

*Volume 55, Issue 1 (Winter 2018)*

*The CJPTA: A Decade of Progress*

*Guest editors: Janet Walker, Gerard Kennedy, and Sagi*

*Peari*

Article 9

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

Joost Blom

*Peter A Allard School of Law, University of British Columbia*

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>

 Part of the [Law Commons](#)

Article



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

## Citation Information

Blom, Joost. "The Court Jurisdiction and Proceedings Transfer Act and the Hague Conference's Judgments and Jurisdiction Projects." *Osgoode Hall Law Journal* 55.1 (2018) : 257-304.

<http://digitalcommons.osgoode.yorku.ca/ohlj/vol55/iss1/9>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

---

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

## **Abstract**

The Court Jurisdiction and Proceedings Transfer Act (CJPTA) codifies the substantive law of jurisdiction in British Columbia, Nova Scotia, and Saskatchewan. One of the questions that may be posed by the future of the CJPTA is how the jurisdictional system that it enacts would function in relation to two potential international conventions that are contemplated by the Hague Conference on Private International Law. One, a convention on the enforcement of judgments, is in an advanced stage of negotiation and may well be adopted by the Hague Conference. It deals with jurisdiction indirectly, by defining jurisdictional standards or "filters" that must be satisfied for civil and commercial judgments to be recognized under its rules. A remoter possibility, but expressly on the Conference's agenda, is a further convention dealing with jurisdiction directly, potentially including acceptable standards of jurisdiction and dealing with issues of forum non conveniens (declining jurisdiction) and *lis alibi pendens* (parallel proceedings pursued concurrently in a foreign court). This article compares the CJPTA's jurisdictional rules with those included as "filters" in the latest draft of the judgments convention in November 2017, and with those that might form part of a further convention to harmonize jurisdictional rules directly. It concludes that the CJPTA could operate without difficulty in relation to the proposed judgments convention and, very probably, an eventual jurisdiction convention, because its jurisdictional standards are, almost without exception, more liberal than those incorporated in the Hague models. The article also suggests that there is no reason to modify the CJPTA so as to bring it closer to the rules being developed in The Hague, since the CJPTA regulates jurisdiction, not just in international, but also in interprovincial cases, where different standards are appropriate.

## **Cover Page Footnote**

I am very grateful to Kathryn Sabo, one of the Canadian representatives at the Hague Conference's 2016 Special Commission on the judgments project, for kindly providing me with information about the work of the Commission in June 2016, and for subsequently being a commentator on a draft of this paper at the conference held in Toronto on 21 October 2016.

Special Issue  
The *CJPTA*: A Decade of Progress

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

JOOST BLOM\*

---

I.	JURISDICTION IN THE INTERNATIONAL CONTEXT .....	259
II.	THE <i>CJPTA</i> AND THE HAGUE PROJECTS.....	265
III.	SUBJECT MATTER ISSUES.....	266
IV.	TERRITORIAL COMPETENCE.....	270
	A. General.....	270
	B. Consent.....	272
	1. Defendant Sued on Counterclaim .....	272
	2. Submission in the Course of Proceedings .....	273
	3. Agreement that the Court has Jurisdiction .....	274
	C. Ordinary Residence .....	275
	1. Individuals.....	275
	2. Corporations and Other Entities .....	275
	D. Assumed Jurisdiction: Presumed Real and Substantial Connection.....	277
	1. Rights in Property in the Province.....	278
	2. Trusts.....	279
	3. Contractual Obligations.....	280
	4. Restitutionary Obligations.....	282
	5. Tort.....	282
	6. Business Carried On.....	284
	7. Injunction.....	284

---

\* Professor Emeritus, Peter A Allard School of Law, University of British Columbia. I am very grateful to Kathryn Sabo, one of the Canadian representatives at the Hague Conference's 2016 Special Commission on the judgments project, for kindly providing me with information about the work of the Commission in June 2016, and for subsequently being a commentator on a draft of this paper at the conference held in Toronto on 21 October 2016.

E.	Assumed Jurisdiction—Residual Real and Substantial Connection .....	285
F.	Assumed Jurisdiction: Forum of Necessity .....	285
V.	DECLINING JURISDICTION .....	285
A.	Forum non conveniens .....	285
B.	Parallel Proceedings .....	286
VI.	CONCLUSION .....	287
VII.	APPENDIX.....	290

---

**THE COURT JURISDICTION AND PROCEEDINGS TRANSFER ACT (CJPTA)** codifies the substantive law of jurisdiction in British Columbia, Nova Scotia, and Saskatchewan. One of the questions that may be posed by the future of the *CJPTA* is how the jurisdictional system that it enacts would function in relation to two potential international conventions that are contemplated by the Hague Conference on Private International Law. One, a convention on the enforcement of judgments, is in an advanced stage of negotiation and may well be adopted by the Hague Conference. It deals with jurisdiction indirectly, by defining jurisdictional standards or “filters” that must be satisfied for civil and commercial judgments to be recognized under its rules. A remoter possibility, but expressly on the Conference’s agenda, is a further convention dealing with jurisdiction directly, potentially including acceptable standards of jurisdiction and dealing with issues of *forum non conveniens* (declining jurisdiction) and *lis alibi pendens* (parallel proceedings pursued concurrently in a foreign court). This article compares the *CJPTA*’s jurisdictional rules with those included as “filters” in the latest draft of the judgments convention in November 2017, and with those that might form part of a further convention to harmonize jurisdictional rules directly. It concludes that the *CJPTA* could operate without difficulty in relation to the proposed judgments convention and, very probably, an eventual jurisdiction convention, because its jurisdictional standards are, almost without exception, more liberal than those incorporated in the Hague models. The article also suggests that there is no reason to modify the *CJPTA* so as to bring it closer to the rules being developed in The Hague, since the *CJPTA* regulates jurisdiction, not just in international, but also in interprovincial cases, where different standards are appropriate.

## I. JURISDICTION IN THE INTERNATIONAL CONTEXT

The codification of the substantive law of jurisdiction in the *Court Jurisdiction and Proceedings Transfer Act (CJPTA)*<sup>1</sup> must be viewed not only from the perspective of Canadian private international law but also from that of international efforts to coordinate the law of jurisdiction and foreign judgments. Most prominent among the latter are the projects of the Hague Conference on Private International Law (“Hague Conference”). These include a failed attempt at a convention to deal both with jurisdiction and with foreign judgments (1999–2001); a promulgated convention on Choice of Court Agreements (2005); a new attempt, currently under way, to develop a convention on recognition and enforcement of foreign judgments without any direct rules on jurisdiction—instead, using jurisdictional “filters” (judgments convention); and a foreshadowed attempt to develop a separate convention with direct rules on jurisdiction.

This article compares the *CJPTA*’s jurisdictional rules with those included as “filters” in the latest draft of the judgments convention in November 2017, and with those that might form part of a further convention to harmonize jurisdictional rules directly. It concludes that the *CJPTA* could operate without difficulty in relation to the proposed judgments convention and, very probably, an eventual jurisdiction convention, because its jurisdictional standards are, almost without exception, more liberal than those incorporated in the Hague models. The article also suggests that there is no reason to modify the *CJPTA* so as to bring it closer to the rules being developed in the draft Hague convention.

To set the context, a brief history of the Hague Conference projects is necessary. The earliest attempt to develop a comprehensive convention on the

- 
1. The *Uniform Court Jurisdiction and Proceedings Transfer Act* promulgated by the Uniform Law Conference in 1994 has been enacted in three provinces—British Columbia, Nova Scotia, and Saskatchewan. See Uniform Law Conference of Canada, *Proceedings of the Seventy-Sixth Annual Meeting, 1994*, Appendix C: *Court Jurisdiction and Proceedings Transfer Act*, online: <[www.ulcc.ca/images/stories/1994\\_EN\\_pdf/1994ulcc0008\\_Court\\_Jurisdiction\\_Proceedings\\_Transfer\\_Act.pdf](http://www.ulcc.ca/images/stories/1994_EN_pdf/1994ulcc0008_Court_Jurisdiction_Proceedings_Transfer_Act.pdf)> at 140; *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 (entered into force 4 May 2006) [*CJPTA* (BC)]; *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2d Sess), c 2 (entered into force 1 June 2008); *The Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1 (entered into force 1 March 2004) [*CJPTA* (SK)]. The acts differ slightly. Yukon Territory has enacted it but has not yet brought it into force. See *Court Jurisdiction and Proceedings Transfer Act*, SY 2000, c 7. See also Vaughan Black, Stephen GA Pitel & Michael Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell, 2012). All general section references to the *CJPTA* in this article refer to the section numbering in the BC enactment unless otherwise specified.

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

In May 1992, the United States proposed to the Hague Conference that it initiate a new project on the recognition and enforcement of civil judgments, contrasting the success of the 1958 *New York Convention* on the enforcement of arbitral awards with the absence of any international agreement on enforcing civil judgments.<sup>5</sup> The Hague Conference took up this proposal. From the outset, there were shifting and conflicting views on whether the convention should include rules, not only on foreign judgments, but also on the grounds on which courts in states that were parties to the convention must or must not take jurisdiction.

- 
2. Catherine Kessedjian, “International Jurisdiction and Foreign Judgments in Civil and Commercial Matters” (The Hague: Permanent Bureau of the Hague Conference on Private International Law, April 1997) at para 3, online: <assets.hcch.net/docs/76852ce3-a967-42e4-94f5-24be4289d1e5.pdf>.
  3. *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, 1 February 1971, Hague Conference on Private International Law (entered into force 20 August 1979), online: <www.hcch.net/en/instruments/conventions/full-text/?cid=78> [*Hague Convention*].
  4. Kessedjian, *supra* note 2 at para 7. According to the Report, citing the Permanent Bureau’s Preliminary Document No 17 of May 1992, the *Brussels Convention* built to a large extent on the *Hague Convention* and was negotiated in part by the same persons. See EC, *1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, [1972] OJ, L 299/32 [*Brussels Convention*]. The *Lugano Convention* extended the Brussels regime to the European Free Trade Area (“EFTA”). See EC, *Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, [2009] OJ, L 147/5 [*Lugano Convention*].
  5. Letter from the Legal Advisor to the Secretary of State to the Secretary General of the Hague Conference on Private International Law (5 May 1992), online: State Department of the United States <www.state.gov/documents/organization/65973.pdf> [Letter from the Legal Advisor]. The approach to the Hague Conference came after informal discussions that Arthur von Mehren had in 1991 with representatives of the Netherlands and the United Kingdom to explore possibly negotiating a foreign judgments treaty between the United States and the EC-EFTA member states. The consensus was that working on a Hague convention was a more promising avenue. See Arthur T von Mehren, “Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?” (1994) 57:3 *Law & Contemp Probs* 271 at 281-82 [von Mehren, “Recognition and Enforcement”].

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

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

In 1999, a Special Commission developed a preliminary draft convention ("1999 Hague draft"), which was the subject of an explanatory report by Peter

---

6. Letter from the Legal Advisor, *supra* note 5.

7. The mixed convention option was favoured by von Mehren. See von Mehren, "Recognition and Enforcement," *supra* note 5 at 287. He continued to believe in it even when negotiations on it were going badly. See Arthur T von Mehren, "Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project Succeed?" (2001) 49:2 Am J Comp L 191 [von Mehren, "Drafting a Convention"]. On the typology of judgment conventions, suggesting that there are actually nine types, see Ralf Michaels, "Some Fundamental Jurisdictional Conceptions as Applied to Judgment Conventions" in Eckart Gottschalk et al, eds, *Conflict of Laws in a Globalized World* (Cambridge: Cambridge University Press, 2007) 29 at 45.

8. "Some Reflections of the Permanent Bureau on a general convention on enforcement of judgments" in *Proceedings of the Seventeenth Session*, vol 1 (The Hague: Hague Conference on Private International Law, 1992) at 231, paras 16-19, online: <assets.hcch.net/docs/bd6dcaab-b2a4-4255-84-ec-cca3b7233588.pdf>.

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

10. Kessedjian, *supra* note 2 at para 8 [citations omitted].

Nygh and Fausto Pocar.<sup>11</sup> At the 2001 Diplomatic Conference of the Hague Conference, a reworking of the draft (“2001 Hague draft”)<sup>12</sup> showed all too clearly the tensions between enthusiasts for the Brussels model and other countries, especially the United States, with very different, generally broader, jurisdictional grounds.<sup>13</sup> Brackets, alternative versions, and variant versions had proliferated like weeds.

Efforts to move things forward were unsuccessful. In 2003, the Hague Conference narrowed the focus of the project to one relatively uncontroversial jurisdictional principle, which was consent to jurisdiction by agreement. This resulted in the *Hague Convention of 30 June 2005 on Choice of Court Agreements*

- 
11. *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law, Prel Doc No 11 (2000), online: <assets.hcch.net/docs/638883f3-0c0a-46c6-b646-7a099d9bd95e.pdf> [1999 Hague draft] (The 1999 Hague draft was adopted by a Special Commission in 1999). This will occasionally be referred to as the “1999 mixed convention draft.” See also Peter Nygh & Fausto Pocar, “Report of the Special Commission,” Hague Conference on Private International Law, Prel Doc No 11 (2000) at 19, online: <assets.hcch.net/docs/638883f3-0c0a-46c6-b646-7a099d9bd95e.pdf>. The aforementioned draft text and report are both in Preliminary Document Number 11. For a Canadian view at the time, see Vaughan Black, “Commodifying Justice for Global Free Trade: The Proposed Hague Judgments Convention” (2000) 38:2 Osgoode Hall LJ 237.
  12. *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001: Interim Text*, Hague Conference on Private International Law, Commission II, Jurisdiction and Foreign Judgments in Civil and Commercial Matters, 19th Sess (2001), online: <assets.hcch.net/docs/e172ab52-e2de-4e40-9051-11ae7c7be67.pdf> [2001 Hague draft]. This will occasionally be referred to as the “2001 mixed convention draft.”
  13. Although not always broader. Brussels grounds of jurisdiction, especially assumed jurisdiction in relation to contracts and torts, extend to some cases in which US law would have due process concerns. See Ronald A Brand, “Due Process, Jurisdiction and a Hague Judgments Convention” (1999) 60:3 U Pitt L Rev 661 [Brand, “Due Process”]. On the impasse, see generally John J Barceló III & Kevin M Clermont, eds, *A Global Law of Jurisdiction and Judgments: Lessons from The Hague* (The Hague: Kluwer, 2002); Graf-Peter Calliess, “Value-added Norms, Local Litigation, and Global Enforcement: Why the Brussels-Philosophy failed in The Hague” (2004) 5:12 German LJ 1489; William E O’Brian Jr, “The Hague Convention on Jurisdiction and Judgments: The Way Forward” (2003) 66:4 Mod L Rev 491; Justyna Regan, “Recognition and Enforcement of Foreign Judgments – A Second Attempt in The Hague:” (2015) 14:1 Rich J Global L & Bus 63 at 64-71. Arthur von Mehren, writing in the midst of the impasse, attributed it in significant measure to “a fundamental discordance between the views of the United States and of most, perhaps all, European Union States respecting the role of adjudication in contemporary society.” See von Mehren, “Drafting a Convention,” *supra note 7* at 195.

(“*Choice of Court Convention*”).<sup>14</sup> The *Choice of Court Convention* is in force: the European Union, Mexico, and Singapore have become parties to it.<sup>15</sup> Because defining jurisdiction was not the main issue,<sup>16</sup> the convention’s importance lies more in the provisions setting out the conditions of, and defences to, recognition and enforcement of a judgment of the chosen court. Many of those provisions have been carried over, *mutatis mutandis*, into the current project on a general convention on the recognition and enforcement of judgments in civil and commercial matters.

The current project dates from 2011, when, at the instigation of the Permanent Bureau, the Hague Conference appointed an Experts’ Group to consider further work on a judgments project. That group recommended that work be undertaken on a recognition and enforcement convention, including jurisdictional filters. This recommendation led to a Working Group, which in

- 
14. *Hague Convention of 30 June 2005 on Choice of Court Agreements*, 30 June 2005, Hague Conference on Private International Law (entered into force 1 October 2015), online: <[www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court](http://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court)> [*Choice of Court Convention*].
  15. Hague Conference on Private International Law, “Status Table: Convention of 30 June 2005 on Choice of Court Agreements” (last updated 5 October 2017), online: <[www.hcch.net/en/instruments/conventions/status-table/?cid=98](http://www.hcch.net/en/instruments/conventions/status-table/?cid=98)>. As at the time of writing this article, the United States and Ukraine had signed but not yet ratified.
  16. Although some Canadian common law jurisdictional rules would change if Canada becomes a party. Most notably, “strong cause” would no longer be a ground for taking jurisdiction despite a forum selection clause choosing another judicial forum. Article 6 of the *Choice of Court Convention* limits the ability to take jurisdiction in the face of an exclusive contractual choice of another court. If the choice of court agreement is contractually valid, taking jurisdiction is only possible if giving effect to the agreement would “lead to a manifest injustice or would be manifestly contrary to public policy” of the forum, or the agreement cannot be reasonably performed, or the chosen court will not hear the case. See *Choice of Court Convention*, *supra* note 14, art 6(c)-(e), respectively. See also Vaughan Black, “Hague Convention Choice of Court Agreement and the Common Law” (Paper delivered at the Annual Proceedings of the Uniform Law Conference of Canada, Charlottetown, September 2007) at paras 29-31, online: <[www.ulcc.ca/en/annual-meetings/216-2007-charlottetown-pe/civil-section-documents/566-hague-convention-choice-of-court-agreement-and-the-common-law-2007](http://www.ulcc.ca/en/annual-meetings/216-2007-charlottetown-pe/civil-section-documents/566-hague-convention-choice-of-court-agreement-and-the-common-law-2007)>. See also H Scott Fairley & John Archibald, “After the Hague: Some Thoughts on the Impact on Canadian Law of the Convention on Choice of Court Agreements” (2006) 12:2 ILSA J Intl & Comp L 417.

2015 produced a proposed draft text of a convention (“Working Group draft”).<sup>17</sup> The Working Group draft went to a Special Commission that met in June 2016 and revised it. The result was published as the Special Commission’s “2016 Preliminary Draft Convention.”<sup>18</sup> The Special Commission met again twice and revised the 2016 draft into the February 2017 Draft Convention which most recently led to the November 2017 Draft Convention (“November 2017 Hague draft”),<sup>19</sup> which is the latest indication of what a convention might look like. Confidence seems high that a final version can be achieved. The Special Commission has said it will propose to the Council of the Hague Conference that the Special Commission have a fourth meeting in mid-2018 and that a Diplomatic Session be convened in mid-2019.<sup>20</sup>

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

- 
17. *Proposed Draft Text on the Recognition and Enforcement of Foreign Judgments*, Hague Conference on Private International Law, Working Group on the Judgments Project, Prel Doc No 1 (2016), online: <assets.hcch.net/docs/01adb7d9-13f3-4199-b1d3-ca62de79360f.pdf> [Working Group draft]. For an explanatory note accompanying the Working Group draft, see *Explanatory Note Providing Background on the Proposed Draft Text and Identifying Outstanding Issues*, Hague Conference on Private International Law, Prel Doc No 2 (2016), online: <assets.hcch.net/docs/e402cc72-19ed-4095-b004-ac47742dbc41.pdf> [April 2016 Explanatory Note].
  18. *2016 Preliminary Draft Convention*, Hague Conference on Private International Law, Special Commission on the Recognition and Enforcement of Foreign Judgments, online: <assets.hcch.net/docs/42a96b27-11fa-49f9-8e48-a82245aff1a6.pdf> [2016 Hague draft].
  19. *February 2017 Draft Convention*, Hague Conference on Private International Law, Special Commission on the Recognition and Enforcement of Foreign Judgments, online: <assets.hcch.net/docs/d6f58225-0427-4a65-8f8b-180e79cafddb.pdf> [February 2017 Hague draft]; *November 2017 Draft Convention*, Hague Conference on Private International Law, Special Commission on the Recognition and Enforcement of Foreign Judgments, online: <assets.hcch.net/docs/2f0e08f1-c498-4d15-9dd4-b902ec3902fc.pdf> [November 2017 Hague draft]. A major portion of the November 2017 Hague draft is included as an appendix to this article.
  20. Hague Conference on Private International Law, “The Judgments Project: Special Commission on the Judgments Project,” online: <<https://www.hcch.net/en/projects/legislative-projects/judgments>>.

and *lis pendens*/declining jurisdiction)” with a view to “preparing an additional instrument.”<sup>21</sup> The Council reiterated this plan in March 2017.<sup>22</sup>

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

## II. THE *CJPTA* AND THE HAGUE PROJECTS

The main question about the *CJPTA* and the Hague projects is whether the *CJPTA*'s rules might cause difficulty in the event that Canada becomes a party to the judgments convention currently being negotiated. This convention is already taking fairly clear shape, and, as noted, the chances that the negotiations will succeed seem good. If they do, and if the convention is adopted by Canada

- 
21. *Conclusions and Recommendations Adopted by the Council*, Hague Conference on Private International Law, Council on General Affairs and Policy of the Conference (15-17 March 2016) at para 13, online: <assets.hcch.net/docs/679bd42c-f974-461a-8e1a-31e1b51eda10.pdf>. The Council “confirmed that this is a priority project.” See *ibid* at para 14.
  22. *Conclusions and Recommendations Adopted by the Council*, Hague Conference on Private International Law, Council on General Affairs and Policy of the Conference (14-16 March 2017) at para 7, online: <assets.hcch.net/docs/77326cfb-ff7e-401a-b0e8-2de9efa1c7f6.pdf>.
  23. If litigants know what jurisdictional grounds entitle an eventual judgment to be recognized or enforced in another country, and having the judgment recognized or enforced matters to them, their choice of where to litigate is accordingly circumscribed. There might still be jurisdictional contests and manoeuvring because there could be more than one forum that complies with the recognition rules (*e.g.*, to take two from the November 2017 Hague draft: the defendant’s habitual residence and the place where the defendant’s tortious conduct took place. See November 2017 Hague Draft, *supra* note 19 at arts 5(1)(a), (g)). Here, a separate jurisdiction convention might help by, for instance, providing a *lis pendens* rule. Where parties do not care about whether an eventual judgment will be enforceable, the range of possible jurisdictional struggles is larger, and a jurisdiction convention in principle would help by reining in broad jurisdictional rules and providing an agreed upon set of rules to deal with multiple forums and parallel proceedings. The benefits from doing all that, however, are much harder to evaluate than the benefits from an agreed set of rules for recognizing and enforcing judgments. One reason is that it is hard to assess how successfully, on the whole, the problem of competing jurisdictions is already addressed through the current decentralized international system, in which each country controls the ability of its own courts to take or decline jurisdiction if there are other available forums.

(probably province by province)<sup>24</sup> and by a number of Canada's trading partners, the relationship between the *CJPTA* regime and the jurisdictional criteria in the convention will become a matter of great practical importance.

A separate Hague jurisdiction convention is a remoter prospect. Such a convention may one day see the light of day, but the jurisdictional principles in the 1999 and 2001 drafts elicited little consensus at the time, and it is doubtful whether they would garner any more now. If a new jurisdiction convention eventually emerges, it is almost certainly going to look very different from these drafts. Nevertheless, I have referred occasionally in this article to the contents of the 1999 and 2001 Hague drafts as glimpses of what might possibly be included in such a convention.

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

### III. SUBJECT MATTER ISSUES

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

The *CJPTA* has no provisions that exclude any subject matter from its scope, but some subject matters are indirectly excluded because court jurisdiction in relation to them is dealt with in another statute, whether provincial or federal.<sup>27</sup> The scope of the November 2017 Hague draft, as with the Hague project from

---

24. November 2017 Hague draft, *supra* note 19, art 27. The now familiar "federal state clause" enables a state to declare that the convention extends to all its territorial units or only to some of them. The declaration to limit application to certain units must be made when the state becomes a party but may be modified subsequently.

25. *Ibid*, art 16.

26. *Ibid*, art 1(2).

27. *CJPTA* (BC), *supra* note 1, s 12.

the beginning, is limited to “civil or commercial matters.”<sup>28</sup> Revenue matters are expressly excluded as not being civil or commercial.<sup>29</sup> A fairly long list of subject matters that are definitely or arguably civil or commercial is also excluded. The details are not material for the present purpose. Among others, they embrace the status and capacity of natural persons, family law matters, succession, insolvency, carriage of passengers and goods, and the validity, nullity, or dissolution of corporations and other entities.<sup>30</sup> A notable exclusion is defamation,<sup>31</sup> because it involves freedom of expression and may have constitutional implications.<sup>32</sup>

The November 2017 Hague draft also makes some matters subject to the exclusive jurisdiction of one state. These, by and large, correspond to matters that Canadian common law rules also regard as within one country’s exclusive jurisdiction. The *Moçambique* rule<sup>33</sup> is present, though in a narrower form. Only courts in the country where immovable property is situated can rule directly on rights *in rem* in the immovable,<sup>34</sup> but that rule does not extend to personal claims relating to such property.<sup>35</sup>

An area where the Special Commission has still not reached consensus is how to deal with judgments on intellectual property (“IP”) rights. The November 2017 Hague draft, unlike the 2016 Preliminary Draft Convention, has a bracketed provision that would exclude judgments on IP rights from the scope of the convention altogether.<sup>36</sup> There is a further bracketed provision that would exclude the enforcement of non-monetary remedies related to judgments

---

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

29. *Ibid.*

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

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

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

33. The rule, originating in *British South Africa Co v Companhia de Moçambique*, [1893] AC 602, [1891-94] All ER Rep 640 (HL), is that a court cannot adjudicate any claim, including an *in personam* claim like trespass, that might involve adjudicating on the plaintiff’s title to foreign immovable property.

34. November 2017 Hague draft, *supra* note 19, art 6(b). Article 6(c) adds a special rule about judgments ruling on a tenancy of immovable property for a period of more than six months. The court of the *situs* has exclusive jurisdiction under the convention only if the *situs* is in a contracting state and the law of that state gives its own courts exclusive jurisdiction.

35. April 2016 Explanatory Note, *supra* note 17 at para 156.

36. November 2017 Hague draft, *supra* note 19, art 2(l)(m). There is a bracketed extension of the exclusion to “analogous matters.”

rendered in IP matters ruling on an infringement—even if such judgments were within the convention.<sup>37</sup>

Alternative provisions set out the jurisdictional tests that will apply to IP judgments if they are included in the convention's scope. The drafters had to grapple with the issue of territoriality. It has long been the general view that jurisdiction in an infringement action, or some other action in which the validity of the IP right is in issue, is strictly territorial, in the sense that only the state whose IP right is in question can adjudicate the validity or infringement of the right. The current of opinion has moved away from this position in relation to copyright and other rights that do not depend on registration because there is no impingement, even arguably, on the state's sovereignty by a foreign court's deciding on such rights.<sup>38</sup> Because a foreign decision on a *registered* right arguably does involve the sovereignty of the state of registration, the territoriality principle remains more solidly in place—although not unchallengeable—for rights like patents and trademarks, which mostly do depend on registration.<sup>39</sup>

The November 2017 Hague draft removes judgments that rule on an IP right or an analogous right from the general jurisdictional provisions altogether,<sup>40</sup> and restricts their recognition to three jurisdictional grounds, each of which apply to a particular type of judgment. If the judgment rules on an infringement of an IP right required to be granted or registered, it is recognized if the infringement took place in the state of origin and the judgment is given by a court in the state where the grant or registration of the right has taken place. There is a bracketed exception for cases where, although the infringement took place in the state of origin, the defendant had not acted there “to initiate or further the

37. *Ibid*, art 11. The provision would also confine the monetary remedy to an award “in relation to harm suffered in the State of origin.”

38. *Lucasfilm Ltd v Ainsworth*, [2011] UKSC 39, [2012] 1 AC 208. The issue has not yet come up in a Canadian case, but see *Geophysical Service Inc v Jebco Seismic UK Ltd*, 2016 ABQB 402 at para 24, 268 ACWS (3d) 765 [*Jebco*]. In *Jebco*, the court states: “It is difficult to contemplate how a forum outside of Canada would ever be an appropriate forum for the consideration and application of Canadian copyright law.”

39. The distinction between the territorial implications of the two types of IP rights is why article 2(1)(l) of the February 2017 Hague draft contemplated that the convention might include judgments on copyright and other non-registered rights even if it otherwise excluded IP rights from its scope. See February 2017 Hague draft, *supra* note 19, art 2(l)(i). This possible excision from the (bracketed) general exclusion of IP judgments has been dropped in the November 2017 Hague draft. See November 2017 Hague Draft, *supra* note 19, art 2(1)(m). If IP judgments are ultimately not excluded, the distinction between registered and non-registered IP rights would play out in the (currently bracketed) set of jurisdictional tests for IP judgments. See November 2017 Hague Draft, *supra* note 19, art 5(3).

40. Compare the February 2017 Hague draft, *supra* note 19, art 5(1)(k)-(m).

infringement,” or the “activity cannot reasonably be seen as having been targeted at that state.”<sup>41</sup> The bracketed provision would seem aimed at concerns that the place of infringement alone would not necessarily meet United States due process standards.<sup>42</sup> The other two jurisdictional grounds deal with judgments ruling on the infringement or the validity of a copyright or related right, an unregistered trademark, or unregistered industrial design. In the case of a judgment that rules on an infringement, the infringement must have taken place in the state of origin and the judgment must be given by a “court in the State for which protection was claimed” (*i.e.*, it must be that state’s copyright or other right that was in question).<sup>43</sup> In the case of a judgment that rules on validity, it must be the validity of the right in the state of origin that is in issue, and the judgment must be “given by a court in the State for which protection was claimed.”<sup>44</sup> It is noteworthy that this draft applies the territorial principle even to judgments relating to copyright and other unregistered rights.<sup>45</sup> This is done by means of a combined territorial jurisdiction and applicable law test. The state of origin must be both the jurisdiction where the infringement took place or where the validity of the right was in issue (territorial jurisdiction), and the state for which protection was claimed (applicable law).

In the case of granted or registered IP rights, the obligation to recognize and enforce a judgment of a court of the state in which the grant or registration took place, if the judgment rules on infringement of the right in that state, is reinforced

---

41. November 2017 Hague draft, *supra* note 19, art 5(3)(a).

42. See Part IV(D)(3) below. The February 2017 Hague draft, *supra* note 19, art 5(1)(k), had the same proviso but its jurisdictional test was wider. It used only the place of grant or registration of the right as the jurisdictional criterion, without stipulating that the infringement must also have taken place in that state.

43. November 2017 Hague draft, *supra* note 19, art 5(3)(b). This includes the same bracketed proviso as article 5(3)(a), excluding cases in which the defendant has not acted in the state of origin to further the infringement and did not target its activity at that state.

44. *Ibid*, art 5(3)(c). There is a bracketed extension of the category of judgments to not just validity, but also subsistence or ownership of the right.

45. The February 2017 Hague draft left open the possibility that a judgment ruling on copyright or another unregistered IP right could be recognized or enforced under one of the general jurisdictional criteria—like the defendant’s habitual residence—even if the infringement took place outside the state of origin or the law the court applied was that of a state other than the state of origin. See February 2017 Hague draft, *supra* note 19, art 5. By contrast, the November 2017 Hague draft stipulates in the opening words of article 5(3) that the general jurisdictional criteria in article 5(1) do not apply to a judgment that ruled on an IP right or an analogous right. Only the criteria in article 5(3) apply. See November 2017 Hague draft, *supra* note 19, arts 5(1), 5(3).

by an obligation *not* to recognize or enforce any other state's judgment that rules on the validity of such an IP right.<sup>46</sup>

## IV. TERRITORIAL COMPETENCE

### A. GENERAL

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

A point that needs to be made at the outset is that the rules by which a court determines its *own* jurisdiction, which is what the *CJPTA* deals with, logically can differ from the rules that determine the jurisdiction of a *foreign* court for the purpose of recognizing and enforcing foreign judgments, which is what the Hague judgments convention would deal with. The law may allow domestic courts to take jurisdiction on a ground that would not be recognized as giving a foreign court jurisdiction (the reverse would not normally be true). This is especially so if the domestic jurisdictional system gives a court discretion to decline jurisdiction on *forum non conveniens* or other grounds. If the exercise of jurisdiction is tempered by such a discretion, the grounds for jurisdiction can be more broadly drawn. But in the case of foreign judgments, where there is

---

46. November 2017 Hague draft, *supra* note 19, art 6(a). A bracketed insertion would broaden the wording to “registration or validity” of the right. The obligation to refuse recognition or enforcement would have effect if a judgment from a jurisdiction that is not the state of grant or registration would otherwise qualify for recognition or enforcement under the recognizing state's national law. If recognized, such a judgment would not have *in rem* effects on the validity of the registration but could have *in personam* effects as between the parties. The convention does not in general restrict a contracting state's right to apply broader foreign judgment rules than those of the convention. See *ibid*, art 16. There is also a bracketed article 7(1)(g) that would give states the right—but does not impose an obligation—to refuse to recognize or enforce a judgment that rules on the infringement of any IP right, including a non-registered one, if the judgment applies a law to the right or the infringement (the wording is still unsettled) other than that of the state of origin. See *ibid*, art 7(1)(g).

typically no discretion to decline to recognize or enforce, it may be appropriate to frame the grounds for the foreign court's jurisdiction more narrowly.<sup>47</sup>

With very few exceptions, the *CJPTA* grounds for territorial competence are broader than the corresponding jurisdictional grounds in the Hague drafts. The *CJPTA* generally tracks the Canadian common law as it stood in the early 1990s, when the Uniform Law Conference of Canada prepared the uniform *CJPTA*. The common law on jurisdiction has since evolved in two ways. First, in assumed jurisdiction (meaning *in personam* jurisdiction as against a defendant who is not present in the province),<sup>48</sup> the Supreme Court of Canada in *Club Resorts*<sup>49</sup> adopted the analytical device of presumptive connecting factors ("PCFs"). Second, in presence-based jurisdiction, the Supreme Court of Canada, in *Chevron*,<sup>50</sup> clarified that the evolution of the Canadian common law in the last 25 years has left untouched the common law rule that mere presence is enough to found jurisdiction. From this it follows that an individual's presence in the province need not meet any test of substantiality. It also follows that, as was specifically held in *Chevron*, a corporation's constructive presence, through carrying on business in the province, is fully equivalent to the physical presence of an individual. It supports jurisdiction in any claim against the corporation, regardless of whether the claim has anything to do with the defendant's activities in the province.

These developments have, if anything, opened up something of a gap between the common law and the *CJPTA*, leaving the *CJPTA* sitting closer to the Hague standards than the Canadian common law now does. In cases of assumed jurisdiction, common law PCFs are now in some respects much wider than

---

47. In theory, Canadian law since 1990 has treated the scope of domestic jurisdiction and the scope of a foreign court's jurisdiction as correlatives by applying the "real and substantial connection" criterion to both. See *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 at 1094, 76 DLR (4th) 256; *Beals v Saldanha*, 2003 SCC 72 at paras 37-38, 84, 202, [2003] 3 SCR 416 [*Beals*]. The principle of correlativity applies in a system constructed like that of the European Brussels I Regulation (recast). See EC, *Regulation No 1215/2012 of the European Parliament of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, [2012] OJ, L351/1. It is not axiomatic in relation to a common law system, and the difficulties posed by it have never been fully examined by Canadian courts.

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

49. *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at paras 78-79, [2012] 1 SCR 572 [*Club Resorts*].

50. *Chevron*, *supra* note 48.

the presumed real and substantial connections listed in the *CJPTA*.<sup>51</sup> True, the expansive tendency of the common law may filter into the *CJPTA* via the use of the “residual” real and substantial connection. However, the residual connection is an avenue that courts in the *CJPTA* provinces have not been inclined to open up much until now, and they will not necessarily change this stance just because, in the non-*CJPTA* provinces, some PCFs are more liberal than the *CJPTA* presumptions.<sup>52</sup>

In cases of presence-based jurisdiction, a clear gap exists in relation to individuals because the *CJPTA* chose to make ordinary residence, rather than presence, the test. There is no significant gap as far as claims against a corporation are concerned, because the *CJPTA*’s definition of ordinary residence for a corporation encompassed the common law criterion of carrying on business in the province, later affirmed in *Chevron*.<sup>53</sup>

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

## B. CONSENT

### 1. DEFENDANT SUED ON COUNTERCLAIM

**Sometimes Hague compliant.** The *CJPTA* gives territorial competence whenever the defendant is sued on a counterclaim to a proceeding in which that person

51. For example, the PCF, for the purpose of a tort claim, that the claim is connected with a contract that was made in the province. See *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP*, 2016 SCC 30, [2016] 1 SCR 851 [*Lapointe*]. This case actually relied on the PCF of a contract made in the jurisdiction as supporting jurisdiction in a tort action, but the result suggests the Court may lean in favour of retaining “necessary or proper party” as a ground for jurisdiction *simpliciter*. One decision has already accepted it as a PCF. See *Geophysical Service Inc v Arcis Seismic Solutions Corp*, 2015 ABQB 88 at para 42, 20 Alta LR (6th) 112 [*Geophysical*].

52. Compare the reluctance to import the *Muscutt* factors. See *Laxton v Jurem Anstalt*, 2011 BCCA 212 at para 31, 334 DLR (4th) 76 discussing the factors outlined in *Muscutt v Courcelles* (2002), 60 OR (3d) 20, 213 DLR (4th) 577 (CA).

53. *CJPTA* (BC), *supra* note 1, s 7(c). There may be nuances. At common law, someone like an incorporated consultant could carry on business in the jurisdiction without necessarily having a fixed place of business in the jurisdiction. On the other hand, the Court in *Chevron* emphasized that courts “consistently found the maintenance of physical business premises to be a compelling jurisdictional factor.” See *Chevron*, *supra* note 48 at para 85.

is plaintiff.<sup>54</sup> The November 2017 Hague draft qualifies the enforceability of a judgment on such a counterclaim. To the extent that the counterclaim succeeds, the judgment is enforceable only if the counterclaim “arose out of the same transaction or occurrence as the claim.”<sup>55</sup> This is a qualification not present in the *CJPTA*. Whether a counterclaim can be brought if it arises out of an unrelated transaction depends on the local rules. It does appear likely that some counterclaims that would fit under the *CJPTA* rule would not meet the “same transaction or occurrence” test under the November 2017 Hague draft, such as when the defendant in a contract action counterclaims based on an unrelated debt that the plaintiff owes the defendant.

## 2. SUBMISSION IN THE COURSE OF PROCEEDINGS

**Sometimes Hague compliant.** The expression used in the *CJPTA* provision is that the defendant “submits to the court’s jurisdiction” in the course of the proceeding.<sup>56</sup> This must be compared with the combination of two jurisdictional grounds in the November 2017 Hague draft. One says: “expressly consented to the jurisdiction of the court of origin in the course of the proceedings.”<sup>57</sup> This is narrower than the *CJPTA* provision because submission in the Canadian sense can take place by conduct that implicitly accepts the jurisdiction of the court without clearly qualifying as “express consent.” The Hague grounds also include one that the Special Commission added to the Working Group’s draft in 2016<sup>58</sup> and retained in revised form in the November 2017 Hague draft.<sup>59</sup> It is that the defendant “argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law.”<sup>60</sup> The expression “argued on the merits” covers most of the situations in which, according to the Canadian

---

54. *CJPTA* (BC), *supra* note 1, s 3(a).

55. November 2017 Hague draft, *supra* note 19, art 5(1)(l)(i). To the extent that the counterclaim fails, it must be recognized “unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion.” *Ibid*, art 5(1)(l)(ii).

56. *CJPTA* (BC), *supra* note 1, s 3(b).

57. November 2017 Hague draft, *supra* note 19, art 5(1)(e).

58. 2016 Hague draft, *supra* note 18, art 5(1)(f).

59. November 2017 Hague draft, *supra* note 19, art 5(1)(f). The 2016 version, which was in brackets, used “entered an appearance” rather than “argued on the merits.” See 2016 Hague draft, *supra* note 18, art 5(1)(f).

60. November 2017 Hague draft, *supra* note 19, art 5(1)(f).

case law, a defendant implicitly accepts jurisdiction, but perhaps not all of them.<sup>61</sup> The very significant qualification that arguing on the merits does not give the court jurisdiction if the defendant had no viable way to contest jurisdiction has no equivalent in Canadian law.

It is worth noting that the November 2017 Hague draft would restrict the “express consent” ground to consent that “was addressed to the court, orally or in writing,” if the person said to be bound by the judgment is a consumer being sued on a consumer contract or an employee being sued on an employment contract.<sup>62</sup> It would also exclude such consumer and employment judgments from the “argued on the merits” jurisdictional ground altogether.<sup>63</sup>

### 3. AGREEMENT THAT THE COURT HAS JURISDICTION

To avoid overlap between the 2005 *Choice of Court Convention* and the proposed general judgments convention, the November 2017 Hague draft does not deal with submission under an exclusive choice of court agreement, which is the preserve of the *Choice of Court Convention*.<sup>64</sup> Any agreement designating a court or courts of one contracting state is deemed to be exclusive unless the parties expressly provide otherwise.<sup>65</sup> A court designated in a valid exclusive choice of court agreement has jurisdiction and cannot decline it in favour of a court in another state.<sup>66</sup> A judgment of a court that is exclusively chosen must be recognized and enforced,<sup>67</sup> subject only to fairly standard defences such as fraud and public policy.<sup>68</sup>

Where jurisdiction was taken on the basis of a non-exclusive choice of court agreement, recognition and enforcement are mandatory under the *Choice of Court Convention* only if both the state of origin and the requested state have made declarations that they are prepared to recognize and enforce judgments where jurisdiction is taken on such a basis.<sup>69</sup> A state that signs on to the proposed judgments convention will, however, bind itself to enforce a judgment “given by

---

61. Such as when the defendant writes the court a letter responding to the notice of the proceeding, as the Thivys did in *Beals*, which Justice LeBel said was attornment. See *Beals*, *supra* note 47 at para 147.

62. November 2017 Hague draft, *supra* note 19, art 5(2)(a).

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

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

65. *Ibid*, art 3(b).

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

67. *Ibid*, art 8(1).

68. *Ibid*, art 9.

69. *Ibid*, art 22.

a court designated in an agreement concluded or documented in writing ... other than an exclusive choice of court agreement.<sup>70</sup> This supplement to the *Choice of Court Convention* is consistent with the principle of consent, which the *CJPTA* also embodies when it says that a court has territorial competence if “there is an agreement between the plaintiff and [the defendant] to the effect that the court has jurisdiction in the proceeding.”<sup>71</sup>

## C. ORDINARY RESIDENCE

### 1. INDIVIDUALS

**Always Hague compliant.** Both ordinary residence (the *CJPTA* test)<sup>72</sup> and habitual residence (the November 2017 Hague draft test)<sup>73</sup> have been applied for many years by Canadian courts, especially in family matters, and they are generally treated as equivalent. Assuming that they are, a judgment in any case in which territorial competence was based on an individual’s ordinary residence will comply with the habitual residence criterion in the November 2017 Hague draft.

The 1999 Hague draft (the mixed convention draft) also used habitual residence as the basic jurisdictional test,<sup>74</sup> and specifically prohibited jurisdiction based on the defendant’s temporary residence or presence in the state.<sup>75</sup> The negotiations the following year showed disagreement on whether the term used should be “residence” or “habitual residence.”<sup>76</sup> And in case “residence” were to be chosen, a bracketed provision was inserted to select the state of principal residence, if possible, from among multiple residences.<sup>77</sup>

### 2. CORPORATIONS AND OTHER ENTITIES

**Sometimes Hague compliant.** The *CJPTA* follows the common law tradition of treating a corporation as present in the province if it does business or has an agent for service there. Because the Hague model, following the civil law pattern, makes habitual residence (not presence) the basic ground for personal

70. November 2017 Hague draft, *supra* note 19, art 5(1)(m). This jurisdictional ground was not in the 2016 draft.

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

72. *Ibid*, s 3(d).

73. November 2017 Hague draft, *supra* note 19, art 5(1)(a).

74. 1999 Hague draft, *supra* note 11, art 3(1).

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

76. 2001 Hague draft, *supra* note 12, art 3(1).

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

jurisdiction, the test for corporate habitual residence is aimed at selecting only the state or states (a corporation, like an individual, can have more than one habitual residence) in which the corporation is in some sense based.<sup>78</sup> The criteria have been the same throughout the Hague projects since the 1999 Hague draft.<sup>79</sup> A corporation is habitually resident in a state if it has its statutory seat there, was incorporated there, had its central administration there, or had its principal place of business there.<sup>80</sup> Only one of these—the place of central administration—is also used in the *CJPTA*.<sup>81</sup> The *CJPTA* uses three other alternative criteria that would usually not make the corporation habitually resident in the Hague sense: (1) being required by law to have a registered office in the province; (2) having, pursuant to law, registered an address or an agent in the province for service of process; and (3) having a place of business in the province.<sup>82</sup>

The four Hague criteria for habitual residence apply not only to corporations but also to an “entity or person other than a natural person,” such as unincorporated associations and partnerships.<sup>83</sup> The *CJPTA* deals separately with them, again regarding them as ordinarily resident if, among other things, they have a place of business or, if they do not do business, a place where they conduct their activities in the province.<sup>84</sup> They would not be habitually resident on the Hague test on that basis alone.

The Hague model, again by analogy with individuals, treats jurisdiction as against a corporation or other entity that is not habitually resident in the state, but does have a presence there, as assumed jurisdiction. Under the November

78. Compare the criterion used of the corporation’s being “at home,” which the US Supreme Court has adopted as the basis for general jurisdiction as against a corporation. See *Daimler AG v Bauman*, 134 S Ct 746 (2014); *Goodyear Dunlop Tires Operations SA v Brown*, 564 US 915 (2011). See also Tanya J Monestier, “Where Is Home Depot ‘At Home’?: *Daimler v. Bauman* and the End of Doing Business Jurisdiction” (2014) 66:1 *Hastings LJ* 233. Because of the due process requirements for general jurisdiction, as applied in these cases, the US common law on this issue is much closer to the Hague model than the Canadian common law is.

79. 1999 Hague draft, *supra* note 11, art 3(2).

80. November 2017 Hague draft, *supra* note 19, art 3(2).

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

82. *Ibid*, ss 7(a), (b) and (c), respectively. Having a place of business in the province is judged on fairly flexible lines. See Black, Pitel & Sobkin, *supra* note 1 at 83. Black, Pitel & Sobkin note *Borgstrom v Korean Air Lines Co Ltd*, 2006 BCSC 1690, 153 ACWS (3d) 576, rev’d on other grounds 2007 BCCA 263, 70 BCLR (4th) 206, in which an airline was found to have a place of business in British Columbia because it flew airplanes regularly into Vancouver and had ten employees posted there to handle the planes.

83. November 2017 Hague draft, *supra* note 19, art 3(2).

84. *CJPTA* (BC), *supra* note 1, ss 8-9.

2017 draft, if a defendant maintains a branch, agency, or other establishment<sup>85</sup> in the state of origin at the time the defendant becomes a party to the proceeding, there is jurisdiction if the claim on which the judgment is based arose out of the activities of that branch, agency, or other establishment.<sup>86</sup> This, of course, is the qualification that the Supreme Court of Canada refused, in the *Chevron* case, to add to jurisdiction based on a corporation's presence in the province.<sup>87</sup>

#### D. ASSUMED JURISDICTION: PRESUMED REAL AND SUBSTANTIAL CONNECTION

From the point of view of the enforceability of an eventual judgment, the assumed jurisdiction grounds come into play only if the defendant does not submit to the jurisdiction. The *CJPTA*, following the *Morguard* principle, adopted the real and substantial connection as the *sine qua non* of assumed jurisdiction.<sup>88</sup> The overwhelming majority of cases are taken care of by the listed categories of presumed real and substantial connection.<sup>89</sup> Of the twelve paragraphs of the list, four deal with subject matter that is largely or entirely excluded from the scope of the November 2017 Hague draft, and was also excluded from the 1999 and 2001 mixed convention drafts.<sup>90</sup>

The fifth paragraph, which presumes there to be a real and substantial connection if the proceeding is for the enforcement of a judgment or arbitral award from outside the province,<sup>91</sup> does not feature in the November 2017 Hague draft because the latter is confined to enforcing judgments in the sense of a decision on the merits,<sup>92</sup> not judgments that enforce other judgments or awards. Jurisdiction in foreign judgment proceedings was touched on in the

---

85. November 2017 Hague draft, *supra* note 19, art 5(1)(d). Article 5(1)(d) stipulates that the branch, agency or other establishment must be “without separate legal personality.” The use of jurisdiction over subsidiaries to get at parent companies was an issue in 2001. See 2001 Hague draft, *supra* note 12, art 9 and accompanying footnotes.

86. November 2017 Hague draft, *supra* note 19, art 5(1)(d).

87. But it is included in the *Civil Code of Québec*. See art 3148(2) CCQ.

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

89. *Ibid*, s 10.

90. See *ibid*, ss 10(b), (c), (l), (j). Section 10(b) and (c) are concerned with matters of succession law, though the latter may apply to some *inter vivos* transactions (excluded by November 2017 Hague draft, *supra* note 19, art 2(1)(d)); section 10(j) concerns status and capacity of a natural person (excluded by November 2017 Hague draft, *supra* note 19, art 2(1)(a)); and section 10(l) concerns recovery of taxes and revenue matters (excluded by November 2017 Hague draft, *supra* note 19, art 1(1)).

91. *CJPTA* (BC), *supra* note 1, s 10(k).

92. November 2017 Hague draft, *supra* note 19, art 3(1)(b).

mixed convention drafts, not by specifying when a court had jurisdiction in such proceedings—that was left by silence to national law—but rather by stipulating in the “black list” of prohibited grounds that a judgment creditor’s bringing of such a proceeding in a state would not give that state’s court jurisdiction in a matter not directly related to the enforcement proceeding.<sup>93</sup>

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

## 1. RIGHTS IN PROPERTY IN THE PROVINCE

**Sometimes Hague compliant.** The *CJPTA* gives territorial competence against a non-resident defendant if the proceeding “is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable.”<sup>94</sup> The November 2017 Hague draft recognizes no jurisdiction based on the claim having to do with rights in movable property situated within the state.<sup>95</sup> There are two provisions relating to claims to rights in immovables. One recognizes jurisdiction if a judgment rules on a tenancy of immovable property in the state of origin.<sup>96</sup> The other is the provision, already referred to in Part III, above,<sup>97</sup> that gives the court of the *situs* exclusive jurisdiction to rule on rights *in rem* in immovable property.<sup>98</sup> The *CJPTA*’s “proprietary or possessory rights” in an immovable would cover claims to *in rem* rights and tenancies, as would claims to a security interest in an immovable that amounts to a right *in rem* because it is an interest in the land.<sup>99</sup> There may be some types of security interests in immovables that are within the *CJPTA* presumption but outside the Hague criteria because they are not rights *in rem*.

---

93. 1999 Hague draft, *supra* note 11, art 18(2)(h). Compare 2001 Hague draft, *supra* note 12, art 18(2)(h) (where two versions are proposed).

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

95. See *Tucows.com Co v Lojas Renner SA*, 2011 ONCA 548, 106 OR (3d) 561, leave to appeal to SCC refused, 34481 (24 May 2012). Jurisdiction would not be recognized on the sole basis that the domain name at issue was movable property in Ontario.

96. November 2017 Hague draft, *supra* note 19, art 5(1)(h).

97. It is discussed in the text accompanying notes 33-35.

98. November 2017 Hague draft, *supra* note 19, art 6(b).

99. Like the mortgages that were at issue in *Hogg v Provincial Tax Commission*, [1941] 4 DLR 501, [1941] 3 WWR 605 (Sask CA).

## 2. TRUSTS

**Sometimes Hague compliant.** Both the *CJPTA* and the November 2017 Hague draft have fairly elaborate provisions about jurisdiction relating to trusts. They overlap but do not coincide. The November 2017 Hague draft provision is limited to trusts “created voluntarily and evidenced in writing,”<sup>100</sup> whereas the *CJPTA* paragraph applies to any trust, including one imposed by law or created orally.<sup>101</sup>

To take the four *CJPTA* grounds concerning trusts in turn, the first is that relief against a trustee (wherever resident) is claimed only as to trust assets, whether movable or immovable, in the province.<sup>102</sup> This is not a ground under the November 2017 Hague draft. The second is that the trustee is ordinarily resident in the province.<sup>103</sup> This may be covered by the general November 2017 Hague draft provision that “the person against whom recognition or enforcement is sought was habitually resident” in the state of origin.<sup>104</sup> The third is that the administration of the trust is principally carried on in the province.<sup>105</sup> This would usually correspond to the November 2017 Hague draft criterion that the trust instrument expressly or impliedly designates the state of origin as the state in which the principal place of administration of the trust is situated.<sup>106</sup> The November 2017 Hague draft provision refers to where the principal administration should take place according to the trust instrument, whereas the *CJPTA* provision refers to where it actually takes place. The fourth *CJPTA* ground is that by the express terms of a trust document, the trust is governed by the law of the province.<sup>107</sup> The governing law of the trust is not a jurisdictional basis under the November 2017 Hague draft.<sup>108</sup>

In one of the rare instances of the Hague jurisdictional criteria covering a situation the *CJPTA* presumptions do not cover, the November 2017 Hague draft recognizes a judgment if the state of origin was designated in the trust instrument as a state (not necessarily the only state) in which disputes about such matters are to be determined.<sup>109</sup> Even though this exact ground is not in the

---

100. November 2017 Hague draft, *supra* note 19, art 5(1)(k).

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

102. *Ibid*, s 10(d)(i).

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

104. November 2017 Hague draft, *supra* note 19, art 5(1)(a).

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

106. November 2017 Hague draft, *supra* note 19, art 5(1)(k)(ii).

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

108. It was included in the February 2017 Hague draft. See February 2017 Hague draft, *supra* note 19, art 5(1)(n)(ii). This ground does not appear in the November 2017 Hague draft.

109. November 2017 Hague draft, *supra* note 19, art 5(1)(k)(i).

*CJPTA*, in almost every case where a trust does say that disputes about the trust could be litigated in the province, it seems more than likely that one or other of the existing *CJPTA* presumptions would give territorial competence (place of administration, express choice of governing law, et cetera).<sup>110</sup>

The 1999 Hague draft has one other ground relating to trusts, which is that a court would have jurisdiction if the trust had its closest connection with the forum state.<sup>111</sup> The 2001 Hague draft expands this by adding some factors to be taken into account in determining the closest connection.<sup>112</sup> It also adds a further jurisdictional ground, which is that the settlor, if living, and all living beneficiaries were all habitually resident in the forum state.<sup>113</sup>

### 3. CONTRACTUAL OBLIGATIONS

**Sometimes Hague compliant.** The *CJPTA* has only two general jurisdictional presumptions relating to contractual obligations.<sup>114</sup> Territorial competence exists if the contractual obligations with which the proceeding is concerned were, to a substantial extent, to be performed in the province.<sup>115</sup> It also exists if, by its express terms, the contract is governed by the law of the province.<sup>116</sup> There is a third presumption relating specifically to consumer contracts, defined as contracts for the purchase of property or services for use other than in the course of the purchaser's trade or profession.<sup>117</sup> Territorial competence is presumed to exist if the contract resulted from a solicitation of business in the province on behalf of the seller.<sup>118</sup>

---

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

111. 1999 Hague draft, *supra* note 11, art 11(2)(c).

112. 2001 Hague draft, *supra* note 12, art 11(2)(c).

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

114. Saskatchewan has a third general jurisdictional presumption, namely, that the contract was made in Saskatchewan. See *CJPTA* (SK), *supra* note 1, s 9(e)(ii). This may be because the Saskatchewan version of the act followed an earlier ULCC draft rather than the final one. See Black, Pitel & Sobkin, *supra* note 1 at 35-36. The place of contracting has (unfortunately, in my view) attracted the Supreme Court of Canada, which declared it to be a presumptive connecting factor even in tort cases if the tort was connected with the contract. See *Club Resorts*, *supra* note 49; *Lapointe*, *supra* note 51 at para 36. The place of signing a contract was on the "black list" in the 1999 Hague draft. See 1999 Hague draft, *supra* note 11, art 18(2)(j).

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

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

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

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

The November 2017 Hague draft also recognizes jurisdiction based on where a contract was or should have been performed, but without the “to a substantial extent” qualification. Performance of the obligation in issue must have taken place, or ought to have taken place, in the forum state.<sup>119</sup> The November 2017 Hague draft does, however, add another qualification, one that is unusual in that it is phrased in the style of US law and is probably directed at due process concerns.<sup>120</sup> The fact that the forum state was the place of performance does not give jurisdiction if “the defendant’s activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that state.”<sup>121</sup> This wording is in the Working Group draft; the group suggests that the use of “purposeful” might need further elaboration and discussion by the Special Commission,<sup>122</sup> but the latter left the wording alone.<sup>123</sup> The 1999 and 2001 Hague drafts are quite different. The first has a rule based strictly on the place of performance.<sup>124</sup> The second adds an alternative version based on the contract being “directly related” to “frequent [and/or] significant activity” in the state.<sup>125</sup> Whether to include “activity jurisdiction” was one of the main sticking points in the 2000–2001 negotiations.

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

It is worth noting that there is a specific provision, in brackets, that could have been designed for the *Morguard* case; the court had jurisdiction if the judgment ruled on a contractual obligation secured by a right *in rem* in immovable property in the state, if the claim was brought together with a claim relating to that right.<sup>126</sup>

The November 2017 draft provides that assumed jurisdiction based on the place of performance does not exist if the person sought to be bound is a consumer or an employee.<sup>127</sup> This is one of only two places in which the November 2017 draft deals with the special jurisdictional problems relating to contract actions

---

119. November 2017 Hague draft, *supra* note 19, art 5(1)(g).

120. See Brand, “Due Process,” *supra* note 13.

121. November 2017 Hague draft, *supra* note 19, art 5(1)(g).

122. April 2016 Explanatory Note, *supra* note 17 at para 96.

123. The Special Commission also deployed a modified version of it in other provisions. See November 2017 Hague draft, *supra* note 19, arts 5(3)(a), (b). See also *supra* note 42 and accompanying text.

124. 1999 Hague draft, *supra* note 11, art 6.

125. 2001 Hague draft, *supra* note 12, art 6, Alternative A. Two variant paragraphs would have elaborated on what “activity” meant.

126. November 2017 Hague draft, *supra* note 19, art 5(1)(i).

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

brought against consumers and employees.<sup>128</sup> The 1999 Hague draft, no doubt influenced by the *Brussels Convention* model, has special jurisdictional rules for both categories of contract, dealing with actions brought by, as well as against, the consumer or employee.<sup>129</sup> The 2001 Hague draft reflects acute controversies about the consumer provisions; there were now multiple alternative and variant proposals. Commission II had not got to the employment provisions.<sup>130</sup>

#### 4. RESTITUTIONARY OBLIGATIONS

**Never Hague compliant.** The November 2017 Hague draft has no provision recognizing jurisdiction based on the place where restitutionary obligations arose that would be analogous to the presumption in the *CJPTA*.<sup>131</sup> There is a jurisdictional principle based on where a non-contractual obligation arose,<sup>132</sup> but that provision, discussed in Part IV(D)(5) below, is limited to claims for physical injury. The 1999 and 2001 mixed convention drafts did not have a provision for restitutionary claims either.

#### 5. TORT

**Sometimes Hague compliant.** The *CJPTA* presumes territorial competence, based on a real and substantial connection, if the proceeding concerns a tort committed in the province. Canadian law has been especially liberal when it comes to assumed jurisdiction in tort claims. The locus of the tort, for jurisdictional purposes, can be in any country that was substantially affected by the defendant's activities or their consequences, provided that the law of that country is likely to have been in the reasonable contemplation of the parties.<sup>133</sup> In *Club Resorts*<sup>134</sup> and *Lapointe*,<sup>135</sup> the Supreme Court of Canada went beyond the *CJPTA* when it held that jurisdiction in a tort claim could be based, not on where the tort was committed, but on the place of making of a contract with which the tort was connected. This notion of "connection" is a flexible one.

---

128. For the other, see November 2017 Hague draft, *supra* note 19, art 5(2)(a). See also the text accompanying *supra* note 62.

129. 1999 Hague draft, *supra* note 11, arts 7-8.

130. 2001 Hague draft, *supra* note 12, arts 7-8.

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

132. November 2017 Hague draft, *supra* note 19, art 5(1)(j).

133. *Moran v Pyle National (Canada) Ltd*, [1975] 1 SCR 393 at 408-09, 43 DLR (3d) 239 [*Moran*].

134. *Club Resorts*, *supra* note 49.

135. *Lapointe*, *supra* note 51.

The November 2017 Hague draft, by sharp contrast, is very conservative when it comes to assumed jurisdiction in tort claims. It eschews economic claims altogether, thereby cutting out (among others) almost all negligent or fraudulent misrepresentation claims, the locus of which, for jurisdictional purposes, is often litigated in Canada.<sup>136</sup> The exclusion of defamation claims, another fertile source of jurisdictional disputes in Canadian courts, was referred to earlier in Part III, above.<sup>137</sup> It also settles firmly on a place of acting test. The rule recognizes only judgments based on a “non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, [if] the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred.”<sup>138</sup> By this test, default judgments based on the jurisdictional grounds approved in many of the leading Canadian cases, including *Moran*<sup>139</sup> and *Club Resorts*,<sup>140</sup> would not have been enforceable under the November 2017 Hague draft provision.

The 1999 Hague draft, for the mixed convention, was much closer to the Canadian position. It would have included in the “white list” of required jurisdictional grounds a tort claim where the act or omission occurred in the state, or where the injury arose in the state, unless the defendant can show that it could not reasonably have been foreseen that the act or omission could result in an injury of that nature in that state.<sup>141</sup> The 2001 Hague draft included another provision, bracketed, that parallels the activity-based ground proposed for jurisdiction in contract claims.<sup>142</sup> Jurisdiction could be based on the defendant’s having “engaged in frequent or significant activity” in the forum state if the tort claim arose out of that activity.<sup>143</sup>

---

136. See e.g. *Central Sun Mining Inc v Vector Engineering Inc*, 2013 ONCA 601 at para 35, 117 OR (3d) 313, leave to appeal to SCC refused, 35640 (13 March 2014).

137. November 2017 Hague draft, *supra* note 19, art 2(1)(k). See also the text accompanying *supra* note 31.

138. November 2017 Hague draft, *supra* note 19, art 5(1)(j).

139. *Moran*, *supra* note 133.

140. *Club Resorts*, *supra* note 49. In neither of the two cases decided in *Club Resorts* was jurisdiction taken based on the tort having been committed in Ontario, and so they would not have fitted under the *CJPTA* presumption. They could have been cases where a “residual” real and substantial connection might be shown.

141. 1999 Hague draft, *supra* note 11, art 10(1).

142. See 2001 Hague draft, *supra* note 12, art 6, Alternative A. See also the text accompanying *supra* note 125.

143. *Ibid*, art 10(2). The provision would also have required that “the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State.”

## 6. BUSINESS CARRIED ON

**Sometimes Hague compliant.** The *CJPTA* presumes territorial competence if the proceeding concerns a business carried on in the province.<sup>144</sup> This ground is not often needed when it comes to suing a corporation, because the *CJPTA*'s tests for the ordinary residence of a corporation include the fact that the corporation had a place of business in the province. So this presumption comes into play only if the claim concerns a business carried on in the province by a corporation that does not have a "place" of business there and is not otherwise ordinarily resident there, or a business carried on by an individual who is ordinarily resident elsewhere. The November 2017 Hague draft does not recognize jurisdiction on the basis of a corporation's doing business other than through a branch, agency or other establishment.<sup>145</sup> It does have a provision for jurisdiction based on a natural person's having his or her principal place of business (not just a place of business) in the forum state, if the claim arose out of the business done there.<sup>146</sup>

## 7. INJUNCTION

**Never Hague compliant.** The *CJPTA* presumes there to be a real and substantial connection if the plaintiff claims an injunction ordering a party to do, or refrain from doing, anything in the province, or in relation to immovable or movable property in the province.<sup>147</sup> The November 2017 Hague draft has no corresponding ground.<sup>148</sup> The 1999 Hague draft and 2001 Hague draft dealt with jurisdiction to issue injunctions only as provisional or protective measures.<sup>149</sup>

---

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

145. November 2017 Hague draft, *supra* note 19, art 5(1)(d). See also the text accompanying *supra* note 86.

146. November 2017 Hague draft, *supra* note 19, art 5(1)(b).

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

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

149. 1999 Hague draft, *supra* note 11, art 13. In the 2001 Hague draft, opinion was divided on whether the convention should exclude provisional and protective measures from its scope altogether or, as the 1999 draft had proposed, specifically provide for jurisdiction to order protective measures that have effect only within the state of the court that orders them, and are designed to protect a claim on the merits. See 2001 Hague draft, *supra* note 12, arts 1(2)(k), 13, Alternatives A and B.

## E. ASSUMED JURISDICTION—RESIDUAL REAL AND SUBSTANTIAL CONNECTION

Using the November 2017 Hague draft as the basis for comparison, there would be very few Hague-compliant grounds of jurisdiction that would lie outside the *CJPTA*'s listed presumptions, and so would support jurisdiction under the *CJPTA* only on the basis of a residual (affirmatively shown) real and substantial connection. One example would be the bracketed ground for recognizing a judgment ruling on the validity of a copyright or other unregistered IP rights solely on the basis that the state of origin's law governed the right.<sup>150</sup> It would be rare, though not impossible, for such claims to find their way into the court of a province as distinct from the Federal Court, and so the *CJPTA* would practically never be involved.<sup>151</sup>

## F. ASSUMED JURISDICTION: FORUM OF NECESSITY

None of the Hague drafts include the concept of forum of necessity, which is understandable, given that it is controversial even within a legal system such as Canada's. A judgment based on the *CJPTA* forum of necessity provision<sup>152</sup> would not be Hague compliant.

## V. DECLINING JURISDICTION

### A. FORUM NON CONVENIENS

It is worth noting briefly the extent to which the *CJPTA*'s *forum non conveniens* provisions<sup>153</sup> fit into the Hague discussions. For obvious reasons, the November 2017 Hague draft, which is concerned only with recognition and enforcement of judgments, does not touch on declining jurisdiction. The discretion to decline jurisdiction is generally not a significant part of the jurisdictional system in civil law countries, and does not form part of the Brussels system. Nevertheless, it is included in the 1999 Hague draft for the mixed convention. That draft

---

150. November 2017 Hague draft, *supra* note 19, art 5(3)(c). Jurisdiction based on the place of infringement, as provided in article 5(3)(a) (registered rights) and article 5(3)(b) (non-registered rights) would probably fall within the "tort committed in [the province]" presumption in the *CJPTA*. See *ibid*, art 5(3)(a), (b); *CJPTA* (BC), *supra* note 1, s 10(g).

151. For a case where copyright infringement claims were brought against non-resident defendants, although in a non-*CJPTA* province, see *Geophysical*, *supra* note 51.

152. *CJPTA* (BC), *supra* note 1, s 6. The forum of necessity section was omitted in the *CJPTA* (SK), *supra* note 1. See also Black, Pitel & Sobkin, *supra* note 1 at 174-77.

153. *CJPTA* (BC), *supra* note 1, s 11.

convention would have permitted a court in a contracting state, in “exceptional circumstances,” to suspend its proceedings if it was “clearly inappropriate” for the court to exercise jurisdiction and another state’s court was “clearly more appropriate to resolve the dispute.”<sup>154</sup> If the other court took jurisdiction, the first court would then decline jurisdiction.<sup>155</sup> This provision survived almost intact into the 2001 Hague draft.<sup>156</sup> The references to “exceptional circumstances” and “clearly inappropriate” seem to make the standard for declining jurisdiction somewhat higher than the *CJPTA*’s.<sup>157</sup> Even the alternative forum’s being “clearly more appropriate” is stricter than the *CJPTA*’s “more appropriate,”<sup>158</sup> although the common law has sanctified the “clearly more appropriate” test and courts tend to equate the *CJPTA* test with it.<sup>159</sup>

## B. PARALLEL PROCEEDINGS

The *CJPTA*, like the common law, has no principle of *lis alibi pendens*. The *forum non conveniens* provisions of the *CJPTA* therefore apply to cases in which proceedings on the same matter between the same parties have been brought elsewhere, as the Supreme Court of Canada confirmed in the *Teck* case.<sup>160</sup>

Because it only proposes a recognition and enforcement convention, the November 2017 Hague draft does not have to deal with *lis alibi pendens*. It does, however, have a provision permitting the requested state to refuse or postpone recognition or enforcement of a foreign judgment that is otherwise entitled to it, if proceedings between the same parties on the subject matter are pending before a court in that state, provided that the local court was seized before the court of origin and there is a close connection between the dispute and the

154. 1999 Hague draft, *supra* note 11, art 22.

155. *Ibid.*

156. 2001 Hague draft, *supra* note 12, art 22. See Ronald A Brand, “Comparative *Forum Non Conveniens* and the Hague Convention on Jurisdiction and Judgments” (2002) 37:3 *Tex Intl LJ* 467.

157. Black, *supra* note 11 at 260. The “clearly inappropriate” element has affinities with the Australian law on *forum non conveniens*. See Justin Paul Cook, “Declining Jurisdiction in The Hague’s Proposed Judgments Convention: Amalgamating the ‘More Appropriate Forum’ and the ‘Clearly Inappropriate Forum’ Tests to Provide the Optimal Forum Non Conveniens Clause” (2014) 21 *Aust ILJ* 19.

158. “More appropriate” is the standard in both sections 11(1) and (2). See *CJPTA* (BC), *supra* note 1, ss 11(1), (2).

159. See *Club Resorts*, *supra* note 49 at paras 108-109; *Colonial Countertops Ltd v Maple Terrazzo Marble & Tile Inc*, 2014 BCSC 752 at paras 25-29, [2014] 11 *WWR* 827.

160. *Teck Cominco Metals Ltd v Lloyd’s Underwriters*, 2009 SCC 11 at paras 21-22, 29, [2009] 1 *SCR* 321 [*Teck*].

requested state.<sup>161</sup> The Permanent Bureau's commentary notes that jurisdictions differ on whether a pending local proceeding is pre-empted by a foreign judgment that is entitled to recognition.<sup>162</sup> Hence, this provision is worded in permissive rather than mandatory terms.

The 1999 Hague draft for the mixed convention includes a rule that the court second seized must suspend jurisdiction in favour of the court first seized,<sup>163</sup> subject to two exceptions. One is where the action in the court first seized is for a determination that the plaintiff has no obligation to the defendant whereas the action in the other court seeks substantive relief; in that case the court first seized must suspend the proceedings.<sup>164</sup> The other is where the court first seized, on application by a party, determines that the court second seized is "clearly more appropriate to resolve the dispute."<sup>165</sup> The article would not allow, as in *Teck*, the court second seized to refuse to decline jurisdiction because it considers itself to be clearly the more appropriate forum. The article survived into the 2001 Hague draft with only minor amendments.<sup>166</sup>

## VI. CONCLUSION

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

---

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

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

163. 1999 Hague draft, *supra* note 11, art 21(1). The court first seized must be "expected to render a judgment capable of being recognised" under the convention.

164. *Ibid*, art 21(6).

165. *Ibid*, art 21(7).

166. 2001 Hague draft, *supra* note 12, art 21(7).

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

Two other considerations come into play as well. One, which relates to a point referred to in Part V(A) above,<sup>167</sup> is that the domestic jurisdictional grounds are structured as they are because they include a robust discretion to decline jurisdiction on the basis of *forum non conveniens*. To recast the grounds along the lines of the grounds found in the November 2017 Hague draft judgments convention would ignore this fundamental structural feature. The other consideration is that one of the main roles of the *CJPTA* is to define jurisdiction vis-à-vis other provinces. This the *CJPTA* does, following in a reasonable way the constitutional limits on jurisdiction limits that, in retrospect, were interpreted fairly conservatively. To narrow the *CJPTA* jurisdictional grounds under the influence of a Hague convention would, therefore, in a sense, put the international cart before the interprovincial horse.<sup>168</sup>

It is hard to imagine any scenario in which the Hague system and the common law jurisdictional systems, of which the *CJPTA* is part, will be brought close enough together to allow them to merge into one integrated whole. Even if a Hague convention on jurisdiction, separate from the recognition and enforcement of judgments convention currently being negotiated, comes to pass, it will almost

---

167. See *supra* note 47 and accompanying text.

168. The international cart may also eventually take more than one form. Since 2005, the Commonwealth Law Ministers have been developing a Model Law for the recognition of judgments among the Commonwealth nations. The Ministers considered a draft in 2014. See Meeting of Commonwealth Law Ministers and Senior Officials, *Final Communiqué* (Gaborone, Botswana: 5-8 May 2014), online: <[thecommonwealth.org/sites/default/files/inline/Commonwealth\\_Law\\_Ministers\\_Meeting\\_2014\\_Communique.pdf](http://thecommonwealth.org/sites/default/files/inline/Commonwealth_Law_Ministers_Meeting_2014_Communique.pdf)>. Further work is proceeding. The drafters have drawn on both the Hague model and the work of Commonwealth law reform agencies. See *ibid* at para 9.

certainly leave states free to use jurisdictional grounds that do not comply with the “white list” in the convention. There may or may not be an agreed “black list” of prohibited grounds of jurisdiction. Even if the black list in the 1999 Hague draft<sup>169</sup> were to be replicated in a new convention, it would not ban any of the grounds of assumed jurisdiction listed as presumed real and substantial connections in the *CJPTA*.<sup>170</sup> It is possible that such a convention could require some adjustments, probably not radical ones, to *forum non conveniens* and *lis alibi pendens* rules. Very probably, therefore, the *CJPTA* could function perfectly well even if Canada became a party to an eventual Hague jurisdiction convention.

Disparities between the *CJPTA* and the Hague system, whatever it may become, seem to be less of a concern than the growing disparities, the result of the evolution of the common law, between the *CJPTA* and non-*CJPTA* systems within Canada. The Supreme Court of Canada’s desire, as expressed in *Club Resorts*,<sup>171</sup> to harmonize the two as far as possible seems to have faded,<sup>172</sup> much to the detriment of the Canadian jurisdictional system as a whole.

---

169. 1999 Hague draft, *supra* note 11, art 18(2).

170. Except Saskatchewan’s presumption based on the place a contract is made. See *CJPTA* (SK), *supra* note 1, s 9(c)(ii).

171. *Club Resorts*, *supra* note 49.

172. As evidenced most notably in *Lapointe*, *supra* note 51. In *Lapointe*, the Court expanded considerably a presumptive jurisdictional ground (the place of making of a contract) that was deliberately omitted in the *CJPTA*.

## VII. APPENDIX

### **Hague Conference on Private International Law Special Commission on the Recognition and Enforcement of Foreign Judgments November 2017 Draft Convention (“November 2017 Hague draft”)**

#### CHAPTER I – SCOPE AND DEFINITIONS

##### Article 1

###### *Scope*

1. This Convention shall apply to the recognition and enforcement of judgments relating to civil or commercial matters. It shall not extend in particular to revenue, customs or administrative matters.
2. This Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State.

##### Article 2

###### *Exclusions from scope*

1. This Convention shall not apply to the following matters –
  - a. the status and legal capacity of natural persons;
  - b. maintenance obligations;
  - c. other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
  - d. wills and succession;
  - e. insolvency, composition, resolution of financial institutions, and analogous matters;
  - f. the carriage of passengers and goods;
  - g. marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;
  - h. liability for nuclear damage;

- i. the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs;
  - j. the validity of entries in public registers;
  - k. defamation ;
  - l. privacy / unauthorised public disclosure of information relating to private life];
  - m. intellectual property rights [and analogous matters]].
2. A judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings. In particular, the mere fact that such a matter arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.
  3. This Convention shall not apply to arbitration and related proceedings.
  4. A judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings.
  5. Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

### Article 3 *Definitions*

1. In this Convention –
  - a. “defendant” means a person against whom the claim or counterclaim was brought in the State of origin;
  - b. “judgment” means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.
2. An entity or person other than a natural person shall be considered to be habitually resident in the State –
  - a. where it has its statutory seat;
  - b. under whose law it was incorporated or formed;
  - c. where it has its central administration; or

- d. where it has its principal place of business.

## CHAPTER II – RECOGNITION AND ENFORCEMENT

### Article 4

#### *General provisions*

1. A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.
2. Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin.
3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.
4. If a judgment referred to in paragraph 3 is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired, the court addressed may –
  - a. grant recognition or enforcement, which enforcement may be conditional on the provision of such security as it shall determine;
  - b. postpone the decision on recognition or enforcement; or
  - c. refuse the recognition or enforcement.
5. A refusal under sub-paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

### Article 5

#### *Bases for recognition and enforcement*

1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –
  - a. the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin;
  - b. the natural person against whom recognition or enforcement is sought had his or her principal place of business in the State of origin at the time that person became a party to the proceedings in

- the court of origin and the claim on which the judgment is based arose out of the activities of that business;
- c. the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;
  - d. the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment;
  - e. the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;
  - f. the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;
  - g. the judgment ruled on a contractual obligation and it was given in the State in which performance of that obligation took place, or should have taken place, in accordance with
    - i. the parties' agreement, or
    - ii. (ii)the law applicable to the contract, in the absence of an agreed place of performance,
    - iii. unless the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;
  - h. the judgment ruled on a tenancy of immovable property and it was given in the State in which the property is situated;
  - i. the judgment ruled against the defendant on a contractual obligation secured by a right *in rem* in immovable property located in the State of origin, if the contractual claim was brought together with a claim against the same defendant relating to that right *in rem*;
  - j. the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred;

- k. the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and –
    - i. at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in which disputes about such matters are to be determined; or
    - ii. (ii)at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.  
This sub-paragraph only applies to judgments regarding internal aspects of a trust between persons who are or were within the trust relationship;
  - l. the judgment ruled on a counterclaim –
    - i. to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim
    - ii. (ii)to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;
  - m. the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement.
  - n. For the purposes of this sub-paragraph, an “exclusive choice of court agreement” means an agreement concluded by two or more parties that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction of any other courts.
2. If recognition or enforcement is sought against a natural person acting primarily for personal, family or household purposes (a consumer) in matters relating to a consumer contract, or against an employee in matters relating to the employee’s contract of employment –
    - a. paragraph 1 applies only if the consent was addressed to the court, orally or in writing;
    - b. paragraph 1, and do not apply.

3. Paragraph 1 does not apply to a judgment that ruled on an intellectual property right or an analogous right. Such a judgment is eligible for recognition and enforcement if one of the following requirements is met –
  - a. the judgment ruled on an infringement in the State of origin of an intellectual property right required to be granted or registered and it was given by a court in the State in which the grant or registration of the right concerned has taken place or, under the terms of an international or regional instrument, is deemed to have taken place[, unless the defendant has not acted in that State to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State];
  - b. the judgment ruled on an infringement in the State of origin of a copyright or related right, an unregistered trademark or unregistered industrial design, and it was given by a court in the State for which protection was claimed[, unless the defendant has not acted in that State to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State];
  - c. the judgment ruled on the validity[, subsistence or ownership] in the State of origin of a copyright or related right, an unregistered trademark or unregistered industrial design, and it was given by a court in the State for which protection was claimed.]

#### Article 6

##### *Exclusive bases for recognition and enforcement*

1. Notwithstanding Article 5 –
  - 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;]
  - b. a judgment that ruled on rights *in rem* in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin;
  - c. a judgment that ruled on a tenancy of immovable property for a period of more than six months shall not be recognised and enforced if the property is not situated in the State of origin and the

courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State.

Article 7

*Refusal of recognition or enforcement*

1. Recognition or enforcement may be refused if –
  - a. the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim –
    - i. was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or
    - ii. (ii)was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;
  - b. the judgment was obtained by fraud;
  - c. recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State;
  - d. the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court other than the court of origin;
  - e. the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
  - f. the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same subject matter, provided that the earlier judgment fulfills the conditions necessary for its recognition in the requested State;

- g. the judgment ruled on an infringement of an intellectual property right, applying to that [right / infringement] a law other than the internal law of the State of origin.].
- 2. Recognition or enforcement may be refused or postponed if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –
  - a. the court of the requested State was seised before the court of origin; and
  - b. there is a close connection between the dispute and the requested State.

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

## Article 8

### *Preliminary questions*

1. Where a matter to which this Convention does not apply, or a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled arose as a preliminary question, the ruling on that question shall not be recognised or enforced under this Convention.
2. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply, or on a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled.
3. However, in the case of a ruling on the validity of a right referred to in Article 6, paragraph , recognition or enforcement of a judgment may be postponed, or refused under the preceding paragraph, only where –
  - a. that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State referred to in Article 6, paragraph ; or
  - b. proceedings concerning the validity of that right are pending in that State.

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

Article 9  
*Severability*

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

Article 10  
*Damages*

1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.
2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 11  
*Non-monetary remedies in intellectual property matters*

In intellectual property matters, a judgment ruling on an infringement shall be [recognised and] enforced only to the extent that it rules on a monetary remedy in relation to harm suffered in the State of origin.]

Article 12  
*Judicial settlements* (transactions judiciaires)

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

## Article 13

*Documents to be produced*

1. The party seeking recognition or applying for enforcement shall produce—
  - a. a complete and certified copy of the judgment;
  - b. if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
  - c. any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;
  - d. in the case referred to in Article 13, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.
2. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require any necessary documents.
3. An application for recognition or enforcement may be accompanied by a document relating to the judgment, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.
4. If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

## Article 14

*Procedure*

1. The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.
2. The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

Article 15

*Costs of proceedings*

1. No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given in another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.
2. An order for payment of costs and expenses of proceedings, made in a Contracting State against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 shall, on the application of the person entitled to the benefit of the order, be rendered enforceable in any other Contracting State.]

Article 16

*Recognition or enforcement under national law*

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

CHAPTER III – GENERAL CLAUSES

Article 17

*Transitional provision*

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

Article 18

*Declarations limiting recognition and enforcement*

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

## Article 19

*Declarations with respect to specific matters*

1. Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.
2. With regard to that matter, the Convention shall not apply –
  - a. in the Contracting State that made the declaration;
  - b. in other Contracting States, where recognition or enforcement of a judgment given in a Contracting State that made the declaration is sought.

## Article 20

*Declarations with respect to judgments pertaining to governments*

1. A State may declare that it shall not apply this Convention to judgments which arose from a proceeding to which it is a party, or to which any of its governmental agencies or any person acting on behalf of such governmental agency is a party, only to the extent specified in the declaration. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the exclusion from scope is clearly and precisely defined.
2. With regard to a declaration made pursuant to paragraph (1), the Convention shall not apply to the excluded proceedings as specified and defined in the declaration –
  - a. in the Contracting State that made the declaration;
  - b. in other Contracting States, where recognition or enforcement of a judgment given in a Contracting State that made the declaration is sought.]

## Article 21

*Declarations with respect to common courts*

1. A Contracting State may declare that –
  - a. a court common to two or more States exercises jurisdiction over matters that come within the scope of this Convention; and

- b. such a court –
  - i. has only an appellate function; or
  - ii. (ii) has first instance and appellate functions.
- 2. Judgments of a Contracting State include –
  - a. judgments given by a court referred to in paragraph 1;
  - b. judgments given by a court referred to in paragraph 1(ii) if all States referred to in paragraph 1 are parties to this Convention.
- 3. If a court referred to in paragraph 1 serves as a common court for States some of which are Contracting States and some of which are non-Contracting States to this Convention, judgments given by such a court shall only be considered as judgments of a Contracting State if the proceedings at first instance were instituted in a Contracting State.
- 4. In case of a judgment given by a court referred to in paragraph 1(ii) the reference to the State of origin in Articles 5 and 6 shall be deemed to refer to the entire territory over which that court had jurisdiction in relation to that judgment.]

#### Article 22

##### *Uniform interpretation*

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

#### Article 23

##### *Review of operation of the Convention*

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

- a. review of the operation of this Convention, including any declarations; and
- b. consideration of whether any amendments to this Convention are desirable.

#### Article 24

##### *Non-unified legal systems*

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

- a. any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;
  - b. any reference to habitual residence in a State shall be construed as referring, where appropriate, to habitual residence in the relevant territorial unit;
  - c. any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;
  - d. any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.
2. Notwithstanding the preceding paragraph, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.
  3. A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.
  4. This Article shall not apply to a Regional Economic Integration Organisation.

#### Article 25

##### *Relationship with other international instruments*

1. This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.
2. This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] that was concluded before this Convention entered into force for that Contracting State [as between Parties to that instrument].
3. This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] concluded after this Convention entered into force for that Contracting State 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. [Nothing in

the other instrument shall affect the obligations under Article 6 towards Contracting States that are not Parties to that instrument.]

4. This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.
5. A Contracting State may declare that other international instruments listed in the declaration shall remain unaffected by this Convention.]

[Chapter IV, Final Clauses, is omitted.]