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TRAVAIL EN COURS EN MATIÈRE DE CONTENTIEUX INTERNATIONAL ET POSSIBLE CONTINUATION DU PROJET SUR LES JUGEMENTS

établi par le Bureau Permanent

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ONGOING WORK ON INTERNATIONAL LITIGATION AND POSSIBLE CONTINUATION OF THE JUDGMENTS PROJECT

drawn up by the Permanent Bureau

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Permanent Bureau | *Bureau Permanent*
6, Scheveningseweg 2517 KT The Hague | *La Haye* The Netherlands | *Pays-Bas*
telephone | *téléphone* +31 (70) 363 3303 fax | *télécopieur* +31 (70) 360 4867
e-mail | *courriel* secretariat@hcch.net website | *site internet* http://www.hcch.net

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TABLE OF CONTENTS

Introduction

1. The facilitation of efficient and reliable mechanisms for cross-border dispute settlement is a pillar of the work of the Hague Conference. Most recently, the 2012 Special Commission on the Practical Operation of the 1980 and 1996 Conventions recommended that within the context of family law disputes, "exploratory work be undertaken to identify legal and practical problems that may exist in the recognition and enforcement abroad of [settled] agreements."[1] In relation to court proceedings, uniform rules to ensure that judgments issued by courts in a State (and rendered according to approved bases of jurisdiction) are enforced by other States have been developed *in specific fields*.[2] However, beyond these specific fields, there is currently no project dealing with cross-border litigation in civil and commercial matters *in general.* Previous work in this area (known as the "Judgments Project") was discontinued in 2002 when the Hague Conference decided that the then ongoing negotiations should focus only on international litigation relating to choice of court agreements.[3]

2. In April 2010, the Council discussed future work in the area of international litigation to supplement the ongoing efforts to ensure wide ratification of the Convention of 30 June 2005 on Choice of Court Agreements (hereinafter "the Choice of Court Convention"). It "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".[4] The 2011 Council meeting continued its discussions on further work in the area of international litigation and "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 Council also 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".[5]

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[1] "Conclusions and Recommendations (Part II)", of the Special Commission on the practical operation of the 1980 and 1996 Conventions (25-31 January 2012), adopted by the Special Commission, item 76.

[2] See, for example: *Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations* (divorce decrees); *Hague Convention of 25 October 1980 on International Access to Justice* (cost orders); *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (adoption orders); *Hague 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* (orders concerning the protection of children – jurisdiction, and recognition and enforcement); *Hague Convention of 13 January 2000 on the International Protection of Adults* (*idem* concerning the protection of vulnerable adults); *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (maintenance orders).

[3] For a summary of the history of this project see "Continuation of the Judgments Project", Prel. Doc. No 14 of February 2010 drawn up for the attention of the Council of April 2010 on General Affairs and Policy of the Conference, available on the Hague Conference website < www.hcch.net > under "Work in Progress" then "General Affairs", pp. 3-5; a detailed chronology of the Project is set out in the new "Judgments Project Section" of the Hague Conference (see para. [12] below). For more information on the informal working group's decision to progress with a convention limited to choice of court agreements, see "Report on the first meeting of the Informal Working Group on the Judgments Project of October 2002", Prel. Doc. No 20 of November 2002 prepared by A. Schulz for the attention of the meeting of the Informal Working Group of January 2003, available on the Hague Conference website < www.hcch.net > under "Choice of Court Section" then "Preparatory Work"; and "Report on the work of the Informal Working Group on the Judgments Project, in particular on the preliminary text achieved at its third meeting of March 2003", Prel. Doc. No 22 of June 2003, prepared by A. Schulz available on the Hague Conference website < www.hcch.net > under "Choice of Court Section" then "Preparatory Work". See also a commentary by one of the participating experts, P. Beaumont "Hague Choice of Court Agreements Convention 2005", *Journal of Private International Law*, Vol. 5(1), 2009, p. 134.

[4] "Conclusions and Recommendations adopted by the Council", 2010, available on the Hague Conference website < www.hcch.net > under "Work in Progress" then "General Affairs".

[5] "Conclusions and Recommendations adopted by the Council", 2011, available on the Hague Conference website < www.hcch.net > under "Work in Progress" then "General Affairs".

3. This Note seeks to provide a preliminary overview of relevant factors in assessing the merits of continuing work on the Judgments Project. As a preface, the current status of the Choice of Court Convention is set out along with the work of the Permanent Bureau in continuing to promote this instrument. The Note then details the steps that have been taken towards convening an expert group in line with the mandate given by the 2011 Council meeting. This includes exploratory work into the background and current context of the Judgments Project and the identification of some key issues to be discussed by the expert group. Finally, the note concludes with a preliminary analysis of possible options for further work in this area for consideration by the Council.

1. Ensuring progress on the Choice of Court Convention

4. The entry into force of the Choice of Court Convention remains a priority for the Hague Conference in the area of international litigation. Therefore, the Permanent Bureau continues to focus efforts on ensuring the timely entry into force of the Convention following a second accession or ratification, as well as encouraging a wide acceptance.

5. It is hoped that a number of States that are in the process of joining the Convention will inform the Council of progress made in this regard.[6] In order to assist this process, the Permanent Bureau continues to promote the Convention and provide support to ensure that interested States receive adequate information and assistance regarding implementation. Such support is, inter alia, provided through an online dialogue which allows States to pass information on implementation issues for other States that are considering joining the Convention. In addition, the Implementation Checklist for the Choice of Court Convention has been available online since September 2011.[7] The Checklist highlights issues that may need to be considered by States when joining the Convention. This document will be kept up to date by the Permanent Bureau as other implementation issues are brought to its attention.[8]

6. In order to facilitate the access to information regarding the Convention, in September 2011 the Permanent Bureau also launched a section on the website that is dedicated to the Choice of Court Convention, which is regularly consulted by stakeholders and has given rise to a surge in individual requests as to the status of the Convention. It can be accessed through the homepage of the Hague Conference at < www.hcch.net >.

7. The Permanent Bureau has continued its efforts to promote the Choice of Court Convention at various events throughout the year. These opportunities also allow for the exchange of ideas regarding implementation. The Permanent Bureau wishes to thank those States that have hosted seminars or presentations on the Convention, such as the First Gulf Judicial Seminar on Cross-Frontier Legal Co-operation held in Doha, the Fourth Asia Pacific Regional Conference held in Manila, and the Justice Horizons Seminar held in Wellington.

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[6] See "Draft Agenda", Council of General Affairs and Policy of the Conference of April 2012, Item VI: "Round table on progress made concerning the signature and ratification of and accession to the Hague Conventions", p. 4.

[7] "Implementation Checklist: Hague Convention of 30 June 2005 on Choice of Court Agreements", available on the Hague Conference website < www.hcch.net > under "Choice of Court Section".

[8] Please note that the Permanent Bureau has also recently updated the "Outline of the Convention" document to reflect recent progress made in respect of the Convention. The revised document is on the Hague Conference website < www.hcch.net > under "Choice of Court Section".

2. Steps towards convening an expert group

a) Organisation of expert group

8. In keeping with the mandate given by the Council in 2011, the Permanent Bureau has organised an expert group to study the merits of resuming the Judgments Project. The meeting of the expert group is expected to take place from 12 to 14 April 2012, in advance of the Council meeting. This arrangement has two benefits: firstly, it allows for the conclusions of the expert group to be reported directly back to the Council; and secondly, it will mean that, where appropriate, States can send the same expert to attend both meetings allowing them to allocate resources more efficiently.

9. In line with the mandate given by the Council, the expert group will be a "small group" comprised of a representative selection of Members. As far as possible, the composition of the group aims to represent the major legal systems and regions of the world, particularly in light of regional judgments schemes that exist in the Arab World, Central Asia, Europe, and Latin America. The Permanent Bureau has also sought to promote the participation of some smaller Members and new Members in the expert group. Based on the above considerations, and bearing in mind those States that made interventions during the 2010 and 2011 Council meetings, the Members that have been invited to send delegates are: Argentina, Australia, Brazil, China, Costa Rica, Egypt, the European Union, India, Japan, the Russian Federation, Switzerland, South Africa, the United States of America and New Zealand. Participation will remain open to other Members with a specific interest in the Judgments Project, acknowledging the limited space in the Permanent Bureau conference facilities. Any other Members that would like to participate in the expert group are asked to contact the Permanent Bureau.

10. In order to keep the group to an appropriate size, each State will be invited to send no more than two experts. As was the preference during the discussions at the 2011 Council meeting, it is expected that the expert group will be made up largely of government experts and possibly some experts from the academic or legal professions.[9] It is expected that the findings of the expert group will be reported back to the Council in the form of a Working Document, to be distributed on the first day of the 2012 Council meeting.

b) Setting the scene for the expert group

11. In order to come to an informed decision, it is necessary that the expert group be provided with sufficient information regarding both the history and current context of the project. The Permanent Bureau has carried out preliminary work in this area by researching the background of the Judgments Project and analysing this information. It is hoped that this will assist the experts in developing an opinion as to what is needed and achievable in any future work in this area. This research is also valuable in isolating the issues that have arisen in past attempts at a global convention and considering how these might be resolved in future discussions.

12. To facilitate the access to information regarding the background of the Judgments Project, the Permanent Bureau launched a new section on the Hague Conference website that is dedicated to the Judgments Project in December 2011. The specialised section is accessible from the homepage of the website at < www.hcch.net >. It contains a detailed chronology of the project, links to relevant documentation and an extensive bibliography.

[9] See "Report of Meeting No 4" from the Council on General Affairs and Policy of the Conference (4-7 April 2011), Item IV, part 3. An expert from the United States of America indicated that the convening of an expert group should be subject to the qualification that it should "consist of government officials and possibly some non-governmental experts". This approach was agreed to by a number of delegations.

The aim of the Judgments Project Section is to encourage awareness of the project and ensure that previous documents and other information is centralised in an accessible location.

13. In the process of preparing the background materials for the expert group, the Permanent Bureau has also had a number of opportunities to discuss the issues relating to the Judgments Project at various events during 2011 and early 2012.[10] The benefits of such activities include being able to discuss the project with an audience from a variety of legal systems as well as sharing information on the ongoing work of the Hague Conference with interested stakeholders.

14. The research carried out by the Permanent Bureau has been consolidated into a Background Note for the attention of the experts. The Background Note elaborates on the information contained in the present document regarding the history of the Judgments Project and sets out some of the recent regional and international developments that might influence a decision on the feasibility of resuming the project. A brief overview of these developments is set out in section (ii). A preliminary yet crucial question related to the merits of resuming the Judgments Project is whether such an instrument is needed at an international level. In light of this, the next section highlights the relative importance of the Judgments Project from an economic and social perspective (i).

(i) International trade and foreign investment

15. In today's world, cross-border trade and foreign investment are commonplace and the rate of international transactions continues to increase.[11] Liberalised global markets and increasing international trade and foreign investment have generated numerous benefits.[12] However, the growth in cross-border transactions also leads to risks for those companies and States involved and highlights the potential costs of protecting international investments.[13] In light of these risks, with regard to both its domestic and

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[10] For further information on the 2011 events, refer to the Hague Conference's "Annual Report 2011". In 2012, the Judgments Project was discussed at a conference held in Paris on 17 February 2012: "UE-Russie: vers une pleine reconnaissance réciproque des décisions judiciaires", organised by the Société Juridique Franco-Russe in Paris on 17 February 2011.

[11] The growth in world exports in 2010 was the highest on record since 1950, largely in response to a severe downturn in 2009. Global imports rose by 13.5% while exports rose by 14.5%, for details see, "World Trade Report 2011: The WTO and preferential trade agreements: From co-existence to coherence", World Trade Organisation, available online at < http://www.wto.org/english/res_e/publications_e/wtr11_e.htm > (consulted 20 February 2012), pp. 20-26; "International Trade Statistics 2011", World Trade Organisation, available online at < http://www.wto.org/english/res_e/statis_e/its2011_e/its11_toc_e.htm > (consulted 20 February 2012). Foreign direct investment also rose by 5% in 2010 and although it is still below its pre-crisis levels, UNCTAD expected foreign direct investment flows to reach their pre-crisis levels in 2011, see "World Investment Report 2011", UNCTAD, available online at < http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf > (consulted 20 February 2012), p. 2.

[12] Some such benefits of trade liberalisation include economic growth, variations in capital flows, the enhanced mobility of people and resources, consumer access to goods and services, and access to technology, see "World Trade Report 2008: Trade in a Globalizing World", World Trade Organisation, available online at < http://www.wto.org/english/res_e/publications_e/wtr08_e.htm >, pp. xi-xxii, 21-23, 70-73; "Seizing the benefits of Trade for employment and growth", OECD, ILO, World Bank, WTO, Final Report prepared for submission to the G-20 summit meeting (Seoul, 11-12 November 2010), available online at < http://www.oecd.org/dataoecd/61/57/46353240.pdf > (consulted 20 February 2012); P. Van den Bossche, *The Law and Policy of the World Trade Organisation* (2005, Cambridge: Cambridge University Press), pp. 2-28; M. Seker, "Trade Policies, Investment Climate, and Exports across Countries" (May 2011) The World Bank, Policy and Research Working Paper 5654, available online at < http://go.worldbank.org/GVSDC9EPB0 > (consulted 20 February 2012).

[13] See J. Dammann and H. Hansmann, "Globalizing commercial litigation", *Cornell Law Review*, Vol. 94(1), 2008, p. 1; M.-L. Niboyet, "La globalisation du procès civil international (dans l'espace judiciaire européen et mondial)", *Clunet*, Vol. 133, 2006, p. 937; Hon. J.J. Spigelman, "The Hague Choice of Court Convention and International Commercial Litigation", *Australian Law Journal*, Vol. 83, 2009, p. 386. For more specific perspectives on the impacts of globalisation see M.P. Ramaswamy, "Hong Kong as a Conduit of Commerce between China and United States: The Role of Private International Law with a Specific Reference to Jurisdictional Issues", *US-China Law Review*, Vol. 8(4), 2011, pp. 297-299, in which the author discusses the benefits that an efficient enforcement regime have for States such as Hong Kong that act as intermediaries between trading partners; D. Goddard, "Rethinking the Hague Judgments Convention: A Pacific Perspective" *Yearbook of Private International Law*, 2001, p. 27, in which he suggests that for the trading nations in the Pacific region, an instrument dealing with the recognition of foreign judgments would provide greater legal certainty for businesses wishing to transact internationally; Y-C. Choong, "Enforcement of Foreign Judgments:

its cross-border aspects, the legal framework of States involved becomes particularly relevant to encouraging foreign trade and investment. According to a 2010 World Bank report, effective public institutions and efficient dispute resolution processes are important for encouraging foreign direct investment.[14] While other dispute resolution mechanisms such as arbitration remain popular in the context of cross-border agreements, in some specific sectors and transactions, it is in the interest of the companies or individuals involved to have the option of pursuing litigation as a reliable and efficient dispute settlement mechanism.[15] Moreover, small and medium enterprises, which conduct a significant share of cross-border trade,[16] are particularly vulnerable to the costs of resolving cross-border disputes.[17]

16. The World Trade Organisation ("WTO") and similar organisations at the regional level continue to play a vital role in ensuring that both international and national legal frameworks are conducive to international trade on equitable terms.[18] The TRIPS Agreement, for example, specifically recognises the need "to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade".[19] More research on how a reliable dispute settlement system is

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The Role of the Courts in Promoting (or Impeding) Global Business, *World Academy of Science, Engineering and Technology*, Vol. 30, 2007, p. 92.

[14] "Investing Across Borders 2010: Indicators of foreign direct investment regulation in 87 economies", Investment Climate Advisory Services, World Bank Group, available online at < http://iab.worldbank.org/ > (consulted 20 February 2012). The report specifically discusses the importance of clear and accessible arbitration procedures in promoting foreign investment and the need for national courts to facilitate and support such procedures. Note that the role of domestic courts in complementing arbitration regimes is also recognised by a number of authors; see for example, G.A. Bermann, "The 'Gateway' Problem in International Commercial Arbitration", *The Yale Journal of International Law*, Vol. 37, 2012, pp. 1-50; C. Whytock, "Domestic Courts and Global Governance", *Tulane Law Review*, Vol. 84(67), 2009-2010. p. 67.

[15] See, for example, C. Drahozal and S.J. Ware, "Why do businesses use (or not use) arbitration clauses?", *Ohio State Journal on Dispute Resolution*, Vol. 25(2), 2010, p. 433; Dammann and Hansmann, "Globalizing commercial litigation" (*op. cit.* note 13); Whytock, "Domestic Courts and Global Governance" (*op. cit.* note 14), pp. 111-114.

[16] For statistics on SMEs in cross-border trade and investment in Asia and the Pacific, see United Nations Economic and Social Commission for Asia and the Pacific, "Globalization of Production and the Competitiveness of Small and Medium-sized Enterprises in Asia and the Pacific: Trends and Prospects", 2009, in particular Table 13, available online at < http://www.unescap.org/tid/publication/tipub2540.pdf >. For statistics on SMEs in the European Union engaged in international business activities beyond the internal market, see European Commission, "Internationalisation of European SMEs", Figure 2, available online at < http://ec.europa.eu/enterprise/policies/sme/market-access/files/internationalisation_of_european_smes_final_en.pdf >.

[17] European Business Test Panel (EBTP), "Commercial disputes and cross border debt recovery: Final Report", available online at < http://ec.europa.eu/yourvoice/ebtp/consultations/2010/cross-border-debt-recovery/index_en.htm > (consulted 8 March 2012).

[18] See "World Trade Report 2008: Trade in a Globalizing World" (*op. cit.* note 12) pp. 158-160 (consulted 20 February 2012), in which the WTO indicates that there international organisations could assist in reducing the technology gap between developed and developing regions by "coordinating the enforcement of property rights and by encouraging the production of technologies more appropriate to the needs of less developed countries." See also "Doing Business in a more Transparent World", The World Bank, Washington DC, 2012, available online at < http://data.worldbank.org/data-catalog/doing-business-database > (consulted 20 February 2012), pp. 2, 14. Note that while the report deals largely with the national regulatory environment, it also considers that strong and reliable courts are an important factor in encouraging business. In particular, the report shows a link between a State's trade performance and the ability to enforce contracts within the State, see p. 21.

[19] "Agreement on Trade-Related Aspects of Intellectual Property Rights" ('TRIPS'), Annex 1C of the *Marrakesh Agreement Establishing the World Trade Organization*, signed in Marrakesh, Morocco on 15 April 1994, available online at < http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm >, Preamble (consulted 20 February 2012). To this end, Part III of TRIPs also obliges Members to provide procedures and remedies to ensure that foreign right holders can effectively enforce their IP rights.

conducive to international trade and foreign investment could be a valuable asset to any future work of the Hague Conference in the area of cross-border litigation. It should also be noted that the Permanent Bureau has previously made contact with representatives from the WTO regarding cooperation in this area. If it is decided to resume work on the Judgments Project, then renewing contact with the WTO and other organisations might be considered as a possible step forward to ensure that the future instrument adequately responds to the international social and economic environment.

17. The difficulties faced by companies and individuals engaging in cross-border transactions is evidenced in a number of recent cases that have come to the attention of the Permanent Bureau.[20] In the United States, proceedings continue regarding the 'Chevron case', a highly publicised lawsuit in which, leaving many ramifications aside, the plaintiffs obtained a foreign money judgment against Chevron in Ecuador and are now attempting to enforce the judgment in the United States.[21] Also in the United States, a 2009 case marked a "milestone" as the first time that a United States court recognised a judgment from the People's Republic of China.[22] However, despite the ultimate decision in favour of recognition, the fact that it took 15 years from the date of injury before the China-based plaintiffs obtained recognition demonstrates the existence of substantial barriers when a judgment is obtained abroad.[23] Cases from other jurisdictions also evidence such difficulties, which arise in a number of different contexts. In Australia for example, a case heard by the Supreme Court of Victoria considered the future enforceability of an Australian judgment in the People's Court of China as a relevant matter in deciding how much security for costs should be ordered.[24] In another case, the Australian Federal Court looked at the reciprocal enforceability of civil judgments rendered in the United Arab Emirates and Australia in denying an application for an anti-suit injunction, effectively permitting the applicant to continue related civil proceedings in both States.[25] These cases demonstrate the inherent difficulties and additional expenses faced by litigants who need to enforce judgments abroad.

18. The above sample of case law evidences the benefits that could be gained from a global instrument that addresses the recognition and enforcement of foreign judgments in civil and commercial matters. While many States currently have a practice of recognising judgments based on reciprocity or existing bilateral or regional instruments,

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[20] Please note that the cases discussed in this Note are by no means exhaustive. It is a small selection of cases from a few jurisdictions for the purposes of illustration only.

[21] L.J. Dhooge, "*Aginda v. ChevronTexaco:* Mandatory grounds for non-recognition of foreign judgments for environmental injury in the United States", *Journal of Transnational Law and Policy*, Vol. 91(1), 2009-2010, pp. 40-56.

[22] *Hubei Gezhouba Sanlian Industrial Co., Ltd. and Hubei Pinghu Cruise Co., Ltd vs. Robinson Helicopter Company, Inc.* CV-01798-FMC (2009) (US Court of Appeals, 9th Circuit - Case No 09-56629). The Ninth Circuit Court of Appeals recognised the money judgment against Robison Helicopter Company Inc. based on a number of considerations including: whether the Chinese court had subject-matter jurisdiction; the existence of "due process"; the nature of the service under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; whether the PRC judgment was a final and conclusive determination; and finally, whether principles of reciprocity prevented recognition of the judgment. Specifically on the latter, see also the judgment of the Higher Regional Court of Berlin, 18 May 2006, IPRax 2011, 565 and commentary by S. Dreißer.

[23] M. Moedritzer, K. Whittaker and A. Ye, "Judgments 'Made in China' but enforceable in the United States?: Obtaining recognition and enforcement in the United States of Monetary Judgments entered in China against U.S. companies doing business abroad" *The International Lawyer*, Vol. 44, 2010, p. 825.

[24] *Premier Capital (China) Ltd v Sandhurst Trustees Ltd & Ors* [2011] VSC 572 (18 November 2011). Note also Article 14 of the *Hague Convention of 25 October 1980 on International Access to Justice*, which would have applied if both Australia and China were parties to the Convention.

[25] *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* (No 2) [2010] FCA 312 (31 March 2010).

it is evident that the lack of reliable and uniform rules in this area influences the decisions of companies and individuals regarding cross-border trade and foreign investment.[26] As such, a global instrument that addresses, at the minimum, the recognition and enforcement of foreign judgments, along with the regulation of international jurisdiction if considered an indispensable component of the instrument, would provide much needed reliability by ensuring that decisions resulting from cross-border litigation could be enforced in another Contracting State.

(ii) Bilateral and regional developments

19. Any future work on international litigation must be assessed against the framework of the bilateral and regional mechanisms that have been concluded in this field. Some recent developments in this area are:

- The Trans-Tasman Agreement on Court Proceedings between Australia and New Zealand which is reaching the final stages of implementation. Once in force, it will provide for the automatic recognition and enforcement of judgments rendered in these jurisdictions.[27]
- The revision of the Brussels I Regulation addressing the possible extension of the regime to all disputes, including those involving litigants from outside the European Union.[28]
- The 2007 Lugano Convention[29], which is open to accession by any State subject to the unanimous agreement of Contracting Parties, could also be considered as a potential global scheme on international jurisdiction and recognition and enforcement of foreign judgments.
- The Commonwealth Law Ministers are due to consider model legislation on the recognition and enforcement of foreign judgments at their meeting in 2014.[30] The model legislation is designed to update existing arrangements, and possibly expand the grounds for the recognition and enforcement of judgments from other Commonwealth States.[31]
- Renewed focus on international litigation within the League of Arab States as

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[26] See for example, C. Lightfoot, "Hope on Russian Enforcement", *International Financial Law Review"*, March 2010, in which the author discusses the potential hurdles faced by companies doing business in States in which the recognition and enforcement of foreign judgments is difficult. A significant number of States only enforce foreign judgments where there is a binding treaty in force between the issuing and the requested State.

[27] *Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement*, available at < http://www.austlii.edu.au/au/other/dfat/treaties/notinforce/2008/12.html > (consulted 20 February 2012), Art. 5. According to Art. 16(2), the Agreement will enter into force 30 days after each Party has notified the other, through diplomatic channels, of the completion of their respective domestic procedures for the entry into force of this Agreement. Australia and New Zealand are currently putting in place regulations and amending court rules to complete the domestic implementation process.

[28] See "Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)" COM (2010) 748 final, available online at < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0748:FIN:EN:PDF > (consulted 20 February 2012). In December 2011, the European Council agreed to establish political guidelines on the abolishment of the exequatur: "Press Release", 3135th Council Meeting, Justice and Home Affairs, Brussels 13-14 December 2011, 18498/11, available online at < http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/11/491&format=HTML&aged=0&lg=en&guiLanguage=en > (consulted 20 February 2012). Negotiations continue on the possible extension of the Brussels I reviewed rules on litigation involving non-EU parties.

[29] *Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* ("Lugano Convention").

[30] Meeting of Senior Officials of Commonwealth Law Ministries, Marlborough House, London, 18-20 October 2010, Communiqué, 10.

[31] For an example of the difficulties in recognition and enforcement of foreign judgments between Commonwealth States, see: *Petrodel Resources Ltd v Timothy Snowden Le Breton* (2011) ORD 59, 9 November 2011, available at < http://www.judgments.im/content/J1145.htm > (consulted 20 February 2012). In this case the plaintiff applied for recognition and enforcement of a judgment handed down in Nigeria. The Manx Court refused to recognise the judgment by virtue of the fact that the Nigerian court did not to have jurisdiction because the defendant did not appear voluntarily before it.

part of the development of a mechanism to improve the implementation of the 1983 Riyadh Arab Agreement for Judicial Co-operation.[32]

20. Bilateral and regional instruments might, on the one hand, indicate that there is now less motivation for States to pursue an additional, global instrument. However, as trade and investment continue to take on global dimensions, a more persuasive conclusion is that the expanding network of instruments dealing with the recognition and enforcement of foreign judgments evidences the fact that there is continued interest in developing a global regime.

c) Identification of issues for future discussions

21. In light of the preliminary research conducted into the background of the Judgments Project and recent developments in this area, it is necessary to identify certain issues for the substantive discussions.[33] The isolation of these issues not only assists the experts in identifying what is needed and achievable in the coming years but, if the Council decides to continue the project, it will also provide a possible starting point for further work. The first issue for consideration is what type of instrument would be a preferable outcome of future work. In the broadest sense, there are two types of instrument available: a convention or a non-binding instrument. If the Council is of the view that a new instrument is feasible, it is then necessary to consider the model of instrument that should be the focus of future discussions.

(i) Type of future instrument

22. The Hague Conference has previously focused on the development of international conventions, in line with the Statute of the Conference.[34] In addition to this, the Hague Conference has increasingly embarked on non-binding instruments such as the future Hague Principles on Choice of Law in International Commercial Contracts.[35] One option to consider regarding the Judgments Project is therefore whether a non-binding instrument might provide greater chances of reaching consensus on key issues. Despite there being some support for a non-binding instrument[36], the Permanent Bureau has previously indicated that the conclusion of a such an instrument should only be considered once

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[32] Endorsed by the Council of Arab Ministers of Justice on 6 April 1983 and signed by all Member States of the League of Arab States; entry into force on 30 October 1985. The Agreement has been ratified by Algeria, Bahrain, Djibouti, Egypt, Iraq, Jordan, Kuwait, Libya, Mauritania, Morocco, Oman, Palestine, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, UAE and Yemen. The text of the Agreement as an English translation at < http://www.unhcr.org/refworld/docid/3ae6b38d8.html > (consulted 20 February 2012).

[33] In doing so, the Permanent Bureau has carefully considered a range of factors and determined which issues relate to the merits of resuming work on this project, and which issues should be left to be discussed only if it is determined that work on this project should be continued. Most significantly, based on the history of the project and the previous discussions that have taken place, the Permanent Bureau considers that any discussions on the substantive scope of a future instrument should only proceed once a decision has been made regarding the future of the project and, possibly, the proposed outcome of any future work in this area. For further details see part 2.3(v) of this note: "Substantive scope".

[34] *Statute of the Hague Conference on Private International Law*, available on the Hague Conference website < www.hcch.net > under "Conventions" then "Statute of the Hague Conference", Art. 8.

[35] See in general "Final Act of the Fourteenth Session", Part D, No 4, in *Actes et documents de la Quatorzième session* (1980), Tome I, *Miscellaneous matters*, page 63, in which the Fourteenth Session of the Hague Conference explicitly stated that the Conference can use "procedures of less binding effect, such as recommendations or model laws, where, having regard to the circumstances, such procedures appear to be particularly appropriate". Other projects that might fall into this category include the Guides to Good Practice on the 1980 Child Abduction Convention and the 1993 Intercountry Adoption Convention, available on the Hague Conference website < www.hcch.net > under "Publications" then "Guides to Good Practice", and the Practical Handbook on the Operation of the Hague Service Convention, produced in 2006, information available on the Hague Conference website < www.hcch.net > under "Publications" then "Practical Handbooks".

[36] For example, in a Symposium held in Wellington on 26 November 2011, David Goddard QC, in his paper entitled "Forum allocation and Judgments – Next Steps" [copy available on request from the Permanent Bureau], noted the potential value in a non-binding framework regarding the recognition of foreign judgments and suggested that the "experience of the UNCITRAL Model Law on Commercial Arbitration suggests that in the field of cross-border dispute resolution a great deal can be achieved by work on a non-binding instrument". Note also his comments regarding the possibility of an *"à la carte convention"* which would effectively allow participants to sign up to optional grounds of jurisdiction.

other options have been exhausted, given the potential issues surrounding reciprocity.[37] If the Council does decide that a non-binding instrument is a practical way forward, the Hague Conference would be able to draw on the experience gained through the prior projects, along with the experience of other international organisations such as UNCITRAL and UNIDROIT.

(ii) Model of future instrument

23. If the Council concludes that it is feasible to continue work on this topic, it is important to consider what model of instrument will be achievable.[38] Until now, the Judgments Project has been concerned with developing a convention that includes provisions on both direct grounds of jurisdiction and the recognition and enforcement of foreign judgments.[39] In looking towards a future project, the Council should consider whether an instrument dealing only the recognition and enforcement aspect (a "simple" model) or a "reinforced simple" model is preferable to a double instrument.[40] The following sections address the issues that arise with regards to each of these models.

- The "simple" model

24. In determining the feasibility of concluding a new instrument addressing foreign judgments, the Council might consider whether it is possible to take a "bottom up" approach. This approach involves selecting those areas which, at a minimum, might achieve consensus. It is notable that previous discussions on the Judgments Project evidenced a "broad consensus" with regards to the chapter on recognition and enforcement while consensus relating to the grounds of jurisdiction proved more difficult to achieve.[41] In this light, it was suggested at the Council meeting in 2011 that the expert group might consider "a less ambitious but more realistic Convention that does not include both jurisdiction and recognition and enforcement of judgments".[42] On the other hand, regulating the exercise of jurisdiction has so far been considered an indispensable component of any instrument aiming at facilitating the general cross-border circulation of judgments. In this regard, it may be noted that the 1992 Working

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[37] See "Continuation of the Judgments Project" (*op. cit.* note 3), p. 7. Note also that a non-binding model was also considered during negotiations on the 1971 Enforcement Convention, but was rejected due to its complexity and the fact that it was less likely to be successful at generating bilateral arrangements: See, "Explanatory Report on the 1971 Hague Judgments Convention", drafted by Ch. N. Fragistas, *Actes et documents de la Session extraordinaire (1966), Exécution des jugements*, The Hague, 1969, pp. 362-363.

[38] Three options for a future convention were previously set out in the 2010 Note to Council: "Continuation of the Judgments Project" (*op. cit.* note 3), pp. 5-7.

[39] The "mixed convention" model is that which was proposed by the United States in 1992 and includes a "grey list" of discretionary bases for jurisdiction and subsequent enforcement of judgments made based on a basis of jurisdiction in this list. It is in essence a form of double convention. For more information see note 60.

[40] Note that the 1992 working group on judgments recognised that a simple convention would "fall short of meeting present needs", and as such, the group recommended the development of a double convention which regulates both jurisdiction and the recognition and enforcement of judgments; see "Conclusions of the Working Group meeting on enforcement of judgments", drawn up by the Permanent Bureau, Prel. Doc. No 19 of 1992, *Proceedings of the Seventeenth Session*, Tome I, pp. 257-259. However, recent developments and the conclusion of other successful instruments suggest that there are mechanisms that can operate to improve the effectiveness of a simple convention.

[41] Conclusions of Commission I of the Nineteenth Diplomatic Session of April 2002. Upon a review of the minutes of this meeting, there was no discussion about pursuing a "simple" convention based on the relevant chapter of the Interim Text. See also G. Tu, *A Study on a Global Jurisdiction and Judgments Convention*, 2009, Macau: Sweet & Maxwell, pp. 8-10.

[42] See "Report of Meeting No 4" from the Council on General Affairs and Policy of the Conference (4-7 April 2011), Item IV, part 3, intervention by expert from the United States of America. Several delegations supported this approach.

Group on judgments recognised that a simple convention would "fall short of meeting present needs", and as such, the group recommended the development of a double convention which regulates both jurisdiction and the recognition and enforcement of judgments.[43] In light of these differing views, the Council should consider whether there is sufficient interest among Members of the Hague Conference for a *simple instrument* dealing only with recognition and enforcement (and possibly containing indirect grounds of jurisdiction) or a reinforced model.[44]

25. The Hague Conference has previously concluded a simple convention dealing with foreign judgments, namely the Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters ("Enforcement Convention"). However, the Enforcement Convention and its Supplementary Protocol[45] rely on a complex system of bilateralisation which requires States Parties to enter into subsequent bilateral agreements to give effect to the Convention as between the Contracting States. The Enforcement Convention never entered into operation as no bilateral instruments were deposited by the States that joined the Convention.[46] Despite this, the Convention's lack of success is most likely not due to its intrinsic qualities, but rather to its unusual and complex form, as well as the success of regional instruments on the recognition and enforcement of judgments.[47] Indeed, a review of regional and bilateral instruments concluded subsequently reveals broad similarities when compared to the recognition and enforcement scheme of the Enforcement Convention.[48]

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[43] See "Conclusions of the Working Group meeting on enforcement of judgments", drawn up by the Permanent Bureau, Prel. Doc. No 19 of 1992, *Proceedings of the Seventeenth Session*, Tome I, pp. 257-259. See also P. Nygh and F. Pocar, "Report on the preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters", Prel. Doc. No 11 of August 2000 for the attention of the Nineteenth Session of June 2001, p. 28, available on the website of the Hague Conference at < www.hcch.net >, under "Specialised Sections", "Judgments Project" then "Preparation of a preliminary draft convention".

[44] Support for this approach can also be found in commentary, for example, see: Y. Oestreicher, "The rise and fall of the 'mixed' and 'double' convention models regarding recognition and enforcement of foreign judgments" *Washington University Global Studies Law Review*, Vol. 6, 2007, p. 339; Y. Oestreicher, "'We're on the road to nowhere': Reasons for the continuing failure to regulate recognition and enforcement of foreign judgments" *International Lawyer*, Vol. 48, 2008 p. 61; R. Brand, "Current Problems, Common Ground, and First Principles: Restructuring the Preliminary Draft Convention Text", paper presented at the Symposium: *A Global Law of Jurisdiction and Judgments: Lessons from the Hague Convention,* Cornell - Paris I*,* Summer Institute of International & Comparative Law*,* Paris, 8 July 2000, in which the author states: "The world will be much better off with a convention of limited ambition, providing a foundation for future developments, than with a convention that will leave out important states and never result in true global adherence. Thus, it is worth the effort to back up a bit and focus on first principles, building a convention through a focus on those provisions for which there is a consensus." In the same vein, the participants to the 2011 ASADIP Conference held in San José (Costa Rica) expressed their preference for the development of a new simple Convention on recognition and enforcement of judgments by the Hague Conference, see < http://asadip.files.wordpress.com/2011/12/asadipcrreport-s.pdf >.

[45] *Supplementary Protocol of 1 February 1971 to the Hague Convention on the Recognition and Enforcement of* Foreign Judgments in Civil and Commercial Matters ("Supplementary Protocol").

[46] The Enforcement Convention and Supplementary Protocol have been ratified or acceded to by four States: Cyprus, Kuwait, the Netherlands and Portugal. For information on the status of the Enforcement Convention, see the Hague Conference website < www.hcch.net > under "Conventions" then "All Conventions" then "Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters". Note that the Permanent Bureau has previously indicated that given the advancement of available techniques of permitting refusal of recognition and enforcement of foreign judgments, it is unlikely that a system of bilateralisation would be required; see "Some Reflections of the Permanent Bureau on a general convention on enforcement of judgments", Prel. Doc. No 17 of May 1992 for the attention of the Special Commission of June 1992, in *Proceedings of the Seventeenth Session* (1993), Tome I, *Miscellaneous matters*, The Hague, 1995, p. 239.

[47] See "Some reflections of the Permanent Bureau on a general convention on enforcement of judgments" (*op. cit.* note 46), p. 231.

[48] See G. Droz, Regards sur le droit international privé compare, Cours général de droit international privé, 1991, p. 107. These instruments include not only the *Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters* ("Brussels Convention"), *Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* and *Copenhagen Convention of 11 October 1977 on the recognition and enforcement of judgments in civil matters*, which were directly influenced by the Enforcement Convention, but also the *Inter-American Convention of 8 May 1979 on extraterritorial validity of foreign judgments and arbitral awards* ("Montevideo Convention"), the *Riyadh Arab Agreement of 6 April 1983 for Judicial Cooperation* ("Riyadh Arab Agreement"), the *Las Leñas Protocol of 27 June 1992 on Jurisdictional Co-operation and Assistance in Civil, Commercial, Labour and Administrative Matters* ("Las Leñas Protocol"), and the *Protocol of 6 December 1995 on the Enforcement of Judgments Letters Rogatory, and Judicial Notices issued by the Courts of the Member States of the Arab Gulf Co-operation Council* ("GCC Protocol").

26. One possible first step in developing a new simple instrument dealing with recognition and enforcement is to consider whether inspiration can be taken from other instruments. In this regard, the rules on recognition and enforcement of the Interim Text,[49] the Choice of Court Convention, and the 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance might be considered as appropriate starting points for new discussions.[50] Notably all of these instruments also address the permissible bases of jurisdiction that bring the judgment within the terms of the convention. Therefore, if a simple model is preferred, it seems likely that it will also need to include provisions to allow the court addressed to query whether the court of origin was justified in exercising jurisdiction. Indeed, all major instruments based on the simple model provide for the verification of jurisdiction, whether against a list of indirect jurisdictional grounds set out in the instrument, or against jurisdictional grounds accepted by the law of the State addressed.[51]

27. Despite the existence of schemes in other instruments that limit the ability of a court addressed to verify the jurisdiction of the court of origin – for example, the Trans-Tasman Agreement[52] – it is unlikely that such a mechanism could work in the context of a simple convention. Contracting States to these instruments often share cultural and legal traditions which serve to foster confidence in each others' processes and it seems doubtful that such confidence could succeed on a global level given the diversity of legal traditions.[53] In light of this, the inclusion of a list of jurisdictional grounds that activate the recognition and enforcement provisions of the future instrument appears to be a practical way of ensuring confidence between Contracting States.[54]

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[49] "Interim Text – Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6 – 20 June 2001", prepared by the Permanent Bureau and the Co-reporters, available on the Hague Conference website < www.hcch.net > under "The 'Judgments Project'" then "Response to the Preliminary Draft Convention (2000-2001)".

[50] Note that the starting point for negotiating the rules on recognition and enforcement of foreign judgments in the Choice of Court Convention was the chapter in the Interim Text. Another interesting feature is the inclusion of a two-track application procedure for recognition and enforcement in the 2007 Child Support Convention, see Arts. 23 and 24 respectively, and the "Explanatory Report" drawn up by A. Borrás and J. Degeling with the assistance of W. Duncan and P. Lortie, available on the Hague Conference website < www.hcch.net > under "Conventions" then "All Conventions" and "Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance", paras 490 *et seq*,

[51] See, for example, Art. 2(d) of the Montevideo Convention, Art. 1(A) of the GCC Protocol; Art. 25(b) of the Riyadh Arab Agreement; Art. 20(c) of the Las Leñas Protocol. It appears likely that a planned model law among Commonwealth countries will also make provision for the court addressed to verify the jurisdiction of the court of origin: see Commonwealth Secretariat, "The Recognition and Enforcement of Foreign Judgments". For a discussion of these two methods of verifying jurisdiction, see Droz, *Regards sur le droit international privé compare* (*op. cit.* note 48) p. 100. With regards to bilateral instruments see the 1984 *Ottawa Convention providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Canada and the United Kingdom).

[52] Other examples include the Lugano Convention, and the *Minsk Convention of 22 January 1993 on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters* within the Commonwealth of Independent States. Note, however, that even in these instruments, automatic recognition does not exclude the basic duty of the court addressed to consider whether the rules on recognition of the convention were applicable in the first place: see, H. Muir Watt, "Jurisdiction and Judgments within Europe" in *Global Law of Jurisdiction and Judgments: Lessons from The Hague*. 2002. p. 255.

[53] See generally, R. Mortensen, "The Hague and the Ditch: The Trans-Tasman Judicial Area and the Choice of Court Convention" *Yearbook of Private International Law*, Vol. 10, 2009, p. 213. Notably, both the Enforcement Convention and Interim Text permit the court addressed to verify the jurisdiction of the court of origin: Art. 9 of the Enforcement Convention and Art. 27(2) of the Interim Text. In neither instrument does this apply when the judgment was given by default.

[54] Note also the discussion on a "flexible mixed convention" in Beaumont "Hague Choice of Court Agreements Convention 2005" (*op. cit.* note 3), pp. 128-134. This model, which was originally proposed by the Permanent Bureau in 1992, differs from other models in that it contains "recognition and enforcement provisions based on indirect rules of jurisdiction, no positive direct rules of jurisdiction, but a prohibition on certain types of jurisdiction" (p. 128). This model was adopted in the 2007 Child Support Convention.

- The "reinforced simple" model

28. The Council may also like to consider whether a *reinforced simple instrument* might be achievable. A reinforced model would include the main characteristics of the simple model (*i.e.*, it would deal only with the recognition and enforcement of judgments and not directly regulate jurisdiction), but this could be complemented by additional provisions that regulate the circulation of judgments either at the jurisdiction stage or at the recognition and enforcement stage.

29. For example, a reinforced model could include rules specifying when the court of origin could or should dismiss proceedings in the case of parallel proceedings. Such a provision was included in Article 20 of the Enforcement Convention, which contains a *lis pendens* rule that permits the court in one State to dismiss proceedings if parallel proceedings are already before a court in another State, and those proceedings may result in a judgment that is capable of being recognised in the first State in accordance with the regime set out in the Convention. A more sophisticated rule was included in the Interim Text, which goes further to *require* the court to suspend (and eventually dismiss) the proceedings.[55] Such a rule, on which there was at least in-principle agreement[56] could provide an effective way of encouraging efficiency in the circulation of judgments while reducing the time and expense of parallel proceedings.

30. Other instruments also provide inspiration through mechanisms which regulate the flow of judgments at the jurisdiction stage. For example, the Interim Text contains a rule allowing the court to suspend proceedings where it is clearly inappropriate for it to exercise jurisdiction, and another court is clearly the more appropriate forum.[57] Another consideration is whether it might be useful to include a provision which places the onus on the court of origin to consider whether a judgment is likely to require enforcement abroad, and if so, only accept jurisdiction if it is expected that the judgment will be capable of being recognised and enforced under the terms of the instrument. Such a provision may assist in promoting awareness of the potential hurdles in enforcing judgments abroad and motivate originating courts to provide a more comprehensive summary of the reasons for the decision to exercise jurisdiction.

31. Another method of reinforcing the simple model is to include provisions which facilitate judicial communication between courts to support the orderly rendition and recognition of judgments. This mechanism was suggested early on by the Permanent Bureau in the context of the Judgments Project[58], and has more recently gained support in the field of child abduction cases.[59] Judicial communication could take place both at the jurisdiction stage (for example, to support the court of origin in deciding to suspend proceedings on grounds of *lis pendens* or clearly inappropriate forum) and at the

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[55] See Art. 21, Interim Text. See also discussion in G. Tu, *A Study on a Global Jurisdiction and Judgments Convention* (*op. cit*. note 41), pp. 170-176.

[56] See "Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference", Prel. Doc. No 16 of 2002 for the attention of Commission I (General Affairs and Policy of the Conference) of the Nineteenth Diplomatic Session – April 2001, p. 6.

[57] See Art. 22, Interim Text. This bears resemblance to the common law rule of *forum non conveniens.*

[58] "Some Reflections of the Permanent Bureau on a general convention on enforcement of judgments" (*op. cit.* note 56), p. 237.

[59] See the Child Abduction Section, available on the Hague Conference website < www.hcch.net > under "Specialised Sections" then "Child Abduction Section". The Hague Conference also supports the International Hague Network of Judges which currently includes 67 judges worldwide. Recently, the Special Commission on the Practical Operation of the 1980 and 1996 Conventions gave its "general endorsement" for the "Emerging Guidance and General Principles for Judicial Communications"; see "Conclusions and Recommendations", adopted by the Special Commission on the Practical Operation of the 1980 and 1996 Conventions (1-10 June 2011), available on the Hague Conference website < www.hcch.net > under "Work in Progress" then "Child Abduction Section". Conclusion No 68. A copy of the emerging rules is contained in "Emerging rules regarding the development of the International Hague Network of Judges and draft general principles for judicial communications, including commonly accepted safeguards for direct judicial communications in specific cases, within the context of the International Hague Network of Judges", Prel. Doc. 3 A of March 2011, available on the Hague Conference website < www.hcch.net > under "Work in Progress" then "Child Abduction Section". For more information see also "Specialised Sections" then "Child Abduction Section", under "The International Hague Network of Judges".

recognition and enforcement stage (for example, to support the court addressed in verifying the jurisdiction of the court of origin).

- The "double" model

32. If it is determined that there are merits in pursuing a new *double instrument* containing provisions on both direct jurisdiction and the recognition and enforcement of judgments, it will also be necessary for future discussions to consider the bases of jurisdiction to be included.[60] A starting point for discussions might be to focus on those areas where the most agreement has been achieved in the past, such as the list of "core areas" identified in previous discussions. This list includes defendant's forum, counter-claims, branches, submission, trusts and physical injury torts.[61] Such an approach would allow the drafters to benefit from previous discussions. In fact, the process of narrowing down the bases of jurisdiction to specific grounds has been previously carried out when the decision was made to limit to scope of the Judgments Project to focus on a specific ground of jurisdiction.[62] If consensus can be reached regarding specific grounds of jurisdiction, then these might be used as building blocks for a comprehensive new instrument. Alternatively, the bases of jurisdiction could be separated into optional chapters which complement a uniform regime on recognition and enforcement and apply only as between States that have accepted each jurisdictional basis. While there would be notable drawbacks to this method, it might provide an achievable option that gives Contracting States the ability to "pick and choose" from the acceptable list of jurisdictional grounds and as such, it may encourage a wider acceptance of the future instrument.[63]

33. At the same time, it is important to note that grounds of jurisdiction that were previously excluded from negotiations might be reconsidered in light of developments that have taken place since previous discussions on this project. Furthermore, in some areas where consensus proved to be difficult in the past – such as in relation to e-commerce, intellectual property and the definition of "defendant's domicile" – notable advances have taken place at a multilateral level that may reduce the barriers they presented in the past. For example:

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[60] Note that the Judgments Project has previously referred to both "mixed" and "double" conventions but for the purposes of this Note they will be dealt with together. A *mixed convention* was terminology used by the United States of America in 1992. Like a double convention, it contains a list of permissible jurisdictional grounds (the "white list"), and a list of prohibited grounds (the "black list"). However, a mixed convention differs in that it contains a third list of discretionary ground (the 'grey list') which allow discretion on the part of the court of origin in exercising jurisdiction and the court addressing in recognition and enforcing a resulting judgment. See P.A. Nielsen, "The Hague Judgments Convention", *Nordic Journal of International Law,* Vol. 80, 2011, pp. 98-99.

[61] See Goddard, "Rethinking the Hague Judgments Convention: A Pacific Perspective" (*op. cit.* note 13), in which he addresses a number of priority areas of jurisdiction from a Pacific perspective.

[62] See discussion of possible "core grounds" of jurisdiction in "Reflection Paper to assist in the preparation of a convention on jurisdiction and recognition and enforcement of foreign judgments in civil and commercial matters", prepared by A. Schulz, Prel. Doc. No 19 of August 2002 for the attention of the meeting of the Informal Working Group of October 2002, available on the Hague Conference website < www.hcch.net > under "Choice of Court Section" then "Reflection Paper".

[63] See D. Goddard, "Rethinking the Hague Judgments Convention: A Pacific Perspective" (*op. cit.* note 13); see also comments made by David Goddard QC in a paper delivered in Wellington, "Forum allocation and Judgments – Next Steps" (*op. cit.* note 36), in which he referred to this model as an "*à la carte"* convention in which States would agree on a common enforcement mechanism along with "optional chapters" relating to different heads of jurisdiction.

- *E-commerce* – One concern in previous discussions relating to jurisdiction was the impact that the growth of e-commerce would have on cross-border litigation.[64] UNCITRAL is currently carrying out substantial work in this area to facilitate online dispute resolution procedures for claims arising from e-commerce, including the development of draft procedural rules on this topic.[65] It is notable that only a small number of disputes in this area attract litigation, the reason being that most e-commerce disputes are "high volume low value" claims and accordingly, do not justify the high cost of litigation.[66] As such, speculation that the growth in e-commerce would lead to a corresponding rise in cross-border litigation appears to have largely subsided. Nonetheless, the availability of adequate dispute resolution mechanisms to resolve complex or high value conflicts arising from e-commerce transactions is necessary and it is in this context that future work of the Hague Conference on the Judgments Project might complement the promising initiatives being undertaken by UNCITRAL.[67]
- *Intellectual property* – Another issue that generated disagreement during previous discussions is cross-border litigation relating to intellectual property rights.[68] While intellectual property remains a highly technical issue, there has also been progress made in this area in recent years. In particular, expert groups have been involved in the development of draft principles relating to private international law and intellectual property and these principles are currently the subject of a global project being undertaken by the International Law Association.[69] Solid bases for a global regime of private international law in intellectual property are laid by the "Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes", developed by the American Law Institute[70], the "Principles for Conflict of Law in Intellectual Property", developed by the European CLIP

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[64] See "The impact of the Internet on the Hague Judgments Project", Prel. Doc. No 17 of February 2002, prepared by A. Haines for the attention of Commission I (General Affairs and Policy of the Conference) of the Nineteenth Diplomatic Session – April 2002, available on the Hague Conference website < www.hcch.net > under "The "Judgments Project"" then "Focus on international litigation involving choice of court agreements (2002-2003)". See also discussion on the impact of the Internet and e-commerce on international litigation in: J.A. Franklin and R.J. Morris, "International Jurisdiction and Enforcement of Judgments in the era of global networks: Irrelevance of, goals for, and comments on the current proposals", *Chicago-Kent Law Review*, Vol. 77, 2001-2002 p. 1213.

[65] See "Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules", UNCITRAL, Working Group III (Online Dispute Resolution, 24th Session, A/CN.9/WG.III/WP.109, distributed 27 September 2011, available online at < http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html >; "Report of Working Group III (Online Dispute Resolution) on the work of its twenty-fourth session (Vienna, 14-18 November 2011)", UNICTRAL, 45th Session, A/CN.9/739, distributed 21 November 2011, available online at < http://www.uncitral.org/uncitral/en/commission/working_groups/4Electronic_Commerce.html >; "Possible future work on online dispute resolution in cross-border electronic commerce transactions", UNCITRAL, 43rd Session, A/CN.9/706, distributed 10 April 2010, available online at < http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html >.

[66] "Possible future work on online dispute resolution in cross-border electronic commerce transactions", UNCITRAL, (*op. cit.* note 65) para 31. See also M.E. Hisock, "Cross-border online consumer dispute resolution" *Contemporary Asia Arbitration Journal*, Vol. 1, 2011, p. 1, in which the author suggests that any work proposed by UNCITRAL in this area is a "long range solution" and that it is necessary to look at the existing Free Trade Agreements and whether these can accommodate other mechanisms for cross-border consumer disputes.

[67] See also Working Group Note which lists the cross-border enforcement of agreements resulting from online dispute resolution as one of the issues for consideration: "Online dispute resolution for cross-border electronic commerce transactions: issues for consideration in the conception of a global ODR framework", UNCITRAL, Working Group III (Online Dispute Resolution, 24th Session, A/CN.9/WG.III/WP.110, distributed 28 September 2011, available online at < http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html >, part F.

[68] See Y. Oestreicher, "We're on the road to nowhere" (*op. cit.* note 44) pp. 72-75

[69] For information about the ILA Committee currently considering intellectual property and private international law, see the website of the ILA at < http://www.ila-hq.org/en/committees/index.cfm/cid/1037 >.

[70] Final Draft, 14 May 2007, published 2008, information available on the website of The American Law Institute at < http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=79 > (consulted 20 February 2012).

Group[71], and the "Commentary on Principles of Private International Law on Intellectual Property Rights", a proposal drafted by members of the Private International Law Association of Korea and Japan.[72] This collaboration indicates a growing consensus on key issues relating to cross-border intellectual property disputes. In the context of these projects, the Permanent Bureau was been in contact with representatives from the World Intellectual Property Organisation (WIPO) in 2011. WIPO has been involved as an observer in previous discussions on the Judgments Project and as the main intergovernmental organisation concerned with intellectual property, could provide insight into the decision as to whether intellectual property disputes should be included within by any future discussions.

- *Defendant's domicile* – Discussions for a future instrument might also benefit from the experience of instruments such as the UNCITRAL Model Law on Cross Border Insolvency[73] or the EC Regulation on Insolvency Proceedings[74] These instruments have adopted new terminology to determine the jurisdiction in cross-border insolvency matters. Namely, the formulation "centre of main interests" ("COMI") is used in place of other terms such as "habitual residence" or "defendant's domicile". The term COMI is not defined in either instrument and interpretation of this phrase along with considerations that the court should make when determining whether to exercise jurisdiction must be made on a case-by-case basis.[75] An overview of case law on the interpretation of COMI by courts operating in different legal traditions might be helpful to determine whether the use of a phrase like COMI in any future instrument on judgments might be a possible way of reducing the barriers that are generated by using other oft-disputed terminology.

34. These developments suggest that the Hague Conference is now able to benefit from the work that has been carried out since the Judgments Project was scaled back in 2002 and use existing regimes to reduce potential obstacles to reaching agreement in relation to grounds of jurisdiction.

(iii) Substantive scope

35. Bearing in mind the mandate given by the Council in 2011, the expert group is unlikely at this stage to discuss the substantive scope of any future instrument *per se*. It is understood that discussions are to focus on the merits of resuming work on this topic, rather than anticipating whether specific sectors of civil and commercial activity, if any, should be included or excluded from any future instrument. In fact, should work resume on Judgments, future discussions on the substantive scope will depend largely on the type and model of instrument that is deemed to be achievable. For example, the

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[71] "Principles for Conflict of Law in Intellectual Property", developed by the CLIP Group funded by the Max Planck Society, Final Text, 31 August 2011, available online at < http://www.cl-ip.eu/en/pub/home.cfm > (consulted 20 February 2012).

[72] "Commentary on Principles of Private International Law on Intellectual Property Rights", 14 October 2010, available online at < http://www.globalcoe-waseda-law-commerce.org/activity/pdf/28/08.pdf > (consulted 20 February 2012).

[73] UNCITRAL Model Law on Cross Border Insolvency, 30 May 1997, available online at < http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html >.

[74] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, available online at < http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33110_en.htm > (consulted 20 February 2012).

[75] See commentary by Judge L.M. Clark, "'Centre of Main Interests' finally becomes the Centre of Main Interests in case law", *Texas International Law Journal Forum* Vol. 24, 2008, p. 14.

substantive scope of the Enforcement Convention (being a simple convention) is broader that that of a double instrument such as the Choice of Court Convention (in which Article 2 excludes a number of civil and commercial matters). It is therefore proposed to leave the issue of the substantive scope for consideration when and if work in the areas covered by this Note is resumed.

3. Options for the Council

36. In line with the decision in 2011,[76] any position of the Council as to the future of the Judgments Project should take into consideration the recommendations of the expert group, which will be made available as a Working Document at the outset of the 2012 Council meeting. If the expert group is of the opinion that there are merits in continuing the Judgments Project, then the Permanent Bureau would suggest that the Council add this project to the work programme of the Hague Conference.

37. If the Judgments Project is resumed, the Permanent Bureau proposes to the Council the following as a possible next step: that the Permanent Bureau be asked to convene a Working Group to further discuss the technical aspects of a future instrument, in particular specific issues regarding the type, model and substantive scope of a new instrument. The proposed Working Group might be made up along the lines of the Informal Working Group that met three times from October 2002 to March 2003 after a decision was made to narrow the scope of the Judgments Project; at which time all experts attended the meetings in their personal capacity. The Council might also give consideration as to whether it is conducive to invite international organisations to be represented as observers during the Working Group meetings.[77] An interim report on progress would be submitted to the 2013 Council.

38. The Permanent Bureau expects to keep resources devoted to this project to a minimum until the end of 2012, due to other existing commitments and especially the volume of work in connection with the November 2012 Special Commission meeting on the 1961 Apostille Convention and the possible Special Commission on the Choice of Law in International Contracts. However, it wishes to stress that if a decision is made to place discussions for a new instrument on the work programme of the Hague Conference, then it will be important that the project receive the resources it requires to be successful. This might require the Permanent Bureau making internal adjustments to devote more resources to supporting the Judgments Project. It is hoped that the Council will take this into consideration and offer guidance on priorities going forward.

Conclusion

39. This Note details the steps that have been taken by the Permanent Bureau towards fulfilling the mandate given by the Council in 2011 and some options for the possible resumption of work on the Judgments Project. In this regard, the Permanent Bureau has convened an expert group to meet prior to the Council meeting in April 2012. Armed with

[76] See "Conclusions and Recommendations adopted by the Council", 2011, *(op. cit.* note 5), Conclusion No 12.
[77] It is not unprecedented for international organisations to participate in working groups: for example, a number of international organisations participated in the Administrative Co-operation Working Group. See "Report of the Administrative Co-operation Working Group", Prel. Doc. No 34 of October 2007 for the attention of the Twenty-First Session of October 2007, prepared by the Administrative Co-operation Working Group which met in January, March and September 2007. Similarly, international organisations participated as observers in the Working Group on Choice of Law in International Contracts, see "List of Working Group members and observers (as per 8 March 2010)", available on the Hague Conference website < www.hcch.net > under "Work in Progress" then "International Contracts" under "Members of the Working Group".

sufficient information on the background of the project, it is expected that the expert group will make useful recommendations to Council regarding the merits of continuing this project and if so, offer advice as to what type of instrument is needed and achievable in this area. The decision as to whether to resume work on the Judgments Project ultimately rests with the Council and it is hoped that the information provided in this Note, along with the Conclusions and Recommendations of the expert group, will allow the Council to come to an informed decision regarding any future work on this topic.