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General Synthesis and Future Perspectives

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I. General Synthesis

A. Introduction

The preceding chapters offer a rich variety of insights into the genesis, scope, structure and intended practical operation of the HCCH 2019 Judgments Convention, its relationship with the HCCH 2005 Choice of Court Convention and with international commercial arbitration, as well as potential challenges and benefits of the Convention from the perspective of many parts of the world: ASEAN, China, the Arab countries, Africa, South-East Europe, the European Union (EU), the United States, Canada and Latin America.

All the contributions show a keen interest in the Convention, and the fact that the various regional comments all take a positive attitude towards the Treaty bodes well for its chances as a basic global instrument for the circulation of judgments. The fact that the EU and Ukraine both joined the Convention on 29 August 2022, which will lead to its entry into force on 1 September 2023, reinforces this positive outlook.

That said, the contributions also make it clear that much work, including promotion, explanation and support will be needed to convince and enable a significant number of jurisdictions to join the Convention. In more than a few countries, its implementation may well be a laborious process. And beyond the stage of embracing the Convention lies the further challenge of ensuring its uniform and effective application in a rapidly changing world.

A number of themes emerge from the discussion and assessment of the Convention by the contributors: The Current Situation regarding Recognition and Enforcement of Judgments in Different Parts of the World (section I.B); the Definitions (section I.C); the Exclusions from Scope (section I.D); often related to: The Convention's Relationship with Other International Instruments (section I.E); The Jurisdictional Filters or Indirect Bases of Jurisdiction (section F); The Grounds for Refusal (section G); and the Bilateralisation option (section I.H)

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B. Current Situation in Different Parts of the World

The various contributions vividly illustrate the current diversity of legal systems regarding the recognition and enforcement of foreign judgments.[1]

i. No Specific Rules on 'Recognition'

The Convention creates a uniform set of 'core rules' on both recognition and enforcement of foreign judgments.[2] In contrast, 'recognition' of a foreign judgment as distinct from its 'enforcement' is not acknowledged in some jurisdictions. As noted by Béligh Elbalti (chapter nine), with the exception of Lebanon, Tunisia and perhaps Egypt, Middle Eastern and North African Arab countries generally demand an *exequatur* decision before giving effect to a foreign decision.

ii. Differing Attitudes towards Recognition and Enforcement

Jurisdictions of the common law tradition generally recognise and enforce foreign decisions, at least monetary judgments. A number of these countries in the ASEAN region (Brunei, Malaysia, Myanmar, Singapore) and in Africa (eg, Nigeria, Ghana and the mixed jurisdiction of South Africa) continue to follow in their statutes the scheme of the 1933 UK Foreign Judgments (Reciprocal Enforcement) Act, or even the 1920 Administration of Justice Act. These statutes provide for registration of judgments emanating from countries designated therein which gives them the same effect as a judgment obtained in the registering court (Adeline Chong (chapter twelve); Abubakri Yekini and Chukwuma Okoli (chapter thirteen)). Judgments from other countries can still be enforced under common law: at common law such judgments create a legal obligation allowing the judgment creditor to file a fresh action to enforce this obligation, together with an application for summary judgment with a certified copy of the foreign judgment. This may be a quick way of getting a judgment, but it remains 'open to litigation tactics that can frustrate a judgment creditor' (Yekini and Okoli).

As Geneviève Saumier and Linda Silberman (chapter eight) explain, the United States and Canada have a tradition of generously giving effect to foreign judgments, while facing obstacles regarding the recognition and enforcement of US and Canadian judgments abroad. This last aspect in particular makes the Convention attractive to these States.

By contrast, many civil law countries have more reserved attitudes towards foreign judgments. Adeline Chong points out that the civil law countries of ASEAN – Cambodia, Indonesia, Lao PDR, Thailand, Vietnam – 'display varying degrees of receptiveness to the recognition and enforcement of foreign judgments'. Among them, 'Vietnam's laws on foreign judgments are the most advanced', while, at the other extreme, 'the general position under Indonesian and Thai laws is that foreign judgments are not entitled to enforcement'.

According to Zheng Tang (chapter fourteen), 'Chinese law only permits recognition and enforcement of foreign civil and commercial judgments on two conditions: by treaty obligations and by reciprocity'. Given the limited number of such treaties, the reciprocity requirement remains crucial from a Chinese perspective.

[1] For a continually updated country-by-country summary of recognition and enforcement requirements, see L Garb and JDM Lew, *Enforcement of Foreign Judgments* (Kluwer Law International 2016).

[2] F Garcimartín and G Saumier, *Explanatory Report on the 2019 HCCH Judgments Convention* (HCCH 2020) paras 111–17. But note that the Convention only provides for the enforcement, *not* for the *recognition*, of judicial settlements (Art 11), see below, section II.C.i.a and II.C.ii.b).

The Arab countries all have laws on foreign judgments, which generally require an exequatur. However, as Elbalti explains, despite their similarity they display important differences.

As Yekini and Okoli point out, African civil law countries under their codes of civil procedure also generally require an *exequatur*, which may depend on evidence of reciprocal enforcement of judgments by the State of origin of the judgment.

Southeast European countries have detailed but varying rules on foreign judgments. As Ilija Rumenov (chapter ten) points out, some (Serbia, Kosovo, Bosnia Herzegovina) still adhere to the 1982 Yugoslav Law on Conflict of Laws, requiring reciprocity, while others (Albania, Montenegro, North Macedonia and Turkey) have reformed their laws (except for Turkey).

iii. Reciprocity Often Required

As the foregoing suggests, 'reciprocity' as a condition for the recognition and enforcement of foreign judgments remains widespread. By contrast, in Canada reciprocity was never a condition for recognition and enforcement. In the United States, where recognition and enforcement of foreign judgments is primarily a matter of state law, some state laws do require reciprocity (Saumier and Silberman).

Where reciprocity is required, it can appear in many different shades, from very strict (requiring proof that the forum's judgments have been actually enforced in the other jurisdiction, or that at least its law allows such enforcement) to more relaxed, including 'presumptive reciprocity', where the requested court will presume such a reciprocal relationship in the absence of a precedent of refused recognition or enforcement in the other jurisdiction for lack of reciprocity. 'Presumptive reciprocity' is proposed by the 'Nanning Statement', adopted by the second China–ASEAN Justice Forum in 2017, which, although non-binding, may have some impact in some ASEAN countries (Chong) and China (Tang). In the Arab region where, except for Algeria and Morocco, reciprocity is also generally required, it likewise varies from strict to more relaxed (Elbalti).

iv. No Effect Given to Non-Monetary Judgments

Like the HCCH 2005 Choice of Court Convention, the HCCH 2019 Judgments Convention covers both monetary and non-monetary judgments such as those ordering specific performance or injunctions. Paul Beaumont (chapter six) stresses the practical importance of this inclusion as 'an increasing proportion of wealth is represented by intangible property that can only be effectively protected by such relief'.

Recognition and enforcement of non-monetary judgments is generally not admitted under common law, as this is seen as 'equitable relief' and thereby subject to the court's discretion.

As Chong points out, non-monetary judgments are not enforced in Brunei and Malaysia, Singapore being an exception. Elbalti explains that Arab laws do not differentiate between foreign monetary and non-monetary judgments for the purpose of enforcement, with the notable exception of Iraqi law, which excludes enforcement of non-monetary judgments. Saumier and Silberman cite the landmark judgment of the Canadian Supreme Court which reversed the previous view that non-monetary judgments could not be enforced in Canada.[3] In the United States, although the Uniform Foreign Money Judgments Recognition Acts 1962 and 2005 extend

[3] *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52.

only to claims for money damages, 'the principles of the Acts and the law in most states extend recognition and enforcement to a broader set of judgments' on the basis of comity, and this is now also reflected in the Fourth Restatement of Foreign Relations Law, which extends recognition to foreign judgments 'determining a legal controversy'.

v. Required Connections to the State of Origin

The Explanatory Report speaks of 'three traditional categories of connections to the State of origin' which are considered sufficient for a foreign judgment to be recognised and enforced: 'connections between the State of origin and the defendant, connections established by consent, and connections between the claim and the State of origin'.[4]

The various contributions show, however, that not all legal systems apply a jurisdictional criterion, and when they do, they do not necessarily regard all three categories as sufficient or of equal weight.

First, certain countries do not apply the jurisdictional filters test. An example, noted by Chong, is the Philippines. This country 'does not seem to apply any test of indirect jurisdiction to foreign judgments … a foreign decision that is final and conclusive is simply presumed by the Philippine court to be valid and binding on a defendant in the absence of proof of the contrary'.[5] Elbalti notes (and criticises) the example of Tunisia: no review of the jurisdiction of the original court, except where Tunisian courts claim exclusive jurisdiction. Other Arab countries do apply a jurisdictional filter but differ regarding their requirements for indirect jurisdiction of the foreign court. Turning to Latin America,

> [i]n Brazilian legislation a very open system for the recognition of foreign judgments prevails … The Superior Court of Justice … the only court having jurisdiction to grant recognition to foreign judgments, does not engage in any analysis of how reasonable the links between the foreign jurisdiction and the case under review were.[6]

Second, common law countries generally do not view the connection between the State of origin and the claim as sufficient in the absence of a territorial link with the defendant or the defendant's consent. This is true for the ASEAN common law countries as well as for the civil law country Vietnam (Chong) and for the United States (Saumier and Silberman).

Third, some legal systems see the link between the country of origin and the defendant as a matter of due process, and even as a constitutional requirement, and therefore do not as a matter of principle recognise or enforce foreign judgments not based on such a link (or the defendant's consent).[7] 'In the United States, it has been thought that the bases for *indirect* jurisdiction in the recognition and enforcement context – which take the form of "eligibility" filters in the Convention – must satisfy the same constitutional due process standards as direct jurisdiction' (Saumier and Silberman – but see also their comment in relation to Article 5, below, section I.F).

The view that due process requires a link between the State of origin and the defendant explains why in the Convention the connection between that State and the claim does not appear

[4] Garcimartín and Saumier (n 2) para 138.

[5] See A Reyes (ed), *Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Hart Publishing 2019) 318–19, with critical comment in fn 45.

[6] N de Araujo and M de Nardi, 'Consumer Protection Under the HCCH 2019 Judgments Convention' (2020) 67 *Netherlands International Law Review* 67.

[7] This also explains why it was not possible to establish uniform direct jurisdiction bases in the 2007 Hague Convention on the International Recovery of Maintenance Obligations.

as a self-standing jurisdictional filter but is accompanied by safeguards to ensure a link with the defendant. This applies notably to the jurisdictional filter regarding judgments on contractual obligations, which requires 'a purposeful and substantial connection' to the State of origin (Article 5(1)(g)). The same goes for non-contractual obligations: Article 5(1)(j) demands that 'the act or omission directly causing [the] harm occurred in the State of origin, irrespective of where that harm occurred', thus excluding the courts State of the harm (see also below, section II.C.i b)).

C. Definitions

i. No Definition of 'Courts'

As Wolfgang Hau (chapter two) notes (and regrets), the Convention does not provide a full definition of the notion of 'court', mentioned in Article 3(1)(b). Commenting on the Explanatory Report's viewpoint that this notion should be interpreted autonomously, with which he agrees, he nevertheless points out that it is for the State of origin 'to define which bodies exercise judicial or quasi-judicial functions within its legal system'. Thus, he argues, administrative authorities may qualify as 'courts' if the State confers judicial powers upon them to rule on matters covered by the Convention, and the same goes for State ADR institutions with judicial powers. This suggests a slightly broader understanding of the autonomous concept of 'court' than that of the Explanatory Report but seems correct.

ii. Judgments

The Convention defines judgments as any decision on the merits, and, despite their practical importance for international business,[8] excludes interim measures of protection. As a result, decisions on procedural or enforcement matters, final or provisional, including freezing orders and anti-suit injunctions are excluded (Hau).

As the Explanatory Report points out, decisions on the merits include default judgments (subject to Articles 7(1) and 12(1)(b)), and judgments in collective actions. The latter inclusion is of growing importance, given the rise of collective lawsuits and of legislation on such actions (see also below, section II.C.i.a and II.C.ii.b)). This also applies to judgments ordering the defendant to provide information or to produce a document. As procedural matters, however, they are excluded, except, as Hau argues, where they are rendered in an independent action.

In contrast with the Convention, the Brussels Ia Regulation (as well as the ASADIP 2016 *Principles of Transnational Access to Justice* (Chapter 8), the ALI/UNIDROIT 2006 *Principles of Transnational Civil Procedure* and the 1996 Helsinki International Law Association *Principles on Provisional and Protective Measures in International Litigation*) provide for the enforceability of interim measures of protection.[9] On the other hand, as noted by Saumier and Silberman, interim measures are not generally enforceable as a matter of law in the United States or Canada. While regretting the exclusion of interim measures by the Convention, Hau considers this

[8] See C Kessedjian, 'Comment on the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. Is the Hague Convention of 2 July 2019 a useful tool for companies who are conducting international activities?' (2020) 1 *Nederlands Internationaal Privaatrecht* 19, 23.

[9] It is also noteworthy that, as Jose Angelo Estrella Faria points out, in 2006 a chapter IV A on interim measures was added to the UNCITRAL Model Law on International Commercial Arbitration.

'understandable', in view of the problems to which their inclusion in the Brussels Ia Regulation has given rise. He points out that the party seeking interim measures in another State, including the State (to be) addressed for the recognition and enforcement of the judgment, remains free to request such measures from the courts of that other State under its laws.[10]

The Convention includes both monetary and non-monetary judgments (above section I.B.iv). Non-monetary judgments are often enforced by compulsory measures, typically pecuniary penalties, to encourage the defendant to comply with the judgment. The Convention does not clarify whether such pecuniary penalties are 'judgments'. Garcimartín's analysis of the question leads him 'tentatively' to the conclusion that this silence should be interpreted as meaning that they are not included in the Convention. As he points out, the situation is different under the Brussels Ia Regulation which does provide a definition of pecuniary payments.[11] The Brussels Ia precedent prompts Hau to suggest that the Convention should apply to such payments only where national law provides that the court (of origin) has determined the final amount of the penalty and where it is payable to the judgment creditor (and not to the State).

iii. Finality/res judicata

The Convention dispenses with a definition of the 'finality' of a judgment and is silent on the debated question whether the scope of its *res judicata* effect is determined by the law of the State of origin or that of the requested State.[12] Instead, it provides practical rules in its Article 4(3) and 4(4). Chong considers that this Article can 'work in tandem to accommodate the different conceptions of 'finality' and approaches in relation to judgments [subject to appeal in the State of origin] adopted by the ASEAN Member States … Overall, it is difficult to envisage any of the ASEAN Member States objecting to the operation of Article 4(3) and 4(4)'.

Elbalti points out that Arab States use different terminologies for the finality of a judgment although they are 'commonly understood to mean that the foreign judgment is no longer subject to an ordinary appeal', but also notes the exception of Lebanon where non-final judgments may be enforced. According to Saumier and Silberman, US courts 'tend to interpret finality, conclusiveness and enforceability based on the laws of the foreign jurisdiction where the judgment was rendered', concluding that 'the Convention provision in Article 4(3) is to the same effect'.

iv. Habitual Residence

The Convention applies 'habitual residence' as the criterion for the link between both a natural and a legal person and their State, but only defines it for legal persons. Contrary to the practice of some countries, a person's simple presence in the State of origin is not a sufficient connection for the purposes of the Convention.[13] Rumenov notes that in respect of natural persons, this

[10] As the 2005 Choice of Court Convention, Art 7, second sentence, not replicated in the HCCH 2019 Judgments Convention, recalls. Under Art 40 Brussels Ia Regulation an enforceable judgment carries with it by operation of law the power to proceed to any protective measures which exist under the law of the EU Member State addressed.

[11] F Garcimartin, 'The Judgments Convention: Some Open Questions' (2020) 67 *Netherlands International Law Review* 19, 21–25.

[12] ibid, 25–28. See also, for a detailed discussion of *res judicata*, Paul Beaumont, ch 6 in this volume.

[13] See the discussion by PN Okoli of the South African Court of Appeal case of *Richman v Ben-Tovim* 2007 (2) SA 203, where the respondent did not dispute the debt but argued that his mere presence in England was an insufficient basis for the English court to exercise jurisdiction. The Court, however, considered that a 'realistic approach' was necessary and enforced the foreign judgment: conflictoflaws.net/2020/promoting-foreign-judgments-lessons-in-legal-convergence-from-south-africa-and-nigeria-kluwer-law-international-b-v-2019-3/.

introduces a novelty for several South-East European countries which presently use a variety of criteria, but does not see this as an obstacle. Indeed, the conundrum of determining jurisdiction in the case of migrants (on the basis of formal or factual criteria?) which presently exists in some of those legal systems will no longer arise where the Convention applies.

Significantly, none of the authors object to the Convention's broad fourfold definition of the habitual residence of legal persons (Article 3(2)), although for some jurisdictions this might mean broadening their definition of indirect jurisdiction over such entities.

D. Exclusions from Scope

i. Articles 2, 8, 18[14]

None of the contributors raise major objections to the broad exclusions from the Convention's substantive scope (Article 2, with reflex effect on Article 8) discussed by Xandra Kramer (chapter one). She explains in particular the extent and background of the exclusions of defamation, privacy, intellectual property (IP) and the partially anti-trust or competition matters. Regarding the exclusion of IP, as the Explanatory Report admits, issues may arise in practice regarding the extent to which it applies to contractual IP obligations, including where an IP issue appears as a preliminary question in the foreign judgment (Article 8).

Elbalti simply notes 'some difficulty when it comes to delimitation and categorisation' which may arise as Arab legislation and conventions have a wider scope of application. Silberman and Saumier comment that the fact that existing law in the United States and Canada would extend to judgments in some of the areas excluded from the Convention's scope 'does not present a problem for either country, given that Article 15 would continue to permit this broader recognition under national law'. On the other hand, under US law, the SPEECH Act mandatorily forbids the recognition or enforcement of a foreign judgment based on a claim of defamation.

Andreas Stein and Lenka Vysoka (chapter seven) point out that the Convention does not give the same broad range of protection to consumers and employees as the Brussels Ia Regulation and does not make special provision for the weaker party in insurance matters. Nevertheless, the EU concluded that the Convention's limited protection to employees and consumers suffices, even in respect of weaker insurance parties, and that, therefore, no declaration was needed under Article 18.[15] By contrast, upon its accession, the EU made a declaration under Article 18 to cater for the fact that, contrary to the Brussels Ia Regulation, the Convention does not not afford exclusive jurisdiction to the State where immovable property is located regarding commercial (non-residential) tenancies of such property.[16]

[14] See also, A Bonomi and C Mariottini, 'A Game-Changer in International Litigation? Roadmap to the 2019 Hague Judgments Convention' (2018/19) 20 *Yearbook of Private International Law* 537–67; F Pocar, 'The 2019 Hague Judgments Convention: A Step into the Future or a Restatement of the Present?' in J Harris and C McLachlan (eds), *Essays in International Litigation for Lord Collins* (Oxford University Press 2022).

[15] They also note that according to stakeholders interviewed in the EU, the Convention 'is considered mostly as a B2B instrument with only limited application to consumer and employment matters'.

[16] Declaration made by the EU on 29 August 2022: 'The European Union declares, in accordance with Article 27(1) of the Convention, that it exercises competence over all the matters governed by this Convention. Its Member States will not sign, ratify, accept or approve the Convention, but shall be bound by the Convention by virtue of the accession of the European Union. For the purposes of this declaration, the term "European Union" does not include the Kingdom of Denmark by virtue of Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union. The European Union declares, in accordance with Article 18 of the Convention, that it will not apply the Convention to non-residential leases (tenancies) of immovable property situated in the European Union'. Ukraine did not deposit any declaration upon its ratification of the Convention.

Tang discusses the possible need for a declaration under Article 18 by China in light of its current claim of exclusive jurisdiction over Sino–foreign joint venture contracts, cooperative contracts and cooperative exploration of natural resources contracts performed in China. She suggests that when ratifying the Convention, China might not simply invoke Article 18 to continue this claim but could also relax this exclusivity. This would enable its courts to recognise and enforce judgments concerning such contracts rendered by other States Parties' courts, for example, based on the parties' choice of court[17] or the defendant's consent.

ii. Arbitration, Article 2(3)

'The Convention shall not apply to arbitration and related proceedings' (Article 2(3)). Jose Angelo Estrella Faria (chapter sixteen) considers that the Convention might legitimately have created a 'uniform rule on the international enforceability (or non-enforceability) of a judgment [rendered by the court of the seat of the arbitration] setting aside an arbitral award', because this could have avoided parallel proceedings and conflicts of jurisdiction. However, since this remains a controversial issue, and the drafters of the Brussels Ia Regulation also refrained from including such a rule, he concludes that '[o]n balance … it was a wise decision … to simply exclude entirely all arbitration and related proceedings'.

While the exclusion of Article 2(3) applies to settlements that are enforceable as an arbitral award, settlement agreements *approved by a court or concluded in the course of judicial proceedings* are enforceable under the terms of Article 11. As Estrella Faria points out, this provision is mirrored in Article 1(3) of the United Nations Convention on International Settlement Agreements Resulting from Mediation[18] (Singapore Convention on Mediation – see also below, section I.E.ii) by the exclusion of any settlement agreements that would qualify for enforcement under the HCCH 2019 Judgments Convention as 'judicial settlement'.

E. The Convention's Relationship with Other International Instruments

Although from a formal treaty law perspective the Convention is a self-standing multilateral treaty, functionally it should be seen in the broader context of a range of other multilateral treaties, which may also be relevant to its implementation and interpretation. This applies, first and foremost, to the HCCH 2005 Choice of Court Convention, on which it builds.

i. The HCCH 2005 Choice of Court Convention

The HCCH 2019 Judgments Convention states in its Preamble that it 'is complimentary to the *Convention of 30 June 2005 on Choice of Court Agreements*'. The jurisdictional filter of Article 5(1)(m) of the HCCH 2019 Judgments Convention applies only to non-exclusive choice of court agreements, leaving exclusive agreements to be dealt with under the HCCH 2005 Convention.

[17] China has already signed the 2005 Hague Choice of Court Convention (without filing concomitant declarations). When ratifying that instrument, China may face the same choice under its Art 21, which parallels Art 18 of the HCCH 2019 Judgments Convention.

[18] General Assembly Resolution 73/198, adopted on 20 December 2018, Annex (reproduced in *UNCITRAL Yearbook*, XXXIII: 2002, Part Three).

Beaumont's contribution explains in detail how the two Conventions complement each other. For some issues that may arise under both Conventions, the HCCH 2005 Convention provides solutions that are not found in the HCCH 2019 Judgments Convention. Examples include the important 'deeming' provision,[19] the severability provision,[20] the rule that the court addressed should apply the law of the State of the chosen court (including its private international law rules) to determine the substantive validity of the choice of court agreement (and not its own private international law rules), and is bound by any ruling of the chosen court on the substantive validity of this agreement.[21] Beaumont suggests that the 'uniform features of the 2005 Convention that are not already incorporated into the 2019 Convention should be regarded as best practice for implementing and interpreting the latter Convention'.[22]

On the other hand, the HCCH 2019 Judgments Convention may occasionally shed light on the interpretation of the HCCH 2005 Convention, for example, where the Explanatory Report, stating that Article 11 of the HCCH 2019 Judgments Convention extends to out of court agreements subsequently approved by a court, suggests that the same interpretation should apply to the identical worded Article 12 of the HCCH 2005 Convention,[23] or advocates a broader interpretation of Article 18 than the parallel rule of Article 21 of the HCCH 2005 Convention.[24]

Moreover, as also noted by Saumier and Silberman, if States are bound by both instruments, the HCCH 2019 Judgments Convention reinforces the HCCH 2005 Convention in one important respect. If the parties have concluded an exclusive choice of court agreement designating a court of a Contracting State to the HCCH 2005 Convention, the HCCH 2019 Judgments Convention permits the refusal of recognition and enforcement of a judgment from a non-chosen court when the proceedings in that court were 'contrary' to that agreement.[25] This applies even though an indirect basis for the jurisdiction of that court existed under the HCCH 2019 Judgments Convention (Article 5). By contrast, the HCCH 2005 Convention would permit the requested court to give priority to the (earlier) judgment of the non-chosen court.[26] Beaumont suggests that the requested court should follow this line to uphold the policy of the HCCH 2005 Convention and, under the HCCH 2019 Judgments Convention – though as Hau recalls it 'only deals with the recognition of foreign judgments, not with the recognition of pendency in another forum' – should also refuse to recognise and enforce a judgment given by a non-chosen court where proceedings are still pending in the exclusively chosen court.[27]

[19] HCCH 2005 Choice of Court Convention, Art 3(b).

[20] ibid, Art 3(d).

[21] ibid, Art 9(a).

[22] See, however, Garcimartín and Saumier (n 2) para 269, stating that in the case of Article 7(1)d of the HCCH 2019 Judgments Convention, '[t] the validity … of the agreement … is governed by the law of the requested State, including its private international law rules'.

[23] ibid, para 296.

[24] ibid, para 337, fn 243.

[25] Art 7(1)d. Note that this rule also applies in the case of a non-exclusive choice of court agreement and regardless of whether the chosen court was that of a Contracting State or a third State.

[26] HCCH 2005 Choice of Court Convention, Art 9(f).

[27] Unless, of course, as noted by Beaumont and Goddard, 'the party now relying on the derogative effect of the choice of court agreement expressly consented, or entered an appearance but did not object timeously, to the jurisdiction of the courts of the State of origin'. D Goddard and P Beaumont, 'Recognition and Enforcement of Judgments in Civil or Commercial Matters' in P Beaumont and J Holliday (eds), *A Guide to Global Private International Law* (Hart Publishing 2022) 414.

ii. Other International Instruments

Just as Article 5(1)(m) of the HCCH 2019 Judgments Convention ensures its compatibility with the HCCH 2005 Choice of Court Convention, several of the exclusions under Article 2(1), as well as the exclusion of arbitration (above, section I.D.ii), avoid its incompatibility with other treaties.

Conversely, other treaties may take care not to conflict with the HCCH 2019 Judgments Convention, as illustrated by the exclusion by the UNCITRAL 2018 (Singapore) Convention on Mediation of settlement agreements that would qualify for enforcement under Article 11 of the HCCH 2019 Judgments Convention as 'judicial settlements'.[28]

The Convention in its Article 23 provides a set of general rules for its relationship with other international instruments. As far as possible, it should be interpreted to be compatible with other treaties (Article 23(1)). If they are not compatible, then, as Kramer points out, three different situations arise.

First, the Convention gives way to the other instrument if that was *concluded before* the Convention, even if only the requested State is a Party to that treaty and even if that treaty was ratified by, or entered into force for, the requested State after the Convention (Article 23(2)). Article 23(2) also ensures that earlier concluded regional instruments such as the conventions in the Arab region mentioned by Elbalti – which are generally less liberal than the Convention – and, in Latin America, the 1889 and 1940 Montevideo Treaties on International Procedural Law, the Inter-American Conventions of Montevideo 1979 and La Paz 1984 and the Mercosur Protocols of Las Leñas 1992 and Buenos Aires 1994, referred to by Marcos Dotta Salgueiro (chapter four) and Verónica Ruiz Abou-Nigm (chapter eleven)[29] are respected.

Second, if such an incompatible instrument was concluded *after* the Convention, then that later instrument prevails over the HCCH 2019 Judgments Convention and governs the granting or refusing of recognition and enforcement, subject to Article 6 (Article 23(3)). One could think here of the conclusion after the HCCH 2019 Judgments Convention of a global instrument in a specialised area within the Convention's substantive scope or of a regional instrument aimed at further increasing the efficient recognition and enforcement of judgments.

Finally, the specific case of the circulation of judgments under EU instruments, whether concluded before or – always subject to Article 6 – after the Convention, is preserved by Article 23(4).

F. The Jurisdictional Filters or Indirect Bases of Jurisdiction

The purpose, layout and operation, and various categories of the indirect bases of jurisdiction listed in Articles 5 and 6 are set out extensively and in detail by Pietro Franzina (chapter three). Several other contributions to the volume also comment on these core Articles of the Convention.

[28] 'This Convention does not apply to: (a) Settlement agreements: (i) That have been approved by a court or concluded in the course of proceedings before a court; and (ii) That are enforceable as a judgment in the State of that court; (b) Settlement agreements that have been recorded and are enforceable as an arbitral award'. See also, the comments by Wolfgang Hau on judicial settlements in ch 2 in this volume.

[29] See also, MB Noodt Taquela, and V Ruiz Abou-Nigm, 'The Draft Judgments Convention and its Relationship with other International Instruments' (2017/18) 19 *Yearbook of Private International Law* 449.

i. Article 5

The jurisdictions covered in this volume vary in respect of the connection between the foreign judgment and the State of origin required for its recognition and enforcement (see above, section I.B.v). Yet, with the possible exception of Elbalti, none of the contributions expects grave objections to the bases for recognition and enforcement of judgments required by Article 5.

Chong notes that the jurisdictional filters in Article 5(1) are more extensive than those found under the national laws of the ASEAN Member States. However, for the common law ASEAN countries, the Commonwealth Model Law on the Recognition and Enforcement of Foreign Judgments,[30] by its inclusion of non-traditional bases of jurisdiction based on a connection between the dispute and the State of origin, may assist Commonwealth member countries when considering joining the Convention. And civil law ASEAN countries may benefit from the clarity which Article 5 provides.

Tang demonstrates in detail that most (direct) grounds of jurisdiction in Chinese law are in harmony with the indirect jurisdiction criteria of the Convention and concludes that most Chinese judgments will be eligible for recognition and enforcement under it. There is a diverging rule in Chinese law that gives Chinese courts jurisdiction if the contract is concluded in China, the subject matter of the dispute is situated in China and the defendant has disposable assets situated in China. She believes, however, that this discrepancy is 'not fundamental or serious enough to prevent China from joining the HCCH 2019 Judgments Convention'.

On the other hand, from an Arab perspective, according to Elbalti, the jurisdictional filters of Article 5 appear 'unnecessarily complex'. For example, the choice of law system adopted by Article 5(1)(g) for the determination of the place of performance 'is simply unknown to all MENA Arab jurisdictions'. Moreover, the 'purposeful and substantial connection test' adopted in Article 5(1)(g) 'would rather create more confusion than clarity in the Arab context. This is because Arab courts are not familiar with this notion and also because, in almost all MENA Arab countries, jurisdiction in contractual matters is usually based either on the place of the conclusion of the contract or the place of its performance'. Nevertheless, Elbalti considers that the problem here lies more with the Arab countries which need to reform their rules of international jurisdiction, and his overall assessment of the Convention's usefulness for Arab countries is positive.

Rumenov notes the considerable variety between South-East European States with respect to (direct and) indirect jurisdiction criteria. This applies, for example, to the determination of habitual residence (Article 5(1)(a)) in some countries, to the fact that in many of those countries the jurisdictional criterion of the principal place of business for natural persons conducting business activities (Article 5(1)(b)) is unknown, and to the way they deal with express consent and submission (Article 5(1)(e) and (f)). Also, the jurisdictional bases for both contractual and non-contractual obligations in most of these countries are much broader than those required by Article 5(1)(g) and (j). Judgments on contractual and non-contractual obligations from these countries, therefore, 'will rarely pass this jurisdiction filter', but may be enforceable under other filters of Article 5 or under national law according to Article 15. This is probably true for judgments rendered by the courts of many other States as well. All in all, Rumenov expects more clarity and uniformity for the South-East European region from Article 5, and, regarding exclusive choice of court agreements, from the HCCH 2005 Convention.

[30] Office of Civil and Criminal Justice Reform, The Commonwealth, *Model Law on the Recognition and Enforcement of Foreign Judgments* (Commonwealth Secretariat 2018), available at: thecommonwealth.org/commonwealth-model-laws. The Model Law was endorsed by the Commonwealth Law Ministers in 2017. See also, A Yekini, *The Hague Judgments Convention and Commonwealth Model Law: A Pragmatic Perspective* (Hart Publishing 2021).

As for the United States and Canada, Saumier and Silberman are of the opinion that 'most of the filters in Article 5(1) should be uncontroversial … they are consistent with the rules regarding jurisdiction of a foreign court for the purposes of enforcing its judgment in both countries … Moreover, the filters are also largely compatible with existing jurisdictional rules for the assumption of jurisdiction by courts in both countries, which will satisfy the "eligibility" condition for circulation of judgments from the United States or Canada in other Contracting States'. They note that Article 5(1)(f) on implied consent contradicts the recent decision of the Canadian Supreme Court holding that defending on the merits implies submission even if the defendant has protested the court's jurisdiction. In such a case, therefore, if the foreign judgment meets no other jurisdictional criterion under Article 5, it will have no effect under the Convention, but may be recognised and enforced under Canadian national law.

Likewise, as the jurisdiction exercised by courts in both the United States and Canada in proceedings against consumers and employees is broader than the jurisdictional filters of Article 5(2), some US and Canadian judgments against consumers and employees will not be enforceable under the Convention. This also applies to Canadian judgments on torts, which may be rendered by the courts for the place of injury alone: such a judgment will not pass the filter of Article 5(1)(j). In contrast, this filter corresponds with the position under the law of the United States, where the Supreme Court has ruled that the place of injury without additional purposeful conduct by the defendant does not meet the constitutional due process standard for *direct* jurisdiction.[31] Interestingly, Saumier and Silberman comment that the Supreme Court has in fact never decided that the constitutional test for *indirect* jurisdiction must be the same as that for *direct* jurisdiction, so that 'it might well be that the constitutional test for "indirect" jurisdiction is not necessarily the same as that for direct jurisdiction; in that case foreign judgment recognition could include judgments where the basis of jurisdiction in the foreign court does not satisfy the US constitutional requirements for direct jurisdiction'.

As mentioned (above, section I.B.v), checking jurisdictional filters is not part of the procedure for recognition and enforcement in Brazil. Other MERCOSUR countries have a tradition of applying the grounds of direct jurisdiction also as indirect grounds of jurisdiction. Thus, in Argentina rules of (direct) international jurisdiction apply in the absence of international treaties' provisions to the contrary. Ruiz Abou-Nigm considers that the new Convention could provide a more favourable and less restrictive framework based on the jurisdictional filters therein provided.

From a comparative perspective, a comment may be made on Article 5(1)(f) – submission. According to the Explanatory Report,[32] if in a 'State or origin where the doctrine of *forum non conveniens* is available', a defendant 'did contest jurisdiction but, after this objection was dismissed, did not request that the court decline its jurisdiction', the judgment will be considered to meet the filter unless the defendant proves that this request had no chance of success. This may be a fair rule if defendants are embedded in, or at least familiar with, such a jurisdiction, but what if they are not? And when does a jurisdiction qualify as one 'where the *forum non conveniens* doctrine is available'?

ii. Article 5(3) and Article 6

These Articles do not elicit comments from the contributors, except for Stein and Vysoka, who point out that while Article 5(3) limits the recognition and enforcement of judgments on *residential* tenancies to decisions rendered by a court of the State where the immovable property is

[31] See, eg, *J McIntyre Machinery, Ltd v Nicastro*, 564 US 873 (2011).
[32] Garcimartín and Saumier (n 2) para 178.

situated, this does not apply to judgments on *non-residential* (commercial) tenancies, and that such judgments are likewise not addressed by Article 6. Therefore, they fall under Article 5(1). As Stein and Vysoka explain in detail, this contradicts the EU policy objective, reflected in the Brussels Ia Regulation,[33] which prompted the EU to avail itself of Article 18 and make the declaration mentioned (above, section I.D.i).[34]

iii. Article 15

The Convention provides a floor, not a ceiling, and permits broader recognition and enforcement of judgments covered by the Convention under national law.[35] As the Explanatory Report points out, subject to Article 6, Article 15 is based on a principle of *favor recognitionis*.[36]

Saumier and Silberman stress the particular importance of this rule to the United States and Canada where recognition and enforcement of judgments is generally more generous than the Convention requires. Given the limitations of various jurisdictional filters of Article 5, this is likely to be true as well for a number of other States, including most EU Member States and MERCOSUR States.

G. The Grounds for Refusal

The contribution by Dotta Salgueiro gives an extensive and detailed analysis of Article 7, including a discussion of the provisions of Articles 8–10 (preliminary questions, severability and damages).

i. Article 7

The seven grounds for refusal listed in Article 7(1), and which are largely similar to those of the HCCH 2005 Convention, are exhaustive but – contrary to the obligatory ground for refusal implied in Article 6 – not mandatory. Meier makes the point that their

> optional nature … indicates that [the Convention's] primary focus is the free circulation of judgments, and not the protection of the defendant. The latter's protection is left to the discretion of the State of recognition … a sign of trust amongst the negotiators of the Convention, but also a risk for the defendant.

He rightly points out that in a case of insufficient notification of the defendant, international human rights instruments, such as the European Convention on Human Rights, will stand in the way of recognition and enforcement of a judgment.[37]

Chong points out that several of these grounds do not, or do not fully, correspond to those provided under the laws of ASEAN countries. However, to the extent that ASEAN States'

[33] Art 24.

[34] For a critical comment on the 'classic characterisation of jurisdiction for rights *in rem* as exclusive' (in both the 2005 and 2019 Conventions), given that in B2B situations 'enterprises may well want to deal with rights *in rem* together with other disputes or before another forum than the one located at the place where the property is situated', which may induce them to include arbitration clauses in their deals involving commercial property, see Kessedjian (n 8) 26.

[35] As Beaumont notes, the 2005 Convention likewise does not prevent a Contracting State to that Convention from recognising and enforcing a judgment based on an exclusive choice of court agreement which does not meet the formal validity requirements in the Convention, such as a trade usage, unless the chosen court has decided that the agreement is invalid as regards its substance.

[36] Garcimartín and Saumier (n 2) para 326.

[37] N Meier, 'Notification as a Ground for Refusal' (2020) 67 *Netherlands International Law Review* 81, 92–93.

requirements are more liberal than those of Article 7(1), the non-mandatory nature of the Convention grounds will enable those States[38] to recognise or enforce a judgment that falls under one of these grounds under either the Convention or national law. And conversely, where the national law of an ASEAN State provides for a ground for refusal not found under Article 7(1)(a), (b) or (d)–(f), the public policy ground of Article 7(1)(c) 'will likely cater for this situation', because it remains in essence up to each State to define the public policy defence under this provision.[39] In this regard, Jang (a member of the Korean delegation to the negotiations) points out that Article 7(1)(c) is to be understood as referring to 'the consequences of the recognition and enforcement of a *specific* judgment'.[40]

A similar reasoning applies to China. As Tang sets out, courts in China, at least in enforcing foreign arbitral awards under the York Convention, tend to interpret the public policy exception 'very rarely'. See also her comment on China's current exclusive jurisdiction claim for certain contracts (above, section I.D.i).

Saumier and Silberman recall that while the grounds of Article 7 are non-mandatory, currently the law in the United States does mandate non-recognition of a foreign money judgment in certain circumstances.[41] One of these mandatory grounds is that 'the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness'. They raise the question whether the public policy exception of Article 7(1)(c) 'presents potential tension with respect to US ratification of the Convention', since this Article is not cast in general terms, but refers to 'the *specific* proceedings leading to the judgment were incompatible etc'. May a court in the United States invoke this provision without any need to show unfairness or bias in the specific proceedings giving rise to the foreign judgment, or should the United States make use of Article 29 and refuse to establish relations with the State of origin of such judgment? For the former view they rely on the words in Article 7(1)(c) 'the public policy of the *requested* State' – and the Explanatory Report.[42]

Tang argues that in respect of China, the application of the mandatory rule of US law is more complicated than this rule and a recent decision of the New York Supreme Court suggest.[43] 'The fact that the Chinese judicial system is subject to the macro-supervision of the [Chinese Communist Party] does not suggest that each single judgment is tainted by their direct influence, and thus lacks independence and impartiality'. She therefore advocates a narrower reading of Article 7(1)(c) to avoid 'political decisions' in relation to Chinese judgments so that the requested court 'will have to consider evidence suggesting the quality and justice of the proceedings in each single case'.

One wonders whether the application of the Convention in practice might not reduce the tension between Article 7(1)(c) and a national law such as that of the United States. Assuming

[38] As Garcimartín and Saumier (n 2) para 246, explain: Article 7 is addressed to *States*, which have a variety of options to implement this provision, including 'leav[ing] everything to the discretion of the court'.

[39] ibid, para 264.

[40] J Jang, 'The Public Policy Exception Under the New 2019 HCCH Judgments Convention' (2020) 67 *Netherlands International Law Review* 97, 100, fn 16 (emphasis added).

[41] s 483 of the Restatement (Fourth) of Foreign Relations, reflecting both the Uniform Acts as well as other law in the United States, provides that a court in the United States will not recognise a judgment of a court of a foreign state if: (a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness.

[42] Paras 262–64.

[43] *Shanghai Yongrun Investment Management Co v Kashi Galaxy Venture Capital Co*, 2021 NY Misc LEXIS 2492; 2021 NY Slip Op 31459(U), also discussed by João Ribeiro-Bidaoui and Cristina M Mariottini, ch 5 and Ning Zhao, ch 15 in this volume.

that neither of the two States makes the Article 29 notification vis-a-vis the other, the judgment debtor opposing the foreign judgment will have to challenge, pursuant to Article 7(1)(c), not (or not only) the foreign judicial system *in abstracto*, but (also) the fairness or unfairness of the procedure *in concreto*. If the court is satisfied that the particular procedure was unfair, it will apply Article 7(1)(c). If, on the other hand, it finds no ground to question the impartiality of the court of origin and the fairness of the proceedings in the case at hand, then it will have reason to reject the invocation of this ground for refusal.[44] To refrain from notifying under Article 29 would thus be to accept the rule of Article 7(1)(c) as a refinement – within the context and for the purpose of the Convention only – of a more far-reaching ground for refusal under national law, such as the US rule.

Dotta Salgueiro, raises another important point, namely that the public policy of the requested State may not only be based on fundamental values held by that particular State, but also on universal fundamental principles of public international law, see also below, section II.C.i.a.

ii. Article 7(2)

The rules of this provision are new to some jurisdictions. Elbalti points out that, except for Lebanon, Article 7(2) has no equivalent in the Arab jurisdictions and can therefore be problematic. In the Arab countries courts do not enjoy the discretion to assess the appropriateness of their taking of jurisdiction, even in the case of *lis pendens*. According to Saumier and Silberman: 'No such basis for non-recognition is found in existing law in the United States or in Canada (outside Saskatchewan and Quebec) … Thus it is possible that a court in the United States or in Canada will proceed with a case notwithstanding a prior parallel proceeding in another country, and the resulting judgment could then be at risk under the Convention'.

H. Bilateralisation

João Ribeiro-Bidaoui and Cristina M Mariottini provide a full account of the genesis of this Article, which builds on a long Hague Conference tradition of clauses establishing mutual treaty relations. They also point out its novel features (no distinction between Member and non-Member States of the organisation, simplification compared with the two-step bilateralisation mechanism of the HCCH 1971 Judgments Convention). Their contribution concludes that 'the mechanism set out at Article 29 contributes to the pursuit of an advanced international cooperation characterised by coherent and more virtuous universal spaces of judicial cooperation and integration, for the benefit and the progress of international legal relations'.

Even if one is not immediately won over by this presentation of the strength of Article 29, the fact is that its inclusion was a *sine qua non* for the adoption of the Treaty, as Ning Zhao (chapter fifteen) also points out. As such it may, as Ribeiro and Mariottini admit, not only provide 'an incentive for States perceived as fraught with a systemic lack of due process to correct and improve, loudly and clearly, their domestic judicial systems', but also 'discourage certain States from seeking adhesion to the Convention'.

[44] For an example of such an approach, see the recent New Zealand High Court judgment *Hebei Huaneng Industrial Development Co Ltd v Shi* [2020] NZHC 2992 [43]–[51], discussed by Ribeiro and Mariottini, ch 5 and Zhao, ch 15 in this volume. See also Hau's comments on Art 7(1)(c) (ch 2 in this volume).

In this regard, Chong notes the dilemma that Article 29 may pose to a number of ASEAN Member States whose judicial systems are perceived to be lacking by international standards. Such a State may 'not want to risk the embarrassment of another Contracting Party refusing to establish treaty relations with it pursuant to Article 29. For these countries, deciding to sign up to the Convention will be a more fraught affair, entailing consideration of factors beyond the palatability of the Convention's rules vis-a-vis enforcing a foreign judgment'. A number of African countries, among others, may find themselves in a similar position.

It is to be hoped that Article 29 will remain an *ultimum remedium*. After all, the Convention gives parties wanting to oppose a foreign decision an array of tools. They can argue that the decision was not a 'court' (Hau), and/or, under Article 7, that they were not properly notified, and/or that the judgment was obtained by fraud and/or that the judgment manifestly violates public policy.

Furthermore, consideration should be given to the possibility of providing international assistance to States with weak judicial systems desiring to join the Convention, see below, section II.D.

II. Future Perspectives

A. Introduction

That the Convention would have universal coverage had always been the hope of the Permanent Bureau of the HCCH when, as Zhao recalls, in early 1992 it suggested to the State Department that, instead of exploring a bilateral arrangement with the countries of Europe, the United States might consider the possibility of choosing the Hague Conference as a global forum for negotiating a Convention on the recognition and enforcement of judgments.[45]

The Convention will not be operating in a normative vacuum. First, it coexists and may interact with other international instruments on the recognition and enforcement of decisions (see above, section I.E). The Convention is thus one of several possible avenues for recognition and enforcement of decisions, including those offered by the HCCH 2005 Choice of Court Convention, the UNCITRAL 2018 (Singapore) Convention on Mediation, and the UNCITRAL 1958 (New York) Arbitration Convention. The availability of the HCCH 2019 Judgments Convention will enlarge businesses' strategic options for cross-border dispute settlement.

Second, the Convention leaves room for more liberal recognition and enforcement rules of national and regional law. Indeed, the Convention with its Article 15, based on *favor recognitionis*, sends an important signal to this effect, particularly to countries which, perhaps due to a lack of legal reform (Chong/Yekini and Okoli) are currently reluctant to give effect to foreign judgments. Okoli gives the example of the leading African jurisdictions of Nigeria and South Africa, which in his view much need a courts' driven openness to foreign judgments and would benefit from the HCCH 2019 Judgments Convention.[46] Several authors of the preceding chapters (Estrella Faria, Chong, Elbalti) anticipate that a country's ratification of the Convention may lead to reform its jurisdictional rules. Estrella Faria, expects a 'move towards enhanced due process standards as

[45] The Permanent Bureau suggested 'a cautious approach … start[ing] with examining the possibility of a *traité simple* [ie, a treaty on *recognition and enforcement* of judgments only] and see whether one could make a further step', see Note 'Some Reflections by the Permanent Bureau on a general convention on enforcement of judgments' Prel Doc No 17 of May 1992, *Hague Conference on Private International Law, Proceedings of the XVIIth Session, Tome I*, 231–39, para 18.

[46] P Okoli, *Promoting Foreign Judgments: Lessons in Legal Convergence from South Africa and Nigeria* (Wolters Kluwer 2019).

a by-product of the countries' participation in a treaty mechanism that may bar the recognition and enforcement of judgments that fail to meet acceptable procedural standards'.

Third, as Dotta Salgueiro observes, the Convention is embedded in 'a framework where human rights and UN Sustainable Development Goals (SDGs) … are an important contemporary normative part of international law'. Several other contributors (Estrella Faria, Zhao) also make this point.

It seems important to dwell on this 'framework' for a moment, as ongoing developments regarding this 'contemporary normative part of international law', will have an impact on the future of the Convention, which like many HCCH Conventions, may well have a lifespan of many decades to come.

B. The Broader Normative Context: UN Sustainable Development Goals, Human Rights, Corporate Social and Environmental Responsibility

i. The UN Sustainable Development Goals

According to its Preamble,[47] the Convention aims 'to promote effective access to justice for all and to facilitate rule-based multilateral trade and investment, and mobility, through judicial cooperation'.

The Convention has the potential to contribute to the achievement of basic objectives of the United Nations *Agenda 2030 for Sustainable Development*.[48] The Agenda with its 17 Sustainable Development Goals (SDGs), although non-binding, is the result of a broad consultation and negotiation process. It offers an authoritative and comprehensive global 'plan of action for people, planet and prosperity … urgently needed to shift the world on to a sustainable and resilient path'.[49]

The interrelated SDGs include a call, echoed in the Preamble of the HCCH 2019 Judgments Convention, to 'promote access to justice for all' (SDG 16), and an appeal for a 'rules-based, open non-discriminatory and equitable trading system' (SDG 17). Although the SDGs do not expressly mention recognition and enforcement of judgments, several contributions to this volume stress the relevance of the Convention for both effective access to justice and sustainable economic growth. Thus, Ruiz Abou-Nigm notes its importance in terms of international access to justice for the Latin American region. Likewise, Yekini and Okoli conclude that the 'Convention as a modern multilateral treaty on the recognition and enforcement of foreign judgments offers positive prospects to many African countries in achieving economic prosperity'.

Recent studies of the interaction between the SDGs and private international law show this potential of the HCCH 2019 Judgments Convention, and of the HCCH 2005 Choice of Court Convention, to strengthen the global implementation of SDGs.[50] This includes their

[47] The Explanatory Report is remarkably silent on the Preamble with one exception (para 313): 'An essential element to ensure the effectiveness of the Convention (see para 2 of the Preamble) is the principle of non-discrimination: judgments given in other States, once they have been determined to be enforceable under the Convention, are to be treated in the same manner as domestic judgments'.

[48] UN General Assembly Resolution A/70/1 *Transforming our world: the 2030 Agenda for Sustainable Development* adopted on 25 September 2015: www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf.

[49] ibid, Preamble, para 2.

[50] R Michaels, V Ruiz Abou-Nigm and H van Loon (eds), *The Private Side of Transforming our World: UN Sustainable Development Goals 2030 and the Role of Private International Law* (Intersentia 2020), also accessible (open access) at: www.intersentiaonline.com/library/the-private-side-of-transforming-our-world-un-sustainable-development-goals-2030-and-the-role-of-p.

role in cross-border litigation in the field of global agro-business,[51] energy,[52] decent work,[53] infrastructure,[54] climate change[55] and the environment.[56] These studies also reveal some of the limitations of these Conventions.

ii. Human Rights

According to the 1948 Universal Declaration of Human Rights: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.[57] As a binding legal norm, this principle returns in the 1966 International Covenant on Civil and Political Rights, Article 14(1); the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 6(1); the 1969 American Convention on Human Rights, Article 8(1); and the 1981 African Charter on Human and People's Rights, Article 7(1).

Dotta Salgueiro recalls these human right norms in his discussion of Article 7(1)(a) of the Convention. More generally, failure to give effect to foreign decisions may constitute undue interference with the right to a fair hearing. According to the European Court of Human Rights, Article 6(1), the ECHR applies to the procedure for enforcement of foreign judgments.[58]

With the HCCH 2019 and HCCH 2005 Conventions, among others, in mind, the Institut de Droit International (IDI) adopted the following provision in the Final Article of its 2021 Resolution on Human Rights and Private International Law:

> Article 20, Recognition and enforcement of foreign judgments:
>
> 1. The right to a fair hearing encompasses effective legal protection including with respect to the recognition as well as to the enforcement of foreign judgments.
> 2. A foreign judgment shall not be recognized or enforced against a party's will if the proceeding in the foreign court violated that party's right to a fair hearing, or the competence of the court that rendered the judgment had no significant connection to the dispute.
> 3. States shall promote accession to existing international instruments or the conclusion of agreements on the recognition and enforcement of foreign judgments in civil and commercial matters.[59]

Both the HCCH 2019 and the HCCH 2005 Convention aim to ensure the legal protection mentioned in paragraph 1. As paragraph 2 demands, both instruments require the protection of the party's right to a fair hearing in the proceedings leading to the foreign judgment. This includes proper notification (2019: Article 7(1)(a),[60] 2005: Article 9(c)); non-discrimination regarding security for costs (2019: Article 14); and perhaps also the prohibition of review of the merits of the judgment (2019: Article 4(2), 2005: Article 8 (2)). Likewise, both Conventions require

[51] ibid, Jeannette ME Tramhel, SDG 2: Zero Hunger.
[52] ibid, Nikitas E Hatzimihail, SDG 7: Affordable and Clean Energy.
[53] ibid, Ulla Liukkunen, SDG 8: Decent Work and Economic Growth.
[54] ibid, Vivienne Bath, SDG 9: Industry Innovation and Infrastructure (referring in particular to the 2005 Convention, with critical remarks).
[55] ibid, Eduardo Álvarez-Armas, SDG 13: Climate Action.
[56] ibid, Richard F Oppong, SDG 6: Clean Water and Sanitation; Drossos Stamboulakis/Jay Sanderson, SDG 15: Life on Land.
[57] Art 10.
[58] See, European Court of Human Rights, 23 May 2016, *Avotiņš v Latvia*, No 17502/07, also mentioned by Meier (n 37).
[59] *Institut de Droit International*, Online Session – 2021, Resolution prepared by the Fourth Commission (Rapporteur F Pocar), 4 September: www.idi-iil.org/app/uploads/2021/09/2021_online_04_en.pdf.
[60] But see above, section I.G.i (comments Meier).

a significant connection between the jurisdiction of the court of origin and the dispute (2019: Articles 5 and 6, 2005: Article 5). Finally, paragraph 3 of the Resolution is a barely disguised exhortation to accede to both Hague Conventions.

Although Article 20 does not go as far as the original Rapporteur *Basedow* had suggested,[61] the HCCH 2019 Judgments Convention accomplishes what he had in mind: in the relations between Contracting States, it breaks the principle of not giving effect to foreign decisions, it does away with reciprocity as a condition for the recognition and enforcement of judgments emanating from another State Party, and it prohibits the review of the merits of a foreign decision.

The Resolution also includes the following rule:

> Article 19 Corporate Social Responsibility
>
> States and international organizations shall make sure that corporations respect corporate social responsibility, including human rights, social and environmental rights and the fight against corruption.

In summary form, this Article reflects important recent, ongoing developments, at the global, regional and national level regarding corporate responsibility in social, environmental and governance matters.

iii. Corporate Social Responsibility

At the global level, the 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs),[62] especially address corporate social responsibility in relation to human rights. They apply not only to companies' own operations, but also to all of their business relationships including those throughout their value chain. While the primary responsibility to *protect* human rights lies with States, companies everywhere, large and small, have a responsibility to *respect* human rights, and they also have a certain responsibility to provide *remedies* when things have gone wrong. The UNGPs are not binding, and yet they have become the dominant paradigm for discussing corporate responsibility, not just in relation to social matters, but also to the environment and corporate government. Efforts are under way at the UN to establish a binding instrument on business and human rights.[63]

At the regional level, the EU Commission in February 2022 published its Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence.[64] One of the main objectives of the Proposal is to 'improve access to remedies for those affected by adverse human rights and environmental impacts of corporate behaviour'.[65] As

[61] In his thorough report preceding the 2021 IDI Resolution, Basedow argued that under the angle of the human right to a fair hearing (1) the flat refusal by some States to give effect to foreign judgments in the absence of a treaty providing for such effect, (2) the requirement of reciprocity as a condition for recognition and enforcement, and (3) the review of the merits of a foreign judgment, are all doubtful. He proposed that such rules be declared incompatible with the parties' right to a fair hearing. See 79 *Yearbook IDI* (Pedone 2019) 1, 60–62.

[62] See: www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf. Other relevant texts at the global level, in addition to the UNGPs and Agenda 2030, include the 2008 United Nations Human Rights Council 'Protect, Respect and Remedy' Framework, basis of the UNGPs, the 2012 UN Global Compact on Business and Human Rights; the 2017 ILO *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*; and the 2018 OECD *Due Diligence Guidance for Responsible Business Conduct*.

[63] See the 2021 draft A/HRC/49/65/Add. Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises: www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc.

[64] See: ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en.

[65] At 3.

a crucial step, victims should be able to sue the company liable for any damage caused including outside the Union through its value chain. The Proposal's scope is not limited to companies based in the EU but also, levelling the economic playing field, to those based outside the EU but selling products and rendering services in the EU's internal market. The text provides for a common civil liability regime. Foreign victims, therefore, will be able to seek civil remedies within the EU (Article 22 – Civil Liability, of the Proposal).

This Proposal builds on a range of recent legislative and judicial developments at the national level in the EU and elsewhere.[66]

C. Impact of this Context on the Practical Operation of the Convention

The emerging normative framework outlined above is likely to have a growing impact on the Convention's operation in the years and decades to come. Once in force, the Convention, will increasingly be invoked to obtain recognition and enforcement of foreign judgments on matters relating, directly or indirectly, to human rights, pollution, nature loss and climate change. The growing need to achieve sustainable management of natural resources, chemicals and waste will change modes of production and consumption,[67] transport, of investment[68] and banking, affecting the law of companies, contracts and torts.[69]

This development will reveal the possibilities which the Convention offers, but also its limitations. Some of these can probably be overcome by (creative) interpretation, others may require additional, possibly treaty, work. A few examples may illustrate both pathways.

i. Enhancing the Convention's Effectiveness through Interpretation

a. Judgments in Collective Actions

Collective actions with a transnational aspect are assuming increasing importance. Recent examples include the *Dieselgate* consumer cases,[70] and the UK Supreme Court *Vedanta* and *Okpabi* cases with both human rights and environmental aspects.[71] Collective actions are included in both the 2019 and 2005 Conventions. However, these Conventions, like other cross-border

[66] See also the 2022 Recommendation of the European Group of Private International Law (GEDIP) concerning the Proposal for a directive of 23 February 2022 on Corporate Sustainability Due Diligence, following up on its Recommendation to the Commission of 8 October 2021, available at: gedip-egpil.eu/wp-content/uploads/2022/07/Recommendation-GEDIP2022E.pdf, urging the EU legislator to increase the effectiveness of the proposed directive by adding rules on judicial jurisdiction and applicable law.

[67] See, eg, Jeannette ME Tramhel, SDG 2: Zero Hunger (n 51); G Saumier, SDG 12: Sustainable Consumption and Production; *The Private Side of Transforming our World* (n 50).

[68] See, eg, Vivienne Bath: SDG 9: Industry Innovation and Infrastructure (n 54).

[69] See, eg, B Mihajlović, 'The Role of Consumers in the Achievement of Corporate Sustainability through the Reduction of Unfair Commercial Practices' (2020) 12 *Sustainability* 1, Special Issue Corporate Sustainability Reforms: Securing Market Actors' Contribution to Global Sustainability. On the legal implications of 'reasonable climate quality' of goods for sales contracts, see L Sisula-Tulokas, 'Sales law and the climate considerations' in H Grothe, P Mankowski and F Rieländer (eds), *Europäisches und Internationales Privatrecht, Festschrift Christian von Bar* (Beck 2022).

[70] See, eg, European Court of Justice Case C-343/19, *Verein für Konsumenteninformation v Volkswagen AG*, ECLI:EU:C:2020:534; and the BEUC report with details on various legal actions in Europe: www.beuc.eu/sites/default/files/publications/beuc-x-2020-081_five_years_of_dieselgate_a_bitter_anniversary_report.pdf.

[71] *Vedanta Resources PLC and another v Lungowe and others [2019] UKSC 20; Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3.

judgments instruments including the Brussels Ia Regulation, have been negotiated primarily with *individual* actions, *not collective* procedures, in mind.

As Takashi and Tang point out, this may give rise to issues concerning characterisation of certain types of collective redress (eg, is an action brought by a competition authority still a 'civil or commercial matter?'); indirect jurisdiction (how to construct consent of a represented claimant in opt-out procedures); and, partly related, grounds for refusal (when is an absent claimant sufficiently notified? Can a collective judgment resulting in different damages for individual claimants be enforced? What about 'the same parties' requirement for the refusal ground of inconsistency with other judgments?)[72]

As collective actions typically end in a settlement, usually with a court's approval, further questions arise. According to both Conventions judicial settlements, enforceable in the State of origin, are eligible for enforcement in the same manner as judgments (HCCH 2019 Judgments Convention: Article 11; HCCH 2005 Convention: Article 12). What are the implications of the fact that the Conventions only provide for enforcement, not for *recognition* of judicial settlements? Is there a way around this? Does the argument in the Explanatory Report that, as settlements are essentially consensual no issues of indirect jurisdiction will arise, hold good for collective settlements approved by a court of a State without a sufficient connection with the case?[73] What about the right of an insufficiently notified absent claimant to resist the enforcement of a court approved collective settlement?

It should be possible, as Takashi and Tang illustrate, to resolve some of these issues through interpretation. For example, the text of the HCCH 2019 Judgments Convention supported by the Explanatory Report makes it clear that an out of court settlement subsequently approved by a court constitutes a 'judicial settlement'. This is a strong argument that the same reading should apply to the HCCH 2005 Convention.[74] Likewise, whether a collective action is classified as a civil or commercial matter should not depend on the identity of the representative, but on whether the action seeks to enforce private rights between private parties.[75]

Other interpretative solutions risk being more difficult. The language of Article 7(1)(a) on sufficient notification in the Conventions referring to the 'document which instituted the proceedings' to the 'defendant' to arrange for his 'defence', do not quite suit the protection of the absent claimant in collective settlements. It will require creative interpretation to ensure the protection of the right to a fair hearing of the absent claimant. However, that will not be possible, for example, in respect of the omission in the Conventions of 'recognition' of settlements. Repairment of that omission would require an amendment of the text, or a new instrument.[76]

b. Judgments on Non-Contractual Obligations

The indirect ground of jurisdiction of Article 5(1)(j) has a restricted substantive scope: it only applies to judgments that ruled on non-contractual obligations 'arising from death, physical

[72] K Takahashi and ZS Tang, 'Collective Redress' in P Beaumont and J Holliday (eds), *A Guide to Global Private International Law* (Hart Publishing 2022).

[73] Garcimartín and Saumier (n 2) para 299.

[74] Contrary to the view expressed in T Hartley and M Dogauchi, *Explanatory Report on the HCCH 2005 Convention* (HCCH 2005) para 207.

[75] Takahashi and Tang (n 72) 435.

[76] ibid, 444.

injury, damage to or loss of tangible property'. This is narrower than the 1999 Preliminary Draft Convention.[77]

As Franzina points out, this provision will 'play a limited role, in particular, in commercial tort litigation, as this often revolves around economic and financial loss rather than personal injuries and damage to property'. A further major constraint of the Convention's reach results from the fact that the act or omission directly causing the harm occurred in the State of origin, thus excluding the State, or States, where the harm occurred.

These limitations risk weighing heavily in environmental litigation, including climate change cases. Again, it may be possible through interpretation of the Convention to accommodate, in some respects, the recognition or enforcement of a judgment or the enforcement of a (collective) judicial settlement in environmental proceedings. For example, it would not seem unreasonable to interpret the words where 'such/that harm occurred' as extending to where it 'may occur' to give effect to a (final) injunction to reduce or stop pollution or emission of greenhouse gases. This interpretation, now made explicit in Article 7(2) of the Brussels Ia Regulation, was also accepted for the preceding texts in which the words 'or may occur' were missing.[78]

The Explanatory Report itself provides a starting point for a broader interpretation of the scope of the sub-paragraph.[79] After raising the possibility that a judgment honouring the claim of a spouse or child for moral or economic loss subsequent to the wrongful death of a spouse or parent will not meet the condition of Article 5(1)(j), 'because it excludes non-physical injuries and deals only with harm directly caused', the Report continues suggesting, '[a]lternatively', that such a claim may *well* pass the test of the sub-paragraph as it 'deals with non-contractual obligations *arising* from death'. Bearing in mind the access to justice dimension of the Convention, the latter interpretation is clearly preferable.

Still, while such broader interpretation will give more substance to the sub-paragraph, other limitations remain, including the exclusion of economic and financial loss in environmental cases. It will not facilitate the enforcement of a foreign judgment or judicial settlement, perhaps in a collective action (such as the *Okpabi* case mentioned above), which compensates victims for loss of livelihood as a result of pollution of their fish pond or agricultural land caused by a foreign oil drilling company. If the judgment or settlement is not eligible for enforcement pursuant to other provisions of the Convention, then these victims may attempt to seek enforcement pursuant to Article 15 under national law. Possibly also, part of the foreign judgment may be enforceable under the Convention (eg, if, in the example of the fishermen, the judgment also awards compensation for loss of property) but not the rest of the judgment. This will then activate both Articles 15 and 9 on severability.

[77] The 1999 Preliminary draft Convention on jurisdiction and recognition and enforcement of judgments in civil and commercial matters provided (Art 10): 'A plaintiff may bring an action in tort or delict in the courts of the State a) in which the act or omission that caused injury occurred, or b) in which the injury arose, unless the defendant establishes that the persons claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State', see: assets.hcch.net/docs/638883f3-0c0a-46c6-b646-7a099d9bd95e.pdf.

[78] See Court of Justice of the European Union, Case C-167/00, *Verein für Konsumenteninformation v Karl-Heinz Henkel*, ECLI:EU:C:2002:555). Similarly, the Supreme Court of Japan interpretated the words 'place where the tort took place' in Art 3-3(viii) of the Japanese Code of Civil Procedure as including the place where the wrongful act is *likely to be committed* or the place where a person's rights are *likely to be violated*, Supreme Court of Japan, Case (ju) No 1781 (2011) of 24 April 2014; 68 *Minshu* 4 329 [2004], see B Elbalti, 'The jurisdiction of foreign courts and the recognition of foreign judgments ordering injunction: the Supreme Court judgment of April 24, 2014' (2016) 59 *Japanese Yearbook of International Law* 394, 404–06, also available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=2934702.

[79] Garcimartín and Saumier (n 2) para 197.

c. Public Policy

Article 7(1)(c), which overlaps with sub-paragraphs (a) (notification) and (b) (fraud), refers to 'the public policy of the requested State'. As the Explanatory Report points out,[80] this defence should not be triggered by every mandatory rule of the requested State ('internal public policy'), but only 'where such a mandatory rule reflects a fundamental value, the violation of which would be manifest if [recognition or] enforcement was permitted' ('international public policy'). The law of the EU may also give rise to such mandatory rules of international public policy for situations which have a close link with the Union.

The contributions by Chong, Tang, Elbalti, Yekini and Okoli, and Rumenov show that the distinction between 'internal' and 'international' public policy is not generally familiar to many jurisdictions. Some may already apply this ground for refusal in exceptional cases but a number of jurisdictions may need additional guidance, which the Hague Conference may be able to provide, for example, through a practical handbook or a guide to good practice (see below, section II.D).

In contrast, the distinction is familiar to Latin American jurisdictions. Dotta Salgueiro, while embracing the concept of international public policy, gives it a particular interpretation. Inspired by the Latin American tradition,[81] he understands the concept as including those fundamental values that are enshrined in public international law. That interpretation limits the concept, disregarding as rules of international public policy many that derive solely from national sources.

This focus on international public policy rooted in public international law is given additional topicality by the latter's growing importance for corporate responsibility. According to the UNGPs, corporations must respect 'the core internationally recognized human rights' contained in the Universal Declaration of Human Rights and the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, coupled with the principles concerning fundamental rights in the eight ILO core Conventions as set out in the Declaration on Fundamental Principles and Rights at Work.[82] The draft Directive on Corporate Sustainability Due Diligence proposed by the EU Commission, which if adopted will be binding on EU Member States, adds to this list several more UN instruments, both non-binding and binding.

These developments will increasingly influence the interpretation of 'international public policy', and thus of Article 7(1)(c). It cannot be ruled out that these emerging standards will, under certain circumstances, make it necessary for the court of the requested State to adjust (or even set aside) a norm of international public policy deriving solely from its domestic law, for example, when it finds that such norm rests too narrowly on unsustainable economic interests.

It should be possible to reconcile these two conceptions of international public policy – the conception focusing on rules protecting national fundamental values, and the conception focusing on rules rooted in the international public order – for the purpose of Article 7(1)(c). That can be done by interpreting the words 'manifestly incompatible with the public policy of the requested State' as meaning 'taking into account the public policy standards deriving from the public international legal order'.[83] This will direct the attention of the court of the requested State

[80] ibid, para 263.

[81] As set out by C Fresnedo de Aguirre, 'Public Policy: Common Principles in the American States' (2016) 379 *Recueil des cours* 73; and C Fresnedo de Aguirre, 'Public Policy in Private International Law: Guardian or Barrier?' in V Ruiz Abou-Nigm and MB Noodt Taquela (eds), *Diversity and Integration in Private International Law* (Edinburgh University Press, 2019).

[82] ILO, Declaration on Fundamental Principles and Rights at Work, adopted in 1998 and amended in 2022.

[83] A precedent for such a qualifier of 'public policy' may be found, for example, in Art 23(2 (d) of the 1996 Hague Child Protection Convention, which makes make the public policy exception to the recognition and enforcement of decisions subject to the qualifier 'taking into account the best interests of the child'. See also, *The Private Side of Transforming our World* (n 50) 23–24.

to these international standards, and may, in some circumstances, lead the court to review vital domestic interests thus far considered as being of 'international public policy' in the light of these standards, and perhaps conclude that, if the latter are incompatible with the former, they should not stand in the way of recognising and enforcing the foreign judgment.

ii. Need for Further Work where Interpretation Falls Short

Through interpretation the courts may resolve some of the limitations and ambiguities of the Convention's text. However, not all its limitations can be resolved through interpretation and that may require fresh work. Once more, a few examples may illustrate the point.

a. Parallel Proceedings

In an increasingly mobile world, the number of States with a meaningful, legal or factual, connection to a transaction or relationship is bound to increase accordingly, and with it, the risk of parallel proceedings and disparate judgments. While the Convention in its Article 7(1)(e) and (f), and (2) deals with parallel proceedings 'at the back end' of recognition and enforcement, resolving this issue 'at the front end' of original jurisdiction was outside its scope. Hence the importance of the current HCCH work on that issue, for both individual and collective actions.

Herrup and Brand have proposed a novel approach for a new Hague Convention on this issue, based on the idea of the 'better forum'. The proposed global instrument

> must include (1) criteria for determining the 'better forum' and (2) mechanisms that move cases to that forum. It should also include (1) a requirement that the parties notify the relevant courts when the same or related proceedings are lodged in two or more fora; (2) a mechanism for judicial communication to discuss the situation upon notification; (3) a fallback rule if the better forum declines jurisdiction; (4) necessary and appropriate procedural provisions eg, to expedite movement of evidence to the better forum; and (5) provisions addressing expedited recognition and enforcement of the judgment from the better forum.[84]

Against the background of today's Global South and Global North divisions, and other disparities in our world, establishing such an instrument at the *global* level will not be an easy task.[85] If undertaken, developing common global criteria to determine the 'better forum' and a workable global mechanism for judicial communication will be a major project requiring intense negotiations over many years.

Nevertheless, the authors are right that the absence of a global mechanism for parallel proceedings is a growing 'irritant'.[86] One wonders, therefore, whether, in the short term and as a first step, a simpler solution could be put in place, in line with the HCCH 2019 Judgments Convention. This would consist of building on the ingenious proposal in the 1999 Preliminary Draft Convention, consisting of a synthesis of the mechanisms developed in common law – forum

[84] P Herrup and R Brand, 'A Hague Parallel Proceedings Convention: Architecture and Features' (2022) University of Pittsburgh Legal Studies Research Paper No 2022-27, 3–4), available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=4170254.

[85] See, eg, US Court of Appeals, 2nd Circuit, 14 January 1987, *In re Union Carbide Corp Gas Plan Disaster at Bhopal India* in December 1984, where the Court ruled that India was the better forum despite the fact that the government of India initially supported the US lawsuit, admitting that the Indian court system at the time was unable to handle the cases.

[86] P Herrup and R Brand, 'A Hague Convention on Parallel Proceedings' (2021) 63 *Harvard International Law Journal* 9.

non conveniens – and civil law – priority of the court first seised.[87] A protocol to the HCCH 2019 Judgments Convention could develop this proposal further for the benefit of States Parties to the Convention.[88] After all, those States, having accepted the jurisdictional filters of Articles 5 and 6, should have no difficulty accepting those criteria also to determine the original jurisdiction of courts *for the purpose of parallel proceedings only* within the limited scope of the Convention.

Admittedly, this would be a far more modest and less visionary approach than that proposed by Herrup and Brand. However, like their proposal, it would avoid any attempt to establish direct bases of jurisdiction in general – one of the 'lessons' of the history of the Convention (Zhao) – and would not interfere with their more comprehensive long-term proposal, but would just help facilitate the operation of the HCCH 2019 Judgments Convention in the short term, and possibly provide a pilot project for the development of some of the features of the Herrup/Brand proposal, such as a mechanism for judicial communication, as discussed by Zhao in her contribution.

b. Collective Actions

The 2005 and 2019 Conventions include collective redress in their scope, but they are 'ill-equipped to deal with the features of collective procedures'[89] despite their increasing importance. Creative interpretations may help to some extent, but in order for the Conventions to effectively provide for the recognition and enforcement of judgments and settlements in international collective actions, additional legislative measures are needed. This may involve, inter alia, adding an indirect ground of jurisdiction such as the State of the centre of gravity of contracts and torts in the case of multiple places of performance or tortuous action, solving the issues of notice and procedural fairness that can arise with recognition and enforcement of judgments against represented claimants, and providing for the recognition of collective settlements, which is currently lacking in the Conventions.[90]

c. Environmental Proceedings

In a carefully crafted note for the attention of the 2019 Diplomatic Session the Permanent Bureau had suggested the possibility of including marine pollution in the HCCH 2019 Judgments Convention. Existing international instruments do cover marine pollution from vessels, but 'other types of marine pollution detailed by UNCLOS, including land-based, seabed, "Area", dumping, and atmosphere marine pollution from other sources are largely unregulated'. The inclusion of marine pollution

> would span a wide array of different types of claims, ranging from damage caused to the environment from hydrocarbon drilling operations in the seabed to economic losses suffered by fishing and tourism businesses as a result of marine pollution that stems from land facilities' poor waste disposal.[91]

[87] As also recently suggested by A Arzandeh and M Lehmann in their contribution, 'Conflicts of Jurisdiction' in P Beaumont and J Holiday (eds), *A Guide to Global Private International Law* (Hart Publishing 2022).

[88] See also, LE Teitz, 'Another Hague Judgments Convention? Bucking the Past to Provide for the Future' (2019) 29 *Duke Journal of Comparative & International Law* 491, 503.

[89] Takahashi and Tang (n 72) 447.

[90] ibid.

[91] Note on reconsidering 'marine pollution and emergency towage and salvage' within the scope of the draft Convention on the recognition and enforcement of foreign judgments in civil or commercial matters, Prel Doc No 12 of June 2019: fe3af6ed-5c0e-47ff-887b-ad0ce8feb6a1.pdf (hcch.net) para 50.

However, although the Diplomatic Conference did not decide to exclude marine pollution entirely (as the HCCH 2005 Convention does), it decided to exclude, in addition to ship-source marine pollution, cross-border marine pollution and marine pollution in areas beyond national jurisdiction.

More generally, the Convention with its limited indirect ground of jurisdiction for tortuous action excluding the *locus damni* and limitations regarding collective proceedings is not particularly aimed at encouraging the circulation of judgments and increasing legal certainty in environmental matters.

One way of filling this gap would be to amend the Convention by means of a protocol to bring it more into line with these objectives. As a more ambitious project, the Hague Conference might resume the idea of a global instrument on adjudicatory jurisdiction, applicable law, and recognition and enforcement of judgments, supported by a system of institutional cooperation, which was previously on its agenda. The technical feasibility of such an instrument has already been the subject of extensive thorough research.[92] The rising volume of cross-border civil litigation in environmental and climate change matters and the ongoing normative paradigm shift referred to above, suggest that the need for such a global instrument is growing by the day.

The suggestions (i)–(iii) are of course not intended to minimise the need to review other exclusions, discussed by Kramer, like defamation and privacy and intellectual property. And above all, they do not in any way detract from the need to see the Treaty enter into force on a broad scale soon.

D. Post-Convention Work: Ensuring Uniform Interpretation, Promotion and Support

i. Ensuring Uniform Interpretation

Interpreting the Convention 'in an international spirit to promote uniformity of its application',[93] so that it can fully serve its purpose, will help ensure that the Convention functions in a diverse and rapidly changing global environment. The 1999 Preliminary Draft Convention contained a provision similar to Article 20 but reinforced by a second paragraph to the effect that 'the courts of each Contracting State shall, when applying and interpreting the Convention, take due account of the case law of other Contracting States'.[94] Although an analogous provision is lacking in the Convention, it would be very helpful, and indeed necessary, to establish a system that would facilitate taking due account of each other's decisions.

Such a system obviously requires a database of case law that is freely accessible, preferably combined with, or linked to, that for the HCCH 2005 Choice of Court Convention. To help feed

[92] The Permanent Bureau prepared several studies on the topic, including 'Note on the law applicable and on questions arising from conflicts of jurisdiction in respect of civil liability for environmental damage' (Adair Dyer), April 1995, *A&D XVIIIth Session, Tome I*, 72 et seq, and 'Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?' (Christophe Bernasconi), April 2000, *A&D XIXth Session, Tome I*, 320 et seq. In April 1994, the University of Osnabrück, in cooperation with the Hague Conference, organised an in-depth scientific colloquium, the proceedings of which – mostly in English, some in French – may be found in C von Bar (ed), *Internationales Umwelthaftungsrecht*, I (C Heymanns 1995).

[93] Garcimartín and Saumier (n 2) para 352.

[94] See Preliminary Draft Convention on Jurisdiction and foreign judgments in Civil and Commercial Matters adopted by the Special Commission; and P Nygh and F Pocar, Prel Doc No 11 (2000): assets.hcch.net/docs/638883f3-0c0a-46c6-b646-7a099d9bd95e.pdf, Article 38 (see also bracketed Arts 39 and 40).

this database, and select important judgments, a network of liaison judges, or courts, of States Parties could be established. Such a network may develop into a global community, which could be supported by a periodical newsletter with contributions from judges. In due course, a practical handbook could systematise the case law, elucidate concepts not defined by the Convention such as 'employee',[95] 'contractual obligation' or 'non-contractual obligation' (Franzina) and over time grow into a good practice guide (see also above, section I.E.i). Making materials available in many, including at least the five official UN languages, will be essential. Meanwhile Special Commission meetings reviewing the practical operation of the Convention (Article 21) could make recommendations on its interpretation. None of this would be new, as the Hague Conference can build on a unique experience with 'post-Convention services', especially for the Children's Conventions.[96]

As a further step, a legal guide jointly prepared by UNCITRAL, UNIDROIT and the Hague Conference on the instruments on dispute resolution and transnational civil procedure which they have created and continue to monitor, would undoubtedly fill a practical need.

At some point in time, the absence of a global dispute resolution system for the interpretation of the Convention will be felt. This was already anticipated in the 1999 Preliminary Draft but remained without conclusions.[97] An interpretative role for the International Court of Justice remains a thing of the future.[98]

ii. Promotion and Support

The efforts made by the negotiators to bridge differences of laws and practices, applying pragmatic and flexible approaches, should hopefully to a significant extent reduce the need for potential States Parties to change their laws, and thus facilitate the wide acceptance of the Convention (Zhao). However, more than a few countries may nevertheless be, or feel, unable to join the Convention, possibly also because they fear the risk that their accession might trigger the sanction of Article 29 by some States (above, section I.H). Promoting the Convention to such States may therefore need to be accompanied by efforts to enhance their capacity to implement and operate the Treaty properly.[99] This is of course the primary responsibility of each such State, but could be facilitated by tailor-made assistance, for example to strengthen (parts or sectors) of the justice system, and to provide education and training to judges. Again, the Hague Conference

[95] See G van Calster, 'Of giggers and digital nomads – what role for the HCCH in developing a regulatory regime for highly mobile international employees?' in T John, R Gulati and B Köhler (eds), *The Elgar Companion to the Hague Conference on Private International Law* (Edward Elgar 2020).

[96] See, eg, the Special Sections on Adoption, Child Abduction and Child Support: www.hcch.net/en/home.

[97] [Article 40 1. Upon a joint request of the parties to a dispute in which the interpretation of the Convention is at issue, or of a court of a Contracting State, the Permanent Bureau of the Hague Conference on Private International Law shall assist in the establishment of a committee of experts to make recommendations to such parties or such court. [2. The Secretary General of the Hague Conference on Private International Law shall, as soon as possible, convene a Special Commission to draw up an optional protocol setting out rules governing the composition and procedures of the committee of experts.]]: assets.hcch.net/docs/638883f3-0c0a-46c6-b646-7a099d9bd95e.pdf.

[98] See JHA van Loon and S de Dycker, *The Role of the International Court of Justice in the Development of Private International Law* (Asser Press 2013) ch III: Some thoughts on the possible future role of the World Court for the development of private international law: knvir.org/knvir-site/wp-content/uploads/2014/02/preadvies-2013.pdf. Note, in this connection, that as Andreas Stein and Lenka Vysoka point out (ch 7 in this volume), the Court of Justice of the European Union (CJEU) will be responsible for interpreting the rules in the Convention and its interpretation will be binding on the courts of all EU Member States. Moreover, the CJEU will also become a court of a Contracting Party whose judgments may circulate under the Convention. This will increase the need for uniform interpretation at the supra-regional level.

[99] *cf* Bonomi and Mariottini (n 14) 567.

has a great deal of experience in this respect in a wide array of countries in all continents, including through its Regional Offices for Latin America and the Caribbean (since 2005) and for the Asia-Pacific region (since 2012).

Such programmes have often been set up jointly with Members and with other international organisations. Given its leadership in joining the Convention, inspired by the wish to seeing it expand 'soon',[100] the EU may well give consideration to joining the Permanent Bureau in its endeavours to reach out to States willing to embrace the Convention but which need technical support.

[100] Statement by the EU Commissioner for Justice Didier Reynders on the occasion of the EU accession on 29 August 2022.