2017

The Court Jurisdiction and Proceedings Transfer Act and the Hague Conference's Judgments and Jurisdiction Projects

Joost Blom
Allard School of Law at the University of British Columbia, blom@allard.ubc.ca

Citation Details

Joost Blom, "The Court Jurisdiction and Proceedings Transfer Act and the Hague Conference's Judgments and Jurisdiction Projects" ([forthcoming in 2017]) 55:1 Osgoode Hall LJ.

The *Court Jurisdiction and Proceedings Transfer Act* and the Hague Conference's Judgments and Jurisdiction Projects

1. INTRODUCTION

The codification of the substantive law of jurisdiction in the CJPTA[1] must be viewed not only from the perspective of Canadian private international law but also from that of international efforts to coordinate the law of jurisdiction and foreign judgments. Most prominent among these are the projects of the Hague Conference on Private International Law. These include a failed attempt at a convention to deal both with jurisdiction and with foreign judgments (1999-2001); a promulgated convention on Choice of Court Agreements (2005); a new attempt, currently under way, to develop a convention on recognition and enforcement of foreign judgments without any direct rules on jurisdiction; and a foreshadowed attempt to develop a separate convention with direct rules on jurisdiction. A brief history of these evolutions is necessary.

The earliest attempt to develop a comprehensive convention on the recognition and enforcement of civil judgments began with a decision of the Conference in 1960[2] and culminated in the Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.[3] This convention attracted no adherents, partly because of its complexity and partly because the European countries had developed the Brussels Convention,[4] which successfully covered the field within the European Communities.

In May 1992 the United States proposed to the Hague Conference that it initiate a new project on the recognition and enforcement of civil judgments, contrasting the success of the 1958 New York Convention on the enforcement of arbitral awards with the absence of any international agreement on

---

1 The *Uniform Court Jurisdiction and Proceedings Transfer Act* promulgated by the Uniform Law Conference in 1994 has been enacted in three provinces: *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 [CJPTA (BC)] (in force 4 May 2006); *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2d Sess), c 2 [CJPTA (NS)] (in force 1 June 2008); *Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1 [CJPTA (SK)] (in force 1 March 2004). The acts differ slightly. Yukon Territory has enacted it but not brought it into force: Court Jurisdiction and Proceedings Transfer Act, SY 2000, c 7. See Vaughan Black, Stephen GA Pitel & Michael Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell, 2012).

2 Hague Conference on Private International Law, Preliminary Document No 7, April 1997, *International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, report drawn up by Catherine Kessedjian, online: Hague Conference on Private International Law <https://assets.hcch.net/docs/76852ce3-a967-42e4-94f5-24be4289d1e5.pdf> [Kessedjian report], para 3.

3 Online: Hague Conference on Private International Law <https://www.hcch.net/en/instruments/conventions/full-text/?cid=78>.

4 According to the Kessedjian report, *supra* note 2, para 7, citing the Permanent Bureau's Preliminary Document No 17 of May 1992, the Brussels Convention built to a large extent on the Hague Convention and was negotiated in part by the same persons. The Lugano Convention extended the Brussels regime to the European Free Trade Area.

enforcing civil judgments.[5] The Hague Conference took up this proposal. From the outset there were shifting and conflicting views on whether the convention should include rules, not only on foreign judgments, but also on the grounds on which courts in states that were parties to the convention must or must not take jurisdiction.

The United States' initial proposal dealt with this issue.[6] It suggested that the Brussels Convention model was a valuable one but a closed list of acceptable bases for jurisdiction might not attract broad enough support outside Western Europe. Rather than having to choose between a *traité simple*, dealing with recognition and enforcement of judgments only, and a *traité double*, mandating as well the jurisdictional grounds that states must follow, the Conference should consider the third option of a *traité mixte*, which could mandate some jurisdictional grounds (a "white list"), exclude others as exorbitant grounds (a "black list"), and leave states free to use or not use jurisdictional grounds that were not on either list (a "gray zone").[7]

The Permanent Bureau of the Hague Conference first took the view that efforts should be directed at a *traité simple*, because any attempt to codify jurisdictional grounds would run up against the problem that parties to the Brussels and Lugano Conventions would be very reluctant to subscribe to any jurisdictional regime that departed significantly from the the European one.[8] Things moved along and in 1996 the Conference definitively decided to look at "the question of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters".[9] A year later, the Permanent Bureau had swung around to insisting that "the issue is much more one of direct jurisdiction than of the recognition and enforcement of judgments".[10] From then on the Conference's efforts were directed at producing at least a *traité mixte* rather than just a *traité simple*.

---

5 Letter from the Legal Advisor to the Secretary of State to the Secretary General of the Hague Conference on Private International Law, 5 May 1992, online: State Department of the United States <http://www.state.gov/documents/organization/65973.pdf>. The approach to the Hague Conference came after informal discussions that Arthur von Mehren had in 1991 with representatives of the Netherlands and the United Kingdom, to explore possibly negotiating a foreign judgments treaty between the United States and the EC-EFTA member states. The consensus was that working on a Hague Convention was a more promising avenue. See Arthur T von Mehren, "Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?" (1994) 57 L & Contemp Prob 271 at 281-82.

6 Letter from the Legal Advisor, *ibid.*

7 The mixed convention option was favoured by von Mehren, *supra* note 5 at 287. He continued to believe in it at the time when negotiations on it were going badly: "Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project Succeed?" (2001) 49 Am J Comp L 19. On the typology of judgment conventions, suggesting there are actually nine types, see Ralf Michaels, "Some Fundamental Jurisdictional Conceptions as Applied to Judgment Conventions", in Eckart Gottschalk *et al*, *Conflict of Laws in a Globalized World* (Cambridge: Cambridge University Press, 2007) 29.

8 "Some Reflections of the Permanent Bureau on a general convention on enforcement of judgments", Preliminary Document No 17 of May 1992, online: Hague Conference on Private International Law <https://assets.hcch.net/docs/bd6dcaab-b2a4-4255-84ec-eca3b7233588.pdf> at paras 16-19.

9 Hague Conference on Private International Law, *Final Act of the Eighteenth Session* (1996), online: Hague Conference on Private International Law <https://assets.hcch.net/docs/63159a78-60af-43a4-be35-1f58a22645c1.pdf> at 47.

10 Kessedjian report, *supra* note 2, para 8 [footnotes omitted].

In 1999 a Special Commission had developed a preliminary draft convention, which was the subject of an explanatory report by Peter Nygh and Fausto Pocar.[11] (It is one of four drafts that I will be referring to in this paper; I will refer to this one as the "1999 Hague draft".) At the 2001 Diplomatic Conference of the Hague Conference, Commission II reworked the draft. The product of its efforts (the "2001 Hague Draft"[12]) showed all too clearly the tensions between enthusiasts for the Brussels model and other countries, especially the United States, with very different, generally broader, jurisdictional grounds.[13] Brackets, alternative versions and variant versions had proliferated like weeds.

Efforts to move things forward were unsuccessful. In 2003 the Conference narrowed the focus of the project to one relatively uncontroversial jurisdictional principle, which was consent to jurisdiction by agreement. This resulted in the Hague Convention of 30 June 2005 on Choice of Court Agreements.[14] The Choice of Court Convention is in force; the European Union, Mexico and Singapore have become parties to it.[15] Because defining jurisdiction was not the main issue,[16] the convention's importance lies more in

---

[11] The draft text and the report are both in Preliminary Document No 11 (August 2000), online: Hague Conference on Private International Law <https://assets.hcch.net/docs/638883f3-0c0a-46c6-b646-7a099d9bd95e.pdf>. I will refer to the draft text as the "1999 Hague draft" (it was adopted by a Special Commission in 1999). For a Canadian view at the time, see Vaughan Black, "Commodifying Justice for Global Free Trade: The Proposed Hague Judgments Convention" (2000) 38 Osgoode Hall LJ 237.

[12] Online: Hague Conference on Private International Law, Commission II, Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Nineteenth Session, *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001: Interim Text*, online: Hague Conference on Private International Law <https://assets.hcch.net/docs/e172ab52-e2de-4e40-9051-11aee7c7be67.pdf>[2001 Hague draft].

[13] Although not always broader. Brussels grounds of jurisdiction, especially assumed jurisdiction in relation to contracts and torts, extend to some cases in which American law would have due process concerns; see Ronald A Brand, "Due Process, Jurisdiction and a Hague Judgments Convention" (1999) 60 U Pitts L Rev 661. On the impasse generally, see John J Barceló III & Kevin M Clermont, *A Global Law of Jurisdiction and Judgments: Lessons from The Hague* (The Hague: Kluwer, 2002); Gralf-Peter Calliess, "Value-added Norms, Local Litigation, and Global Enforcement: Why the Brussels Philosophy Failed in The Hague" (2004), 5 German LJ 1489; William E O'Brian Jr, "The Hague Convention on Jurisdiction and Judgments: The Way Forward" (2003) 66 MLR 491; Justyna Regan, "Recognition and Enforcement of Foreign Judgments — A Second Attempt in The Hague?" (2015) 14 Richmond J Global L & Bus 63 at 64-71. Arthur von Mehren, writing in the midst of the impasse, attributed it in significant measure to "a fundamental discordance between the views of the United States and of most, perhaps all, European Union States respecting the role of adjudication in contemporary society": von Mehren, *supra note* 7 at 195.

[14] Online: Hague Conference on Private International Law <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court> [Choice of Court Convention].

[15] Status table, online: Hague Conference on Private International Law <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>. As the time of writing the United States and Ukraine had signed but not yet ratified.

[16] Although some Canadian common law jurisdictional rules would change if Canada becomes a party. Most notably, "strong cause" would no longer be a ground for taking jurisdiction despite the clause. Art 6 limits the ability to take jurisdiction in the face of an exclusive contractual choice of another court. If the choice of court agreement is contractually valid, taking jurisdiction is only possible if giving effect to the agreement would "lead to a manifest injustice or would be manifestly contrary to public policy" of the forum, or the agreement cannot be reasonably performed, or the chosen court will not hear the case (para (c)-(e), respectively). See

the provisions setting out the conditions of, and defences to, recognition and enforcement of a judgment of the chosen court. Many of those provisions have been carried over, *mutatis mutandis*, into the current project on a general convention on the recognition and enforcement of judgments in civil and commercial matters.

The current project dates from 2011, when, at the instigation of the Permanent Bureau, the Hague Conference appointed an Experts' Group to consider further work on a judgments project. That group recommended that work be undertaken on a recognition and enforcement convention, including jurisdictional filters. This recommendation led to a Working Group, which in 2015 produced a proposed draft text of a convention.[17] The Working Group's draft went to a Special Commission that met in June 2016 and reworked it. The result was published as the Special Commission's "2016 Preliminary Draft Convention".[18] The Special Commission met again and revised the 2016 draft into the "February 2017 Draft Convention",[19] which is the latest indication of what a convention might look like. Confidence seems high that a final version can be achieved. The Special Commission has tentatively scheduled a third session in November 2017 and it has recommended that a Diplomatic Conference may be convened towards the end of 2018 or early 2019.[20]

So the prospects seem good that a *traité simple* form of convention will emerge, with "jurisdictional filters" but no direct rules on taking jurisdiction. Nevertheless, despite the fiasco of 1999-2001, the ambition to create a jurisdiction convention lives on. The Council of the Hague Conference resolved in March 2016 that, once the Special Commission had drawn up a draft recognition and enforcement convention, the Experts' Group would be convened again, this time to consider "matters relating to direct

---

Vaughan Black, "Hague Convention Choice of Court Agreement and the Common Law 2007", online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/annual-meetings/216-2007-charlottetown-pe/civil-section-documents/566-hague-convention-choice-of-court-agreement-and-the-common-law-2007> at paras 29-31. See also H Scott Fairley & John Archibald, "After The Hague: Some Thoughts on the Impact on Canadian Law of the Convention on Choice of Court Agreements" (2006), 12 ILSA J Int'l & Comp L 417.

17 Hague Conference on Private International Law, Preliminary Document No 2, April 2016, includes the text of the Working Group draft and the Permanent Bureau's *Explanatory Note Providing Background on the Proposed Draft Text and Identifying Outstanding Issues*, online (as part of a set of files labeled 2016 Special Commission Documentation): Hague Conference on Private International Law, <https://www.hcch.net/en/projects/legislative-projects/judgments/special-commission1>. I will refer to the draft text as "Working Group draft" and the explanatory note as "April 2016 Explanatory Note".

18 Hague Conference on Private International Law, Special Commission on the Recognition and Enforcement of Foreign Judgments, 2016 Preliminary Draft Convention, online: Hague Conference on Private International Law <https://assets.hcch.net/docs/42a96b27-11fa-49f9-8e48-a82245aff1a6.pdf> [2016 Hague draft].

19 Hague Conference on Private International Law, Special Commission on the Recognition and Enforcement of Foreign Judgments, February 2017 Draft Convention, online: Hague Conference on Private International Law < https://assets.hcch.net/docs/d6f58225-0427-4a65-8f8b-180e79cafdbb.pdf> [February 2017 Hague draft]. The major portion of this draft is included as an appendix to this paper.

20 Hague Conference on Private International Law, Council on General Affairs and Policy of the Conference (14-16 March 2017), *Conclusions and Recommendations Adopted by the Council*, online: Hague Conference on Private International Law < https://assets.hcch.net/docs/77326cfb-ff7e-401a-b0e8-2de9efa1c7f6.pdf > at para 5.

jurisdiction (including exorbitant grounds and *lis pendens* / declining jurisdiction)" with a view to "preparing an additional instrument".[21] The Council reiterated this plan in March 2017.[22]

Whether anything comes of such further consideration seems highly uncertain. If a convention along the lines of the February 2017 Hague draft does materialize and is reasonably widely adopted, it is far from clear how much value a convention on "direct jurisdiction" would add to the international litigation system.[23] If a judgments convention does not materialize or — probably the greater risk — is not widely taken up, it is hard to see a jurisdiction convention, which we know from experience is a much greater challenge, being viable at all.

2. THE CJPTA AND THE HAGUE PROJECTS

The main question about the CJPTA and the Hague projects is whether the CJPTA's rules might cause difficulty in the event that Canada becomes a party to the judgments convention currently being negotiated. This convention is already taking fairly clear shape, and, as noted, the chances that the negotiations will succeed seem good. If they do, and if the convention is adopted by Canada (probably province by province[24]) and by a number of Canada's trading partners, the relationship between the CJPTA regime and the jurisdictional criteria in the convention will become a matter of great practical importance.

A separate Hague jurisdiction convention is a remoter prospect. Such a convention may one day see the light of day, but the jurisdictional principles in the 1999 and 2001 drafts elicited little consensus at the time, and it is doubtful whether they would elicit any more now. If a new jurisdiction convention eventually emerges, it is almost certainly going to look very different from these drafts. Nevertheless, I

---

21 Hague Conference on Private International Law, Council on General Affairs and Policy of the Conference (15-17 March 2016), *Conclusions and Recommendations Adopted by the Council*, online: Hague Conference on Private International Law <https://assets.hcch.net/docs/679bd42c-f974-461a-8e1a-31e1b51eda10.pdf> at para 13. The Council "confirmed that this is a priority project" (*ibid* at para 14).

22 Hague Conference on Private International Law, Council on General Affairs and Policy of the Conference (14-16 March 2017), *Conclusions and Recommendations Adopted by the Council*, *supra* note 20 at para. 7.

23 If litigants know what jurisdictional grounds entitle an eventual judgment to be recognized or enforced in another country, and having the judgment recognized or enforced matters to them, their choice of where to litigate is accordingly circumscribed. There might still be jurisdictional contests and manoeuvring because their could be more than one forum that complies with the recognition rules (e.g., to take two from the February 2017 Hague draft, the defendant's habitual residence and the place where the defendant's tortious conduct took place). Here a separate jurisdiction convention might help by, for instance, providing a *lis pendens* rule. Where parties do not care about whether an eventual judgment will be enforceable, the range of possible jurisdictional struggles is larger, and a jurisdiction convention in principle would help by reining in broad jurisdictional rules and providing an agreed set of rules to deal with multiple forums and parallel proceedings. The benefits from doing all that, however, are much harder to evaluate than the benefits from an agreed set of rules for recognizing and enforcing judgments. One reason is that it is hard to assess how successfully, on the whole, the problem of competing jurisdictions is already addressed through the current decentralized international system, in which each country controls its own courts' ability to take or decline jurisdiction if there are other available forums.

24 February 2017 Hague draft, art 28, the now familiar "federal state clause" that enables a state to declare that the convention extends to all its territorial units or only to some of them. The declaration to limit application to certain units must be made when the state becomes a party but may be modified subsequently.

have referred here and there to what was in the 1999 and 2001 Hague drafts, as glimpses of what might possibly be included in such a convention.

The jurisdictional grounds approved in the February 2017 Hague draft are a relatively short list, which is not surprising, given that the participants in the Special Commission, from a wide range of countries, could all agree on them. A judgment from a court that had jurisdiction on one of these grounds would have to be recognized or enforced. The convention's regime would not be exclusive; a state would be free to have its courts recognize judgments on jurisdictional grounds accepted in its national recognition and enforcement rules even if those judgments did not qualify under the convention.[25] The convention would apply only if both the state of origin and the requested state were parties to the convention.[26]

3. SUBJECT MATTER ISSUES

Before looking in detail at how the CJPTA compares with the jurisdictional provisions in the February 2017 Hague draft, it is worth noting some aspects of the Hague regime relating to subject matter.

The CJPTA has no provisions that exclude any subject matter from its scope, but some subject matters are indirectly excluded because court jurisdiction in relation to them is dealt with in another statute, whether provincial or federal.[27] The scope of the February 2017 Hague draft, as of the Hague project from the beginning, is limited to "civil or commercial matters".[28] Revenue matters are expressly excluded as not being civil or commercial.[29] A fairly long list of subject matters that are definitely or arguably civil or commercial are also excluded. The details are not material for the present purpose. Among others, they embrace the status and capacity of natural persons, family matters, succession, insolvency, carriage of passengers and goods, and the validity, nullity or dissolution of corporations and other entities.[30] A notable exclusion is defamation,[31] because it implicates freedom of expression and may have constitutional implications.[32]

The February 2017 Hague draft also makes some matters subject to the exclusive jurisdiction of one state. These by and large correspond to matters that Canadian common law rules also regard as within one country's exclusive jurisdiction. The *Moçambique* rule is present, though in a narrower form. Only courts

---

25 February 2017 Hague draft, *supra* note 19, art 17.

26 *Ibid*, art 1(2).

27 CJPTA (BC), *supra* note 1, s 12. I am using the BC version of the CJPTA as representative of all three.

28 February 2017 Hague draft, *supra* note 19, art 1(1).

29 *Ibid*, art 1(1).

30 See *ibid*, art 2(1).

31 *Ibid*, art 2(1)(k). The same provision has a bracketed extension to judgments on privacy.

32 As it is put in the April 2016 Explanatory Note, *supra* note 17, para 38. Although it is not referred to in so many words, including defamation would have run head-on into the United States' 2010 SPEECH Act [*Securing the Protection of our Enduring and Established Constitutional Heritage Act*], 28 USC § 4102.

in the country where an immovable is situated can rule directly on rights *in rem* in the immovable,[33] but that rule does not extend to personal claims relating to such property.[34]

An area in which the Special Commission reached no consensus in February 2017 was how to deal with judgments on intellectual property (IP) rights. The February 2017 draft, unlike the 2016 draft, has a bracketed provision that would exclude judgments on IP rights from the scope of the convention altogether, possibly subject to an exception, separately bracketed, for judgments based on copyright or other non-registered rights.[35] There is a further bracketed provision that would exclude the enforcement of non-monetary judgments in IP matters even if monetary damage awards in such matters were within the convention.[36] .

Alternative provisions assume that some or all IP judgments will be included in the convention's scope. They grapple with the issue of territoriality. It has long been the general view that jurisdiction in an infringement action, or some other action in which the validity of the IP right is in issue, is strictly territorial in the sense that only the state whose IP right is in question can adjudicate on the validity or infringement of the right. The current of opinion has moved away from this position in relation to copyright and other rights that do not depend on registration, because there is no impingement, even arguably, on the state's sovereignty by a foreign court's deciding on such rights.[37] Because a foreign decision on a *registered* right arguably does involve the sovereignty of the state of registration, the territoriality principle remains more solidly in place— but not unchallengeably so —for rights like patents and trademarks, which mostly do depend on registration.[38]

The 2016 Hague draft would have applied the territoriality principle to judgments ruling on the registration or validity of a registered right.[39] They would be enforceable under the convention if *and only if* they came from a court in the country of registration.[40] Thus there would be an obligation *not* to enforce

---

[33] *Ibid*, art 6(b). Art 6(c) is a special rule about judgments ruling on a tenancy of immovable property for a period of more than six months. The court of the situs has exclusive jurisdiction under the convention only if the situs is in a contracting state and the law of that state give its own courts exclusive jurisdiction.

[34] April 2016 Explanatory Note, *supra* note 17, para 156.

[35] February 2017 Hague draft, *supra* note 19, art 2(l)(l) (the blanket exclusion and the copyright inclusion are separately bracketed). See also *infra* note 38 and accompanying text.

[36] February 2017 Hague draft, *ibid*, art 12.

[37] *Lucasfilm Ltd v Ainsworth*, [2011] UKSC 39, [2012] 1 AC 208. The issue has not come up yet in a Canadian case. See, however, *Geophysical Service Inc v Jebco Seismic UK Ltd*, 2016 ABQB 402 at para 24: "It is difficult to contemplate how a forum outside of Canada would ever be an appropriate forum for the consideration and application of Canadian copyright law."

[38] The distinction between the territorial implications of the two types of IP right is why art 2(1)(l) (*supra* note 35) contemplates that the convention might include judgments on copyright and other non-registered rights even if it otherwise excludes IP rights from its scope.

[39] "Ruling on" would presumably include deciding on the validity of the right as part of a judgment for infringement.

[40] Under another bracketed provision in the February 2017 Hague draft, art 5(1)(k), a judgment of the state of registration for infringement of a registered patent, trademark or other listed intellectual property right would be enforceable without any other basis of jurisdiction being present, but the draft added (compared with 2016)

judgments from a country other than that of registration even if one of the other grounds of jurisdiction was present, like the defendant's habitual residence in that country.[41] However, in its February 2017 draft the Special Commission put brackets around this provision, raising the possibility that judgments from states other than that of registration might be encompassed in the obligation to enforce.[42] In the case of copyright and other non-registered rights (assuming they were not excluded from the convention's scope), a judgment based on any of the convention's jurisdictional grounds would be enforceable, regardless of whether the copyright or other right in question was governed by the law of the state of origin or a different state.[43]

4. TERRITORIAL COMPETENCE

4.1 General

In this part of the paper I will review the various heads of territorial competence under the CJPTA from the point of view of how far they correspond to the jurisdictional criteria that feature in the February 2017 Hague draft. As already mentioned, I will also make occasional comparisons to the "direct jurisdiction" provisions in the 1999 and 2001 Hague drafts.

A point that needs to be made at the outset is that the rules for domestic jurisdiction, which is what the CJPTA deals with, need not correspond to the rules that determine the jurisdiction of a foreign court for the purpose of foreign judgments, which is what the Hague judgments convention would deal with. The law may allow domestic courts to take jurisdiction on a ground that would not be recognized as giving a foreign court jurisdiction. (The reverse would not normally be true.) This is especially so if the domestic jurisdictional system includes a discretion to decline jurisdiction, on *forum non conveniens* or other grounds. If the exercise of jurisdiction is tempered by such a discretion, the grounds for jurisdiction can be more broadly drawn. But in the case of foreign judgments, where there is typically no discretion to

---

the qualification, itself separately bracketed, "unless the defendant has not acted in that State [the state of registration] to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State". The latter proviso probably reflects United States due process concerns if jurisdiction is based solely on the fact that the right infringed was that of the state of origin.

41 2016 Hague draft, *supra* note 18, art 6(a). Enforcement under national law would not be an option because the exclusive jurisdiction provisions in art 6 would apply even if national law was to the contrary (art 16 of the 2016 draft, carried forward into art 17 of the February 2017 draft, *supra* note 19).

42 February 2017 Hague draft, *ibid*, art 6(a). It is clear that a judgment from outside the country of registration could not have *in rem* effects, such as invalidating the registration, but it could be binding between the parties *in personam*.

43 Art 6(a) of the February 2017 Hague draft, referred to *supra* note 41, is limited to judgments on IP rights that are required to be granted or registered, which would not apply to copyright or other unregistered rights. However, in art 7(1)(g) (bracketed), the draft would allow states optionally to refuse to enforce a judgment for infringement of an IP right if the court applied to that right a law other than the law governing the right. The fact that the law of the state of origin governed the right in question would be a distinct head of jurisdiction under two bracketed provisions in the February 2017 Hague draft, *supra* note 19, art 5(1)(l) and (m), which deal with judgments on the ownership or subsistence (para (l)) or infringement (para (m)) of copyright or other non-registered rights. As with judgments for infringement of registered rights (see *supra* note 40), there is a separately bracketed qualification in para (m) that would exclude infringement judgments in which the defendant did not act in, or direct its activities towards, the state in question.

decline to recognize or enforce, it may be appropriate to frame the grounds for the foreign court's jurisdiction more narrowly.[44]

With very few exceptions, the CJPTA grounds for territorial competence are broader than the corresponding jurisdictional grounds in the Hague drafts. The CJPTA generally tracks the Canadian common law as it stood in the early 1990s, when the Uniform Law Conference of Canada prepared the act. The common law on jurisdiction has since evolved in two ways. First, in assumed jurisdiction, meaning *in personam* jurisdiction as against a defendant who is not present in the province,[45] Canadian law, in *Club Resorts,*[46] adopted the analytical device of presumptive connecting factors (PCFs). Second, in presence-based jurisdiction, the Supreme Court of Canada, in *Chevron*,[47] clarified that the evolution of the Canadian common law in the last 25 years has left untouched the common law rule that mere presence is enough to found jurisdiction. From this it follows that an individual's presence in the province need not meet any test of substantiality. It also follows that, as was specifically held in *Chevron*, a corporation's constructive presence, through carrying on business in the province, is fully equivalent to the physical presence of an individual. It supports jurisdiction in any claim against the corporation, regardless of whether the claim has anything to do with the defendant's activities in the province.

These developments have, if anything, opened up something of a gap between the common law and the CJPTA, leaving the CJPTA sitting closer to the Hague standards than the Canadian common law now does. In cases of assumed jurisdiction, common law PCFs are now in some respects much wider than the presumed real and substantial connections listed in the CJPTA.[48] True, the expansive tendency of the common law may filter into the CJPTA via the use of the "residual" real and substantial connection. However, the "residual" connection is an avenue that courts in the CJPTA provinces have not been inclined to open up much until now, and they will not necessarily change this stance just because, in the non-CJPTA provinces, some PCFs are more liberal than the CJPTA presumptions.[49]

In cases of presence-based jurisdiction, a clear gap exists in relation to individuals because the CJPTA chose to make ordinary residence, rather than presence, the test. There is no significant gap as far as

---

44 In theory Canadian law since 1990 has treated the scope of domestic jurisdiction and the scope of a foreign court's jurisdiction as correlatives by applying the "real and substantial connection" criterion to both: *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at 1094; *Beals v Saldanha*, 2003 SCC 72, [2003] 3 SCR 416 at paras 37-38, 84, 202. The principle of correlativity applies in a system constructed that like that of the European Brussels I Regulation (recast), Reg (EU) No 1215/2012. It is not axiomatic in relation to a common law system, and the difficulties posed by it have never been fully examined by Canadian courts.

45 The distinction between assumed and presence-based jurisdiction was stressed in *Chevron Corp v Yaiguaje*, 2015 SCC 42 at para 81, [2015] 3 SCR 69 [*Chevron*].

46 *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572 [*Club Resorts*].

47 *Chevron*, *supra* note 45.

48 For example, the PCF, for the purpose of a tort claim, that the claim is connected with a contract that was made in the province. This PCF was applied in *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP*, 2016 SCC 30 [*Lapointe*]. This case actually relied on the presumptive connecting factor of a contract made in the jurisdiction as supporting jurisdiction in a tort action, but the result suggests the court may lean in favour a retention of "necessary or proper party" as a ground for jurisdiction *simpliciter*. One decision has already accepted it as a PCF: *Geophysical Service Inc v Arcis Seismic Solutions Corp*, 2015 ABQB 88, 20 Alta LR (6th) 112.

49 Cf the reluctance to import the *Muscutt* factors: *Laxton v Jurem Anstalt*, 2011 BCCA 212, 334 DLR (4th) 76.

claims against a corporation are concerned, because the CJPTA's definition of ordinary residence for a corporation[50] encompassed the common law criterion of carrying on business in the province, later affirmed in *Chevron*.

In reviewing the CJPTA criteria for territorial competence, I have indicated at the start of each discussion whether I think a judgment of a Canadian court that took jurisdiction on that ground would be "Hague compliant" in the sense of meeting the jurisdictional standards in the February 2017 Hague draft. The answer usually is sometimes, in a few cases it is always, and in some cases it is never.

4.2 Consent

4.2.1 Defendant sued on counterclaim

Sometimes Hague compliant. The CJPTA gives territorial competence whenever the defendant is sued on a counterclaim to a proceeding in which that person is plaintiff.[51] The February 2017 Hague draft qualifies the enforceability of a judgment on such a counterclaim. To the extent that the counterclaim succeeded, the judgment is enforceable only if the counterclaim arose out of the same transaction or occurrence as the claim.[52] This is a qualification not present in the CJPTA. Whether a counterclaim can be brought if it arises out of an unrelated transaction depends on the local rules. It does appear likely that some counterclaims that would fit under the CJPTA rule would not meet the "same transaction or occurrence" test, as when the defendant in a contract action counterclaims based on an unrelated debt that the plaintiff owes the defendant.

4.2.2 Submission in the course of proceedings

Sometimes Hague compliant. The expression used in the CJPTA provision[53] is that the defendant "submits to the court's jurisdiction" in the course of the proceeding. This must be compared with the combination of two jurisdictional grounds in the February 2017 Hague draft. One says, "expressly consented to the jurisdiction of the court of origin in the course of the proceedings".[54] This is narrower than the CJPTA provision because submission in the Canadian sense can take place by conduct that implicitly accepts the jurisdiction of the court without clearly qualifying as "express consent". The Hague grounds also include one that the Special Commission added to the Working Group's draft in 2016[55] and

---

50 CJPTA (BC), *supra* note 1, s 7(c). There may be nuances; at common law someone like an incorporated consultant could carry on business in the jurisdiction without necessarily having a fixed place of business in the jurisdiction. On the other hand, the court in *Chevron*, *supra* note 45 at para 85, emphasized that courts consistently found "maintenance of physical business premises to be a compelling jurisdictional factor".

51 CJPTA (BC), *ibid*, s 3(a).

52 February 2017 Hague draft, *supra* note 19, art 5(1)(o). To the extent that it failed, it must be recognized unless the law of the state of origin required the counterclaim to be filed in order to avoid preclusion; *ibid*.

53 CJPTA(BC), s 3(b).

54 February 2017 Hague draft, *supra* note 19, art 5(1)(e).

55 2016 Hague draft, *supra* note 18, art 5(1)(f).

revised in February 2017.[56] This is that the defendant "argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law".[57] The expression "argued on the merits" covers most of the situations in which, according to the Canadian case law, a defendant implicitly accepts jurisdiction, but perhaps not all of them.[58] The very significant qualification that arguing on the merits does not give the court jurisdiction if the defendant had no viable way to contest jurisdiction has no equivalent in Canadian law.

It is worth noting that the February 2017 Hague draft would restrict the "express consent" ground to consent that "was addressed to the court, orally or in writing", if the person said to be bound by the judgment is a consumer being sued on a consumer contract or an employee being sued on an employment contract.[59]

4.2.3 Agreement that the court has jurisdiction

To avoid overlap between the 2005 Choice of Court Convention and the general judgments convention, the February 2017 Hague draft does not deal with submission under an exclusive choice of court agreement, which is the preserve of the 2005 convention.[60] Any agreement designating a court or courts of one contracting state is deemed to be exclusive unless the parties expressly provide otherwise.[61] A court designated in a valid exclusive choice of court agreement has jurisdiction and cannot decline it in favour of a court in another state.[62] A judgment of a court that is exclusively chosen must be recognized and enforced,[63] subject only to fairly standard defences such as fraud and public policy.[64]

Where jurisdiction was taken on the basis of a non-exclusive choice of court agreement, recognition and enforcement are mandatory under the Choice of Court Convention only if both the state of origin and the requested state have made declarations that they are prepared to recognize and enforce judgments where jurisdiction is taken on such a basis.[65] A state that signs on to the proposed judgments convention will, however, bind itself to enforce a judgment "given by a court designated in an agreement concluded or

---

56 February 2017 Hague draft, *supra* note 19, art 5(1)(f). The 2016 version, which was in brackets, used "entered an appearance" rather than "argued on the merits".

57 February 2017 Hague draft, *ibid*, art 5(1)(f).

58 As when the defendant writes the court a letter responding to the notice of the proceeding, as the Thivys did in *Beals v Saldanha*, 2003 SCC 72, [2003] 3 SCR 416, which LeBel J said at para 147 was attornment.

59 February 2017 Hague draft, *supra* note 19, art 5(2)(a).

60 Choice of Court Convention, *supra* note 14, art 1(1).

61 *Ibid,* art 3(b).

62 *Ibid*, art 5(1)-(2).

63 *Ibid,* art 8(1).

64 *Ibid*, art 9.

65 *Ibid*, art 22.

documented in writing . . . other than an exclusive choice of court agreement".[66] This supplement to the Choice of Court Convention is consistent with the principle of consent, which the CJPTA also embodies when it says that a court has territorial competence if "there is an agreement between the plaintiff and [the defendant] to the effect that the court has jurisdiction in the proceeding".[67]

4.3 Ordinary residence

4.3.1 Individuals

Always Hague compliant. Both ordinary residence, the CJPTA test,[68] and habitual residence, the Hague test,[69] have been applied for many years by Canadian courts, especially in family matters, and they are generally treated as equivalent. Assuming that they are, a judgment in any case in which territorial competence was based on an individual's ordinary residence will comply with the habitual residence criterion in the February 2017 Hague draft.

The 1999 Hague draft (the mixed convention) also used habitual residence as the basic jurisdictional test,[70] and specifically prohibited jurisdiction based on the defendant's temporary residence or presence in the state.[71] The negotiations the following year showed disagreement on whether the term used should be residence or habitual residence,[72] and in case residence were to be chosen, a bracketed provision was inserted to select the state of principal residence if there was one.[73]

4.3.2 Corporations and other entities

Sometimes Hague compliant. The CJPTA follows the common law tradition of treating a corporation as present in the province if it does business or has an agent for service there. Because the Hague model, following the civil law pattern, makes habitual residence, not presence, the basic ground for personal jurisdiction, the test for corporate habitual residence is aimed at selecting only the state or states (a corporation, like an individual, can have more than one habitual residence) in which the corporation is in some sense based.[74] The criteria have been the same throughout the Hague projects since the 1999 draft.[75]

---

66 February 2017 Hague draft, *supra* note 19, art 5(1)(p). This jurisdictional ground was not in the 2016 draft.

67 CJPTA (BC), *supra* note 1, s 3(c).

68 CJPTA (BC), *supra* note 1, s 3(d).

69 February 2017 Hague draft, *supra* note 19, art 5(1)(a).

70 1999 Hague draft, *supra* note 11, art 3(1).

71 *Ibid*, art 18(2)(d).

72 2001 Hague draft, *supra* note 12, art 3(1).

73 *Ibid*, art 3(2). Art 3(2)(b)(ii) would have allowed the defendant to be resident in multiple states if there was no principal residence.

74 Compare the criterion used of the corporation's being "at home", which the US Supreme Court has adopted as the basis for general jurisdiction as against a corporation: *Daimler AG v Bauman*, 134 S Ct 746 (2014); *Goodyear Dunlop Tires Operations SA v Brown*, 564 US 915, 131 S Ct 2846 (2011); see Tanya Monestier, "Where Is Home Depot 'At Home'?: *Daimler v Bauman* and the End of Doing Business Jurisdiction" (2014)

A corporation is habitually resident in a state if it has its statutory seat there, was incorporated there, had its central administration there, or had its principal place of business there.[76] Only one of these, the place of central administration, is also used in the CJPTA.[77] The CJPTA uses three other alternative criteria that would usually not make the corporation habitually resident in the Hague sense: being required by law to have a registered office in the province; having, pursuant to law, registered an address or an agent in the province for service of process; and having a place of business in the province.[78]

The four Hague criteria apply not only to corporations but also to an "entity or person other than a natural person", like unincorporated associations and partnerships.[79] The CJPTA deals separately with them, again regarding them as ordinarily resident if, among other things, they have a place of business or, if they do not do business, a place where they conduct their activities in the province.[80] They would not be habitually resident on the Hague test on that basis alone.

The Hague model, again by analogy with individuals, treats jurisdiction as against a corporation or other entity that is not habitually resident in the state, but does have a presence there, as assumed jurisdiction. Under the February 2017 draft, if a defendant maintains a branch, agency or other establishment[81] in the state of origin at the time the defendant becomes a party to the proceeding, there is jurisdiction if the claim on which the judgment is based arose out of the activities of that branch, agency or other establishment.[82] This, of course, is the qualification that the Supreme Court of Canada refused, in the *Chevron* case, to add to jurisdiction based on a corporation's presence in the province.[83]

4.4 Assumed jurisdiction — presumed real and substantial connection

From the point of view of the enforceability of an eventual judgment, the assumed jurisdiction grounds come into play only if the defendant does not submit to the jurisdiction. The CJPTA, following the *Morguard* principle, adopted the real and substantial connection as the *sine qua non* of assumed

---

66 Hastings LJ 233. Because of the due process requirements for general jurisdiction, as applied in these cases, the American common law on this issue is much closer to the Hague model than the Canadian common law is.

75 1999 Hague draft, *supra* note 11, art 3(2).

76 February 2017 Hague draft, *supra* note 19, art 3(2).

77 CJPTA (BC), *supra* note 1, s 7(d).

78 *Ibid*, s 7(a), (b) and (c), respectively. Having a place of business in the province is judged on fairly flexible lines. Black *et al*, *supra* note 1 at 83 notes *Borgstrom v Korean Air Lines Co Ltd,* 2006 BCSC 1690, rev'd on other grounds 2007 BCCA 263, 70 BCLR (4th) 206, in which an airline was found to have a place of business in British Columbia because it flew airplanes regularly into Vancouver and had ten employees posted there to handle the planes.

79 February 2017 Hague draft, *supra* note 19, art 3(2).

80 *Ibid*, s 8-9.

81 February 2017 Hague draft, *supra* note 19, art 5(1)(d) stipulates that the branch, etc., must be "without separate legal personality". The use of jurisdiction over subsidiaries to get at parent companies was an issue in 2001: see 2001 Hague draft, *supra* note 12, art 9 and the footnotes to it.

82 February 2017 Hague draft, *ibid*, art 5(1)(d).

83 But it is included in the Civil Code of Québec: art 3148(2).

jurisdiction.[84] The overwhelming majority of cases are taken care of by the listed categories of presumed real and substantial connection.[85] Of the twelve paragraphs of the list, four deal with subject matter that is largely or entirely excluded from the scope of the February 2017 Hague draft, and was also excluded from the drafts of the 1999 and 2001 mixed convention drafts.[86]

A fifth paragraph, which presumes there to be a real and substantial connection if the proceeding is for the enforcement of a judgment or arbitral award from outside the province,[87] does not feature in the February 2017 Hague draft because the latter is confined to enforcing judgments in the sense of a decision on the merits,[88] not judgments that enforce other judgments or awards. Jurisdiction in foreign judgment proceedings was touched on in the mixed convention drafts, not by specifying when a court had jurisdiction in such proceedings — that was left by silence to national law — but by stipulating in the "black list" of prohibited grounds that a judgment creditor's bringing such a proceeding in a state would not give that state's court jurisdiction in a matter not directly related to the enforcement proceeding.[89]

I will review the remaining seven paragraphs briefly, indicating how far the jurisdictional bases will fit the criteria in the February 2017 Hague draft.

4.4.1 Rights in property in the province

Sometimes Hague compliant. The CJPTA gives territorial competence against a non-resident defendant if the proceeding "is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is movable or immovable".[90] The February 2017 Hague draft recognizes no jurisdiction based on the claim having to do with rights in movable property situated within the state.[91] There are two provisions relating to claims to rights in immovables. One recognizes jurisdiction if a judgment rules on a tenancy of immovable property in the state of origin.[92] The other is the provision, already referred to,[93] that gives the court of the *situs* exclusive jurisdiction to

---

84 CJPTA (BC), *supra* note 1, s 3(e).

85 *Ibid*, s 10.

86 The four are CJPTA (BC), *ibid*, s 10(b) and (c), which are concerned with matters of succession (though (c) may apply to some *inter vivos* transactions); s 10(j), on status and capacity of a natural person; and s 10(l) on recovery of taxes.

87 CJPTA (BC), *ibid*, s 10(k).

88 February 2017 Hague draft, *supra* note 19, art 3(1)(b).

89 1999 Hague draft, *supra* note 11, art 18(2)(h); compare 2001 Hague draft, *supra* note 12, where two versions are proposed.

90 CJPTA (BC), *supra* note 1, s 10(a).

91 So the jurisdiction in *Tucows.com Co v Lojas Renner SA*, 2011 ONCA 548, 336 DLR (4th) 443. leave to appeal to SCC refused, 34481 (24 May 2012), would not be recognized (entitlement to domain name regarded as movable property in Ontario).

92 February 2017 Hague draft, *supra* note 19, art 5(1)(h).

93 *Supra* note 33.

rule on rights *in rem* in immovable property.[94] The CJPTA's "proprietary or possessory rights" in an immovable would cover claims to *in rem* rights and tenancies, as would claims to a security interest in an immovable that amounts to an right *in rem* because it is an interest in the land.[95] There may be some types of security interests in immovables that are within the CJPTA presumption but outside the Hague criteria because they are not rights *in rem*.

4.4.2 Trusts

Sometimes Hague compliant. Both the CJPTA and the February 2017 Hague draft have fairly elaborate provisions about jurisdiction relating to trusts. They overlap but do not coincide. The Hague provision is limited to trusts "created voluntarily and evidenced in writing",[96] whereas the CJPTA paragraph applies to any trust, including one imposed by law or created orally.

To take the four CJPTA grounds in turn, the first is that relief against a trustee (wherever resident) is claimed only as to trust assets, whether movable or immovable, in the province.[97] This is not a ground under the February 2017 Hague draft. The second is that the trustee is ordinarily resident in the province.[98] This would be covered, I think, by the general February 2017 Hague draft provision that "the person against whom recognition or enforcement is sought was habitually resident" in the state of origin.[99] The third is that the administration of the trust is principally carried on in the province.[100] This would usually correspond to the Hague criterion that the trust instrument expressly or impliedly designates the state of origin as the state in which the principal place of administration of the trust is situated.[101] The Hague provision refers to where the principal administration should take place according to the trust document, whereas the CJPTA one refers to where it actually takes place. The fourth CJPTA ground is that by the express terms of a trust document, the trust is governed by the law of the province.[102] The corresponding Hague ground is actually wider, because it recognizes jurisdiction if the law of the state of origin was expressly or impliedly designated as the governing law.[103] It is also more precise, because it caters to trusts governed by more than one law. It refers to the law designated as governing the

---

94 February 2017 Hague draft, *supra* note 19, art 6(b).

95 Like the mortgages in *Hogg v Provincial Tax Commission*, [1941] 3 WWR 605 (Sask CA).

96 February 2017 Hague draft, *supra* note 19, art 5(1)(n).

97 CJPTA (BC), *supra* note 1, s 10(d)(i).

98 *Ibid*, s 10(d)(ii).

99 February 2017 Hague draft, *supra* note 19, art 5(1)(a).

100 CJPTA (BC), *supra* note 1, s 10(d)(iii).

101 February 2017 Hague draft, *supra* note 19, art 5(1)(n)(iii).

102 CJPTA (BC), *supra* note 1, s 10(d)(iv).

103 February 2017 Hague draft, *supra* note 19, art 5(1)(n)(ii). A bracketed proviso, which was not present in the 2016 draft, would not recognize the governing law as a basis of jurisdiction if the defendant's activities in relation to the trust "clearly did not constitute a purposeful and substantial connection to that State", another instance of American due process concerns about basing jurisdiction purely on abstract legal connections; compare *supra* note 40 (law governing an IP right); *infra* note 116 and accompanying text (place of performance of contract).

aspect of the trust that is the subject of the litigation, whereas the CJPTA refers only to the law designated as governing the trust as a whole.

In one of the rare instances of the Hague jurisdictional criteria covering a situation the CJPTA presumptions do not cover, the February 2017 Hague draft recognizes a judgment if the state of origin was designated in the trust instrument as a state (not necessarily the only state) in which disputes about such matters are to be determined.[104] Even though this exact ground is not in the CJPTA, in almost every case where a trust did say that disputes about the trust could be litigated in the province, it seems more than likely that one or other of the existing CJPTA presumptions would give territorial competence (place of administration, express choice of governing law, etc.).[105]

The 1999 Hague draft had one other ground relating to trusts, which was that a court would have jurisdiction if the trust had its closest connection with the forum state.[106] The 2001 version expanded this by adding some factors to be taken into account in determining the closest connection.[107] It also added a further jurisdictional ground, which was that the settlor, if living, and all living beneficiaries were all habitually resident in the forum state.[108]

4.4.3 Contractual obligations

Sometimes Hague compliant. The CJPTA has only two general jurisdictional presumptions relating to contractual obligations.[109] Territorial competence exists if the contractual obligations with which the proceeding is concerned were, to a substantial extent, to be performed in the province.[110] It also exists if, by its express terms, the contract is governed by the law of the province.[111] There is a third presumption relating specifically to consumer contracts, meaning contracts for the purchase of property or services for use other than in the course of the purchaser's trade or profession.[112] Territorial competence is presumed to exist if the contract resulted from a solicitation of business in the province on behalf of the seller.[113]

---

104 *Ibid*, art 5(1)(n)(i).

105 And there is always the "residual" real and substantial connection if there is an express choice of a forum in the province for trust disputes, but none of the existing presumptions applies.

106 1999 Hague draft, *supra* note 11, art 11(2)(c).

107 2001 Hague draft, *supra* note 12, art 11(2)(c).

108 *Ibid*, art 11(2)(d).

109 Saskatchewan has a third, namely, that the contract was made in Saskatchewan: CJPTA (SK), *supra* note 1, s 9(d)(ii). This may be because the Saskatchewan version of the act followed an earlier ULCC draft than the final one; see Black *et al*, *supra* note 1 at 35-36. The place of contracting has (unfortunately, in my view) attracted the Supreme Court of Canada, which declared it to be a presumptive connecting factor even in tort cases, if the tort was connected with the contract: *Club Resorts*, *supra* note 46; *Lapointe*, *supra* note 48. The place of signing a contract was on the "black list" in the 1999 Hague draft, *supra* note 11, art 18(1)(j).

110 CJPTA (BC), *supra* note 1, s 10(e)(i).

111 *Ibid*, s 10(e)(ii).

112 *Ibid*, s 10(e)(iii)(A).

113 *Ibid*, s 10(e)(iii)(B).

The February 2017 Hague draft also recognizes jurisdiction based on where a contract was or should have been performed, but without the "to a substantial extent" qualification. Performance of the obligation in issue must have taken place, or ought to have taken place, in the forum state.[114] The draft does, however, add another qualification, unusual in that it savours of American law and is probably directed at due process concerns.[115] The fact that the forum state was the place of performance does not give jurisdiction if "the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that state".[116] This wording was in the Working Group's draft; the group suggested that the use of "purposeful" might need further elaboration and discussion by the Special Commission,[117] but the latter left the wording alone.[118] The 1999 and 2001 drafts were quite different. The first had a rule based strictly on the place of performance.[119] The second had added an alternative version based on the contract being "directly related" to "frequent [and] [or] significant activity" in the state.[120] Whether to include "activity jurisdiction" was one of the main sticking-points in the 2000-01 negotiations.

Assumed jurisdiction based on the contract's being governed by the law of the state of origin does not exist under the February 2017 Hague draft.

It is worth noting that there is a specific provision, in brackets, that could have been designed for the *Morguard* case; the court had jurisdiction if the judgment ruled on a contractual obligation secured by a right *in rem* in immovable property in the state, if the claim was brought together with a claim relating to that right.[121]

The February 2017 draft provides that assumed jurisdiction based on the place of performance does not exist if the person sought to be bound is a consumer or an employee.[122] This is one of only two places in which the 2016 draft deals with the special jurisdictional problems relating to contract actions brought against consumers and employees.[123] The 1999 draft, no doubt influenced by the Brussels model, had special jurisdictional rules for both categories of contract, dealing with actions brought by, as well as against, the consumer or employee.[124] The 2001 draft reflected acute controversies about the consumer

---

114 February 2017 Hague draft, *supra* note 19, art 5(1)(g).

115 See *supra* note 13.

116 *Ibid.*

117 April 2016 Explanatory Note, *supra* note para 96.

118 And deployed it in other provisions, though not always using "purposeful". See *supra* notes 40 and 103.

119 1999 Hague draft, *supra* note 11, art 6.

120 2001 Hague draft, *supra* note 12, art 6, Alternative A. Two variant paragraphs would have elaborated on what "activity" meant.

121 February 2017 Hague draft, *supra* note 19, art 5(1)(i).

122 *Ibid*, art 5(2)(b).

123 For the other, see *supra* note 59 and accompanying text.

124 1999 Hague draft, *supra* note 11, art 7-8.

provisions; there were now multiple alternative and variant proposals. Commission II had not got to the employment provisions.[125]

4.4.4 Restitutionary obligations

Never Hague compliant. The February 2017 Hague draft has no provision recognizing jurisdiction based on the place where restitutionary obligations arose, that would analogous to the presumption in the CJPTA.[126] There is a jurisdictional principle based on where a non-contractual obligation arose,[127] but that provision, discussed immediately below, is limited to claims for physical injury. The mixed convention drafts did not have a provision for restitutionary claims, either.

4.4.5 Tort

Sometimes Hague compliant. The CJPTA presumes territorial competence, based on a real and substantial connection, if the proceeding concerns a tort committed in the province. Canadian law has been especially liberal when it comes to assumed jurisdiction in tort claims. The locus of the tort, for jurisdictional purposes, can be in any place that was substantially affected by the defendant's activities or its consequences, the law of which is likely to have been in the reasonable contemplation of the parties.[128] In *Club Resorts*[129] and *Lapointe*,[130] the Supreme Court of Canada went beyond the CJPTA when it held that jurisdiction in a tort claim could be based, not on where the tort was committed, but on the place of making of a contract with which the tort was connected, the notion of "connection" being a flexible one.

The February 2017 Hague draft, by sharp contrast, is very conservative when it comes to assumed jurisdiction in tort claims. It eschews economic claims altogether, thus cutting out (among others) almost all negligent or fraudulent misrepresentation claims, the locus of which, for jurisdictional purposes, is often litigated in Canada.[131] (The exclusion of defamation claims, another fertile source of jurisdictional disputes in Canadian courts, was referred to earlier.[132]) It also settles firmly on a place of acting test. The rule recognizes only judgments based on a "non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, [if] the act or omission directly causing such harm occurred in the state of origin, irrespective of where that harm occurred".[133] By this test, default judgments based

---

125 2001 Hague draft, *supra* note 12, art 7-8.

126 CJPTA (BC), *supra* note 1, s 10(f).

127 February 2017 Hague draft, *supra* note 19, art 5(1)(j).

128 *Moran v Pyle National (Canada) Ltd.*, [1975] 1 SCR 393 at 408-09.

129 *Club Resorts*, *supra* note 46.

130 *Lapointe*, *supra* note 48.

131 *Eg Central Sun Mining Inc v Vector Engineering Inc*, 2013 ONCA 601, 117 OR (3d) 313, leave to appeal to SCC refused, 35640 (13 March 2014).

132 *Supra* note 31 and accompanying text.

133 February 2017 Hague draft, *supra* note 19, art 5(1)(j).

on the jurisdictional grounds approved in many of the leading Canadian cases, including *Moran v Pyle*[134] and *Club Resorts*,[135] would not have been enforceable under the Hague provision.

The 1999 Hague draft, for the mixed convention, was much closer to the Canadian position. It would have included in the "white list" of required jurisdictional grounds a tort claim where the act or omission occurred in the state, or where the injury arose in the state, unless the defendant can show that it could not reasonably have foreseen that the act or omission could result in an injury of that nature in that state.[136] The 2001 draft included another provision, bracketed, that parallels the activity-based ground proposed for jurisdiction in contract claims.[137] Jurisdiction could be based on the defendant's having "engaged in frequent or significant activity" in the forum state if the tort claim arose out of that activity.[138]

4.4.6 Business carried on

Sometimes Hague compliant. The CJPTA presumes territorial competence if the proceeding concerns a business carried on in the province.[139] This ground is not often needed when it comes to suing a corporation, because the CJPTA's tests for the ordinary residence of a corporation include the fact that the corporation had a place of business in the province. So this presumption comes into play only if the claim concerns a business carried on in the province by a corporation that does not have a "place" of business there and is not otherwise ordinarily resident there, or a business carried on by an individual who is ordinarily resident elsewhere. The February 2017 Hague draft does not recognize jurisdiction on the basis of a corporation's doing business other than through a branch, agency or other establishment.[140] It does have a provision for jurisdiction based on a natural person's having his or her principal place of business (not just a place of business) in the forum state, if the claim arose out of the business done there.[141]

4.4.7 Injunction

Never Hague compliant. The CJPTA presumes there to be a real and substantial connection if the plaintiff claims an injunction ordering a party to do or refrain from doing anything in the province, or in relation to immovable or movable property in the province.[142] The February 2017 Hague draft has no

---

134 *Supra* note 128.

135 *Club Resorts*, *supra* note 46. In neither of the two cases decided in *Club Resorts* was jurisdiction taken based on the tort having been committed in Ontario, and so they would not have fitted under the CJPTA presumption. They could have been cases where a "residual" real and substantial connection might be shown.

136 1999 Hague draft, *supra* note 11, art 10(1).

137 See *supra* note 120 and accompanying text.

138 2001 Hague draft, *supra* note 12, art 10(2). The provision would also have required that "the overall connection of the defendant to that state makes it reasonable that the defendant be subject to suit in that state".

139 CJPTA (BC), *supra* note 1, s 10(h).

140 See *supra* note 82 and accompanying text.

141 February 2017 Hague draft, *supra* note 19, art 5(1)(b).

142 CJPTA (BC), *supra* note 1, s 10(i).

corresponding ground.[143] The 1999 and 2001 mixed convention drafts dealt with jurisdiction to issue injunctions only as provisional or protective measures.[144]

4.5 Assumed jurisdiction — residual real and substantial connection

Using the February 2017 Hague draft as the basis for comparison, there would be very few Hague compliant bases of jurisdiction that would lie outside one or other of the CJPTA's listed presumptions and so could be applied on the basis of a residual (affirmatively shown) real and substantial connection. These would include most of the jurisdictional grounds relating to IP rights that are based solely on the law governing the right.[145] It would be rare, though not impossible, for such claims to find their way into the court of a province as distinct from the Federal Court, and so the CJPTA would practically never be involved.[146]

4.6 Assumed jurisdiction — forum of necessity

None of the Hague drafts included the concept of forum of necessity, which is understandable, given that it is controversial even within a legal system like Canada's. A judgment based on the CJPTA forum of necessity provision[147] would not be Hague compliant.

5. DECLINING JURISDICTION

5.1 *Forum non conveniens*

It is worth noting briefly the extent to which the CJPTA's *forum non conveniens* provisions[148] fit into the Hague discussions. For obvious reasons the February 2017 Hague draft, which is concerned only with recognition and enforcement of judgments, does not touch on declining jurisdiction. The discretion to decline jurisdiction is generally not a significant part of the jurisdictional system in civil law countries, and does not form part of the Brussels system. Nevertheless it was included in the 1999 Hague draft for the mixed convention. That draft convention would have permitted a court in a contracting state, in "exceptional circumstances", to suspend its proceedings if it was "clearly inappropriate" for the court to

---

143 Injunctions are within the range of judgments recognized or enforced under the proposed convention. It includes a "decree or order" within the scope of "judgment": February 2017 Hague draft, *supra* note 19, art 3(1)(b). The injunction would have to be a permanent one, given after a decision on the merits; the same provision states that interim measures of protection are not included.

144 See 1999 Hague draft, *supra* note 11, art 13. In the 2001 Hague draft, *supra* note 12, opinion was divided on whether the convention should exclude provisional and protective measures from its scope altogether or, as the 1999 draft had proposed. specifically provide for jurisdiction to order protective measures that have effect only within state of the court that orders them, and are designed to protect a claim on the merits. See art 1(2)(k) and art 13, Alternatives A and B.

145 See February 2017 Hague draft, *supra* note 19, art 5(1)(k)-(m), all bracketed, dealing with judgments ruling on IP rights governed by the law of the state of origin. See *supra* notes 40 and 43.

146 One cases where copyright infringement claims were brought against non-resident defendants, although in a non-CJPTA province, was *Geophysical Service Inc v Arcis Seismic Solutions Corp*, *supra* note 48.

147 CJPTA (BC), *supra* note 1, s 6. The forum of necessity section was omitted in the CJPTA (SK), *supra* note 1; see Black *et al*, *supra* note 1 at 174-77.

148 *Ibid*, s 11.

exercise jurisdiction and another state's court was "clearly more appropriate to resolve the dispute". If the other court took jurisdiction, the first court would then decline jurisdiction.[149] This provision survived almost intact into the 2001 draft.[150] The references to "exceptional circumstances" and "clearly inappropriate" seems to make the standard for declining jurisdiction somewhat higher than the CJPTA's.[151] Even the alternative forum's being "clearly more appropriate" is stricter than the CJPTA's "more appropriate",[152] although the common law has sanctified the "clearly more appropriate" test and courts tend to equate the CJPTA test with it.[153]

5.2 Parallel proceedings

The CJPTA, like the common law, has no principle of *lis alibi pendens*. The *forum non conveniens* provisions of the CJPTA therefore apply to cases in which proceedings on the same matter between the same parties have been brought elsewhere, as the Supreme Court of Canada confirmed in the *Teck* case.[154]

Because it only proposes a recognition and enforcement convention, the February 2017 Hague draft does not have to deal with *lis alibi pendens*. It does, however, have a provision permitting the requested state to refuse or postpone recognition or enforcement of a foreign judgment that is otherwise entitled to it, if proceedings between the same parties on the subject matter are pending before a court in that state, provided that the local court was seized before the court of origin and there is a close connection between the dispute and the requested state.[155] The Permanent Bureau's commentary notes that jurisdictions differ on whether a pending local proceeding is pre-empted by a foreign judgment that is entitled to recognition.[156] Hence this provision is worded in permissive rather than mandatory terms.

---

149 1999 Hague draft, *supra* note 11, art 22.

150 2001 Hague draft, *supra* note 12, art 22. See Ronald A Brand, "Comparative *Forum Non Conveniens* and the Hague Convention on Jurisdiction and Judgments" (2002), 37 Texas Int'l LJ 467.

151 Black, *supra* note 11 at 260. The "clearly inappropriate" element has affinities with the Australian law on *forum non conveniens*; see Justin Paul Cook, "Declining Jurisdiction in The Hague's Proposed Judgments Convention: Amalgamating the 'More Appropriate Forum' and the 'Clearly Inappropriate Forum' Tests to Provide the Optimal Forum Non Conveniens Clause" (2014) 21 Aust Int'l LJ 19.

152 "More appropriate" is the standard in both s 11(1) and (2).

153 See *Club Resorts*, *supra* note 46 at paras 108-109; *Colonial Countertops Ltd v Maple Terrazzo Marble and Tile Inc*, 2014 BCSC 752 at paras 25-29, [2014] 11 WWR 827.

154 *Teck Cominco Metals Ltd v Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 SCR 321.

155 February 2017 Hague draft, *supra* note 19, art 7(2). The Working Group's draft also provided that recognition could be refused or postponed, even if the dispute were not closely connected with the requested state, if the proceedings before the court of origin were "brought for the purpose of frustrating the effectiveness of the pending proceedings": Working Group draft, *supra* note 17, art 7(2)(b). The Special Commission deleted this part of article 7(2).

156 April 2016 Explanatory Note, *supra* note 17, at para 171. In notes 81 and 82, Québec and Saskatchewan are listed as jurisdictions favouring the local proceeding whereas the other Canadian jurisdictions are listed as favouring recognition of the foreign judgment.

The 1999 draft for the mixed convention included a rule that the court second seized must suspend jurisdiction in favour of the court first seized,[157] subject to two exceptions. One is where the action in the court first seized is for a determination that the plaintiff has no obligation to the defendant whereas the action in the other court seeks substantive relief; in that case the court first seized must suspend the proceedings.[158] The other is where the court first seized, on application by a party, determines that the court second seized is clearly more appropriate to resolve the dispute.[159] The article would not allow, as in *Teck*, the court second seized to refuse to decline jurisdiction because it itself is clearly the more appropriate forum. The article survived into the 2001 draft with only minor amendments.

6. CONCLUSION

The short answer to the question, whether the CJPTA's rules will cause difficulty if a Hague Convention on foreign judgments comes into force along the lines of the February 2017 draft, is no. The CJPTA's jurisdictional rules are in many respects wider than the jurisdictional grounds recognized in the Hague draft, but that would not prevent judgments from being recognized under the convention if the facts brought the judgment within the Hague grounds. If recognition and enforcement abroad is important to the parties, they can usually know in advance whether the judgment would be Hague compliant.

There would be little reason to narrow the jurisdictional grounds in the CJPTA in an attempt to bring it closer to a Hague compliant jurisdictional system. There would be no real benefit in terms of certainty of operation of the CJPTA itself; the existing CJPTA seems to be working reasonably predictably. Nor would it gain wider acceptance for our judgments abroad, since the recognition and enforcement convention, like the common law, does not make jurisdiction depend on the ground on which the foreign court actually took jurisdiction but on whether the ground was present in fact. The cost of a disparity between the CJPTA jurisdictional system and a Hague system is that litigants who care about recognition or enforcement of a judgment elsewhere cannot rely on the CJPTA's grounds as a guarantee that a judgment will be effective abroad. However, this is the present situation and, Hague or no Hague, we will almost certainly have to keep living with it.

Two other considerations come into play as well. One, which relates to a point that was referred to earlier,[160] is that the domestic jurisdictional grounds are structured as they are because they include a robust discretion to decline jurisdiction on the basis of *forum non conveniens*. To recast the grounds along the lines of the grounds in the Hague judgments convention would ignore this fundamental structural feature. The other consideration is that one of the main roles of the CJPTA is to define jurisdiction vis-à-vis other provinces. This the CJPTA does, following in a reasonable way the constitutional limits on jurisdiction — fairly conservatively interpreted, as it now turns out. To narrow the CJPTA jurisdictional grounds under the influence of a Hague Convention would therefore, in a sense, put the international cart before the interprovincial horse.[161]

---

157 1999 Hague draft, *supra* note 11, art 21(1). The court first seised must be "expected to render a judgment capable of being recognized" under the convention.

158 *Ibid*, art 21(6).

159 *Ibid*, art 21(7).

160 *Supra* note 44 and accompanying text.

161 The international cart may also eventually take more than one form. Since 2005 the Commonwealth Law Ministers have been developing a Model Law for the recognition of judgments among the Commonwealth nations. The Ministers considered a draft in 2014: see Meeting of Commonwealth Law Ministers and Senior

It is hard to imagine any scenario in which the Hague system and the common law jurisdictional systems of which the CJPTA is part will be brought close enough together to allow them to merge into one dovetailed whole. Even if a Hague Convention on jurisdiction, separate from the recognition and enforcement of judgments convention currently being negotiated, comes to pass it will almost certainly leave states free to use jurisdictional grounds that do not comply with the "white list" in the convention. There may or may not be an agreed "black list" of prohibited grounds of jurisdiction. Even if the black list in the 1999 Hague draft[162] were to be replicated in a new convention, it would not ban any of the grounds of assumed jurisdiction listed as presumed real and substantial connections in the CJPTA.[163] It is possible that such a convention could require some adjustments, probably not radical ones, to *forum non conveniens* and *lis alibi pendens* rules. Very probably, therefore, the CJPTA could function perfectly well even if Canada became a party to an eventual Hague jurisdiction convention.

Disparities between the CJPTA and the Hague system, whatever it may become, seem to me less of a concern than the growing disparities, as a result of the evolution of the common law, between the CJPTA and non-CJPTA systems within Canada. The Supreme Court of Canada's desire, as expressed in *Club Resorts*,[164] to harmonize the two as far as possible seems to have faded,[165] to the detriment of the Canadian jurisdictional system as a whole.

Officials, Final Communiqué (5-8 May 2014), online: Commonwealth <http://thecommonwealth.org/media/news/communique-commonwealth-law-ministers-meeting-2014>. Further work is proceeding. The drafters have drawn on both the Hague model and the work of Commonwealth law reform agencies (*ibid*, para 9).

162 *Supra* note 11, art 18(2).

163 Except Saskatchewan's presumption based on the place a contract is made; see *supra* note 109.

164 *Supra* note 46.

165 As evidenced most notably in the *Lapointe* case, *supra* note 48, expanding considerably a presumptive jurisdictional ground (the place of making of a contract) that was deliberately omitted in the CJPTA.

Appendix

Hague Conference on Private International Law
Special Commission on the Recognition and Enforcement of Foreign Judgments

February 2017 Draft Convention ("February 2017 Hague Draft")

CHAPTER I – SCOPE AND DEFINITIONS

Article 1
Scope

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

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

Article 2
Exclusions from scope

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

(a) the status and legal capacity of natural persons;

(b) maintenance obligations;

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

(d) wills and succession;

(e) insolvency, composition, resolution of financial institutions, and analogous matters;

(f) the carriage of passengers and goods;

(g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;

(h) liability for nuclear damage;

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

(j) the validity of entries in public registers;

(k) defamation [and privacy].

[(l) intellectual property rights[, except for copyright and related rights and registered and unregistered trademarks]].

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

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

4. A judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings.

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

Article 3
Definitions

1. In this Convention –

(a) "defendant" means a person against whom the claim or counterclaim was brought in the State of origin;

(b) "judgment" means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

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

(a) where it has its statutory seat;

(b) under whose law it was incorporated or formed;

(c) where it has its central administration; or

(d) where it has its principal place of business.

CHAPTER II – RECOGNITION AND ENFORCEMENT

Article 4
General provisions

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

enforcement may be refused only on the grounds specified in this Convention.

2. Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin.

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

4. If a judgment referred to in paragraph 3 is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired, the court addressed may –

(a) grant recognition or enforcement, which enforcement may be conditional on the provision of such security as it shall determine;

(b) postpone the decision on recognition or enforcement; or

(c) refuse the recognition or enforcement.

A refusal under sub-paragraph (c) does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 5
Bases for recognition and enforcement

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

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

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

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

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

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

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

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

(i) the parties' agreement, or

(ii) the law applicable to the contract, in the absence of an agreed place of performance,

unless the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;

(h) the judgment ruled on a tenancy of immovable property and it was given in the State in which the property is situated;

(i) the judgment ruled against the defendant on a contractual obligation secured by a right *in rem* in immovable property located in the State of origin, if the contractual claim was brought together with a claim against the same defendant relating to that right *in rem*;

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

[(k) the judgment ruled on an infringement of a patent, trademark, industrial design, plant breeder's right, or similar right required to be granted or registered and it was given by a court in the State of origin in which the grant or registration of the right concerned has taken place, or is deemed to have taken place under the terms of an international or regional instrument[, unless the defendant has not acted in that State to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State];]

[(l) the judgment ruled on the ownership or subsistence of copyright or related rights, [or use-based trademarks, trade names, or unregistered designs] [or other intellectual property rights not required to be registered] and the right is governed by the law of the State of origin;]

[(m) the judgment ruled on an infringement of copyright or related rights, [or use-based trademarks, trade names, or unregistered designs] [or other intellectual property rights not required to be registered] and the right is governed by the law of the State of origin, [unless the defendant has not acted in that State to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State];]

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

(i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in which disputes about such matters are to be determined;

(ii) the law of the State of origin is expressly or impliedly designated in the trust instrument as the law governing the aspect of the trust that is the subject of the litigation that gave rise to the judgment[, unless the defendant's activities in relation to the trust clearly did not constitute a purposeful and substantial connection to that State]; or

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

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

(o) the judgment ruled on a counterclaim –

(i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim

(ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;

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

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

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

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

(b) paragraph 1(f), (g) and (p) do not apply.

Article 6
Exclusive bases for recognition and enforcement

Notwithstanding Article 5 –

[(a) a judgment that ruled on the registration or validity of a patent, trademark, industrial design, plant breeder's right, or similar right

required to be granted or registered shall be recognised and enforced if and only if the State of origin is the State in which grant or registration has been applied for, has taken place, or is deemed to have been applied for or to have taken place under the terms of an international or regional instrument;]

(b) a judgment that ruled on rights *in rem* in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin;

(c) a judgment that ruled on a tenancy of immovable property for a period of more than six months shall not be recognised and enforced if the property is not situated in the State of origin and the courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State.

Article 7
Refusal of recognition or enforcement

1. Recognition or enforcement may be refused if –

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

(i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

(ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

(b) the judgment was obtained by fraud;

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

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

(e) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or

(f) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same subject matter, provided that the earlier judgment fulfills the conditions necessary for its recognition in the requested State;

[(g) the judgment ruled on an infringement of an intellectual property right, applying to that right a law other than the law governing that right.].

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

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

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

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

Article 8
Preliminary questions

1. Where a matter to which this Convention does not apply, or a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled arose as a preliminary question, the ruling on that question shall not be recognised or enforced under this Convention.

2. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply, or on a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled.

3. However, in the case of a ruling on the validity of a right referred to in Article 6, paragraph (a), recognition or enforcement of a judgment may be postponed, or refused under the preceding paragraph, only where –

(a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State referred to in Article 6, paragraph (a); or

(b) proceedings concerning the validity of that right are pending in that State.

A refusal under sub-paragraph (b) does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 9
Equivalent effects

A judgment recognised or enforceable under this Convention shall be given the same effect it has in the State of origin. If the judgment provides for relief that is not available under the law of the requested State, that relief shall, to the extent possible, be adapted to relief with effects equivalent to, but not going beyond, its effects under the law of the State of origin.

Article 10
Severability

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

Article 11
Damages

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

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

[Article 12
Non-monetary remedies in intellectual property matters

A judgment granting a remedy other than monetary damages in intellectual property matters shall not be enforced under this Convention.]

Article 13
Judicial settlements (transactions judiciaires)

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

Article 14
Documents to be produced

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

(a) a complete and certified copy of the judgment;

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

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

(d) in the case referred to in Article 13, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.

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

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

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

Article 15
Procedure

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

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

[Article 16
Costs of proceedings

1. No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given in another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.]

2. An order for payment of costs and expenses of proceedings, made in a Contracting State against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 shall, on the application of the person entitled to the benefit of the order, be rendered enforceable in any other Contracting State.]

Article 17
Recognition or enforcement under national law

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

CHAPTER III – GENERAL CLAUSES

Article 18
Transitional provision

This Convention shall apply to the recognition and enforcement of judgments if, at the time the proceedings were instituted in the State of origin, the Convention was in force in that State and in the requested State.

[Article 19
No legalisation

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality, including an Apostille.]

Article 20
Declarations limiting recognition and enforcement

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the court of origin, were connected only with the requested State.

Article 21
Declarations with respect to specific matters

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

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

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

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

[Article 22
Declarations with respect to common courts

1. A Contracting State may declare that –

(a) a court common to two or more States exercises jurisdiction over matters that come within the scope of this Convention; and

(b) such a court –

(i) has only an appellate function; or

(ii) has first instance and appellate functions.

2. Judgments of a Contracting State include –

(a) judgments given by a court referred to in paragraph 1(b)(i);

(b) judgments given by a court referred to in paragraph 1(b)(ii) if all States referred to in paragraph 1(a) are parties to this Convention.

3. If a court referred to in paragraph 1(b)(i) serves as a common court for States some of which are Contracting States and some of which are non-Contracting States to this Convention, judgments given by such a court shall only be considered as judgments of a Contracting State if the proceedings at first instance were instituted in a Contracting State.

4. In case of a judgment given by a court referred to in paragraph 1(b)(ii) the reference to the State of origin in Articles 5 and 6 shall be deemed to refer to the entire territory over which that court had jurisdiction in relation to that judgment.]

Article 23
Uniform interpretation

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

Article 24
Review of operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for –

(a) review of the operation of this Convention, including any declarations; and

(b) consideration of whether any amendments to this Convention are desirable.

Article 25
Non-unified legal systems

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

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

(b) any reference to habitual residence in a State shall be construed as referring, where appropriate, to habitual residence in the relevant territorial unit;

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

(d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.

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

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

4. This Article shall not apply to a Regional Economic Integration Organisation.

Article 26
Relationship with other international instruments

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

2. This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention entered into force for that Contracting State, if applying this Convention would be inconsistent with the obligations of that Contracting State to any non-Contracting State. This paragraph shall also apply to treaties that revise or replace a treaty concluded before this Convention entered into force for that Contracting State, except to the extent that the revision or replacement creates new inconsistencies with this Convention.

3. This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.

4. This Convention shall not affect the application by a Contracting State of a treaty which, in relation to a specific matter, governs the recognition or enforcement of judgments, even if concluded after this Convention and even if all States concerned are Parties to this Convention. This paragraph shall apply only if the Contracting State has made a declaration in respect of the treaty under this paragraph. In the case of such a declaration and to the

extent that any inconsistencies exist between the above-mentioned treaty and this Convention, other Contracting States shall not be obliged to apply this Convention to a judgment which relates to that specific matter and which was rendered by a court of a Contracting State that made the declaration.

5. This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

[Chapter IV, Final Clauses, is omitted.]