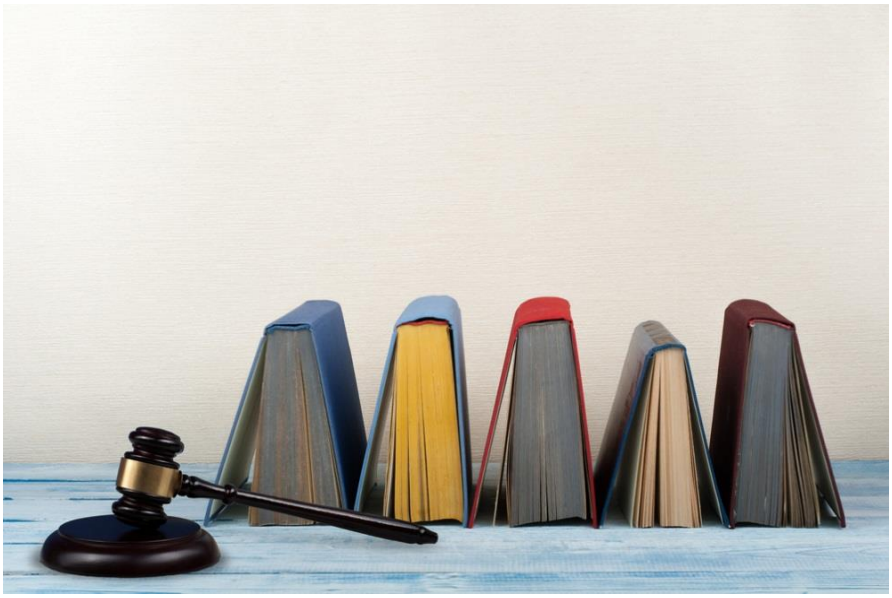
STUDY

Requested by the JURI committee

European Parliament

THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW "JUDGMENTS CONVENTION"



Policy Department for Citizens' Rights and Constitutional Affairs
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THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW "JUDGMENTS CONVENTION"

STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, provides an assessment of the ongoing work of the Hague Conference on the Judgments Convention. The analysis focuses on the November 2017 Draft Convention, its interplay with international and Union instruments in the field, as well as its potential future impact on the regulation of civil and commercial cross-border disputes.

ABOUT THE PUBLICATION

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LIST OF ABBREVIATIONS

Brussels Ibis	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)
Choice of Court Convention	2005 Hague Convention on Choice of Court Agreements
CJEU	Court of Justice of the European Union
Draft Convention/ Convention	November 2017 draft Hague Judgments Convention. Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017)
EU	European Union
Hague Conference	Hague Conference on Private International Law
IP	Intellectual Property
Lugano Convention	2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
MS(s)	Member State(s) (of the European Union)
PIL	Private International Law
Preliminary Report/ Report	Judgments Convention: Preliminary Explanatory Report of October 2017
REIO	Regional Economic Integration Organization
US	United States of America
UNCITRAL	The United Nations Commission on International Trade Law

EXECUTIVE SUMMARY

Background

The Hague Judgments Project aims at establishing a uniform legal framework for the recognition and enforcement of foreign judgments in civil and commercial matters. The idea of an international instrument in this area corresponds to the reality of a globalized economy, where the flux of cross-border movements and transactions is in constant increase and leads to an equal intensification of cross-border litigation. The lack of a common system of dispute resolution at the transnational level results in uncertainty, furthers the costs of exchanges, and may even deter the economic actors from entering into cross-border exchanges.

The initial project encompassed both the international jurisdiction of courts and the recognition and enforcement of judgments abroad, but in 2011 the project was continued with a view to conclude an international convention limited to recognition and enforcement without rules on (direct) jurisdiction. A Special Commission to prepare a draft Convention was set up in 2016 producing three Draft Conventions. The third and most recent text is the November 2017 Draft Convention (hereinafter, Draft Convention or Convention).

Aim

The purpose of this study, as requested by the European Parliament, is to:

- explain the background and significance of the Hague Judgments Project;
- provide a legal assessment of the scope and content of the Draft Convention and identify the main legal challenges that may arise from its application;
- examine the relationship of the Draft Convention with other international conventions and assess the consistency of the legal framework provided by the conventions of the Hague Conference;
- reflect on the interactions of the Draft Convention with the EU legal framework on judicial cooperation in civil matters, particularly the Brussels Ibis Regulation;
- consider the potential impact of the Draft Convention on the regulation of cross-border disputes and shed light by evaluating its limitations;
- submit policy recommendations regarding the position of the EU vis-à-vis the Draft Convention and the development of a comprehensive and consistent legal framework in the field.

Key Findings

The Draft Convention

- The goal of the Draft Convention is to ensure that judgments in an array of civil and commercial matters will be recognised and enforced in all Contracting States, under one legal regime. It is not a "mixed convention" – ie it does not contain rules on direct jurisdiction.
- The EU may become a party to the Convention, and declare that its Member States will not be parties but shall be bound by virtue of the signature, acceptance, approval or accession of the EU.
- The Convention establishes eligibility requirements for judgments from one Contracting State to be recognised or enforced in another. Besides, it provides for grounds to refuse recognition/enforcement, which are wider than those foreseen under the Brussels Ibis regulation. As a rule an application which would fail under the Convention may still succeed under a more favourable

domestic regime. No common procedure is established to decide on an application for recognition or enforcement. The interplay of the Convention with international and EU instruments on recognition and enforcement may prove difficult in practice. Uniform interpretation raises concerns as well.

Relationship with other international instruments

- The Draft Convention addresses the risk of interference with other international instruments in two ways: to some extent it prevents that risk from arising in the first place by excluding from its scope a number of matters governed by specialised conventions; for the rest, it makes a point of managing possible conflicts, notably by stating the primacy of pre-existing conventions (and, subject to appropriate qualifications, subsequent conventions) dealing with the recognition of judgments.
- The means employed to avoid or minimise conflicts do not substantially differ from those used in other instruments and can be expected to function well.
- By their nature, treaty conflicts may give rise to delicate issues: however, as far as the Draft Convention is concerned, difficulties should not be frequent and should not prove harder to overcome than under other PIL instruments

Interaction with the EU legal framework

- Should the Draft Convention be adopted by the Union, it will mostly interact with EU rules on exclusive jurisdiction, while the effect on the EU rules on pending actions and on the recognition and enforcement of judgments is limited.
- The exclusive jurisdiction rules in Art 24 Brussels Ibis are sufficiently reflected in the Draft Convention and will not be undermined by it. It appears advisable, though, to seek a clarification in the Explanatory Report for proceedings concerned with the enforcement of judgments.
- For insurance contracts, the protection afforded by the exclusive jurisdiction rules of Brussels Ibis is not reflected in the Draft Convention. Parties are only protected if the contract can be qualified as a consumer contract in the sense of Art 5(2) Draft Convention.
- For consumer contracts (similar considerations apply to employment contracts), the level of protection in the Draft Convention is, in general, acceptable. The Draft Convention does not provide a plaintiff's forum in favour of the consumer. The EU negotiating party might consider trying to extend the protection under Art 5(2) of the Draft Convention also to the base for recognition and enforcement of Art 5(1)(k) (trust agreements).
- Should the Union decide to further participate in the negotiations with a view to join the Convention, it seems helpful to seek certain clarifications concerning Arts. 25(4) and 28(4) on REIOs.

Future impact on the regulation of international disputes

- The future impact of the Convention will depend on whether the national rules of the future contracting states are more conservative than the regime established by the Convention.
- The Convention would not improve the circulation of judgments between the United States and the Member States considered in this study (DE, ES, FR, IT and LU).
- The Convention being more liberal than the laws of England, India or Australia, it would lead such states to enforce judgments that they do not currently enforce.
- US negotiators have successfully limited the ambition of the Convention in accordance with their own standards.
- An option would be to explore whether a more ambitious and practically useful Convention, following European standards of jurisdiction, could be accepted by a significant number of other states.

Additional policy recommendations

- The potential of the Draft Convention to foster uniformity has to be balanced with the drawbacks of creating an additional layer of complexity.
- The limited scope and uncertain success of the Draft Convention undermines its potential to provide a comprehensive legal framework on the recognition and enforcement of third country judgments. Even if worldwide cooperation in this field is desirable, EU institutions should consider also the adoption of Union rules on recognition and enforcement of third State judgments in civil and commercial matters.

INTRODUCTION

EU judicial cooperation in civil matters: state of play regarding recognition and enforcement

Mutual recognition and enforcement of MSs' judgments is a cornerstone of judicial cooperation in civil matters within the EU, as acknowledged in Art. 81 TFEU. Mutual trust and the interplay of the provisions on recognition and enforcement with the proper functioning of the internal market and EU integration require a specific EU regime facilitating mutual recognition between MSs. Judgments delivered by courts of third countries are not covered by EU Regulations such as Brussels Ibis. Common rules regarding third country judgments are applied in a very limited number of cases, particularly as a result of MSs being bound by conventions ratified or approved by the EU, such as the Choice of Court Convention, the Lugano Convention and the 2007 Hague Convention on the International Recovery of Child Support. Apart from those conventions, no common rules on third country judgments have been adopted at EU level. That area remains governed basically by national rules or conventions previously concluded by MSs. Therefore, approaches differ among MSs, including, for instance, the extent to which reciprocity is required.

The CJEU has emphasized that the rules on recognition and enforcement of judgments rendered in non EU States may affect EU rules in this field.[1] In particular, they may undermine the possibility to recognise or enforce a judgment rendered in another MS (see, e.g., Art 45(1)(d) Brussels Ibis) and affect the application of the rules on lis pendens and related actions (Arts 33(1)(a) and 34(1)(b) Brussels Ibis). Moreover, the adoption of common rules on the recognition and enforcement of third country judgments would contribute to the proper functioning of the internal market and to develop a more coherent EU PIL system.[2] Notwithstanding this, the possibility to address in EU Regulations the recognition and enforcement of judgments rendered in third States has not received significant attention.

In accordance with the position of the CJEU, the broad interpretation of the external exclusive competence of the EU in this area has also been reflected in certain EU instruments.[3] Already in its 2005 Hague Programme, the European Council stressed the need to develop a coherent external dimension of the Union policy of freedom, security and justice.[4] In the light of the lack of progress in establishing EU rules on third country judgments, negotiations of international conventions in the framework of multilateral organisations may provide an opportunity to adopt common rules to be applied in all MSs regarding judgments delivered in other States that become parties to the relevant convention. However, in many aspects, such as scope, effect, interpretation or revision, the rules on international conventions differ from those of EU regulations and this reduces their significance as an integration tool within the EU.

The Judgments Project: Background and Context

The story of the Hague Judgments Project starts in 1992 with a proposal from the US for future work by the Hague Conference, with a view to the adoption of a convention at the Conference's 18th session.

[1] Opinion 1/03, 07.02.2006, ECLI:EU:C:2006:81, para. 170. See also Opinion 1/13, 14.10.2014, ECLI:EU:C:2014:2303.
[2] Basedow (1982) pp. 99-181, Kreuzer (2006) p. 77, and De Miguel Asensio (2006) pp. 462-463.
[3] See Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between MSs and third countries concerning, among other fields, recognition and enforcement of judgments in certain matters.
[4] European Council, Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C 53, pp. 1–14, at p. 14.

The Permanent Bureau of the Hague Conference replied with a document comprising several possibilities for a Convention on (jurisdiction) recognition and enforcement of judgments. Negotiating a brand new convention was the prevailing option; the works started immediately in view of what was to be commonly known as "The Judgments Project".[5]

Initially conceived as a far-reaching convention, the Judgments Project was scaled down after a decade of negotiations and limited to international cases involving choice of court agreements. The first draft preliminary adopted in October 1999 corresponded to a "mixed convention", comprising three kinds of jurisdictional grounds: required jurisdiction (the "white list"); prohibited jurisdiction (the "black list"); undefined area (the "grey area"). The court of origin could exercise jurisdiction on the grounds included in the "white list" and the resulting judgment would be entitled to recognition and enforcement in the other Contracting States. The court of origin could not exercise jurisdiction based on the grounds listed in the "black list" and in any case a judgment based on a ground included in the black list should not to be recognized.

Consultation with interest groups in 2000 showed that the acceptance of the text, particularly of certain issues of jurisdiction, would encounter serious difficulties.[6] In March 2003 an Informal Working Group recommended that negotiations proceed on a convention focusing on choice of court agreements in business-to-business cases. The Choice of Court Convention was adopted in 2005, and signed by the US and the European Community in 2009. It entered into force on 1 October 2015 between the EU and Mexico. It is also in force for Singapore since 1 October 2016.

The continuation of the Judgments Project was suggested by the Permanent Bureau to the Council on General Affairs and Policy in 2010. Between 2012 and 2016 a Working Group met and designed provisions for inclusion in the future convention on the recognition and enforcement of judgments. A Special Commission to prepare a draft Convention was set up in 2016 producing three Draft Conventions - the 2016 Preliminary Draft Convention; the February 2017 Draft Convention; and the November 2017 Draft Convention.

Structure of the study

This research paper is structured in four main sections. Section 1 presents the scope and solutions of the Draft Convention as well as the main legal challenges it poses from the EU perspective. Section 2 addresses the relationship of the Draft Convention with other international conventions and assesses the methods used to prevent and manage potential conflicts. Section 3 deals with the interaction of the Draft Convention with the EU rules on jurisdiction, pending actions and recognition and enforcement of judgments. Section 4 focuses on the potential impact of the Draft Convention to facilitate the circulation of judgments as between the future contracting states. These four sections are preceded by Key Findings. Finally, conclusions are drawn with a view to propose policy recommendations for the establishment of a comprehensive legal framework on international litigation in civil and commercial matters.

[5] A chronology of the Project including relevant documentation is available at the website of The Hague Conference, https://www.hcch.net/en/projects/legislative-projects/judgments.
[6] Von Mehren (2000) p. 466, Wagner (2001) pp. 537-541, and Feldman (2014) pp. 2202-2203.

1. THE DRAFT CONVENTION (NOVEMBER 2017)

KEY FINDINGS

- The goal of the Draft Convention is to ensure that judgments in an array of civil and commercial matters will be recognised and enforced in all Contracting States, under one legal regime. It is not a "mixed convention" - ie it does not contain rules on direct jurisdiction.
- The EU may become a party to the Convention, and declare that its Member States will not be parties but shall be bound by virtue of the signature, acceptance, approval or accession of the EU.
- The Convention establishes *eligibility requirements* for judgments from one Contracting State to be recognised or enforced in another. Besides, it provides for *grounds to refuse recognition/enforcement*, which are wider than those foreseen under the Brussels Ibis regulation. As a rule an application which would fail under the Convention may still succeed under a more favourable domestic regime. No common procedure is established to decide on an application for recognition or enforcement. The interplay of the Convention with international and EU instruments on recognition and enforcement may prove difficult in practice. Uniform interpretation raises concerns as well.

1.1. The "new life" of the Project. Objectives

The Draft Convention is grounded on the principle of judicial cooperation; its immediate goal is to ensure that judgments to which it applies will be recognised and enforced in all Contracting States, under one legal regime.[7] As a consequence the need for duplicative proceedings in different Contracting States will diminish; access to practical, less expensive and quicker justice will be eased. The commonality of the legal regime increases the predictability of the law: claimants will thus be enabled to make informed choices about where to bring proceedings, taking into account the enforceability of the resulting judgment in other States. In this way, the Draft Convention fosters international trade, investment and mobility.[8]

1.2. The intended scope and limits

1.2.1. Geographical scope

The Convention is open for signature and for accession by all States (Art 26). According to Art 1.2, it applies to the recognition and enforcement in one State party to the Convention of a judgment given by the court of another contracting State. Chapter IV (Final Clauses) provides information on the territorial reach of the Convention. First, a specific regime is foreseen for non-unified legal systems under Art 27. Secondly, the Draft Convention addresses the case of Regional Economic Integration Organisations (REIOs): under Art 28 a REIO constituted by sovereign States and with competence over matters governed by the Convention, such as the EU, may become a party to the Convention, whereby it shall have the rights and obligations of a Contracting State. Art 29 allows a REIO to declare that its Member States will not be parties to the Convention but shall be bound by virtue of the signature,

[7] However, certain reservations are allowed under Arts 18 and 19 of the Draft Convention. Besides, according to Art 16 recognition and enforcement may be granted under a more favourable national regime.

[8] See Garcimartín Alférez & Saumier, 'Judgments Convention: Preliminary Explanatory Report', October 2017, https://assets.hcch.net/docs/e1b5b4de-d68e-41f0-9ac4-6492345a5b0d.pdf (Preliminary Report), para. 1.

acceptance, approval or accession of the Organization[9]; should this be the case, any reference to a 'Contracting State' or 'State' in the Convention shall apply as well to the Member States. It is to be expected that the EU, upon accession to the Convention by approval, makes a declaration under Art 29.[10]

1.2.2. Scope in time

The Convention shall apply to the recognition and enforcement of judgments if, at the time the proceedings were instituted in the State of origin, the Convention was in force in that State and in the requested State (Art 17). No common definition is provided as to what that time is.

1.2.3. Substantive scope

The Draft Convention applies to the recognition and enforcement of judgments relating to civil or commercial matters (Art 1). The proper ascertainment of its substantive scope requires a complex operation, putting together several provisions hosted in different Chapters. In particular, Art 19, in Chapter III, allows contracting States to further extend the list of excluded matters from the scope of application.[11] The Convention provides no definition of 'civil or commercial matters', but gives some hints to help interpreting the notion. First, the final sentence of Art 1(1), 'it shall not extend in particular to revenue, customs or administrative matters', points to public law as the opposite concept (while clarifying at the same time that those particular fields are not covered by the Convention). Secondly, Art 2(4) stresses the irrelevance of the nature of the parties to the dispute: the fact that one of them is a State or an emanation of a State does not prevent the Convention from applying, provided the State or emanation engaged in the contentious relation as a private person, ie without exercising any extraordinary power.

According to Art 2(2), a judgment is not excluded from the Convention if a matter to which the Convention does not apply arose merely as a preliminary question. However, the ruling on that question shall not be recognised or enforced under the Convention (Art 8(1)), whereas the part of the judgment dealing with an included subject matter may, provided it is severable from the rest (Art 9). Recognition or enforcement regarding this part may nevertheless be refused if, and to the extent that, the judgment was based on the ruling on the excluded matter (Art 8(2)). Pursuant to Art 3 judgments are decisions on the merits given by a court (the term 'court' is not defined). Procedural orders are therefore excluded, with the exception of the determinations on costs which relate to a decision on the merits falling under the scope of the Convention. Provisional measures are explicitly left out. Judicial settlements which are enforceable in the same manner as a judgment in the State of origin shall be enforced under the Convention as if they were judgments (Art 12).

1.2.4. Exclusions

Under the heading 'Exclusions from scope', Art 2(1) leaves out of the Convention a cluster of matters in spite of their civil or commercial nature, under different rationales.

Subparas (a) (status and legal capacity of natural persons), (b) (maintenance obligations), (c) (other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships), and (d) (wills and succession) encompass subject matters already dealt with in previous Hague Conventions. The exclusion of insolvency under subpara (e) is linked to the particularities of the subject matter. The term 'insolvency' can be understood as encompassing only judgments directly related to insolvency, or other connected decisions as well. Even if some

[9] According to Art 216.2 TFUE: "Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States".
[10] The term 'European Union' will not include Denmark.
[11] Arts 20 and 21, on additional declarations aiming respectively at excluding judgments pertaining to governments and to include decisions rendered by common courts, are currently under brackets.

commonality has been achieved in this respect, the experience under the EU insolvency regulation shows the difficulty of the delimitation. The fact that subpara (e) comprises open-ended notions ('analogous matters') will not make the task easier. Subparas (f) (the carriage of passengers and goods), (g) (marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage) and (h) (liability for nuclear damage) respond to the existence of international conventions. The exclusion reflects as well the specific complexity which often characterizes the liability regime under substantive and national procedural law. Subpara (i) (the validity, nullity, or dissolution of legal persons or associations, and the validity of decisions of their organs) and (j) (the validity of entries in public registers) leave out of the Convention issues subject to exclusive jurisdiction under other regimes, such as Brussels Ibis. The exclusion of defamation, subpara (k), relates to the constitutional underpinning of the matter for many States. It remains to be decided whether judgments on privacy and IP matters will also be struck out. Pursuant to Art 2.3, the Convention does not apply to 'arbitration and related proceedings'.

1.3. The solutions in a nutshell

1.3.1. Eligible judgments

Chapter II of the Draft Convention, entitled 'Recognition and enforcement', creates upon the contracting States the obligation to recognize and enforce judgments from other parties to the Convention meeting the eligibility requirements set under Arts 4, 5 and 6. Recognition and enforcement may be refused only on the basis of grounds foreseen in the Convention under Art 7; the 'complete picture' requires taking also into account particularly Arts 4(4), 8.2, 10, 16 and 18. As a rule, there shall be no review of the merits of the foreign judgment. However, the Convention acknowledges that the assessment of the conditions for eligibility and of the absence of grounds for refusal may call for some reviewing of the foreign decision.

Eligibility is conditional upon the following requirements: the judgment falls under the scope of the Convention; the judgment, final or not, has effect -for recognition purposes- or is enforceable -for enforcement purposes- at the State of origin; at least one of the indirect jurisdictional bases listed in Art. 5 and 6 is met. The Convention does not contain rules on direct jurisdiction. Arts 5 and 6 enumerate indirect grounds for jurisdiction or 'jurisdictional filters', ie, connections that a requested State will accept as legitimate when asked to recognize or enforce a foreign judgment, independently of whether they match or not the direct rules for exercising jurisdiction. The list is exhaustive; it comprises alternative basis under Art 5, and exclusive ones under Art 6. According to Art 4(4), decisions under review or still appealable at the State of origin are eligible for recognition or enforcement. However, the requested State is given several options: it may grant recognition or enforcement subject to security, postpone the decision on recognition or enforcement, or refuse recognition or enforcement. No indication is provided as to the criterion to proceed in one way or another.

1.3.2. Bases for recognition and enforcement: alternative jurisdictional filters

The inventory of circumstances amounting to jurisdiction filters is split into two paragraphs: the case of recognition or enforcement being sought against a natural person acting in his/her capacity as consumer or employee deserves special treatment. A specific regime for judgments on IP rights or analogous rights is still in brackets.

Art 5(1) lays down 18 bases for indirect jurisdiction built upon circumstances of the parties (or the person against whom recognition is sought); their consent; the connection between the claim and the court; the interconnection between claims.

- Subparas (a) to (d) correspond to the first category. Under (a) and (b), the connection in regard to natural persons is the habitual residence, or the principal place of business for claims limited to the business activities. Under (c), the connection is based on having brought the claim before the

court rendering the judgment. The so called 'branch jurisdiction' is addressed under (d); only establishments lacking separate legal personality are comprised.

- Subparas (e), (f) and (m), resort to consent as a jurisdictional filter: in the form of an agreement conferring non-exclusive jurisdiction[12] to the court of origin; or as a result of an express or implicit acceptance of the jurisdiction by the defendant.
- Subparas (g), (h), (j) and (k) are built upon the connection between the claim and the court of origin. Contractual claims, torts, and trusts are addressed here.
- Judgments on joint claims in matters relating to a contract secured by a right in rem on immovable property are addressed in subpara (i). Counterclaims are the subject of subpara (l), distinguishing between judgments in favour and against the counterclaimant.

Judgments against weaker parties, meaning natural persons acting in their capacity as consumers or employees, follow in principle the same criteria as any other decision, hence the jurisdictional filters in Art 5(1) apply as well. However, Art 5(2) limits or directly excludes the legitimacy of several grounds of jurisdiction, with a view to protecting those categories in contractual settings (see Section 3.1.3, below).

1.3.3. Exclusive bases for recognition and enforcement

Art 6(b) establishes exclusive grounds for jurisdiction in view of the recognition or enforcement of judgments on rights *in rem* in immovable property, which shall be recognised and enforced 'if and only if' the property is situated in the State of origin. The expression 'if and only if' makes it clear that recognition and enforcement must be refused in case the jurisdictional basis has been a different one. Judgments on a tenancy of immovable property for a period of more than six months are the object of a special solution in Art 6(c): they shall not be recognised and enforced where the property is not situated in the State of origin, if the courts of the State in which it is situated have exclusive jurisdiction under its own law. The inclusion under Art 6(a) of a third category - judgments on the [registration or] validity of an IP right required to be granted or registered- is currently under discussion.

1.3.4. Grounds for non-recognition or enforcement

Grounds for non-recognition or enforcement of an eligible judgment are mainly laid down in Arts 4(4), 7 and 8.2. Art 7 enumerates the grounds allowing refusal. Refusal is not compulsory: according to Art 16, recognition and enforcement may still be granted under a more favourable national regime. The Convention does not address whether the objections must be raised by the defendant or by the Court, *sua sponte*; the point pertains to procedure and is left to each State under Art 14.

Under Art 7(1) there are up to seven possibilities open to the person against whom recognition or enforcement is sought to resist it.

- According to Art. 7(1)(a), recognition and enforcement can be opposed for reasons related to the service of the document instituting the proceedings. There is no indication as to the evaluation of the conditions 'in sufficient time' and 'in such a way as to enable [the defendant] to arrange for his defence', although it is to be expected that the assessment be factual rather than technical.[13] When notification had to be made in the requested State, the opposition to recognition or enforcement may be based as well on the incompatibility with fundamental principles of that State on the service of documents -a ground which probably matches the 'sovereignty and security' expression in Art 13.1 of the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.

[12] To avoid overlapping or conflict with the Choice of Court Convention. See section 2.1.1 below.
[13] Preliminary Report, para. 231.

- The separate provision on fraud under subpara (b) is a concession to the States where the public policy defence, addressed in subpara (c), does not already encompass it. A similar explanation applies to Art 10, allowing the refusal to recognise or enforce decisions including exemplary or punitive damages under certain circumstances.
- The public policy defence figures in subpara (c), subject to the usual limitation requiring incompatibility to be manifest. Both substantive and procedural grounds may be invoked under the fraud and public policy defences.
- Following subpara (d) recognition or enforcement may be refused if the proceedings in the court of origin were contrary to an agreement under which the dispute in question was to be determined in a court other than the court of origin.
- Inconsistency between judgments may hinder recognition or enforcement, with more or less severe conditions to be met depending on whether the conflicting judgment has been rendered on the requested State (subpara (e)) or on a third State (subpara (f)).

Recognition and enforcement may be refused, but also simply postponed, if proceedings between the same parties on the same subject matter are pending before a court of the requested State, provided the court of the requested State was seized before the court of origin, and there is a close connection between the dispute and the requested State. No hint is provided as to what is meant by a 'close connection'. The decision on whether to refuse or to postpone recognition or enforcement is left to each contracting State.

1.3.5. Procedures

Unless otherwise provided by the Convention all procedures concerning recognition and enforcement are governed by the law of the requested State (Art 13). The Convention addresses the documents to be produced under Art 13. The application cannot be refused on the ground that it should be filed with another State (Art. 14). Art 15, addressing the cost of the proceedings and prohibiting discriminatory securities is currently in brackets.

1.4. Outlook on the main legal challenges

The desirability of a global-reaching convention on the recognition and enforcement of foreign judgments in civil and commercial matters is not usually contested,[14] *a priori* the Hague efforts deserve to be welcomed. However, even taking for granted the need for such an instrument, the Convention as it stands today raises some doubts (see section 4 below).

1.4.1. Becoming a party? Limited scope, added complexity

The Convention's scope is quite limited. It only addresses recognition and enforcement - a sound option to avoid a new failure of the negotiations, but still a second best solution. From the substantive point of view, not only relevant civil and commercial matters are excluded, but the same applies to interim measures of protection. Authentic documents are not included either. Excluded subject matters which are not covered by other instruments includes defamation. Moreover, the inclusion of privacy[15] and IP matters are currently under discussion. As to IP rights, the EU has already made its

[14] See nevertheless Regan (2015) 84. Interestingly, there is a widespread perception in the US in the sense that American courts are much more receptive to foreign judgments than foreign courts are to American judgments, see Porterfield (2014),101 ff, with further references.
[15] See Note on the possible exclusion of privacy matters from the Convention as reflected in Article 2(1)(k) of the February 2017 draft Convention, particularly the Annex 'The concept of "privacy" – some points of comparison', https://assets.hcch.net/docs/ff125c57-c85a-467d-ab5e-8acc3a50e2eb.pdf.

position clear in favour of retaining them within the scope of the Convention,[16] and so has WIPO, whereas it is strongly opposed by several other delegations.

All in all, the Convention's potential to create an additional layer of complexity in an already dense legal panorama should not be underestimated; on the contrary, it should be balanced against the benefits of becoming a contracting party. Whereas none of the legal concepts in the Convention deserve to be labelled "unfamiliar" for continental lawyers, the language of the rules may still be too complicated for the average EU practitioner.

1.4.2. Interpretation

The success of the Convention depends largely on how the text is applied, which in turn depends on how it is understood. The absence of a common interpretative body may be regarded as one of the most relevant shortcomings of the Convention. A Glossary of Commonly Used Terms and References has been prepared by the Permanent Bureau,[17] but besides its very limited scope it lacks any binding value. The same applies to the Preliminary Report -or to the final accompanying report in line with the traditional practice at the Hague Conference[18]- which will nevertheless be of great use since many of the open questions will find an answer therein.[19]

From the EU perspective it is noteworthy that many of the concepts (for instance, 'civil or commercial matters') and rules (indirect grounds for jurisdiction, such as Art 5(1)(d) of the Draft Convention on "branch jurisdiction") used by the Draft Convention are found in EU procedural regulations as well. In the EU Regulations, their meaning has been (or can be in the future) autonomously determined by the CJEU in the light of the specific EU principles and aims. In the context of a Hague Convention, their meaning may be different: Firstly, because they come from other Hague Conventions or other international instruments; secondly, because they must be interpreted in line with their character as an instrument of international (rather than EU) law and with the need to promote uniformity in its application (Art 22 Draft Convention). Therefore, the interpretation of the same term in EU law and in the Draft Convention may differ. This holds true in spite of the fact that international agreements concluded by the EU form an integral part of its legal order and can therefore be the subject of a request for a preliminary ruling to the CJEU.[20] The CJEU has already held that an international convention 'must be interpreted in accordance with the rules of interpretation of general international law, which are binding on the EU'.[21] While a divergence in interpretation of the same terms in an international Convention and an EU instrument is unavoidable, this risk can be reduced. As already mentioned, for each Hague Convention an Explanatory Report is published which provides (persuasive) guidance to national courts interpreting the Convention. Should the EU intend to join the Convention, it should be a high priority that EU views will be reflected in its Explanatory Report (on this issue, see Section 3, below).

[16] See EU Discussion Document on the operation of the future Hague Judgments Convention with regard to Intellectual Property Rights, https://assets.hcch.net/docs/284b672a-9e4a-44db-856e-6d247df19b9a.pdf.
[17] https://assets.hcch.net/docs/2d15f975-623c-4a29-b972-164862a91866.pdf.
[18] For the Choice of Court Convention, see the report by Hartley and Dogauchi, https://www.hcch.net/en/publications-and-studies/details4/?pid=3959.
[19] The importance of the Report to clarify the meaning of the Convention is also stressed by Jacobs (2017) p. 26.
[20] See, eg, Opinion of Advocate General M. Szpunar in case C-83/17, KP, ECLI:EU:C:2018:46.
[21] Case C-63/09, Walz/Clickair, ECLI:EU:C:2010:251 at [22] (the case concerned the Montreal Convention for the Unification of Certain Rules for International Carriage by Air).

2. RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS

KEY FINDINGS

- The Draft Convention addresses the risk of interference with other international instruments in two ways: to some extent it prevents that risk from arising in the first place by excluding from its scope a number of matters governed by specialised conventions; for the rest, it makes a point of managing possible conflicts, notably by stating the primacy of pre-existing conventions (and, subject to appropriate qualifications, subsequent conventions) dealing with the recognition of judgments.
- The means employed to avoid or minimise conflicts do not substantially differ from those used in other instruments and can be expected to function well.
- By their nature, treaty conflicts may give rise to delicate issues: however, as far as the Draft Convention is concerned, difficulties should not be frequent and should not prove harder to overcome than under other PIL instruments.

The EU and its MSs are parties to several international conventions on the recognition and enforcement of judgments in civil and commercial matters. Some are primarily concerned with the recognition of judgments (and the direct jurisdiction of courts), and are mostly general in scope, such as the Lugano Convention, which is in force for the EU in its relationship with Denmark, Iceland, Norway and Switzerland. Other conventions address a variety of issues alongside recognition, but have, in turn, a narrower material coverage. The Draft Convention potentially interferes with the operation of the above instruments whenever its rules, on the one hand, and the rules in one or more of such instruments, on the other, are at least *prima facie* applicable to the recognition of the judgment concerned. For a risk of interference to arise, the judgment concerned must normally come with the scope of international rules that are in force for both the State of origin of the judgment and the requested State. Thus, the Draft Convention, if in force for the EU, could in principle interfere with (or suffer the interference by) the international instruments to which the individual EU MS where recognition is sought is a party, or the EU itself is a party.

The Convention addresses the risk of interference with other international instruments in basically two ways: by excluding altogether from its scope the subject matter of some multilateral conventions concerning specific matters, thereby preventing conflicts from arising in the first place; by clarifying the operation of its own rules in situations falling within the scope of other instruments, thereby ensuring the management of possible conflicts.

2.1. Conflict prevention

As previously noted, some of the exclusion in Art 2 of the Draft Convention reflect a concern for treaty conflicts: where recognition is sought of a judgment in an excluded matter, the Convention neither interferes with, nor suffers any interference from, instruments on that matter.

2.1.1. Instruments originating from the Hague Conference on Private International Law

The Draft Convention refrains from dealing with matters covered by instruments elaborated within the Hague Conference. The exclusion of 'maintenance obligations' from the scope of the Convention, pursuant to Art 2(1)(b), translates precisely this concern, as this is a matter governed by the 2007 Hague

Convention on the International Recovery of Child Support (in force for the EU and various third countries) and other previous instruments. Similar remarks apply to the exclusion of matters relating to 'the status and legal capacity of natural persons', which form the object of the 1970 Convention on the Recognition of Divorces and Legal Separations (in force for thirteen EU MSs), and the 2000 Convention on the International Protection of Adults (currently in force for eight EU MSs).

In the same vein, the Draft Convention seeks to avert interference with the 2005 Choice of Court Convention. Here, however, the approach is different, since the material coverage of the two instruments is largely the same, and the special character of the 2005 Convention rather owes to the fact that its rules are only concerned with exclusive choice-of-court agreements, ie, agreements that confer jurisdiction on the designated court(s) 'to the exclusion of the jurisdiction of any other courts'. The Draft Convention stipulates in Art 5(1)(m) that a judgment is eligible for recognition if it 'was given by a court designated in an agreement concluded or documented in writing', but goes on to clarify that this basis for recognition is only available where the agreement in question is not exclusive within the meaning of the Choice of Court Convention. If the agreement is exclusive, and the conditions for the applicability of the Choice of Court Convention are met, then the latter Convention, rather than the Draft Convention, will apply. The two instruments are meant to operate in parallel, and complement each other on grounds of speciality. The Draft Convention and the Choice of Court Convention do overlap, however, when the issue arises of the recognition of a judgment originating from a country other than the country (whose courts have been) designated under a choice of court agreement. Pursuant to Art 7(d) of the Draft Convention, recognition may in fact be refused (absent any other eligible basis for recognition) no matter whether the jurisdiction thus conferred was exclusive or not. Thus, in the latter scenario, both instruments would provide a basis for denying recognition. Their concurrent application, however, should not be problematic here, as they would lead in fact to the same practical result.

2.1.2. Specialised instruments on carriage, maritime matters and nuclear damage

Art 2 of the Draft Convention equally seeks to avert the risk of conflicts with multilateral conventions elaborated outside the Hague Conference. Specifically, Art 2(1)(f), (g) and (h) aim to ensure the undisturbed operation of the various international instruments which regard, respectively, the international carriage of passengers and goods, maritime matters (including marine pollution and emergency towage and salvage), and liability for nuclear damage. Thus, for example, if the Convention were in force for the EU, a judgment given in a third country bound by the 1956 Geneva Convention on Carriage of Goods by Road (CMR) in respect of carriage under that instrument, would still be recognised in an EU MS in accordance with the latter Convention (which is in force for all MSs), rather than the Draft Convention. Conversely, the recognition of an EU judgment will still be governed in a third State by the CMR, no matter whether such State might also be a party to the Draft Convention. Similar findings apply to instruments such as the 1974 Athens Convention on the Carriage of Passengers and their Luggage by Sea, the 2001 Convention on Civil Liability for Bunker Oil Pollution Damage or the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy.

2.1.3. Instruments relating to arbitration

The Draft Convention makes clear in Art 2(3) that it does not apply to 'arbitration and related proceedings'. The exclusion prevents the risk of interference with international instruments in the field of arbitration, such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. By referring to both arbitration and proceedings 'related' to arbitration, Art 2(3) clarifies that the Draft Convention neither ensures nor prevents the recognition of decisions taken by State courts in support of arbitral proceedings (such as decisions appointing or dismissing arbitrators),

or decisions otherwise connected with such proceedings or the resulting award (such as decisions whereby the parties are compelled to proceed to arbitration, or decisions that set aside arbitral awards). One notable implication of the exclusion is that Art 4(1) of the Draft Convention – according to which recognition may be refused 'only on the grounds specified in [the] Convention' itself – does not prevent a State bound by the Convention from denying the recognition of a judgment resulting from proceedings that were contrary to an arbitration agreement, no matter whether the judgment emanates from a State bound by the Convention and would otherwise be eligible for recognition thereunder.[22]

2.1.4. Rules concerning the immunities of States and international organisations

Nothing in the Draft Convention, as stated in Art 2(5), affects the 'privileges and immunities of States or of international organisations'. This prevents the risk of conflicts with the international rules, customary or conventional, whereby sovereign States and international governmental organisations are immune, in appropriate circumstances, from the civil jurisdiction of other States, including as regards the enforcement of judgments. Thus, for example, if the EU were a party to the Draft Convention, EU MSs would not be required to enforce a decision originating from a State bound by the Convention whenever doing so would infringe the privileges and immunities of the EU, as they result from Protocol (No 7) to the TFEU, or would defeat the provisions in a seat agreement between the requested State and an international organisation.

2.2. Conflict management

The Draft Convention includes provisions aimed at managing conflicts with international instruments, bilateral and multilateral, which either lay down rules on the recognition of judgments in matters governed by the Convention itself, or otherwise affect its operation.[23] Basically, these provisions follow four approaches.

2.2.1. Management by interpretation

Treaty conflicts may often be mitigated, if not overcome entirely, through interpretation.[24] Art 25(1) alludes to the potential of interpretation for solving treaty conflicts by prescribing that the Draft Convention be interpreted 'so far as possible to be compatible with other treaties' in force for contracting States. This implies that, where a provision in the Convention lends itself to two or more readings, the interpretation to be preferred is the one that enables the Convention and such other treaties to operate harmoniously. The provision actually reiterates and clarifies the customary rule of treaty interpretation codified in Art 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties, according to which regard should be had to 'any relevant rules of international law applicable in the relations between the parties'.[25]

Codified rules of treaty interpretation are likely to solve conflicts in other situations, as well. This is true, in particular, of the rule in Art 31(1) of the Vienna Convention according to which a treaty must be interpreted 'in the light of its object and purpose'. Specifically, this rule will prove helpful where recognition is sought of a judgment for which two or more international recognition regimes are in

[22] Preliminary Report, para. 56.
[23] For an overview of the rules of public international law that govern treaty conflicts, forming the background against which the provisions in the Convention have been framed, see Schulz (2003).
[24] Borgen (2005) pp. 587 ff.
[25] See generally on this provision, Merkouris (2015).

force between the State of origin and the requested State. If the purpose of those regimes is to facilitate recognition, then applying the regime that makes recognition easier in the circumstances should not be seen as an infringement of the other regimes, as interpreted in accordance with the goals they pursue (*interpretatio in favorem*).[26]

2.2.2. Management by subordination

Pursuant to Art 25(2), the Draft Convention 'shall not affect' the application by a contracting State of a treaty concluded prior to the entry into force of the Convention for such State. The provision – a compatibility clause, or 'non-affect' clause,[27] as may be found in numerous conventions in the field of PIL[28] – preserves existing conventions as may be applicable between the State of origin and the requested State. Thus, in the scenario of the Draft Convention being in force for the EU and Switzerland, a judgment given in an EU MS will still be recognised in Switzerland under the Lugano Convention. In reality, the compatibility clause in Art 25(2) does not entail that pre-existing conventions will systematically take precedence over the Draft Convention. The purpose of the provision is rather to clarify that the Draft Convention does not have the ambition of superseding those conventions altogether, and that possible conflicts might then be addressed otherwise, namely by means of interpretation. Accordingly, for the reasons illustrated in the previous paragraph, recognition will follow either the Draft Convention or the relevant pre-existing treaty, depending on whether, in the circumstances, recognition can more easily be achieved under one regime instead of the other.

Art 25(3) extends the scope of the above 'non-affect' clause to instruments concluded after the entry into force of the Draft Convention, albeit only 'for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that instrument'. Subsequent conventions are thus to enjoy priority over the Draft Convention to the extent to which the former would result in the recognition of a judgment that would not qualify for recognition under the Draft Convention. The rationale lies, once more, in the *in favorem* approach described above.

2.2.3. Management by disconnection

The Draft Convention comes with a 'disconnection clause' aimed at resolving conflicts with the rules on recognition in force between Member States of a REIO, such as the EU, bound by the Convention. Disconnection clauses –actually a variation of compatibility clauses and an increasingly frequent occurrence in PIL conventions[29]– are provisions whereby the treaty they belong to refrains from regulating situations that form the object of instruments in force for some contracting States, as long as those situations merely concern two or more of such contracting States.[30] Under Art 25(4), the Draft Convention is without prejudice to the application of the rules on recognition of a REIO, 'whether adopted before or after [the] Convention'. In practice, were the Draft Convention in force for the EU, a judgment rendered in an EU MS would keep being recognised in all other MSs in accordance with Brussels Ibis, where applicable, rather than the Draft Convention.

[26] On the use of the principle of 'maximum effectiveness' to address treaty conflicts in the area of private (international) law, see Brière (2001) pp. 183 ff, and Sadat-Akhavi (2003) p. 240 ff.
[27] Generally speaking, compatibility clauses are treaty provisions the purpose of which is to regulate the relationship between the treaty they form part of and existing (and possibly subsequent) instruments on the same matter and in force for the same parties, Volken (1977) pp. 252 ff.
[28] See further Álvarez González (1993) pp. 39 ff., Brière (2001) pp. 42 ff.
[29] See, e.g., Article 13(3) of the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects, and Article 52(2) of the 1996 Hague Convention on Measures for the Protection of Children.
[30] See generally Borrás (2004), pp. 57 ff., and Neframi (2008) pp. 477 ff.

2.2.4. Management by adaptation

In particular circumstances, the operation of the Draft Convention undergoes some adaptation as a means to take the existence of particular international instruments into account. This occurs, in particular, where the issue arises of the recognition of judgments rendered by a court common to two or more States, such as the Benelux Court of Justice, or the future Unified Patent Court. The relevant provision, actually still in square brackets (to denote on-going discussion), is Art 21 of the Draft Convention. It clarifies under which circumstances and subject to which conditions a judgment given by such a common court, possessing jurisdiction over matters within the scope of the Draft Convention, is be regarded as a judgment of a contracting State for the purposes of the Convention itself. The provision also specifies how the reference to the 'State of origin' of a judgment, in Arts 5 and 6, should be interpreted as regards the recognition of a judgment given by a common court. On this issue see further Section 3.4, below.

2.3. Assessment

The negotiators of the Draft Convention deployed considerable efforts to avoid interference with other international instruments, or minimise their impact. The means employed appear to be adequate. Their practical operation, however, may in particular situations give rise to some difficulties.

2.3.1. Conflict prevention

The strategy that consists in excluding sectors of civil and commercial law from the scope of the Convention to prevent treaty conflicts results, by definition, in a fragmented legal landscape, with different groups of judgments falling under separate sets of rules. This shortcoming is of little practical significance as long as the rules in question (i) clearly define their respective scope of application, (ii) employ for this purpose a common language, and (iii) ensure, all in all, a sufficiently broad coverage of the civil and commercial area, leaving relatively few gaps.

As far as the Draft Convention is concerned, the first two conditions seem to be met. In shaping the scope of the excluded matters, the Draft Convention employs a language that either largely corresponds to that of the instruments with which the Convention itself seeks to avoid conflicts, or otherwise benefits from clarification provided by State practice or the work of the relevant international organisations (including the Hague Conference itself). For instance, it should not prove overly difficult to reach a relatively uniform understanding of the expressions 'insolvency', 'composition' and 'resolution of financial institutions', which describe the exclusion under Art 2(1)(e). The commonly accepted meaning of those expressions may in fact be drawn, with an acceptable degree of precision, from the 1997 UNCITRAL Model Law on Cross-Border Insolvency, as clarified and complemented through the work of UNCITRAL's Working Group V,[31] or from documents adopted by the Financial Stability Board (FSB).[32] Needless to say, this does not rule out the risk of divergent interpretations altogether. It is worth noting, in any case, that the Hague Conference provides a permanent forum of discussion on the operation of its instruments, which effectively enhances, in the long term, the uniform interpretation of those instruments.[33]

The third requirement – the prospect of achieving a comprehensive set of internationally uniform rules on the recognition of judgments – largely depends on political considerations, such as the issue of whether a more-than-regional unification of the rules governing the recognition of judgments in

[31] See UNCITRAL Model Law on Cross-Border Insolvency (1997) with Guide to Enactment and Interpretation (2013) http://uncitral.org.
[32] See, in particular, 'Key Attributes of Effective Resolution Regimes for Financial Institutions' (2014 version) http://www.fsb.org.
[33] Franzina (2013) pp. 642 ff.

particular areas is a realistic option at this stage, and whether a move of this kind would indeed bring more benefits than costs. The on-going discussion on the inclusion of IP and privacy in the scope of the Draft Convention provides an illustration of the political stakes of the unification of the rules on recognition.

2.3.2. Conflict management

The tools whereby the Draft Convention coordinates with other international instruments dealing with the recognition and enforcement of judgments in matters covered by the Convention itself are rather well-known in kind and normally prove to function well. Admittedly, the practical use of those tools does not always represent an easy task, and practitioners may occasionally be faced with delicate interpretative issues (for instance, when the need arises to identify the most favourable of two or more regimes).

These difficulties, however, should not be overestimated. To begin with, they are likely to arise in a rather limited number of cases. Several 'old' conventions should clearly present themselves as being less favorable to recognition than the Draft Convention, thus paving the way to the undisturbed application of the latter out of a plain *in favorem* interpretation. This approach will likewise prove helpful to deal with the rather puzzling situation occurring where an international instrument benefiting from the non-affect clause in Art 25(2) of the Draft Convention features, in turn, a non-affect clause benefiting subsequent instruments, such as the Draft Convention itself. This is a scenario where the instruments in question simply accept to coexist one alongside the other, the solution of their conflict being left to other means, including interpretation *in favorem*.

Secondly, the kind of interpretive problems that the Draft Convention may trigger do not fundamentally differ from the problems raised by other international instruments in the area of PIL. In this respect, on-going efforts aimed at enhancing the training of legal professionals in this area of law throughout the EU are set to prove beneficial to the smooth functioning of the Draft Convention, also as regards the relationship with other international instruments.

3. INTERACTION WITH EU LEGAL FRAMEWORK

KEY FINDINGS

- Should the Draft Convention be adopted by the Union, it will mostly interact with EU rules on exclusive jurisdiction, while the effect on the EU rules on pending actions and on the recognition and enforcement of judgments is limited.
- The exclusive jurisdiction rules in Art 24 Brussels Ibis are sufficiently reflected in the Draft Convention and will not be undermined by it. It appears advisable, though, to seek a clarification in the Explanatory Report for proceedings concerned with the enforcement of judgments.
- For insurance contracts, the protection afforded by the exclusive jurisdiction rules of Brussels Ibis is not reflected in the Draft Convention. Parties are only protected if the contract can be qualified as a consumer contract in the sense of Art 5(2) Draft Convention.
- For consumer contracts (similar considerations apply to employment contracts), the level of protection in the Draft Convention is, in general, acceptable. The Draft Convention does not provide a plaintiff's forum in favour of the consumer. The EU negotiating party might consider trying to extend the protection under Art 5(2) of the Draft Convention also to the base for recognition and enforcement of Art 5(1)(k) (trust agreements).
- Should the Union decide to further participate in the negotiations with a view to join the Convention, it seems helpful to seek certain clarifications concerning Arts. 25(4) and 28(4) on REIOs.

At first sight, the relationship between the Draft Convention and the EU legal framework, in particular Brussels Ibis, seems to be clearly defined by Art 25(4) of the Draft Convention.[34] According to this provision, '[t]his Convention shall not affect the application of the rules of a REIO that is a Party to this Convention, whether adopted before or after this Convention as concerns the recognition or enforcement of judgments as between Member States of the REIO'. Nevertheless, the example of the existing Choice of Court Convention (where the issue is addressed in Art 26(6)) shows that there may be a certain need for coordination. The following section will address this need for coordination by analysing the interactions of the Draft Convention with the existing *acquis* in the field of civil and commercial matters. The analysis will focus on the rules of Brussels Ibis and not cover the EU Regulations on matters excluded from the Draft Convention.

3.1. Interaction with the EU rules on jurisdiction

3.1.1. Overview

As already noted, the Draft Convention does not establish any direct rules on jurisdiction. Therefore, both the EU and its MSs will (in general) remain free to preserve and adopt any rules on jurisdiction of civil courts as they please. Instead of harmonising jurisdiction rules, the Draft Convention provides for

[34] It should be mentioned that there seems to be little to none publications which address the interplay between existing EU law and the Draft Convention. For an analysis of a comparable problem, see in Canada, Bloom (2017) and for a perspective from a Brazilian point of view, see Moschen & Marcelino (2017) and De Araujo & De Nardi (2017).

'Bases for Recognition and Enforcement' (Arts 5, 6).[35] These bases only serve the purpose of defining eligibility for recognition and enforcement. They are, therefore, only 'indirect' rules on jurisdiction, because they do not prescribe or forbid taking jurisdiction over foreign defendants. They only say that where a judgment resulting from court proceedings shall later be recognised under the Convention, it must meet the requirements of one of the 'bases for recognition and enforcement'. Consequently, there is, in general, no impact of the Draft Convention on the rules of jurisdiction found in EU regulations or in the laws of the MSs. Having said that, however, a qualification is in order, and the reason for this is Art 4 of the Draft Convention. As a consequence of this provision, recognition and enforcement is mandatory for all signatory States to the Draft Convention, provided the requirements of Chapter II are met. In other words: Where the requirements of Chapter II are met, which include the 'Bases for recognition and enforcement' in Arts 5 and 6, the judgment has to be enforced. This has two consequences for the jurisdictional rules of the EU (and its MS).

First, it will no longer be possible to refuse recognition and enforcement of judgments from States that adopted the Draft Convention if the requirements of Arts 5 and 6 are met. This holds true even if the jurisdictional rules of the EU or its MSs provide for an exclusive competence in the EU in such a situation (which, under present law, makes a judgment from another state than the one having exclusive jurisdiction unenforceable).[36] The EU rules on exclusive jurisdiction need not be changed (and would still be effective in relation to states which have not adopted the Draft Convention), but they would be ineffective to block recognition of judgments from third states which adopted the Draft Convention. The adoption of the Draft Convention could thus undermine all those exclusive rules of jurisdiction in EU law that are not reflected in the Draft Convention.[37]

Second, the introduction of the 'Bases for Recognition and Enforcement' raises the question whether all of these are already reflected in EU law. While it would (arguably) be compatible with the Draft Convention not to have such 'bases' in EU law (at the price that the potential of this 'bas' to have one's own judgments enforcement abroad is lost), it seems advisable to have such rules in order to fully benefit from the Convention. By and large, it can be said that EU jurisdiction rules reflect most of the 'bases of recognition and enforcement' of Art 5 of the Draft Convention, albeit sometimes not in the same form and scope. The fact that the indirect jurisdictional rules do not always mirror the jurisdiction rules of Brussels Ibis is not as such a reason to reject them. However, EU MS remain obliged to apply the EU jurisdiction rules whenever their application requirements are met - typically, when the defendant has its domicile in a MS. This may entail that a judgment delivered by a court of an EU MS is not eligible under the Convention. For instance, in the case of torts, in application of the Brussels Ibis Regulation claimants willing to file an action with the courts of an EU MS may chose as well the place of the harm, Art. 7.2 as interpreted by the CJEU.

3.1.2. Relationship with the rules on exclusive jurisdiction in the Brussels Ibis Regulation

For the reason explained above, we will now compare the rules for exclusive jurisdiction in the Draft Convention and Brussels Ibis. The analysis will be limited to the EU rules of jurisdiction, not those of the Member States, even if EU rules may not apply because MSs may evaluate jurisdiction, in the context of recognition and enforcement of judgments from third states, according to their domestic

[35] For a concise analysis of these provisions, see Wagner (2017) p. 100.
[36] As recognition and enforcement of judgments from third states is governed by national law, this is provided for in national law. The parallel provision for enforcement of judgments within the EU is Article 45(1)(e) Brussels Ibis.
[37] See Schack (2014) p. 836, pointing out that the exclusive jurisdiction rules must be in a future Hague Judgment Convention.

jurisdiction rules.[38] Still, the EU rules are a useful common denominator. In the rules on exclusive jurisdiction, two groups can be distinguished.

A first group of exclusive jurisdiction rules are found in Art 24 Brussels Ibis. In this context it is necessary to compare those rules with the respective provisions of the Draft Convention. On the text of the relevant provisions, see Annex III, below.

The comparison shows that the grounds of Art 24(1)-(3) Brussels Ibis are either reflected in the Draft Convention or excluded from its scope. Consequently, the EU rules on these matters will not be affected. For proceedings concerning the registration or validity of registered IP rights – an issue where it is apparently still unclear whether it will be included at all (see Art 2(1)(m) Draft Convention, which is in brackets), the proposed Art 6(a) Draft Convention reflects Art 24(4) Brussels Ibis. However, it does not include the clarification inserted in Art 24(4) ('irrespective of whether the issue is raised by way of an action or as a defence') which – contrary to other matters – extends exclusive jurisdiction to scenarios where validity of the registered IP right is raised as an incidental or preliminary question of the dispute (e.g. validity in an infringement dispute). However, Art 8 of the Draft Convention seems to solve this problem. Moreover, it seems likely that jurisdiction for IP disputes will be limited to the state of registration or protection in general (see Art 5(3) Draft Convention; the proposal is in brackets, though). Should this particularly restrictive approach be the outcome of negotiations, it appears to be of no relevance how broad exclusive jurisdiction for validity and registration of registered IP rights is defined, as even in infringement cases only judgments from the courts of the state of registration will be eligible for recognition and enforcement under the Draft Convention. In this connection, it can be noted that the restrictive approach on the recognition of judgments concerning IP disputes that results from Art 5(3) of the Draft Convention (in connection with other provisions such as Arts 7(g) and 11) are not satisfactory from the perspective of the existing EU jurisdiction rules in that matter and the needs of cross-border litigation.[39]

This leaves one matter that, at first sight, is not sufficiently reflected in the Draft Convention, namely exclusive jurisdiction for proceedings concerned with the enforcement of judgments. The problem may be solved by Art 3(1)(b) which defines a 'judgment' as a 'decision on the merits'. This, arguably, could exclude decisions on remedies brought at the enforcement stage (e.g. that the claim has been fulfilled after the judgment had been rendered). Moreover, Art 14 of the Draft Convention subjects the procedure for enforcement to the 'law of the requested State unless this Convention provides otherwise', which could be seen as a further hint that any remedy against enforcement falls outside the scope of the Convention (or, at least, in the exclusive jurisdiction of the state of enforcement). Still, the intention of the Convention's drafters in this respect could be clarified in the Explanatory Report. The Preliminary Report states that decisions on recognition and enforcement of foreign judgments or arbitral awards and enforcement orders cannot be recognised or enforced under the Convention.[40] However, there are other proceedings that relate to enforcement, e.g. an action to find that the claim for which the judgment has been granted has later been fulfilled or otherwise been extinguished, or an action claiming unlawfulness of the specific measures of enforcement taken. A word on such actions may be helpful.

[38] In Germany, for example, it is debated whether in the context of recognition of judgments from third states, the examination of the jurisdiction of the court of origin is to be done according to German rules of jurisdiction (§ 328(1) No 1 Zivilprozessordnung excludes recognition 'if the courts of the state to which the foreign court belongs do not have jurisdiction according to German law') or whether the rules of Brussels Ibis are also to be considered.
[39] European Max Planck Group on Conflict of Laws in Intellectual Property (2013) pp. 388 ff.
[40] Preliminary Report, para. 69.

3.1.3. Insurance, consumer and employment contracts

A second group of exclusive jurisdiction rules in Brussels Ibis relate to insurance, consumer and employment contracts. These rules are not 'exclusive' in a strict sense. Rather, in these areas Brussels Ibis, according to recital 18, seeks to protect the weaker party 'by rules of jurisdiction more favourable to his interests than the general rules'. In general, this is done by allowing the consumer or employee to bring proceedings against the other party either in the courts of the MS in which the other party is domiciled or where the consumer is domiciled (Art 18(1) Brussels Ibis) or where the employee habitually carries out his work (Art 21(1)). If a judgment conflicts with the jurisdiction rules protecting consumers or employees or (in case of insurance) the policyholder, the insured or a beneficiary and the 'protected party' was the defendant, the judgment will not be enforceable (Art 45(1)(e)(i) Brussels Ibis). The Draft Convention deals with the protection of consumers and employees in Art 5(2) in a different manner.[41] Furthermore, it does not include special rules for insurance, nor does it exclude this matter from its scope. Consequently, the protection for the policyholder, the insured or a beneficiary under Art 14 Brussels Ibis is not reflected in the Draft Convention. These parties are thus only protected under the general rules for consumer contracts (Art 5(2) Draft Convention).

The definition of a consumer in Art 5(2) of the Draft Convention[42] (a natural person acting primarily for personal, family or household purposes in matters relating to a consumer contract) is similar to the definition under Art 17(1) Brussels Ibis. However, Art 5(2) of the Draft Convention does not include the further requirements of Art 17(1)(a)-(c) Brussels Ibis. This makes the scope of application of the special rules for consumer contracts slightly broader under the Draft Convention. Concerning employment contracts, the Draft Convention does not provide a definition, but the Preliminary report states that it is intended to cover 'salaried workers at any level'.[43] Both Brussels Ibis (Art 20(1): 'individual contract of employment') and the Draft Convention[44] exclude collective agreements from the scope of the protective rules for employment contracts.

Concerning the jurisdiction filters for consumer (and employment[45]) contracts, the starting point in the Draft Convention is Art 5(2), a provision which excludes certain 'bases for recognition and enforcement' under Art 5(1) if recognition or enforcement is sought against a consumer in matters relating to a consumer contract, or against an employee in matters relating to the employee's contract of employment. This exclusion concerns in particular jurisdiction based on the consumer's (or employee's) consent. Art 5(2) of the Draft Convention excludes the application of Art 5(2)(f) (jurisdiction based on the defendant arguing on the merits before the court of origin without contesting jurisdiction[46]) and (m) (jurisdiction based on a non-exclusive choice of court agreement). This leaves only the possibility of express consent of the consumer in the course of proceedings (Art 5(1)(e) Draft Convention), and this consent must (Art 5(2) Draft Convention) have been addressed to the court, orally or in writing. As such consent must be given 'in the course of proceedings' (Art 5(1)(e) Draft Convention), this limited form of consent must have been entered into after the dispute has arisen and would thus also be permissible under Art 19(1) Brussels Ibis.

Many of the other 'bases of recognition' of Art 5(1) Draft Convention for an action against a consumer appear to be similar to the jurisdiction grounds permitted under Brussels Ibis. Both Art 18(1) Brussels

[41] Arguing in favour of excluding consumer and employment disputes Schack (2014) 832.
[42] The definition has been taken from other international conventions, see Report, para. 204.
[43] See Report, para. 205.
[44] See Report, para. 206.
[45] As the rules on both contracts are similar in the two instruments, the analysis focuses on consumer contracts.
[46] In this respect, Article 26(2) Brussels Ibis seems to be more liberal as it allows jurisdiction based on submission if 'the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance'.

Ibis and Art 5(1)(a) of the Draft Convention allow recognition where the judgment has been handed down by the courts at the consumer's domicile (Brussels Ibis) or habitual residence (Draft Convention). Moreover, Art 18(3) and Art 5(1)(l) (the latter with some restrictions, which in this scenario will benefit the consumer) are also in agreement in allowing a counter-claim against the consumer in the court where the consumer has brought his action. Finally, Art 17(1) Brussels Ibis ('without prejudice to point 5 of Art 7') and Art 5(1)(d) Draft Convention allow jurisdiction where a branch of the defendant is situated, a form of jurisdiction which is very unlikely (if at all possible) to apply to consumers as defendants. Moreover, Art 5(2) of the Draft Convention excludes the general rule of Art 5(1)(g) for jurisdiction for contractual disputes, as it is excluded by Art 17(1) Brussels Ibis.

It remains to be asked whether the other grounds under Art 5(1) Draft Convention which are not excluded by Art 5(2) go beyond the bases of jurisdiction for actions against consumers under Brussels Ibis. No problem is posed in this respect by Art 5(1)(j) for jurisdiction in non-contractual matters, as such actions do not fall under the protective rules of Arts 17-19 Brussels Ibis for consumer contracts.[47] Another acceptable provision in this regard is Art 5(1)(c) of the Draft Convention. It allows recognition against the person that brought the claim: if a consumer (or employee) chooses a specific court to sue actively the other party of the contract, it is only fair that a judgment in this venue can be recognised against the consumer (or employee). The jurisdiction at the principal place of business (Art 5(1)(b)) will not apply to consumers or employees for lack of a "business". This leaves jurisdiction for 'tenancy of immovable property' (Art 5(1)(h)), jurisdiction for a contractual obligation secured by a right *in rem* in immovable property (Art 5(1)(i)) and jurisdiction concerning a voluntary trust (Art 5(1)(k)) to be scrutinised. The jurisdiction for 'tenancy of immovable property' in Art 5(1)(h) leads to jurisdiction in the place where the property is located which is also provided for under the exclusive jurisdiction rule of Article 24(1) Brussels Ibis;[48] the provision should therefore not be of concern from a consumer protection point of view.

The same holds true for the other two of the grounds mentioned (obligation secured by a right in rem; trust; Arts 5(1)(i) and (k) of the Draft Convention). These grounds of jurisdiction are also known in Brussels Ibis, but they are grounds of special jurisdiction (Art 8(4) and Art 7(6) Brussels Ibis). As such, they are excluded by the special protective rules for consumer contracts if the agreement in question (obligation secured by a right *in rem*, trust agreement) can be qualified as a consumer contract falling under Art 17(1) Brussels Ibis. In the case of an obligation secured by a right *in rem*, it may be argued that the protection is not effective, as the consumer will face the parallel action under the right *in rem* in immovable property given as security in the courts where the property is located (so it does not make sense to protect the consumer against the action based on the obligation in the same venue). In the case of trust agreements, it could be argued that these will not qualify as a consumer contract in the sense of Art 5(2) of the Draft Convention. However, if this is true, it would also do no harm to expressly exempt Art 5(1)(k) by mentioning it in Art 5(2).

A last word should be said on the plaintiff's forum established in favour of the consumer in Brussels Ibis. Only Art 18(1) Brussels Ibis, not the Draft Convention provides for a *forum actoris* of the consumer, ie a judgment rendered at the place of the consumer's domicile (or habitual residence) would not be recognised and enforced under the Convention. This fails to introduce the consumer's privilege of a *forum actoris* into the Draft Convention. Given the different ideas about the desirability of consumer

[47] Mankowski & Nielsen (2016) at [37].
[48] The additional forum of common habitual residence of landlord and tenant for leases for private use of a maximum of six months of Art 24(1) second sentence Brussels Ibis is not reflected in the Draft Convention, but it seems dispensable as exclusive jurisdiction under the Draft Convention covers only (as an option) tenancies of more than six months (Art 6(c) Draft Convention).

protection worldwide, it seems unrealistic to try to impose a European privilege for consumers into a Convention aimed at the entire world.

3.2. Interaction with the EU rules on lis pendens

Another field of interaction between the existing EU acquis with the Draft Convention are the rules on pending actions (*lis alibi pendens*). For conflicting actions pending in an EU MS and a third State, Art 33 Brussels Ibis Regulation permits, for certain grounds of jurisdiction and under certain requirements, a stay by a court of a MS in favour of proceedings in a third State on an optional basis ('court of the Member State may stay the proceedings'). Because of the optional nature of the stay, the action in the MS will not necessarily be stayed even if the proceedings in the third State were initiated before the action in the EU MS has been started. The Draft Convention, on the other hand, does not address *lis alibi pendens*. However, it seems to permit a stay of enforcement by the requested State in favour of proceedings pending in its own courts only where 'the court of the requested State was seised before the court of origin' (Art 7(2)(a) Draft Convention). Thus, the decision of the court of the MS to proceed with its later action, which is possible and permitted under Art 33 Brussels Ibis Regulation, may be thwarted if the proceedings in the third state signatory to the Draft Convention lead to a judgment before the action in the EU Member State is finished, as such a judgment would benefit from the obligation of recognition under the Draft Convention. However, this scenario is already addressed by Art 33(3) Brussels Ibis Regulation which requires a court of the MS to dismiss its proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that MS. The court deciding about a stay under Art 33 Brussels Ibis Regulation should consider this possibility already when deciding about the (optional) stay of proceedings.

3.3. Interaction with the EU rules on recognition and enforcement

Finally, the interaction with the EU rules on recognition and enforcement should be mentioned. In principle, there is no conflict between the Draft Convention and the Brussels Ibis Regulation in this field because Art 16 of the Draft Convention expressly permits more favourable national rules on recognition and enforcement. It is true that Art 6 of the Draft Convention ('subject to Art 6') restricts this *favor recognitionis* principle.[49] However, this should be of no concern to the EU. First, the grounds of Art 6 of the Draft Convention are very similar to Art 24 Brussels Ibis Regulation. More importantly, Art 25(4) of the Draft Convention states that '[t]his Convention shall not affect the application of the rules of a REIO that is a Party to this Convention, whether adopted before or after this Convention as concerns the recognition or enforcement of judgments as between Member States of the REIO'.[50] While this provision should dispel all doubts, it may be helpful to ask for an amendment of the Preliminary Report to Art 16 stating that Art 25(4) permits the application of more favourable rules on recognition and enforcement in a REIO without the reservation of Art 6. Concerning the relationship between potentially conflicting judgments from an EU MS and a third State, both Art 45(1)(d) Brussels I Recast Regulation and Art 7(1)(f) Draft Convention give precedence to the first judgment which meets the conditions of recognition. Therefore, there does not seem to be a conflict in this respect.

[49] This means that 'national law cannot be invoked to grant recognition or enforcement of a judgment that has infringed the exclusive bases of jurisdiction set out in that provision', see Preliminary Report, para. 314.
[50] See Schack (2004) p. 831.

3.4. Other issues

Finally, two other issues shall be briefly mentioned. First, it appears to be not entirely clear how the 'bases for recognition and enforcement' in Arts 5 and 6 of the Draft Convention are to be interpreted in the case the EU joins together with the MSs. Many of these provisions refer to certain elements to be found in the 'State of origin' in order to establish an accepted 'base for recognition and enforcement'. For instance, Art 5(1)(j) of the Draft Convention allows recognition and enforcement if 'the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred'. Art 4(1) defines the 'State of origin' as the Contracting State where the court has rendered the judgment to be recognised. In the case of a REIO as the EU, Art 28(4) of the Draft Convention provides that '[a]ny reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a REIO that is a Party to it'. This raises the question whether, for instance in the case of Art 5(1)(j) of the Draft Convention, the act or omission must have directly caused harm in a specific EU MS (so that only judgments from that MS would qualify for recognition and enforcement under the Convention), or whether it is sufficient that the harm was caused in the EU for any EU court's judgment to be recognised and enforced under the Convention. In other words, it seems helpful to clarify in the Explanatory Report how Art 28(4) of the Draft Convention is applied to the different references to Contracting States in Arts 5 and 6 if these Contracting States form part of a REIO. In particular, it should be explained what the proviso 'where appropriate' in Art 28(4) means.[51]

A second point concerns the integration of common courts of two or more Member States.[52] Such a court may be established in the future should the Unified Patent Court come into existence. Art 21 of the Draft Convention provides for the possibility of a declaration to include such a court in the structure of the Convention. As the Unified Patent Court has been established under an international Convention and not (only) on the basis of EU law, the relationship between enforcement under this agreement and the Draft Convention ought to be considered. Art 82 of this Agreement on a Unified Patent Court (and Rule 354 of the Rules of Procedure of the Unified Patent Court) provide for automatic enforcement of the decisions and orders of this court in all Contracting States of the Agreement on a Unified Patent Court. Due to its nature as an international Convention, it is not entirely clear whether the Agreement of the Unified Patent Court will fall under Art 25(4) of the Draft Convention. While it seems likely that the Agreement on the Unified Patent Court will enter into force before the Draft Convention does (and would thus fall under Art 25(2) of the Draft Convention), the EU institutions may be well advised to consider this agreement and possibly add a clarification in the Explanatory Report on Art 25.

[51] The Preliminary Report covers so far only the arts of the Draft Convention up to Art 17. The rules on 'non-unified legal system' (which probably would not fit the EU) do not apply to REIOs, see Arts. 24(4) and 27(4).
[52] On this point, see Würtenberger & Freischem (2017) p. 884.

4. FUTURE IMPACT OF THE JUDGMENTS CONVENTION ON THE REGULATION OF INTERNATIONAL DISPUTES

KEY FINDINGS

- The future impact of the Convention will depend on whether the national rules of the future contracting states are more conservative than the regime established by the Convention.
- The Convention would not improve the circulation of judgments between the United States and the Member States considered in this study (DE, ES, FR, IT and LU).
- The Convention being more liberal than the laws of England, India or Australia, it would lead such states to enforce judgments that they do not currently enforce.
- US negotiators have successfully limited the ambition of the Convention in accordance with their own standards.
- An option would be to explore whether a more ambitious and practically useful Convention, following European standards of jurisdiction, could be accepted by a significant number of other states

4.1. Introduction

The objective of the Convention is to facilitate the circulation of judgments as between the future contracting states. As already, noted, the Draft Convention would not prevent a contracting state from applying national rules if the latter were more liberal than the regime established by the Convention (Art 16). 'The Draft Convention sets out a minimum standard for mutual recognition or enforcement of judgments, but states may go further than that standard'.[53]

The future impact of the Convention will therefore depend on whether the national rules of the future contracting states are more conservative than the regime established by the Convention. The rationale of the project is built on the understanding that a restrictive approach to recognition and enforcement of foreign judgments prevails in many states around the world and that it is in principle to be expected that the new regime will typically be more favourable than domestic rules in the field. This, however, should be verified, and from the EU perspective a dual analysis should be conducted. On the one hand, the Draft Convention should be compared to the national rules on the enforcement of foreign judgments of the MSs. That analysis would allow policy makers to assess whether the Draft Convention would force MSs to recognize judgments rendered in third states that they do not currently recognize. On the other hand, the Draft Convention should be compared to the rules on the enforcement of foreign judgments of third states. It is indeed essential to assess whether the Draft Convention would force third states to recognize judgments rendered by the courts of EU MSs. Quite clearly, the interest of the MSs and of the EU is first and foremost to see an improvement of the status of judgments rendered by the courts of the MSs outside of the EU.

[53] Preliminary Report, para. 312.

It should also be underscored that the relevance of the Convention will be limited to those cases where there is a practical need to enforce judgments abroad.[54] Such need exists particularly where the defendant does not have assets in the state of origin of the judgment. While exceptional cases exist, defendants typically have assets in the state of their habitual residence/domicile, or where they have a permanent establishment. As a consequence, rules on the enforcement of judgments rendered in the state of the residence or establishment of the defendant in other states will have limited practical significance, as such judgments will typically be enforced in the state of origin.[55] Likewise, there will typically be no need to enforce a judgment settling a dispute on a particular property[56] outside the state where this property is situated.[57] It follows that the practical significance of the Convention should be assessed in those cases where a judgment is rendered against a defendant who has no presence in the state of origin, and thus likely no significant asset. These cases are essentially the following:

- In tort cases, a foreign defendant has caused a damage to a victim in the state of origin of the judgment. A typical example is damage resulting from defective products sold in the state of origin by a foreign manufacturer with no significant presence in that state. Cyber-torts regarding damages caused via the internet by foreign defendants are a more modern example.
- The defendant has performed a contract in the state of origin of the judgment. For instance, a foreign company has provided a service to a client who alleges a breach of contract and sues the service provider locally. Many such cases will be covered by a choice of court agreement, and thus fall in the following category.[58]
- The defendant has agreed to the jurisdiction of the court of the state of origin of the judgment, where he has no presence. Note that this case is covered by the Choice of Court Convention, and there is no need for a new Convention in that respect.[59]

4.2. Enforcement in selected EU Member States of judgments rendered in third States

We assess first whether the law of foreign judgments in selected EU Member States is more liberal or more restrictive than the regime of the Draft Convention. It is not possible to offer an analysis of the law of all MSs in this study, so we present the law of the four biggest Member States: France (and Luxembourg), Germany, Italy and Spain.[60]

4.2.1. France and Luxembourg

The French law of foreign judgments has been almost entirely developed by the French Supreme Court in civil and criminal matters.[61] French law has traditionally been highly influential in Luxembourg, and Luxembourgish courts have endorsed the most recent French precedents in the area of the law of foreign judgments.[62] Two of the requirements for the recognition and the enforcement of foreign judgments in France are similar to the grounds for refusal listed in Art 7 of the Draft Convention, namely that (1) the judgment should comport with French procedural and substantive public policy and (2)

[54] The Convention would also be relevant if there was a practical need to merely recognize judgments abroad, for instance to ensure that rights recognized by the judgments are respected abroad. Some fields where such need is particularly significant, such as family law or insolvency are excluded from the scope of the Draft Convention.
[55] As recognized by one of the US negotiators at the Hague Conference, Prof. R. Brand, in Brand (2013b), 99.
[56] For instance, a dispute on the ownership of a land or a building.
[57] See Brand (2013b), p. 99.
[58] Or will be covered by an arbitration agreement and fall within the scope of the 1958 New York Convention.
[59] Except for the marginal cases where the scope of the two instruments might not correspond.
[60] Given the decision of the UK to withdraw from the EU, the law of England which is followed by many third states, is analysed in section 4.3 below.
[61] Cuniberti (2017); Cuniberti (2007).
[62] Cuniberti (2014).

the judgment should not conflict with a French judgment or an earlier foreign judgment producing effect in France.

The most important requirement is that the foreign court has jurisdiction. The requirement is assessed by a flexible test which will be satisfied if any actual connection between the dispute and the foreign court can be identified. Such connection could be either with the parties or the subject matter of the dispute. It seems clear that French courts would enforce a judgment issued by the court of the place of performance of the litigious contract. In theory, the mere fact that the damage was suffered in the state of origin should also suffice to constitute an actual connection in a tort case. It appears, however, that the French Supreme Court has always found that such connection existed in cases where the wrongful act had at least been partly committed in the state of origin.[63] A last requirement is that the foreign judgment should not have been obtained for the purpose of avoiding the application of French law, which does not correspond to any of the grounds provided by the Draft Convention.

4.2.2. Germany

In Germany, the requirements for the recognition and the enforcement of foreign judgments in civil and commercial matters (excluding family matters) are found in § 328 (recognition) and §§ 722, 723 (enforcement) of the German Code of civil procedure (*Zivilprozessordnung*, or ZPO). Several of these requirements are similar to the grounds for refusal listed in Art 7 of the Draft Convention. In particular, recognition and enforcement shall be excluded if (1) the defendant who has not entered an appearance in the proceedings and who takes recourse to this fact, has not duly been served the document by which the proceedings were initiated, or not in such time to allow him to defend himself; (2) the foreign judgment is incompatible with a judgment delivered in Germany, or with an earlier judgment handed down in a foreign country that is to be recognised, or the foreign proceedings on which such judgment is based should not be incompatible with proceedings initiated earlier in Germany; (3) the recognition of the judgment would lead to a result that is obviously incompatible with essential principles of German law, and in particular with fundamental rights; and (4) it is not a final judgment ruling on substantive matters.
German law also requires that that the foreign court has jurisdiction in conformity with German jurisdictional rules. The relevant factors are, in contractual matters, the place of performance of the contractual obligation in question (§ 29, ZPO) and, in tort matters, the place where the harmful event occurred (§ 32, ZPO). Finally, German Law provides for one requirement which is not found in the Convention: reciprocity. Recognition of a foreign judgment is excluded if the courts of the foreign country do not recognise German judgments. It seems that reciprocity has sometimes been used as an indirect tool to block judgments from jurisdictions with doubtful standards concerning the rule of law and judicial independence.

4.2.3. Italy

In Italy, the law of foreign judgments is governed by Law No 218 of 31 May 1995 reforming the Italian PIL System. Art 64 of Law No 218 provides for seven requirements for the recognition and the enforcement of foreign judgments. Several of these requirements are similar to the grounds for refusal listed in Art 7 of the Convention, namely that the defendant was properly served with the document instituting the proceedings in the State of origin in accordance with the law of that State, and that the relevant fundamental procedural guarantees were complied with (Art 64(b)), that the judgment should have become final (Art 64(d)); that the judgment does not conflict with any final judgment rendered in Italy (Art 64(e)); that no proceedings should be pending before Italian courts between the same parties

[63] See, e.g., French *Cour de cassation*, 11 February 2015, *Aquatonic*, case no 14-10074: a tort committed in the US by a French resident is sufficiently connected to the US to justify the jurisdiction of the foreign court.

and in respect of the same cause of action, which were initiated before the foreign proceedings (Art 64(f)) and that the provisions of the judgment are not incompatible with Italian public policy (Art 64(g)).

Art 64(a) also requires that the foreign court has jurisdiction in conformity with the principles that govern jurisdiction under Italian law. Under those principles,[64] an Italian court would consider that a foreign court had jurisdiction where, in contractual matters, the relevant contractual obligation was performed within the jurisdiction of the foreign court and, in tort matters, where either the damage was suffered or the wrongful conduct took place within the jurisdiction of the foreign court.

4.2.4. Spain

The rules on recognition and enforcement of foreign judgments in civil and commercial matters are established in Arts 41 to 55 Law 29/2015, of 30 July, on International Legal Cooperation in Civil Matters.[65] The grounds for refusal are laid down in Art 46. Several of these grounds are similar to the grounds for refusal listed in Art 7 of the Draft Convention, namely incompatibility with substantive or procedural public policy; control of the proper notification of the proceedings to the defaulting defendant; incompatibility of the foreign judgment with a judgment given or recognized in Spain; incompatibility with an earlier judgment given in another State, provided that the earlier judgment fulfils the conditions necessary for its recognition in Spain; and pending proceedings between the same parties having the same cause of action before a Spanish court if the proceedings in Spain were first instituted. Spanish law also requires that the foreign judgment be final.

The assessment of the jurisdiction of the court of origin is governed by Art 46.1.c. It excludes recognition and enforcement where the foreign judgment had decided on a matter within the exclusive jurisdiction of Spanish courts or on any other matter if the jurisdiction of the court of origin is not the result of a reasonable connection. The existence of a reasonable connection with the dispute shall be presumed when the foreign court had relied on jurisdictional grounds similar to those provided for under Spanish law. Spanish jurisdiction rules are modelled to a great extent on the jurisdiction provisions of the Brussels Ibis Regulation. Therefore, the reasonable connection test required by Art 46.1.c. is typically fulfilled where a foreign judgment was rendered by a court of the place of performance of the contractual obligation in question or in matters of non-contractual obligations by a court of the place where the harmful event occurred.

4.3. Enforcement in selected third States of judgments rendered in EU Member States

Below, we assess whether the law of foreign judgments in selected third states is more liberal or more restrictive than the regime of the Convention. We limit our analysis to four states or groups of states, which were selected because 1) they adopt different approaches to the enforcement of foreign judgments and 2) some of them are the most important trade partners of the EU.

4.3.1. United States of America

The law on the recognition and enforcement of foreign judgments is not uniform in the US. Each of the 50 states has its own separate regime in this respect. However, the variations between the rules of the different states are limited.[66] Many states have adopted at least one of two uniform laws on the

[64] Remarkably, such principles are essentially found in the 1968 Brussels Convention, as Art 3(2) of the Italian Law has unilaterally extended the scope of the Brussels Convention to govern the jurisdiction of Italian courts where the defendant is domiciled in a third state.
[65] De Miguel Asensio (2017) p. 2534.
[66] See, e.g., Brand (2015) p. 889; Born & Rutledge (2011) p. 1081.

recognition of foreign judgments[67] and the other states follow an approach which is 'relatively consistent'[68] with the third American Restatement on Foreign Relations Law.[69]

The requirement that the foreign court has personal jurisdiction over the defendant is common to all these regimes. The reason why is that it has a constitutional foundation. The US Supreme Court has long held that the 14th Amendment to the US Constitution demands that courts only retain jurisdiction over defendants where certain minimum contacts exist between the defendant and the forum. This constitutional test is applied by US courts to define the extent of their own jurisdiction to decide disputes, but also to verify whether the jurisdiction of a foreign court was legitimate from the perspective of the US, and the judgment that it has rendered should thus be enforced in the US.[70] A peculiarity of US law is that the 14th Amendment demands, where the defendant is not sued in his home state, that there be a connection not only between the claim and the court which retained jurisdiction, but also between the defendant and that court. Under US constitutional law, a court may only retain jurisdiction over a defendant if the activities of the defendant in the state of origin constituted a purposeful and substantial connection to that state. Therefore, it is not enough that a product manufactured by the defendant was put in the stream of commerce elsewhere and was eventually used in the state of origin of the judgment and caused a damage there.[71] It is necessary that the defendant had purposefully availed itself of the market of the state where the product was eventually used and caused damage, for instance by making special marketing efforts to sell its product in that state.[72]

The essential consequence of this restrictive definition of jurisdiction is that a US court would not enforce a judgment issued by the court of the country where a US resident caused damage if that resident did not have other connections to that country. It also explains two important compromises of the drafters of the Convention. First, it explains why Art 5(1)(g) only accepts the jurisdiction of the place of performance of a contractual obligation 'unless the defendant activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to [the state of performance of the contractual obligation].' Second, it explains why Art 5(1)(j) is silent on the jurisdiction of the court of the place of the damage of a tort, thereby implicitly excluding it. The influence of US law on these two critical provisions seems clear.[73] The result is that, under the present draft, the US would not enforce foreign judgments that they do not already enforce.[74] In particular, US courts would not enforce judgments rendered by states where the products manufactured by US residents would have caused damage.

4.3.2. People's Republic of China

The Chinese law on civil procedure[75] provides that foreign judgments can be enforced in the People's Republic of China ('China') either on the ground of a treaty concluded between China and the state of origin of the judgment, or on the ground of reciprocity. China has entered into over 30 bilateral treaties providing for the enforcement of foreign judgments,[76] including with Russia, Brazil and nine MSs of the

[67] 1962 *Foreign Money Judgments Recognition Act* (adopted by 31 states, the District of Columbia and the Virgin Islands); 2005 *Foreign-Country Money Judgments Recognition Act* (adopted by 23 states and the District of Columbia).
[68] Brand (2014) p. 136.
[69] § 481 and 482, Restatement (third) on Foreign Relations Law (1987).
[70] See, e.g., Brand (2014), 155, and *Hendrik Koster v. Automark Industries, Inc.* 640 F.2d 77 (7th Cir. 1981).
[71] US Supreme Court, 27 June 2011 *J. McIntyre Machinery Ltd v. Nicastro*, 131 S.Ct. 2780.
[72] Idem.
[73] Bonomi (2016) p. 26.
[74] Indeed, US negotiators have raised the issue whether Art 6(c) of the Convention would force US courts to deny enforcement to judgments on a tenancy of immoveable property that US would have otherwise enforced.
[75] See art. 281 and 282 of the Law on Civil Procedure of 9 April 1991 (as amended).
[76] See generally Tsang (2017).

EU.[77] Until 2016, however, these treaties had been of limited practical significance, since 99% of cases of enforcement of foreign judgments in China were concerned with judgments rendered in states which had not concluded such treaty with China.[78]

The reciprocity principle has been interpreted by Chinese courts as meaning that the courts of the state of origin of the judgment should have enforced a Chinese judgment in the past.[79] For many years, Chinese courts routinely denied enforcement to foreign judgments on the ground of the absence of reciprocity with the relevant foreign state. In 2006, 2009 and 2014 respectively, courts of Germany, the United States and Singapore declared enforceable Chinese judgments. Chinese courts then ruled that the reciprocity principle was constituted with each of these three countries, and declared enforceable judgments originating from Germany (2013), Singapore (2016) and the United States (2017).[80] For many years, it was considered that the prospects of enforcing foreign judgments in China were very limited. These recent developments are promising and suggest that there is a real prospect that Chinese courts would enforce foreign judgments under a multilateral judgments convention such as the Hague project.[81]

Although the bilateral treaties concluded by China have rarely been applied, they are important insofar as many of them include rules on the jurisdiction of the foreign court which were accepted by China, and would likely be accepted again. These rules, which appear in the treaties concluded with Italy, Spain and Cyprus for instance, are more liberal than those included in the Convention, and recognize the jurisdiction of the court of the country where the contract was performed, and the jurisdiction of the court of the country where the damage was suffered.[82]

4.3.3. Australia, Commonwealth Africa, Singapore, England

English law continues to be highly influential in many of its former colonies. This explains why the law of foreign judgments of Australia, Commonwealth African countries[83] and Singapore is essentially the same as the English common law of foreign judgments. A number of countries of the Commonwealth have adopted a more liberal regime to enforce their own reciprocal judgments, which will not be discussed here.

The first requirement for enforcing a foreign judgment under English law is that the foreign court had personal jurisdiction over the defendant. This requirement has traditionally been understood very restrictively: a foreign court only has jurisdiction if the defendant was present in the foreign state at the time of initiation of the proceedings (service), or consented to the jurisdiction of the foreign court, whether expressly or implicitly.[84] Residence in the foreign state was once a valid ground of jurisdiction, but scholars debate whether it remains to be.[85] The jurisdiction of the foreign court is thus defined more restrictively under the English rule than under the Draft Convention. In any case, the courts of

[77] Bulgaria, Cyprus, France, Hungary, Greece, Italy, Poland, Spain, Romania. It is unclear whether the bilateral treaty between China and Hungary is still in force.
[78] Tsang (2017), p. 30: out of 2846 cases, only 29 were brought under a bilateral treaty.
[79] See e.g. Zhang (2014) p. 96.
[80] See Zhang (2017).
[81] The limited evidence available on the application of the public policy exception by Chinese courts does not suggest that they would resort to it abusively: see Zhang (2014), 161; Tang, Xiao & Huo (2016) no 6.48.
[82] See Tang, Xiao & Huo (2016), no 6.29.
[83] The following countries apply the same rules on issues of relevance for this report: Ghana, Kenya, Malawi, Nigeria, Sierra Leone, Tanzania, Uganda and Zambia. Zimbabwe and Gambia also do, although they are not members of the Commonwealth: see Oppong (2014).
[84] See, in England, Collins (2012), 14R-054; in Australia, Mortensen, Garnett & Keyes (2015) 5.11; in Commonwealth Africa, Oppong (2014) p. 373; in Singapore, Yeo (2013), no 75-170.
[85] See, in England, Collins (2012), no 14-062; in Australia, Mortensen, Garnett & Keyes (2015), no 5-19; in Singapore, Yeo (2013), no 75.171.

these countries would not enforce a judgment rendered by the court of the place where a foreign defendant caused damage or by the court of the place of performance of the contract.

4.3.4. India

Although India is a member of the Commonwealth and largely follows the English lead, it has a significantly more restrictive regime of foreign judgments than other former English colonies. The difference does not concern the jurisdiction of the foreign court, which is defined in the same way as in other commonwealth countries. It concerns the merits of the case: Indian courts may deny enforcement to foreign judgments for the sole reason that an Indian court would have applied Indian law in the relevant case, or that the outcome of the case amounts to 'a breach of any law in force in India'.[86] In contrast, the Draft Convention would limit the review of the merits of the foreign judgment to the violation of the fundamental principles of the forum (which is the traditional understanding of the public policy exception in PIL).

4.4. Conclusion

The practical significance of the Convention will depend on whether the current law of the future contracting states is more conservative or more liberal than the Convention. A first group of states has a very conservative law of foreign judgments. Such conservatism can first be revealed by the power of local courts to review foreign judgments on the merits and deny enforcement to any foreign judgment which might be contrary to local law. It can also be revealed by a narrow definition of acceptable grounds of jurisdiction. India belongs to the first category, England, Australia, Singapore and many other states of the Commonwealth belong to the second. The impact of the Convention would be high if such states would join the Convention and thus liberalise their law of foreign judgments. From the perspective of EU MSs it would be a considerable gain, as the prospect of enforcement of their judgments would considerably increase.

A second group of states have a liberal law of foreign judgments. They include the five MSs surveyed in this study (but not England). The Draft Convention is more conservative than their law, in particular insofar as it does not accept the jurisdiction of the court of the place of performance of the contract and the place where the damage was suffered. However, the Convention would not prevent those states from applying their more liberal national regime and thus enforce judgments from more conservative states which would not reciprocate the favour.

Finally, the law of foreign judgments in the US is quite liberal, but more conservative than that of the five MSs surveyed in this study. The Draft Convention is inspired from US standards on certain key provisions, such as the jurisdiction of the foreign court in contractual and torts matters. Thus, US courts would only enforce foreign judgments in cases where US courts would retain jurisdiction. The Convention would thus seem to be essentially neutral for the MSs and the US in their reciprocal relations,[87] and beneficial for both blocs in their relations with conservative states.

A danger exists, however, that certain states which currently enforce foreign judgments on the basis of reciprocity will only apply the grounds of the Convention although they might have been ready to agree on broader grounds of jurisdiction. This is likely the case of China, which has accepted a more

[86] Indian Civil Procedure Code, section 13.
[87] Bonomi (2016).

liberal regime in past negotiations, and which might have been ready to agree on a regime as liberal as the one of many EU MSs.

There are therefore two options for the negotiators of the Convention. The first is to prioritise the inclusion of the US, which is the biggest economic partner of the EU, and to accept, for that purpose, the narrow US standards of jurisdiction. It must be underscored, however, that the strong involvement of US negotiators in The Hague is no guarantee that the US will eventually ratify the Convention, even if it successfully imposed its jurisdictional standards.[88] Additionally, there are strong debates in the US as to whether, should the US ratify the Convention, the complexity of the US federal system would exclude implementation through federal legislation, and impose implementation through a uniform law that each state would be free to enact or maybe to vary.[89] The second option would be to explore whether a more ambitious and practically useful Convention, following European standards of jurisdiction, could be accepted by a significant number of other states, in particular in Asia.[90]

[88] Almost ten years after signing the Choice of Court Convention, the US does not seem to be even close to ratifying it.
[89] See, in the context of the Choice of Court Convention, the contributions of L. Silberman, D. Stewart and P. Trooboff *in* Stefan (2014). See also Burbank (2006). In the words of a leading US scholar: '*a state-by-state implementation regime risks making future treaty negotiations virtually impossible for the US. Other states will logically question the ability of any US negotiators to deliver on ratification and implementation in a manner that will place interpretive emphasis on the treaty text as negotiated*', Brand (2013a)
[90] In the words of the same US scholar, Brand (2013a): *'the EU speaks with a single voice in such multilateral negotiations, and it becomes much easier for the EU to "sell" its approach on a global basis. [This result] is enhanced by the fact that much of the rest of the world has borrowed the continental civil law model for civil and commercial law matters. This makes a legislative approach, and the predictability of civil law rules, much more easily negotiated with the rest of the world. It creates, in effect, a European magnet for the development of PIL on a global scale.'*

POLICY RECOMMENDATIONS: A COMPREHENSIVE LEGAL FRAMEWORK ON CROSS-BORDER LITIGATION

In the light of the lack of progress in establishing common rules on the recognition and enforcement of third country judgments at EU level, the efforts to adopt a global-reaching convention in the field deserve to be welcomed. However, whether the Draft Convention would be worth signing and ratifying poses some doubts. Its potential to foster uniformity at international and EU (regarding third country judgments) level has to be balanced with the drawbacks of creating an additional layer of complexity. Joining the Convention would entail that a new system, which for obvious reasons is not aligned with the EU Regulations, is added to the latter and to the existing national and international rules. Solutions which would at first sight be deemed coincident with those of the EU instruments may actually diverge under the Convention, and hence risks of misapplication arise. The potential of the Draft Convention to achieve its goals is undermined by its limited scope, particularly if IP disputes are finally excluded and ratification prospects by third States are not much higher than in previous instruments (such as the Choice of Forum Convention).

The EU should reconsider whether the ratification of the future Convention by the US is a priority. The Draft Convention would not improve the enforcement of the judgments of the courts of EU MSs in the US and reveals that the US is not ready to further liberalize its law on foreign judgments. Moreover, due to its complex federal structure, there is no guarantee that the US would ratify the Convention even if it successfully imposed its jurisdictional standards. Several provisions of the Draft Convention suggest that the US has successfully imposed its views on certain key issues such as jurisdiction in tort and contractual matters. These narrow provisions, however, severely limit the practical significance of the Draft Convention. The jurisdictional standards of the EU are broader and a convention adopting broader standards would allow the circulation of judgments in cases where enforcement abroad is most needed. The EU should explore whether other states than the US would agree to such broader standards. In the affirmative, it should prioritise the conclusion of a more ambitious and practically significant Convention.

Should the EU decide to further participate in the negotiations with a view to join the Convention, the EU negotiators might consider trying to extend the protection under Art 5(2) of the Draft Convention to the base for recognition and enforcement of Art 5(1)(k) (trusts). This would protect natural persons entering as consumers into trust agreements (which could possibly be designed as a form of investment where consumers might expect protection). Moreover, it seems helpful to seek certain clarifications regarding proceedings concerned with the enforcement of judgments, how Art 28(4) is applied to the references to Contracting States in Arts 5 and 6 if these Contracting States form part of a REIO, and on the precedence granted by Art 25(4) to the rules of a REIO.

The limited scope and uncertain success of the Draft Convention undermines its potential to provide a comprehensive legal framework on the recognition and enforcement of third country judgments. Moreover, in many respects, such as scope, effect, interpretation or revision, the rules in international conventions differ from those of EU regulations, which reduces the potential of conventions to contribute to uniformity of EU PIL. Therefore, even if worldwide cooperation in this field is desirable, EU institutions should consider also the adoption of Union rules on recognition and enforcement of third State judgments in civil and commercial matters.

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ANNEX II: INTERNATIONAL INSTRUMENTS

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Agreement on a Unified Patent Court (Brussels, 19 February 2013)

ANNEX III: PROVISIONS ON EXCLUSIVE JURISDICTION AND EXCLUSIVE BASES FOR RECOGNITION AND ENFORCEMENT

Art 24 Brussels Ibis Regulation The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:	**Art 6 Draft Convention** *Exclusive bases for recognition and enforcement* Notwithstanding Art 5 –
(1) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated. However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;	(b) a judgment that ruled on rights in rem in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin; (c) a judgment that ruled on a tenancy of immovable property for a period of more than six months shall not be recognised and enforced if the property is not situated in the State of origin and the courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State.
(2) in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. (…)	[excluded from scope, see Art 2(1)(i): This Convention shall not apply to the following matters (…) (i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs;]
(3) in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;	[excluded from scope, see Art 2(1)(j): This Convention shall not apply to the following matters (…) (j) the validity of entries in public registers]
(4) in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have taken place. (…)	[(a) a judgment that ruled on the [registration or] validity of an intellectual property right required to be granted or registered shall be recognised and enforced if and only if the State of origin is the State in which grant or registration has taken place, or, under the terms of an international or regional instrument, is deemed to have taken place;]
(5) in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.	[Possibly excluded by Art 3(1)(b): In this Convention – (…) (b) "judgment" means any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention.]

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, provides an assessment of the ongoing work of the Hague Conference on the Judgments Convention. The analysis focuses on the November 2017 Draft Convention, its interplay with international and Union instruments in the field, as well as its potential future impact on the regulation of civil and commercial cross-border disputes.

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