

# ANOTHER HAGUE JUDGMENTS CONVENTION? BUCKING THE PAST TO PROVIDE FOR THE FUTURE

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## INTRODUCTION

Today’s global economy needs global agreements to facilitate commerce not only within a limited internal market area but internationally. And what has been lacking for years is a convention to provide for judgment recognition and enforcement that mirrors the reality of today’s trade, which

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Professor Teitz also participated in the ALI Judgments Project and served as co-Reporter (with Kathleen Patchel) on the Uniform Choice of Court Agreements Implementation Act until May 2011, when Teitz became First Secretary at the Hague Conference. She has been a proponent of a multilateral convention to recognize judgments in civil and commercial matters, to help provide an alternative to arbitration, and to help promote global commerce and trade.

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with cyberspace and new technologies, crosses borders instantaneously. The Hague Conference on Private International Law has been laboring in this field for almost fifty years, planting seeds from 1971. It is on the brink of completing such a convention which offers the promise of an instrument incorporating sufficient flexibility to allow multiple legal systems to join while leaving room for growth with changing technologies and further harmonization of this area of law.

This Article provides the background on the negotiations through the years, especially the last twenty-five plus years, and considers how the instruments have changed in response to evolving dynamics in cross-border trade and internal changes at The Hague Conference. Part IV provides a general introduction to the current draft that is to be negotiated at the final Diplomatic Session in June 2019 and Part V considers issues remaining both generally and for the United States' participation. Part VI evaluates the proposed convention and considers what changes it will bring domestically and internationally. And it answers the question of whether the world needs this global judgments convention and why the U.S. needs to be a willing partner.

## I. THE PAST AS PROLOGUE

The Hague Conference on Private International Law's modern efforts at a judgments convention date back to at least 1971, when the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters was first signed.<sup>1</sup> The convention failed to attract more than five Contracting States,<sup>2</sup> which is attributed in part to an awkward bilateralization process that required Contracting States to enter into Supplementary Agreements with each other,<sup>3</sup> largely defeating the value and

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1. HAGUE CONF. ON PRIV. INT'L LAW, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (1971), <https://assets.hcch.net/docs/bacf7323-9337-48df-9b9a-cf33e62b43be.pdf>. It is interesting to note that in the preamble, there is no reference to either judicial cooperation or international trade, both of which appear in the Declaration to the Convention on Choice of Court Agreements, which [hereinafter Choice of Court Convention], also presumably will appear prominently in the preamble of the new Judgments Convention. HAGUE CONF. ON PRIV. INT'L LAW, CONVENTION ON CHOICE OF COURT AGREEMENTS (2005), <https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf>.

For a thorough discussion of the history of the 1971 Convention as well as the later Judgments work, see Hans van Loon, *Towards a Global Hague Convention on the Recognition and Enforcement of Judgements in Civil or Commercial Matters*, Zbornik radova Pravnog fakulteta Univerziteta u Nišu, COLLECTION OF PAPERS, FACULTY OF LAW UNIVERSITY OF NIŠ, Issue 82/2019 (forthcoming 2019). The Journal can be found at HeinOnline.

2. *Id.* Cyprus, The Netherlands, and Portugal joined in the first fifteen years; Kuwait (2002) and Albania (2010) joined much later.

3. *Id.* art. 21.

efficiencies of a multilateral convention.

Two decades later, in 1992–93, The Hague Conference was persuaded by the United States, and primarily Arthur von Mehren, to undertake a mixed convention on jurisdiction and recognition and enforcement. Much has been written about these efforts.<sup>4</sup> The initial suggestion of the United States incorporated von Mehren's idea: a mixed convention with three categories of jurisdictional bases and corresponding recognition rules.<sup>5</sup> Many member states, who had little trouble having their judgments recognized and enforced in the U.S., saw the negotiations as an opportunity to reduce what they perceived to be exorbitant aspects of U.S. personal jurisdiction, particularly general doing business jurisdiction, activity-based jurisdiction, and jurisdiction based solely on service of process within the jurisdiction (tag jurisdiction).<sup>6</sup> They were less interested in getting their judgments enforced in the U.S., while U.S. businesses and plaintiffs' lawyers were focused on increasing their ability to recover on their U.S. judgments outside of the

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4. There is extensive literature on The Hague jurisdiction and judgments negotiations and drafts. See generally SAMUEL P. BAUMGARTNER, *THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS: TRANS-ATLANTIC LAWMAKING FOR TRANSNATIONAL LITIGATION* (2003); Peter Nygh, *Arthur's Baby: The Hague Negotiations for a World-Wide Judgments Convention*, in *LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN* 151 (James A. R. Nafziger & Symeon C. Symeonides eds., 2002); Ronald A. Brand, *Jurisdictional Common Ground: In Search of a Global Convention*, in *LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN* 11 (James A. R. Nafziger & Symeon C. Symeonides eds., 2002); Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 *AM. J. COMP. L.* 543 (2005); Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 *CORNELL L. REV.* 89 (1999); Linda J. Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 *DEPAUL L. REV.* 319 (2002); Peter Trooboff, *Ten (and Probably More) Difficulties in Negotiating a Worldwide Convention on International Jurisdiction and Enforcement of Judgments: Some Initial Lessons*, in *A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE* 263 (John J. Barcelo & Kevin M. Clermont eds., 2002); Arthur T. von Mehren, *Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions*, 24 *BROOK J. INT'L L.* 17 (1998). See also HAGUE CONF. ON PRIV. INT'L LAW, *BIBLIOGRAPHY RELATED TO THE JUDGMENTS PROJECT* (2018), <https://assets.hcch.net/docs/bd35517f-09ea-47d6-95ad-865d2c162504.pdf>; HAGUE CONF. ON PRIV. INT'L LAW, *THE JUDGMENTS PROJECT* (2018), <https://www.hcch.net/en/projects/legislative-projects/judgments>.

5. Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 *LAW & CONTEMP. PROBS.* 271, 282–85 (1994). The white list was to contain clearly acceptable bases (requiring recognition of resulting judgments); the black list comprised unacceptable bases (excluding recognition); and the grey list contained bases permitted under national law but otherwise left undecided (neither requiring nor excluding recognition of judgments under the convention). *Id.*

6. See Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 *ROGER WILLIAMS U. L. REV.* 1, 60 (2004). Ironically, the U.S. Supreme Court, in three cases from 2011 to 2014 (*Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear v. Brown*, 564 U.S. 915 (2011); and *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011)), limited general doing business jurisdiction and constricted specific jurisdiction to the extent that U.S. jurisdiction is narrower than that under the Brussels Regulation, a point highlighted in the plurality decision of Justice Kennedy in *Nicastro*. See *id.* at 885–86.

country. Of course, enforcing U.S. judgments abroad was not critical since many foreign company assets were still in the U.S. and subject to the broad reach of domestic jurisdiction and the Full Faith and Credit Clause.<sup>7</sup>

The initial drafts looked like the Brussels Convention on Jurisdiction and Enforcement of Judgments.<sup>8</sup> The draft reflected the composition of The Hague Conference in 1993, member countries who were largely from, and focused on, Europe and western legal systems, although most of the negotiations occurred prior to the shift in competence from individual countries to the community under the Treaty of Amsterdam.<sup>9</sup>

This came to a head in 2001 at the First Half diplomatic session, when everyone expected that the “Hague magic” would wipe away the huge differences and result in a final convention in twenty-one days. If one looks at the draft from June 2001,<sup>10</sup> it is more than thirty pages with over 200 footnotes (as long as a law review article). The negotiations themselves were different from earlier meetings as there was agreement to operate this First Part not by voting but by consensus—a process already used by UNCITRAL, another intergovernmental entity for harmonization of private international law.<sup>11</sup> In fact, it had been agreed that while the First Part of the diplomatic session would proceed by consensus, the second part would revert to the traditional voting system. There was, however, no second part, so when consensus was adopted for the First Part of the diplomatic session, there was no agreement that it would be used again or become the *modus operandi* for

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7. U.S. CONST. art. IV, § 1.

8. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1990 O.J. (C 189) 2. The Brussels Convention was replaced by Council Regulation (EC) No. 44/2001 of 22 December 2001, 2001 O.J. (L 12) 1, amended by Commission Regulation (EC) No. 1496/2002 of 21 August 2002, 2002 O.J. (L 225) 1. The regulation was amended again, effective January 10, 2015. See Regulation (EU) No. 1215/12 of the European Parliament and of the Council of 12 December 2012, 2012 O.J. (L 351) 1 [hereinafter Brussels I Recast].

9. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, art. 73m, Oct. 2, 1997, 1997 O.J. (C 340) 1; Consolidated Version of the Treaty Establishing the European Community, art. 65, Dec. 29, 2006, 2006 O.J. (C 321) 37. See *infra* to section on changes in HCCH.

10. The 2001 draft of the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, an interim text, was drawn up at Part One of the Nineteenth Diplomatic Session, which was held from June 6–22, 2001. See HAGUE CONF. ON PRIV. INT’L LAW, INTERIM TEXT - SUMMARY OF THE OUTCOME OF THE DISCUSSION IN COMMISSION II OF THE FIRST PART OF THE DIPLOMATIC CONFERENCE, 6–22 JUNE 6–22, 2001, PREPARED BY THE PERMANENT BUREAU AND THE CO-REPORTERS (2001), <https://www.hcch.net/en/publications-and-studies/details4/?pid=3499&dtid=35>.

11. Although I use the term “private international law,” that phrase in the United States has increasingly been understood to encompass the areas covered by the United States State Department, Office of Private International Law. For a thorough explanation of private international law in the United States, see David P. Stewart, *Private International Law: A Dynamic and Developing Field*, 30 U. PA. J. INT’L L. 1121 (2009). Professor Stewart is the former Assistant Legal Adviser for Private International Law, Department of State, and headed up efforts to implement several conventions.

Hague Conference negotiations.<sup>12</sup> The areas of nonconsensus are in brackets. Jurisdiction provisions are almost all in brackets; there was much greater consensus in the recognition and enforcement provisions.<sup>13</sup> One delegate made an intervention at the close of the negotiations stating that it had been a wonderful opportunity for a three-week course on comparative law but “unfortunately my government expects me to come back with more.”

In February 2002, the U.S. announced that it would not continue with a comprehensive jurisdiction and recognition and enforcement convention. Many of the obstacles that ultimately prevented the adoption of a comprehensive jurisdiction and judgments convention with U.S. participation were not apparent at the beginning of the negotiations, but arose only later, such as the emergence of the internet and electronic commerce, the increasingly prominent role of the consumer, and the rather rapid integration of the European Community.<sup>14</sup> The documents of the Hague Conference itself point out many of the difficulties.<sup>15</sup> Some of the problems plaguing The Hague Conference mirrored the difficulties within the European Union, such as the accommodation of both civil and common-law approaches to jurisdiction and judgments. While the European Union countries have common political goals and a Court of Justice to settle such disputes, The Hague Conference lacks both a set of shared substantive values

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12. See Hague Conference on Private International Law, *Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Conference*, Prel. Doc. No. 10 (June 2000), [https://assets.hcch.net/upload/wop/genaff2000concl\\_e.pdf](https://assets.hcch.net/upload/wop/genaff2000concl_e.pdf). The procedure was officially changed in 2005. See *infra* note 55.

13. Hague Conference on Private International Law, *supra* note 10.

14. See Fausto Pocar, *The Drafting of a World-Wide Convention on Jurisdiction and the Enforcement of Judgments: Which Format for the Negotiations in the Hague?*, in *LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN* 191 (James A. R. Nafziger & Symeon C. Symeonides eds., 2002).

15. Following the June 2001 diplomatic session, there were informal meetings among different member nations, exploring ways to continue the work on the Judgments Convention. For a discussion of the state of negotiations, see Hague Conference on Private International Law, *Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference*, at 4–9, Prel. Doc. No. 16 (Feb. 2002), [https://assets.hcch.net/upload/wop/gen\\_pd16e.pdf](https://assets.hcch.net/upload/wop/gen_pd16e.pdf). Two other documents on The Hague Conference website, both produced by Avril D. Haines, provide insight into the problems that the Conference has faced, especially in connection with the internet and also the problems related to choice of court agreements. “[T]he Hague Conference mirrored the difficulties within the European Union, such as the accommodation of both civil and common-law approaches to jurisdiction and judgments. While the European Union has common political goals and a Court of Justice to settle such disputes, the Hague Conference lacks both a set of shared substantive values and a tribunal to decide when consensus is impossible. This made drafting a treaty difficult and agreement in the area of jurisdiction and judgments ultimately impossible.” Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 *AM. J. COMP. L.* 543, 546 (2005). See Hague Conference on Private International Law, *The Impact of the Internet on the Judgments Project: Thoughts for the Future*, Prel. Doc. No. 17 (Feb. 2002), [https://assets.hcch.net/upload/wop/gen\\_pd17e.pdf](https://assets.hcch.net/upload/wop/gen_pd17e.pdf).

and a tribunal to decide when consensus is impossible. This made drafting a treaty difficult and agreement in the area of jurisdiction and judgments ultimately impossible.<sup>16</sup> Proposals were made to look for a smaller area of consensus, that of choice of court agreements, and the resulting Choice of Court Convention was finished in June 2005.<sup>17</sup>

## II. A DECADE AND MORE OF CHANGES

In 2002, the comprehensive judgments convention/project was “shelved” in place of the more limited Choice of Court convention. The Judgments Project sat “in storage” for a decade. What happened during that period to suggest that it might be time to reconsider, and why might the time be ripe now?

The Hague Conference underwent significant changes from when the Judgments Project started in 1993 to when it ended in 2002, but underwent even more changes after that. As mentioned earlier, in 1992 The Hague Conference was very Eurocentric. Under the leadership of then-Secretary General Hans van Loon, The Hague Conference moved from a largely western European entity to a global body.<sup>18</sup> In fact, in 1990, it had only thirty-three member states, as compared to forty-seven in 2000, and an additional twenty-eight by 2013 when the total was seventy-five (one of the members being the EU).<sup>19</sup> One can also look at the increase in contracting states to the four international legal cooperation treaties (Apostille, Service, Evidence, Access to Justice) all of which increased at least 50% in the short time from 2000 to 2013.<sup>20</sup> Today there are eighty-two countries that are members of The Hague Conference, as well as the EU which is a member as well<sup>21</sup> and more than 150 countries are members or contracting states to one

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16. Teitz, *supra* note 15, at 546.

17. Hague Conference on Private International Law, 37: *Convention on Choice of Court Agreements*, at Art. 21 (June 30, 2005), <https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf>. [hereinafter *Choice of Court Agreements*]. See generally Marta Pertegás and Louise Ellen Teitz, *Prospects for the Convention of 30 June 2005 on Choice of Court Agreements*, in *A COMMITMENT TO PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF HANS VAN LOON* 465 (2013); Louise Ellen Teitz, *Implementing the Hague Choice of Court Agreements Convention for the Twenty-first Century: Providing a Viable Alternative to Arbitration*, in *VISITING PROFESSORS ALL'ALMA MATER: LEZIONI ALLA FACOLTÀ DI GIURISPRUDENZA DELL'UNIVERSITÀ DI BOLOGNA 2006-2010* (2011).

18. The current Secretary General, Christophe Bernasconi, who took over on July 1, 2013, has continued to emphasize growth in membership and added new members.

19. Hague Conference on Private International Law, *Annual Report 2013*, at 10–12 (2014), <https://assets.hcch.net/docs/6e0c6044-fca2-46cc-a6d8-41a26bf06dad.pdf>.

20. *Id.* at 32–33.

21. The Statute of The Hague Conference was amended in June 2005 to provide for membership for REIOs—regional Economic Integration Organizations. Andrea Schulz, *The Accession of the European Community to the Hague Conference on Private International Law*, 56 *INT'L & COMP. L.Q.* 939, 942–43 (2007).

or more Hague Conventions.<sup>22</sup> The global nature of The Hague Conference and the shift from a western European focus can also be seen in the current two regional offices, one for Latin America in Argentina and one for the Asia Pacific region in Hong Kong. The regional office in Latin America has increasingly played an important role in preparing countries for participation in Special Commissions, and the dynamic nature of the Latin American delegations has served in some cases and in some areas of Hague Conference work as a counter-balance to the EU, which has competence in the Judgments Convention and speaks for all its members.

The change in the EU and the shift in competence after 1999 had a significant impact in the stalemate of the 2001 negotiations. But the real effect of the change in competence has been that as the common judicial area has developed its European regional instruments, these regulations have become almost “operational documents” for the Judgments negotiations. What is being negotiated must be as consistent as possible and include critical aspects of Brussels I Recast. For example, the jurisdictional filter for exclusive jurisdiction under Article 6(c), dealing with tenancies of immovable property “for a period of more than six months,” has to be included even though from a U.S. perspective this could create problems with our existing law. The same is true in regard to special treatment for consumers and the jurisdictional filters in Article 5(2). While obviously the U.S. has required changes to comply with constitutional requirements of due process, thus necessitating an “activity basis” in the filters for contract and tort such as in Article 5(1)(g) and 5(1)(j), U.S. personal jurisdiction is not codified and has no specific regulation to serve as a guide for the negotiations. The role of a European patent court is also driving some of the negotiations, including those concerning whether to include in the convention judgments from “common courts” and how to define that term. The increased harmonization of European law since 2001 creates some rigidity but also more consistency. It is also a harbinger of the growing trend of unification/harmonization of law on a regional basis, not only in Europe.

Another significant change appears in the representation of delegations to The Hague Conference, at least as to Special Commissions and Diplomatic Sessions. The delegations once populated by academics are increasingly composed of governmental representatives, who often represent their countries not only at the Hague Conference but at UNCITRAL and other regional entities.<sup>23</sup> Even the Hague Conference Permanent Bureau, the name for the Secretariat, has moved away from law professors as the “diplomat

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22. Hague Conference on Private International Law, *About HCCH: A World Organisation...*, <https://www.hcch.net/en/about> (last visited Apr. 8, 2019).

23. In many areas, especially family law, delegations include active judges.

lawyers,” with the last academic departing in spring 2017.<sup>24</sup> Another change in the complexion of delegations in general to Hague Conference Special Commissions has been the inclusion of experts in complex substantive areas of the law, such as intellectual property or family law, as opposed to the experts in private international law. As intellectual property plays an increasing role in cross-border trade and commerce, its importance in negotiations has increased.

The Hague Conference has not completed a hard law instrument (that is, a treaty), since the 2007 Maintenance Convention—more than a decade. The Hague Principles, its first real soft law instrument, was finished in 2015. And the nature of ratification and entry into force has also changed, even while the number of entities needed to bring a convention into force has decreased.<sup>25</sup> The Choice of Court Convention took more than ten years; and the 2006 Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary also took more than ten years. What this suggests is the possibility that some conventions could be out-of-date even before they enter into force with the rapid change of law.<sup>26</sup> This could be especially true for conventions that include intellectual property or some of the expanding technologies.

All of these changes contributed to a climate by 2012 that was quite different from that in 2001, especially when combined with the increasing global trade and the need for dispute resolution to support this trade. Indeed, the last several years have seen the burgeoning of international commercial courts, many conducting the procedures in English, in Dubai, Singapore, Germany, The Netherlands, and Belgium.<sup>27</sup> Meanwhile, the goal of limiting U.S. direct jurisdiction has increasingly been of less interest to other countries as the U.S. Supreme Court since 2011 has taken care of what was viewed as exorbitant jurisdiction based on general doing business jurisdiction as well as narrowed specific jurisdiction against foreign corporations, depending on how they structure their distribution channels.

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24. First Secretary Pertegás, Professor at Antwerp University and now also Professor at Maastricht University, had primary responsibility for the Judgments Project’s following its rebirth from 2010/2011 and for the Choice of Court Convention from 2008, as well as the Hague Principles on Choice of Law in International Commercial Contracts.

25. *Compare* Convention on Choice of Court Agreements art. 31, June 30, 2005, 44 I.L.M. 1294, *with* Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary art. 19, July 5, 2006, 17 U.S.T. 401.

26. One advantage to the building-up approach may be leaving room for further development and harmonization of law.

27. The Belgian proposal is more akin to arbitration than litigation. For a discussion of the use of specialized commercial courts in the U.S., see John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915 (2012).

### III. “THE THIRD TIME IS THE CHARM”

In 2011, the Council on General Affairs and Policy (“the Council”),<sup>28</sup> considered revisiting civil and commercial judgments,<sup>29</sup> a project raised in 2010 but initially put on hold until the Choice of Court Convention entered into force.<sup>30</sup> An Experts’ Group of approximately twenty-five, representing different legal traditions and geographic diversity, was convened in the Hague in 2012, focused primarily on policy decisions, the most critical issue

28. The Council on General Affairs and Policy governs The Hague Conference activities and is made up of all member states and meets each spring, currently in March, to determine the work Agenda of the Hague Conference for the following year.

29. From 2010: Continuation of the Judgments Project:

The Council noted the suggestions made in Preliminary Document No 14, including a proposal to convene an expert group to explore the options presented in this document. The Council recalled the valuable work which has been done in the course of the Judgments Project and noted that this could possibly provide a basis for further work. The Council concluded, however, that such exploratory work, including the appointment of an expert group, will be further considered only following the entry into force of the 2005 Choice of Court Convention.

Hague Conference on Private International Law, *Conclusions and Recommendations Adopted by the Council*, at 3 (Apr. 5–7, 2010), [https://assets.hcch.net/upload/wop/genaff2010concl\\_e.pdf](https://assets.hcch.net/upload/wop/genaff2010concl_e.pdf).

From 2011: Continuation of the Judgments Project:

The Council recalled the conclusion adopted at its 2010 meeting concerning the continuation of the Judgments Project and stressed that any future work in this area should not interfere with the ongoing efforts to promote the entry into force of the Convention of 30 June 2005 on Choice of Court Agreements. The Council concluded that a small expert group should be set up to explore the background of the Judgments Project and recent developments with the aim to assess the possible merits of resuming the Judgments Project. The Permanent Bureau should report back to the Council in 2012 on progress.

Hague Conference on Private International Law, *Conclusions and Recommendations Adopted by the Council*, at 3 (Apr. 5–7, 2011), <https://assets.hcch.net/docs/6927488c-4415-4659-a2f0-e748fbc0a3f0.pdf>.

From 2012: Continuation of the Judgments Project:

The Council welcomed the exploratory work conducted by the Experts’ Group and its Conclusions and Recommendations on possible future work.

....

The Council acknowledged that in working towards a future instrument, it will be important to begin by working on an agreed core of essential provisions. Consistent with that acknowledgement, the Council decided to establish a Working Group whose initial task shall be to prepare proposals for consideration by a Special Commission in relation to provisions for inclusion in a future instrument relating to recognition and enforcement of judgments, including jurisdictional filters.

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The Council acknowledged that the desirability and feasibility of making provisions in relation to matters of jurisdiction (including parallel proceedings) in this or another future instrument require further study and discussion. The Council invited the Experts’ Group to reconvene in order to consider and make recommendations on these matters.

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The Permanent Bureau will report regularly to the Council on progress on this work, which will maintain oversight of the work

Hague Conference on Private International Law, *Conclusions and Recommendations Adopted by the Council*, at 3 (Apr. 17–20, 2012), [https://assets.hcch.net/upload/wop/gap2012concl\\_en.pdf](https://assets.hcch.net/upload/wop/gap2012concl_en.pdf).

30. See Hague Conference on Private International Law, *Continuation of the Judgments Project*, Prel. Doc. 14 (Feb. 2010), <https://assets.hcch.net/upload/wop/genaff2010pd14e.pdf>.

being the scope of any judgments convention.<sup>31</sup> There was strong pressure by most of the experts for a convention addressing direct jurisdiction as well as recognition and enforcement, especially from some European members. The U.S. strongly opposed such an approach after the disastrous results of the 2001 draft and even rejected a two-track or protocol approach of simultaneous work.<sup>32</sup>

The U.S. adamantly refused to consider direct jurisdiction and in an effort to achieve a compromise, a procedure was set up with an Experts' Group to address policy issues and a Working Group to address drafting. Eventually the EU and others agreed that the Experts' Group would wait to address direct jurisdiction until after a draft convention addressing only recognition and enforcement was completed. This meant that the recognition and enforcement provisions had to be based on indirect jurisdiction, not direct.<sup>33</sup> The Working Group met five times from 2013 until October 2015, preparing a draft for a Special Commission to consider. The Special Commission (composed of and open to all member countries and their representatives, as well as some observers and NGOs) met four times: June 2016, February 2017, November 2017, and May 2018, in preparation for a diplomatic session which would consider the final draft of the Special Commission and negotiate a final convention, now scheduled for June 2019.<sup>34</sup>

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31. See Hague Conference on Private International Law, *Ongoing Work on Judgments, Choice of Court Convention and Judgments Project*, Prel. Doc. 7 (2014), <https://www.hcch.net/en/governance/council-on-general-affairs/archive>; Hague Conference on Private International Law, *Ongoing Work on International Litigation*, Prel. Doc. 3 (2013), <https://www.hcch.net/en/governance/council-on-general-affairs/archive>.

32. *Id.* In March 2019, the Council on General Affairs and Policy met and set a date of February 2020 for the Experts' Group to meet.

"5. Council confirmed the mandate given to the Permanent Bureau to plan a further meeting of the Experts' Group addressing matters relating to jurisdiction with a view to preparing an additional instrument. As requested by Council, the meeting will be held in the first week of February 2020. The Experts' Group will provide an update to Council at its 2020 meeting."

Conclusions and Recommendations of Council, <https://assets.hcch.net/docs/c4af61a8-d8bf-400e-9deb-afcd87ab4a56.pdf>.

33. Hague Conference on Private International Law, *supra* note 1.

34. At its March 2018 meeting, the Council on General Affairs and Policy instructed the Secretary General (SG) "to continue preparations for a Fourth and final Special Commission in May 2018." Hague Conference on Private International Law, *Conclusions and Recommendations Adopted by the Council*, at 1 (Apr. 13–15, 2018), <https://assets.hcch.net/docs/715fc166-2d40-4902-8c6c-e98b3def3b92.pdf> [hereinafter *2018 Conclusions and Recommendations*]. The Council on General Affairs and Policy has not yet held its meeting of 2019. After the 2018 meeting, the Council on General Affairs and Policy issued a report stating:

In line with this mandate, the Special Commission (SC) on the Recognition and Enforcement of Foreign Judgments met for the Fourth and final time from 24 to 29 May 2018 in The Hague to prepare a draft Convention on the recognition and enforcement of foreign judgments in civil or commercial matters.

The Working Group, in drafting the text of the Judgments Convention, utilized a system of building up a list of categories or bases for recognizing judgments, reminiscent of some of the categories present in the 1895 U.S. Supreme Court decision, *Hilton v. Guyot*,<sup>35</sup> the fountainhead of U.S. recognition of foreign judgments. These bases have been described as “jurisdictional filters” and utilize indirect jurisdiction. As consensus emerged or could be forged, more bases were added, with thirteen grounds currently, incorporated into Article 5 of the Convention and then some exclusive bases in Article 6. This approach of indirect jurisdiction built on the concept that bases for jurisdiction for initiating action and the bases for jurisdiction that are acceptable for recognizing a judgment are not coextensive in many legal systems, the latter recognition jurisdiction being more limited than the former initial jurisdiction. In the U.S. legal system, since jurisdiction is largely based on constitutional due process requirements, our direct and indirect jurisdiction are largely the same.<sup>36</sup> In many systems there is a “jurisdictional gap,”<sup>37</sup> such that their initial suits are

....  
The SC made very good progress and prepared the 2018 draft Convention. The SC adopted the following Conclusions and Recommendations for the Council for decision:

....  
“In accordance with the mandate given by the Council on General Affairs and Policy of the Conference (“the Council”) at its meeting in March 2016, March 2017 and March 2018, the Special Commission on the Recognition and Enforcement of Foreign Judgments (“the Special Commission”) met in June 2016, February 2017, November 2017 and May 2018 in The Hague to prepare a draft Convention on the recognition and enforcement of judgments in civil and commercial matters. The draft Convention appears as an annex to this report.

....  
The Special Commission considers that it has completed the mandate conferred on it by the Council and that, as contemplated by the Council, work on the draft Convention has reached the point where a Diplomatic Session can be convened in mid-2019. The Special Commission notes the desirability of consultation and informal collaboration between Members in preparing for the Diplomatic Session. The Special Commission understands that the Academy Building would be available for a Diplomatic Session from 17 June to 2 July 2019.

Hague Conference on Private International Law, Council on General Affairs and Policy, *Judgments Project: Report on the Special Commission Meeting of May 2018 and Next Steps*, at 2, Prel. Doc. No. 1 (Oct. 2018), <https://assets.hcch.net/docs/1580b17f-2e0f-4f19-9b40-bf6702678048.pdf> (quoting 2018 *Conclusions and Recommendations*). See also *supra* note 32.

35. 159 U.S. 113 (1895); Ronald A. Brand, *New Challenges in the Recognition and Enforcement of Judgments* 7 (Legal Studies Research Paper Series, Working Paper No. 29, 2018), <http://ssrn.com/abstract=3246053> (“Justice Gray’s 1895 opinion in *Hilton v. Guyot* provides the starting point for just about every analysis of the question of foreign judgment recognition.”).

36. One example in the U.S. where there might be a difference in jurisdiction is quasi in rem and in *Shaffer v. Heitner*, where the Court suggests that indirect jurisdiction could be different.

Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.

*Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977).

37. Ronald A. Brand, *Understanding Judgments Recognition*, 40 N.C. J. INT’L L. & COM. REG. 877, 880 (2015). In the United States, this problem has resulted in the failure to understand the gap that

treated differently than incoming judgments from foreign countries. Some experts<sup>38</sup> have suggested that we adopt a very simple rule that contracting states would recognize any judgment that would be allowed if it were a domestic judgment. In this way, there would be no “judgment discrimination”<sup>39</sup> and no concern about multiple declarations in the text and inconsistent results. Although a simpler structure might be more acceptable to some common law jurisdictions and lead to more consistency in application, given the “jurisdictional gap,” the only viable option is to start with the simplest categories of harmonization and work to build consensus on more complicated jurisdictional situations. Examples of generally agreed categories are: where the court of origin is the defendant’s habitual residence,<sup>40</sup> where the person against whom one seeks enforcement initiated the claim,<sup>41</sup> and where there is express consent.<sup>42</sup> There is the limited possibility of removing entire categories from scope through the declaration

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exists in some other legal systems between the bases of jurisdiction on which courts are allowed to hear a case in the first instance (bases of direct jurisdiction) and the bases of jurisdiction courts will accept as appropriate in the originating court of another state for purposes of the recognition of the resulting judgment (bases of indirect jurisdiction).

38. *See id.* at 905 (describing the general international trend of no judgement discrimination).

39. Prof. Ron Brand suggests that the movement of international law has been towards nondiscrimination, but it is still not likely to eliminate the jurisdictional gap:

The general trend for more than half a century in international economic law has been to use treaties to move toward (and even to require) non-discrimination. Three factors, however, make it extremely difficult to move toward complete elimination of the jurisdiction gap approach to judgments recognition on a global basis. The first is that the European Union has embraced this discriminatory approach to judgments recognition, despite the European Commission’s efforts to reduce the effects of such discrimination in its original proposal for the Brussels I Recast Regulation. The second is that most other countries follow the Continental civil law approach to law generally, including on rules of private international law. The third is that, as the Commonwealth example demonstrates, even among the common law legal systems of the world, the United States tends to be an outlier in having no jurisdiction gap.

*Id.*

40. Hague Conference on Private International Law: Fourth Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments, *Judgments Convention: Revised Preliminary Explanatory Report*, at No. 82, Prel. Doc. No. 10 (May 2018), <https://assets.hcch.net/docs/7cd8bc44-e2e5-46c2-8865-a151ce55e1b2.pdf>; Hague Conference on Private International Law: Special Commission on the Recognition and Enforcement of Foreign Judgments, *November 2017 Draft Convention*, at Art. 5(1)(a) (November 13, 2017), <https://assets.hcch.net/docs/2f0e08f1-c498-4d15-9dd4-b902ec3902fc.pdf>.

41. *November 2017 Draft Convention*, *supra* note 40 at Art. 5(1)(c). “The *Hilton* legacy is the application of the doctrine of comity to the recognition of foreign judgments—showing respect for, and giving effect to, the decisions of foreign courts.”; Ronald A. Brand, *The Continuing Evolution of U.S. Judgments Recognition Law*, 55 COLUM. J. TRANSNAT’L L. 277, 282 (2017). In *Hilton v. Guyot*, Justice Gray “determined that cases brought either against a national of the state of the court of origin, or by the party against whom the judgment was rendered, presented easy decisions to recognize the result.” *Id.*

42. *November 2017 Draft Convention*, *supra* note 40 at Art. 5(1)(e).

mechanism under Article 19, which results in a reciprocal exclusion and is structured like the Choice of Court's Article 21.<sup>43</sup>

This approach of building up consensus also works with the idea that the convention is a floor, not a ceiling. National law remains, except as it is limited for *in rem* and tenancies in immovable property, as well as possibly in some registered intellectual property rights.<sup>44</sup> Critics of the structure have raised concerns about likely inconsistent application of the many categories and unnecessary complication. On the other hand, one could see this “bottom up” approach as leaving more room for growth as more harmonization develops, as well as leaving flexibility for the convention to be more nimble in response to rapidly developing areas of law in the changing economies and technologies. One possibility is to view the convention as currently drafted as a base to which one could add later protocols like the Capetown Convention and even at some point look to tackle and include issues such as parallel litigation or *lis pendens*. Thus the weakness of the convention to some may be a strength for maximizing the life of and attractiveness of a Hague Judgments Convention.

#### IV. A WALK THROUGH THE CONVENTION

For those not familiar with the convention, a short overview of the structure and critical components of the Fourth Special Commission draft of May 2018 will provide sufficient background to consider some of the issues still remaining for the final diplomatic session in June 2019.<sup>45</sup> It is important to keep in mind that the current draft is not binding on the final session which may renegotiate provisions.<sup>46</sup> In drafting the Judgments Convention, the delegates took care to utilize the same language, where possible, as that used in the smaller and earlier Choice of Court Convention, recognizing that

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43. One can compare the language in Art. 19 of the Judgments May 2018 draft with Art. 21 of the Choice of Court Convention, both using similar language. For a discussion of how Art. 21 works in the Choice of Court Convention. *See generally* Ronald A. Brand & Paul Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (2008).

44. *E.g.*, *November 2017 Draft Convention*, *supra* note 40, art. 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.”

45. *See generally* Hague Conference on Private International Law: Special Commission on the Recognition and Enforcement of Foreign Judgments, *2018 Draft Convention* (May 24–29, 2018), <https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf>; Hague Conference on Private International Law: Twenty-Second Session Recognition and Enforcement of Foreign Judgments, *Judgments Convention: Revised Draft Explanatory Report*, Prel. Doc. No. 1 (June 18–July 2 2019), <https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf>.

46. *See* Hague Conference on Private International Law, *Rules of Procedure*, <https://assets.hcch.net/docs/1bc57743-5a7e-4fa2-955b-9dbc9db01561.pdf>.

minor deviations might be viewed as deliberate rejection or change of meaning from the earlier convention.

The general scope and exclusions from scope appear in Articles 1 and 2, as possibly modified on an individual country basis under Article 19.<sup>47</sup> Unlike the Choice of Court Convention, consumers are included in this convention as are “non-contractual obligation arising from death, physical injury, damage to or loss of tangible property...”<sup>48</sup> Article 4 sets out the general provisions, including requiring that the judgment have effect and be enforceable in the rendering forum, F1, to be recognized under the convention in F2. Articles 5, 6 and 7 are the heart of the convention. Article 5 lists the current thirteen bases for recognition and indicates that a judgment is “eligible” for recognition and enforcement if it meets one of those categories. Article 6 adds a limitation for certain exclusive bases of indirect jurisdiction. Article 7 completes the critical provisions, providing grounds for discretionary non-recognition of a judgment that has satisfied Article 4 and 5. It included many traditional grounds, such as due process violations, public policy, inconsistent with certain other judgments, and obtained by fraud. Interestingly, the fraud provision originally only applied to fraud in connection with a matter of procedure or extrinsic fraud, but that portion of the “defense” to recognition was deleted, allowing for the potential of relitigating underlying matters by claiming intrinsic fraud. The U.S. was not in favor of that deletion. National law is incorporated as an independent basis for recognition under Art. 16. Many U.S. academics and practitioners may find the structure of the convention difficult to interpret, especially if they are not expecting the “laundry list” of grounds for recognition. It is easier to appreciate this structure in the context of the negotiations and the process at the Hague Conference.

## V. THE ELEPHANT(S) IN THE ROOM

There are several areas where consensus has not been achieved which have been identified for intersessional work in smaller groups.<sup>49</sup> These include: “(1) the treatment of decisions of competent authorities on validity issues of intellectual property rights and the treatment of intellectual property related judgments in general; (2) common courts; (3) the relationship with other international instruments; (4) the treatment of judgments pertaining to governments; and (5) the possible exclusion of anti-trust (competition)

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47. See Brand & Herrup, *supra* note 43 and accompanying text.

48. *November 2017 Draft Convention*, *supra* note 40, art. 5 (1)(j).

49. Hague Conference on Private International Law, Council on General Affairs and Policy, *Judgments Project: Report on the Special Commission Meeting of May 2018 and Next Steps*, Prel. Doc. 1 (Oct. 2018), <https://assets.hcch.net/docs/1580b17f-2e0f-4f19-9b40-bf6702678048.pdf>.

matters, respectively.”<sup>50</sup> Some of these, such as exclusion of intellectual property and antitrust, are neither simple nor necessarily likely to be resolved by a small informal working group. Rather they are basic policy issues that require the government experts who have more authority—those who will be at the Diplomatic Session. Issue one, intellectual property, has been a wild card from the beginning and has not remained static. Intellectual property is incorporated into so much law today, and will be even more integrated with time, so that trying to excise some or all of it from the convention may reduce the effectiveness of the instrument. In contrast, removing antitrust may be easier and would be consistent with the exclusion from scope in Art. 2 of the Choice of Court Convention. Areas such as IP, which may be territorial, and judgments pertaining to governments raise major sovereignty issues on which countries may differ.

Several other questions remain, such as how does one handle the overlap with arbitration, which is excluded from scope under Art. 2 (3); as well as country-specific problems, such as where does BREXIT fit in; the U.S. concerns with the broad scope of fraud, the tenancies for more than six months,<sup>51</sup> and how Article 14 will work on statute of limitations. There is also concern from a U.S. perspective, but shared by others as well, about the number of declarations, which are allowed and listed in Article 30. Some question whether the Convention’s value will be diluted due to lack of uniformity and predictability among Contracting States, especially when any convention is competing in theory with other dispute resolution mechanisms—arbitration and mediation. The BREXIT issue is just one illustration of the problem of how to implement the convention internationally in a way that allows flexibility but enough harmonization.

And there is the real elephant in the room that hasn’t been discussed openly: how is this convention to be implemented internationally? While the expansion of The Hague Conference to include more countries across the globe as members has been beneficial, that brings with it concerns about the judicial and legal systems in some of these. Some governments have concerns about having to recognize judgments from countries about whom they question their due process and whether their justice systems are fair and not corrupt (“country X”). In many legal systems, one could avoid having to recognize an incoming judgment by using the public policy exclusion in Article 7. But that is not available in all legal systems, some of which have very narrow public policy grounds. In addition, while public policy may protect a country from an incoming judgment, one has no control over the

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50. *Id.* at 2.

51. Some of us refer to as the “sabbatical rental” problem as considered by Prof. Symeonides.

outgoing judgments of the country X which might be against a U.S. party who falls within one of the filters for recognition in a country where the party might have assets. On the other hand, any system for bilateralization, even if simpler than the 1971 Convention, instead using either an opt-in or opt-out version, still results in considerable loss of efficiencies. The Hague Conference has used two different models in the family law conventions. The 1980 Child Abduction Convention uses the “opt-in” model, where countries who are Members at the time of the diplomatic conference have to agree to be in a treaty relationship with each country that accedes after them.<sup>52</sup> The practical and diplomatic difficulties connected to this process have been evident in several cases and exacerbated by disputes about competence between the EU and its member states. Sixteen years later in the 1996 Child Protection Convention,<sup>53</sup> The Hague Conference adopted an opt-out model for those who join after the diplomatic conference. In each case, however, one is “stuck” with a treaty relationship with existing members of The Hague Conference at the time of the final diplomatic session, a politically sensitive issue for some countries who are not willing to be in “partnership” with some existing Hague Conference members. The solution of true bilateral agreements only threatens to defeat the value of any convention. Diplomats will no doubt negotiate long and hard on this last issue to decide if the game is worth the candle.

The ghost of 2001 has often led members of some delegations to suggest that this convention is likely to end up like the “Interim Text” from 2001—unworkable and lacking predictability and certainty—as evidenced by the multiple alternative provisions in brackets throughout the jurisdiction provisions.<sup>54</sup> It is interesting to note that the first half “diplomatic session” in 2001 was the first diplomatic session when the consensus model<sup>55</sup> was

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52. Hague Conference on Private International Law, 28: *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, art. 38 (Oct. 25, 1980), <https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf>.

53. Hague Conference on Private International Law, 34: *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, art. 58 (Oct. 19, 1996), <https://assets.hcch.net/docs/fl6ebd3d-f398-4891-bf47-110866e171d4.pdf>.

54. Hague Conference on Private International Law, *Interim Text - Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference (6-22 June 2001)*, Prepared by the Permanent Bureau and the Co-reporters (2001), <https://www.hcch.net/en/publications-and-studies/details4/?pid=3499&dtid=35>.

55. The rules of The Hague Conference were officially amended to incorporate the consensus first model (voting only if necessary) in 2005. The current rule reads as follows:

To the furthest extent possible, all decisions shall be taken by consensus. If exceptionally it is not possible to attain consensus, decisions shall be taken by vote in accordance with the following rules.

used, as opposed to voting, a change in approach that perhaps is reflected in the vast numbers of brackets to show consensus was lacking. At the time, the agreement was that future negotiations (including “Part II”) would revert to the voting model, and the internal procedures were only officially amended in 2005 at the time of the final Diplomatic Conference for the Choice of Court Convention, which also accepted a change to the Statute of the Conference that codified the consensus system.<sup>56</sup> Fifteen years later, the parties seem to have gotten more comfortable with the consensus model and seem to understand that brackets are not a solution to every area where compromise has not yet been achieved and is likely not to be achieved easily. There are fewer brackets, although the legal and policy areas covered by the brackets, such as intellectual property, are vast and highly divisive.<sup>57</sup> It will be interesting to observe whether the limited brackets currently remaining expand significantly during the final negotiations in June 2019 or if the parties will work harder to find consensus to remove the brackets which cannot remain in a final text. Or will they simply delete from scope the hard choices?

## VI. THE FUTURE OF A JUDGMENTS CONVENTION: PEERING INTO THE GLASS BALL

Should the U.S. become a contracting party to any new instrument (or just lead from behind)? The crucial question is: does this convention benefit U.S. business, consumers, and government?<sup>58</sup> In theory, the convention should increase the ability to export U.S. judgments abroad and to a wider range of countries than would have been parties to the last effort in 1993–2001.<sup>59</sup> Given the increase in global commerce, U.S. individuals and

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Hague Conference on Private International Law, *Rules of Procedure*, available at <https://assets.hcch.net/docs/1bc57743-5a7e-4fa2-955b-9dbc9db01561.pdf>. Using consensus in negotiations, while new to the Hague Conference, was certainly well-known at UNCITRAL, which uses it in its work.

56. *Id.*

57. Hague Conference on Private International Law, Council on General Affairs and Policy, *Judgments Project: Report on the Special Commission Meeting of May 2018 and Next Steps*, Prel. Doc. 1 (Oct. 2018), <https://assets.hcch.net/docs/1580b17f-2e0f-4f19-9b40-bf6702678048.pdf>.

58. During the negotiations for the 2005 Choice of Court Convention, the U.S. government wanted to be sure that the government as a plaintiff could rely on the convention in transactions that had exclusive choice of court agreements. Although the role of governments in the new Judgments Convention has been an area generating disagreement, much of the concern is not with governments acting in a commercial context.

59. However, this also creates issues in connection with what mechanism can be employed for joining the convention. Although one would get a broader range of countries for potential enforcement of an outgoing judgment, the U.S. may not be happy to be “partners” with all of these and may have

businesses (and the government in commercial activities) have cross-border transactions with Asian and Latin American countries who have become actively involved in The Hague Conference and this negotiation. The new China “One Belt One Road”<sup>60</sup> initiative also reflects the increasing importance of trade in the region.<sup>61</sup>

This broader enforcement may have less importance now after the restriction of general jurisdiction to where the company is “essentially at home,” as shown in *Goodyear*<sup>62</sup> and *Daimler*,<sup>63</sup> and the narrowing of specific jurisdiction in *Nicastro*<sup>64</sup> and most recently in *Bristol Meyers Squibb*.<sup>65</sup> The impact of this jurisdiction-narrowing case law is that the litigation cannot be brought initially in the U.S., and so ironically there will be no U.S. judgment to enforce overseas. From the time the negotiations began in 1993 to the present, the availability of assets of foreign entities and defendants in the U.S. has decreased, and the ability to move these assets to offshore locations with a “click of a mouse” has increased exponentially, thus also suggesting in theory that there is an increasing need for effective means to enforce U.S. judgments abroad. The growth of alternative dispute resolution, not only arbitration but also mediation, in commercial transactions is evident from statistics and even from UNCITRAL’s just-completed Convention on

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concerns recognizing their judgments (incoming) due to due process and systemic/individual corruption. Although both could be a basis to refuse recognition, that doesn’t necessarily resolve the problem as the judgment could be enforced in other contracting states where a U.S. party has assets or does business. See text at Part V and accompanying *supra* notes 52–53.

60. SCOTT KENNEDY & DAVID A. PARKER, *BUILDING CHINA’S “ONE BELT, ONE ROAD”*, CTR. FOR STRATEGIC & INT’L STUDIES (Apr. 3, 2015), <http://csis.org/publication/building-chinas-one-belt-one-road> (“China’s efforts to implement this initiative will likely have an important effect on the region’s economic architecture—patterns of regional trade, investment, infrastructure development—and in turn have strategic implications for China, the United States, and other major powers”).

61. Reflecting the growing importance of the Asia Pacific area, The Hague Conference opened an Asia Pacific Regional office in Hong Kong in 2012. The Secretary General of the Hague Conference, Mr. Hans van Loon noted that, “The Asia Pacific Regional Office in Hong Kong will undoubtedly be a significant resource for all States in the Asia Pacific Region.” He added, “The Hong Kong office, coupled with the support of Member States, will significantly contribute to the visibility of The Hague Conference in the Asia Pacific region, the promotion of the work of the Conference and the proper implementation and operation of The Hague Conventions, which is ultimately in the interest of all Members of the Conference and their citizens.” *Hague Conference to Open Asia Pacific Regional Office in Hong Kong*, Hague Conference on Private International Law (Apr. 27, 2012), <https://www.hcch.net/en/news-archive/details/?varevent=256>.

62. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

63. *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014); see Linda J. Silberman, *The End of Another Era: Reflections on Daimler and its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675 (2015).

64. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011). The actual impact of this narrowing could depend in part on the way the defendant structures its business and distribution of products and the relationship of any subsidiary to parent.

65. *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1780 (2017).

International Settlement Agreements Resulting from Mediation, which will be known as the Singapore Convention on Mediation.<sup>66</sup>

The U.S. role in global trade may also suggest a reason not only to be at the table in negotiating, but also to go forward with becoming a contracting state. Although the negotiations here are not of direct jurisdiction, as a practical matter the convention impacts attitudes of direct jurisdiction. The fact that the U.S. has successfully negotiated to incorporate an activity-based element into contract and tort claims has the potential to lead to increasing harmonization of direct jurisdiction, as well as impacting later work.<sup>67</sup> Similarly, the U.S.'s involvement has suggested areas where U.S. law might expand to meet changing and developing areas of law.

Evidence of the potential damage to future work on unification and harmonization<sup>68</sup> of law can be seen in the response of the EU to U.S. proposals, an unstated calculus in their willingness to make changes to accommodate U.S. law. This attitude was obvious at an EU hearing in April 2018 in Brussels before the European Parliament's JURI Committee<sup>69</sup> to present a study on "The Hague Conference on Private International Law 'Judgments Convention.'" The study was commissioned from a consortium of five legal academics at various European institutions to assess the work on the Hague Judgments Convention and "its interplay with international and Union instruments in the field, as well as its potential future impact on the regulation of civil and commercial cross-border disputes."<sup>70</sup> The study considers the impact of the convention in selected EU and Third States,

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66. U.N. Comm. on Int'l Trade Law, *Report of the U.N. Comm. on Int'l Trade Law, Fifty-first session*, ¶ 49, U.N. Doc. A/73/17 (June 25–July 13, 2018) (finalization of the Convention) and Annex I (text of the U.N. Convention on International Settlement Agreements Resulting from Mediation); see also Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, SSRN (Sept. 18, 2018).

67. On the other hand, if the U.S. isn't willing to go forward on this convention at The Hague Conference, negotiations on future projects are less likely to incorporate U.S. needs such as the activity basis for our constitutional due process.

68. This impact is not limited to The Hague Conference but also could be felt at both UNCITRAL and UNIDROIT, as well as regional economic integration organizations such as ASEAN or the EU, as many of the participants in negotiations are involved in the other organizations as well.

69. The Public Hearing of the Committee on Legal Affairs 24 April 2018 was preceded by a closed hearing, both considering the study commissioned by the Parliament's Policy department for Citizens' Rights and Constitutional Affairs. The author was privileged to be able to attend the Parliament meeting as a guest of one of the principal authors. See Pedro A. de Miguel Asensio et al., *The Hague Conference on Private International Law "Judgments Convention*, European Parliament Pol'y Dep't For Citizens' Rights & Const. Affairs (April 2018).

70. The study is based not on the final draft pre-diplomatic session but from the earlier November 2017 draft. The authors of the report are: Pedro A. De Miguel Asensio, Professor, Complutense University of Madrid, Spain, Gilles Cuniberti, Professor, University of Luxembourg, Pietro Franzina, Professor, University of Ferrara, Italy, Christian Heinze, Professor, Leibniz University of Hannover, Germany Marta Requejo Isidro, Senior Research Fellow, Max Planck Institute Luxembourg. *Id.* at 1.

pointing out that “U.S. negotiators have successfully limited the ambition of the Convention in accordance with their own standards.”<sup>71</sup> The study proceeds to look at whether a convention would improve the circulation of judgments in some States, determining the impact based on whether the law of foreign judgments is more liberal or more restrictive than the proposed convention. Highlighting the impact of U.S. law in contractual and tort matters, the study suggests two options: either to work to include the U.S., “which is the biggest economic partner of the EU,” by accepting what they see as “narrow U.S. standards of jurisdiction,” or instead “to explore whether a more ambitious and practically useful Convention, following European standards of jurisdiction, could be accepted by a significant number of other states, in particular in Asia.”<sup>72</sup>

In the study’s conclusion and at the oral hearing, the authors were skeptical about U.S. ratification, albeit based on a limited perception of the internal dynamics of domestic U.S. implementation and federal/state implementation.<sup>73</sup> “It must be underscored, however, that the strong involvement of U.S. negotiators in The Hague is no guarantee that the U.S. will eventually ratify the Convention, even if it successfully imposed its jurisdictional standards.”<sup>74</sup> While the U.S. government has not committed to the means of the implementation of any new judgments convention, one path that has been speculated about is a package where the Choice of Court Convention is implemented domestically, largely through federal law, and the larger Judgments Convention would be implemented primarily on the

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71. See European Parliament, Report, *The Hague Conference on Private International Law “Judgments Convention,”* POL’Y DEP’T FOR CITIZENS’ RIGHTS & CONST. AFFAIRS (April 2018), [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604954/IPOL\\_STU\(2018\)604954\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604954/IPOL_STU(2018)604954_EN.pdf) [hereinafter HAGUE STUDY].

72. See *id.* For one view of strategy for the EU, see Paul Beaumont, *Respecting Reverse Subsidiarity as an excellent strategy for the European Union at the Hague Conference on Private International Law—reflections in the context of the Judgments Project?*, available at [https://www.abdn.ac.uk/law/documents/CPIL\\_Working\\_paper\\_2016\\_3\\_revised.pdf](https://www.abdn.ac.uk/law/documents/CPIL_Working_paper_2016_3_revised.pdf).

73. See HAGUE STUDY, *supra* note 71, at 36–37. The authors are not necessarily accurate about the impact of any implementation through a cooperative federalism and the notion that “each state would be free to enact or maybe to vary [the implementing law]” (emphasis added). These statements have been made primarily by those who favor only federal implementation and who made many of them within the context of the Choice of Court Convention, a situation that is not directly in point. For different perspectives, see also Linda J. Silberman, *The Need for a Federal Statutory Approach to the Recognition and Enforcement of Foreign Country Judgments*, in STEPHAN, ED., FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM, Ch. 5 (26th Sokol Colloquium 2014); David P. Stewart, *Implementing the Hague Choice of Court Convention: The Argument in Favor of “Cooperative Federalism,”* in STEPHAN, ED., FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM, Ch. 8 (26th Sokol Colloquium 2014); Peter D. Trooboff, *Implementing Legislation for the Hague Choice of Court Convention*, in STEPHAN, ED., FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM, Ch. 7 (26th Sokol Colloquium 2014).

74. See HAGUE STUDY, *supra* note 71, at 37.

state level (as it is today) and largely with a state uniform law and limited federal law where necessary for structural reasons.<sup>75</sup> The U.S., as a federal state where judgment enforcement has long been primarily a matter of state law, has had to confront difficulties in the private international law area. but it has shown that it can achieve effective and agreed implementation in a broad range of private international law treaties, from family law to intermediated securities, and there is hope that the Judgments Convention can be implemented in a way that maintains the current state/federal balance.<sup>76</sup>

The U.S. has a history of participation in entities working on unification and harmonization of law<sup>77</sup> and its history at The Hague Conference has often been one of leadership.<sup>78</sup> The current negotiations threaten that reputation and may make the U.S. role significantly less important—and possibly irrelevant. The U.S. commitment to multilateral private international law instruments and to global trade weighs in the balance, and the U.S.’s ability to lead in the future may be strengthened if those with whom it negotiates see its resolve to move forward as part of any binding instrument.

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75. The author is a Rhode Island Uniform Law Commissioner, as well as participating in three of the four Special Commissions on the Judgments Project as a delegate on the U.S. State Department, representing the ULC. The author therefore would hope that the U.S. would implement the Judgments Convention in a way that maintains the existing state/federal balance and federalism. The current draft is largely compatible with existing state uniform law and with *Hilton v. Guyot* and common-law and cooperative federalism is feasible. One could analogize to certain private international law treaties that are compatible with the existing UCC and therefore have been “pre-implemented” and the federal implementing legislation maintains the existing state law. The author also served as co-Reporter with Kathleen Patchel until May 2011 of the Uniform Choice of Court Agreements Implementation Act (UCCAIA), which is a uniform act that was to help implement the Choice of Court convention in the U.S. For a discussion of some of these issues see generally Linda J. Silberman, *The Need for a Federal Statutory Approach to the Recognition and Enforcement of Foreign Country Judgments*, in FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM (26th Sokol Colloquium), Chapter 5 (Stephan, ed., 2014.); Peter D. Trooboff, *Implementing Legislation for the Hague Choice of Court Convention*, in FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM (26th Sokol Colloquium), Chapter 7 (Stephan, ed., 2014.).

76. For an excellent discussion of the potential for cooperative federalism, see David P. Stewart, *Implementing the Hague Choice of Court Convention: The Argument in Favor of “Cooperative Federalism”* in FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM (26th Sokol Colloquium), Chapter 8 (Stephan, ed., 2014.); See also *supra* note 74.

77. Re UNCITRAL, UNIDROIT; and domestically, the beginnings of NCCUSL/ULC

78. The U.S. officially joined in 1964 but many experts had involvement earlier on a personal basis. The Permanent Bureau has had only two U.S. diplomat lawyers: Adair Dyer, who served for almost 25 years, and the author.