Towards a global Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

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Abstract

This article describes the background and context of the 'Hague Judgments Project'. Apart from earlier attempts, three stages may be distinguished in the history of this project: a first stage, dominated by the dynamics of the early European integration process, with the result that the 1965 and 1971 Hague Conventions on choice of court and recognition and enforcement of judgments, although providing inspiration for the 1968 Brussels Convention, remained unsuccessful; a second stage, very much determined by the transatlantic dimension, with differing strategic objectives of the EU and the USA notably regarding judicial jurisdiction, resulting in the lack of success of the 'mixed' convention proposal; and a third stage, where negotiations took on a more global character, resulting in the 2015 Choice of Court Convention and the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

The article discusses the interaction between the global Hague and the regional EU negotiations on jurisdiction and enforcement of judgments, the impact of domestic judicial jurisdiction rules (the claim/ forum relationship versus the defendant/forum link) on the Hague negotiations and other (in some cases: recurrent) core issues characterizing each of the aforementioned three stages, and their influence on the type (single, double, 'mixed') and form of convention that resulted from the negotiations.

1. Introduction

Following a series of lectures given at the Law Faculty of the University of Niš (Serbia), the author was invited to write a contribution on the 'Hague Judgments Project' for the Law Faculty's Journal. That contribution was published in early 2019, and thus before the Diplomatic Session of the Hague Conference on Private International Law (18 June-2 July 2019), which completed the drafting of what has become the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. The present article is essentially a reprint of this Niš Law Journal contribution.[1] It therefore focuses on the Draft

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1 See *Zbornik radova Pravnog fakulteta Univerziteta u Nišu/ Collection of Papers Faculty of Law, Niš,* No. 82, LVIII, 2019, pp. 15-35, https://heinonline.org/HOL/Page?handle=hein.journals/copnis82&div=1&id=&page=&collection=journals, reprinted with the kind permission of the publishers; whilst the bibliography and annex have been omitted, a few clarifications have been added.

Convention drawn up in May 2018 (the '2018 Draft').[2] References have been added in footnotes to facilitate a comparison with the final Convention text, which largely follows the 2018 Draft. However, since this article was essentially written before the Convention was adopted, it does not systematically compare the 2018 Draft with the final text. Rather, it aims at providing the essential background and context of the negotiations, as they unfolded over an extensive period of time.

In addition to the preparation of the Diplomatic Session, arrangements were made for a further meeting of an Experts' Group to address 'matters relating to direct jurisdiction (including exorbitant grounds and *lis pendens*/declining jurisdiction), to be held shortly after the conclusion of the Diplomatic Session'.[3]

The Judgments Project started with an American proposal in 1992, which first led to an attempt to negotiate a 'mixed' convention. The idea, developed by Prof. Arthur von Mehren, was to draw up an instrument that would: (1) *require* the court of origin of a judgment (the rendering court) to decide cases brought before it on certain grounds of (adjudicatory or judicial) jurisdiction prescribed by the instrument (the 'white' or 'green' list), with the effect that the resulting judgment *must* be recognised and enforced by all other Contracting States, (2) *prohibit* the rendering court to base its judgment on certain grounds of jurisdiction (the 'black' or 'red' list), with the result that any judgment based upon such prohibited grounds *may not* be recognised and enforced, and (3) leave a 'grey area' of grounds of jurisdiction not included in any of these two lists to national law, with the effect that courts of Contracting States remain free to assume jurisdiction on any such other ground provided by their national laws, and free to recognise and enforce, or not, judgments based on any such ground.[4]

With the 'mixed' convention concept as a start, negotiations took place from 1996 until 2001. But the resulting 2001 Interim Text,[5] preceded by a Preliminary Draft Convention in 1999,[6] left many issues unresolved and was not followed by a final text. Therefore, it was decided to take a step back and to focus, first, on a possible instrument on jurisdiction and the recognition and enforcement of foreign judgments *only* in cases where *commercial* parties conclude an exclusive *choice of court agreement*. This led to the adoption, on 30 June 2005, of the Hague Convention on Choice of Court Agreements[7] ('COCC'), which entered into force on 1 October 2015.

Following the completion of the COCC in 2005, a new attempt was made to negotiate a convention with a wider substantive scope. Without abandoning the idea of an instrument

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2 See https://assets.hcch.net/docs/9faf15e1-9c36-4e57-8d56-12a7d895faac.pdf. The Draft, adopted in English and French, is accompanied by an Explanatory Report by Prof. Francisco Garcimartín and Prof. Geneviève Saumier, who took part in the Special Commission as the experts of Spain and Canada, respectively, see Prel. Doc. No. 1 of December 2018 – Judgments Convention: Revised Draft Explanatory Report, https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf.

3 Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference, March 2018, https://www.hcch.net/en/governance/council-on-general-affairs > Archive > Meeting 2018. The Experts' Group met in February 2020.

4 See A. von Mehren, 'Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies, and Practices of Common-Law and Civil-Law Systems', General Course, *Recueil des Cours /Collected Courses* (295) 2002, pp. 408-425, with further references.

5 See https://assets.hcch.net/docs/e172ab52-e2de-4e40-9051-11aee7c7be67.pdf.

6 See https://assets.hcch.net/docs/638883f3-0c0a-46c6-b646-7a099d9bd95e.pdf.

7 See https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf.

dealing both with the issue of the original ('direct') jurisdiction of the rendering court and the recognition and enforcement of the resulting judgment – a 'double' convention (*traité double*) – negotiations concentrated on an instrument on the *recognition and enforcement of judgments only* – a 'single' convention (*traité simple*). This resulted in the 2018 Draft, the basis for the 2019 Diplomatic Session. In contrast to a double convention, a single convention does not directly deal with grounds of jurisdiction of the rendering court, which therefore remains free to decide on any ground offered by its own law. Instead, a single convention only provides, indirectly, that if a foreign judgment, retrospectively, may be considered as being based on any ground of adjudicatory jurisdiction listed in the convention, that judgment is entitled to recognition and enforcement.

2. Background and context

The work of the Hague Conference on judgments in civil and commercial matters has a long history.[8] Since the 1960s, this history has been intertwined with legislative action regarding civil and commercial judgments in the context of the European Economic Community (EEC), subsequently the European Union (EU).

2.1 The 1965 Choice of Court and 1971 Recognition and Enforcement Conventions

2.1.1 Interaction with the 1968 Brussels Convention

The first Hague attempts to draw up a multilateral treaty on recognition and enforcement of judgments date back to the 1920s. They were resumed after the Second World War. In 1956 a Convention on Choice of Court Agreements in the Context of International Sales Contracts saw the light of day, first signed in 1958.[9] This instrument, in turn, inspired a Convention on the Choice of Court[10] with a wider scope, adopted in 1964 and first signed in 1965. But neither of these instruments entered into force.

In 1966 the Conference adopted a Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters,[11] first signed in 1971. This was a single Convention, therefore dealing only with indirect adjudicatory jurisdiction. But this instrument made recognition and enforcement subject to a bilateral agreement to be concluded between any two Contracting States to the Convention. In addition, the Convention was supplemented by an optional Protocol[12] that excluded a number of 'exorbitant' grounds of jurisdiction, thus barring any foreign judgment based on such grounds from recognition and enforcement.

8 See also L.E. Teitz, 'Another Hague Judgments Convention? Bucking the Past to Provide for the Future', *Duke Journal of Comparative & International Law* (29) 2019, pp. 491-511, https://scholarship.law.duke.edu/djcil/vol29/iss3/7.

9 See https://www.hcch.net/en/instruments/conventions/full-text/?cid=34.

10 See https://www.hcch.net/en/instruments/conventions/full-text/?cid=77.

11 See https://www.hcch.net/en/instruments/conventions/full-text/?cid=78, with explanatory report by Ch. Fragistas.

12 See https://www.hcch.net/en/instruments/conventions/full-text/?cid=79, with explanatory report by G. Droz.

The 1958, 1965 and 1971 Hague Conventions[13] provided inspiration for the work of the Member States of the EEC that resulted in the 1968 Brussels Convention on the Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters. But the Brussels Convention, now Brussels Regulation 1215/2012 (Recast)[14] ('Brussels I recast'), went much further than the Hague texts in major respects:

(1) The Brussels Convention and Regulation are *double* instruments: they provide uniform rules of *direct* jurisdiction, determining both the bases of jurisdiction which the rendering court must apply and those it may not apply – thus going beyond the original objective of establishing uniform rules for the recognition and enforcement of judgments only;
(2) they provide for recognition and enforcement generally without a review of the grounds of jurisdiction; and
(3) they benefit from a mechanism of uniform interpretation by the Court of Justice of the EU (CJEU).

Soon after its adoption, the Brussels Convention turned out to be a great success. It provided the model for the Lugano Convention of 1988, revised in 2007.[15] But it was precisely this success that reduced the life chances of the 1965 and 1971 Hague Conventions. The European Member States of the Conference, focused on litigation in Europe, showed little interest in the Hague instruments, although these could have provided a bridge to non-European countries. As a result, these other countries also lacked interest, especially the US, which had a very liberal system for the recognition and enforcement of foreign judgments but was keen to obtain more easy recognition and enforcement of US judgments in Europe.

2.1.2 Other reasons why the 1971 Recognition and Enforcement Convention failed

There were two further reasons why the 1971 Hague Convention never got off the ground: its alleged discriminatory effect, and the bilateralisation requirement. The 1968 Brussels Convention had been severely criticized by the American Prof. Nadelmann for discriminating against defendants based outside Europe. The Convention (in its Art. 4, now Art. 6 of Brussels I recast) not only maintains exorbitant bases of jurisdiction regarding defendants not domiciled in the EU, but also makes these grounds of jurisdiction available to any person domiciled in an EU Member State, and amplifies their effect by ensuring the free circulation of the resulting judgment in all States Parties. This criticism prompted the US delegation, supported by the United Kingdom, to propose, as an additional instrument to the 1971 Convention, the 1971 Protocol (*supra* section 2.1.1), in order to neutralize these effects. But the Protocol complicated the operation of the Convention.

Interestingly, the discrimination argument was heard less as negotiations in The Hague progressed, probably because it became more widely accepted that the EU should be seen as

13 As well as the 1958 Hague Convention on the Recognition and Enforcement of Decisions on Maintenance Obligations Towards Children, https://www.hcch.net/en/instruments/conventions/full-text/?cid=38.

14 *OJ* 2012, L 351/1, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:En:PDF, as modified by Regulation 542/2014 and Regulation 2015/281.

15 *OJ* 2007, L 339/3, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22007A1221(03)&from=EN.

one unity in respect of the circulation of judgments. Contrary to the Protocol to the 1971 Convention, the 2018 Draft does not contain a list of prohibited indirect grounds of jurisdiction, but only of *exclusive* indirect grounds (Art. 6, *infra* section 5.2). One could imagine, however, that the discrimination argument might revive with Brexit, unless the UK were to remain bound by the Lugano Convention in either its 1988 or 2007 versions. If not, exorbitant bases of jurisdiction in the EU will revive against defendants domiciled in the UK!

The second issue – bilateralisation – has not disappeared. As noted (*supra* section 2.1.1), the 1971 Convention was to work only between Contracting States that had concluded a bilateral treaty to that effect, as a negotiated expression of mutual trust. This forces Contracting States to decide, in respect of any other Contracting State, whether or not to accept that State as a partner for purposes of recognition and enforcement. That does not facilitate ratification. The 2018 Draft leaves the bilateralisation question unresolved.[16]

2.2 The 1999 Preliminary Draft Convention and the 2001 Interim Text[17]

2.2.1 Mixed convention, *traité simple*, *traité double*

In May 1992 the legal adviser of the US State Department in a letter to my predecessor Georges Droz, proposed that the Conference 'take up the negotiations on a multilateral convention on the recognition and enforcement of judgments'. Attached to the letter was a report by Prof. von Mehren, setting out his idea of the 'mixed' convention, which, as we have seen, also included proposals relating to *direct* adjudicatory jurisdiction. The US had initially envisaged bilateral negotiations with European States only, but when we pointed out the benefits of a multilateral instrument applying at the global level, and the experience of the Hague Conference with multilateral treaty-making, the US chose the Hague Conference as the negotiating forum.

However, we felt that the 1971 Hague Convention could not simply be ignored. So we suggested that the prudent course would be to proceed, just as the Brussels Convention had developed, by starting negotiations on a *single* convention, a *traité simple*, including certain indirect grounds of jurisdiction, and then look at whether the further step of a double convention, a *traité double,* including direct grounds of jurisdiction, was possible.[18] However, the politics of the 1990s dictated a different course.

2.2.2 US v. EU

In fact, the dynamics of the negotiations were very much determined by the transatlantic dimension, with very different, and as it turned out, incompatible strategic objectives on each side. On the one hand, the US was interested in securing recognition and enforcement of its

16 The final Convention text did find a solution, see Art. 29.

17 For the history of the 2001 Interim text and the 1999 Preliminary Draft Convention, see F. Pocar and C. Honorati (eds.), *The Hague Preliminary Draft Convention on Jurisdiction and judgments*, Proceedings of the Round Table held at Milan University on 15 November 2003, Milan, 2005.

18 See 'Some reflections of the Permanent Bureau on a general convention on enforcement of judgments', Prel. Doc. No. 17 of May 1992, Hague Conference on Private International Law, *Proceedings of the Seventeenth Session, Tome I, Miscellaneous Matters*, 1995, pp. 231-293.

judgments, and non-discrimination for its US-based companies and persons regarding direct grounds of jurisdiction in Europe (*supra* section 2.1.2). But since the US pursued a liberal policy in respect of the recognition and enforcement of foreign judgments,[19] it had little to offer in exchange. Europe, on the other hand, was primarily interested in seeing the US reduce the reach of the grounds of jurisdiction of its courts over Europe-based companies and persons. This was, in the EU strategy, the price the US should pay in order to obtain easier access for its judgments in Europe and the abolishment of the EU's discriminatory policy towards non-EU-based defendants.

So, the negotiations in the period 1996-2001 were strongly focused on issues of adjudicatory jurisdiction. The EU pushed towards a full double convention, which the US resisted. Tension mounted further with the 1997 Amsterdam Treaty that entered into force in 1999, which gave the EU legislative powers in the field of private international law, and led to the perception that the EU States acted as a bloc in the Hague negotiations. A Preliminary Draft Convention was adopted in 1999, generally welcomed by European States but not by the US and some other States. By 2001, when the 'Interim Text' full of disputed bracketed language saw the light of day, it was clear that a comprehensive convention dealing with both jurisdiction and the recognition and enforcement of judgments was beyond our reach, and that the project had to be scaled down.

Nevertheless, the work invested in the project was not lost. Various ideas and provisions found their way into the COCC (*supra* section 1), as well as into the 2018 Draft. Moreover, the 1999 Nygh-Pocar Report on the Preliminary Draft Convention[20] has been an invaluable reference tool not only for the Hartley-Dogauchi Explanatory Report on the COCC[21] but also for the Garcimartín-Saumier Report on the 2018 draft Convention.

2.2.3 Six major challenges

Six major issues, in particular, prevented the conclusion of a comprehensive global *traité double* in 2001. Four of these were related to direct grounds of jurisdiction – (i) activity-based jurisdiction, (ii) the internet, (iii) consumer and employment contracts, and (iv) intellectual property (IP). The other two were (v) bilateralisation and (vi) the relationship with the Brussels (and Lugano) regime.[22] These issues had to be, and were, resolved in the context of the COCC. They also provided challenges for the negotiations on the Judgments Convention.

19 Recognition and enforcement in the US are not covered by federal statute, but mainly by two Uniform Acts, the 1962 Uniform Foreign Money-Judgements Recognition Act and the 2005 Uniform Foreign-Country Money Judgments Recognition Act. The liberal attitude towards recognition and enforcement which they reflect is followed, in those states of the US that have not adopted these two statutes and for judgments not covered by them, by common law principles based on comity.

20 See https://assets.hcch.net/docs/638883f3-0c0a-46c6-b646-7a099d9bd95e.pdf.

21 See https://assets.hcch.net/upload/expl37final.pdf.

22 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, https://assets.hcch.net/docs/fc32c43e-22ac-4cb1-8f79-67688d66b282.pdf.

2.3 The 2005 Choice of Court Convention[23]

2.3.1 How the COCC deals with these challenges

Activity-based jurisdiction (major issue (i)) and the internet (ii) present challenges when it comes to determining the proper determination of the competent court in the absence of a designation by the parties. These issues disappear, however, where the parties agree themselves on the competent court, the situation contemplated by the COCC. Regarding consumer and employment contracts (iii), they are excluded from the scope of the COCC. The Convention also found a way to deal with IP issues (iv): it excludes issues of validity of patents and trademarks, the idea being that they should not be the object of contractual designation, but be litigated in the place where they were registered. But since that problem does not arise with unregistered rights such as copyright, these are included. On the other hand, agreements on the infringement of patents and trademarks are, again, excluded, except where they are part of a dispute on a licensing contract. The exclusions do not apply to proceedings if the excluded matter arises merely as a preliminary issue.

In the context of the COCC, limited to situations where the parties agree on the exclusive court, there was no need to provide for a bilateralisation mechanism (major issue (v)). Importantly, the COCC found a solution for its relationship with the Brussels and Lugano regimes[24] (vi), thus providing inspiration for the negotiations on the Judgments Convention.[25]

2.3.2 Interaction between the COCC and Brussels I recast

The COCC has had a substantial impact on the revised provisions on prorogation of jurisdiction (Art. 25) and *lis pendens* (Art. 31) of Brussels I recast. Conversely, this has facilitated the early approval of the COCC by the EU.[26] As we shall see, the COCC also, in many respects, has been a model for the 2018 Draft, including its scope and grounds for the refusal of recognition and enforcement. But there are also departures from that model.

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23 See H. van Loon, 'The 2005 Hague Convention on Choice of Court agreements: an Introduction', and other contributions on various aspects of the COCC by R. Brand, M. Stanivukovick, B. Musseva, J.U. Alihodzic, and B.C. Süral, in 12th Regional PIL Conference: 'Private International Law on Stage – National, European and international Perspectives', 23 and 24 October 2015', *Anali Pravnog Fakulteta Univerziteta U Zenici*, 2016, https://www.prf.unze.ba/Docs/Anali/Analibr18god9/1.pdf. H. van Loon, 'The Global Horizon of Private international Law', *Recueil des cours/Collection of Courses* (380) 2016, pp. 1-108 (at pp. 46-51), Chinese translation, 著，张美榕译，吴用校：《全球视角中的国际私法》，in《国际法研 (*Chinese Review of International Law*), 2017 年第六期, vol. 6.

24 See Art. 26(6) respectively 26(2) and (3).

25 See Art. 24(4) and (2) and (3), which reappear as Art. 23(4) – with some refinements – and (2) and (3) in the final text of the Convention.

26 In addition to the EU (27 States), Denmark, Mexico, Montenegro and Singapore are Parties to the COCC. With a view to ensuring the continued application of the Convention, following Brexit, the UK signed and ratified the Convention on 28 December 2018, entry into force following the transition period. China and the US have signed but not yet ratified the Convention.

3. Challenges for the negotiations on the Judgments Convention[27]

3.1 Changed dynamics

If one could say that at the time of the 2001 Interim Text, the EU-US dynamics prevailed, nowadays the negotiations in The Hague have changed and have acquired a more global character. China and other (formerly) 'emerging' States have become more actively involved, and any new treaty must reflect more global interests. That a judgments convention would serve the whole world was always our hope at the Permanent Bureau, and had been a major argument when we suggested the Hague Conference as the appropriate forum for the topic (*supra* section 2.2.1).

In some respects, it has become more challenging to reach a global agreement. A noticeable example here is IP (major issue (iv), *supra* section 2.2.3). Whereas the COCC found a solution for the inclusion of some IP rights in the treaty, in the course of the negotiations on the 2018 Draft, China, the EU, the US, and others, each had their own views on whether IP should be included, and, if so, which aspects. The 2018 Draft reflects this lack of common understanding (*infra* section 4.4).

On the other hand, the limitation of the Judgment Project to the recognition and enforcement of judgments – therefore not including the direct determination of the grounds of jurisdiction of the rendering court – should make it easier to reach consensus. As we saw (*supra* section 1), for the purpose of such a convention, a foreign judgment needs to pass the test of whether the court giving the judgment had a sufficient link with the case in terms of the indirect grounds of jurisdiction listed in the convention, but States remain free to determine in which cases their courts may, or may not, assume jurisdiction. So, contrary to the COCC which excludes consumer and employment contracts (major issue (iii), *supra* section 2.2.3), judgments in such matters are included in the 2018 Draft (*infra* section 4.5).

Nevertheless, the difference in approach between the US and other States to adjudicatory jurisdiction, although reduced by recent US Supreme Court decisions, remains an important issue even at the stage of recognition and enforcement of judgments. As a result, major issues such as activity-based jurisdiction (i), and the internet (ii) (*supra* section 2.2.3), pose challenges also for the negotiations on the Judgments Convention.

3.2 Adjudicatory jurisdiction: the US compared with other States

In the US adjudicatory jurisdiction is a constitutional matter – in that respect its position is rather unique.[28] Whatever statutes in the US say about the reach of the jurisdiction of the courts, the courts must apply constitutional principles of due process to check that the limitations of due process are not exceeded. According to *International Shoe* v. *Washington*,[29] the defendant must have 'minimum contacts' with the forum state such that the maintenance of the

27 See also Andrea Bonomi, 'Courage or caution? A critical overview of the Hague Preliminary Draft on Judgments', *Yearbook of Private International Law* (17) 2015/2016, pp. 1-31. This article discusses an earlier draft text, but is still relevant. And see the contribution by Teitz 2019 (*supra* n. 8).

28 In *Pennoyer* v. *Neff*, 95 US 714 (1878) the US Supreme Court decided that when it comes to adjudicatory jurisdiction defendants are protected under the Fifth and Fourteenth amendments of the US Constitution.

29 326 US 310 (1945).

suit does not 'offend traditional notions of fair play and substantial justice'. This leads to a focus on the relationship *between the defendant and the forum*, whereas in Europe and other States it is the relationship *between the subject matter of the litigation (or claim) and the forum* that is the relevant touchstone.

At the same time, in the US the defendant is found for purposes of adjudicatory jurisdiction not only where it is *domiciled*[30] – the dominant approach of the Brussels/Lugano system – but also when it is *active* in a State or *directs activity* at that State – a criterion which in Brussels I recast only appears in Article 17(1)(c) relating to consumer cases. If the defendant is not domiciled in a State, but is doing business there in a continuous and systematic manner, it may be brought to court in that country, *even if the claim arises out of the activity of the defendant elsewhere*, not in that State: in the American terminology, the court then has *general jurisdiction*, as opposed to *specific jurisdiction*.

Recently, and in part as a result of the criticisms expressed during the negotiations on the Judgments Project in The Hague of the overly broad assertion of adjudicatory jurisdiction to which this may lead, the US Supreme Court[31] has narrowed the standard for *general jurisdiction*. A corporation's link with the forum must be so *continuous* and *systematic* as to render it 'essentially at home' in the forum State, which comes close to the place of incorporation and principal place of business known in the Brussels/Lugano system.

If the defendant, although not present in the forum country, is active there, or directs activity at that country but not in such a continuous and systematic manner as to render it 'essentially at home' in that country, then it may still be subject to the jurisdiction of that court, provided the claim 'arises out of that activity': *specific jurisdiction*. This, however, requires 'purposeful availment' by the defendant of 'the benefits and protections of [the forum State's] laws'.[32] Again, recent case law of the Supreme Court has limited the reach of the 'arising out/purposeful availment' requirement.[33]

So, in respect of *contracts*, the court–dispute connection based on the place of performance of the contract, as defined by Article 7(1) of Brussels I recast, is in the US view on the one hand too narrow, because it does not provide for jurisdiction where the defendant, without being active *in* that country, directed its activity *at* that country. But on the other hand it is too broad, because it may lead to the jurisdiction of a court in a country in which the defendant neither was active nor at which it directed activities.

In respect of *torts* (Art. 7(2) Brussels I recast), the EU and US approaches do not conflict in so far as the court-claim connection is based on the place where the act or omission causing the injury occurs. But in so far as the court-claim connection is based simply on the place where the injury arose, and not on the 'purposeful conduct' of the defendant, the US has a problem. In the

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30 Or *deemed* to be domiciled, see Arts. 11(2), 17(2), and 20(2) of the Brussels Regulation (Recast).

31 First in *Goodyear Dunlop Tires* v. *Brown*, 131 S. Ct. 2846 (2011), then in *Daimler AG* v. *Bauman,* 134 S. Ct. 746 (2014). In *Daimler* (p. 23), the Supreme Court referred to the Solicitor General's brief, according to which 'foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments', an indirect reference to the Hague negotiations on a 'mixed' convention.

32 Justice O'Connor, in *Asahi Metal Industry Co.* v. *Superior Court*, 107 S. Ct. 1026 (1987).

33 See *McIntyre Machinery, Ltd.* v. *Nicastro*, 131 S. Ct. 2780 (2011); *Bristol-Myers Squibb Co.* v. *Superior Court of California*, 137 S. Ct. 1773 (2017).

US view, this is only acceptable if the defendant's activity is in one way or another directed at the country where the injury took place. In *Walden* v. *Fiore*,[34] the US Supreme Court recently ruled that mere injury suffered by a forum resident is not a sufficient connection between the defendant and the forum. Internet jurisdiction, both in defamation and in other cases, including concerning trademark infringement, raises special questions relating to what 'purposeful availment' implies.

Not surprisingly, then, the *forum actoris*, provided for by the Brussels/Lugano regime, enabling weak parties such as insured persons, consumers and employees to sue a defendant who is not domiciled abroad in the court of their own domicile, only based on the fact of their being domiciled there, is not acceptable in US eyes.

4. Impact on the 2018 Draft Convention

The difference in approach between the US, focused on the defendant-forum relationship, and that of the Brussels/Lugano regime and other States, focused on the dispute (claim)-forum relationship, is reflected in the 2018 Draft, in particular its Article 5, that deals with indirect grounds of jurisdiction for recognition and enforcement. But the 2018 Draft also echoes other, economic and cultural differences, including in relation to intellectual property, defamation and privacy.

4.1 Contracts

Article 5(1)(g) of the 2018 Draft, in its first limb, focusing on the place of performance, reflects the court-dispute approach. Therefore, it does not cover judgments given by a court of a country where under the contract a significant amount of (preparatory) work was done, but not such that it qualified as 'the place of performance'. On the other hand, the second limb excludes recognition and enforcement of judgments based on the test of the first limb where 'the defendant's activities did not constitute a purposeful and substantial connection to that State'. This meets the US defendant-forum requirement, but implies a limitation of the Brussels/Lugano approach, and reduces predictability.[35]

4.2 Torts

Article 5(1)(j) of the 2018 Draft on non-contractual obligations, including torts, is narrowly drafted in two respects. First, in terms of the types of damage with which the judgment is concerned: 'death, physical injury, damage to or loss of tangible property', thus excluding immaterial damage. Second, by excluding judgments rendered by the courts of the State where the injury arose, if that was not also the State where the act or omission took place. This is a more limited approach than that of the CJEU interpreting the Brussels Convention,[36] according to which both the court of the place where the damage is caused and where the injury arose have jurisdiction. It is even narrower than the 2001 Interim Text, which, analogous to the provision

34 134 S. Ct. 1115 (2014).

35 Art. 5(1)(g) reappears, essentially unchanged, in the final Convention text.

36 CJEU 30 November 1976, C-21-76, ECLI:EU:C:1976:166, *Bier* v. *Mines de Potasse*.

on contractual obligations (*supra* section 4.1), did include this basis of jurisdiction subject to a foreseeability test.[37,38] It is hoped – also in the light of the 2030 UN Agenda for Sustainable Development which highlights the current 'immense challenges to sustainable development'[39] – that the final text will make room for the recognition and enforcement of judgments emanating from the court of the place of the harmful event where the defendant could reasonably foresee that its conduct would give rise to the harm in that State.[40,41]

4.3 Internet

Courts in the US, the EU, and Canada continue to wrestle with issues of jurisdiction concerning defamation through the internet, which may cause damage in multiple States. The US Supreme Court in *Keeton* v. *Hustler Magazine*,[42] in the context of print distribution, permitted a defamation claim for the *totality* of the damage, even in a forum where minimal damage occurred. By contrast, the CJEU, in *Shevill* v. *Press Aliance*,[43] also a print defamation case, ruled that a plaintiff may sue only for the damage suffered in the State of distribution (the 'mosaic' approach), and can recover *full* damages or injunctive relief only by suing in the place where the publisher is established. However, in *eDate Advertising and Others*[44] and *Bolagsupplysningen OU* v. *Svensk Handel AB*,[45] both internet cases, the CJEU found that the plaintiff may, in addition, bring a suit for *full* damages and injunctive relief in the courts of the Member State where the plaintiff has the 'centre of his interests', while maintaining the mosaic approach. A recent Canadian Supreme Court decision on internet defamation is conspicuous by a sharp division of the justices regarding the application of *forum non conveniens*.[46] In view of these differences, and more fundamental cultural differences on the balance between freedom of speech and the protection of personal reputation, it comes as no surprise that the 2018 Draft excludes defamation altogether in Article 2(1)(k).[47]

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37 Art. 10 of the 2001 Interim Text read as follows: 'A plaintiff may bring an action in tort or delict in the courts of the State a) in which the act of omission that caused the injury occurred or b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.'

38 This probably reflects uncertainty regarding the US Supreme Court's position in respect of the requirements for the exercise of specific jurisdiction over a non-resident defendant, following its recent decision in *Bristol-Myer Squibb* v. *Superior Court* (*supra* n. 33).

39 See https://sustainabledevelopment.un.org/post2015/transformingourworld, para. 14.

40 Cf. also H. van Loon, 'Principles and building blocks for a global legal framework for transnational civil litigation in environmental matters', *Uniform Law Review* 23 (2018), pp. 298-318 (paras. 43 and 44), Chinese translation in: 政法论丛 (*Zhengfa Luncong*) [Journal of Politics and Law], 2018, No. 5, pp. 150-160.

41 Art. 5(1)(j) reappears, unchanged, in the final Convention text.

42 465 US 770 (1984).

43 CJEU 7 March 1995, C-68/93, ECLI:EU:C:1995:61, *NIPR* 1995, 533.

44 CJEU 25 October 2011, C-509/09, ECLI:EU:C:2011:685, *NIPR* 2011, 475.

45 CJEU 17 October 2017, ECLI:EU:C:2017:766, *NIPR* 2018, 53.

46 *Haaretz.com* v. *Goldhar*, 2018 SCC 28.

47 Unchanged in the final Convention text.

4.4 Intellectual property

Other types of cases may also involve the internet, for example infringement of trademarks or commercial contracts. Article 5(3) under (a) and (b) of the 2018 Draft has bracketed language to deal with a judgment given by, for example, a court in the State of registration of a trademark against a defendant who offers cloud-based services from an interactive website attracting customers from around the world, for infringement of that trademark, without having acted in, or targeted activities at that State.

But Article 5(3) of the 2018 Draft itself appears in brackets, as do Articles 6(a), 7(1)(g), 8(3), and 11. Moreover, Article 2(1)(m) potentially excludes IP altogether. A complete exclusion of IP would be a retrograde step in comparison with the COCC, so hopefully it will be possible to avoid such a far-reaching decision.[48]

4.5 Consumers and employees

Contrary to the COCC, the 2018 Draft includes judgments on consumer and employee contracts. Where the consumer or employee seeks recognition and enforcement of a judgment *in their favour*, the other rules apply. However, the trader/employer will only obtain recognition and enforcement *against* a consumer or employee, where they have addressed to the court their express consent to its jurisdiction and the 2018 Draft excludes in that case judgments given by the court of performance (Art. 5(2)).[49] Nor does it provide for recognition and enforcement of judgments given by courts of the consumers' or employees' domicile (in contrast to Arts. 17-23 Brussels I recast).

5. Other features of the 2018 Draft Convention

5.1 Exclusions/inclusions

The exclusions from the scope of the 2018 Draft largely coincide with those of the COCC. But the 2018 Draft includes judgments given in anti-trust (competition) matters – still in brackets, a sensitive matter[50]– and on claims for personal injury, damage to tangible property,[51] and rights *in rem* in immovable property.[52] As in the COCC, where an excluded matter arises merely as a preliminary issue in the proceedings, that does not trigger the exclusion of the judgment: Article 2(2) of the 2018 Draft.[53] But the ruling on that preliminary matter itself *shall* not be recognised and enforced *under the Convention* (but *may* still be *under national law*), and in so

48 The final Convention text excludes intellectual property (Art. 2(1)(m)).

49 Unchanged in the final Convention text.

50 See the Note by the Permanent Bureau, 'The possible exclusion of anti-trust matters from the Convention as reflected in Article 2(1)(p) of the 2018 draft Convention', https://assets.hcch.net/docs/dcd7c92a-d3fd-46a5-bae5-627ff1636003.pdf. The final Convention text in principle excludes anti-trust matters but makes an exception for certain anti-competitive agreements or concerted practices, see Art. 1(1)(p).

51 Art. 5(1)(j) (idem in the final Convention text).

52 Art. 6(b) (idem Art. 6 in the final Convention text).

53 Idem, Art. 2(2) of the final Convention text.

far as the judgment was based on a ruling on that matter, it *may* be refused (Art. 8 of the 2018 Draft). Contrary to Article 10(4) COCC, a reference to Article 19 (enabling any Contracting State to declare that it will not apply the Convention to a certain specific matter) is missing in the 2018 Draft, however.[54] Also contrary to the COCC (Art. 17), the 2018 Draft does not contain a provision for contracts of (re-)insurance relating to a matter to which the Convention does not apply.[55]

Similar to the COCC, the 2018 Draft provides that 'proceedings are not excluded from the scope of the Convention by the mere fact that a State, including a government, a governmental agency or any other person acting for a State, is a party thereto' (Art. 2(4)). However, Article 20 of the 2018 Draft, in bracketed language, permits a Contracting State to reverse this rule, by declaring, with reciprocal effect, that it will *not* recognise or enforce such a judgment when that State, or an agency or person acting on its behalf, is *itself* involved, except where it concerns an enterprise owned by a State.[56]

5.2 Exclusive bases for recognition and enforcement. Recognition and enforcement under national law

Article 6 of the 2018 Draft obliges courts to refuse recognition and enforcement of judgments that do not respect the requirements of Article 6(a) (*supra* section 4.4), (b) and (c). As noted, the Draft Convention does not include a list of prohibited grounds of jurisdiction preventing recognition and enforcement of the judgment based on such grounds, but indirectly these provisions have a similar effect regarding judgments not based on the exclusive bases of Article 6. This is an exception to Article 16 of the 2018 Draft, which makes it clear that the Convention is generally non-exclusive, leaving Contracting States free to recognise and enforce judgments on any basis not foreseen, or on any matter excluded, by the Convention.[57]

5.3 Refusal of recognition or enforcement and procedural matters

Articles 7 (grounds of refusal),[58] 8 (preliminary questions) (*supra* section 5.1), 9 (severability),[59] 10 (punitive damages),[60] 12 (judicial settlements),[61] 13 (documents),[62] and 14(1) (procedure)[63] of the 2018 Draft correspond largely with, or are even identical to, Articles 9, 10, 15, 11-14 of the COCC.

54 Idem, Art. 8 of the final Convention text (in which Art. 19 reappears, unchanged, as Art. 18).

55 Idem, final Convention text.

56 Art. 2(4) reappears essentially unchanged in the final Convention text. Art. 20 reappears in Art. 19 as an optional declaration with reciprocal effect.

57 Unchanged in the final Convention text (Art. 16, renumbered Art. 15).

58 Art. 7 final Convention text, essentially unchanged.

59 Art. 9 final Convention text, unchanged.

60 Art. 10 final Convention text, unchanged.

61 Art. 11 final Convention text, unchanged.

62 Art. 12 final Convention text, essentially unchanged.

63 Art. 13(1) final Convention text, unchanged.

Article 7(1)(b) of the 2018 Draft, permitting the refusal of recognition and enforcement if the judgment is obtained 'by fraud' contrasts with the corresponding provision of the COCC, limited to fraud 'in connection with a matter of procedure'. The risk, as with the added language in paragraph (c) ('[…] and situations involving infringements of security or sovereignty of that State'), is that this may invite a review of the merits of the judgment, contrary to the provision of Article 4(2) which prohibits such review. Article 7(1)(d) of the 2018 Draft extends the idea underlying the COCC that court designations by the parties must be respected, to non-exclusive choice of court agreements and trust instruments.

The 2018 Draft contains several interesting novelties. One is the provision of Article 4(4),[64] which gives the requested court a certain flexibility in dealing with judgments that are subject to review in the State of origin. Contrast this with many national recognition regimes requiring that the judgment must be final. Another is the exclusion by Article 14(2)[65] of the application of the *forum non conveniens* test at the stage of recognition and enforcement: the requested court may not refuse the recognition or enforcement of a judgment on the ground that the requesting party had better seek such recognition or enforcement in another State.[66] Helpful is also Article 15[67] on security for costs, inspired by Articles 14 and 15 of the 1980 Hague Convention on Access to Justice.

5.4 Judgments given by a common court

New also is the provision, in bracketed language, dealing with judgments rendered by 'common courts' (Art. 4 [(5)], [(5) and (6)]) of the 2018 Draft. These are courts such as the Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law (CCJA); the Caribbean Court of Justice (CCJ); the Judicial Committee of the Privy Council (JCPC); or the future Unified Patent Court, established by two or more States. But since the EU counts as a 'Contracting State', as it may itself become a Party to the Convention, the CJEU is not to be considered as a common court.

The 2018 Draft seeks to establish the conditions under which a judgment rendered by a common court 'shall be deemed to be a judgment given by a court of a Contracting State'. First, a declaration of a Contracting State identifying such a court is required. Second, the draft deals with the 'free rider' problem, i.e., it seeks to prevent recognition or enforcement of a judgment rendered by a common court in situations where one or more of the States on whose behalf the common court exercises jurisdiction is not a Party to the Convention. Otherwise, a State could benefit from the Convention without binding itself to it.[68] Finally, the Declaration has

64 Art. 4(4) final Convention text, unchanged.

65 Art. 13(2) final Convention text, unchanged.

66 Note that the Convention does not, and being a *traité simple*, cannot exclude the application of the *forum non conveniens* test by the court originally addressed.

67 Art. 14 final Convention text, unchanged.

68 Subparagraph (a) excludes such situations where the judgment is based on consent only of the parties. Subparagraph (b) deals with all other situations, in so far as a clear link can be established between the judgment and a Contracting State.

effect in relation to other Contracting States only if they have not opted out from (Art. [6], first alternative), or in to it (Art. [6], second alternative).[69]

6. Conclusion

There is a certain irony in the fact that, with the completion of the Convention on the Recognition and Enforcement of Foreign Judgments, the work that started in the 1960s with the 1965 Choice of Court and the 1971 Recognition and Enforcement Conventions will have come full circle: the Hague Conference, once again, after having crafted an instrument on Choice of Court, adopts a Recognition and Enforcement Convention!

Yet, the image of an upward spiral will hopefully do better justice to the outcome. If one compares the 1965 and 2005 Choice of Court Conventions, it is only fair to note that the former went only half way, in particular in so far as it did not unify the rules of recognition and enforcement of judgments but left these to national law. And it never came into force, whereas the 2005 Convention now binds 32 States, has been signed by the US and China, and is likely to attract more Parties in the future.

The reasons for the failure of the 1971 Convention have been set out *supra* sections 2.1.1 and 2.1.2. The structure of the new Convention should be less complicated than that of its predecessor. A bilateralisation requirement should be avoided, or at least drafted in a way that makes the application of the Convention not unduly difficult.[70]

Contrary to the situation forty years ago, there is no competing (European or international) instrument available: the Convention will fulfil a globally felt need. In terms of its scope – if, for example, IP and or anti-trust matters were excluded[71] – it may end up as a rather modest instrument, but that may be inevitable to attract worldwide participation. And its substantive reach might be broadened, through additional protocols, in the future.

It will be very important to focus the energy of the Conference on the promotion of and a follow-up on the implementation and application of the new Convention. This will require considerable efforts, efforts from which work on a possible '*traité double*' (*supra* section 1) should not detract. After so many years of intense study, dialogue and negotiations, the new Convention has the potential of meeting the need for a truly global common framework for the circulation of judgments in our emerging world society.

69 The provisions on judgments of common courts have not made it to the final Convention text.

70 See Art. 29 of the final Convention text, and cf. *supra* n. 16.

71 See the exclusions from scope in Art. 2(1)(m) and (p) of the final Convention text, and cf. *supra* nn. 48 and 50.