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THE HAGUE JUDGMENTS CONVENTION IN THE UNITED STATES: A "GAME CHANGER" OR A NEW PATH TO THE OLD GAME?

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THE HAGUE JUDGMENTS CONVENTION IN THE UNITED STATES: A "GAME CHANGER" OR A NEW PATH TO THE OLD GAME?

Ronald A. Brand*

ABSTRACT

The Hague Judgments Convention, completed on July 2, 2019, is built on a list of "jurisdictional filters" in Article 5(1) and grounds for non-recognition in Article 7. If one of the thirteen jurisdictional tests in Article 5(1) is satisfied, the judgment may circulate under the Convention, subject to the grounds for non-recognition found in Article 7. This approach to Convention structure is especially significant for countries considering ratification and implementation. A different structure was suggested in the initial Working Group stage of the Convention's preparation, which would have avoided the complexity of multiple rules of indirect jurisdiction, each of which comes with its own complexity and risk for non-uniform interpretation. That alternative structure, however, may in fact be possible under the current Convention text, using Article 15 as the focus for domestic implementation. Article 15 allows the recognition or enforcement of judgments under national law. For countries like the United States, with very liberal existing law on the recognition of foreign judgments, Article 15 may in fact provide a more efficient, effective, and economical approach, even under the Convention. This Article considers the benefits and risks of the complex Convention structure that was chosen, as well as the alternative Convention architecture that was left behind in the negotiation process. It then suggests that the

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path through Article 15 may well offer a valuable alternative in the implementation and operation of the Convention in countries with existing liberal and non-discriminatory approaches to judgments recognition.

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INTRODUCTION

The 2019 Hague Judgments Convention is the culmination of over a quarter-century of negotiations at the Hague Conference on Private International Law.[1] Those negotiations began in 1992, when the United States requested that a global approach to jurisdiction and judgments recognition be placed on the Hague Conference agenda.[2] Along the way to the 2019 Convention, the 2005 Hague Convention on Choice of Court Agreements was completed and is now in effect in Mexico, Montenegro, Singapore, the United Kingdom,[3] and the Member States of the European Union.[4] This propelled the world towards the goal of global recognition and enforcement of judgments in cases arising from commercial contracts with exclusive choice of court agreements. As the Final Text of the Judgments Convention was signed on July 2, 2019 by those who participated in the negotiations, the Secretary General of the Hague Conference spoke of the Convention as a "game changer" in international litigation.

The new Judgments Convention is based largely on what some have referred to as "jurisdictional filters." Article 5(1) of the Convention provides a list of thirteen authorized bases of indirect jurisdiction by which a foreign judgment is first tested.[5] If one of these jurisdictional filters is satisfied, the resulting judgment is presumptively entitled to circulate under the Convention,[6] subject to the Article 7 set of grounds for non-recognition that generally are consistent with existing practice in most legal systems.[7]

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[1] *Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters*, HAGUE CONF. ON PRIV. INT'L L. (July 2, 2019), https://www.hcch.net/en/instruments/conventions/full-text/?cid=137 [hereinafter *Judgments Convention*].

[2] The discussion of judgments recognition at the Hague Conference began much earlier with a Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters completed in 1971, but never entering into effect. *See* RONALD A. BRAND & PAUL M. HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS ch. 1 (Cambridge Univ. Press 2008).

[3] On September 28, 2020, the United Kingdom expressed its consent to be bound by the Convention upon its exit from the European Union. *See Declaration*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/instruments/conventions/status-table/ notifications/?csid=1318&disp=resdn (last visited Sept. 18, 2021).

[4] Hague Conference on Private International Law, Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 [hereinafter Choice of Court Agreements]. *See Status Table, Convention on Choice of Court Agreements*, HAGUE CONF. ON PRIV. INT'L L., http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (last updated Mar. 3, 2021) [hereinafter *Status Table*].

[5] *Judgments Convention*, *supra* note 1, art. 5(1).

[6] *Id.*

[7] *Id.* art. 7.

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This operational structure of the Judgments Convention—its "architecture"—is important to those states that will consider ratification and accession, and it is of particular importance to the United States. Once the discussions at The Hague moved from Working Group to Special Commission process, however, it was a matter of only limited discussion. The Working Group draft that became the focus of the work of Special Commissions and the Diplomatic Conference represented a very specific choice in this regard, and the matter of convention architecture was considered to have been settled at the outset, with no real opportunity for reconsideration.

For the United States, consideration of ratification of the Judgments Convention must take into account existing U.S. law on judgments recognition, which is more closely aligned to an alternative approach that was not followed in the Working Group or the subsequent negotiating sessions. That does not, however, prevent the 2019 Judgments Convention from being attractive from a U.S. perspective. The Convention would provide clear benefits to the United States in the recognition and enforcement of U.S. judgments abroad. The Convention architecture does, however, have important implications for the implementation and use of the Convention should the United States ratify it.

In Part I of this Article, I begin with a review of the history of the Hague Judgments Project in order to provide the context for the decisions that were made in reaching the 2019 Judgments Convention text, as discussed in Part II. In Part III, I then give particular attention to Article 5(1) of the Convention, the manner in which it is constructed, and the alternative convention architecture that could have been chosen. Using this background, in Part IV, I consider why, in the United States (as well as in a number of other states without a "jurisdiction gap" between direct and indirect jurisdiction rules), the operation of the Convention may be determined less by the Article 5(1) list of indirect bases of jurisdiction than by the Article 15 simple statement that "this Convention does not prevent the recognition or enforcement of judgments under national law." In Part V, I conclude by considering whether it would be practical to add the Convention overlay of complexity brought about by Article 5(1) in U.S. courts or to simply use the avenue provided by Article 15 when foreign judgments are brought for recognition and enforcement should the United States ratify and implement the Convention. This approach may well mean that Article 5(1)—the central piece of the Convention's architecture—will have limited, if any, relevance in cases brought to recognize and enforce a judgment in a Contracting State that, like the United States, has no direct/indirect jurisdiction gap.

I. THE HISTORY OF THE HAGUE JUDGMENTS PROJECT

In May of 1992, the United States proposed that the Hague Conference on Private International Law consider preparing a multilateral convention on the

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recognition and enforcement of judgments.[8] The matter was placed on the agenda of the Hague Conference in October 1996,[9] resulting in a Preliminary Draft Convention text in October 1999.[10] That text was revised again at the first part of a split Diplomatic Conference in June 2001. While a new text was created, closely following the 1999 Text, problems with completion were clear from its many bracketed provisions, footnotes, and explanations of various positions.[11] In April 2002, the Conference instructed an informal working group to consider drafting a more limited convention, including only those jurisdictional provisions on which substantial consensus existed. This resulted in a March 2003 Draft Text for a Convention on Choice of Court Agreements.[12] A further Special Commission considered that text, and the Convention on Choice of Court Agreements was concluded at a Diplomatic Conference in June of 2005.[13]

The Hague Convention on Choice of Court Agreements went into effect for Mexico and the European Union (for 27 of its Member States) on October 1, 2015;[14]

[8] Letter from Edwin D. Williamson, Legal Advisor, U.S. Dep't of State, to Georges Droz, Sec'y Gen., Hague Conference on Private Int'l Law (May 5, 1992) (distributed with Hague Conference document L.c. ON No. 15 (92)).

[9] Hague Conference on Private International Law, Final Act of the Eighteenth Session, Oct. 19, 1996, 35 I.L.M. 1391.

[10] PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, INFORMATIONAL NOTE ON THE WORK OF THE INFORMAL MEETINGS HELD SINCE OCTOBER 1999 TO CONSIDER AND DEVELOP DRAFTS ON OUTSTANDING ITEMS, PRELIMINARY DOCUMENT NO. 15 (2001) (containing the text of the Preliminary Draft Convention).

[11] *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6*, HAGUE CONF. ON PRIV. INT'L L. (June 20, 2001), https://assets.hcch.net/docs/e172ab52-e2de-4e40-9051-11aee7c7be67.pdf.

[12] PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY RESULT OF THE WORK OF THE INFORMAL WORKING GROUP ON THE JUDGMENTS PROJECT, PRELIMINARY DOCUMENT NO. 8 (2003).

[13] *Final Act of the Twentieth Session*, HAGUE CONF. ON PRIV. INT'L L. (June 30, 2005), https://www.hcch.net/en/instruments/conventions/full-text/?cid=98; *Jurisdiction Project*, HAGUE CONF. ON PRIV. INT'L L. (Feb. 19, 2021), https://www.hcch.net/es/projects/legislative-projects/jurisdiction-project [hereinafter *Jurisdiction Project*].

[14] On January 31, 2020, the United Kingdom notified the Depositary that "the United Kingdom and the European Union have signed, ratified and approved a Withdrawal Agreement, which will enter into force on 1 February 2020" (the "Withdrawal Agreement"). The Withdrawal Agreement includes provisions for a transition period to start on the date the Withdrawal Agreement enters into force and end on December 31, 2020 (the "transition period"). In accordance with the Withdrawal Agreement, during the transition period, European Union law, including the Agreement, will continue to be applicable to and in the United Kingdom. *See Status Table*, *supra* note 4.

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for Singapore on October 1, 2016; for Montenegro on August 1, 2018; and for Denmark on September 1, 2018.[15] The United Kingdom has given notice that it remains in effect for the United Kingdom subsequent to Brexit.[16] The People's Republic of China, the Republic of North Macedonia, Ukraine, and the United States have signed, but have not ratified, the Convention.[17]

The Choice of Court Convention contains three basic rules: Article 5 provides that a court chosen in an exclusive choice of court agreement shall have exclusive jurisdiction; Article 6 provides that a court not chosen shall defer to the chosen court; and Article 8 provides that the courts of all contracting states shall recognize and enforce judgments from a court chosen in an exclusive choice of court agreement, subject to an explicit list of bases for non-recognition found in Article 9.[18] Thus, the 2005 Convention is both a jurisdiction convention (limited to one basis of jurisdiction: consent to exclusive dispute settlement in the courts of one state) and a judgments convention (providing for circulation of judgments from cases based on exclusive choice of court agreements).

In October 2011, the Council on General Affairs and Policy of the Hague Conference established an Experts' Group to consider the resumption of the Judgments Project.[19] There was a desire on the part of some delegations to return to the original project and again draft a convention that would deal with both direct jurisdiction and the recognition and enforcement of judgments. In 2012, the Council split these two objectives when it established a Working Group to prepare proposals for a judgments convention and directed the Experts' Group to give further study to a separate jurisdiction convention.[20] The Working Group completed a Proposed Draft Text of a judgments convention in 2016, and the Council established a Special Commission to move the text forward. The Experts' Group was instructed to move forward on a jurisdiction convention only after the judgments convention text would be concluded.[21] Special Commission meetings for a Judgments Convention were

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] For a more complete discussion of the Choice of Court Convention, see BRAND & HERRUP, *supra* note 2.

[19] *See Jurisdiction Project*, *supra* note 13.

[20] *Id.*

[21] *Id.*

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held on June 1–9, 2016; February 16–24, 2017; November 13–17, 2017; and May 24–29, 2018. The Diplomatic Conference concluded on July 2, 2019, with the adoption of the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters as its Final Text.[22] Ukraine and Uruguay have signed the Convention, but neither has yet ratified.[23]

II. THE 2019 JUDGMENTS CONVENTION

A. The Architecture of the Convention and the Rejected Alternative

The basic structure of the Judgments Convention text is rather simple, but it is then made more complex through the set of indirect jurisdiction filters by which a court is to determine whether a judgment may circulate under the Convention. Articles 1–3 set forth the scope of the Convention and provide definitions.[24] The Convention applies to "the recognition and enforcement of judgments relating to civil or commercial matters," subject to the exclusions from scope found in Article 2.[25] The scope provisions generally follow those in the 2005 Hague Convention on Choice of Court Agreements, except that the Judgments Convention does not exclude consumer matters from the scope.

Article 4(1) provides the operative rule of the Convention, which requires that each Contracting State shall recognize and enforce judgments from other Contracting States and permits refusal only on those grounds expressly set out in the Convention.[26] The text reads as follows:

> 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.[27]

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[22] *Judgments Convention*, *supra* note 1.

[23] *See Status Table*, *supra* note 4.

[24] *Judgments Convention*, *supra* note 1, arts. 1–3.

[25] *Id.* arts. 1–2.

[26] *Id.* art. 4(1).

[27] *Id.*

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Article 5 then determines which judgments are "eligible for recognition and enforcement" under the Convention by providing a list of bases of jurisdiction on which a judgment may have been founded.[28] Thus, the court addressed for purposes of recognition and enforcement considers indirectly the basis of jurisdiction on which the court of origin directly founded its judgment (or could have done so). Each item on the list is effectively adopted as an indirect basis of jurisdiction for purposes of the Convention text.[29] If the facts before the court of origin could have satisfied any one of the jurisdictional tests in the Article 5(1) list, then the judgment is presumptively qualified for recognition and enforcement under the Convention.[30]

Not all of the tests in the Article 5(1) list may necessarily be described as "bases of jurisdiction." For example, the tests in sub-paragraphs 5(1)(a) (court in the state of the defendant's habitual residence), 5(1)(c) (party that brought the principal claim), and 5(1)(e) (party consent), can be described as simple fairness tests by which it can be determined that it is appropriate for the courts of other states to give effect to the resulting judgment.[31] These tests may also be described as rules of comity based on public international law considerations, namely: when should a public body (a court) in one country not interfere with, and instead contribute to, making effective, the relationship between a public act (a judgment of a court of another country) and the parties affected by that act?

Article 6 departs from the basic character of the Convention by inserting a single direct jurisdiction rule. It states that "[n]otwithstanding Article 5, 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."[32] Thus, while the Convention otherwise deals with rules that *allow* recognition and enforcement, Article 6 provides a rule that can *prohibit* recognition and enforcement of a judgment

[28] *Id.* art. 5.

[29] *Id.* In the terminology thus used to describe the provisions of Article 5(1), a "direct basis of jurisdiction" is a basis applied in the court of origin, in which the original judgment is rendered. An "indirect basis of jurisdiction" is a basis used by the court addressed when it is asked to grant recognition and enforcement. In this way, bases of indirect jurisdiction are used by the court addressed to test the jurisdiction of the court of origin in order to determine the qualification of the judgment for recognition and enforcement in the court addressed. The recognizing court indirectly applies these jurisdictional tests to consider the legitimacy of the resulting judgment for purposes of circulation under the Convention.

[30] *Id.* art. 5(1).

[31] *Id.*

[32] *Id.* art. 6.

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that is not from the State in which the immovable property is located.[33] This is the only rule in the Convention of this type.

Article 7 provides the general bases for non-recognition of a judgment, even if that judgment meets the requirements of Article 5. This list tracks closely the grounds for non-recognition found in the 2005 Hague Choice of Court Convention,[34] which are generally familiar in national law throughout the world and include such concerns as fraud, lack of proper notice, the existence of inconsistent other judgments, and inconsistency with the public policy of the recognizing state.[35]

Articles 8–15 provide additional rules governing specific circumstances and procedures in an action for recognition and enforcement of a judgment. Articles 16–23 are the "general clauses" for purposes of the operation of the Convention. Articles 24–32 are the "final clauses" dealing with ratification, etc.

Articles 4–7 thus contain the basic rules by which judgments will be tested for purposes of recognition and enforcement under the Convention. Of these, if a judgment is within the scope of the Convention under Articles 1 and 2, Article 5(1) determines the judgments which are eligible for recognition, and Article 7 then sets out the bases on which recognition may be denied. This makes Article 5(1) the door through which a judgment must pass in order to be considered for recognition and enforcement under the Convention.

The Convention text represents a very specific approach to convention architecture by establishing the basic test for circulation of a foreign judgment through a complex set of thirteen jurisdictional filters found in Article 5(1). The building of the Convention text around that choice is significant. An alternative approach to convention architecture, which would have allowed the test for judgment circulation to be built on as few as four rules, was considered and passed over in the earlier Working Group.[36] The first three rules in such an alternative would state simple "fairness" tests, binding a judgment debtor to (1) decisions of the judgment debtor's home court; (2) decisions of the court in which the judgment debtor initiated

[33] *Id.* Article 5(3) specifically prevents the use of the Article 5(1) bases of jurisdiction in order to build circulation of a judgment falling within the ambit of Article 6 ("Such a judgment is eligible for recognition and enforcement only if it was given by a court of the State where the property is situated.").

[34] Choice of Court Agreements, *supra* note 4, art. 9.

[35] For the U.S. example, see UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(b)–(c) (UNIF. LAW COMM'N 2005).

[36] The author was a member of the Working Group.

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the action; and (3) decisions of a court to which the judgment debtor expressly consented to jurisdiction.[37] These three bases of jurisdiction reflect the common elements of general jurisdiction throughout the world as a result of the judgment debtor's territorial home and party consent. While the manner in defining the "home" of the defendant/judgment debtor may differ in degree,[38] they otherwise are for the most part non-controversial in comparative jurisdictional jurisprudence. They provide respect for jurisdiction-based choices made by the party against whom a judgment may be recognized and enforced; choices that justify that party being bound by the decision of the court of origin for the judgment.

The fourth rule in the alternative approach to convention architecture would have replaced ten of the thirteen jurisdictional filters in Article 5(1) with a single rule that would provide the indirect jurisdiction test for what is commonly referred to as "special" or "specific" jurisdiction. Rather than attempting to define all of the possible acceptable bases of indirect jurisdiction for the life of the Convention, such a provision would state a simple rule of non-discrimination. If the court addressed would have allowed personal jurisdiction over the defendant on the facts existing in the court of origin (i.e., if jurisdiction would have existed under direct jurisdiction rules of the state of the court addressed based on the existing facts as determined by the court of origin), then the court addressed must acknowledge the legitimacy of the basis of jurisdiction in the court of origin and allow the judgment to circulate, subject to the Convention's standard grounds for non-recognition.[39] In other words, a

[37] UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(b)–(c) (UNIF. LAW COMM'N 2005).

[38] This is an area in which the U.S. Supreme Court has moved closer to the European model in the past decade by limiting general jurisdiction over corporations to cases brought in a state in which the defendant is not just engaged in continuous and systematic activity, as was the former test, but cases in which "a foreign corporation's in-forum contacts . . . are so 'continuous and systematic' as to render [the corporation] essentially at home in the forum State." Daimler AG v. Bauman, 571 U.S. 117, 152 (2014). Justice Ginsburg's opinion clearly reflected an understanding of the general jurisdiction rule based on domicile found in Article 5 of the Brussels I (Recast) Regulation. Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I (Recast) Regulation), 2012 O.J.E.U. (L 351/1) [hereinafter Brussels I (Recast) Regulation].

[39] This is what the German Federal Supreme Court (Bundesgerichtshf) did when it applied § 323 of the German Civil Procedure Code (ZPO) to recognition of a judgment from a U.S. Federal District Court in Wisconsin, when there were otherwise no connections between the defendant and Wisconsin, but the defendant had assets in Illinois. This meant that jurisdiction based on any property of the defendant in the forum state (here the entire United States) was consistent with German direct jurisdiction law and was considered sufficient, even if a similar rule of jurisdiction did not exist in the United States. Bundesgerichtshof [BGH] [Federal Court of Justice], 141 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 268 (Ger.); NJW 1999, 3198 (Ger.).

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Contracting State's rules of indirect jurisdiction, used to determine recognition and enforcement of foreign judgments, would be the same as that State's rules of direct jurisdiction for determining whether to take a case as the originating court. Each Contracting State would thus be compelled to acknowledge, as to its partner Contracting States, that, if a rule of jurisdiction is found to be acceptable at home, it must be found to be acceptable in other Contracting States.

The Judgments Convention's Article 5(1) list of jurisdictional filters offers apparent advantages in that it provides an exhaustive list of available indirect bases of jurisdiction, creates predictability in international litigation by having the list available when a case is initiated, and conforms (in part) to the predominant legal system model—continental European civil law.[40] Nonetheless, it also carries with it several disadvantages.

B. The Text of the Article 5(1) Threshold for Judgment Circulation

Because of its fundamental role in the Convention architecture, Article 5(1) is likely to be of central concern to any state's determination of whether to ratify the Convention. Thus, the advantages and disadvantages of the Article 5(1) list of jurisdictional filters deserve careful consideration. In some ways, this provision represents an effort to provide the equivalent of a comprehensive domestic recognition and enforcement statute in an international convention. This is similar to what occurred in the original jurisdiction and judgments project and was found in the 1999 and 2001 texts. When that approach failed to generate a workable text, negotiators sought a different approach, resulting in the 2005 Convention on Choice of Court Agreements.

The problems in the 1999 and 2001 draft texts of a comprehensive jurisdiction and judgments convention went far beyond over-drafting and largely existed because of bracketed text and footnotes indicating both uncertainty and failure of substantive agreement (and, in fact, strong disagreement over the policy and drafting of those provisions).[41] The two situations clearly have differences, and the Article 5(1) approach in the Judgments Convention contributed to, rather than inhibited, the conclusion of a final Convention text. Nonetheless, it is worth considering the role

[40] The core instrument in that system is the Brussels I (Recast) Regulation. *See* Brussels I (Recast) Regulation, *supra* note 38.

[41] *See Interim Text, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6*, HAGUE CONF. ON PRIV. INT'L L. (June 20, 2001), https://assets.hcch.net/upload/wop/jdgm2001draft_e.pdf.

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of Article 5(1), both in the application of the Convention's rules and in its impact on national law upon possible ratification and implementation of the Convention.

In order to carefully consider the impact of Article 5(1), it is necessary to consider the length and complexity of its terms, which read as follows:

> 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 their 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 by a court of the State in which performance of that obligation took place, or should have taken place, in accordance with
>
> (i) the agreement of the parties, or

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

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

(h) the judgment ruled on a lease of immovable property (tenancy) and it was given by a court of 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 the courts of which disputes about such matters are to be determined; or

(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; or

(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;

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(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.

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.[42]

C. A Text for the Rejected Alternative Approach to Article 5(1)

The alternative approach to Article 5(1), which was considered but not followed in the Working Group,[43] would have taken a more streamlined approach. The following is an example of how such an alternative approach might look (with the first three tests being quite similar to those found in Article 5(1)(a), (c), and (e) of the Convention text):[44]

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[42] *Judgments Convention*, *supra* note 1, art. 5(1). The remainder of Article 5 has relevance for consideration of paragraph (1), and reads as follows:

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

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

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

3. Paragraph 1 does not apply to a judgment that ruled on a residential lease of immovable property (tenancy) or ruled on the registration of immovable property. Such a judgment is eligible for recognition and enforcement only if it was given by a court of the State where the property is situated.

Id. art. 5(2)–(3).

[43] *See supra* text following note 6.

[44] *Judgments Convention*, *supra* note 1, art. 5.

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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 person against whom recognition or enforcement is sought is the person that brought the claim on which the judgment is based;

   c) the defendant expressly consented to the jurisdiction of the court of origin either prior to or in the course of the proceedings in which the judgment was given; or

   d) the dispute in the State of origin was based on facts which would have satisfied a basis of direct jurisdiction available in the State addressed.

This approach would have provided for a much simpler Convention architecture, and in that sense, would have made the Convention similar to the New York Arbitration Convention, which has been successful in part because its simplicity has allowed both wide ratification and development consistent with evolving needs.[45]

III. THE IMPACT OF THE CHOICE FOR CONVENTION ARCHITECTURE

A. Advantages of the Judgments Convention Article 5(1) Text

At the outset, like any other legal text, Article 5(1) presents factors that may be categorized as both advantages and disadvantages, depending on the purpose one is seeking to achieve. Thus, some of the factors listed as possible advantages in this section will also be discussed as possible disadvantages in the following section.

[45] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

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1. A Comprehensive and Exhaustive Set of Bases of Indirect Jurisdiction

Article 5(1) of the Judgments Convention represents an effort to be as exhaustive as possible. Thus, in traditional civil law fashion, there was an attempt to cover every possible acceptable direct jurisdiction basis as a rule of indirect jurisdiction—i.e., as a jurisdictional filter. To the extent being exhaustive is an advantage in a judgments convention, this is an advantage of the Article 5(1) text. It leaves fewer possibilities for judicial consideration outside the Convention's application. By allowing the recognition and enforcement of judgments beyond those covered by the Convention (except for judgments in violation of the direct jurisdiction rule of Article 6), the Convention presents a floor for judgments recognition purposes and not a ceiling.[46] Under Article 15, courts in Contracting States may consider granting recognition and enforcement to judgments beyond those which may be recognized and enforced under the Convention; they simply would not do so by applying Convention rules.[47] The Article 5(1) list, however, by including thirteen jurisdictional tests, represents an effort to establish a high floor.

2. Predictability Through Clear Statement

Like civil law code-type legal instruments, Article 5(1) has been drafted with an eye to predictability. There are clear advantages to having the set of all possible indirect jurisdictional bases allowed under the Convention expressly stated rather than acknowledged by implication, as is otherwise possible. A lawyer bringing an action in a case that may require recognition and enforcement in a state other than the state of the court of origin will have a single list of indirect jurisdiction bases to consider. If one of those bases is satisfied, then any resulting judgment is presumptively eligible for recognition and enforcement in all Contracting States under the Convention.

3. Adoption of the Majority Legal System Model

The civil law model on which Article 5(1) is based is the predominant model for judgments recognition law throughout the world. In the Hague negotiations, the European Union was a leading advocate of this approach and proposed many of the provisions of Article 5(1), understandably working to keep the set of jurisdictional filters consistent with current E.U. law. Conformity with the predominant legal system model presents obvious advantages for future Convention ratification and

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[46] *Judgments Convention*, *supra* note 1, art. 15 ("Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.").

[47] *Id.*

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operation. Because many non-European legal systems have developed from the continental civil law model, it is necessarily the approach more consistent with legal systems in most Hague Member States. The Convention is more likely to be ratified by the E.U. as a major player in the process, and thus it is more likely to draw further adherents as a result of having an important lead ratification. As the Brexit process also demonstrates, important common law states have adopted many aspects of the continental civil law model for jurisdictional rules, thus making the draft text approach to presumptive circulation of a judgment a natural one.

B. Disadvantages of the Judgments Convention Article 5(1) Text

Some of the disadvantages of the Judgments Convention architecture arise from the same issues that create advantages. Others are separate and distinct.

1. The Risk of Locked-in Treaty Text

The advantages of the exhaustive nature of Article 5(1) of the draft Convention text also bring corresponding disadvantages. By attempting to be exhaustive, the Article 5(1) text runs both the risk of not going far enough and the risk of going too far. The effort is exhaustive only with respect to situations that have been confronted up to this point in time. Given the dynamism of international trade—and the rapid process of change in concepts of legal persons, methods of communication, and technical means for the delivery of both content and services—it is not difficult to imagine that other bases of jurisdiction may become widely adopted but remain outside the Convention. Nor is it difficult to imagine that existing bases of jurisdiction may no longer fit advancing technological methods. The Convention approach in Article 5(1) thus risks locking in what may become outdated tests that can be changed only by treaty amendment—a process which is extremely difficult, particularly if (as is otherwise desirable) there becomes a large number of Contracting States.

2. The Risk of "Homeward Trend" Interpretation

The litigation predictability generated by an exhaustive list of jurisdictional filters also has its downside. While the Article 5(1) list may present a lawyer considering the best forum in which to bring an international case with the full set of indirect jurisdictional bases under the Convention, it also brings with it a greater opportunity for non-uniformity of interpretation. Thus, while predictability is enhanced by having a fixed list, it is also diminished by having an elaborate and complex set of "uniform" rules that will be interpreted by multiple national courts. Each of those courts, under Article 20 of the Convention, will have an obligation of

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uniform interpretation.[48] Nonetheless, because there is no single final court to provide a binding interpretation of the Convention text, the courts of every Contracting State are likely to be subject to the "homeward trend" prevalent in other conventions that purport to provide "uniform" rules.[49]

In the alternative, the narrowness of each jurisdictional filter may result in net predictability about the application of each rule but reduced coverage of situations relevant to the evolving world of cross-border relationships. The alternative approach suggested above would result in the test for judgment circulation being determined by national courts based on their own rules of direct jurisdiction. These may evolve pragmatically to take account of new developments. Moreover, they would be interpreted and applied by the courts of the state in which they exist, making non-uniform interpretations of the Convention text less likely.

3. The Risk of Assuming Effective Legal System Transfer

While the text of Article 5(1) may be predictable, and while such an approach may work well in national or regional internal legislation such as the Brussels I Regulation (where a single court will provide uniform interpretation), using the same approach in a global convention that is not easily subject to later amendment can be a source of potential problems. While the E.U. has demonstrated that the Brussels I Regulation may be updated and revised, that is not so easily accomplished with a treaty designed to be global and not just regional. The very specific nature of the language of each entry in Article 5(1) may well lock in terminology that, over the course of time, simply will not be capable of fair and reasonable application. What is appropriate in the law of a single federal entity is not necessarily appropriate in a global treaty.

4. The Risk of Favoring Discriminatory Jurisdictional Schemes over Reciprocity

In the Explanatory Note setting the stage for Special Commission consideration of the Judgments Convention draft text from the Working Group, one of the stated goals of a judgments convention was listed as the facilitation of international trade

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[48] *Id.* art. 20 ("In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.").

[49] The "homeward trend" in the interpretation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) was first noted by Professor John Honnold and has been demonstrated through inconsistent interpretations in Contracting States with the development of regional versions of the CISG as a result of judicial gloss. *See, e.g.*, Harry M. Flechtner, *Another CISG Case in the U.S. Courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations*, 15 J.L. & COM. 127 (1995).

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and investment by enhancing the free flow of judgments.[50] In other words, this is intended to be more than a private international law convention; it is also intended to be a trade law convention.

A fundamental rule found in just about every trade treaty is a rule of non-discrimination.[51] Contracting States take on reciprocal obligations in order to create an international system that is fair and balanced. Article 5(1) does not include a rule of non-discrimination. Rather, through the choice of a specific set of rules of indirect jurisdiction, it allows those states that discriminate in the process of judgments recognition to continue to do so. This results from the creation of a set of indirect jurisdiction rules which may be more limited than a Contracting State's corresponding set of direct jurisdiction rules. This will allow Member States to continue to allow the use of what are otherwise considered to be exorbitant bases of jurisdiction against foreign defendants in their own courts while at the same time refusing to recognize and enforce judgments brought on the same bases in foreign courts.[52]

The discriminatory jurisdiction gap problem is not a minor one in the global system for the recognition of judgments. A study done for the Working Group in

[50] *See, e.g.*, PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, EXPLANATORY NOTE PROVIDING BACKGROUND ON THE PROPOSED DRAFT TEXT AND IDENTIFYING OUTSTANDING ISSUES, PRELIMINARY DOCUMENT NO. 2, at 3 (2016), https://assets.hcch.net/docs/e402cc72-19ed-4095-b004-ac47742dbc41.pdf [hereinafter PRELIMINARY DOCUMENT NO. 2] ("The Working Group proceeded on the basis that the future Convention is intended to pursue two goals:

- to enhance access to justice;
- to facilitate cross-border trade and investment, by reducing costs and risks associated with cross-border dealings.").

[51] *See, e.g.*, General Agreement on Tariffs and Trade art. III, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5 & 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187, *reprinted in* IV GATT, Basic Instruments and Selected Documents 1–78 (1969), as amended by the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, *opened for signature* Apr. 15, 1994. *See also* Ronald A. Brand, *New Challenges in the Recognition and Enforcement of Judgments*, *in* PRIVATE INTERNATIONAL LAW: CONTEMPORARY CHALLENGES AND CONTINUING RELEVANCE (Franco Ferrari & Diego P. Fernández Arroyo eds., 2019).

[52] Such a discriminatory approach is clearly rejected in the internal E.U. system for recognition and enforcement of judgments through the operation of Article 5 of the Brussels I (Recast) Regulation, which allows defendants domiciled in Member States to be sued in other Member States only if one of the bases of jurisdiction listed in Sections 2 through 7 of the Regulation exists. Brussels I (Recast) Regulation, *supra* note 38. With the resulting exclusive list of direct bases of jurisdiction, recognition and enforcement under Article 36 then occurs without consideration of jurisdiction in the court of origin, thus making the bases for direct and indirect jurisdiction exactly the same under the Regulation. *Id.*

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2015 listed the following countries as using the same test for direct jurisdiction as for indirect jurisdiction and thus having no jurisdiction gap:[53]

Albania	Chile	Israel	Luxembourg
Argentina	Germany	Italy	Mexico
Austria	Greece	Japan	Slovakia
Bulgaria	Hungary	Korea	United States
Canada	Ireland	Latvia	

The same study found a jurisdiction gap in which direct bases of jurisdiction were more extensive than were indirect bases of jurisdiction in the following countries:[54]

Australia	Ghana	Kenya	UAE
Cyprus	Iceland	New Zealand	United Kingdom
Denmark	Indonesia	Nigeria	
Egypt	Jordan	Norway	
Finland	Kazakhstan	Sweden	

The absence of a jurisdiction gap can be demonstrated by the judgments recognition systems in the United States, Germany, and Italy. In the United States, the general rule for recognition of judgments is found most often in state law in the form of a uniform act.[55] The 2005 Uniform Foreign-Country Money Judgments Recognition Act[56] provides that a foreign money judgment, which is final and enforceable in the country in which it is rendered, shall be recognized and enforced,[57] subject to a limited list of grounds for non-recognition.[58] One of the mandatory grounds for non-recognition is that "the foreign court did not have personal

[53] Memorandum from Charles Kotuby, Partner, Jones Day, to the Permanent Bureau of the Hague Conference on Private International Law, at 2 nn.4–5 (July 1, 2015), https://assets.hcch.net/docs/7ebd2982-351a-4ca7-b6b3-356c8cdc1778.pdf [hereinafter Kotuby Memo]; *see also* PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, COMPARATIVE TABLE ON GROUNDS OF JURISDICTION PREPARED BY THE PERMANENT BUREAU (2015).

[54] Kotuby Memo, *supra* note 53, at 2 nn.4–5.

[55] For more complete information on the U.S. system for the recognition of foreign judgments, see Ronald A. Brand, *Federal Judicial Center International Litigation Guide: Recognition and Enforcement of Foreign Judgments*, 74 U. PITT. L. REV. 491 (2013).

[56] UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(b)–(c) (UNIF. LAW COMM'N 2005).

[57] *Id.* art. 4(a).

[58] *Id.* art. 4(b)–(c).

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jurisdiction over the defendant."[59] U.S. courts have uniformly interpreted this provision of the Uniform Act (and of the common law test without the Uniform Act) to mean the foreign court must have had jurisdiction according to U.S. tests of personal jurisdiction.[60] This means that if the facts before the foreign court would have satisfied the tests a U.S. court applies in determining direct jurisdiction, then the U.S. court addressed for purposes of recognition and enforcement will accept that judgment, subject to specific listed grounds for non-recognition. There is no difference between the test for direct jurisdiction and the test for indirect jurisdiction.

The same is true in German courts faced with a request for recognition and enforcement of a judgment from outside the European Union.[61] Section 328(I) of the German Code of Civil Procedure includes a requirement that the foreign court from which a judgment originates had "jurisdiction under German law."[62] In Italy, Article 64 of Law 218/1995 is similar on this issue, requiring that, for recognition of a foreign judgment to occur, "the authority rendering the judgement had jurisdiction pursuant to the criteria of jurisdiction in force under Italian law."[63] In each of these instances, the rules of direct jurisdiction are applied as the rules of indirect jurisdiction. This means that, so long as the case could have been brought in the recognizing state on similar jurisdictional facts, the court addressed will accept that jurisdiction was proper in the court of origin.

This is not the case in those countries which have a broader list for direct jurisdiction than for indirect jurisdiction purposes. An example of such a discriminatory jurisdiction gap is found in the United Kingdom. There, the direct jurisdiction rules are found in Practice Direction 6B, which accompanies Part 6 of

[59] *Id.* art. 4(b)(2).

[60] "The prevailing view is that, even if the rendering court had jurisdiction under the laws of its own state, a court in the United States asked to recognize a foreign judgment should scrutinize the basis for asserting jurisdiction in the light of American concepts of jurisdiction to adjudicate. *International Shoe* and its progeny govern this determination." RONALD A. BRAND, INTERNATIONAL BUSINESS TRANSACTIONS FUNDAMENTALS 386 (2d ed. 2018). *See, e.g.*, Mercandino v. Devoe & Raynolds, Inc., 436 A.2d 942, 943 (N.J. Super. Ct. App. Div. 1981) ("In determining whether the Italian court had jurisdiction we deem it appropriate to apply the minimum contacts test.").

[61] Judgments from within the E.U. are governed by the Brussels I (Recast) Regulation. Brussels I (Recast) Regulation, *supra* note 38.

[62] PHILIP R. WEEMS, ENFORCEMENT OF MONEY JUDGMENTS ABROAD (Lawrence W. Newman ed., 1993).

[63] Legge 31 maggio 1995 n.218, G.U. June 3, 1995 n.128 (It.), *translated in Italy: Law Reforming the Italian System of Private International Law*, 35 I.L.M. 760, 779–80 (1996).

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the Civil Procedure Rules 1998 of the Supreme Court of England and Wales (CPR).[64] The Practice Direction provides a court with discretion to order service outside the jurisdiction of the United Kingdom by listing twenty-one connecting factors, each of which may justify service outside the jurisdiction and thus constitutes an acceptable basis of jurisdiction over a foreign defendant.[65]

[64] Part 6 Practice Direction 6B (UK CP 6PD.6).

[65] *Id.*

> Service out of the jurisdiction where permission is required
> 3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where—
>
> General Grounds
> (1) A claim is made for a remedy against a person domiciled within the jurisdiction.
> (2) A claim is made for an injunction (GL) ordering the defendant to do or refrain from doing an act within the jurisdiction.
> (3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and—
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.
> (4) A claim is an additional claim under Part 20 and the person to be served is a necessary or proper party to the claim or additional claim.
> (4A) A claim is made against the defendant in reliance on one or more of paragraphs (2), (6) to (16), (19) or (21) and a further claim is made against the same defendant which arises out of the same or closely connected facts.
>
> Claims for interim remedies
> (5) A claim is made for an interim remedy under section 25(1) of the Civil Jurisdiction and Judgments Act 1982.
>
> Claims in relation to contracts
> (6) A claim is made in respect of a contract where the contract—
> (a) was made within the jurisdiction;
> (b) was made by or through an agent trading or residing within the jurisdiction;
> (c) is governed by English law; or
> (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract.
> (7) A claim is made in respect of a breach of contract committed within the jurisdiction.
> (8) A claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in paragraph (6).
>
> Claims in tort
> (9) A claim is made in tort where—
> (a) damage was sustained, or will be sustained, within the jurisdiction; or

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(b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction.

Enforcement

(10) A claim is made to enforce any judgment or arbitral award.

Claims about property within the jurisdiction

(11) The subject matter of the claim relates wholly or principally to property within the jurisdiction, provided that nothing under this paragraph shall render justiciable the title to or the right to possession of immovable property outside England and Wales.

Claims about trusts etc.

(12) A claim is made in respect of a trust which is created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, and which is governed by the law of England and Wales.

(12A) A claim is made in respect of a trust which is created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, and which provides that jurisdiction in respect of such a claim shall be conferred upon the courts of England and Wales.

(13) A claim is made for any remedy which might be obtained in proceedings for the administration of the estate of a person who died domiciled within the jurisdiction or whose estate includes assets within the jurisdiction.

(14) A probate claim or a claim for the rectification of a will.

(15) A claim is made against the defendant as constructive trustee, or as trustee of a resulting trust, where the claim arises out of acts committed or events occurring within the jurisdiction or relates to assets within the jurisdiction.

(16) A claim is made for restitution where—

(a) the defendant's alleged liability arises out of acts committed within the jurisdiction; or

(b) the enrichment is obtained within the jurisdiction; or

(c) the claim is governed by the law of England and Wales.

Claims by HM Revenue and Customs

(17) A claim is made by the Commissioners for H.M. Revenue and Customs relating to duties or taxes against a defendant not domiciled in Scotland or Northern Ireland.

Claim for costs order in favour of or against third parties

(18) A claim is made by a party to proceedings for an order that the court exercise its power under section 51 of the Senior Courts Act 1981 to make a costs order in favour of or against a person who is not a party to those proceedings.

(Rule 46.2 sets out the procedure where the court is considering whether to exercise its discretion to make a costs order in favour of or against a non-party.)

Admiralty claims

(19) A claim is—

(a) in the nature of salvage and any part of the services took place within the jurisdiction; or

(b) to enforce a claim under section 153, 154,175 [sic] or 176A of the Merchant Shipping Act 1995.

Claims under various enactments

(20) A claim is made—

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The Practice Direction thus provides a set of "gateways" to jurisdiction in U.K. courts. The list of jurisdictional grounds is tempered by Paragraph 6.37, which adds a *forum conveniens* element by granting the court discretion and limiting jurisdiction based on any of the grounds to those cases in which the court is "satisfied that England and Wales is the proper place in which to bring the claim."[66]

When a judgment is brought from a foreign court for recognition and enforcement and a U.K. court indirectly tests the jurisdiction of a foreign court, it will apply "The Dicey Rule," found in the most recent edition of *Dicey & Morris, The Conflict of Laws*.[67] That test provides for only four grounds of indirect jurisdiction.[68] The result could be interpreted either as an acknowledgment that the

(a) under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in this paragraph; or
(b) under the Directive of the Council of the European Communities dated 15 March 1976 No. 76/308/EEC, where service is to be effected in a Member State of the European Union.

Claims for breach of confidence or misuse of private information
(21) A claim is made for breach of confidence or misuse of private information where
(a) detriment was suffered, or will be suffered, within the jurisdiction; or
(b) detriment which has been, or will be, suffered results from an act committed, or likely to be committed, within the jurisdiction.

[66] *Id.*

Application for permission to serve the claim form out of the jurisdiction
6.37
(1) An application for permission under rule 6.36 must set out—
(a) which ground in paragraph 3.1 of Practice Direction 6B is relied on;
(b) that the claimant believes that the claim has a reasonable prospect of success; and
(c) the defendant's address or, if not known, in what place the defendant is, or is likely, to be found.
(2) Where the application is made in respect of a claim referred to in paragraph 3.1(3) of Practice Direction 6B, the application must also state the grounds on which the claimant believes that there is between the claimant and the defendant a real issue which it is reasonable for the court to try.
(3) The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.

Id.

[67] DICEY, MORRIS & COLLINS, ON THE CONFLICT OF LAWS 689–90 (15th ed. 2012). *See, e.g.*, Rubin v. Eurofinance SA [2012] UKSC 46, AT ¶¶ 7–10 (Lord Collins, the General Editor of DICEY, MORRIS & COLLINS, follows the "Dicey Test," and traces its history).

[68] DICEY, MORRIS & COLLINS, *supra* note 67, at 689–90.

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longer list of direct bases of jurisdiction found in Practice Direction 6B contains otherwise questionable bases of jurisdiction or that there is a desire to discriminate against judgments from foreign courts.[69]

The alternative approach to Article 5(1) suggested above would effectively prevent a jurisdiction gap in the operation of the Convention by making the grounds for indirect jurisdiction in each Contracting State exactly the same as that state's grounds for direct jurisdiction—for judgments coming from courts of other Contracting States. This would mean that the rules for recognition and enforcement in each Contracting State could differ for purposes of Article 5(1) from those in other Contracting States, but they would be consistent with each State's rules for direct jurisdiction. Parties to litigation in which recognition and enforcement may be required in other Contracting States would logically begin by looking at the first three bases for judgment circulation in the alternative list. This alone would create some channeling of litigation into those three more favored approaches to jurisdiction. Beyond that, parties to international litigation would then consider the grounds for direct jurisdiction in the state or states in which recognition or enforcement may be required. This step is no different from what is currently

> Rule 43—Subject to Rules 44 to 46, a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment *in personam* capable of enforcement or recognition as against the person against whom it was given in the following cases:
>
> *First Case*—If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.
>
> *Second Case*—If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.
>
> *Third Case*—If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.
>
> *Fourth Case*—If the person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.

Id.

[69] *See* Ardavan Arzandeh, *"Gateways" Within the Civil Procedure Rules and the Future of Service-out Jurisdiction in England*, 15 J. PRIV. INT'L L. 516, 520 (2019) (suggesting that the direct jurisdiction gateways of Practice Direction 6B have become superfluous and should be abandoned); Ardavan Arzandeh, *Reformulating the Common Law Rules on the Recognition and Enforcement of Foreign Judgments*, 39 LEGAL STUD. 56 (2017) (recommending that the full list of gateway direct jurisdiction bases found in Practice Direction 6B should be applied for indirect jurisdiction purposes in testing foreign judgments for purposes of recognition and enforcement).

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necessary when recognition and enforcement may be required in a country in which there is no jurisdiction gap.

Whether one is concerned with simple fairness and preventing discrimination, or with the normal process of reciprocity common to international trade treaties, the fact that Article 5(1) of the Judgments Convention locks in discriminatory jurisdiction gaps in the states in which they currently exist should be a matter of concern in the international litigation process.

5. The Risk of a Diminished Channeling Function

The other goal of a Judgments Convention, which was noted in the Permanent Bureau Report to the first Special Commission, is the possibility of improving the litigation landscape through "access to justice" for parties considering or involved in cross-border litigation.[70] While access to justice is a judgments recognition issue, it is first a direct jurisdiction issue. This raises the question of how a judgments convention might impact questions of direct jurisdiction.

Other than the Article 6 incorporation of exclusive jurisdiction status for cases involving rights *in rem* in immovable property[71] and its use to provide grounds for prohibition of recognition even outside the Convention,[72] the Judgments Convention does not explicitly affect rules of direct jurisdiction. A functioning Judgments Convention can, however, have an impact on national rules of direct jurisdiction through a channeling effect, which may occur even in the absence of a separate jurisdiction convention. Litigators bringing claims that may require judgment recognition in a country other than that of the court of origin will necessarily consider the bases of direct jurisdiction, which can result in the circulation of their judgment under a Convention (i.e., when that direct jurisdiction choice becomes a matter of indirect jurisdiction analysis). Their litigation conduct should logically be channeled into the most widely accepted bases of jurisdiction.

With the Judgments Convention built on rules of indirect jurisdiction, those rules should also be considered by litigators at the outset and should channel cases into courts in which acceptable bases of jurisdiction exist for both direct and indirect jurisdiction purposes. A list of thirteen indirect jurisdiction bases in Article 5(1) limits the possibilities of achieving this channeling function.[73] The list does encourage bringing cases that satisfy one of the jurisdictional bases on the list. As

[70] PRELIMINARY DOCUMENT NO. 2, *supra* note 50.

[71] *Judgments Convention*, *supra* note 1, art. 6.

[72] *Id.* art. 4.

[73] *Id.* art. 5.

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noted earlier, however, it also sets up rather complex rules that may result in different interpretations of those jurisdictional bases in the courts of different Contracting States, thus limiting predictability and risking non-recognition even though the court of origin finds the jurisdictional basis to exist.

An alternative based on a simple non-discrimination rule would have encouraged cases to be brought based on the direct jurisdiction rules most common to countries in which recognition and enforcement might be sought. Over time, this might have caused Contracting States to reassess their bases of direct jurisdiction, and thus might also have served to provide a channeling effect resulting in the reduction of the number of exorbitant bases of jurisdiction existing in those states. This might have been only an indirect way of achieving what could otherwise be done by a jurisdiction convention, but given the problems that prevented coalescence on rules of direct jurisdiction in the Hague 1999 and 2001 drafts of a comprehensive jurisdiction and judgments convention (problems that largely remain today), it might have been a more palatable and effective way of achieving that result.

C. Comparing the Alternatives

The advantages of the approach found in Article 5(1) of the Judgment Convention may be summarized as follows:

1) it provides an exhaustive list of available indirect bases of jurisdiction;
2) it creates predictability in international litigation by having the list available when a case is initiated; and
3) it conforms to the predominant legal system model—that of the continental European civil law legal system.

In comparison, the alternative approach suggested above would diminish or eliminate:

1) the risk of an exhaustive list that locks in what may become outdated tests that can be changed only by difficult treaty amendment;
2) the risk of diminishing predictability through national court interpretation and the attendant "homeward trend" that has been evident in similar conventions that provide "uniform" rules;
3) the risk of assuming that effective national or regional legal frameworks can automatically be implemented on a global basis;
4) the risk of retention and endorsement of discriminatory jurisdictional schemes applied to judgments recognition rules (thus providing consistency with normal international trade treaty concepts of reciprocity); and
5) the risk of a diminished channeling function that might otherwise be achieved under a system that encourages uniformity of direct and indirect bases of jurisdiction.

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Consistently more rapid technological developments have a significant impact on both what is exchanged across borders and the manner in which those exchanges occur. Such developments also have an impact on legal rules dealing with disputes that arise from those exchanges. Today, we are faced more and more with a borderless world for international trade but have jurisdictional rules that necessarily require reference to territorial concepts. While people and goods could easily be identified to exist within the physical borders of states in the nineteenth century, developments in legal personality, intellectual property rights, electronic transmission of data, financial services, and other elements of international trade cause both legal persons and relevant legal concepts and rights to exist in many places (and many states) at once, without clear practical deference to state authority defined by lines drawn on maps.

Jurisdictional rules based on the place of performance of a contract or the place of injury resulting from a tort now often require the reification of *concepts* in order to treat them as if they are *things* that exist within physical borders. In other words, they require reference to legal fictions. This may simply be a matter of necessity, but it is important that we not have nineteenth-century law for solving twenty-first-century problems.

IV. WHY THE ARTICLE 5(1) CONVENTION ARCHITECTURE MATTERS: THE LIKELY USE OF ARTICLE 15 TO AVOID THE ARTICLE 5(1) CONVENTION FRAMEWORK IN STATES WITH NO JURISDICTION GAP

It may be that the solution to the problems discussed above is found in the Convention itself. Article 15 is, at first glance, a simple provision of limited consequence. It provides: "Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law."[74] Article 15 makes the Convention obligations a floor and not a ceiling. Contracting States must recognize and enforce judgments when they meet the requirements of the other provisions of the Convention. Under Article 15, however, Contracting States are not prohibited from recognizing and enforcing judgments that would not be required to be recognized and enforced under the Convention (they are, in fact, encouraged to do so). This may include judgments outside the scope of the Convention (e.g., judgments in cases involving intellectual property rights) or judgments within the scope of the convention but not based on grounds of jurisdiction otherwise excluded from Article 5(1).

[74] *Id.* art. 15.

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It may be that Article 15 will be a much more consequential provision of the Convention than many have contemplated. This is particularly the case in regard to two matters, the second of which is discussed below with specific reference to potential ratification and implementation in the United States.

A. Article 15 Differences in States with No Jurisdiction Gap

It might appear at first glance that some of the problems related to the Article 5(1) architecture of the Convention will be reduced through the operation of Article 15. As already noted, Article 15 allows Contracting States to continue to apply rules on the recognition and enforcement of foreign judgments, which are more liberal than those in the Convention text. This is a positive function, but it has a positive effect only if national law actually allows recognition and enforcement beyond what is achieved through other Convention rules.

Those Contracting States without a jurisdiction gap—in which judgments that fall outside of the Article 5(1) gateway to judgment circulation could be recognized and enforced as consistent with the direct jurisdiction rules in the state addressed—will continue to give effect to foreign judgments from other Contracting States. Thus, recognition and enforcement beyond Convention requirements will be achieved through the use of Article 15.

Contracting States with a significant jurisdiction gap, on the other hand, are less likely to be able to use Article 15 to recognize and enforce judgments outside the Convention framework, simply because national law is unlikely to allow broader circulation of judgments than does the Convention. The list of thirteen jurisdictional filters in Article 5(1) is more likely in these states to already include the bases of indirect jurisdiction on which recognition and enforcement are allowed under national law—in fact, the Convention should enhance recognition and enforcement in such states, which is its very purpose. The basic reciprocity expected of treaty relationships will likely be frustrated in those states with such jurisdiction gaps that remain after ratification and implementation of the Convention.

B. Convention Operation in States with No Jurisdiction Gap: Lessons for U.S. Ratification and Implementation

1. Using Article 15 to Avoid the Transaction Costs of Article 5(1)

If ratified and implemented by the United States, the Convention will have two principal roles for U.S. litigants: (1) providing rules for the recognition and enforcement of foreign judgments from other Contracting States in U.S. courts, and (2) providing rules for the recognition and enforcement of U.S. judgments in the courts of other Contracting States. U.S. lawyers will be most involved in the first. They should, however, be most concerned about the second when bringing actions in U.S. courts for which recognition and enforcement might be required abroad.

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It is wholly possible that Article 5(1) of the Convention will have little, if any, role when a foreign judgment is brought to the United States for recognition and enforcement. This may be true as well in other Contracting States that have no direct/indirect jurisdiction gap. Because of the complex nature of the thirteen indirect bases of jurisdiction stated in Article 5(1), it will simply make no sense in U.S. litigation to waste the time of counsel and courts trying to understand and apply those provisions when Article 15 provides a fast track to recognition and enforcement. All a litigant and a court need to know is current U.S. (often state) law on the recognition and enforcement of foreign judgments. Because that law operates without a jurisdiction gap, it will naturally be more liberal for purposes of recognition and enforcement (one need not compare the Article 5(1) indirect jurisdiction rules with national rules that would otherwise apply in the absence of the Convention). Pre-existing law on judgments recognition will also be more easily understood by lawyers and judges accustomed to U.S. rules of direct jurisdiction, which serve similarly to the rules of indirect jurisdiction. Thus, it will save judicial time and expense simply to apply existing rules and use Article 15 to fit within the Convention structure. If the recognition and enforcement of a judgment can be achieved under Article 15, there simply is no need to deal with the complexities of Article 5(1) and no need to risk the accompanying problems of non-uniform interpretation as compared to decisions of courts in other Contracting States.

2. Using Article 15 to Avoid Burden of Proof Uncertainties

There would be other benefits as well to recognizing foreign judgments in U.S. courts through the function of Article 15 rather than engaging in the more complex Article 5(1) analysis. Neither the Convention nor the Explanatory Report provides a clear statement regarding the manner in which a court will receive information on whether a foreign judgment does or does not meet one of the thirteen Article 5(1) gateway requirements to circulation under the Convention. In existing U.S. law, the indirect jurisdiction test is not a gateway requirement to circulation; it is a ground for non-recognition. There is an important distinction implied here in the burden of proof. When the requirement is a ground for non-recognition, then the judgment debtor generally has the burden of proving the ground in order to achieve non-recognition. This is the position taken in the 2005 Uniform Foreign-Country Money Judgments Recognition Act § 4(d).[75]

When the indirect jurisdiction requirement is a basis for circulation (a gateway function), the clear implication is that the judgment creditor has the burden of

[75] UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(d) (UNIF. LAW COMM'N 2005).

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proving that the requirement has been met. This, again, makes the Convention architecture much more restrictive (and difficult, and expensive) for a judgment creditor and counsels in favor of a party seeking recognition in a U.S. court directly under Article 15, thus bypassing the Convention architecture entirely.

3. Using Article 15 to Avoid the Limitations of Article 5(2)

Article 5(2) is designed to coordinate with rules found in E.U. law that are intended to protect consumers and employees as weaker parties. Both the Brussels I (Recast) Regulation and the Rome I Regulation have provisions designed to use rules of private international law to protect weaker parties.[76] Thus, Article 5(2) operates to prevent the circulation of judgments against consumers and employees in situations in which the E.U. instruments create an irrebuttable presumption that the consumer or employee is the weaker party and should not be allowed to exercise party autonomy on choice of forum or choice of law.

Article 5(2) operates only to limit recognition and enforcement under the Convention and does not otherwise change the national law of a Contracting State. Thus, where Article 15 allows broader recognition and enforcement under national law, the effect of Article 5(2) is also reduced. The "ceiling-not-a-floor" effect of the Convention allows national law to operate free of the limitations of Article 5(2). Whether such cases will present an issue in the operation of the Convention may be only an academic question, but the possibility of broader recognition than is allowed under Article 5 is real and provides one more opportunity to avoid the complexities of the Convention architecture through the operation of Article 15.

V. CONCLUSION

For States like the United States, that do not have a direct/indirect jurisdiction gap in their national law, the 2019 Judgments Convention may not change the game so much as simply shuffle the framework in which the existing rules are applied. Compared to existing U.S. law on the recognition and enforcement of foreign judgments, Article 5(1) of the Convention presents a more complex initial inquiry into the jurisdiction of the court of origin, as well as the possibility of non-uniform interpretation of Convention provisions. These problems may be avoided, however, by using Article 15 to divert decisions to national law.

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[76] For more detailed discussion of the use of private international law for purposes of consumer protection and a comparison of E.U. and U.S. approaches, see Ronald A. Brand, *The Unfriendly Intrusion of Consumer Legislation into Freedom to Contract for Effective ODR*, *in* LIBER AMICORUM JOHAN ERAUW 365 (Maud Piers, Henri Storm & Jinske Verhellen eds., 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520035.

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The advantages of the Convention architecture reflected in Article 5(1) are that it provides a comprehensive and exhaustive set of bases of indirect jurisdiction, predictability through a single list of those bases of jurisdiction, and familiarity by being similar to the major civil law legal systems of the world. In the process, however, this structure creates significant risks, including:

1) the risk of an exhaustive list that locks in what may become outdated tests that can be changed only by difficult treaty amendment;
2) the risk of diminishing predictability through national court interpretation and the attendant "homeward trend" that has been evident in similar conventions that provide "uniform" rules;
3) the risk of assuming that effective national or regional legal frameworks can automatically be implemented on a global scale;
4) the risk of retention and endorsement of discriminatory jurisdictional schemes applied to judgments recognition rules, thus avoiding normal international trade treaty concepts of reciprocity; and
5) the risk of a diminished channeling function that might otherwise be achieved under a system that encourages uniformity of direct and indirect bases of jurisdiction—i.e., the Convention will not encourage either private parties to alter their litigation conduct or States to reconsider the continuation of exorbitant bases of direct jurisdiction.

Despite these problems with Convention architecture, ratification and implementation of the Convention in states that have no direct/indirect jurisdiction gap, like the United States, may still be worthwhile. The benefits of enhanced recognition and enforcement of home country judgments abroad may well make it useful to implement the Convention and use Article 15 to continue to apply national law to judgments recognition in domestic courts. This would approach the alternative architecture that could have been used and thus reduce both transaction costs and the likelihood of inconsistent interpretation of the provisions of Article 5(1).

While the normal reciprocity effects of any private international law treaty should operate to reduce transaction costs, there are serious questions about whether the Judgments Convention will have that effect for foreign judgments brought for recognition and enforcement in the United States. It is much more likely that the transaction costs of other Convention rules, and in particular Article 5(1), will counsel avoidance of Article 5(1) entirely, through the path provided by Article 15.

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