University of Dundee

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Jueptner, Eva

Published in:
Journal of Private International Law

DOI:
[10.1080/17441048.2020.1766220](https://doi.org/10.1080/17441048.2020.1766220)

Publication date:
2020

Document Version
Peer reviewed version

[Link to publication in Discovery Research Portal](#)

Citation for published version (APA):
Jueptner, E. (2020). The Hague Jurisdiction Project: What options for the Hague Conference? *Journal of Private International Law*, 16(2), 247-274. <https://doi.org/10.1080/17441048.2020.1766220>

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The Hague Jurisdiction Project – What options for the Hague Conference?

Eva Jueptner*

After the adoption of the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, the Hague Conference on Private International Law faces the question which methods should be employed to address matters relating to international direct jurisdiction in an efficient and politically feasible way. This paper will argue that the harmonisation of international direct jurisdiction via a model law would not be conducive to foster legal certainty and predictability. Instead, the creation of a binding Protocol to the 2019 Hague Judgments Convention should be considered, unifying a core set of rules of international direct jurisdiction. In this way, the mixed-convention concept as developed by Arthur von Mehren in the 1990s in the context of the original Judgments Project would finally come to fruition. As the paper will demonstrate, this concept has the capacity to foster legal certainty and predictability, while being politically feasible.

Keywords: 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters; Hague Conference on Private International Law; Hague Jurisdiction Project; Hague Judgments Project; direct jurisdiction; mixed convention; unification; legal certainty; transaction costs; exorbitant jurisdiction

* Eva Jueptner, LL.M., PhD candidate, School of Social Sciences (Law), Scrymgeour Building, Park Place, University of Dundee, Dundee DD1 4HN, United Kingdom, emjueptner@dundee.ac.uk. The author would like to thank Ms Aude Fiorini, Senior Lecturer, School of Social Sciences (Law), University of Dundee, for comments on an earlier version of the article.

A. Introduction: The need for harmonising rules applicable to international commercial litigation

The last decades have seen an enormous increase in the number of people, services, capital and goods moving across borders due to improved means of transportation and communication, and the rise of the internet.¹ If disputes do arise out of these cross-border movements, for example because one party fails to fulfil its obligations under a sales contract to deliver goods from State A to State B, or because a tourist gets injured while holidaying abroad,² the question arises which States have jurisdiction to render a judgment in the proceedings (the question of international direct jurisdiction).³ Furthermore, once a judgment has been rendered, the question might arise whether the judgment can also be recognised or enforced abroad if the judgment debtor does not have assets in the forum State, or if the judgment debtor has moved its assets abroad.⁴ Both questions (the question of international direct jurisdiction, and the question of the recognition and enforcement of a judgment abroad) involve risks for litigants, which have been described as the ‘venue risk’ and the ‘enforcement risk’.⁵

1. The enforcement risk

The enforcement risk in international civil and commercial litigation is the risk that a judgment obtained in the forum State might be unenforceable in another State.⁶ It exists

¹ Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press 2003) para 1.04-1.08; David W Robertson, ‘Forum non conveniens in America and England: "a rather fantastic fiction"' (1987) 103 *Law Quarterly Review* 398, 407.

² Bell (n 1) para 1.06; *Regie Nationale des Usines Renault SA v Zhang* [2002] HCA 10.

³ Bell (n 1) para 1.10; 1.11; Ronald A Brand, ‘Transaction Planning Using Rules on Jurisdiction and the Recognition and Enforcement of Judgments’ (2011) 358 *Hague Recueil des Cours* 9, 92; James J Fawcett, ‘General Report’, in James J Fawcett (ed), *Declining Jurisdiction in Private International Law* (Clarendon Press 1995) 1, 3.

⁴ Brand, *ibid*, 92; the need for cross-border enforcement can obviously also arise if the original proceedings did not involve a cross-border element, see, eg, Richard Fentiman, *International Commercial Litigation* (2nd edn, Oxford University Press 2015) para 1.21.

⁵ Fentiman (n 4) para 1.11; 1.21; Brand, *ibid*, 92.

⁶ Fentiman *ibid*.

because States are not necessarily prepared to recognise and enforce a judgment rendered abroad.⁷ For example, some States, like Denmark, Finland, Iceland, Norway, and Sweden, bar the recognition and enforcement or, in case of the Netherlands, the enforcement, of foreign judgments altogether in the absence of a treaty obligation.⁸ Other States are in general prepared to recognise and enforce foreign judgments, but only subject to certain conditions, which normally differ from State to State.⁹ One condition for the recognition and enforcement of foreign judgments exists, however, which seems to be common to all those national regimes that are prepared to give foreign judgments effects on their territory: the question of indirect jurisdiction.¹⁰ The question of indirect jurisdiction refers to a check by the court in the State in which the recognition and enforcement of the foreign judgment is sought ('the requested State'¹¹ or 'the State addressed'¹²) whether the court that rendered the judgment (in 'the State of origin'¹³) had jurisdiction to render the judgment from the point of view of the requested State.¹⁴

⁷ Jonathan Hill and Máire Ní Shúilleabhúin, *Clarkson & Hill's Conflict of Laws* (5th edn Oxford University Press 2016) para 1.173; Ch N Fragistas, 'Rapport explicatif' in Conférence de La Haye de droit international privé, *Actes et Document de la Session extraordinaire 13 au 26 avril 1966* (Imprimerie Nationale 1969) 360, 360.

⁸ For Denmark, Finland, Iceland, Norway, and Sweden, see Robert E Lutz, *A Lawyers Handbook for Enforcing Foreign Judgments in the United States and Abroad* (Cambridge University Press 2007) 432; for the Netherlands, see Dutch Code of Civil Procedure, Art 431; Marielle Koppenol-Laforce, Freek Vermeulen, 'Comparative Study of "Residual Jurisdiction" in Civil and Commercial Disputes in the EU – National Report for: Netherlands' (on file with author) para 29.

⁹ Fragistas, (n 7) 360; Hill (n 7) para 3.6; Lutz, *A Lawyers Handbook* (n 8) 424; Peter R Barnett, *Res Judicata, Estoppel and Foreign Judgments* (Oxford University Press 2001) para 1.51.

¹⁰ Ch N Fragistas, 'Rapport de la Commission spéciale' in Conférence de La Haye de droit international privé (n 7) 24, 29.

¹¹ Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (adopted 2 July 2019) (2019 Hague Judgments Convention), Art 4(1) <www.hcch.net/en/instruments/conventions/full-text/?cid=137> accessed 2 February 2020.

¹² Permanent Bureau, 'Background Note – Document for the attention of the Expert Group (meeting of 12-14 April 2012)' para 44 <<https://assets.hcch.net/docs/d2355e5c-fd79-4366-9caa-8a434367ba84.pdf>> accessed 2 February 2020.

¹³ 2019 Hague Judgments Convention, Art 4(1).

¹⁴ Permanent Bureau, 'Background Note' (n 12) para 44.

2. *The venue risk*

The other big risk involved in international civil litigation, the so-called venue risk, concerns the question of international direct jurisdiction and comprises both the risk of having to litigate in an unfavourable forum,¹⁵ and the risk for litigants of not being able to determine the available fora with certainty.¹⁶

(a) Having to litigate in an unfavourable forum

In proceedings with a cross-border element, normally multiple fora exist which have international jurisdiction to hear the proceedings and render a judgment.¹⁷ The existence of multiple fora which could exercise international direct jurisdiction over a case is an idiosyncrasy of international commercial litigation, and has been described with the term ‘concurrent grounds of jurisdiction’,¹⁸ or ‘positive conflict in jurisdiction’.¹⁹ In theory, the risk of having to litigate in an unfavourable forum can emerge for both the claimant and the defendant if either none of these concurrent grounds of direct jurisdiction is favourable, or if a favourable forum which is available in theory is not available in practice.²⁰

¹⁵ Fentiman (n 4) para 1.11.

¹⁶ Fentiman (n 4) para 1.14; see also Fawcett, ‘General Report’ (n 3) 3-5.

¹⁷ Bell (n 1) para 4.01; Ronald A Brand, *International Business Transactions Fundamentals* (2nd edn, Wolters Kluwer 2019) 289.

¹⁸ Bell (n 1) para 4.01.

¹⁹ István Szászy, *International Civil Procedure – A comparative study* (A W Sijthoff 1967) 312; a side effect of these concurrent grounds of international direct jurisdiction is the possibility that parallel proceedings can be brought in two (or more States), a possibility which could be regarded as unwanted since it wastes the resources of the courts and parties involved, and because it could lead to conflicting judgments (which has the potential to undermine the confidence in the legal systems involved), see Fawcett, ‘General Report’ (n 3) 27, 28.

²⁰ Cf Fentiman (n 4) para 1.11.

However, this risk of having to litigate in an unfavourable forum is far greater from the point of view of the defendant who, unlike the claimant, does not get to choose the forum in which he/she will be sued in the first place.²¹

This risk for the defendant of having to defend himself/herself in a forum which is unfavourable is heightened by the fact that many of these concurrent grounds of international direct jurisdiction allow the exercise of jurisdiction in the State of origin on the basis of a connecting factor which does not reflect a strong connection between either the defendant and the forum, or the case and the forum, ie, on the basis of a so-called 'exorbitant' ground of international direct jurisdiction.²² The exercise of international direct jurisdiction on the basis of these exorbitant grounds might therefore seem improper and unfair from the point of view of the defendant, as these exorbitant grounds could force a defendant to defend himself/herself in a forum geographically far away from his/her home forum, or in another forum which does not meet the reasonable expectations of the defendant.²³

Potentially all States in the world employ these exorbitant grounds of international direct jurisdiction in order to ensure access to justice for litigants wishing to sue in the forum State,²⁴ and the risk for a defendant in international civil litigation of being subject to one of these exorbitant, unfavourable forums is high, therefore. As Lord Goff of Chieveley noted, '[t]here is, so to speak, a jungle of separate, broadly based, jurisdictions

²¹ Cf Arthur T von Mehren, 'Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?' (1994) 57 *Law & Contemporary Problems* 271, 286.

²² Kevin M Clermont and John R B Palmer, 'Exorbitant Jurisdiction' (2006) 58 *Maine Law Review* 474, 476.

²³ Clermont, *ibid*; L I De Winter, 'Excessive Jurisdiction in Private International Law' (1968) 17 *International and Comparative Law Quarterly* 706, 708.

²⁴ Andreas Bucher, 'La dimension sociale du droit international privé. Cours général' (2009) 341 *Hague Recueil des Cours* 9, 433; Clermont, *ibid*.

all over the world'.²⁵ The most notorious of these exorbitant grounds of direct jurisdiction might be Article 14 Code Civil,²⁶ which allows French courts to exercise international direct jurisdiction over an out-of-State defendant on the mere basis that the defendant has entered into business-relationships with a French citizen. Another example is the exercise of jurisdiction over a defendant on the basis that a claim form is served on the defendant while he/she is present in the forum, be it only for a short period of time (so-called 'transient jurisdiction', or 'tag jurisdiction').²⁷ What is more, German courts allow the exercise of international direct jurisdiction over a defendant on the basis that assets of the defendant are located in the forum State.²⁸

(b) Uncertainty regarding the forum

The venue risk further comprises the risk that the available fora cannot be determined with certainty in the first place.²⁹ For example, identifying the relevant grounds of international direct jurisdiction can be difficult since the foreign jurisdiction most likely employs a different language from the one the litigant is familiar with, or even a different alphabet. As a result, if either no or no accurate translation can be obtained, the pertaining jurisdictional provisions might be unintelligible to the reader. Identifying the pertaining grounds of international direct jurisdiction can also be difficult since the foreign State might not even have a codified regime on international direct jurisdiction at all, and the pertaining jurisdictional rules may be derived entirely from case law which can make

²⁵ Lord Goff of Chieveley, *Airbus Industrie G I E v Patel and Others* [1999] 1 AC 119, 132.

²⁶ Clermont (n 22) 482; De Winter (n 23) 706, 707.

²⁷ Clermont (n 22) 477, 478; Trevor C Hartley, *International Commercial Litigation* (2nd edn, Cambridge University Press 2015) 161.

²⁸ German Code of Civil Procedure, Art 23; De Winter (n 23) 707; according to case law, a sufficient connection between the claim and Germany is required, see judgment of 2 July 1991 – IX ZR 206/90, BGHZ 115, 90, 94; according to recent case law (Federal Court of Justice, ruling of 13 December 2012 – III ZR 282/11), however, this connection exists already if the claimant is domiciled in Germany, therefore the exorbitant reach has not been restricted in a significant way.

²⁹ Cf Fentiman (n 4) paras 1.11, 1.14.

identifying the jurisdictional provisions even harder.³⁰ In addition, national grounds of international direct jurisdiction are not set in stone, but can be subject to constant development.³¹

Furthermore, even if the foreign jurisdictional provisions can be identified, it could then prove difficult to apply these provisions. For example, the foreign jurisdiction might employ different connecting factors than the home jurisdiction,³² or it might employ different principles of characterisation.

Due to the difficulties in identifying and/or applying the relevant rules of international direct jurisdiction, determining the potentially available fora in international civil proceedings with certainty can be a lengthy and cost-intensive, if not an impossible, task therefore. If the available fora cannot be determined with certainty, it becomes impossible to predict the chances of successful international litigation. For example, it will not be clear which substantive law will be applied to a case, as this question depends on the choice-of-law rules of the forum State.³³ Moreover, also the procedural rules which

³⁰ Before the entry into force of the Act for Partial Revision of the Code of Civil Procedure (CCP) and the Civil Provisional Remedies Act (CPRA) on 1 April 2012, no written rules on international direct jurisdiction existed in Japan, and rules on international direct jurisdiction were derived from case law, see, eg, Yuko Nishitani, 'International Jurisdiction of Japanese Courts in a Comparative Perspective' (2013) *Netherlands International Law Review* 251, 252; in some legal systems, the rules on international direct jurisdiction are based on a mixture of case law and codified rules, as is the case, for example, in Australia, the United States of America and New Zealand, see Fawcett, 'General Report' (n 3) 3.

³¹ See, eg, the continuing development of the interpretation of German Code of Civil Procedure, Art 23, fn 28.

³² Some states of the United States of America, for example California, allow for the exercise of international direct jurisdiction on any basis which is 'not inconsistent with' the US Constitution, see West's Annotated California Codes, Code of Civil Procedure, § 410.10; in order not to be inconsistent with the US constitution, the exercise of jurisdiction must comply with the 'minimum contacts' doctrine derived from the US Constitution which requires that an out-of-state defendant has 'certain minimum contacts with [the territory of the forum] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice"', *International Shoe v State of Washington* 326 US 316; Hartley (n 27) 155.

³³ Bell (n 1) para 1.34; cf also Louise Ellen Teitz, 'Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings' (1992) 26 *International Lawyer* 21, 23.

differ from forum State to forum State can have an impact on the outcome of legal proceedings.³⁴

The uncertainty regarding the available grounds of international direct jurisdiction and the resulting unpredictability of international civil and commercial litigation also has the potential to hinder cross-border trade and investment. The legal uncertainty regarding the available fora can, for example, raise insurance fees for cross-border activities,³⁵ or the prices for goods or services delivered or provided across borders.³⁶ In the worst-case scenario, these higher so-called ‘transaction costs’³⁷ associated with legal uncertainty might even deter natural or legal persons from trading across borders altogether.³⁸ In 2003, a survey conducted by the International Chamber of Commerce found that out of 100 companies, 40 had abstained from engaging in cross-border trade because of the risks associated with cross-border litigation.³⁹

³⁴ Bell (n 1) para 1.34; Teitz, *ibid* 23.

³⁵ For example, it has been argued that international commercial aviation was only able to become successful because the Convention for the Unification of Certain Rules Relating to International Carriage by Air (adopted 12 December 1929; entered into force 13 February 1933) 137 LNTS 11 (Warsaw Convention) provided inter alia legal certainty regarding the fora available in lawsuits arising from international commercial aviation, which ‘enabled meaningful risk management by affordable insurance’, Michael Milde, ‘Liability in International Carriage by Air: The New Montreal Convention’ (1999) 4 *Uniform Law Review* 835, 836.

³⁶ Hans Sperl, ‘Eine internationale Zuständigkeitsordnung in bürgerlichen Rechtssachen (Hölder-Pichler-Tempsky 1926)’ 7, 8.

³⁷ ‘Transaction costs’ have been defined as ‘the costs of negotiating, drafting and enforcing contracts’, Dieter Schmidtchen et al, ‘Conflict of Law Rules and International Trade – A Transaction Costs Approach’ 2 <www.econstor.eu/bitstream/10419/23042/1/2004-01_conflict.pdf> accessed 2 February 2020.

³⁸ Fentiman (n 4) para 1.14; International Chamber of Commerce, ‘Jurisdictional certainty is essential in international contracts’ (2 April 2003) <<https://iccwbo.org/media-wall/news-speeches/jurisdictional-certainty-is-essential-in-international-contracts/>> accessed 2 February 2020; Pedro A De Miguel Asensio et al, ‘The Hague Conference on Private International Law “Judgments Convention” – Study’ (Policy Department for Citizen’s Rights and Constitutional Affairs 2018) 6 <[www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2018\)604954](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)604954)> accessed 2 February 2020.

³⁹ International Chamber of Commerce, *ibid*.

3. Efforts of the Hague Conference on Private International Law in reducing the venue risk and the enforcement risk

The question of reducing the venue risk is intrinsically linked to the question of reducing the enforcement risk, as the question whether the exercise of international direct jurisdiction in the State of origin was appropriate from the point of view of the State addressed (the question of indirect jurisdiction) is one of the main conditions for the recognition and enforcement of a foreign judgment.⁴⁰ During the first phase of the Judgments Project which took place between 1992 and 2001, the Hague Conference Members attempted to address both the venue risk and the enforcement risk at the same time by creating a Hague Judgments Convention that would have created both common grounds of international direct jurisdiction and common rules on the recognition and enforcement of foreign judgments.⁴¹ However, work on this broad convention was suspended after the failure of the Diplomatic Session of the Hague Conference in 2001 to reach agreement on a final convention text.⁴² In an attempt to save at least a part of the work that had been done, the scope of the project was narrowed drastically to cover only

⁴⁰ Fragistas, 'Rapport de la Commission spéciale' (n 10) 29; Arthur T von Mehren, 'Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions' (1998) 24 *Brooklyn Journal of International Law* 17, 18.

⁴¹ Permanent Bureau and the Co-reporters, 'Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6 – 20 June – 2001 Interim Text', in Hague Conference on Private International Law, *Proceedings of the Twentieth Session (2005), Tome II, Judgments* (Intersentia Publishing 2013) 620-657 (2001 Interim Text).

⁴² Andrea Schulz, 'Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters – Preliminary Document No 19 – August 2002' para A I <https://assets.hcch.net/upload/wop/jdgm_pd19e.pdf> accessed 2 February 2020.

choice-of-court agreements.⁴³ This approach finally resulted in the conclusion of the 2005 Convention on Choice of Court Agreements, which entered into force in October 2015.⁴⁴

In 2010, the Hague Conference began to consider actively whether the Judgments Project should be resumed.⁴⁵ For this purpose, a small expert group was set up with the mandate ‘to explore the background of the Judgments Project and recent developments with the aim to assess the possible merits of resuming the Judgments Project.’⁴⁶ Originally, the Hague Conference explored whether both the question of recognition and enforcement (ie, the enforcement risk) and the question of international direct jurisdiction (ie, the venue risk) should be addressed in a new Hague instrument.⁴⁷ After the meeting of the expert group in 2012, it was decided to divide further work on reviving the Judgments Project between an Experts’ Group and a Working Group.⁴⁸ The Experts’ Group was charged with studying ‘the desirability and feasibility of making provisions in

⁴³ ‘Note by the Permanent Bureau’, as reported in Andrea Schulz, ‘Report on the Work of the Informal Working Group on the Judgments Project, in Particular on the Preliminary Text Achieved at its Third Meeting – 25-28 March 2003 – Preliminary Document No 22 of June 2003’ para I <https://assets.hcch.net/upload/wop/jdgm_pd22e.pdf> accessed 2 February 2020; Masato Dogauchi and Trevor C Hartley, ‘Preliminary Draft Convention on Exclusive Choice of Court Agreements – Explanatory Report – Preliminary Document No 25 of March 2004 drawn up for the attention of the Special Commission of April 2004 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters’ para 6 <https://assets.hcch.net/upload/wop/jdgm_pd25e.pdf> accessed 2 February 2020.

⁴⁴ Convention on Choice of Court Agreements (adopted 30 June 2005; entered into force 1 October 2015) (2005 Hague Choice of Court Convention) 44 *International Legal Materials* 1294; see also below Part C.1.

⁴⁵ Hague Conference on Private International Law, ‘Council on General Affairs and Policy of the Conference (5-7 April 2011)’ para 15 <www.hcch.net/en/governance/council-on-general-affairs/archive> accessed 2 February 2020; see also Paul Beaumont, ‘The revived Judgments Project in The Hague’ (2014) 4 *Nederlands Internationaal Privatrecht* 532, 535.

⁴⁶ Hague Council *ibid* para 15.

⁴⁷ Permanent Bureau, ‘Background Note’ (n 12) paras 35, 36; 40-72; Permanent Bureau, ‘Process Paper on the Continuation of the Judgments Project – Document for the attention of the Working Group and the Experts’ Group – August 2013’ paras 1, 6-9 <<https://assets.hcch.net/docs/79c4fd67-6f1e-4bf8-bf18-01e589862f45.pdf>> accessed 2 February 2020.

⁴⁸ Permanent Bureau, ‘Process Paper’ *ibid* paras 1, 6-9; see also Paul Beaumont and Lara Walker, ‘Recognition and enforcement of judgments in civil and commercial matters in the Brussels I Recast and some lessons from it and the recent Hague Conventions for the Hague Judgments Project’ (2015) 11 *Journal of Private International Law* 31, 43.

relation to matters of jurisdiction [...]',⁴⁹ the Working Group was charged with making '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 [ie, grounds of indirect jurisdiction]⁵⁰.'⁵¹ From 2014 onward, only work on the recognition and enforcement of judgments was advanced,⁵² and work on international direct jurisdiction by the Experts' Group was deferred to a later date.⁵³ This process resulted in the adoption of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (hereafter the 2019 Hague Judgments Convention) on 2 July 2019.⁵⁴ The regime created by the 2019 Hague Judgments Convention will ensure the recognition and enforcement of judgments

⁴⁹ Hague Conference on Private International Law, 'Council on General Affairs and Policy of the Conference (17-20 April 2012 – Conclusions and Recommendations adopted by the Council' para 18 <www.hcch.net/en/governance/council-on-general-affairs/archive> accessed 2 February 2020; Permanent Bureau, 'Process Paper' (n 47) paras 1, 6, 7, 9; the Experts' Group consisted of experts in Private International Law derived from 18 Hague Conference Members (Argentina, Australia, Belarus, Brazil, China (People's Republic of), Costa Rica, Cyprus, the European Union, France, Germany, Japan, Mexico, New Zealand, the Russian Federation, South Africa, Switzerland, the United Kingdom and the United States of America), and met under the chairmanship of Mr David Goddard QC, see Permanent Bureau, 'Preliminary document No 3 – March 2013 – Ongoing work on International Litigation – Annex 2' 1, fn 1 <<https://assets.hcch.net/docs/d00eb333-41fc-4b92-8405-e7eb20039154.pdf#report2>> accessed 2 February 2020.

⁵⁰ Francisco Garcimartín and Geneviève Saumier, 'Judgments Convention: Revised Draft Explanatory Report – Preliminary Document No 1 of December 2018' para 144 <<https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf>> accessed 2 February 2020.

⁵¹ Hague Council Conclusions 2012 (n 49) para 17; Permanent Bureau, 'Process Paper' (n 47) paras 1, 6, 8, 9; the Working Group met back to back with the Experts' Group under the chairmanship of Mr David Goddard QC and consisted of experts in Private International Law derived from the same 18 Hague Conference Members which had sent experts to the Experts' Group meeting, Permanent Bureau, 'Preliminary document No 3 – Annex 1' (n 49) 1, fn 1.

⁵² According to Louise Ellen Teitz, 'Another Hague Judgments Convention: Bucking the Past to Provide for the Future' (2019) 29 *Duke Journal of Comparative & International Law* 491, 500, the decision to advance only work on the recognition and enforcement of foreign judgments, and not on international direct jurisdiction, was apparently due to a strong reluctance of the United States of America to proceed with work on international direct jurisdiction against the background of the 'disastrous results' of the 2001 Diplomatic Conference.

⁵³ Cf Permanent Bureau, 'Process Paper' (n 47) paras 17, 20; Permanent Bureau, 'Preliminary Document No 7A – January 2015 – Ongoing Work on Judgments – Choice of Court Convention and the Judgments Project' paras 6-9 <https://assets.hcch.net/upload/wop/gap2015pd07a_en.pdf> accessed 2 February 2020; Beaumont (n 48) 43.

⁵⁴ Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (adopted 2 July 2019) (2019 Hague Judgments Convention) <www.hcch.net/en/instruments/conventions/full-text/?cid=137> accessed 2 February 2020.

in the Contracting Parties to the Convention (once in force), thereby enhancing access to justice for judgment creditors and reducing the enforcement risk.⁵⁵

The Hague Conference now has the opportunity to address the venue risk, in the context of what is now called the ‘Jurisdiction Project’⁵⁶: in its conclusions and recommendations of 2018, the Council on General Affairs and Policy (the governing body of the Hague Conference),⁵⁷ tasked the Permanent Bureau (the secretariat of the Hague Conference),⁵⁸ ‘to make arrangements for a further meeting of the Experts’ Group addressing matters relating to direct jurisdiction (including exorbitant grounds and *lis pendens*/declining jurisdiction),⁵⁹ to be held shortly after the conclusion of the Diplomatic Session.’⁶⁰ This meeting of the Experts’ Group took place in February 2020.⁶¹ The Experts’ Group faces the question how the venue risk (ie, the risk of an uncertain forum, the risk of competing litigation and the risk of having to litigate in an inappropriate forum)

⁵⁵ 2019 Hague Judgments Convention, Art 4(1); as of 5 February 2020, the 2019 Hague Judgments Convention is not yet in force and has only two signatory States (Ukraine and Uruguay), see <www.hcch.net/en/instruments/conventions/status-table/?cid=137> accessed 4 May 2020.

⁵⁶ See <<https://www.hcch.net/en/projects/legislative-projects/jurisdiction-project>> accessed 2 February 2020.

⁵⁷ According to the Statute of the Hague Conference on Private International Law (adopted 31 October 1951, entered into force 15 July 1955, as amended), in Permanent Bureau of the Hague Conference on Private International Law (eds), *Collection of Conventions (1951-2019)*, Art 4(1), first sentence, the Council ‘has charge of the operations of the Conference’.

⁵⁸ Statute of the Hague Conference on Private International Law, Arts 4(2) and 6(c).

⁵⁹ This paper will not address whether and how the Hague Conference should tackle the issue of *lis pendens*/declining jurisdiction in order not to exceed its word limit; for an analysis of these questions see, eg, Paul Beaumont, ‘*Forum non Conveniens* and the EU rules on Conflicts of Jurisdiction: A Possible Global Solution’ (2018) *Revue Critique de Droit International Privé* 447.

⁶⁰ Hague Conference on Private International Law, ‘Council on General Affairs and Policy of the Conference (13-15 March 2018 – Conclusions and Recommendations adopted by the Council’ para 5 <<https://assets.hcch.net/docs/715fc166-2d40-4902-8c6c-e98b3def3b92.pdf>> accessed 2 February 2020.

⁶¹ Hague Conference on Private International Law, ‘Council on General Affairs and Policy of the Conference (5-8 March 2019) – Conclusions and Recommendations adopted by the Council’ para 5 <<https://assets.hcch.net/docs/c4af61a8-d8bf-400e-9deb-afcd87ab4a56.pdf>> accessed 2 February 2020; the meeting took place from 18-21 February, see <<https://www.hcch.net/en/projects/upcoming-meetings1>> accessed 2 February 2020.

can be reduced in an efficient and politically feasible manner by means of a new Hague instrument.

B. Options to reduce the venue risk (reducing uncertainty and improving appropriateness in international direct jurisdiction)

The venue risk can be addressed by the Members of the Hague Conference by creating a common regime of unified grounds of international direct jurisdiction, and by agreeing to ban the use of certain inappropriate, so-called exorbitant grounds of international direct jurisdiction by means of a new Hague instrument. At the outset, two possible methods are to be considered for creating this new instrument:⁶² the creation of a non-binding model law, and the creation of a binding international instrument (in the form of a Protocol to the 2019 Hague Judgments Convention).⁶³ However, as will be shown, only a binding instrument will be able to enhance legal certainty in a meaningful way, and to improve the appropriateness of grounds of international direct jurisdiction.

1. *The need for a binding Protocol in order to foster legal certainty*

By creating common rules of international direct jurisdiction by means of a Protocol to the 2019 Hague Judgments Convention, the Hague Conference Members could help to increase legal certainty and predictability by making it easier for litigants and lawyers to identify the relevant grounds of international direct jurisdiction. A binding instrument

⁶² Permanent Bureau, 'Continuation of the Judgments Project – Preliminary Document No 14 of February 2010 for the attention of the Council of April 2010 on General Affairs and Policy' paras 10, 11; 17 <<https://assets.hcch.net/docs/cd5f79f4-d710-44a1-a266-af0e73a6ffb4.pdf>> accessed 2 February 2020; Permanent Bureau, 'Background Note' (n 12) paras 37-39; Permanent Bureau, 'Issues Paper on Matters of Jurisdiction (Including Parallel Proceedings) – January 2013 – Document for the attention of the Experts' Group (February 2013 meeting)' paras 8, 9 <<https://assets.hcch.net/docs/edf2f696-2ac2-4553-afa5-d13c942b8f0d.pdf>> accessed 2 February 2020.

⁶³ Since the Hague instrument on international direct jurisdiction is meant to supplement the 2019 Hague Judgments Convention, the name 'Protocol' seems appropriate, see United Nations, *Treaty Handbook* (rev edn, United Nations Publication 2012) 69 <<https://treaties.un.org/doc/source/publications/THB/English.pdf>> accessed 2 February 2020.

obliges its Contracting Parties to make its jurisdictional provisions available exactly in the way as prescribed in the instrument.⁶⁴ Unlike a model law, a binding instrument does not allow States to choose if they want to implement a jurisdictional provision contained in the international instrument or not. Creating a binding instrument on international direct jurisdiction would therefore result in the establishment of a homogenous regime of unified grounds of international direct jurisdiction in all the Hague Conference Members and other States adopting the instrument. By consulting the text of the instrument, litigants could easily identify the fora where proceedings can be brought.⁶⁵

A model law on international direct jurisdiction, on the other hand, would not be able to achieve the same level of legal certainty and predictability. A model law does not create legal obligations for States or, in case of the Hague Conference, so-called Regional Economic Integration Organisations (REIOs)⁶⁶ to implement the provisions contained in it.⁶⁷ Rather, a model law only constitutes recommendations to States and REIOs seeking guidance in improving their legal systems.⁶⁸ As a result, a model law on international direct jurisdiction would allow States and REIOs to implement only some of the

⁶⁴ Permanent Bureau, 'Background Note' (n 12) para 37.

⁶⁵ Von Mehren, (n 21) 283; under a mixed-convention approach, these grounds of direct jurisdiction would serve as additional options to the national grounds of international direct jurisdiction, *ibid* and below, C.1.

⁶⁶ Statute of the Hague Conference on Private International Law (adopted 31 October 1951, entered into force 15 July 1955, as amended), in Permanent Bureau, *Collection of Conventions* (n 57) Art 3; the European Union is such a Regional Economic Integration Organisation in the sense of the Statute, Art 3(9), see Garcimartín, (n 50) para 124; according to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (adopted 2 July 2019) (2019 Hague Judgments Convention) <www.hcch.net/en/instruments/conventions/full-text/?cid=137> accessed 2 February 2020, Art 26(1), a REIO may become a party to the Hague Judgments Convention; according to 2019 Hague Judgments Convention, Art 27(1), a REIO may declare (at the time of signature, acceptance, approval or accession) that it exercises competence over all the matters governed by the Convention and that its Member States will not be Parties to the Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the REIO.

⁶⁷ Katharina Boele-Woelki, *Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws* (Martinus Nijhoff Publishers 2010) 72, 73; Permanent Bureau, 'Background Note' (n 12) para 39.

⁶⁸ Boele-Woelki *ibid*.

jurisdictional provisions suggested by the model law. States and REIOs interested in the harmonisation of rules on international direct jurisdiction could choose therefore which (if any) of the jurisdictional provisions contained in the model law should be adopted.⁶⁹

Due to its non-binding nature, the model law could therefore result in a patchwork of partially harmonised rules on international direct jurisdiction. Consequently, litigants and lawyers would still need to consult the relevant national laws in order to verify which jurisdictional provisions of the model law have in fact been implemented. This need to check the national laws could be reduced to a certain extent if the Permanent Bureau would undertake to publish on the Hague Conference website the laws of those States which have implemented the model law,⁷⁰ possibly together with a translation into the two official languages of the Hague Conference (English and French).⁷¹ Nevertheless, ascertaining the relevant jurisdictional provisions would remain a rather laborious process characterised by uncertainty, as lawyers would still need to check the implementing national legislation as the primary legal source in order to fulfil a lawyer's duty of care. Only a binding Protocol on international direct jurisdiction would be able to achieve genuine unification of grounds of international direct jurisdiction and to foster legal certainty in a meaningful way.

⁶⁹ Cf *ibid* 73; cf also Fragistas, (n 7) 362.

⁷⁰ <www.hcch.net>; this option was chosen for the Hague Principles on Choice of Law in International Commercial Contracts, see <www.hcch.net/en/instruments/conventions/publications1/?dtid=41&cid=135> accessed 2 February 2020.

⁷¹ Cf Statute of the Hague Conference on Private International Law (adopted 31 October 1951, entered into force 15 July 1955, as amended), in Permanent Bureau, *Collection of Conventions* (n 57) Final clause.

2. Need for a Protocol in order to ensure the uniform application of unified grounds of international direct jurisdiction

Another reason for establishing a binding instrument on international direct jurisdiction is that in order to achieve a maximum amount of legal certainty and predictability, it is not sufficient to merely establish a harmonised or unified regime of grounds of international direct jurisdiction. Rather, the success of uniform rules on international direct jurisdiction in fostering legal certainty depends on their uniform application in all the States (or REIOS) implementing the new Hague instrument.⁷² To ensure the uniform application of the jurisdictional provisions of a future Hague instrument, it is necessary for these rules to have a supranational character in order for these rules to be interpreted uniformly and autonomously.⁷³ Only then would litigants know with certainty where they can sue and be sued. If the Hague Conference were to elaborate merely a non-binding model law on international direct jurisdiction, ensuring this uniform application would be very difficult. The jurisdictional provisions based on a model law would be embedded in the national legal systems and would rank only as ordinary national law.⁷⁴ As a result, the national legal systems would have the final say regarding the interpretation of these provisions. Creating a binding instrument on international direct jurisdiction seems to be necessary therefore also in order to ensure the uniform application of the unified jurisdictional regime to be created by the new Hague instrument.

⁷² Cf Rupert H Graveson, 'The International Unification of Law' (1968) 16 *American Journal of Comparative Law* 4, 12; see also De Miguel Asensio (n 38) 16, para 1.4.2.

⁷³ Cf Arthur T von Mehren, 'Jurisdictional Requirements: To What Extent Should the State of Origin's Interpretation of Convention Rules Control For Recognition and Enforcement Purposes?', in Andreas F Lowenfeld and Linda J Silberman (eds), *The Hague Convention on Jurisdiction and Judgments – Records of the Conference Held at New York University School of Law on the Proposed Convention – April 30 – May 1, 1999* (Juris Publishing 2001) Annex-29, A-33, A-34; see also Graveson (n 72) 12.

⁷⁴ Cf Boele-Woelki (n 67) 72, 73.

3. Need for a Protocol in order to improve the appropriateness of grounds of international direct jurisdiction (reducing exorbitant grounds of international direct jurisdiction)

A new Hague instrument on international direct jurisdiction need not only regulate the exercise of international direct jurisdiction positively by unifying certain grounds of direct jurisdiction, and obliging its Contracting Parties to make these fora available to litigants (by means of a so-called ‘green list’ of grounds of international direct jurisdiction).⁷⁵ Rather, the new Hague instrument can also be used to prevent Contracting Parties from exercising certain grounds of international direct jurisdiction generally regarded as exorbitant by prohibiting the use of these grounds (by means of a so-called ‘red list’ of direct grounds of international jurisdiction).⁷⁶

In order to induce future Contracting Parties to the Hague Protocol to agree to disuse some of their exorbitant grounds of international direct jurisdiction, a binding obligation by the other Contracting Parties to establish unified grounds of international direct jurisdiction is required. Exorbitant grounds of international direct jurisdiction are meant to ensure access to justice for litigants in cases where otherwise no forum might be available at all or might not be readily available.⁷⁷ To ensure access to justice, States will be prepared to forego the use of some of their exorbitant grounds of jurisdiction only if other States will in turn guarantee by means of a binding international instrument that alternative fora for proceedings within the scope of the Protocol will be created, and that

⁷⁵ Also known as ‘white list’, see Catherine Kessedjian, ‘International Jurisdiction and Foreign Judgments in Civil and Commercial Matters – Preliminary Document No 7 of April 1997’ (Prel Doc No 7), in Hague Conference, *Proceedings of the Twentieth Session (2005)*, Tome II, *Judgments* (n 41) 13, 17, for the sake of political correctness, the term ‘green list’ will be used in this article.

⁷⁶ Such a list had been used during the old Judgments Project, see 2001 Interim Text (n 41) art 18; the ‘red list’ is also known as ‘black list’, see Kessedjian, *ibid*, fn 27; for the sake of political correctness, the term ‘red list’ will be used in this article.

⁷⁷ Bucher (n 24) 433.

judgments rendered on these bases will be recognised and enforced. For example, the fact that the 1968 Brussels Convention ensured access to justice for proceedings within the convention scope by means of the broad list of grounds of international direct jurisdiction facilitated the readiness of the Contracting Parties to the 1968 Brussels Convention to forego the use of their exorbitant grounds of international direct jurisdiction against defendants domiciled in another Contracting State.⁷⁸ The Explanatory Report accompanying the 1968 Brussels Convention states in this regard that

[...] since [the 1968 Brussels Convention] establishes, on the basis of mutual agreement, an autonomous system of international jurisdiction in relations between the Member States, the Convention makes it easier to abandon certain rules of jurisdiction which are generally regarded as exorbitant.⁷⁹

Attempting to reduce the number of exorbitant grounds of international direct jurisdiction by means of a model law, on the other hand, is not a workable option, as the model-law approach cannot guarantee that States or REIOs will actually implement the unified grounds of international direct jurisdiction contained in the model law.

C. Architecture of a Hague Protocol on international direct jurisdiction

If the Hague Conference decides to work towards creating a binding instrument on international direct jurisdiction in the form of a Protocol to the 2019 Hague Judgments Convention, further structural questions on how to create this Hague Protocol on International Direct Jurisdiction (in the following: Hague Protocol) arise and must be addressed at the outset in order to provide a clear focus of the preparatory work on the

⁷⁸ Paul Jenard, 'Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels, 27 September 1968' [1979] OJ C 59/1, 7.

⁷⁹ *Ibid.*

Hague Protocol and to enable the required policy decisions on the part of the Hague Conference Members involved in its preparation.⁸⁰ Moreover, it is essential that participants in the Jurisdiction Project have a realistic expectation of what can be achieved in terms of unifying grounds of international direct jurisdiction.

1. *Exhaustive vs non-exhaustive regulation of international direct jurisdiction*

The first question which has to be addressed is whether the Hague Protocol should regulate the exercise of international direct jurisdiction exhaustively.⁸¹ Regulating the exercise of international direct jurisdiction exhaustively entails that the Parties to the Protocol would forgo their right to exercise international direct jurisdiction on the basis of their own non-harmonised, national legal systems for proceedings within the scope of the instrument.⁸² That means, Contracting Parties to the Hague Protocol would be able to exercise international direct jurisdiction only on the basis of the grounds of international direct jurisdiction contained in the instrument (the green list).⁸³ Regulating international direct jurisdiction in a non-exhaustive way, on the other hand, would allow Parties to the Hague Protocol to continue to exercise international direct jurisdiction on the basis of their national provisions (the so-called ‘grey area’, or ‘grey zone’, or ‘permitted bases’).⁸⁴ This grey area of national grounds of direct jurisdiction which already exist or which could still be created would be available in addition to the grounds of direct jurisdiction contained in the text of the Protocol, ie, in addition to the green list.⁸⁵ That means, the

⁸⁰ Cf Permanent Bureau, ‘Process Paper’ (n 47) para 5.

⁸¹ Cf Permanent Bureau, ‘Preliminary Document No 3 of March 2013 – Annex 2’ (n 49) para (b).

⁸² Von Mehren, ‘Reflections’ (n 40) 19.

⁸³ De Winter (n 23) 709; von Mehren, ‘New Approach’ (n 21) 282, 283.

⁸⁴ Von Mehren, ‘New Approach’ (n 21) 283-285; von Mehren, ‘Reflections’ (n 40) 19; this grey area could be restricted by a red list of prohibited grounds of direct jurisdiction, see Arthur Taylor von Mehren, ‘Recognition of United States Judgments Abroad and Foreign Judgments in the United States: Would an International Convention Be Useful?’ (1993) 57 *Rechts Zeitschrift* 449, 458; von Mehren, ‘New Approach’ (n 21) 283, 285; see also below Part D.

⁸⁵ Von Mehren, ‘Recognition’ (n 84) 458; von Mehren, ‘New Approach’ (n 21) 283.

Hague Protocol would create a parallel regime of grounds of international direct jurisdiction, creating more choice for litigants.⁸⁶

The development of an international instrument which regulates the exercise of international direct jurisdiction only in a non-comprehensive way seems to have been foreshadowed also by the informal Experts' Group: during its meeting in 2013, the Experts' Group reported that they were of the preliminary view that if a list of required grounds of jurisdiction (ie, a green list) would be created, this list would probably not be a 'comprehensive' (ie, an exhaustive) list.⁸⁷ Moreover, the Experts' Group Report noted 'that an instrument concerning jurisdiction would be expected to address [...] additional grounds of jurisdiction under national law [...] [which would be permitted subject only to any specific prohibitions].'⁸⁸

There are strong arguments which support the preliminary conclusions of the Experts' Group that a green list of a new Hague instrument should not be comprehensive. Due to the existing differences in national concepts on international direct jurisdiction, scholars like Arthur T von Mehren have argued that the *exhaustive* unification of grounds of international direct jurisdiction would be very hard, if not impossible to achieve on a global level.⁸⁹ For example, from the point of view of some States, jurisdiction can only be validly exercised if it is based on the connection between the forum and the defendant:

⁸⁶ Cf Olivier Tell, 'Tentative Draft on the Jurisdiction and the Enforcement of Foreign Judgments: Can a Mixed Convention Work?', in John J Barceló III and Kevin M Clermont (eds), *A Global Law of Jurisdiction and Judgments: Lessons from The Hague* (Kluwer Law International 2002) 37, 37, 38.

⁸⁷ Permanent Bureau, 'Preliminary Document No 3 of March 2013 – Annex 2' (n 49) para (a).

⁸⁸ *Ibid* para (b).

⁸⁹ Von Mehren, 'Recognition' (n 84) 457, 459; see also Peter Nygh, 'Arthur's Baby: The Hague Negotiations For a World-Wide Judgments Convention', in James A R Nafziger and Symeon Symeonides (eds), *Law and Justice in a Multistate World – Essays in Honour of Arthur T von Mehren* (Transnational Publishers Inc 2002) 151, 157.

in the United States of America, for example, jurisdiction over an out-of-State defendant (who has not been served with process while temporarily present in the forum State, or who has not consented to the jurisdiction of the forum)⁹⁰ can only be validly exercised if the defendant was connected to the forum state by some minimum contacts 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'91

Other jurisdictional regimes also take the interests of other stakeholders involved in the process of international civil litigation into account. The 2012 Brussels Ia Regulation, for instance, lets a close connection between the forum and the claim suffice for some proceedings, eg for claims arising in matters relating to torts, delicts or quasi-delicts, in order to provide alternative fora for claimants.⁹² Some jurisdictional regimes also have regard to the interests of the forum State in an effective administration of justice: according to the 2012 Brussels Ia Regulation, Article 8(1), for example, proceedings against a defendant domiciled in one Member State of the European Union can be brought in the home forum of one of his/her co-defendants, thereby fostering an effective administration of justice.⁹³

⁹⁰ Service of process on a defendant who is even only temporarily present in the forum state establishes general jurisdiction over the defendant, see *Burnham v Superior Court* (1990) 495 US 604, 604; consent also establishes general personal jurisdiction over the out-of-State defendant, see *Ins Co of Ireland v Compagnie Des Bauxites* (1982) 456 US 694, 703; see also e.g., David S Clark and Tuğrul Ansay (eds), *Introduction to the Law of the United States* (1992 Kluwer Law and Taxation Publishers) 414; Eugene F Scoles and Peter Hay, *Conflict of Laws* (2nd edn, West Publishing Co 1992) 267, 275-285, 327.

⁹¹ *International Shoe v State of Washington* 326 US 310, 316, 320.

⁹² Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels Ia Regulation) [2012] OJ L351/1, Art 7(2), Recital 16.

⁹³ Brussels Ia Regulation, Art 8(1).

Achieving agreement on a *comprehensive* common list of unified grounds of international direct jurisdiction would require one to merge these divergent concepts. Moreover, one could argue that the experience with the old Judgments Project has proven already that regulating the exercise of international direct jurisdiction *exhaustively* for proceedings in civil and commercial matters is politically unfeasible since the Hague Conference Members had not been able to agree on a broad green list of international direct jurisdiction at the time.⁹⁴

Not only does the exhaustive regulation of international direct jurisdiction seem to be unfeasible at the global level, it also seems undesirable. Regulating the exercise of international direct jurisdiction in an exhaustive way would mean that the Contracting Parties to the Hague Protocol would lose the possibility of reacting to social changes by adapting their national rules on international direct jurisdiction accordingly.⁹⁵ By allowing Contracting Parties to continue to use their national grounds of direct jurisdiction, the Protocol would avoid ‘freezing’ jurisdictional standards which could become outdated in the future, which might make the Protocol more appealing to States.⁹⁶

Despite the difficulties involved in attempting to create an *exhaustive* list of unified grounds of international direct jurisdiction, achieving unification in international direct jurisdiction is possible. The negotiations that took place on the old Judgments

⁹⁴ See the 2001 Interim Text (n 41), which displayed a lack of consensus on many of the provisions on international direct jurisdiction, indicated by square brackets around the pertaining provisions; see also Permanent Bureau, ‘Background Note’ (n 12) para 41; cf also Jeffrey D Kovar, ‘re Preliminary Draft Hague Convention on Jurisdiction and the Enforcement of Civil Judgments’ (letter to Hans van Loon, 22 February 2000) 6-8 <www.cptech.org/ecom/hague/kovar2loon22022000.pdf> accessed 2 February 2020.

⁹⁵ Von Mehren, ‘Recognition’ (n 84) 457; von Mehren, ‘New Approach’ (n 21) 287.

⁹⁶ Von Mehren, ‘New Approach’ (n 21) 287; cf also Ronald A Brand, ‘The Circulation of Judgments Under the Draft Hague Judgments Convention’ (2019) 1, 7 <<http://ssrn.com/abstract=3334647>> accessed 2 February 2020.

Project have shown that there is at least a limited number of jurisdictional provisions which Hague Conference Members potentially regard as generally appropriate for exercising international direct jurisdiction (and for recognising and enforcing judgments rendered on these bases), and for which they could be prepared to undertake the obligation by means of an international convention to ensure the availability of these grounds of direct jurisdiction in their national legal systems. The inter-state negotiations that took place during the Diplomatic Session in 2001 revealed that consensus existed on the appropriateness of allowing the exercise of international direct jurisdiction on the basis of the following connecting factors: jurisdiction based on an exclusive choice-of-court agreement of the parties for disputes arising out of a particular legal relationship,⁹⁷ jurisdiction in matters relating to torts regarding the place where the act or omission that caused the injury occurred,⁹⁸ exclusive jurisdiction based on a trust agreement in proceedings concerning the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing,⁹⁹ jurisdiction based on the express acceptance of jurisdiction,¹⁰⁰ and exclusive jurisdiction concerning the validity of entries in public registers (other than those dealing with intellectual property rights) of the courts of the Contracting State in which the register is kept).¹⁰¹ Moreover, consensus existed that it would be appropriate for a court to exercise jurisdiction over a counter-claim if the court also had jurisdiction to determine the original claim out of which the transaction or the occurrence on which the original claim is based arose.¹⁰²

⁹⁷ 2001 Interim Text (n 41) Art 4(1).

⁹⁸ 2001 Interim Text (n 41) Art 10(1)(a).

⁹⁹ 2001 Interim Text (n 41) Art 11.

¹⁰⁰ 2001 Interim Text (n 41) Art 4(3).

¹⁰¹ 2001 Interim Text (n 41) Art 12(3).

¹⁰² 2001 Interim Text (n 41) Art 15; fn 98.

Already for the preliminary work on the Hague Convention on Choice of Court Agreements,¹⁰³ some of these provisions had been considered as a possible starting point for narrowing the scope of the Judgments Project in an attempt to overcome the deadlock of the negotiations.¹⁰⁴ However, the Hague Conference decided to focus on creating a convention ensuring the jurisdiction of the court chosen by the parties in business-to-business contracts and ensuring the recognition and enforcement of judgments rendered by the chosen court.¹⁰⁵ This process resulted in the adoption of the 2005 Hague Choice of Court Convention. The other connecting factors could now provide a starting point for the deliberations of the Experts' Group as part of the Jurisdiction Project.¹⁰⁶

As suggested by von Mehren, only the non-exhaustive regulation of international direct jurisdiction seems achievable on a global level, therefore.¹⁰⁷

2. Second consideration: symmetric vs asymmetric convention structure

The second structural aspect to consider for creating unified grounds of international direct jurisdiction by means of a binding instrument is the relationship between the grounds of indirect jurisdiction of the 2019 Hague Judgments Convention, and the grounds of direct jurisdiction of the new Hague instrument. Obviously, the recognition and enforcement of judgments rendered on the basis of a jurisdictional provision

¹⁰³ Convention on Choice of Court Agreements (adopted 30 June 2005; entered into force 1 October 2015) (2005 Hague Choice of Court Convention) 44 *International Legal Materials* 1294.

¹⁰⁴ Schulz, 'Reflection Paper' (n 42) para A II; Dogauchi and Hartley, 'Preliminary Draft Convention – Explanatory Report' (n 43) para 5.

¹⁰⁵ 'Note by the Permanent Bureau', as reported in Andrea Schulz, 'Report on the Work of the Informal Working Group on the Judgments Project, in Particular on the Preliminary Text Achieved at its Third Meeting – 25-28 March 2003 – Preliminary Document No 22 of June 2003' para I <https://assets.hcch.net/upload/wop/jdgm_pd22e.pdf> accessed 2 February 2020; Dogauchi and Hartley, *ibid* para 6.

¹⁰⁶ See below (n 144) regarding the relationship between the Hague Protocol on Jurisdiction and the 2005 Hague Choice of Court Convention.

¹⁰⁷ Von Mehren, 'New Approach' (n 21) 286-287.

contained in the Hague Protocol on Jurisdiction will only be guaranteed if the pertaining jurisdictional provision matches one of the jurisdictional filters contained in the 2019 Hague Judgments Convention, Articles 5 and 6. The question which arises in the context of the Hague Protocol is the extent to which the jurisdictional filters of the 2019 Hague Judgments Convention should be reflected in the jurisdictional provisions of the green list of the Hague Protocol.

Other instruments which regulate both the exercise of international direct jurisdiction and the recognition and enforcement of foreign judgments (so-called double conventions)¹⁰⁸ could convey the impression that complete symmetry between the jurisdictional filters and the unified grounds of international direct jurisdiction is required. The 2007 Lugano Convention and the Brussels Ia Regulation, for example, work mostly on the basis of a symmetrical connection between their provisions on direct jurisdiction and their provisions on indirect jurisdiction (for proceedings against defendants domiciled in a Member State of the European Union or in a Contracting State to the 2007 Lugano Convention):¹⁰⁹ under both regimes, if a judgment has been rendered in proceedings within the scope of the pertaining instrument on the basis of a unified ground of international direct jurisdiction, this judgment will be recognised and enforced under the instrument.¹¹⁰ That means, all the grounds of international direct jurisdiction that have

¹⁰⁸ *Ibid* 282-283.

¹⁰⁹ Ralf Michaels, 'Some Fundamental Conceptions as Applied in Judgment Conventions', in Eckart Gottschalk et al (eds) *Conflict of Laws in a Globalized World: A Tribute to Arthur von Mehren* (Cambridge University Press 2007) 29, 46, 59-60; this symmetry is not perfect, however, since the Brussels-Lugano regime also allows for example for the recognition and enforcement of judgments rendered in the Member States of the European Union and the Contracting Parties to the Lugano Convention on the bases of their national law against defendants domiciled in a third State, see *ibid* 48, 59-60.

¹¹⁰ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (adopted 30 October 2007; entered into force 1 January 2010) (2007 Lugano Convention) Title II Section 1-7, Art 33(1) and Art 38(1), (2) <www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-

been unified by the instruments are also regarded as appropriate from the point of view of the States addressed for the purpose of recognition and enforcement of the pertaining judgment.

The same assumption seems to have prevailed during the work on the previous Judgments Project: the 2001 Interim Text, the text containing the end result of the negotiations,¹¹¹ employs the concept of symmetry between the unified grounds of direct and indirect jurisdiction, in that it does not contain any jurisdictional filters which are not matched by a ground of direct jurisdiction.¹¹² There is a possibility therefore that the drafters of a Hague Protocol could deem such a symmetrical relationship between the unified grounds of international direct jurisdiction of the Hague Protocol, and the provisions on indirect jurisdiction of the Hague Judgments Convention necessary, requiring the Hague Protocol to reflect every single jurisdictional filter in a unified ground of international direct jurisdiction.¹¹³

However, in practice no such symmetrical connection is required.¹¹⁴ Rather, in order to create a meaningful instrument on the unification on international direct jurisdiction, the Hague Conference Members are not required to attempt to create a list of unified grounds of direct jurisdiction that is completely symmetric to the list of jurisdictional filters of the 2019 Hague Judgments Convention. Recognising this

conventions/Lugano2/02-conv-prot-ann-corr09_en.pdf> accessed 2 February 2020; Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels Ia Regulation) [2012] OJ L351/1, Chapter II Section 1-7, Arts 36(1) and 39.

¹¹¹ 2001 Interim Text (n 41).

¹¹² 2001 Interim Text (n 41) Art 25(1); Michaels (n109) 59, 60 (regarding an earlier version of the 2001 Interim Text).

¹¹³ Cf Michaels, *ibid*, 60-62.

¹¹⁴ *Ibid*.

possibility could also foster reaching agreement on unified grounds of international direct jurisdiction as negotiating States would not be under pressure to mirror the whole list of jurisdictional filters of the 2019 Hague Judgments Convention in a list on direct grounds of jurisdiction.¹¹⁵ As has been shown above, reaching agreement on a completely symmetrical list of grounds of international direct jurisdiction would most likely prove unfeasible anyway due to the need to merge the different underlying concepts of international direct jurisdiction on such a broad scale.¹¹⁶

Moreover, it is likely that an acceptable list of grounds of direct jurisdiction which are generally regarded as appropriate for exercising international direct jurisdiction (the green list) will be smaller than the list of acceptable grounds of indirect jurisdiction also because different policy considerations can apply for international direct and indirect jurisdiction.¹¹⁷ The fact that the Hague Conference Members have accepted a certain connecting factor as appropriate for recognizing and enforcing a foreign judgment rendered on this basis in the context of the 2019 Hague Judgments Convention does not necessarily mean that they would be equally prepared to also undertake the obligation to exercise international direct jurisdiction on this basis.

This can be demonstrated by a comparison of the 2019 Hague Judgments Convention and the negotiations on the old Judgments Project during the 19th Diplomatic Session in 2001. The 2019 Hague Judgments Convention in its Article 5(1)(a) contains a jurisdictional filter which regards the exercise of international direct jurisdiction as

¹¹⁵ *Ibid* 62; cf also von Mehren, 'New Approach' (n 21) 286.

¹¹⁶ See above Part C.1.

¹¹⁷ Arthur T von Mehren, 'Recognition and Enforcement of Foreign Judgments – General Theory and the Role of Jurisdictional Requirements' (1980) 167 *Hague Recueil des Cours* 9, 56-57; Michaels (n 109) 38-39 and 61.

appropriate if the defendant was habitually resident in the State of origin at the time he became a party to the proceedings in the court of origin.¹¹⁸ However, it might be difficult for the Hague Conference Members to agree on a corresponding provision on international direct jurisdiction: during the negotiations on the old Judgments Project, although there was a consensus among the Members of the Hague Conference that it would be appropriate in general for States to exercise international direct jurisdiction over a defendant in his/her home forum, no consensus existed regarding the question which specific connecting factor should be applied in home-forum cases: while some Members favoured the habitual residence of the defendant as the connecting factor, other States favoured mere residence as a connecting factor.¹¹⁹

Moreover, the Hague 2019 Judgments Convention contains a jurisdictional filter accepting jurisdiction as appropriate which has been exercised by a court in a State in which the defendant maintained a branch, agency or other establishment without separate legal personality at the time that person became a party to the proceedings (if the claim arose out of the activities of that branch, agency or establishment).¹²⁰ It is equally questionable whether this jurisdictional filter could be turned into a corresponding provision on international direct jurisdiction that would be acceptable to all Members of the Hague Conference, and in particular to the United States of America. The delegates from the United States of America had argued during the negotiations on the old

¹¹⁸ According to the revised Draft Explanatory Report on the 2019 Hague Judgments Convention, the jurisdictional filter of Art 5(1)(a) cannot only be applied against defendants ‘but includes any other person, natural or legal, against whom recognition or enforcement is sought. Recognition or enforcement of the foreign judgment may be granted against the defendant, the claimant or a third party that was habitually resident in the State of origin at the time that that person became a party to the proceedings’: Garcimartín (n 50) para 147.

¹¹⁹ 2001 Interim Text (n 41) fn 17.

¹²⁰ Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (adopted 2 July 2019) (2019 Hague Judgments Convention) Art 5(1)(d) <www.hcch.net/en/instruments/conventions/full-text/?cid=137> accessed 2 February 2020.

Judgments Project that they could only accept a provision on specific direct jurisdiction in matters relating to a branch if this provision would allow jurisdiction not only in the State where a defendant had established a branch, agency or other establishment, but also in a State ‘where the defendant has carried on regular commercial activity by other means’.¹²¹ Under US jurisdictional standards, it has long been established that courts can validly exercise specific jurisdiction over an out-of-state defendant if the defendant engages in commercial activity in the forum state, and the action arises out of these activities.¹²² From the US point of view, this addition would most likely still be regarded as vital therefore in order to make the text of a Hague Protocol on International Direct Jurisdiction acceptable to US stakeholders.¹²³ The jurisdictional filter for jurisdiction in matters relating to a branch of the 2019 Hague Judgments Convention, Article 5(1)(d), does not reflect this standard of specific jurisdiction exercised on the basis of the activities of the defendant, nor do the other jurisdictional filters of the 2019 Hague Judgments Convention.

It could be argued that a new Hague instrument containing only a narrow green list of unified grounds of international direct jurisdiction would not be a worthwhile undertaking; however, even if a Hague Protocol on Jurisdiction only contains a narrow green list of unified grounds of international direct jurisdiction, this limited unification would still constitute a significant improvement as compared to the status quo in

¹²¹ ‘Preliminary Draft Convention adopted by the Special Commission and Report by Peter Nygh and Fausto Pocar – Preliminary Document No 11 of August 2000’, in Hague Conference, *Proceedings of the Twentieth Session (2005), Tome II, Judgments* (n 41) 191, art 9; 2001 Interim Text (n 41) Art 9(1); Statement Ms Nickerson (United States of America), ‘Minutes of the Second Commission – Minutes No 4’, in Hague Conference Proceedings, *ibid.*, 478, 496.

¹²² *International Shoe v State of Washington* 326 US 310, 317; 318; *Goodyear Dunlop Tires Operations SA Brown* 564 US (2011) (Slip Opinion) 2; *Bristol-Myers Squibb Company v Superior Court of California* 582 US (2017) 1, 7; Kovar (n 94) 7; see also above Part C.1.

¹²³ Cf Kovar (n 94) 7.

international civil and commercial litigation, and create a powerful new international instrument fostering legal certainty and access to justice.¹²⁴ By ensuring by means of an obligation under a Hague Protocol that these unified grounds of direct jurisdiction are available to litigants, litigants could easily, speedily and accurately identify those grounds of direct jurisdiction which are available for proceedings within the instrument's scope merely by looking into the text of the Protocol.¹²⁵ Moreover, the Protocol would ensure that these grounds of direct jurisdiction would also stay available until a Party would denounce its obligations under the Protocol, and it would encourage the uniform interpretation and application of these provisions in all Contracting Parties.¹²⁶

Creating an international judgments regime with an asymmetric relationship between its grounds of direct jurisdiction and its jurisdictional filters is a feasible and politically desirable option therefore.¹²⁷

3. Improving the appropriateness of grounds of international direct jurisdiction

As described above,¹²⁸ the Hague Protocol could also be used to proscribe the use of certain grounds of direct jurisdiction generally regarded as exorbitant by means of a red list.¹²⁹ This red list would oblige States not to use certain exorbitant grounds of international direct jurisdiction against defendants (habitually) resident/domiciled in a Contracting State for proceedings within the scope of the instrument.¹³⁰ Moreover, in

¹²⁴ Arthur T von Mehren, 'The Case for a Convention-mixte Approach to Jurisdiction to Adjudicate and Recognition and Enforcement of Foreign Judgments' (1997) 61 *Rechts Zeitschrift* 86, 92; Nygh (n 89) 162.

¹²⁵ Von Mehren, 'Reflections' (n 40) 23.

¹²⁶ See Part B.2.

¹²⁷ As argued by von Mehren in the context of the old Judgments Project: 'Jurisdictional Requirements' (n 73) A-39, A-40; see also Michaels (n 109) 59-62.

¹²⁸ See Part B.3.

¹²⁹ Cf von Mehren, 'New Approach' (n 21) 283 ('black list').

¹³⁰ Cf 2001 Interim Text (n 41) Art 18(2).

order to fully protect their nationals against the effects of these exorbitant grounds of international direct jurisdiction, Contracting Parties to the Hague Protocol could consider prohibiting other Contracting Parties from recognising and enforcing judgments rendered on such an exorbitant basis (ie, rendered on the basis of a jurisdictional provision on the red list of the Hague Protocol).¹³¹ The text of the 2019 Hague Judgments Convention as it stands currently does not contain such an obligation, as addressing matters relating to international direct jurisdiction, including exorbitant jurisdiction, was not covered by the mandate of the Working Group whose work lay the foundations for the Special Commission meetings on the Judgments Project and eventually for the adoption of the 2019 Hague Judgments Convention.¹³² In 2019, the Council of General Affairs and Policy of the Hague Conference confirmed the political will to resume work on international direct jurisdiction in 2020.¹³³ Introducing a provision prohibiting the recognition and enforcement of judgments rendered on an exorbitant basis into the text of the new Hague Protocol amending the 2019 Hague Judgments Convention might be considered, therefore.

¹³¹ This option was chosen for the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (adopted 1 February 1971; entered into force 20 August 1979), see Supplementary Protocol to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (adopted 1 February 1971; entered into force 20 August 1979), Arts 2 and 4; see also von Mehren, 'Recognition' (n 84) 458.

¹³² Permanent Bureau, 'Process Paper' (n 47) paras 1, 6-9, 20; see also above Part A.3.

¹³³ Hague Council Conclusions (n 61) para 5; the following 70 Members of the Hague Conference participated in the Council meeting, see *ibid* fn 1: Albania, Andorra, Argentina, Australia, Austria, Azerbaijan, Belarus, Belgium, Brazil, Bulgaria, Canada, Chile, People's Republic of China, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, European Union, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Jordan, Republic of Korea, Latvia, Lithuania, Luxembourg, Malta, Mexico, Monaco, Morocco, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of North Macedonia, Romania, Russian Federation, Saudi Arabia, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Viet Nam and Zambia.

D. Conclusion: non-exhaustive regulation of international direct jurisdiction by means of an asymmetric mixed convention

If the Hague Conference Members choose to create a Protocol on International Direct Jurisdiction which does not regulate the exercise of international direct jurisdiction comprehensively, the regime consisting of the Hague Protocol on International Direct Jurisdiction and the 2019 Hague Judgments Convention would create what has been described as a ‘mixed convention.’¹³⁴ This concept of a mixed convention, developed by Arthur von Mehren during the 1990s in the context of the old Judgments Project,¹³⁵ constitutes a hybrid between the two classic concepts for creating a convention on the recognition and enforcement of foreign judgments in civil and commercial matters:¹³⁶ a single convention focusing only on the recognition and enforcement of foreign judgments,¹³⁷ and a closed double convention which also creates unified grounds of international direct jurisdiction, regulating the exercise of international direct jurisdiction in an exhaustive way for proceedings within the convention’s scope.¹³⁸

Like a closed double convention, the mixed convention contains a green list of unified grounds of international direct jurisdiction which Contracting Parties have to make available to litigants, and on the basis of which Contracting Parties have to exercise

¹³⁴ Von Mehren, ‘New Approach’ (n 21) 283, 287 (‘convention mixte’); von Mehren, ‘Convention-mixte Approach’ (n 124) 89-92; von Mehren, ‘Reflections’ (n 40) 19.

¹³⁵ *Ibid*; Von Mehren, ‘Recognition’ (n 84) 457-459.

¹³⁶ Arthur T von Mehren, ‘Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project succeed?’ (2001) 29 *American Journal of Comparative Law* 191, 198.

¹³⁷ The 2019 Hague Judgments Convention constitutes an example of a single convention as, with its rules on recognition and enforcement of judgments, it contains common rules on only one of the three topics in private international law (international direct jurisdiction, the recognition and enforcement of foreign judgments, and applicable law), see von Mehren, ‘Reflections’ (n 40) 17, 18.

¹³⁸ Matthew H Adler and Michele Crimaldi Zarychta, ‘The Hague Convention on Choice of Court Agreements: The United States Joins the Judgment Enforcement Band’ (2006) 27 *New Journal of International Law & Business* 1, 11, 12; De Winter (n 23) 709; for proceedings against defendants domiciled in a Contracting State, the 2007 Lugano Convention provides an example for a closed double-convention regime, cf von Mehren, ‘New Approach’ (n 21) 275, 276, 283; von Mehren, ‘Reflections’ (n 40) 20.

international direct jurisdiction when these grounds are invoked by litigants (also called ‘required bases’ of jurisdiction).¹³⁹ Unlike under a closed double convention, the green list of a mixed convention would consist *only* of those provisions on which consensus exists among the negotiating States that direct jurisdiction must be available on that basis.¹⁴⁰ This also means that while this green list might initiate a law reform for some States (for example for those States which as yet lack specific grounds of direct jurisdiction in general¹⁴¹ or for certain types of claims), the main benefit of this green list

¹³⁹ Von Mehren, ‘New Approach’ (n 21) 283 (also called ‘white list’); von Mehren, ‘Reflections’ (n 40) 19; Beaumont, ‘The revived Judgments Project in The Hague’ (n 45) 532; Ronald A Brand, ‘Jurisdictional Common Ground: In Search of a Global Convention’ in Nafziger and Symeonides (n 89), 11, 15 fn 15; Michaels (n 109) 32, 33.

¹⁴⁰ Von Mehren, ‘New Approach’ (n 21) 287 (‘[bases] so clearly appropriate as to be recommended for this white list’); von Mehren, ‘Reflections’ (n 40) 27; von Mehren, ‘Convention-mixte Approach’ (n 124) 92; Nygh, ‘Arthur’s Baby’ (n 89) 154, 155.

¹⁴¹ The national law of the Republic of Korea does not provide for specific grounds of international direct jurisdiction (apart from jurisdictional rules for matters arising from consumer and employment contracts), see Kwang Hyun Suk, ‘Recognition and Enforcement of Foreign Judgments in the Republic of Korea’ (2013/2014) 15 *Yearbook of Private International Law* 421, 423, 424; Kwang Hyun Suk, ‘Korea’, in Jürgen Basedow et al (eds), *Encyclopedia of Private International Law – Volume 3 – National Reports A-Z* (Edward Elgar Publishing 2017) 2243, 2245; rather, Korean courts exercise international direct jurisdiction on the basis of the Korean Private International Law Act (Act No 13759), Art 2, which requires judges to develop rules on international direct jurisdiction on a case-by-case basis by applying case law and the venue provisions of the Code of Civil Procedure of the Republic of Korea, see Suk, ‘Korea’, in Basedow (n 141) 2245; this process is characterised by uncertainty and has been criticised therefore, see Suk, ‘Recognition’ (n 141) 424; see also Junhyok Jang, ‘Issues and Tendencies in Reforming Korean Law of International Jurisdiction – Paper presented at Wonkwang University and Hanyang University International Conference – The Diverse Version of International Jurisdiction Clauses: From the Perspective of EU and East Asia – 28 June 2014’ (on file with author) 1, 4; equally, the national law of Indonesia does not seem to contain specific grounds for exercising personal jurisdiction over an out-of-State defendant, see Yu Un Oppusunggu and Gary F Bell, ‘Indonesia’, in Basedow (n 141) 2162, 2163; Sudargo Gautama, ‘International Civil Procedure in Indonesia’ (1996) 6 *Asian Yearbook of International Law* 87, 90-92; rather, Indonesian law provides for a *forum actoris* against defendants without a residence in Indonesia if the claimant is habitually resident in Indonesia (jurisdiction is exercised on the basis of the principle contained in the repealed 1847 Code of Civil Procedure, Art 99(3)), and for a *forum actoris* against a defendant without a residence in Indonesia for obligations arising from transactions with Indonesian nationals (jurisdiction is exercised on the basis of the principle contained in the repealed 1847 Code of Civil Procedure, Art 100), see Oppusunggu and Bell (n 141) 2163; Gautama (n 141) 91, 92; by means of the Hague Protocol (and the 2019 Hague Judgments Convention), Indonesian courts could exercise jurisdiction over and render judgments against defendants without a residence in Indonesia, with the recognition and enforcement of these judgments ensured by the 2019 Hague Judgments Convention, thereby enhancing access to justice for Indonesian claimants, cf Gautama (n 141) 92; Indonesia is not currently a Member State of the Hague Conference, see ‘Status table’ of the Statute of the Hague Conference on Private International Law, <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=29>> accessed 5 February 2020; nor has it signed or acceded to the 2019 Hague Judgments Convention (n 55); however, the 2019 Hague Judgments Convention is open for accession by all States according to its Art 24(3); it can also be expected that the Hague Protocol would be open for signature or accession by all States, since Hague Conventions traditionally have been open to all States, see Hans van Loon and

for States will consist in the codification of generally acceptable standards for the exercise of international direct jurisdiction in an international instrument. The codification of these grounds of direct jurisdiction in a binding international instrument will ensure that these grounds are in fact available for litigants, that these grounds stay available and that these unified grounds of direct jurisdiction will be interpreted uniformly in all Contracting States.¹⁴² At the same time, the recognition and enforcement of judgments rendered on the basis of this green list would be guaranteed by the regime (ie, for the purposes of the Hague Judgments Project, by means of the 2019 Hague Judgments Convention).¹⁴³ For the purposes of the Hague Judgments Project, this green list would be contained in the Hague Protocol on International Direct Jurisdiction.¹⁴⁴

The characteristic feature of a mixed-convention regime which sets it apart from a closed double convention is that it allows its Members to continue to exercise international direct jurisdiction on the basis of their national law (the so-called ‘grey’ or ‘permitted’ area’)¹⁴⁵ in addition to unified grounds of direct jurisdiction of the instrument.¹⁴⁶ The mixed-convention approach therefore can result in the situation that

Andrea Schulz, ‘The European Community and the Hague Conference on Private International Law’, in Bernd Martenczuk and Servaas van Thiel (eds), *Justice, Liberty, Security: New Challenges for EU External Relations* (Brussels University Press 2008) 257, 257, 258.

¹⁴² See above Part B.1 and 2.

¹⁴³ Von Mehren, ‘New Approach’ (n 21) 283; von Mehren, ‘Reflections’ (n 40) 19.

¹⁴⁴ Since both the Hague Protocol and the 2005 Hague Choice of Court Convention would apply to the same subject matter (jurisdiction in civil and commercial matters), it seems advisable to include a rule in the Protocol as the later instrument preserving the applicability of the jurisdictional provisions of the 2005 Hague Choice of Court Convention, see 1968 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 8 *International Legal Materials* 679, Art 30(2) and (3); Andrea Schulz, ‘The Relationship between the Judgments Project and other International Conventions – Preliminary Document No 24 of December 2003’ <<https://assets.hcch.net/docs/70906466-8541-4b08-b447-5c4dd100db3b.pdf>> accessed 2 February 2020 paras 8-15; 52-66; cf also Alexander Orakhelashvili, ‘Article 30’, in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties* (Oxford University Press 2011) 765, 789, paras 65-67.

¹⁴⁵ Beaumont, ‘The revived Judgments Project in The Hague’ (n 45) 532; Brand, (n 139), 11, 15 fn 15; Michaels (n 109) 32, 33; see also above Part C.1.

¹⁴⁶ Von Mehren, ‘Recognition’ (n 84) 458; von Mehren, ‘New Approach’ (n 21) 283.

the unified grounds of direct jurisdiction in the green list of the Protocol are drafted in a similar or even identical way to the national jurisdictional provisions in the grey area. For example, the green list of the Hague Protocol might contain a provision granting jurisdiction in matters relating to torts to the courts of that State in which the act or omission that caused the injury occurred (cf 2001 Interim Text, Art 10(1)(a)), which reflects a jurisdictional concept already existing in some national legal systems, as, for example, in Germany.¹⁴⁷ The difference between the jurisdictional provisions in the green list and the jurisdictional provisions in the grey area is that the existence of the provisions in the green list is guaranteed by the Protocol, that the Contracting Parties are obliged to exercise international direct jurisdiction on these bases if the pertaining conditions for their application are fulfilled (subject to any rules on *lis pendens*/declining jurisdiction), and that the provisions in the green list will be interpreted in the same way in all the Contracting Parties, which will foster legal certainty and predictability for litigants.¹⁴⁸

What is more, the list of unified grounds of international direct jurisdiction in the Hague Protocol could be smaller than the list of jurisdictional filters of the 2019 Hague Judgments Convention. In this way, the Hague Protocol and the 2019 Hague Judgments Convention could create what can be described with the term ‘asymmetric mixed convention’, a concept that had been developed by von Mehren in the late 1990s,¹⁴⁹ and which was further elaborated by Ralf Michaels in 2006.¹⁵⁰ That means that the recognition

¹⁴⁷ German Code of Civil Procedure, Art 32: ‘For claims arising from torts, the court shall have jurisdiction in whose territory the tort has been committed.’ (translation by the author); Art 32 provides for jurisdiction at both the place where the tort has been committed and where the injury resulting from this tort occurred, Federal Court of Justice, decision of 29 June 2010, VI ZR 122/09, para 14.

¹⁴⁸ See above Part B.

¹⁴⁹ This idea was first hinted at in von Mehren, ‘Reflections’ (n 40) fn 16, and further developed in von Mehren, ‘Jurisdictional Requirements’ (n 73) A-39 and A-40; see also von Mehren, ‘Can the Hague Conference Project succeed?’ (n 136) 198, 199.

¹⁵⁰ Michaels (n 109) 59-62.

and enforcement of judgments rendered on the basis of a jurisdictional provision on the green list of the Hague Protocol would be ensured by the 2019 Hague Judgments Convention. In addition, the 2019 Hague Judgments Convention would continue to ensure the recognition and enforcement of judgments that have been rendered by States bound by the Convention merely on the basis of a jurisdictional provision of their national law (if these provisions match one of the jurisdictional filters of the Hague Judgments Convention). Besides, the agreement of a green list could induce States to accept the prohibition of the use of certain exorbitant grounds of international direct jurisdiction by means of a red list (the so-called ‘prohibited bases’ of jurisdiction¹⁵¹).¹⁵² Finally, the Hague Protocol could also require that its Contracting Parties deny the recognition and enforcement of judgments rendered on such an exorbitant basis (by means of what could be called a red list of indirect grounds of jurisdiction, or a list of ‘excluded bases of indirect jurisdiction’¹⁵³).¹⁵⁴

If the Experts’ Group and the Hague Conference Members decide to work towards an international instrument as described above, then von Mehren’s idea of a mixed convention finally might come to fruition after 30 years.¹⁵⁵

¹⁵¹ Von Mehren, ‘Reflections’ (n 40) 19.

¹⁵² See above Part B.3.

¹⁵³ Michaels (n 109) 59.

¹⁵⁴ Von Mehren, ‘Recognition’ (n 84) 458.

¹⁵⁵ The Hague Council in March 2020 accepted the proposal of the Experts’ Group to continue its work with two more meetings before the Hague Council in 2021, see <<https://assets.hcch.net/docs/70458042-f771-4e94-9c56-df3257a1e5ff.pdf>> accessed 20 April 2020.