paras 295-296). This certificate may be issued by a court other than the court involved in the settlement.
302. The Hartley/Dogauchi Report clarifies two issues with regard to paragraph 1. First, the law of the requested State determines the consequences of the failure to produce the required documents. Second, excessive formalism should be avoided. If the judgment debtor was not prejudiced by the absence of documents, the judgment creditor should be allowed to rectify omissions.²²⁸

²²⁵ Hartley/Dogauchi Report, para. 211.

²²⁶ To ensure the effectiveness of the Convention, Contracting States must provide for some means of satisfying this requirement.

²²⁷ The reference to an officer of the court in Art. 12(1)(d) is not contained in the parallel provision of the HCCH 2005 Choice of Court Convention (see Art. 13(1)(e)). The Twenty-Second Session did not find a particular reason to exclude this possibility, which is provided in Art. 12(3) and in the parallel provision of the HCCH 2005 Choice of Court Convention (see Art. 13(3)). As a result, the reference to an officer of the court in Art. 12(1)(d) was included but with no intention to depart from the HCCH 2005 Choice of Court Convention.

²²⁸ Hartley/Dogauchi Report, para. 211.

Paragraph 2 – If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require any necessary documents.

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

Paragraph 3 – An application for recognition or enforcement may be accompanied by a document relating to the judgment, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.

304. Paragraph 3 provides that an application for recognition or enforcement can be accompanied by the Form recommended and published by the HCCH.²²⁹ This Form is issued by a court (including by an officer of that court) of the State of origin. The Convention does not require that the court issuing the Form be the court that gave the judgment. Although States are not required to adopt the Form, its use may facilitate the process of recognition or enforcement. If the Form is used, the court addressed may rely on information contained in it in the absence of challenge. But even if there is no challenge, the information is not conclusive; the court addressed can decide the matter based on all the evidence before it.²³⁰
305. The Form includes a section on judicial settlements. Where the Form is used in relation to a judicial settlement, it satisfies the requirement for a certificate under paragraph 1(d).

Paragraph 4 – If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

306. Paragraph 4 deals with the language of the documents listed in Article 12. If the documents are not in an official language of the requested State, they must be accompanied by a certified translation into an official language, unless the requested State provides otherwise. This State may, therefore, provide that a translation is not necessary at all or that a non-certified translation is sufficient.
307. Unlike the HCCH 2005 Choice of Court Convention (see Art. 18), this Convention does not include a provision on the exemption from legalisation. As a consequence, the certification of foreign legal documents (*i.e.*, legalisation or apostille) is governed by the rules of the requested State, including the international conventions ratified by that State.

²²⁹ For ease of reference, the Form is presented on pages 35-40 of this publication. It is also available on the HCCH website at < www.hcch.net > under "Judgments".

²³⁰ Hartley/Dogauchi Report, para. 213.

Article 13 Procedure

1. The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court of the requested State shall act expeditiously.
2. The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

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

308. Paragraph 1 provides that the procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless the Convention provides otherwise. Thus, the law of the requested State determines whether recognition is automatic or requires a special procedure. Where the law of the requested State does not require a special procedure for the recognition of a foreign judgment, a judgment will be recognised automatically, *i.e.*, by operation of law, based on Article 4 of the Convention.²³¹

309. **Enforcement process.** Article 13 refers to distinct phases of the enforcement process in the requested State.²³² In many States, enforcement will proceed in two phases: first, proceedings will be instituted by the judgment creditor to obtain from the competent authority of the requested State a confirmation or declaration that the foreign judgment is enforceable in that State. Such a declaration of enforceability is called “*exequatur*” in many States. In other States a registration procedure may be provided. The second phase of enforcement refers to the legal procedure by which the courts (or competent authorities) of the requested State ensure that the judgment debtor obeys the foreign judgment. It includes measures such as seizure, confiscation, attachment, or judicial sale. This second phase – often referred to as “execution” of the judgment – presupposes a declaration of enforceability or a registration for enforcement. Typically, once the first phase has been completed, the foreign origin of the judgment is no longer relevant, and the judgment creditor will have access to the same measures of execution (the second phase of enforcement) in the requested State that would be available for a domestic judgment. In other States, these two phases can be combined into a single proceeding, where the court

²³¹ *Ibid.*, para. 215.

²³² Note, however, that in other provisions of the Convention, the term “enforcement” is used with the meaning of “declaration of enforceability or registration for enforcement” (see, *e.g.*, Art. 5 or 7).

may grant a declaration of enforceability of the foreign judgment and also order measures of execution. Regardless of the precise process in a given State, paragraph 1 subjects both phases of the enforcement process to the law of the requested State.

310. **Limitation periods.** In referring to the procedure for enforcement, Article 13 is intended to include the rules of the law of the requested State that provide a limitation period for enforcement of a judgment.²³³ Such rules are applicable, unless, as expressly stated in Article 13, the “Convention provides otherwise”. The Convention does provide, in Article 4(3), that enforcement in the requested State depends on the judgment being enforceable in the State of origin. As a consequence, a longer period of limitation for enforcement in the requested State will not extend the enforceability of a foreign judgment that is no longer enforceable in the State of origin.²³⁴
311. However, this does not address the situation where a shorter limitation period is applicable to the enforcement of judgments in the requested State. A judgment creditor might seek to bring enforcement proceedings in the requested State during the period of enforceability of the judgment under the law of the State of origin but after the limitation period for enforcement under the law of the requested State has expired. Even if the foreign judgment remains enforceable under the law of the State of origin, Article 13 does not prevent the application of a shorter limitation period for enforcement of a judgment under the law of the requested State. For example, if according to the law of the State of origin (State A) the judgment remains enforceable for 15 years but the law of the requested State (State B) establishes a 5-year period, the latter is entitled to prevail. That is, once this latter period has expired, the judgment given in State A will no longer be enforceable in State B.
312. The reference to the law of the requested State in Article 13 is not necessarily to be understood as a direct reference to its internal law. Indeed, the law of the requested State may instead identify the relevant limitation period by reference back to the law of the State of origin or even apply the limitation period governing the substantive right on which the judgment rules. The approaches to this issue vary significantly among jurisdictions and the Convention takes no position on the way the applicable limitation period is determined under the law of the requested State. This interpretation is necessary to ensure the equal treatment of States in relation to the limitation period issue.
313. **General principle under the law of treaties.** Notwithstanding the preceding paragraphs, the reference to the law of the requested State is not a blanket reference. In accordance with Article 31(1) of the Vienna Convention of 1969, a treaty

²³³ The limitation period referred to here only relates to the enforcement of a foreign judgment and should not be conceptually confused with the limitation period governing the original substantive right or claim at stake, *i.e.*, the limitation period to bring a legal action on the merits before a court. This matter relates to the merits of the judgment given by the court of origin and may not be reviewed by the requested State in accordance with Art. 4(2).

²³⁴ Distinct limitation periods may apply under national law to the two phases of enforcement. An initial limitation period may apply to the time limit for instituting proceedings to seek a declaration or confirmation of enforceability (this may apply equally in those States where the two phases are combined in a single proceeding). Once that judgment is obtained, its concrete execution may become subject to a different limitation period. In such a case, the eventual execution of the judgment in the requested State may be possible beyond the limitation period in the State of origin. This may be explained by the fact that once a judgment is declared enforceable under the Convention in the requested State, the judgment becomes equivalent to a domestic judgment and the Convention no longer has any application to its treatment in the requested State.

must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. An essential element to ensure the effectiveness of the Convention (see para. 2 of the Preamble) is the principle of non-discrimination: judgments given in other States, once they have been determined to be enforceable under the Convention, are to be treated in the same manner as domestic judgments. This principle has implications for limitation periods. In particular, a national law that provides for shorter limitation periods for enforcement of foreign judgments than for domestic judgments would not be compatible with this principle. Similarly, when the law of the requested State establishes a special rule on the limitation period for the declaration of enforceability of foreign judgments, an unreasonably short period may be incompatible with the principle of effectiveness of the Convention.

314. Paragraph 1 also provides that in proceedings covered by this provision, the courts (or the competent authorities) of the requested State must act expeditiously. States should consider provisions to avoid unnecessary delays.²³⁵
315. **Application for refusal.** Article 13 only refers to a procedure for recognition, declaration of enforceability or registration for enforcement. But it does not preclude States from providing for applications to *refuse* recognition or enforcement. Thus, States may provide for a judgment debtor to request a declaration of non-recognition (or non-enforceability) of a judgment given in another State on the basis that the judgment is not eligible for recognition under Article 5 or 6, or on one of the grounds referred to in Article 7.

Paragraph 2 – The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

316. Paragraph 2 provides that the court of the requested State shall not refuse the recognition or enforcement of a judgment under the Convention on the ground that recognition and enforcement should be sought in another State. This prevents a court refusing on the basis that, for example, there is an alternative forum where recognition or enforcement of the judgment is more appropriate and convenient.
317. Under the Convention, the judgment creditor may seek recognition and enforcement of the judgment in any State. Even if it entails more costs, a judgment creditor may have a legitimate interest in seeking the enforcement of a judgment in more than one State, such as in cases of worldwide injunctions or in cases of monetary judgments against a party with assets in different States but which are each alone insufficient to satisfy the judgment.
318. The existence of different approaches to the issue addressed in this paragraph explains the need for this provision. In many legal systems, enforcement does not require a basis of jurisdiction, *i.e.*, a special connection between the judgment debtor and the requested State, such as the presence of the debtor's assets in that State. The mere interest of the judgment creditor is sufficient.

²³⁵ Hartley/Dogauchi Report, para. 216.

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

Article 14
Costs of proceedings

1. 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.
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.
3. A State may declare that it shall not apply paragraph 1 or designate by a declaration which of its courts shall not apply paragraph 1.

320. Article 14 deals with security that may be required to guarantee payment of the costs of proceedings, including declaration of enforceability or registration for enforcement, and the enforcement of the judgment.²³⁶ The provision reflects a compromise. Some States supported a "no-security rule". Others preferred to leave this question to national law. The first approach is reflected in the first and second paragraphs, while the second approach is reflected in the third paragraph by means of an opt-out mechanism.

Paragraph 1 – 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.

321. The first paragraph of Article 14 mirrors a traditional view that no security, bond or deposit may be required from the applicant for the sole reason that they are a national of another State or their residence or domicile is in another State.²³⁷ Paragraph 1 only prohibits requirements for security based exclusively on such grounds. A requirement for security is therefore permissible on other grounds,

²³⁶ There is no equivalent provision in the HCCH 2005 Choice of Court Convention.

²³⁷ Nygh/Pocar Report, para. 356.

e.g., that the judgment creditor has no assets in the requested State. The clause applies to both natural and legal persons, irrespective of whether they are a national of another Contracting State or of a third State (or whether they have their residence or domicile in another Contracting State or in a third State).²³⁸

Paragraph 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.

322. The second paragraph of Article 14 is a corollary to the "no-security rule". It protects the judgment debtor when enforcement of the judgment is refused and an order for payment of costs or expenses is issued against the judgment creditor. According to paragraph 2, such an order falls within the scope of the Convention and is enforceable in any other State. This exceptional provision is required because such a cost order would not otherwise be considered to be a judgment for the purposes of the Convention. Under Article 3(1)(b), only orders for payment of costs or expenses that relate to a "decision on the merits which may be recognised or enforced under the Convention" are entitled to enforcement under the Convention. A decision on enforcement of a foreign judgment is not a "decision on the merits" in the sense of Article 3(1)(b). Although the enforcement of an order for payment of costs or expenses is authorised under Article 14(2), it may be refused on the grounds contained in Article 7 of the Convention.
323. This paragraph applies in two situations. First, it applies when an exemption from security for costs has been granted in accordance with paragraph 1. This presupposes that the law of the requested State requires, in general, security for costs for the enforcement of foreign judgments on the sole ground of the nationality, domicile or residency of the judgment creditor, but that an exemption has been granted by virtue of paragraph 1, *i.e.*, for judgments given in another Contracting State. This exemption may arise automatically by operation of law or on a case by case basis by a decision of the court addressed. Second, this paragraph applies when such security does not even exist under the law of the requested State, *i.e.*, when the law of the requested State does not require security for costs solely based on the foreign nationality, domicile or residency of the judgment creditor. Naturally, these States must also receive the full benefit of this provision in the sense that their courts' orders for costs will also circulate under the Convention. The words "or the law of the State where proceedings have been commenced" reflect this second situation.²³⁹

²³⁸ Note that in this provision, the term "resident" is not qualified by the adjective "habitual". This may be explained by the fact that this Article reproduces the first sentence of Art. 14 of the HCCH *Convention of 25 October 1980 on International Access to Justice* (hereinafter "HCCH 1980 Access to Justice Convention"), which uses the same wording.

²³⁹ See Art. 15 of the HCCH 1980 Access to Justice Convention.

Paragraph 3 – A State may declare that it shall not apply paragraph 1 or designate by a declaration which of its courts shall not apply paragraph 1.

324. Finally, the third paragraph sets out a declaration mechanism to opt-out from the no-security rule. A State may declare that it shall not apply paragraph 1 in some or all of its courts. Thus, it is possible to exclude the application of paragraph 1 to certain courts, *e.g.*, to federal courts but not state courts.
325. Article 14 does not clarify how the reciprocity principle would apply when a State makes a declaration under paragraph 3. If the origin of the judgment is taken as a reference, where that judgment is given by the courts of a State that made the declaration, the judgment creditor should not benefit from the no-security rule in paragraph 1. The second paragraph should not apply to cost orders given by a court of the State that made the declaration, where that court imposed security for costs.²⁴⁰

²⁴⁰ Naturally, this is only likely to occur where the security for costs was insufficient to cover the entirety of the costs order.

Article 15
Recognition and enforcement under national law

Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.

326. Article 15 deals with how the Convention relates to national law, providing that, subject to Article 6, the Convention does not prevent the recognition or enforcement of judgments under national law. This provision is based on a *favor recognitionis* principle. If a judgment cannot be recognised or enforced under the Convention, because, *e.g.*, it is not eligible according to Article 5, a party may still seek recognition and enforcement under national law. In other words, the Convention sets a minimum standard for mutual recognition and enforcement of judgments but States may go further. If a judgment is not eligible for recognition or enforcement under the Convention, the national law of the requested State determines whether a party may resort to national law "as a whole" or may combine provisions from both systems.
327. However, Article 6 prevents national law being invoked to grant recognition or enforcement to a judgment that infringes the exclusive basis of jurisdiction in that provision (see *supra*, para. 231).

Chapter III – General clauses

Article 16 Transitional provision

This Convention shall apply 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.

328. Article 16 deals with the temporal application of the Convention. The Convention shall apply if, at the time the proceedings were instituted in the State of origin, it already had effect between that State and the requested State. The court addressed must verify (i) the date when the proceedings were instituted in the State of origin (see *supra*, para. 41) and (ii) whether at that time the Convention was effective between the State of origin *and* the requested State. Article 16 is thus based on a non-retroactivity principle. This solution provides legal certainty. All parties will be able to determine, prior to the initiation of the proceedings, whether the future judgment will circulate under the Convention and prepare their procedural strategies accordingly.
329. The determination of the temporal application of the Convention is distinct from the issue of its entry into force (see *infra*, Art. 28) and the establishment of relations between two Contracting States (see *infra*, Art. 29). Since the Convention only operates between two Contracting States (see *supra*, Art. 1(2)), Article 16 presupposes that (i) the Convention has entered into force (Art. 28) and (ii) that neither the State of origin nor the requested State has objected to the establishment of relations with the other under Article 29, *i.e.*, it presupposes that the Convention “has effect” between the State of origin and the requested State.
330. **Example.** State A ratifies the Convention in April 2020 and State B in May 2020. According to Articles 28 and 29(1), if neither of them makes a declaration under Article 29(2) or 29(3), the Convention shall enter into force and have effect between those two States on 1 June 2021 (see *infra*, para. 401). Pursuant to Article 16, it will apply to the recognition and enforcement of judgments deriving from proceedings that are instituted on or after that date.

Article 17
Declarations limiting recognition and enforcement

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.

331. Article 17 provides that a State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another State if the parties were resident in the requested State and the relationship of the parties and all other elements relevant to the dispute (other than the location of the court of origin) were connected only with the requested State. This provision is from the HCCH 2005 Choice of Court Convention (see Art. 20).
332. **Rationale.** Article 17 deals with situations that are, from the point of view of the requested State, wholly domestic. It allows a State to relieve itself from the obligation to recognise and enforce a judgment under the Convention in these cases. Typically, HCCH instruments only apply to international cases. However, for the purposes of recognition and enforcement, a case is always international if the judgment was given by a court in a State other than that in which recognition or enforcement is sought. Yet there may be scenarios where the internationality of the case has been engineered by the parties. Some of the filters laid down by Article 5 may be met in a wholly domestic situation, in particular those based on implied or express consent (see Art. 5(1)(c), (e), (f), (k), (l), or (m)). A judgment given in such cases would ordinarily circulate under the Convention even if the dispute had no additional connections with the State of origin. Article 17 recognises that such a case may not be a true international case, and that, on a proper analysis of the connecting elements of the dispute, the dispute ought to have been heard in the requested State. States may make a declaration to address such scenarios.
333. **Relevant time.** The relevant time to determine whether a situation is wholly domestic is the time when the proceedings were instituted in the State of origin. Thus, if the requested State has made the declaration envisaged by Article 17, the court addressed must verify if, at the time when the proceedings were instituted in the State of origin, the parties were resident in the requested State and their relationships and all other relevant elements were also connected only with the requested State.²⁴¹ Only in such a case may the court addressed refuse to recognise or enforce the judgment under Article 17.

²⁴¹ Note that this provision, like Art. 20 in the HCCH 2005 Choice of Court Convention, does not use the term "habitual residence" but simply "residence". In practice, this is not relevant since, if the residence is not habitual, the conditions for the application of this provision will not be met.

334. **Example.** The parties are resident in State A and all other relevant elements are connected only with that State. One of the parties brings proceedings before a court in State B, and the defendant argues on the merits without contesting jurisdiction. If the court of State B gives a judgment on the merits, that judgment will circulate under the Convention (see Art. 5(1)(f)). However, if State A has made the declaration envisaged by Article 17, it will not be required to recognise or enforce that judgment. Other States, however, may not invoke the declaration made by State A to refuse recognition or enforcement of the judgment.

Article 18
Declarations with respect to specific matters

1. 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.
2. 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.

335. Article 18 permits States to extend the list of matters excluded from the scope of the Convention beyond those enumerated in Article 2(1) through a declaration. It provides that, where a State has a strong interest in not applying the Convention to a specific matter, it may declare that it will not do so.

336. **Rationale.** This provision facilitates the ratification of the Convention by “relaxing” its scope of application. If such opt-outs were not possible, some States might not become Parties to the Convention.²⁴² However, this policy must be balanced against the interests of the other States and the fundamental objectives of the Convention itself, *i.e.*, to enhance the cross-border effectiveness of judgments in civil and commercial matters. To achieve this balance, Article 18 contains certain safeguards.

Paragraph 1 – 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.

337. **Safeguards.** First, a State should only make a declaration where it has a strong interest to do so and the declaration should meet the proportionality principle, *i.e.*, the scope of the declaration should not be broader than necessary. In accordance with this principle, the exclusion may be defined by a reference to a specific subject matter, *e.g.*, “contracts over immovable property”, “consumer contracts”, “labour contracts”, “environmental damage” or “anti-trust”. Such a reference may be narrowed down, *e.g.*, by: (i) a particular link between the subject matter and the

²⁴² See also Hartley/Dogauchi Report, para. 236.

requested State, e.g., "contracts over immovable property situated in the requested State"; or (ii) a particular type of remedy in that subject matter, e.g., "injunctions in anti-trust matters". This approach is consistent with the policy underpinning the provision since it ensures that the declaration "is no broader than necessary".²⁴³

338. Secondly, the specific matter excluded must be clearly and precisely defined. This ensures that the parties and other States are able to easily identify the scope and reach of the declaration.²⁴⁴ Under Article 30, any declaration under Article 18 must be notified to the depositary, which will inform the other States (Art. 32 (c)). The declarations will also be posted on the website of the HCCH to ensure transparency.
339. The Convention does not require any particular form for the declarations. However, where a State makes a declaration stating that the Convention does not apply to matters within its exclusive jurisdiction, for example, it should include a clear and precise list of such matters.²⁴⁵
340. **Non-retroactivity.** A declaration under Article 18 made at the time the Convention comes into force in the requested State will take effect simultaneously. But a declaration made *after* the Convention comes into force for the requested State will take effect on the first day of the month following the expiration of three months following the date on which the notification is received by the depositary (see Art. 30(4)). Such a declaration will not apply to judgments resulting from proceedings that have already been instituted before the court of origin when the declaration takes effect (see Art. 30(5)). This ensures that the parties will be able to determine, when the proceedings are instituted, whether or not the future judgment will be affected by this declaration.

Paragraph 2 – With regard to that matter, the Convention shall not apply –

Sub-paragraph (a) – in the Contracting State that made the declaration;

Sub-paragraph (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.

341. **Reciprocity.** Paragraph 2 establishes reciprocity for declarations made under Article 18(1). With regard to matters excluded by a declaration, the Convention shall not apply (i) in the State that made the declaration and (ii) in other States where recognition or enforcement of a judgment given in a State that made the declaration is sought. In this latter case, however, the reciprocity principle does not prevent the recognition or enforcement of the judgment under national law.
342. **Review of declarations.** Article 21 envisages that the operation of declarations under Article 18 may be considered from time to time (see *infra*, para. 354).

²⁴³ Note that the Hartley/Dogauchi Report, at para. 235, may be read to suggest a stricter interpretation of the parallel provision in the HCCH 2005 Choice of Court Convention. The only declaration made under Art. 21 of the HCCH 2005 Choice of Court Convention at this point is consistent with the interpretation put forward in this Report (see Declaration of the European Union, under Art. 21 of the HCCH 2005 Choice of Court Convention, of 11 June 2015, available on the HCCH website at < www.hcch.net > under "Choice of Court Section" then "Status table").

²⁴⁴ The Hartley/Dogauchi Report, at note 274, points out that where the State making the declaration so wished, the declaration could first be sent in draft to the Secretary General of the HCCH for circulation to the other States for their comments.

²⁴⁵ See *Aide memoire* of the Chair of the Special Commission (Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017)), para. 23.

Article 19
Declarations with respect to judgments pertaining to a State

1. A State may declare that it shall not apply this 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.

343. This provision permits a State to make a declaration that it shall not apply the Convention to judgments which arose from proceedings to which that State, a government agency of that State, or a natural person acting for either of them, was a party, even though the judgment relates to civil or commercial matters.
344. **Rationale.** The Convention does not exclude judgments from its scope merely because a State was a party to the proceedings (Art. 2(4)). While the Convention expressly applies only to civil or commercial matters (Art. 1(1)), some delegations maintained that this limitation could be challenging to apply with regard to a State party, in particular with respect to whether a State party was exercising sovereign powers. A further concern was that the preservation of immunities in Article 2(5) might be insufficient to protect State interests. Article 19 responds to these concerns by allowing States to make a declaration excluding the application of the Convention to judgments that arose from proceedings to which such a State was a party.

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

Sub-paragraph (a) – that State, or a natural person acting for that State; or

Sub-paragraph (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.

345. Paragraph 1 identifies the parties who can be included in the declaration. According to paragraph 1(a) and (b), these include the State itself and a government agency of that State. It also includes a natural person acting for either of them,²⁴⁶ but it does not include legal persons acting for the State, unless they qualify as government agencies.²⁴⁷ In all cases, paragraph 1 identifies parties who have the authority to exercise sovereign power, whether directly or in a delegated manner, generally or in a specific field, and natural persons acting for them, regardless of their employment status. 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. Political sub-divisions of a State (including regional or local government) can also be included in a declaration under this provision. In essence, an Article 19 declaration can only be made in relation to a party who has the capacity to exercise sovereign power, even though it may also engage in commercial activities. The terms are broad to capture the diversity of government structures and procedural definitions of juridical personality or capacity among States. Paragraph 1 also requires that the declaration be no broader than necessary and that the exclusion from scope be clearly and precisely defined. As a result, a State making a declaration under Article 19 should identify which government agencies are covered by its declaration and the circumstances under which they would be included.

346. **Safeguards.** The structure and content of Article 19 is largely parallel to Article 18. As in Article 18, the State making such declaration shall ensure that the declaration is no broader than necessary (see *supra*, para. 337) and that the exclusion from scope is clearly and precisely defined (see *supra*, para. 338). For example, the declaration may refer to any proceedings, in civil or commercial matters, or to only certain categories of proceedings. The declaration may be limited to certain subject matters and additional criteria may be specified to narrow down its scope, *e.g.*, to certain government agencies, a particular link between the subject matter and the requested State or certain types of remedies (see *supra*, para. 337). Additionally, paragraph 1 clarifies that the declaration shall not distinguish between judgments where the State, a government agency or a natural person acting for either of them,

²⁴⁶ The expression "acting for" is also used in Art. 2(4). It covers cases where the natural person is acting "in the name of" the State or a government agency; typically, the person is acting as an "agent" of the State. Conversely it does not cover those cases where the natural person is acting in their own name, *e.g.*, entering into a contract with a third party in their own name and capacity, even if the contract is in the interest of the State.

²⁴⁷ For background on this part of Art. 19(1), see Minutes of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019), Minutes No 6, paras 36-43, and Minutes No 15, paras 155-162, in particular the consensus that this provision does not cover legal persons, irrespective of their ownership, be they commercial enterprises owned by the State or privately owned, except where they are governmental agencies.

is a defendant or claimant in the proceedings before the court of origin. Moreover, it should not distinguish between judgments depending on whether they are the judgment creditor or the judgment debtor.²⁴⁸ When the declaring State merely intervenes in the proceedings in the State of origin as a third party, the judgment may circulate as between the claimant and the defendant, who are not affected by the declaration.

347. **Non-retroactivity.** As in Article 18, 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 *infra*, Art. 30(4)). Such a declaration will not apply to judgments resulting from proceedings that have already been instituted by or against the State party, or to which the State party has already been added, before the court of origin when the declaration takes effect (see *infra*, Art. 30(5)).

Paragraph 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.

348. As in Article 18, paragraph 2 establishes reciprocity for declarations made under Article 19(1).²⁴⁹ When a declaration is made under Article 19(1), another State *may* refuse to recognise or enforce a judgment given by a court of the State that made the declaration and arising from proceedings to which one or more of the following is a party: (i) the declaring State, (ii) the requested State, (iii) a government agency of the declaring State or the requested State, (iv) a natural person acting for the declaring State or the requested State, or (v) a natural person acting for a government agency of the declaring State or the requested State.²⁵⁰ The scope of the refusal to recognise or enforce based on reciprocity should reflect the extent of the declaration.
349. **Example 1.** State A has made a declaration under Article 19(1), which covers any judgment arising out of proceedings to which that State is a party. A judgment given in State B against State A will not be recognised or enforced in State A under the Convention. Such a judgment will however circulate under the Convention in other States (assuming, naturally, that the conditions for such circulation are met, in particular the filters laid down by Art. 5, and subject to Art. 2(5), which confirms that nothing in the Convention affects the immunities of State A).

²⁴⁸ The safeguard seeks to prevent strategic or opportunistic declarations. However, in practice, it cannot prevent the declaring State from recognising or enforcing the favourable judgment under its own national law. This would occur outside the scope of the Convention, *i.e.*, not under Art. 15.

²⁴⁹ Unlike Art. 18(2), the reciprocity principle in Art. 19(2) does not operate to exclude the application of the Convention.

²⁵⁰ The wording of para. 2 confirms that recognition or enforcement may make sense when the declaring State is the judgment debtor.

350. **Example 2 (reciprocity).** If a judgment is given in State A (declaring State) against State B (requested State), the latter State may invoke Article 19(2) to refuse to recognise or enforce such a judgment. State B however may not invoke the reciprocity clause if recognition or enforcement of that judgment is sought in another State, *e.g.*, State C. Likewise, if the judgment had been given in State C (State of origin) and State A (declaring State) is the judgment creditor, State B (requested State) may not refuse to recognise or enforce such a judgment under Article 19(2).
351. **Review of declarations.** Article 21 envisages that the operation of declarations under Article 19 may be considered from time to time (see *infra*, para. 354).

Article 20
Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

352. Article 20 states that in interpreting the Convention regard must be had to its international character and the need to promote uniformity in its application. Courts applying the Convention must interpret it in an international spirit to promote uniformity of application. Where reasonably possible, foreign decisions and commentary should be taken into account, keeping in mind that concepts and principles axiomatic in one legal system may be unknown or rejected in another. The objectives of the Convention can be attained only if all courts apply it in an open-minded way.²⁵¹
353. This Article must be read jointly with Article 21 below (Review of operation of the Convention) because both Articles share the objective of a proper and uniform application of the Convention.

²⁵¹ This clause is also present in the HCCH 2005 Choice of Court Convention (Art. 23). See Hartley/Dogauchi Report, para. 256; the HCCH *Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* (Art. 13); and the HCCH 2007 Child Support Convention (Art. 53).

Article 21
Review of operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for review of the operation of this Convention, including any declarations, and shall report to the Council on General Affairs and Policy.

354. Article 21 requires the Secretary General of the HCCH to make arrangements at regular intervals for the review of the operation of the Convention, including any declarations made under it, and to report to the Council on General Affairs and Policy. One major purpose of these reviews is to examine the operation of declarations under Article 14, 17, 18 or 19. The Council on General Affairs and Policy will determine whether there is a need to begin the process to consider possible amendments to the Convention.

Article 22
Non-unified legal systems

1. In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention –
 - (a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;
 - (b) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;
 - (c) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit;
 - (d) any reference to a connecting factor in relation to a State shall be construed as referring, where appropriate, to that connecting factor in relation to the relevant territorial unit.
2. Notwithstanding paragraph 1, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.
3. A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.
4. This Article shall not apply to Regional Economic Integration Organisations.

355. Article 22 is concerned with potential difficulties resulting from non-unified legal systems, *i.e.*, States composed of two or more territorial units, each with its own judicial or legal system. The individual territorial units of such States may have separate courts and civil procedure (non-unified judicial system) or distinct substantive law rules (non-unified legal system) such that references to “courts of State A” or the “law of State A” are either meaningless or insufficiently precise. Some States may exhibit both of these “non-unified” characteristics. In principle, since the Convention deals with procedural matters (recognition and enforcement of judgments), this Article will typically be relevant only for States that are composed of two or more territorial units, each with its own judicial system.²⁵²

²⁵² See also Hartley/Dogauchi Report, para. 258.

356. This situation occurs most often in the case of federations, such as Canada or the United States of America, but can also occur in other States as well, such as the People's Republic of China or the United Kingdom. In these cases, the question may arise whether a reference to a State in the Convention is to the State as a whole ("State" in the international sense) or whether it is to a particular territorial unit within that State.

Paragraph 1 – In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention –

Sub-paragraph (a) – any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;

Sub-paragraph (b) – any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;

Sub-paragraph (c) – any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit;

Sub-paragraph (d) – any reference to a connecting factor in relation to a State shall be construed as referring, where appropriate, to that connecting factor in relation to the relevant territorial unit.

357. **Interpretive rule.** Article 22(1) provides that where different systems of law apply in the territorial units with regard to any matter dealt with in the Convention, the Convention is to be construed as applying either to the State in the international sense or to the relevant territorial unit, whichever is appropriate. Article 22(1) serves as an interpretive guide to those provisions of the Convention that require the identification of a geographical or territorial location. It has no implications on the scope of the Convention.
358. The words "where appropriate" in the four sub-paragraphs of Article 22(1) do not provide the court in the requested State with discretion on the issue. Rather, this refers to the fact that the reference to the territorial unit rather than the State will only occur where such reference is appropriate because of the relevant non-unified characteristic of the State.
359. The point of departure for this analysis is that the Convention applies to a judgment if it has effect or is enforceable in the State of origin (Art. 4(3)). Where the judgment in question comes from a State with a non-unified judicial system, it may be the case that a judgment from a court in a territorial unit has effect or is enforceable as a domestic judgment only in the territorial unit whose court issued the judgment and not throughout the State as a whole. In other words, while the judgment from the territorial unit may become effective or enforceable in other territorial units within the State, it is not regarded as a domestic judgment in those other territorial units. Depending on the particular configuration or nature of the State's judicial system, judgments from its courts may instead be considered as domestic judgments throughout the State.²⁵³ Where judgments of courts are considered to be domestic only within a particular territorial unit, it may be "appropriate" to refer to that territorial unit whenever the Convention refers to the "State".

²⁵³ Art. 22(2) specifies that the Convention does not apply to situations involving recognition and enforcement between territorial units of non-unified States (see *infra*, para. 365).

360. **Filters.** The application of filters in Articles 5 and 6 may involve recourse to the interpretive rules provided in Article 22. The words “where appropriate” in Article 22 indicate that reliance on the interpretive rule is restricted to situations where the non-unified characteristic of the State of origin is relevant. In cases where the filter refers to a connecting factor with the territory of a State (e.g., in Art. 5(1)(a), (b), (d) or (g)), the analysis provided in the previous paragraph will be relevant to the interpretation of that filter. That is, where the judgment from the territorial unit is a domestic judgment only for that territorial unit and not for the State as a whole, it would be appropriate to treat the reference to “State” in the filter as a reference to the territorial unit. Thus, for example, the condition of Article 5(1)(a) will only be met if the habitual residence of the party against whom recognition or enforcement is sought is within the territorial unit over which the court of origin exercises its jurisdiction. Conversely, if the judgment is one that is effective and enforceable as a domestic judgment throughout the State, then it would be appropriate to treat the reference to “State” in the filter as a reference to the State as a whole.
361. Not all filters include connecting factors. Some only refer to the law of the State. For example, Article 5(1)(f) refers to contesting jurisdiction within the timeframe provided by the “law of the State of origin”. In such a case, it would be appropriate to refer to the procedural law of the territorial unit in the non-unified judicial system of that State, since the law applicable to the issue varies from one territorial unit to the other. Indeed, a reference to the law of the State as a whole would be ineffectual to determine if the filter is met.
362. **Other provisions in the Convention.** The issue of interpretation may also arise when the *requested* State is a non-unified State. For example, under Article 13, the rule that the procedure for recognition or enforcement is governed by the law of the requested State may appropriately be a reference to the law of the territorial unit in a State with a non-unified judicial system.
363. Under Article 7(2), recognition or enforcement may be postponed or refused if proceedings between the parties on the same subject matter are pending before a court of the requested State. The interpretive rule in Article 22(1)(c) justifies a restrictive reading of this provision by limiting its application to parallel proceedings before a court of the territorial unit, if this is the appropriate consequence of the non-unified judicial system of the State. Without Article 22(1)(c), it might be open to the court of a territorial unit to refuse to enforce a judgment because of parallel proceedings before the courts of a different territorial unit within the State, even though this would not normally be an option available within its domestic law. This in turn reinforces the general principle of the Convention that foreign judgments be treated in the same manner as domestic judgments when the relevant criteria for recognition and enforcement are met.
364. **Difference with the HCCH 2005 Choice of Court Convention.** The structure of Article 22 differs slightly from its parallel provision in the HCCH 2005 Choice of Court Convention (Art. 25). These differences arise from the need to adapt this provision to the particularities of the Convention, not from an intention to change its meaning. In Article 25 of the HCCH 2005 Choice of Court Convention, the reference to the term “residence” is expressly mentioned in an independent limb. Conversely, Article 22 of this Convention includes all connecting factors, including “residence”, in one limb (Art. 22(1)(d)) and keeps the reference to “a connection” with a State in a different one (Art. 22(1)(c)). The former encompasses all connecting factors in relation to a State mentioned in the Convention, in particular in Articles 5 and 6 (filters). The latter covers the reference to the term “connection” with a State used in Articles 5(1)(g) and 7(2) of the Convention.

Paragraph 2 – Notwithstanding paragraph 1, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

365. Article 22(2) specifies that a State with two or more territorial units in which different systems of law are applied is not bound to apply the Convention to situations involving solely such different territorial units. This is consistent with Article 1(2) of the Convention that defines the scope of the Convention in terms of recognition and enforcement in one State of judgments given in another State. The recognition and enforcement obligations under the Convention only arise with respect to foreign judgments, understood in the international sense.

Paragraph 3 – A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

366. Article 22(3) states that there is no obligation of recognition or enforcement in one territorial unit flowing from the recognition or enforcement of a foreign judgment in another territorial unit of the same State. Thus, for example, a French judgment enforced under the Convention in Quebec, Canada need not be automatically enforced in Ontario, Canada. This is a natural consequence of the scope of the Convention, as defined in Article 1(2), but it is explicitly addressed in Article 22(3) to avoid confusion.

Paragraph 4 – This Article shall not apply to Regional Economic Integration Organisations.

367. Finally, Article 22(4) indicates that these special rules applying to non-unified legal systems do not apply to an REIO, which is instead governed by its own rules in Articles 26 and 27 (see below).

Article 23
Relationship with other international instruments

1. This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.
2. This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention.
3. This Convention shall not affect the application by a Contracting State of a treaty concluded after this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. Nothing in the other treaty shall affect the obligations under Article 6 towards Contracting States that are not Parties to that treaty.
4. This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Member State of the Regional Economic Integration Organisation where –
 - (a) the rules were adopted before this Convention was concluded; or
 - (b) the rules were adopted after this Convention was concluded, to the extent that they do not affect the obligations under Article 6 towards Contracting States that are not Member States of the Regional Economic Integration Organisation.

368. Article 23 deals with the relationship between the Convention and other international instruments.²⁵⁴ The starting point is Article 30 of the Vienna Convention of 1969, Article 30(2) of which provides that, where a treaty states that it is subject to another treaty (whether earlier or later), the other treaty will prevail. Article 23 of this Convention specifies three cases (Art. 23(2)-(4)) in which another treaty will prevail over it, including where there is a conflict between the Convention and the rules of an REIO that is a Party to the Convention. Outside of these three cases, the Convention has effect to the fullest extent permitted by international law.

²⁵⁴ For a background discussion, see A. Schulz, "The Relationship between the Judgments Project and other International Instruments", Prel. Doc. No 24 of December 2003 for the attention of the Special Commission of December 2003. See also the discussion of customary international law for Contracting States to the Convention which are not party to the Vienna Convention of 1969 (at paras 36 *et seq.*)

369. The problem of conflicting instruments arises only if two conditions are fulfilled. First, the State of the court addressed must be a Party to both instruments. If that State is a Party to only one, its courts will simply apply that one. Article 23 is, therefore, addressed to States that are parties to both the Convention and to another legally binding international instrument that conflicts with it.
370. Second, there must be an actual incompatibility between the two instruments. In other words, the application of the two instruments must lead to incompatible results in a concrete situation. Where this is not the case, both instruments can be applied. In some cases, an apparent incompatibility may be eliminated through interpretation. Where this is possible, the problem is solved. Article 23(1) reflects this approach.

Paragraph 1 – This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

371. The first paragraph of Article 23 contains a rule of interpretation. It provides that the Convention must be interpreted, as far as possible, to be compatible with other instruments in force for Contracting States. This applies irrespective of whether the other instrument was concluded before or after the Convention. Thus, where a provision in the Convention is reasonably capable of two meanings, the meaning that is most compatible with the other instrument should be preferred. This does not, however, mean that a strained interpretation should be adopted in order to achieve compatibility.

Paragraph 2 – This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention.

372. Where two instruments are not compatible in their application to a concrete situation, Article 23(2) allows for the *earlier* instrument to prevail. Article 23(2) does not require the earlier instrument to have been in force prior to the entry into force of this Convention, but merely to have been concluded prior to the conclusion of the Convention, *i.e.*, prior to 2 July 2019. Of course, if the earlier treaty is not yet in force, no possible incompatibility can arise. This specificity avoids any uncertainty in the timing element.²⁵⁵ Furthermore, unlike paragraphs 3 and 4, paragraph 2 does not require that the State of origin also be a party to the earlier treaty.
373. **Example 1 (treaty between Contracting States).**²⁵⁶ State A (State of origin) and State B (requested State) are parties to the 2007 Lugano Convention and Contracting States of this Convention. In relation to an insurance judgment, under the 2007 Lugano Convention, the beneficiary of the insurance (*i.e.*, the injured person or the policy holder) may only be sued before the courts of their domicile. If they are sued

²⁵⁵ Note that Art. 23 takes the time of the Convention's conclusion as the relevant element for distinguishing between *earlier* and *later* treaties, and not the date it entered into force. The date of conclusion is an objective element (determined by public international law) common to all States, whereas the date of entry into force may vary among States. Therefore, the reference to the date of entry into force might have implied that, with regard to the same treaty, some States would have applied Art. 23(2) and others Art. 23(3). See "Report of the informal working group III – Relationship with other international instruments", Prel. Doc. No 9 Rev Rev of June 2019 for the attention of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019) (hereinafter, "Prel. Doc. No 9 of June 2019"), para. 4

²⁵⁶ The example is taken from Prel. Doc. No 9 of June 2019, paras 11 and 14 of the Annex.

elsewhere, recognition or enforcement of the judgment shall be refused (Art. 35). This Convention, however, does not include a special rule for insurance contracts to protect beneficiaries, policyholders or injured parties (unless they qualify as consumers). If a judgment satisfies the filter laid down, *e.g.*, in Article 5(1)(g), then State B will be obliged to recognise and enforce the judgment under the Convention, though the 2007 Lugano Convention forbids it. In such a case, Article 23(2) gives priority to the application of the 2007 Lugano Convention and thus allows State B to refuse to recognise or enforce the judgment without breaching its obligation under the Convention.²⁵⁷

374. **Example 2 (treaty with third States).** State A (State of origin) and State B (requested State) are both Contracting States of the Convention. State B is also a party to an earlier treaty on international settlement agreements.²⁵⁸ Assume that a judgment given by a court of State A is presented for recognition and enforcement under the Convention in State B, and the judgment debtor objects on the grounds that it conflicts with a settlement agreement between the same parties. In such a case, the court of State B may give priority to the treaty on international settlement agreements and refuse to recognise or enforce the judgment, even if State A is not a party to that treaty and even if that treaty entered into force in State B after the Convention. It is sufficient that it was concluded before the Convention. The rationale is that when State A adhered to the Convention, the other treaty had already been concluded and therefore State A somehow assumed the risk that other Contracting States might ratify it.
375. **Relationship with the HCCH 2005 Choice of Court Convention.** Since the HCCH 2005 Choice of Court Convention was concluded in 2005, and involves recognition and enforcement of foreign judgments, it is useful to mention it specifically in relation to Article 23(2). In general, there are no tensions or inconsistencies between the HCCH 2005 Choice of Court Convention and the Convention, as neither instrument restricts or limits recognition and enforcement of judgments under national law,²⁵⁹ including under other treaties.
376. **Example 1.** Where the two States (the State of origin and the requested State) are Contracting States of the Convention and parties to the HCCH 2005 Choice of Court Convention, and, for example, the judgment was given by the chosen court under an exclusive choice of court agreement and the State of origin was also the habitual residence of the person against whom recognition and enforcement is sought, there should be no tension in principle between the two instruments. In most systems, the party seeking recognition and enforcement can rely on either instrument, or on both instruments, in the alternative. There may be a ground for refusal under one instrument that does not exist under the other. This would be the case if the grounds for refusal under the Convention diverged significantly from the grounds for refusal under Article 9 of the HCCH 2005 Choice of Court Convention. The result would be that the State addressed must still recognise and enforce the judgment under the instrument that does not permit refusal. This is because the grounds for refusal under

²⁵⁷ Note, however, that this example is unlikely to occur when the other treaty also establishes rules on direct jurisdiction, as is the case with the 2007 Lugano Convention.

²⁵⁸ The *co-Rapporteurs* note that any similarity between this hypothetical example and the 2018 Convention on International Settlement Agreements resulting from Mediation is purely coincidental.

²⁵⁹ The only limitation to enforcement under national law in the Convention refers to Art. 6, but rights *in rem* over immovable property are excluded from the scope of the HCCH 2005 Choice of Court Convention (see Art. 2(2)(l)), thereby avoiding any risk of inconsistencies on that point.

both instruments are permitted grounds for refusal, not mandated grounds for refusal. There is therefore no requirement to refuse recognition or enforcement under the instrument that permits refusal. If there is an obligation to recognise and enforce under the HCCH 2005 Choice of Court Convention – or national law – then they will apply and there will be no inconsistency with the Convention.

377. **Example 2.** State A (State of origin) and State B (requested State) are both Contracting States of the Convention, while State B and State C are parties to the HCCH 2005 Choice of Court Convention. A judgment is given in State A, where the defendant is habitually resident, but in spite of an exclusive choice of court agreement designating the courts of State C. In such a case, State B may refuse to recognise and enforce that judgment under Article 7(1)(d) of the Convention. It is therefore not even necessary to refer to Article 23 as there is no inconsistency between the two instruments.
378. **Example 3.** A further example might involve two judgments. State A (State of origin) and State B (requested State) are both Contracting States of the Convention, while State B and State C are parties to the HCCH 2005 Choice of Court Convention. State A gives a judgment falling within one of the bases for recognition and enforcement under Article 5 of the Convention and afterwards State C gives another judgment on the basis of an exclusive choice of court agreement. The judgments are inconsistent. In principle, both judgments might have a claim for recognition and enforcement in State B. In such circumstances, Article 7(1)(d) of the Convention would allow giving priority to the judgment of the chosen court (State C). The court addressed is then required to recognise and enforce the judgment of the chosen court unless the other judgment was given first, in which case recognition or enforcement could be refused under Article 9(g) of the HCCH 2005 Choice of Court Convention. In this paradoxical situation, where the judgment of the non-chosen court was the earlier judgment, the court addressed is not compelled to enforce either judgment. In principle, it should be left to the discretion of the requested State whether the ground for refusal will actually lead to the refusal to recognise or enforce a judgment as both Conventions provide that the requested State "may refuse". However, in light of both Conventions' purpose to promote the recognition or enforcement of judgments, the requested State should not refuse the recognition or enforcement of both judgments.²⁶⁰

Paragraph 3 – This Convention shall not affect the application by a Contracting State of a treaty concluded after this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. Nothing in the other treaty shall affect the obligations under Article 6 towards Contracting States that are not Parties to that treaty.

379. Article 23(3) provides for the situation where a Contracting State enters into a treaty dealing with the recognition and enforcement of judgments with another Contracting State, and the other treaty has been concluded *after* this Convention. Unlike Article 23(2), this paragraph requires that the State of origin and the requested States are both Contracting States of the Convention and parties to the later instrument. Furthermore, Article 23(3) uses the expression "as concerns the recognition or enforcement of a judgment" to allow Contracting States to apply a later instrument for the purpose of granting or refusing recognition or enforcement of judgments

²⁶⁰ See Prel. Doc. No 9 of June 2019, para. 4 of the Annex.

given by a court of a Contracting State that is also a party to that instrument, *i.e.*, the prevalence of the later instrument is not limited by a *favor recognitionis* principle.²⁶¹ The general requirement of incompatibility between the two instruments continues to apply.

380. The second difference between earlier and later treaties relates to Article 6 of the Convention. This rule of priority for later instruments does not affect the obligations under Article 6 of the Convention owed to Contracting States that are not parties to the later instrument. This ensures the protection of the exclusive filter contained in Article 6 for Contracting States that are not parties to the later instrument. It does not apply, however, with respect to immovable property in non-Contracting States (see *supra*, paras 237-243).
381. **Example 1.** States A and B are both Contracting States of the Convention. They later conclude a bilateral treaty on enforcement of judgments. This treaty provides that neither of those States will enforce non-monetary judgments in certain matters. According to Article 23(3), this treaty prevails over the Convention and therefore State B may refuse the enforcement of a non-monetary judgment given in State A even if one or more of the filters laid down by Article 5 of the Convention is met. Obviously, this later treaty cannot be invoked against other Contracting States of the Convention to refuse recognition or enforcement of non-monetary judgments given in these States.
382. **Example 2.** States A and B are both Contracting States of the Convention. They later conclude a bilateral treaty on enforcement of judgments. This treaty provides for, among other things, recognition and enforcement of judgments on claims involving rights *in rem* related to immovable property situated in either State. The treaty provides that such judgments can originate either from courts in the State where the immovable property is situated or in the State of the defendant's habitual residence. Under the Convention, the latter judgment could *not* be recognised, even under national law, due to Article 6. This would produce a conflict with the later bilateral treaty. In such a case, the later treaty may prevail under Article 23(3), and justify the recognition and enforcement of the judgment under that treaty.
383. **Example 3.** States A, B and C are all Contracting States to the Convention. States A and B subsequently conclude a bilateral treaty according to which judgments on claims relating to rights *in rem* over immovable property are mutually recognised and enforced even if the immovable property is situated in a third State, as long as the claimant and the defendant are habitually resident in either State A or State B. A court in State A gives such a judgment relating to a right *in rem* over immovable property in State C. The judgment is brought for enforcement in State B. Under the Convention, this judgment cannot be enforced because it does not satisfy the rule in Article 6. In such a case, Article 23(3) cannot be invoked to justify recognition and enforcement since the property is located in a Contracting State that is not a party to the other treaty.

²⁶¹ *Ibid.*, para. 3

Paragraph 4 – This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Member State of the Regional Economic Integration Organisation where –

Sub-paragraph (a) – the rules were adopted before this Convention was concluded; or

Sub-paragraph (b) – the rules were adopted after this Convention was concluded, to the extent that they do not affect the obligations under Article 6 towards Contracting States that are not Member States of the Regional Economic Integration Organisation.

384. Article 23(4) deals with the situation where a Regional Economic Integration Organisation becomes a Contracting Party to the Convention and relates to the circulation of judgments within the REIO. In this context, it is possible that rules (legislation) adopted by the REIO conflict with the Convention. Article 23(4) contains two priority rules. First, the Convention does not affect the application of rules adopted by the REIO before the conclusion of the Convention. Second, the Convention does not prejudice the application of rules adopted by the REIO after the Convention was concluded, to the extent they do not affect the obligations under Article 6 towards Contracting States that are not Member States of the REIO. In practice, this implies that the REIO cannot adopt a rule, after the Convention is concluded, allowing for the circulation among its Member States of judgments on a right *in rem* over immovable property situated in another Contracting State.

Chapter IV – Final clauses

<p style="text-align: center;">Article 24 Signature, ratification, acceptance, approval or accession</p> <ol style="list-style-type: none">1. This Convention shall be open for signature by all States.2. This Convention is subject to ratification, acceptance or approval by the signatory States.3. This Convention shall be open for accession by all States.4. Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.
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385. This provision is concerned with the ways in which a State may become a Party to the Convention. It provides two methods, either (i) by signature followed by ratification, acceptance or approval (paras 1 and 2), or (ii) by accession (para. 3). The mere signing of the Convention obliges the State to refrain from acts that defeat the object and purpose of the Convention (see Art. 18 of the Vienna Convention of 1969). The deposit of the instrument of ratification, acceptance, approval or accession constitutes, in each case, an international act whereby a State expresses its consent to be bound by the Convention (see Art. 2(1)(b) of the Vienna Convention of 1969).
386. Whatever method is adopted by a State, the result is the same.²⁶² Both methods are equally available to Member States and non-Member States of the HCCH. Article 24 also makes no distinction between States that participated at the Twenty-Second Session at which the text was adopted and those that did not. States are free to choose through which method it is most convenient for them to become a Party, which facilitates widespread adherence to the Convention.
387. The relevant instruments are deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands. The depositary then notifies those indicated in Article 32 of any signature, ratification, acceptance, approval or accession under this Article. The entry into force of the Convention, both on an international level and for a specific Contracting State, is governed by Article 28, and the establishment of treaty relations between Contracting States is governed by Article 29.

²⁶² The Hartley/Dogauchi Report points out that in other HCCH Conventions, an acceding State is in a less favourable position than a ratifying State, since accession to those Conventions is subject to the agreement of the States that are already Parties (para. 311). This is not the case with either the HCCH 2005 Choice of Court Convention or with this Convention (see para. 407).

Article 25
Declarations with respect to non-unified legal systems

1. If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may declare that the Convention shall extend to all its territorial units or only to one or more of them. Such a declaration shall state expressly the territorial units to which the Convention applies.
2. If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.
3. This Article shall not apply to Regional Economic Integration Organisations.

388. The Convention deals with "non-unified legal systems" in two different provisions, Articles 22 and 25. The former determines how the Convention must be construed and interpreted in those cases (see *supra*, paras 355-359). The latter envisages a declaration mechanism to extend the application of the Convention to all the territorial units or only one or more of them.
389. **Non-unified legal systems.** Article 25, like Article 22, refers to States that have two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention. Since the Convention deals with procedural matters (recognition and enforcement of judgments), such a definition really refers to States composed of two or more territorial units, each with its own judicial system (see *supra*, paras 355-356). This is the case for federal States, *e.g.*, Canada or the United States of America, but it may occur in other States as well, *e.g.*, the People's Republic of China or the United Kingdom. REIOs, however, are not covered by this Article (see para. (3)).
390. **Declaration.** Article 25(1) permits States to declare that the Convention shall extend to all their territorial units or only to one or more of them. This declaration may be made at the time of signature, ratification, acceptance, approval or accession or any time thereafter. It may also be modified by submitting another declaration at any time afterwards. These declarations shall be notified to the depositary and shall state expressly the territorial unit or units to which the Convention applies. The entry into force and the application in time of the Convention in these cases are addressed by Article 28 (see *infra*, paras 405-406).
391. If a State to which this Article applies makes no declaration, the Convention shall extend to all territorial units of that State.
392. Finally, paragraph 3 establishes that this provision does not apply to an REIO. Article 25 only applies to States (in the international sense) and territorial units *within a State* in which different systems of law apply. Conversely, REIOs are constituted by two or more sovereign States and are dealt with in the next two Articles.

Article 26
Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.
2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.
3. For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 27(1) that its Member States will not be Parties to this Convention.
4. Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation.

393. Articles 26 and 27 enable REIOs to become a Contracting Party to the Convention. An REIO constituted solely by sovereign States may sign, accept, approve or accede to the Convention (the absence of the term *ratify* is intentional, as only States ratify conventions), but only to the extent that it has competence over matters covered by the Convention.²⁶³ REIOs are not considered to be non-unified legal systems within the meaning of the Convention and therefore it is necessary to include a provision permitting them to become a Contracting Party.

394. The Convention contemplates the REIO and its Member States becoming Parties (Art. 26) or the REIO alone becoming a Party (Art. 27).

²⁶³ The Hartley/Dogauchi Report, at note 351, explains that REIOs should have an autonomous meaning (not depending on the law of any State) and that it should be interpreted flexibly to include sub-regional and trans-regional organisations as well as organisations whose mandate extends beyond economic matters.

395. Article 26 is concerned with the first possibility, *i.e.*, where both the REIO and its Member States become Parties to the Convention. This may occur if they enjoy concurrent external competence over the subject matter of the Convention (joint competence), or if some matters fall within the external competence of the REIO and others within that of the Member States (which would result in shared or mixed competence for the Convention as a whole).
396. In view of the importance of this matter, REIOs are to notify the depositary in writing of the matters covered by this Convention in respect of which competence has been transferred to that organisation by its Member States. The notification has to be made at the time of signature, acceptance, approval or accession. Furthermore, REIOs must *promptly* notify the depositary in writing of any changes to their competence as specified in the most recent notice (Art. 26(2)).
397. Where the number of States is relevant for the purposes of the entry into force of the Convention, paragraph 3 provides that any instrument deposited by an REIO shall not be counted unless it declares, in accordance with Article 27(1), that its Member States will not be Parties to it.
398. **Meaning of "State".** A Contracting REIO has, within the limits of its competence, the same rights and duties as a Contracting State. Thus, paragraph 4 provides that where an REIO becomes a Party to the Convention, whether under Article 26 or under Article 27, any reference in the Convention to "Contracting State" or to "State" applies equally, where appropriate, to the REIO. In the case of the European Union, this means that "State" could mean either the European Union or one of its Member States, depending on what is appropriate. It follows that, since the European Union as an REIO may become a party to the Convention and qualify as a Contracting State, its judicial arm, the Court of Justice of the European Union, should be considered as the court of a Contracting State for the purposes of this Convention.²⁶⁴

²⁶⁴ See also Hartley/Dogauchi Report, para. 17: "It follows from this that a choice of court agreement designating 'the courts of the European Community' or referring specifically to 'the Court of Justice of the European Communities (Court of First Instance)' would be covered by the Convention."

Article 27
**Regional Economic Integration Organisation as a Contracting Party
without its Member States**

1. At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.
2. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

399. Article 27 deals with the second possibility mentioned above, *i.e.*, where the REIO alone becomes a Party. This may occur where it has exclusive external competence over the subject matter of the Convention. In such a case, the REIO may declare its Member States bound by the Convention by virtue of the agreement of the REIO. As in the former case, any reference to "Contracting State" or "State" under the Convention shall apply equally, where appropriate, to the Member States of the REIO.

Article 28
Entry into force

1. This Convention shall enter into force on the first day of the month following the expiration of the period during which a notification may be made in accordance with Article 29(2) with respect to the second State that has deposited its instrument of ratification, acceptance, approval or accession referred to in Article 24.
2. Thereafter this Convention shall enter into force –
 - (a) for each State subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of the period during which notifications may be made in accordance with Article 29(2) with respect to that State;
 - (b) for a territorial unit to which this Convention has been extended in accordance with Article 25 after the Convention has entered into force for the State making the declaration, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

400. Article 28 specifies when the Convention enters into force. It distinguishes between the entry into force of the Convention as such, *i.e.*, as an international instrument (para. 1), and the entry into force thereafter for each subsequent adhering State (para. 2).²⁶⁵ In both cases, the date of entry into force is determined by reference to the period laid down by Article 29(2), during which Contracting States may refuse the establishment of relations pursuant to the Convention as regards a new adhering State, in order to keep the parallelism between the entry into force of the Convention and its effectiveness between two Contracting States. Paragraph 2(b) contains a special rule for non-unified States.

Paragraph 1 – This Convention shall enter into force on the first day of the month following the expiration of the period during which a notification may be made in accordance with Article 29(2) with respect to the second State that has deposited its instrument of ratification, acceptance, approval or accession referred to in Article 24.

401. Paragraph 1 establishes that the Convention shall enter into force on the first day of the month following the expiration of the period during which a notification may be made in accordance with Article 29(2) with respect to the second State that has deposited its instrument of adherence to the Convention. Article 28(1) must be read together with Article 29, which allows Contracting States to refuse the establishment

²⁶⁵ To facilitate the reading of this part of the Report, the generic terms "adherence" or "adhering State" are used to mean the act by which a State expresses its consent to be bound by the Convention, and include "ratification", "acceptance", "approval" or "accession" (see Art. 24).

of relations pursuant to the Convention. This possibility of opt-out may be exercised by (i) those States that are Contracting States as regards new States adhering to the Convention, and (ii) by the adhering States in relation to those States that are already Contracting States. The period to exercise the opt-out is 12 months from the date of the notification of adherence of a new State. By the reference to the period laid down in Article 29(2), Article 28(1) entails that the Convention shall enter into force after 12 months from the date when the adherence of the second State has been notified to the first Contracting State. At such a date, the Convention shall enter into force simultaneously for both States.

402. **Example.** State A ratifies the Convention on 14 April 2020, while State B ratifies it one month later on 14 May 2020. State B does not notify that its ratification shall not have the effect of establishing relations with State A (see Art. 29(3)). The ratification by State B is notified by the depositary to State A on 16 May 2020. In accordance with Article 29(2), State A may still make a notification under this provision, and thus opt for not establishing relations pursuant to the Convention with State B, up to and including 16 May 2021. Two situations are then imaginable. If State A does not make such a notification, the Convention will enter into force, and shall have effect between State A and B, on 1 June 2021. If, however, State A makes such a notification, the Convention will enter into force on 1 June 2021, but will not have effect between State A and State B.²⁶⁶

Paragraph 2 – Thereafter this Convention shall enter into force –

Sub-paragraph (a) – for each State subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of the period during which notifications may be made in accordance with Article 29(2) with respect to that State;

Sub-paragraph (b) – for a territorial unit to which this Convention has been extended in accordance with Article 25 after the Convention has entered into force for the State making the declaration, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

403. **Subsequent adherences.** Paragraph 2 specifies when the Convention enters into force for subsequent adhering States. To preserve the parallelism between the entry into force and the date of effectiveness, it also includes a reference to the 12-month period laid down by Article 29(2), as in paragraph 1. According to paragraph 2, for each State subsequently adhering to the Convention, it shall enter into force on the first day of the month following the expiration of the period during which notifications may be made in accordance with Article 29(2) with respect to that State. Thus, taking the example above, where State A does not make a notification regarding State B, if State C ratifies the Convention on 15 June 2021, and this ratification is notified by the depositary to States A and B on 17 June 2021, the Convention shall enter into force with regard to State C on 1 July 2022. If, for example, before 18 June 2022, State A has notified that the adherence to the Convention of State C does not have the effect of establishing relations between the two States (see Art. 29(2)), the Convention shall enter into force for State C on 1 July 2022, but will only have effect as regards State B. Thus, at this date, the Convention will be in force in the three States, but will only have effect between States A and B, and between States B and C.

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In theory, when adhering to the Convention, State B may have also notified that its adherence will not have the effect of establishing relations with State A, but this improbable circumstance would not affect the conclusion; the Convention will enter into force on 1 June 2021, but will have no effect.

404. The rule established by Article 28(2) starts with the adverb “thereafter” and thus applies after the Convention is already in force. However, it does cover cases where a third State adheres before the Convention enters into force, provided that two States have already adhered to it. If a third State adheres to the Convention before its entry into force, the relevant date to start counting the 12-month period as regards this third State is the date of its adherence, not the date of entry into force of the Convention. Thus, for example, State A adheres to the Convention on 14 April 2020, State B on 14 May 2020 and State C on 14 September 2020. The notification of the adherence of State C to States A and B takes place on 16 September 2020. In such a case, the Convention shall enter into force for State C on 1 October 2021.
405. **Special rule for non-unified States.** Paragraph 2(b) establishes a special rule for non-unified States (see *supra*, paras 390-391). In accordance with Article 25, a non-unified State, when adhering to the Convention, may declare that the Convention shall apply to all its territorial units. In such a case, the entry into force is governed by Article 28(2)(a). Article 25 also allows a non-unified State to declare that the Convention shall only apply to one or more of its territorial units. In this case, the State may subsequently extend the Convention to other territorial units. Article 28(2)(b) establishes a special rule for the entry into force of the Convention in these situations, *i.e.*, when a non-unified State that is already a party to the Convention extends its application to a territorial unit that was not initially covered by its adherence. In such a case, the Convention shall enter into force for this territorial unit on the first day of the month following the expiration of three months after the notification of the declaration of that extension. Since Article 29(2) does not apply to individual territorial units, but to the Contracting State as a whole (see *infra*, para. 411), the longer 12-month period is not needed.
406. **Example.** Let us imagine that State A has three territorial units with different judicial systems: A1, A2 and A3. The Convention is in force from May 2022. State A ratifies the Convention in May 2024 and declares, in accordance with Article 25, that the Convention shall only extend to the territorial unit A1. The entry into force of the Convention for State A with respect to territorial unit A1 is governed by the general rule explained above, *i.e.*, Article 28(2)(a). Two years later, on 14 May 2026, State A makes a declaration extending the Convention to territorial unit A2. As regards this declaration, Article 29 does not apply: State A cannot notify that it will not establish treaty relations between A2 and other Contracting States; likewise Contracting States may not notify that the Convention shall not have effect in relation to A2. Thus, in accordance with Article 28(2)(b), the Convention shall enter into force and have effect in relation to territorial unit A2 on 1 September 2026.

Article 29
Establishment of relations pursuant to the Convention

1. This 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.
2. 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.
3. 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.
4. A Contracting State may at any time withdraw a notification that it has made under paragraph 2 or 3. Such a withdrawal shall take effect on the first day of the month following the expiration of three months following the date of notification.

407. Article 29 fulfils two functions: it defines when the Convention becomes effective between two Contracting States and it allows for a limited opt-out option to avoid the establishment of treaty relations with other Contracting States. Such an option was considered fundamental for some States and consensus to include it was reached with a view to facilitating adherence by individual States and to maximise the reach of the Convention. Opt-out mechanisms are included in other HCCH instruments²⁶⁷ but not in the HCCH 2005 Choice of Court Convention. Because the latter instrument applies only to exclusive choice of court agreements, such a mechanism would have been inconsistent with the goal of securing the effect of party autonomy. The present Convention is much broader in scope and therefore a departure from the HCCH 2005 Choice of Court Convention can be justified.

²⁶⁷ See for example the HCCH *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Art. 38); the HCCH *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (Apostille Convention) (Art. 12). See also *supra*, note 262.

Paragraph 1 – This 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.

408. The principal result of Article 29 is that the Convention has effect between two Contracting States only if neither has deposited a notification in respect of the other in accordance with paragraph 2 or 3. Paragraph 1 specifies that in the absence of any such notification, the Convention has effect between the two States from the first day of the month following expiration of the period during which notifications may be made.
409. As explained above (see *supra*, paras 401-402), there is a close link between the Convention's entry into force under Article 28 and the effectiveness condition in Article 29. Effectiveness is also the operative condition under Article 16: the Convention will apply to any given judgment only where the Convention had effect between two Contracting States at the moment proceedings were instituted in the State of origin (see *supra*, paras 328-330).
410. The opt-out mechanism is limited in that it is only available once for bilateral relations between each pair of States. Paragraph 3 provides for the withdrawal of this notification to allow for the establishment of treaty relations and the effectiveness of the Convention between two States.
411. **Non-unified legal systems and REIOs.** Notifications under Article 29 can only be made by one Contracting State in respect of another Contracting State. The opt-out option is not available to, or applicable in relation to, individual territorial units of non-unified States or the individual Member States of REIOs (where the REIO is a Contracting Party), *i.e.*, it applies to the non-unified State or to the REIO as a whole.

Paragraph 2 – 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.

412. Paragraph 2 deals with notification by Contracting States with respect to adhering States.²⁶⁸ It grants a 12-month period for notifying the depositary that treaty relations will not be established with an adhering State. The 12-month period starts to run from the moment the depositary has notified Contracting States of the adhesion. If a Contracting State does not act within the 12-month period, the Convention will have effect between that State and the adhering State, unless the adhering State has made the notification in respect of the Contracting State as permitted under paragraph 3.

²⁶⁸ As indicated in note 265, to facilitate the reading of this part of the Report, the generic terms "adherence" or "adhering State" are used to mean the act by which a State expresses its consent to be bound by the Convention and include "ratification", "acceptance", "approval" or "accession" (see Art. 24).

Paragraph 3 – 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.

413. Paragraph 3 deals with notification by adhering States with respect to Contracting States. It provides that adhering States may notify the depositary that such adherence shall not establish treaty relations with one or more specified Contracting States. This notification is only possible at the time of deposit of the instrument of adherence under Article 24(4). This distinction is explained by the fact that the identity of existing Contracting States is known to adhering States, requiring that the latter make their decision regarding the opt-out prior to depositing their instrument of adherence.
414. **Example.** The Convention has entered into force on 1 May 2022 following the adherence of States A and B, neither of whom has made a notification in relation to the other. State C then adheres to the Convention on 14 May 2022. It is only at that moment that State C is allowed to notify the depositary that its adherence will not have the effect of establishing treaty relations with State A or State B or both (para. 3). States A and B, on the other hand, have 12 months from the moment the depositary notifies them of State C's adherence (say on 16 May 2022) to make the notification regarding treaty relations with State C (para. 2). States A and B will have up to and including 16 May 2023 to do so and therefore the Convention cannot become effective between these three States before 1 June 2023 (para. 1). If State A does make a notification under Article 29(2) but State B does not, the Convention will be effective between States B and C but not States A and C, as of 1 June 2023. It will not be open for either State B or State C to opt-out of treaty relations with the other State at any later point.

Paragraph 4 – A Contracting State may at any time withdraw a notification that it has made under paragraph 2 or 3. Such a withdrawal shall take effect on the first day of the month following the expiration of three months following the date of notification.

415. If a State has exercised its opt-out option, whether under paragraph 2 or 3, it can withdraw it at any time. This withdrawal will take effect on the first day of the month following the expiration of three months following the date of notification. Of course, this will not affect the treaty relations with the designated State if that State had also made a notification under paragraph 2 or 3 and has not withdrawn it.
416. **Example.** Continued from the previous example, if State A decides to withdraw its notification regarding State C and does so on 15 September 2024, it will become effective on 1 January 2025 and therefore the Convention will be effective between States A and C as of that date. Judgments given from proceedings instituted in either State from 1 January 2025 will therefore be eligible for recognition or enforcement in either State. It will not be open for either State to opt-out of relations pursuant to the Convention with the other State at any later point.

Article 30 Declarations

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.
2. Declarations, modifications and withdrawals shall be notified to the depositary.
3. A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.
4. 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.
5. 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.

417. **Timing of declarations.** The 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. They are made to the depositary (the Ministry of Foreign Affairs of the Netherlands).
418. **Entry into effect of declarations at the time of signature or adherence.** A declaration made at the time of signature, ratification, acceptance, approval or accession takes effect simultaneously with the entry into force of the Convention for the State concerned.
419. **Entry into effect of declarations made at a subsequent time.** A declaration made at a subsequent time, and any modification or withdrawal of a declaration, takes effect on the first day of the month following the expiration of three months following the date on which the notification is received by the depositary. However, such a declaration shall not apply to judgments resulting from proceedings that have already been instituted before the court of origin when the declaration takes effect. As a result, declarations will not have any retroactive effect in terms of their application to proceedings that have been instituted prior to the coming into effect of the declaration. The same applies to any modification or withdrawal of a declaration. This ensures greater predictability in the operation of the Convention for all parties to the proceedings.
420. **Reservations.** The Convention does not contain any provision prohibiting reservations. This means that reservations are permitted, subject to the normal rules of customary international law (as reflected in Art. 2(1)(d) and Arts 19–23 of the Vienna Convention of 1969).

Article 31
Denunciation

1. A Contracting State to this Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.
2. The denunciation shall take effect on the first day of the month following the expiration of 12 months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

421. Article 31 provides that a State may denounce the Convention by a notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which the Convention applies. The denunciation takes effect on the first day of the month following the expiration of 12 months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect on the expiration of the longer specified period, after the date on which the notification is received by the depositary.

Article 32
Notifications by the depositary

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded to this Convention in accordance with Articles 24, 26 and 27 of the following –

- (a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 24, 26 and 27;
- (b) the date on which this Convention enters into force in accordance with Article 28;
- (c) the notifications, declarations, modifications and withdrawals referred to in Articles 26, 27, 29 and 30; and
- (d) the denunciations referred to in Article 31.

422. Article 32 requires the depositary to notify the Members of the HCCH, and other States and REIOs that have signed, ratified, accepted, approved or acceded to the Convention, of various matters relevant to the Convention, such as signatures, ratifications, entry into force, declarations and denunciations.

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