THE JUDGMENTS CONVENTION – THE CURRENT STATE OF PLAY[1]

In June 2019 the Members of the Hague Conference on Private International Law (HCCH) will meet in the Hague to finalise the text of a Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the Judgments Convention). This Convention will be the culmination of many years of work by the HCCH on what has come to be known as the "Judgments Project". The purpose of this short note is to describe the current state of play in the development of a draft Convention, and to identify some of the key issues that participants will need to address when they meet in June.

The origins of the Judgments Treaty

The Judgments Project had its origins in the early 1990s, prompted by a proposal made by the United States. As contemplated by that proposal, members initially sought to develop a broad instrument governing both the exercise of jurisdiction and the enforcement of judgments in civil and commercial matters. By 2001, however, it had become clear that this was an overly ambitious goal, and that it would be more productive to focus on a few more tightly circumscribed projects in this broad field.[2]

The first product of this more focused approach was the HCCH Choice of Court Convention, concluded in 2005 and in force from October 2015.[3] This treaty is concerned with exclusive choice of court agreements. It is, broadly speaking, a court-based equivalent of the widely ratified New York Convention on the Recognition and

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[1] David Goddard QC, Barrister, New Zealand; Senior Global Fellow, Hauser Law School, New York University. The author was a member of the New Zealand delegation at meetings of the HCCH on the Judgments Project from 1999 onwards; a Vice President and member of the Drafting Committee at the Diplomatic Conference that adopted the Choice of Court Convention in 2005; chair of the Expert Group appointed in 2011 to assess the possible merits of resuming the Judgments Project; chair of the Working Group appointed in 2012 to prepare proposals on the recognition and enforcement of judgments; and chair of the Special Commission established in 2016 to prepare a draft Judgments Convention. All views expressed in this article are the author's personal views, and are not expressed on behalf of the New Zealand Government or of the HCCH.

[2] See David Goddard, "Rethinking the Judgments Convention – a Pacific Perspective" Yearbook of Private International Law 2001, Volume 3 (2001), pp. 27-62.

[3] The text of the Choice of Court Convention is available at https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court/ . As at January 2019, the parties to the Choice of Court Convention are Mexico, Montenegro, the European Union (including Denmark and the United Kingdom by separate accession and approval) and Singapore. A number of other States are working towards accession to the Choice of Court Convention, including China (which signed the Convention in September 2017) and Australia. The United States has signed the Choice of Court Convention, but has not yet ratified it.

Enforcement of Foreign Arbitral Awards. The Choice of Court Convention provides for the chosen court in a Contracting State to accept jurisdiction and determine the dispute referred to it; for non-chosen courts in other Contracting States to suspend or dismiss proceedings in favour of the chosen court; and for recognition and enforcement in other Contracting States of a judgment rendered by the chosen court.[4] It establishes a presumption that the designation of a court in a Contracting State to hear and determine a dispute is exclusive. There is an optional declaration regime which would enable a Contracting State to extend the operation of the instrument to non-exclusive choice of court agreements: but no State has yet availed itself of this regime, and it is likely to be superseded in practice by the Judgments Convention. The Choice of Court Convention does not restrict or limit enforcement of judgments under national law: it sets a floor for recognition and enforcement, not a ceiling. As we will see below, the draft Convention on Recognition and Enforcement of Foreign Judgments prepared by a Special Commission of the HCCH ("the 2018 Draft Convention") adopts a similar approach on this dimension. [5]

Once this first product of the Judgments Project had been completed, the HCCH turned its attention to other matters that might usefully be addressed in the related fields of jurisdiction and recognition and enforcement of judgments in civil and commercial matters. An Experts Group was established to identify possible areas for further work. There was substantial support for further work on an instrument on recognition and enforcement of judgments, to sit alongside and complement the Choice of Court Convention. A Working Group was established to prepare proposals on the recognition and enforcement of foreign judgments. The views of participants on the usefulness of further work on jurisdiction were more mixed: the Experts Group was asked to further study and discuss the desirability and feasibility of making provisions in relation to jurisdiction.[6]

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[4] For a comprehensive and illuminating discussion of the Choice of Court Convention, see the Explanatory Report prepared by the Co-Rapporteurs, Professors Trevor Hartley and Masato Dogauchi, available at https://www.hcch.net/en/publications-and-studies/details4/?pid=3959&dtid=3 , and Ronald A. Brand and Paul M. Herrup, The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents (Cambridge University Press, 2008).

[5] The 2018 Draft Convention is accessible on the website of the HCCH at https://assets.hcch.net/docs/9faf15e1-9c36-4e57-8d56-12a7d895faac.pdf . [It is set out for ease of reference in the appendix to this note.]

[6] In 2016 the Council on General Affairs and Policy of the HCCH endorsed the recommendation of the Working Group that matters relating to direct jurisdiction (including exorbitant grounds and *lis pendens* / declining jurisdiction) should be put for consideration to the Experts' Group of the Judgments Project soon after a Special Commission has drawn up a draft Judgments Convention. The

The Working Group on recognition and enforcement of judgments completed its work in 2016, recommending that work continue towards a Treaty on this topic. Its recommendation was accompanied by a Proposed Draft Text. The Members of the HCCH accepted the Working Group's recommendation to proceed with work on recognition and enforcement of judgments, and convened a Special Commission: a body charged with developing a draft instrument to be placed before a formal Diplomatic Session of Members for finalisation of the text of a Convention. All Members were invited to participate in the work of the Special Commission, and some 70 States sent delegations to the meetings of the Special Commission.

The Special Commission met four times in the period 2016 to 2018, completing its work in May 2018. The Special Commission produced a draft Convention (the 2018 Draft Convention) that it considered would form an appropriate basis for discussion at a Diplomatic Session. The Co-Rapporteurs appointed by the HCCH's members prepared a Revised Draft Explanatory Report to accompany the 2018 Draft Convention.[7] As mentioned above, a Diplomatic Session is scheduled to take place in The Hague in June 2019 with a view to finalising the text of the Convention.

The 2018 Draft Convention is the product of a great deal of hard work and discussion between participants in the negotiations, both during and between meetings. It will provide the starting point for discussions in June 2019. But it is only a starting point. States are not committed to the provisions of the 2018 Draft Convention, or to approaches adopted at meetings of the Special Commission. All issues are in principle on the table, and wide-ranging discussions are likely. Some provisions were the product of comprehensive discussions and a broad consensus, and are less likely to be revisited. But many will need careful consideration before the text is finalised. Some topics have proven especially difficult to resolve on the basis of consensus, even at the Special Commission stage: a difficulty reflected in the presence in the 2018 Draft Convention of a number of square-bracketed provisions, and alternative formulations of a handful of provisions.

Experts Group is not scheduled to meet to consider these matters prior to the June 2019 Diplomatic Session: it seems likely that it will be reconvened for this purpose after the Judgments Convention has been finalised.

[7] The Revised Draft Explanatory Report prepared by Professors Francisco Garcimartín and Geneviève Saumier is available at https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf .

I identify below some of the key issues that will need to be addressed in June 2019. But before doing that, I will outline the objectives of the 2018 Draft Convention and its broad architecture.

The objectives of the 2018 Draft Convention

At the highest level of generality, the objectives of the 2018 Draft Convention are:

(a) to enhance access to justice; and

(b) to facilitate cross-border trade and investment by reducing the costs and risks associated with cross-border dealings. This objective was at the heart of the Choice of Court Convention, and remains centrally relevant to work on the Judgments Convention.

A successful Judgments Convention will advance those goals in a number of ways. By "successful" I mean two things: a convention that commands broad acceptance and that is widely ratified (the aim is not to prepare an elegant and beautiful text with no practical consequences in the real world); and also a convention that has the maximum reach consistent with that goal.

First, and most importantly, the convention will ensure that judgments to which it applies will be recognised and enforced in all Contracting States. That enhances the practical effectiveness of those judgments, and provides the successful party with better prospects of obtaining meaningful relief. Access to justice is a dead letter if the judgment a successful party obtains cannot be enforced in practice. Parties to disputes do not go to court in order to obtain a piece of paper with a decision recorded on it, and the seal of the court attached: they care about practical outcomes. Access to justice means access to *practical* justice; to just outcomes that are given effect. In today's increasingly globalised world, it is frequently necessary for that practical effect to span borders, if justice is to be effective. So the goal of access to justice, in the sense of access to just outcomes that are practically effective in every State where they need to be implemented, is at the heart of the Judgments Project.

Second, and closely related to that goal, as matters stand it is often necessary for a party to a dispute to bring substantive proceedings of the same kind in more than one country in order to obtain the desired practical outcome. Avoiding the need for duplicative proceedings will contribute significantly to access to justice, and to reducing the costs and risks of cross-border dealings.

Third, and very importantly, if we can improve the accessibility of law relating to recognition and enforcement of judgments, and if we can improve the certainty and clarity of that body of law, then that should reduce the costs and timeframes associated with obtaining recognition and enforcement of judgments. Access to justice in the context of cross-border disputes is often hindered by the cost of getting an effective result. All litigators are familiar with the challenge, even domestically, of ensuring that justice can be achieved at a realistic cost to participants. When disputes span borders, those costs inevitably increase. If we can reduce the cost and the time frames associated with obtaining a practically effective resolution of a dispute with cross-border elements, that will make a significant contribution to the two broad objectives identified above.

Fourth, as matters stand today a lawyer who is asked to advise on the recognition and enforcement in one State of a judgment given in another State will generally find themselves looking at the national law of the State in which enforcement is sought, and also perhaps a patchwork of conventions in operation between different groupings of States: some very well established and very elaborate conventions, and others less well known. One of the significant contributions that a successful and widely ratified convention on recognition and enforcement of judgments would make would be to improve the accessibility of the law: to make it possible for those affected, their advisers, and also of course the judges who need to decide these cases, to look to one place for a framework that guides the recognition and enforcement of a significant number of foreign judgments. This will not be the outcome in all cases because the 2018 Draft Convention does not attempt the challenging and probably impossible task of establishing a comprehensive and exhaustive regime for recognition and enforcement of judgments. Rather, it seeks to set a floor for the circulation of judgments that is widely accepted and that enables many judgments to circulate among Contracting States. But the more widely the Convention is ratified, and the broader its scope, the greater its contribution to enhancing the accessibility of the law.

Fifth, a clear, certain and predictable framework for recognition and enforcement of judgments will enable a party deciding where to bring a claim to make more informed choices about where to bring their initial proceedings. If a party has the choice between bringing proceedings in one of two States, and a judgment in one State will circulate under a widely ratified convention while a judgment in another will not, that is an important factor that will guide parties in making informed, efficient choices about where to litigate in the first place. The 2018 Draft Convention does not seek to regulate jurisdiction. But it seems likely that a successful convention on recognition and enforcement of judgments will influence the choices that parties make about

where to bring proceedings and will guide them to do so in places which are more, rather than less, productive. All too often a decision to bring proceedings in country A has been taken by a party – or that party's lawyers – without thinking about where, ultimately, the judgment will need to be enforced; and without thinking about whether that will be possible. This convention should contribute to the ability of those involved in cross-border disputes to make better decisions about where to bring a claim in the first place.

Over the more than 20 years that the HCCH has been working on these issues, the links between States have become both broader and deeper. The frequency with which individuals move across borders, including as workers, the extent of cross-border consumer dealings, and also of course the frequency and scale of commercial transactions across borders, have all been increasing rapidly. The need to which the Judgments Project is responding has as a result become even greater than at the time of the project's inception.

The 2018 Draft Convention has been developed to operate as a complement to the Choice of Court Convention. That instrument was designed to make a significant contribution to reducing the costs of business dealings across borders, and to facilitating trade and investment across borders. The benefits of that instrument can be expanded by developing an instrument to sit alongside it which pursues the same goals of reducing the costs and risks of cross-border dealings, as well as pursuing wider access to justice goals, in a significantly broader class of disputes.

Because the two instruments are intended to operate in tandem, relevant provisions of the Choice of Court Convention – in particular on the process for recognition and enforcement of judgments – were used as a template in developing the 2018 Draft Convention. Work on the 2018 Draft Convention proceeded on the basis that there needed to be good reason to adopt a different approach, where the issue was the same. But in some cases the different focus of the Judgments Convention, or further reflection and discussion, did lead to differences between corresponding provisions in the two instruments. Those differences, and their rationales, are identified and explained in the Draft Explanatory Report.

The architecture of the 2018 Draft Convention

The 2018 Draft Convention has, at its core, a single practical issue: in what circumstances will the courts of one Contracting State be required to recognise and enforce a judgment given by a court in another Contracting State?

It is important to bear in mind the very tightly circumscribed focus of the 2018 Draft Convention:

(a) it is not concerned with which court will hear and determine the original dispute. That is, it is not concerned with the jurisdiction of the court of origin, or with regulating parallel proceedings, or with so-called exorbitant grounds of jurisdiction. These are all matters to be considered by the Expert Group at a later date;

(b) it is not concerned with judgments from non-Contracting States. It says nothing at all about whether such judgments will be recognised and enforced, or about the criteria and process for recognition and enforcement of such judgments;

(c) importantly, it is not designed to be an exclusive, or comprehensive, statement of the circumstances in which judgments from one Contracting State will be recognised and enforced in another Contracting State. The instrument sets minimum requirements for recognition and enforcement – a floor, not a ceiling. If the prescribed criteria are met, the judgment must be recognised and enforced. But if the criteria in the instrument are not met, it remains open to the State addressed to recognise and enforce the judgment under national law (or under other intergovernmental arrangements). There are two exceptions to this approach set out in Article 6 of the 2018 Draft Convention, to which I return below.[8]

The provisions of the 2018 Draft Convention perform two main functions:

(d) they identify the judgments that are eligible for recognition and enforcement under the convention; and

(e) they make provision for the process for recognition and enforcement of those judgments.

Articles 1, 2 and 3 identify the classes of judgment to which the convention would apply. Article 1 identifies the broad scope of application of the Convention:

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[8] Article 6 sets out criteria for recognition and enforcement of two very specific categories of judgment, and precludes recognition and enforcement if those criteria are not met. Those categories are judgments ruling on validity/registration of registered IP rights, and judgments ruling on rights in rem in immovable property and certain long term tenancies.

judgments in civil or commercial matters.[9] Article 2 sets out certain exclusions from scope. The starting point for this list was the corresponding provision in the Choice of Court Convention. But some exclusions have been removed – expanding the reach of the instrument – and others have been added, in light of the differences in the focus of the two instruments. Article 3 sets out certain definitions, most importantly the definition of the term "judgment". As this definition makes clear, the 2018 Draft Convention provides for circulation of final judgments given by a court. It does not provide for recognition or enforcement of interim measures of protection. Nor does it provide for recognition or enforcement of administrative decisions made by the executive branch of Government.

Article 4 sets out the central obligation imposed on Contracting States by the instrument. It provides that a judgment given by a court of a Contracting State (State of origin) must be recognised and enforced in another Contracting State (the requested State) in accordance with the provisions of Chapter 2 of the instrument. Importantly, recognition or enforcement may be refused only on the grounds specified in the Convention. If a judgment is an eligible judgment under Articles 1 to 3, and if the criteria found in the following provisions of Chapter 2 are met, it is not open to a Contracting State to decline recognition or enforcement on other grounds under national law. In particular, the court addressed cannot decline to recognise or enforce a judgment based on its own view of the merits of the substantive claim.

The text then moves to the next level of detail. In what circumstances will a particular judgment be recognised and enforced if it comes from another Contracting State, it is a civil or commercial judgment, and it is within scope? Should this particular judgment be recognised or enforced?

The 2018 Draft Convention seeks to identify cases where recognition and enforcement of a judgment would command broad acceptance. Cases where, if one were to ask "is it reasonable for this judgment to be recognised and enforced?", we would expect a generally positive answer across the full diversity of legal systems and approaches of Member States. The instrument seeks to walk the sometimes delicate line between maximising the reach of the Convention, and not impairing the objective of commanding widespread acceptance. The Special Commission could have set out to produce a very narrow and uncontroversial instrument, but that would significantly reduce its practical value. If all the Judgments Convention did was

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[9] The Revised Draft Explanatory Report provides a helpful explanation of the scope provisions of the 2018 Draft Convention: see in particular paras [21] – [32].

restate the obvious, then that would probably add something to the international legal order because at least it would improve the accessibility of information about the law. But the 2018 Draft Convention is more ambitious than that. It seeks to go beyond stating the obvious to state the reasonable, the sensible, the things that should on reflection command broad acceptance. In doing so it seeks to restate and develop the existing law to some extent, but not to such an extent that it is asking too much of Contracting States when they come to consider whether or not to accept this instrument.

The Special Commission focused on the scenario where one party to a dispute is seeking recognition or enforcement of a judgment, and another objects. (If both parties are willing to implement the judgment of the court of origin, the instrument simply is not relevant as enforcement in other States is not required.) The Special Commission proceeded on the basis of asking when such an objection would be reasonable, with the result that the instrument should not require recognition and enforcement. Broadly speaking, there are two types of objection to recognition and enforcement of a judgment from another State that the text contemplates.

Articles 5 and 6 address the complaint by the party opposing recognition and enforcement that the court of origin was not an appropriate court to hear and decide the dispute, so its judgment should not be binding on the unsuccessful party. Article 7 addresses all other objections, including objections relating to the process before the court of origin. These are either matters that implicate the interests of the person against whom recognition or enforcement is sought (e.g. inadequate notice, unfair hearings, etc), or, in some cases, matters that implicate the interests of the State addressed (eg inconsistency with core public policy values).

Article 5 sets out the bases for recognition and enforcement, which have also been referred to as "jurisdictional filters", or in more traditional terminology, as "indirect grounds of jurisdiction". What is the connection between the court of origin and the person objecting to recognition or enforcement and/or the subject-matter of the proceedings? When is a complaint that the court of origin should not have heard the case a reasonable complaint, because that court is not sufficiently connected with the parties and/or the dispute? The list of acceptable connections in Article 5(1) is relatively lengthy. But each limb has been the subject of extensive discussion, and is tightly circumscribed. Some are uncontroversial; others have excited considerable debate. I return to some of these below.

One much-debated issue is the extent to which the instrument should apply to judgments on intellectual property matters. Article 5(3) appears in square brackets: it

sets out the very specific connecting factors that would apply to recognition and enforcement of judgments on intellectual property infringement matters, and on the validity of unregistered IP rights (such as copyright), if these matters are within scope. This provision, together with Article 6(a) (discussed below), is intended to ensure that the territorial nature of intellectual property rights is reflected in, and fully respected by, the 2018 Draft Convention.

Article 6 serves two functions. It provides positively for a connection with the court of origin which is sufficient for recognition or enforcement of certain categories of judgments under the Convention, and prohibits recognition or enforcement of judgments in those categories if the prescribed connection is absent. That prohibition extends to recognition or enforcement under national law.

Article 6(a) is concerned with intellectual property rights. It provides that where a judgment rules on registration or validity of patents, trademarks, designs or other rights that are deposited or registered, that judgment will be recognised and enforced under the Convention if and only if the State of origin is the State in which deposit or registration has been applied for, or has taken place, or has been deemed to have been applied for or to have taken place. A judgment that rules on these issues that comes from a State that is not the designated State will not circulate under the Convention, and must not be recognised or enforced by a Contracting State under its national law.

Paragraph (b) adopts the same basic approach in relation to judgments that rule on rights in rem in immovable property or (with certain limits) on tenancies of immovable property for a period of more than six months.

Article 7 provides that recognition and enforcement may – not must – be refused in certain circumstances, which as noted above include matters relating to the process followed in the court of origin. Article 7 is not mandatory because it is open to Contracting States to prescribe less restrictive criteria for recognition and enforcement of foreign judgments – whether generally, or from particular States, or in particular fields.

Articles 8 to 10 and 12 deal with a number of specific issues: rulings on preliminary questions, non-compensatory damages, non-monetary remedies in intellectual property matters and "*transactions judiciaires*" (judicial settlements).

Articles 13 to 15 are concerned with the process for recognition and enforcement of judgments in the State addressed.

Article 16 makes explicit a very important feature of the instrument that I have already mentioned above. Subject to the two narrow exceptions in Article 6, the instrument does not preclude recognition or enforcement of a foreign judgment under national law. The national law of a Contracting State may provide for recognition and enforcement of judgments that are outside the scope of this instrument, or that would not be eligible for recognition and enforcement under the criteria it spells out.

Chapter III sets out general clauses relating to the operation of the Convention, and Chapter IV sets out Final Clauses. I will not go through these in detail here. But it is worth pausing to note the important "safety valve" in Article 19. This "safety valve" provision is intended to enable a State to accede to the Judgments Convention even if it has specific concerns about, for example, a particular category of judgment or a particular basis for recognition and enforcement. Article 19 provides that where a State has a strong interest in not applying the Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration must ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

Article 20, which appears in square brackets, would provide an additional specific declaration regime for judgments pertaining to Governments. The desirability and appropriate scope of any such provision are issues that will need careful consideration at the Diplomatic Session; a topic I return to below.

The use of jurisdictional filters

Some commentators have questioned the approach reflected in Article 5 of identifying a list (a "laundry list", some have labelled it!) of jurisdictional filters – indirect grounds of jurisdiction – in order to identify which specific judgments that are within scope should circulate under the Judgments Convention. Because the Article 5 list is a fundamental feature of the architecture of the 2018 Draft Convention, it is worth taking a moment to respond to these concerns.

This is not a new approach to treaties on recognition and enforcement of judgments. It has a long pedigree, reaching back at least to the 1934 treaties between the United Kingdom and France, and the United Kingdom and Belgium. Those treaties have been superseded so far as the UK is concerned by the European instruments on recognition and enforcement of judgments. But they remain in force between France and Belgium on the one hand, and various former British colonies including Australia and New Zealand on the other hand. The Judgments Working Group spent some time exploring alternative approaches – but none was seen as workable.

One option that was considered was doing away with the list and simply providing that a Contracting State must recognise and enforce a judgment from the court of origin if its own courts would have exercised jurisdiction in corresponding circumstances. This approach would collapse, as between Contracting States, the distinction that many but not all States draw in their national law between the (direct) grounds on which their courts will exercise jurisdiction, and the (indirect) grounds of jurisdiction that must be present for a foreign judgment to be recognised and enforced.[10] There are two main difficulties with this approach. First, it does not advance the goal of accessibility and transparency of the law on recognition and enforcement of judgments: in order to know if a judgment from State A will be enforced in States B and C, it would be necessary to seek advice about the national law of each of States B and C in relation to direct grounds of jurisdiction. The application of the Convention would vary from State to State, and would change as national law rules on direct jurisdiction changed over time. More importantly still, this option is not in my view politically realistic. Many States have broad grounds for the exercise of direct jurisdiction under national law – for example simple presence of the defendant in the jurisdiction at the time of service, in many common law States; the nationality of the defendant or the plaintiff in France; and personal service on the defendant abroad in prescribed circumstances in many States. States with broad direct jurisdiction provisions of this kind are most unlikely to be willing to recognise and enforce judgments from other States where jurisdiction was exercised on a corresponding basis. But they would be required to do so unless, prior to acceding to a Judgments Convention structured in this way, they significantly altered their national law rules on direct jurisdiction. This would introduce a new and very significant barrier to widespread ratification that would almost certainly mean the Convention was a dead letter, however elegant and conceptually pure.

It is in my view very unlikely that the Article 5 list will be replaced by some significantly different approach in June 2019. The limbs of Article 5 will certainly evolve, but the basic structure is likely to remain the same.

Some key issues for the Diplomatic Session

What, then, are the most significant issues that are likely to be discussed in depth at the Diplomatic Session in June 2019? They fall under four broad headings:

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[10] The argument for an approach along these lines is set out in Ronald A. Brand, "New Challenges in the Recognition and Enforcement of Judgments" forthcoming in [cite – to come].

(a) scope issues – in particular, intellectual property, privacy and competition/antitrust;

(b) non-money judgments, in particular in relation to intellectual property matters;

(c) judgments relating to governments and government agencies;

(d) concerns about systemic lack of due process in the courts of a Contracting State.

Scope issues

One of the most complex and challenging issues for the Diplomatic Session is whether to exclude from scope some or all classes of intellectual property matters. The views expressed by delegations and industry stakeholders have covered a wide spectrum, from complete inclusion to complete exclusion. Intermediate approaches such as inclusion of judgments on some classes of intellectual property rights (eg copyright and related rights), or on some types of dispute (eg validity but not infringement) have also been canvassed.

The provisions included in the 2018 Draft Convention, in particular in Art 5(3) and 6(a), are very narrow. They provide for recognition and enforcement under the Convention of:

(a) judgments on the validity of registered rights from a court in a Contracting State under the law of which the right arises, or has been applied for. The finding of a court of a Contracting State on the existence and validity of registered rights under the law of that State would be treated as conclusive, preventing other courts from reaching a different view. Thus the issue could not be relitigated in the courts of another State, for example in the context of infringement proceedings or in a contractual dispute between a franchisor and a franchisee;

(b) judgments on the validity of specified types of unregistered right from a court in a Contracting State under the law of which the right is claimed to arise, and in which protection is claimed. As with registered rights, these issues would not be able to be relitigated in other States if there is a judgment from the courts of the State in which the right is claimed to arise, which determines the existence and validity of the right under the law which governs it and in the territory in respect of which protection is claimed;

(c) judgments on claims about infringement of an intellectual property right, where the infringement occurred in the State of origin and the right is claimed to arise under the law of the State of origin. Another court would not be free to revisit a determination about such an infringement, if that issue has already been determined by a competent court in the State under the law of which the right is claimed to arise, and in which that right is alleged to have been infringed.

These provisions are designed to respect the territorial nature of intellectual property rights. It is not easy to see how they could be used as a basis for extending to one State (State A) the intellectual property rules of another State (State B). Suppose for example that State B recognises some form of intellectual property right that is not recognised under the law of State A. Nothing in Articles 5 or 6 would enable a party to argue that because a right has been held to exist under the law of State B, which restricts certain activities in the territory of State B, there is a corresponding right (or corresponding restriction) under the law of State A, or in the territory of State A. If a party tried to argue that a judgment from the courts of State B should be recognised as establishing such rights or restrictions in State A, that would be precluded by both the inherent nature of such judgments (which are necessarily confined to rights in the relevant territory) and also by the very specific drafting of the current provisions. It seems to me that the 2018 Draft Convention goes a long way to addressing the concerns that were previously expressed about undermining the territorial nature of intellectual property rights. But the Diplomatic Session will need to spend some time considering this issue.

There are other concerns that have been raised about these provisions, which will also need to be carefully examined and discussed. A policy decision will need to be made. A range of reasonable outcomes can be envisaged – including opt in and opt out regimes.

Judgments relating to privacy matters will also need to be discussed in some detail. Differences between national laws and policies, and the evolving nature of the law in this field in many States, have given rise to understandable concerns and sensitivities.[11] But the field of "privacy" is wide, and ill-defined: if there is to be an exclusion, it seems likely that it will need to be expressed in more specific language.

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[11] These issues are discussed in a helpful paper prepared by Cara North for the Special Commission, available at https://assets.hcch.net/docs/ff125c57-c85a-467d-ab5e-8acc3a50e2eb.pdf.

The other scope issue that seems likely to attract detailed discussion is the possible exclusion of competition/antitrust matters. The concern expressed by some participants and stakeholders is that this is an area with a large policy component, and cross-border enforcement could give rise to sensitivities. Others consider that these concerns are not so great as to justify the wholesale exclusion from scope of such matters, and that it would be unfortunate to exclude this important class of proceeding from the scope of the Convention. They emphasise that few of the Article 5 filters will apply to such claims – in particular, the Art 5(1)(j) non-contractual obligation filter, which is confined to physical injuries, will not apply – and that any significant public policy concerns in the State addressed can be addressed under Art 7(1)(c), or perhaps by a declaration under Art 19. These issues will need to be explored in some depth at the Diplomatic Session.[12]

Non-money judgments

The Choice of Court Convention provides for circulation of all final judgments of the chosen court, including both money judgments and non-money judgments. In this it parallels the New York Convention, which does not draw any distinction in relation to enforceability of an award based on the form of relief provided for in the arbitral award. In the arbitration context, States have many years' experience of recognising and enforcing foreign non-money awards. In the context of court judgments, however, recognition is commonplace but the approach of States to enforcement is more variable. In particular, the traditional common law approach has been to decline to enforce foreign non-money judgments.[13] Instead, the plaintiff who succeeded in State A and obtained (say) an injunction to restrain conduct by a defendant based in State B needs to commence a new substantive proceeding in State B, ask the Court in State B to recognise the foreign judgment as giving rise to a cause of action estoppel (or perhaps, various issue estoppels) and on that basis seek similar injunctive relief in the proceedings in State B.

The 2018 Draft Convention provides for recognition and enforcement of non-money judgments. The definition of "judgment" in Article 3 does not draw a distinction based on the form of relief awarded. However the 2018 Draft Convention does not require courts of a requested State to enforce forms of order that are not known in that

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[12] These issues are described in more detail in a helpful paper prepared by Cara North for the Diplomatic Session, available at https://assets.hcch.net/docs/dcd7c92a-d3fd-46a5-bae5-627ff1636003.pdf.

[13] However in Canada see *Pro Swing Inc. v. Elta Golf Inc.* 2006 SCC 52.

State. As Article 14 confirms, the procedure for enforcement of a judgment is governed by the national law of the requested State. But it is implicit in the 2018 Draft Convention that the requested court should grant relief that is as far as possible consistent with the substance of the relief granted in the court of origin, and gives effect so far as possible to the judgment granted by that court, as the Revised Draft Explanatory Report notes.[14]

The inclusion of non-monetary relief is a practically important feature of the 2018 Draft Convention. An increasing proportion of wealth is represented by intangible property that can only be effectively protected by such relief. The ease of dealing across borders, in particular online, means that effective enforcement of non-monetary orders made in one State frequently requires those orders to be practically enforceable in another State where the defendant is situated, and can be made subject to effective practical sanctions to compel performance of the orders.

Provision for enforcement of final non-money judgments has not been controversial in the discussions to date, except in relation to intellectual property proceedings. Article 11, which appears in square brackets, reflects concerns expressed by a number of delegations and stakeholders about the need for further consideration of the practical implications of cross-border enforcement of non-money judgments relating to intellectual property rights. In particular, it has been suggested by some stakeholders that enforcement of such orders may be inconsistent with the territorial nature of intellectual property rights.

The restrictions on enforcement of intellectual property right judgments described above may be sufficient to resolve these concerns, and to reassure participants that it is not inconsistent with the territorial nature of intellectual property rights to enforce in State B an order that prevents a defendant situated in State B from doing acts in State A, or directing conduct to State A, that would be inconsistent with the intellectual property laws of State A as interpreted and applied by the courts of State A. But these and other concerns will need to be carefully discussed and analysed, to ensure that the issues are well understood and that an appropriate approach can be arrived at by consensus in June 2019.

Systemic lack of due process in the State of origin

One of the most challenging issues raised by delegations, and by a number of commentators, is how best to address the risk that judgments from a Contracting State

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[14] At [113].

may be affected by a systemic lack of due process in that State. Suppose for example that the courts of a State (State X) are not effectively independent and neutral, but rather are subject to significant political influence or control that systematically biases outcomes in favour of particular parties or groups. The concern that has been expressed is that if the Convention is open to accession by any State, then State X may become a Contracting State with the result that:

(a) other Contracting States will be required to enforce judgments from State X despite the systemic weaknesses affecting its courts; and

(b) it may be difficult if not impossible for a judgment debtor to establish that the particular proceedings that led to the judgment were affected by systemic defects. Precisely because issues of this kind are pervasive, the argument runs, there may be no available evidence that something has gone wrong in any one specific case. So it may not be possible to invoke those defects to oppose enforcement on the basis of Art 7(1)(c) ie on the basis that "recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State".

A range of possible responses has been identified in relation to concerns of this kind. Some participants have expressed the view that existing mechanisms, in particular the public policy defence, are adequate to address this issue. They point out that this is the approach adopted by common law courts to enforcement of foreign judgments, in the absence of any specific treaty arrangements. Some participants have expressed the view that this is not a sufficient response, and have suggested alternative approaches. Those alternative approaches include:

(a) restrictions on the accession of States to the Convention: existing Contracting States would need to approve accession by a new Contracting State (or existing Contracting States would have a window within which to object to that accession);

(b) some sort of bilateralisation process, under which judgments from one Contracting State would be recognised and enforced in another Contracting State only if both States had made declarations to that effect. However concerns have been expressed about the practical reality of such an approach. If for example there were 50 Contracting States, an approach of this kind would require each of those States to declare their willingness to recognise and

enforce judgments from each of the others – some 2450 Treaty actions. That seems impracticable. In 1971 the Hague Conference prepared a Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, which has only a handful of parties and has not come into operation. It has been suggested by a number of commentators that one of the reasons that the 1971 Convention was not successful in practice was that it required bilateralisation, and that approach was not seen by Members as workable;

(c) a more tailored defence in Article 7 that would be available in cases where concerns of this kind arise. Examples that have been referred to by commentators in this context include the USA Uniform Foreign-Country Money Judgments Recognition Act, which provides in section 4 for a number of defences to claims for enforcement in addition to lack of due process in the proceedings in the foreign court, including where the foreign judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law, or where the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment.[15]

These are important issues. If the Diplomatic Session adopts too restrictive an approach, that may affect the practical workability of the new instrument. But if it adopts an approach that is widely perceived as insufficient to address concerns about systemic lack of due process, that may affect the willingness of some States to accede to the instrument. The June 2019 meeting will need to find a pragmatic, sensitive and creative solution to this challenge.

Final remarks

The first half of 2019 is an important period for the Judgments Project. Members will be preparing for the Diplomatic Session. The HCCH is in the process of preparing a number of preliminary documents to support that preparation. Officials in many Member States will be consulting with domestic stakeholders. Informal discussions

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[15] The American Law Institute's Third Restatement provided for the former of these two defences, which is concerned with the overall integrity of the foreign State's court system, but not for the latter, which is concerned with corruption in the particular case that led to the judgment : see Restatement (Third) Foreign Relations Law § 482(1)(b). The recently published Fourth Restatement provides for both of these defences: see Restatement (Fourth) Foreign Relations Law §483(a), §484(h). See also the ALI's 2005 proposal for a Federal statute to govern recognition and enforcement of foreign judgments: American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2005) §5(a)(i) and (ii) and commentary at 58-60.

will be taking place between participants. International stakeholder groups will be deciding whether to participate in the Diplomatic Session as observers, and what approach to adopt if they do participate.

The Judgments Convention is much more likely to succeed – to produce a high quality text that is widely ratified – if Members can draw on the very substantial expertise in this field of academics, the legal profession, the judiciary, and other stakeholders with experience in cross-border dispute resolution and in relevant fields such as intellectual property. I hope that this short paper will encourage all of these stakeholders to engage with officials, and to participate actively in formal and informal consultation processes, with a view to ensuring that we make the most of this once in a generation opportunity to enhance access to justice and to facilitate cross-border trade, investment and mobility.