The 2019 Hague Judgments Convention through European lenses

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Abstract

The European Union is an important actor in the field of international judicial cooperation and in the Hague Conference on Private International Law. It is itself a member of the Conference, and at the same time represents 27 States that are also members. Because of the EU's own internal rules, where the matters being negotiated at international level are already the subject of EU rules, the EU speaks on behalf of its Member States. Furthermore, if the EU accedes to an international convention in such circumstances, the all or nothing principle applies. Either the EU accedes as a bloc or not at all.

The 2019 Judgments Convention has the potential to facilitate the worldwide recognition and enforcement of judgments in civil and commercial matters. The approach taken by the negotiators has, particularly in the light of the failure of earlier, more ambitious projects, been to aim for a more modest convention, with the objective of encouraging as many States as possible to become Contracting Parties to the Convention.

1. Introduction

On 2 July 2019, the text of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters[1] ('Judgments Convention' or 'Convention') was signed in The Hague. Although, nominally speaking, the work on the Convention was begun in 2012,[2] in reality, it represents the culmination of many years of preparatory work. It is in many ways a revival of the abortive worldwide Judgments project that was abandoned (in favour of work on what later became the 2005 Hague Choice of Court Convention[3]) due largely to the opposition of the United States and the unwillingness of the Hague Conference on Private International Law to take the matter further in the light of United States withdrawal.

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1 Since this article is a part of a series of articles about the Judgments Convention, it does not aspire to provide a complete description of the Convention but, rather, focuses on issues relevant from the European perspective. For analysis of the Convention, see: A. Bonomi and C. Mariottini, 'A Game Changer in International Litigation?: Roadmap to the 2019 Hague Judgments Convention', *Yearbook of Private International Law* (20) 2018/2019, pp. 537-567; D. Stewart, 'The Hague Conference adopts a new Convention on the Recognition and Enforcement of Foreign Judgments in civil or commercial matters', *The American Journal of International Law* 2019, p. 771.

2 See Conclusions and Recommendations adopted by the 2012 Council on General Affairs and Policy of the Conference, albeit it was only in March 2016 that the Council on General Affairs and Policy of the Conference formally decided to set up a Special Commission to prepare a draft convention.

3 Convention of 30 June 2005 on Choice of Court Agreements.

The rocky path to the completion of the Convention logically led its negotiators to opt for a more minimalist approach. The Judgments Convention is a 'simple' convention without direct rules on jurisdiction. It establishes a set of indirect jurisdictional grounds that indicate a sufficient link between the court of origin and the dispute.[4] By virtue of Article 5, a judgment is eligible for recognition under the Convention if one of these grounds exists. That recognition and enforcement regime is without prejudice to more liberal national rules (with the exception of Art. 6, below). Hence, by setting out a common minimum standard, the Convention enables the Contracting Parties to keep their more liberal national rules, thereby letting more judgments circulate.

The Convention applies to recognition and enforcement of judgments in civil or commercial matters. Article 2 puts flesh on the bones by specifying certain matters that are excluded from scope. Contracting Parties may further extend this list by disapplying the Convention with respect to 'specific subject matters' (using declarations in line with Art. 18). The Convention also contains a declaration regime allowing the exclusion of judgments pertaining to a State from circulation.

With this minimalist approach and its generally acceptable nature, the Convention aims at attracting the widest possible number of Contracting Parties.

2. Relationship of Convention to EU instruments in in the field of recognition and enforcement of foreign judgments

Among the parties that signed the final act of the 2019 Convention at the 22nd Diplomatic Session was the European Commission, on behalf of the European Union ('EU'). Since 3 April 2007, the EU (at the time the European Community) has been a member of the Hague Conference on Private International Law. This was made possible by an amendment of the statutes of the Conference in 2005[5] which enabled Regional Economic Integration Organisations ('REIOs') to become members of the Conference. Since that time, the EU has become a Contracting Party to three Hague instruments.[6]

Assuming that the EU accedes to the Judgments Convention, its Member States will be required to apply it. At the same time, they will still be bound amongst themselves to apply internal EU rules, in particular the Brussels Ia Regulation,[7] which covers the same field as the Convention. How then can overlaps and potential clashes between the two instruments be avoided?

This issue is not a new one. It potentially arises every time that the Union concludes an international convention that covers the same field as an EU law instrument. In the realm of the recognition and enforcement of foreign judgments (apart from the Choice of Court Convention and prospectively the Judgments Convention), such an international convention is the Lugano

4 The detailed rules for determining whether a sufficient link is present are contained in Art. 5(1), points a) to m).

5 The amendment was adopted on 30 June 2005 and came into force in July 2007.

6 The 2005 Choice of Court Convention, the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance and the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

7 Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] *OJ* L 351/1.

II Convention.[8] It was concluded between the EU, Denmark, Iceland, Norway and Switzerland and mirrors very closely the Brussels Ia Regulation. The potential regulatory overlap with the Regulation is solved by a 'disconnection clause' (Art. 64 of the Lugano II Convention). This provision permits the EU Member States to apply the Brussels Ia Regulation *inter se* while essentially only applying the Lugano II Convention where the defendant is domiciled in a Contracting Party that is not an EU Member State. Equally, where proceedings are pending simultaneously in an EU Member State and a Lugano State, a court in a Member State, even if it has derived its jurisdiction from the Regulation, will need to determine the issue of *lis pendens* by reference to the appropriate rules of the Convention.[9]

With regard to the Judgments Convention, the potential for a clash with application of the Brussels Ia Regulation in the EU Member States is much less than is the case with Lugano II.[10] This is so, first, because the material scope of the Judgments Convention is much narrower than that of the Brussels Ia Regulation. Second, and perhaps more importantly, the Judgments Convention contains no direct rules on jurisdiction and generally does not preclude recognition and enforcement under national law, of judgments that do not qualify for recognition and enforcement under the Convention.[11]

3. Respective substantive scopes

As regards the material scope of the two instruments, the Union's Brussels Ia Regulation applies, subject to limited exceptions, to all civil and commercial matters. This expression excludes revenue, customs and administrative matters and *acta iure imperii*.[12] Such matters, by their

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8 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007/712/EC [2007], *OJ* L 339/1.

9 For an example of the interplay between the Lugano II Convention and EU law, see *Schlömp* v. *Landratsamt Schwäbish Hall*, C-467/16, ECLI:EU:C:2017:993, *NIPR* 2018, 57. A court in Germany was seised of an application that fell within the scope of the Maintenance Regulation (Regulation (EU) No. 4/2009). At the same time, Swiss courts were seised of the same matter involving the same parties by virtue of the Lugano II Convention (which still covers jurisdiction in maintenance matters). The German court, quite correctly, proceeded on the basis that, although it derived its jurisdiction from the Maintenance Regulation, it was required to apply the *lis pendens* rules of the Convention to determine which proceedings had priority.

10 As regards the relationship between the Brussels Ia Regulation and the 2005 Choice of Court Convention, the position is more complex, since that Convention does contain positive rules on jurisdiction. On this point, see M. Weller, 'Choice of Court agreements under the Brussels Ia and under the Hague Convention: coherences and clashes', *Journal of Private International Law* 2017, pp. 91-129.

11 For the remaining cases of potential overlap, the Convention contains a 'disconnection clause' allowing the EU to continue applying its internal rules *inter se* (see discussion of Art. 23(4) below).

12 Art. 1(1), second sentence of the Brussels Ia Regulation. On what is an act *iure imperii*, the basic principle is that a matter does not constitute such an act simply because a State is party to a dispute; in addition, the State must have acted by virtue of its prerogative powers. After a period in which the CJEU interpreted this notion very narrowly, of late it has adopted a broader interpretation. It thereby excludes disputes of a commercial nature from the scope of the Regulation where a State has resorted to its law-making powers to breach contracts to which it is a party. Contrast *Nikiforidis* (C-135/13, ECLI:EU:C:2015:774, *NIPR* 2016, 405) (an action brought by a teacher claiming back his contractual pay against the State which employs him does not cease to be a civil and commercial matter simply because the State has used its law-making powers

nature, do not fall within the notion of civil and commercial matters and are mentioned *ex abundante cautela*. In addition, certain specific matters,[13] which are covered by other EU instruments, are specifically excluded from the scope of the Regulation. Otherwise, its scope is remarkably broad.

The scope of the Judgments Convention, by contrast, is riddled with far-reaching exclusions. Although the underlying concept of 'civil or commercial matters' is the same, many aspects are, explicitly or by necessary implication, excluded from the scope. Certain exclusions mirror those of the Brussels Ia Regulation, such as revenue, customs or administrative matters,[14] various family law issues,[15] insolvency[16] and arbitration and related proceedings.[17]

With regard to *acta iure imperii,* the Convention contains no general exclusion from scope. It only specifies that the fact that a State or its representative was party to the proceedings does not of itself suffice to exclude a judgment from the scope of the Convention. Nevertheless, the devil is in the detail: activities of armed forces and law enforcement activities are specifically excluded from scope,[18] as is sovereign debt restructuring through unilateral State measures.[19] In addition to these specific exclusions, Article 19 permits a State to disapply the Convention to judgments arising from proceedings involving that State or government agency thereof, or a natural person representing that State or governmental agency.

Furthermore, the Convention provides for other exclusions from scope which find no counterpart in the Regulation, namely carriage of passengers and goods,[20] liability in respect of certain categories of pollution,[21] certain questions relating to legal persons,[22] the validity of entries in public registers,[23] defamation and privacy,[24] intellectual property,[25] and competition matters, with the exception of certain types of cartel.[26]

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to reduce the wages) with *Kuhn* (C-308/17, ECLI:EU:C:2018:911, *NIPR* 2019, 189) (although where a State issues bonds in order to borrow money it enters a contractual relationship, where it breaches the contract by the enactment of legislation, it *acts iure imperii* and hence an action by the bondholder to recover the due amount is not a civil and commercial matter).

13 Essentially family law matters, insolvency and social security.

14 Convention, Art. 1(1), second sentence.

15 Convention, Art. 2(1)(a), (b), (c) and (d).

16 Convention, Art. 2(1)(e).

17 Convention, Art. 2(3).

18 Art. 2(1)(n) and (o) respectively. This corresponds to the case law of the CJEU, in particular case *Lechouritou* (C-292/05, ECLI:EU:C:2007:102, *NIPR* 2007, 126) that ruled that civil liability for atrocities committed by German troops in Greece during the Second World War did not fall within the scope of the Brussels Convention (the predecessor of the Brussels I Regulation).

19 Art. 2(1)(q). This exclusion is more emphatic than the exclusion developed within the context of the *acta iure imperii* exclusion of the Brussels Ia Regulation in *Kuhn* v. *Hellenische Republik*, above.

20 Art. 2(1)(f). Such liability was excluded to avoid conflicts with the numerous conventions existent in this field, which already include jurisdictional rules.

21 Art. 2(1)(g).

22 Art. 2(1)(i).

23 Art. 2(1)(j).

24 Art. 2(1)(k) and (l).

25 Art. 2(1)(m).

26 Art. 2(1)(p).

4. *Modus operandi* of the Convention

As noted above, the Convention simply provides a minimum standard for the acceptance of foreign judgments, whereby judgments falling within its scope have to be accepted for recognition and enforcement unless one of the discretionary grounds for refusal in Article 7 is invoked. The Convention permits courts to go beyond its rules and recognise and enforce foreign judgments based on their more liberal national or REIO rules (see Arts. 15 and 23(4) respectively).

Article 15 however, is subject to Article 6. This one exception relates to judgments that ruled on rights *in rem* in immovable property. Such judgments may be recognised only if the property is situated in the State of origin of the judgment. Judgments on rights *in rem* in immovable property that do not fulfil this territorial criterion are not merely ineligible for recognition and enforcement under the Convention, but they may not be recognised even under national law.

This rule closely mirrors Article 45(e)(ii) of the Brussels Ia Regulation, which forbids the recognition of a judgment that infringes the Regulation's provisions on exclusive jurisdiction. This includes Article 24(1) of the Regulation which attributes exclusive jurisdiction for proceedings that have as their object rights *in rem* or tenancies of immovable property, to the courts of the *situs*. However, the Regulation does not apply as regards a judgment from a court of a third country that ruled on rights *in rem* where the immovable property was not situated in the State of origin. Nor does it preclude recognition of a judgment of a court of a Member State that ruled on rights *in rem* where the *situs* is in a third country. At present, then, a Member State could recognise and enforce such a judgment under its national law. The Convention, though, will outlaw this possibility completely where the court of origin and the *situs* are in two different Contracting States.

To allow the Member States of the EU to continue applying the Brussels Ia Regulation *inter se*, Article 23(4) of the Convention contains a disconnection clause. Article 23(4) does however make a distinction between REIO rules that were adopted before the conclusion of the Convention (which may be applied unconditionally (point (a)), and those adopted at a later stage, which may not affect the obligations under Article 6 as regards Contracting States that are not members of the REIO (point b)). Concretely, this means that the EU could not change the Brussels Ia Regulation so as to require a Member State to recognise and enforce a judgment of another Member State concerning rights *in rem* in immovable property situated outside the EU but in a Contracting State. Consequently, the possible future recast of Brussels Ia Regulation would need to preclude recognition and enforcement in a Member State of a judgment given in another Member State ruling on rights *in rem* in immovable property which is situated elsewhere.[27]

With regard to the application of the Lugano II Convention and other international instruments, the same principles apply. By virtue of Article 23(2), the Convention does not affect the application of a treaty concluded 'before this Convention'.[28] This provision overrides *pro tanto* even Article 6. Article 23(3) equally permits a Contracting State to apply a treaty concluded, with another Contracting State, after the Convention; in such a case however, the other treaty may not affect the obligations under Article 6.

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27 Or, better still, amend the jurisdiction rules of the Regulation so as to prevent the courts assuming jurisdiction in such a case.

28 This expression means before the conclusion of the Judgments Convention, i.e. before 2 July 2019.

Apart from rights *in rem* in immovable property, the Convention also includes specific rules for the recognition and enforcement of tenancies (residential lease of immovable property). The Convention hence envisages three possible regimes for tenancies of immovable property. The first regime relates to residential tenancies that are to be recognised and enforced under the Convention only if they were given by a court of the State where the property is situated (Art. 5(3) of the Convention).[29] Unlike in case of rights *in rem* in immovable property, the Convention however does not positively outlaw recognition and enforcement under national law of a judgment delivered by a court that is not of the *situs*. Second, tenancies of immovable property that have *erga omnes* effects under the law of the *situs* should be considered as rights *in rem* in immovable property under Article 6 and as such find the corresponding exclusive protection. And lastly, judgments about all other types of tenancies in immovable property (which neither invoke *erga omnes* effects nor are of residential nature) are treated as any other judgments to which the Convention applies.[30] Such judgments may be recognized and enforced based on all other jurisdictional criteria of Article 5(1) (such as habitual residence or branch location).

In respect of tenancies, the Brussels Ia Regulation goes further than the prohibition under the Convention, in that it enables judgments which have as their object tenancies of immovable property to circulate only if they are given by a court of the *situs* (save for tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months).[31]

5. Place of the Convention in the EU's system of recognition and enforcement

The EU, as opposed to its Member States, has acquired competence to conclude the Judgments Convention thanks to the enactment of Union law rules, in particular the Brussels Ia Regulation. This rule of EU law is laid down in Article 3(2) of the Treaty on the Functioning of the European Union ('TFEU'), which provides that the Union has exclusive competence for the conclusion of an international agreement when i) its conclusion is provided for in a legislative act of the Union or ii) is necessary to enable the Union to exercise its internal competence or iii) in so far as its conclusion may affect common rules or affect their scope.

This treaty provision represents a consolidation of the case law of the Court of Justice of the European Union ('CJEU').[32] The most relevant head of competence for this field is the third, which expresses the principle of pre-emption, first laid down by the Court in the *ERTA* judgment.[33] According to that judgment, once the Union has adopted common rules in a given field, the Member States, acting alone or collectively, may not conclude international agreements that

29 The same regime of Art. 5(3) also applies to judgments on registration of immovable property.

30 Art. 5(1)(h) applies to tenancies of non-residential nature (professional, commercial, personal etc.).

31 Art. 24(1) of the Brussels Ia Regulation.

32 Hague Abduction Convention Opinion 1/13, ECLI:EU:C:2014:2303, *NIPR* 2014, 328, in particular at paras. 69-71. The Court states specifically that the conditions laid down in Art. 3(2) TFEU 'must be examined in the light of the Court's case-law according to which there is a risk that common EU rules may be adversely affected by international commitments undertaken by the Member States, or that the scope of those rules may be altered'.

33 *Commission* v. *Council, European Agreement on Road Transport*, 22/70, ECLI:EU:C:1971:32.

may affect those rules or alter their scope. In 2006 in Lugano Opinion,[34] this case law was held by the Court to apply to the field of private international law,[35] for which the Union had recently acquired legislative competence by virtue of the Amsterdam Treaty.

In any event, there can be little doubt that the whole of the 2019 Judgments Convention falls within the scope of exclusive Union competence. Consequently, the Member States as such will be unable to become Contracting Parties to the Convention.

This statement has to be slightly qualified in order to take into account the institutional peculiarities of Title V of Part Three TFEU ('Title V') (which includes Art. 81 TFEU, the legal basis on which the instruments on civil judicial cooperation are now adopted). Denmark does not take part in any measures adopted under Title V. It is consequently not bound by the Brussels Ia Regulation. Nevertheless, it has concluded a parallel agreement with the EU, which largely replicates the Brussels Ia Regulation.[36] On the international plane, Denmark is not included in any signature or ratification by the European Union of an international agreement in this field. However, it has ratified in its own name *inter alia* the Lugano II Convention and the 2005 Choice of Court Convention.

The United Kingdom and Ireland do not take part in the adoption of measures under Title V. However, unlike Denmark, they have a facility to opt-in to such measures. In practice, both Member States have made wide use of the opt-in facility and, in particular, both are bound by the Brussels Ia Regulation. This means that, where exclusive external competence is based on that instrument, those Member States do not, acting independently, have the option not to be bound by an international agreement having the same scope if the Union decides to become a Contracting Party.[37]

The Brussels Ia Regulation does not contain comprehensive rules regarding recognition and enforcement *vis-à-vis* third States. Nor does it include jurisdictional rules *vis-à-vis* third States (apart from limited rules on exclusive jurisdiction, consumer cases, *lis pendens* and on related proceedings). Since the EU has not exercised its internal competence to legislate in this field, all Member States are, due to the *ERTA* doctrine, above, and subject to any international commitments entered into by the EU, free to legislate in this area (Arts. 4(j) and 81 TFEU). Each Member State can thus design its system of recognition and enforcement and keep and adopt

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34 Opinion 1/03, ECLI:EU:C:2006:81, *NIPR* 2006, 203.

35 See generally, M. Wilderspin and A.-M. Rouchaud-Joët, 'La compétence externe de la Communauté européenne en droit international privé, *Revue critique de droit international privé* 2003, p. 1.

36 Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2005] *OJ* L 299/62. The Agreement also requires Denmark, on pain of termination of the Agreement, to accept changes to Regulation (EU) No. 44/2001 (Art. 3), to accept the jurisdiction of the Court of Justice to interpret the Agreement (Art. 6) and not to enter into international agreements that may affect the scope of the Brussels I Regulation without the agreement of the EU (Art. 5).

37 See Council Decision 2014/887/EU on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements ([2014] *OJ* L 353/5). Recital 8 of the preamble thereto states that: 'The United Kingdom and Ireland are bound by Regulation (EC) No 44/2001 and are *therefore* taking part in the adoption and application of this Decision' [emphasis added]. The use of the word 'therefore' clearly indicates that the Council took the view that the UK and Ireland participated in the Decision by virtue of being bound by the Brussels I Regulation, not because they had given consent to participation in the Decision by virtue of the Protocol.

its own national rules, as well as keep any bilateral conventions with third countries.[38] Consequently, the national systems of recognition and enforcement vary greatly among the Member States, both in terms of their general openness and particular substantive requirements for giving effects to foreign judgments.

In some Member States, the circulation of third-country judgments is based on similar indirect jurisdictional grounds and limited by similar refusal grounds as those contained in the Judgments Convention.[39] A number of Member States have a rather 'open' system for recognition and enforcement of foreign judgments.[40] On the other hand, Nordic Member States have markedly 'closed' systems whereby foreign judgments are recognized and enforced only based on a reciprocal agreement with a third country to that effect.[41] In English law, the judgments can circulate if the court had jurisdiction by virtue of some connection between it and the defendant, such as residence or submission.[42] Subject-matter jurisdiction (such as in Art. 5(1)(g) or (j) of the Judgments Convention) is limited.

Bearing in mind these differences in legal systems of the Member States, it logically follows that the intensity of the Convention's effects will be different in each Member State.

Once the Union accedes to the Convention, the Convention becomes a part of the EU legal order and as such will prevail over the above-described national systems of recognition and enforcement. Despite that, the national systems will not become obsolete. Not only does the Convention lay down merely a minimum standard for recognition and enforcement and allow the simultaneous application of national rules, it will also apply only in relation to the other Contracting States to the Convention. The existent national law will remain in place in relation to the judgments coming from non-Contracting States. Bilateral and multilateral treaties (such

38 E.g. Bilateral treaties that China concluded with Bulgaria (1995), Cyprus (1996), Greece (1996), Hungary (1997), France (1988), Italy (1995), Lithuania (2002), Poland (1988), Romania (1993) and Spain (1994). See King Fung (Dicky) Tsang, 'Chinese Bilateral Judgment Enforcement Treaties', *Loy. L.A. Int'l & Comp. L. Rev.* (40) 2017, p. 1.

39 See Art. 328 *a contrario* and Arts. 722 and 723 of the German Code of Civil Procedure (*Zivilprozessordnung*) or Arts. 41 to 55 of Spanish Law No. 29/2015 on International Legal Cooperation in Civil Matters.

40 E.g. Germany, Greece, Italy, and Spain. See S.P. Baumgartner, 'How Well Do U.S. Judgments Fare in Europe', *Geo. Wash Int'l L. Rev.* (40) 2008, p. 173. For a country-by-country summary of recognition and enforcement requirements, see: L. Garb and J.D.M. Lew, *Enforcement of Foreign Judgments*, The Hague: Kluwer Law International (loose-leaf).

41 Section 223(a) of the Danish Administration of Justice Act read in conjunction with the Act on Recognition and Enforcement of Certain Foreign Judicial Decisions in the Area of Civil and Commercial Law; Section 30 of the Finnish Act on International Legal Assistance and Recognition and Enforcement of Judgments No. 426/2015; or Section 9 of the Swedish Act 2014:912 on Supplementary Provisions Concerning Court Jurisdiction and Recognition and International Execution of Certain Decisions. Cf. Baumgartner 2008, pp. 187, 188 (above n. 40).

42 Enforcement of foreign judgments in the United Kingdom has its legal basis either in specific statutes (see Administration of Justice Act 1920 and Foreign Judgments Act 1933), or, in their absence, common law relating to recognition and enforcement of judgments applies. At common law, personal jurisdiction is limited to the instances when the defendant was resident (or possibly present) in the territory of the court of origin or explicitly submitted to its jurisdiction by a prior jurisdiction agreement or an appearance before the court.

as Lugano II Convention) on recognition and enforcement will also remain in force after the uptake of the Convention.[43]

Hence, the Judgments Convention will co-exist with the existent systems of recognition and enforcement, thereby adding an additional layer of complexity to the system of national, European and international rules.

6. Relevance to acceptance of judgments from EU Member States in third countries

Since the Convention does not prevent the recognition and enforcement of judgments under national law, above national rules can go beyond the mandatory minimum standard envisaged by the Convention. That being so, the Convention in itself will only become a true game changer if it attracts countries that currently have restrictive systems of recognition and enforcement of foreign judgments.

Such countries are in particular some common law countries with limited enforcement regime for foreign judgments (such as India or Pakistan[44]), or with a strong requirement of reciprocity and those accepting only foreign judgments in conformity with *in personam* jurisdiction (such as Australia[45]).

Most United States also use personal jurisdictional filters.[46] In fact, regardless of the subject-matter filters, courts in the United States do not currently enforce judgments, unless the defendant directed its activity at the forum State or had a minimum relationship thereto.[47] A similar jurisdictional basis is also characteristic for Canada.[48] The requirement of a sufficient personal connection between the defendant and the forum found its way also to the Judgments

43 See Art. 23(2) of the Convention.

44 Both countries can refuse the recognition of a foreign judgment where it sustains a claim founded on a breach of any law in force in the respective country. See Section 13(f) of the Indian and Pakistani Civil Procedure Code, Act 5 of 1908.

45 See M. Douglas, M. Keyes, S. McKibbin and R. Mortensen, 'The HCCH Judgments Convention in Australian Law', *Federal Law Review* (47/3) 2019, pp. 420–443.

46 See e.g. 1962 Foreign Money Judgments Recognition Act or 2005 Foreign-Country Money Judgments Recognition Act. See further Stewart 2019, pp. 782, 783 (above n. 1).

47 The requirement of the defendant's personal connection to the forum State has constitutional underpinning. The United States' courts have developed the 'Due Process' requirement based on the 14th amendment to the Constitution. Under the Due Process clause, a court can assert jurisdiction over a party if the party has a connection to the forum, i.e. if the defendant's presence or activity there are intentional and purposeful. Hence, the judgments originating from the place of performance or the place of wrongful act or omission can be recognised subject to the condition that the defendant purposefully directed its activity at the forum State or had minimum contacts thereto. See R.A. Brand and C.M. Mariottini, 'Note on the concept of "Purposeful and Substantial Connection" in Article 5(1)(g) and 5(1)(n)(ii) of the February 2017 draft Convention', Preliminary Document No. 6 of September 2017; see further A. Bonomi, 'New Challenges in the Context of Recognition and Enforcement of Judgments', in: D. Fernández Arroyo and F. Ferrari, *The Continuing Relevance of Private International Law and its Challenges*, Huntington (NY): Center for Transnational Litigation, Arbitration and Commercial Law, New York University, JurisNet 2019, p. 408.

48 Canada uses a 'real and substantial connection' jurisdictional test. See Brand and Mariottini 2017 (above n. 47).

Convention.[49] The judgments from the place of performance of a contractual obligation or from the place of a tort would hence be recognised under the Convention only if they comply with the 'connection' test. As the Convention reflects the 'personal connection' requirement in place in the United States and Canada, in this regard the Convention will not change the current status quo of the recognition of foreign judgments with these countries.

The situation is different with regard to the current degree of the circulation of judgments among the EU Member States and China. China currently makes the enforcement of foreign judgments conditional on either the existence of a bilateral treaty or established reciprocity of enforcement. The Judgments Convention would therefore result in higher circulation of judgments between China and those Member States that China does not have bilateral agreements with.[50]

The Convention has hence a potential to influence the circulation of judgments between the EU and those countries whose system of recognition and enforcement is more restrictive. On the other hand, where countries already enforce foreign judgments to the same or greater extent than the Convention, the Convention would have to have been more ambitious in order to have brought about a more significant improvement to the those countries' current system of recognition and enforcement.

7. Points of interest from the side of the EU during the negotiation process

Overall, the Convention parallels the Brussels Ia Regulation in many respects. No wonder, the Regulation itself was at its time a result of a consensus among States with different legal traditions. From the EU's perspective, the rules contained in the Regulation were hence a useful starting point for the negotiations of the Judgments Convention.

Aside from aligning the rules of the Convention to those in the EU Regulation,[51] throughout the negotiation process, the EU negotiators had in mind the need for widespread adherence by States to the Convention. If widely adopted, the Convention can provide a much-needed framework for a more effective and predictable justice worldwide and can facilitate rule-based multilateral trade and investment.

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49 The Convention provides grounds for the recognition of those judgments that were given in i) the State where the performance of an obligation took place unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to it (Art. 5(1)(g)); or ii) the State where the act or omission directly causing harm occurred (Art. 5(1)(j)).

50 Arts. 281 and 282 of Chapter XXVII of the Law on Civil Procedure of 9 April 1991 (as amended). As regards bilateral treaties, there are EU Member States that have concluded them with China and they usually provide more liberal regime than the Convention. As regards reciprocity, Chinese courts rendered judgments from certain EU Member States enforceable in the recent years recognizing existent reciprocity. It is nevertheless rather exceptional. See S*tudy The Hague Conference on Private International Law 'Judgments Convention*', Pedro A. de Miguel Asensio (coord.) et al., European Union, April 2018, accessible at: https://www.europarl.europa.eu/thinktank/it/document.html?reference=IPOL_STU%282018%29604954.

51 In theory, the familiarity with rules contained in the Convention should streamline its application by European courts. Nevertheless, it must be stressed that legal concepts in the Convention might be interpreted differently to their counterparts in EU law. They shall be interpreted by reference to the objectives of the Convention and its international character.

Considering the failure of the 1971 Enforcement Convention[52] and the limited uptake to date of the 2005 Choice of Court Convention,[53] wide outreach of the Judgments Convention was one of the central tenets in the negotiation process. To facilitate general consensus and hence the future uptake of the Convention, the Diplomatic Session proceeded with the tactic to include in the Convention obligations and subject matters only if there was a widespread consensus to that effect.[54] For that reason, the finally agreed scope of the Convention resulting from the negotiations is narrower than the one of Brussels Ia Regulation or Lugano II Convention (see the section on respective substantive scope, above).

Although the Convention is applicable to civil and commercial matters, many aspects are excluded from the scope further down the road in Article 2. In some limited instances, it was in the EU's own interest to keep certain matters outside of the scope, such as in case of privacy and defamation.[55] Apart from these instances, the EU usually attempted to broker a consensus to include as many matters in the Convention as possible.

Sometimes a matter was excluded because there exist other international conventions in the area (e.g. maritime matters[56] or carriage of passengers and goods[57]), or because a consensus could not be found to include a matter in the scope, as was the case for intellectual property.[58] It also proved to be a hard-earned achievement to include any judgments on competition matters.[59] Furthermore, Articles 1 and 2(2) are not the only rules delineating the scope of the

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52 The 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters was thoroughly unsuccessful. Nominally, it has been ratified by five States and has been in force since 1979. However, in order to become operational, the Convention relied on a complex system of bilateral Supplementary Agreements, none of which was ever concluded by the small number of Contracting Parties. On the tortuous history of negotiations in this area since then, see G.-P. Calliess, 'Value-added norms, Local Litigation and Global Enforcement: Why the Brussels-Philosophy failed in the Hague', *German Law Journal* 2004, p. 1489; Bonomi and Mariottini 2018/2019 (above n. 1); Stewart 2019, p. 773 (above n. 1); L.E. Teitz, 'Another Hague Judgments Convention? Bucking the past to provide for the future', *Duke Journal of Comparative Law* (29) 2019, p. 491 (written before the text of the Convention was finalised).

53 The EU is one, together with Denmark, Mexico, Montenegro and Singapore.

54 By way of example, see Minutes of the Commission I of the Diplomatic Session Nos. 2, 4, 7, paras. 57, 58, 48 respectively.

55 Art. 2(1)(k) and (l). These exclusions reflect the sensitivity of those areas (it involves a delicate balance between fundamental rights, in particular freedom of expression and right to privacy) and the prevailing differences among States in terms of delineation of these rights.

56 Art. 2(1)(g). For example, the International Convention for the Prevention of Pollution from Ships or the International Convention on Civil Liability for Bunker Oil Pollution Damage.

57 Art. 2(1)(f). For example, the Convention on the Contract for the International Carriage of Goods by Road or Convention for the Unification of Certain Rules for International Carriage by Air.

58 Art. 2(1)(m). After lengthy debates on the shape and form of in- or exclusion of intellectual property, it was decided to exclude it altogether, without prejudice to future work building on the extensive progress made on the matter. The United States were among the starkest opponents of the inclusion. The inclusion of intellectual property was on the other hand advocated e.g. by Brazilian or Israeli delegations. See Minutes No. 7 of the Commission I of the Diplomatic Session.

59 The opposition of a few delegations effectively prevented the inclusion of competition matters, save for specifically delineated instances of 'hard core' cartels where both the conduct and its effects occurred in the State of origin of the judgment. Nevertheless, as limited as this inclusion might seem, competition matters were altogether excluded from most previous instruments, such as the 2005 Choice of Court Convention.

Convention. They are also complemented by Article 18, according to which the Contracting States can adopt declarations excluding certain other specific matters from scope.[60] The Convention is also silent on the possibility of adopting reservations,[61] which effectively means that they are permitted.[62]

The Convention further features a specific declaration mechanism in Article 19 that allows the exclusion of judgments pertaining to a State, even when it acts in the civil and commercial context. That opt-out regime was heavily debated all the way until the Diplomatic Session in order to ensure its appropriate delineation and to avoid possible misuse and over-complication of the system. As a compromise, a limited opt-out mechanism with respect to States and governmental agencies was eventually agreed on. However, States may not exclude judgments pertaining to State-owned enterprises from circulation – something that could have created an unfair advantage in comparison to foreign private enterprises that operate on the same markets. Further, if a State makes a declaration under Article 19, other Contracting States are entitled to apply reciprocal measures (Art. 19(2)).

The Judgments Convention also strikes a compromise between the European jurisdictional standards and those typical for some common law countries. The Convention reflects both the personal and subject-matter jurisdictional standards. Even though this structure limits the number of judgments that can circulate under the Convention, this compromise was a requisite for a consensus on the text of the Convention since its first draft.[63]

Finally, perhaps the toughest nut to crack at the Diplomatic Session was to secure a suitable regime for the judgments that ruled on immovable property.[64] The treatment of such judgments was of interest of many delegations, because many States have exclusive jurisdiction with regard to rights in immovable property. The result of the heated negotiations are Article 6 on rights *in rem* in immovable property and Article 5(3) on residential lease of immovable property (tenancy) or on the registration of immovable property as described above. The current regime for residential tenancies in Article 5(3) is different to the one contained in the previous versions of the Convention[65] and (despite the fact that the regime resulted from a compromise proposal of the EU)[66] also from the more restrictive regime under the Brussels Ia Regulation.

60 The EU might use this provision to declare that it will not apply the Convention to insurance contracts, just as it did when approving the 2005 Choice of Court Convention (See Declaration of 11 June 2015). The insured parties and beneficiaries enjoy (similarly to consumers and employees) special protection under the EU law.

61 Reservations could be used to exclude from the scope something else but a certain subject matter (such as monetary judgments).

62 In line with the normal rules of customary international law and law of treaties. See Arts. 19 to 23 of the 1969 Vienna Convention on the Law of Treaties.

63 See references in n. 47.

64 See Minutes No. 15 of the Commission I of the Diplomatic Session.

65 See Art. 6(c) of the May 2018 Draft Convention.

66 See Working Document No. 83 made by Australia, the European Union and Norway at the Diplomatic Session.

8. Next steps for the EU

The success of the Convention largely depends on the number of Contracting States that it attracts. The Convention shall only enter into force once it has at least two Contracting Parties.[67] Each State may choose to become a Contracting Party either by following a two-step method consisting of signature followed by ratification, acceptance or approval, or one-step method of accession.[68] Uruguay, as the first State, ceremonially signed the Convention at the occasion of the closing ceremony of the Diplomatic Session.

From the Union's perspective, the process to be undertaken before the formal uptake of the Convention is more complex (even leaving aside the constitutional peculiarities of Denmark, the United Kingdom and Ireland[69]). The Convention is clear in its Article 27 that REIOs such as the European Union are allowed to sign, accept, approve or accede to the Convention. Any internal EU decision to sign or ratify the Convention however requires prior formal agreement of the European Parliament and Council.[70] Once the EU formally accedes to the Convention, the Convention becomes a part of the European legal order.

Where the EU is a Contracting Party to an international agreement, that agreement becomes EU law, in particular as regards the jurisdiction of the CJEU to entertain a reference for a preliminary ruling on the interpretation of the agreement. By virtue of Article 267 TFEU, the Court may give preliminary rulings *inter alia* on 'the interpretation of acts of the institutions […] of the Union'. The Court has repeatedly held that it has jurisdiction to interpret the whole of such an agreement even where only a part thereof falls within exclusive Union competence.[71] Within the field of judicial civil cooperation, the Court has exercised this competence in a number of cases.[72] There can be no doubt that this case law is transposable to the Judgments

67 Art. 28(1) of the Judgments Convention.

68 This choice enables the States to use the method most compatible with their domestic law and is hence standard in the Hague Conventions.

69 See above.

70 Art. 216 TFEU confers the power on the Union to conclude an international agreement when one of the conditions set out in Art. 3(2) TFEU is met (see above). The detailed procedure for the signature and conclusion of such an agreement is set out in Art. 218 TFEU. Put summarily, following a proposal by the Commission and after obtaining the consent of the European Parliament, the decisions are taken by the Council by qualified majority. For an example of such a decision, see Council Decision 2014/887/EU on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on 2005 Choice of Court Agreements, [2014] *OJ* L 353/5.

71 Wilderspin and Rouchaud-Joêt 2003, p. 14 (above n. 35); *Hermès International* v. *FHT Marketing*, C-53/96, ECLI:EU:C:1998:292, *NIPR* 1998, 309; *Merck Genéricos* v. *Merck*, C-431/05, ECLI:EU:C:2007:496, both of which concern the TRIPS Agreement.

72 *Schlömp* v. *Landsratsamt Schwäbisch Hall*, C-467/16, ECLI:EU:C:2017:993, *NIPR* 2018, 57; *Bosworth and Hurley* v. *Arcadia Petroleum*, C-603/17, ECLI:EU:C:2019:310, *NIPR* 2019, 191; *Pillar Securitisation* v. *Hildur Arnadottir*, C-694/17, ECLI:EU:C:2019:345, *NIPR* 2019, 193 (Lugano II Convention); *KP* v. *LO*, C-83/17, ECLI:EU:C:2018:408, *NIPR* 2018, 230; *Mölk*, C-214/17, ECLI:EU:C:2018:744, *NIPR* 2018, 367 (Hague Protocol on the Law Applicable to Maintenance Obligations).

Convention. The interpretation of the Convention by the European Court is also likely to influence the interpretation given by courts in other Contracting Parties.[73]

Aside from the CJEU's role in the interpretation of the Convention, once the EU joins the Convention, the Court, as its judicial branch, becomes a court of a Contracting Party within the meaning of the Convention.[74] The CJEU's civil and commercial judgments falling within the scope of the Judgments Convention will hence be equal to the judgments given by the national courts and can circulate under the Judgments Convention.[75] It is thought that the only judgments that are likely to circulate under the Convention are those where jurisdiction is based on Article 268 TFEU (disputes relating to the non-contractual liability of the Union)[76] and Article 272 TFEU (where the parties to a contract concluded by or on behalf of the Union have conferred jurisdiction on the CJEU). Where the third party is resident or has assets in a Contracting Party that is not a Member State, such a judgment could usefully benefit from the circulation under the Convention.

9. Bilateralisation regime

The Convention enters into force between two Contracting Parties under the condition that neither raises an objection against the other.[77]

Some type of a control mechanism as regards the States with whom the treaty relations can be established features in almost every Hague Convention, in particular those that require a high level of mutual trust or a functioning infrastructure to engage effectively in mutual

73 Concurring, see Weller 2017, p. 93 (above n. 10), making the same point as regards the interpretation of the 2005 Choice of Court Convention. Cf. the view of the Hague Conference, referred to ibid., that the EU should model its legislation on existing Hague Conventions. Given the *rapport de force* between the respective bodies, this can only be regarded as an extraordinary piece of wishful thinking.

74 For the definition of the term 'court', see explanation of Art. 3(1)(b) in the Explanatory Report. The Explanatory Report further clarifies that the CJEU as a key judicial authority of the EU shall be considered as a court of a Contracting Party once the EU joins the Convention. This clarification prevents it wrongly being categorized as a so-called 'common court' – i.e. 'courts to which a group of States have transferred or delegated their judicial power, in one or several matters'. The question of 'common courts' remained unregulated in both Judgments and 2005 Choice of Court Conventions, leaving it to national law to assess whether judgments of common courts fall within the scope of the Convention.

75 A judgment given by the CJEU on a reference for a preliminary ruling, which is an interlocutory procedure in the context of proceedings pending before a national court, will not as such circulate under the Convention.

76 Under that provision, the Court has jurisdiction only where the *applicant* claims that the Union has incurred non-contractual liability. The Union cannot avail itself of this head of jurisdiction. A judgment finding that the Union had incurred liability could be easily enforced in the Union and would not therefore need to circulate under the Convention. However, a judgment stating that the Union had not incurred liability could benefit from recognition in a Contracting State if the unsuccessful applicant later commenced fresh proceedings there.

77 Art. 29 of the Judgments Convention.

cooperation.[78] On the other hand, the 2005 Choice of Court Convention has not envisaged any form of bilateralisation, thereby establishing a fully open system.

The negotiators discussed the desirability of introducing a 'safety brake' allowing States not to enter into treaty relations with other States if mutual trust in their judicial system is missing. On the one hand, many States preferred an open system, whereby the Convention remains as open as possible to the new acceding States. This would increase effectiveness of the Convention and prevent its politicization. On the other hand, a number of States wished to be able to exercise some level of control over the counterparts with whom they will engage under the Convention.

A common denominator among the negotiators was to avoid at any cost a cumbersome system resembling that of the failed 1971 Enforcement Convention.[79] The Diplomatic Session eventually chose an open system enabling any country to join the Convention.[80] Such system does not provide any preferential treatment to the Parties having acceded to the Convention earlier, to the Members of the Hague Conference or to those States present at the Diplomatic Session.[81] The Convention further introduced a limited opt-out system similar to the one in the 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. In this opt-out system, any State can raise an objection against any other in a limited time after one of them joins the Convention.[82] This objection may be withdrawn but cannot be later reinstated.[83] This system of bilateralisation in its particular shape and form is novel to the Hague instruments.

It was also acknowledged that once in place, this bilateralisation mechanism should only be used in extreme situations where mutual trust in judicial systems is missing while giving the precedence to the system of checks and balances introduced by the Convention itself.[84]

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78 1980 Hague Abduction Convention and 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

79 In order for decisions rendered in one State to be recognised and enforced in another, not only did both States need to be Contracting Parties to the Convention; in addition, they needed to conclude a Supplementary Agreement between themselves (Art. 21 of that Convention).

80 Whatever method of joining the Convention is used by the State, be it ratification or accession, the resulting status is the same. In contrast, in some other Hague 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 to the Convention.

81 Various combinations of these aspects could be found in previous Hague Conventions. These distinctions however become increasingly ineffective bearing in mind the growing global membership of the Hague Conference and the number of countries present at the Diplomatic Session (81).

82 If no objection is raised during a limited period of time, the Convention enters into force between the two Contracting States. This opt-out mechanism is to be distinguished from an opt-in mechanism requiring a positive action of acceptance by one of the States or both of them.

83 Proposals were made to enable ex-post review of the acceptance (Working Document No. 24 of May 2019) to cater for the cases when situation in a Contracting Country significantly changes – e.g. the rule of law weakens or systemic lack of due process creeps in.

84 Such as jurisdictional filters, exclusive jurisdiction, grounds for refusal of recognition and enforcement and other safeguards.

10. Conclusion

As outlined above, the Convention provides a very welcome framework for the simplified circulation of foreign judgments and thereby fills an existing gap in international procedural law. Bearing in mind that no previous attempt at an overarching convention in this area obtained sufficient support or adherence, the Judgments Convention is a historically unique feat. Its success can however be proclaimed only if it garners wide and early uptake. Indeed, the largely inoffensive nature of the Convention (with matters being excluded from scope in the absence of a consensus) may induce a larger number of States to ratify it. The Convention also provides merely a minimum standard allowing countries to continue applying their more generous rules and can hence co-exist alongside the more liberal national recognition and enforcement systems. However, it creates an additional regulatory layer, which might increase the complexity of the already dense legal arena.

Since the EU has not adopted its own set of rules on the recognition and enforcement of third-country judgments to date,[85] Member State are not precluded from putting in place their own rules on the recognition and enforcement of third-country judgments. After the EU accedes to the Judgments Convention, the Convention will provide a common level-playing field among the Member States and will ease the acceptance of foreign judgments in those Member States that currently have more restrictive national systems (e.g. Nordic EU Member States). On the other hand, a number of EU Member States that already have a comparatively liberal national systems of recognition and enforcement[86] would have benefitted more from a more ambitious Convention which would have made the most difference in comparison to the current status quo.

Bearing in mind the failures of previous projects in this field, ambition quite legitimately gave way to a generally more acceptable regulatory framework, which has the potential to mark the common denominator in this area. However, it remains to be seen whether all the time, expense and effort that has been devoted to the project will have been worthwhile. That will depend largely on which countries join the Convention, how liberal their regime of recognition and enforcement currently is and how often the Convention is applied in practice.

85 With the exception of the 2005 Choice of Court Convention and Lugano II Convention.

86 See above, n. 40.