

**RELATIONSHIP WITH OTHER CONVENTIONS AND
INTERGOVERNMENTAL ARRANGEMENTS – SOME GENERAL
PRINCIPLES – DISCUSSION DRAFT 1**

Preliminary comments

The need for general principles

- 1 Most of the discussion about the proposed Convention's relationship with other conventions has, unsurprisingly, focused on the issues raised by the Brussels and Lugano Conventions. But the same basic issues also arise in relation to a number of existing bilateral and regional agreements, and subject-specific conventions in fields such as transport. And it seems likely that more bilateral and regional arrangements and subject-specific multilateral agreements on jurisdictional issues and the effects of judgments will be entered into in the future, as States address the legal and regulatory implications of increased trade, movement of persons, and economic and social integration generally.
- 2 Thus it seems desirable to have a set of general principles in the Convention that can be applied to determine its interaction with existing and future intergovernmental arrangements that overlap with the issues addressed by the Convention.
- 3 Identifying general principles of this kind should also help us to think about the position in relation to Brussels/Lugano – starting from the general approach, we can ask whether additional rules are required to address additional issues raised by Brussels/Lugano, and why, and what they should say.

Intergovernmental arrangements, not just conventions

- 4 In the preceding paragraph, I referred to “intergovernmental arrangements”, rather than treaties or conventions. This is intended to highlight another respect in which our initial discussions, in focusing on disconnection from other conventions, may have been too narrow. Arrangements between governments in relation to allocation of jurisdiction and enforcement of judgments have generally, in the past, been reflected in treaties of some kind. But this is not always the case. The recent Brussels regulation is the most significant example of an instrument addressing such issues which is effective in more than one country, without itself taking the form of a treaty. Another existing non-treaty model is the reciprocal enforcement of judgments regime implemented in many Commonwealth countries, and a few others, by means of mirror legislation (and extension of the

regime to named countries by subordinate legislation) – all without an underlying treaty.¹

- 5 We should keep our analysis of the issues as general as possible to begin with, it seems to me, and think about the issues raised by a wide range of existing and potential arrangements. It may not be possible to address all of these in our Convention, but the issues need to be identified, and the advantages and disadvantages of addressing them carefully considered.

The Convention can coexist with other arrangements

- 6 An important insight that has been provided by the Permanent Bureau’s working paper on the Convention’s relationship with Brussels/Lugano is that there is not necessarily a problem – a “conflict” – just because the proposed Convention intersects in some way with another arrangement. There need not always be a “disconnection” – in many cases the Convention can coexist with the other arrangement, and they can operate either in parallel (eg where both provide for jurisdiction in the same State, and provide a mechanism for enforcement in another State) or can complement each other (eg where a judgment in State A can be enforced both in Hague Contracting States under the proposed convention, and in other States under other arrangements). Rather than moving straight to questions of disconnection, we need to go further and ask how the various possible “intersections” might arise, and what issues they pose.
- 7 In this paper I begin by noting why it is that the Convention often will be able to coexist with other arrangements. I then identify the circumstances in which the Convention will indeed conflict with other arrangements, giving rise to issues that we need to address. I suggest five basic principles to govern the resolution of these issues – principles which might either be cast in the form of general rules in our Convention, or used as a test for other proposed rules.

Overlap between the Convention and other arrangements

- 8 As the very helpful paper prepared by the Permanent Bureau for the recent Ottawa II meeting explains, the Convention may overlap with other arrangements, such as Brussels/Lugano, without giving rise to any conflict. There is no conflict, for example, where the Convention provides for State A to have jurisdiction, and under Brussels/Lugano State A also has jurisdiction to determine the claim.

¹ Use of mirror legislation also characterises many of the trans-Tasman legal cooperation arrangements entered into between the New Zealand and Australian Governments in fields such as enforcement of competition law judgments, tax enforcement, taking of evidence, and so forth.

- 9 Several features of the proposed Convention are particularly relevant to the potential for overlap:
- 9.1 it is a mixed convention – so the mere existence of other jurisdictional grounds under the law of a Contracting State does not of itself give rise to a conflict;
- 9.2 the Convention’s enforcement regime does not depend on the Convention being expressly invoked at the initial (jurisdictional) stage. Enforcement of a judgment is available under Chapter III provided that the judgment was, *or could have been*, given under Chapter II (Art 25(1)). Thus for example a purely domestic case, to which Chapter II does not apply (see Art 2(1)), will always – since the defendant is by hypothesis habitually resident in the State of the court of origin – meet the requirements of Art 25(1) and be capable of enforcement under Chapter III (subject of course to the other criteria for enforcement);²
- 9.3 the Convention does not seek to govern internal mechanisms for enforcement of domestic judgments within each Contracting State. It does not, for example, apply to enforcement in Queensland of a judgment given in New South Wales, or to enforcement in New York of a judgment given in California. That is left to national law. This provides an important analogy for thinking about cross-border enforcement regimes;
- 9.4 likewise, the Convention does not seek to govern internal allocation of competence between the courts in a given Contracting State. Questions of venue (and subject-matter competence, including allocation between state and federal courts) are determined by the national law of each Contracting State. To the extent that cooperation between States results in allocation rules which are analogous with internal allocation rules in a federal State, the Convention should be able to co-exist with such rules.

Conflict between the Convention and other arrangements

- 10 The first draft of this paper included complex matrices showing the different rules that might be found in the proposed Convention, and in other arrangements. But the results were self-evident enough to spare readers that level of detail. In

² Often, even in international cases, the court of origin will not be concerned to decide whether or not it is exercising white list jurisdiction – provided it has jurisdiction under national law, and the black list does not apply, it has no need to inquire into this issue. The question whether it had white list jurisdiction, as opposed to grey, need only be determined at the enforcement stage – see the rapporteurs’ report at p 46 ff, discussing Art 5 in relation to submission to jurisdiction.

summary, the proposed Convention could conflict with another arrangement only in the following situations:

- 10.1 the Convention provides for State A to exercise jurisdiction, but under the other arrangement State A is required not to exercise jurisdiction (either because of a simple exclusion of State A's competence, or because the other arrangement specifies circumstances in which State A should decline jurisdiction, and that test is met);
- 10.2 the Convention requires State A to refrain from exercising jurisdiction because another Contracting State has exclusive jurisdiction under the proposed Convention, but the other arrangement provides for State A to exercise jurisdiction;
- 10.3 the Convention requires State A to refrain from exercising jurisdiction because the only basis for asserting jurisdiction is prohibited by the black list (Art 18), but the other arrangement provides for State A to exercise jurisdiction;
- 10.4 the Convention provides for State A to decline to exercise jurisdiction (under Art 21 or Art 22, or under Art 4 where a forum clause designates a non-Contracting State), but the other arrangement provides for State A to exercise jurisdiction (and either expressly prohibits, or does not contemplate, State A's courts declining to exercise that jurisdiction);
- 10.5 State A and State B are both parties to the Convention, and to another arrangement which provides for a judgment from State A to be enforced in State B, and the procedure and/or criteria for enforcement differ from those in the Convention. The result may be that:
 - 10.5.1 the judgment is enforceable in State B under the Convention, but its enforcement is not permitted, or is prohibited, under the other arrangement; or
 - 10.5.2 the judgment is enforceable in State B under the other arrangement, but its enforcement is not required under the Convention;
 - 10.5.3 the judgment is enforceable in State B under the other arrangement, but its enforcement in State B is prohibited under the Convention because it was founded on a black list ground of jurisdiction in the court of origin, or because some other Contracting State has exclusive jurisdiction;

10.5.4 the judgment is enforceable in State B under both the Convention and the other arrangement, but the procedures for enforcement differ, and one is more advantageous to the judgment holder than the other. (For example, Brussels/Lugano provides for enforcement without the degree of control by the court addressed that the Convention contemplates.)

11 Thus we have five basic types of “conflict” to think through, with some common elements. In the annexure to this paper, I work through each in turn. That analysis suggests five guiding principles, which are set out below.

Five principles

12 The conclusions I have *tentatively* reached can be summarised by five principles, which are intended to reflect the core features of our Convention that should not be derogated from by other arrangements.

- 1 A plaintiff from a Contracting State should not be denied access to a white list jurisdiction (exclusive or non-exclusive) in State A by reference to another arrangement entered into by State A unless either:
 - (a) the State in which the plaintiff is habitually resident is itself a party to that arrangement; or
 - (b) the arrangement provides for the claim to be heard in another Contracting State, which also has white list jurisdiction under the Convention. (The requirement that the other State must have white list jurisdiction could be omitted if and only if the Convention provides for enforcement where, under an arrangement between two Contracting States, a State with white list jurisdiction refers the claim to the courts of the other Contracting State. In essence, the judgment of the courts of State B would be treated as if it had been given by the courts of State A, by virtue of the arrangement – a sort of “delegated white list jurisdiction.”)
- 2 A plaintiff should not be permitted to bring a claim in Contracting State A in respect of which Contracting State B has exclusive jurisdiction under the Convention, based on some other arrangement entered into by State A, unless State B is a party to that arrangement and has authorised State A to exercise jurisdiction in such claims.

- 3 A defendant who is habitually resident in a Contracting State is entitled to invoke the black list to prevent State A from hearing a claim against that defendant, despite another arrangement entered into by State A which provides for that State to hear the claim, unless:
- (a) the State in which the defendant is habitually resident is a party to that arrangement; or
 - (b) (possibly) State A has entered into an arrangement with another Contracting State which has white list jurisdiction under the Convention, in accordance with which State A is authorised to hear such claims; or
 - (c) (possibly) State A has entered into an arrangement with another Contracting State which is not prohibited from exercising (national law) jurisdiction under the Convention, in accordance with which State A is authorised to hear such claims
- 4 A party is entitled to request State A to decline jurisdiction under Articles 21 and 22 or the second limb of Art 4(1), despite the existence of another arrangement entered into by State A which requires State A to hear the claim, unless:
- (a) the State in which that party is habitually resident is a party to the arrangement which provides for State A to hear the claim; or
 - (b) the State of a court to which State A is required to defer under Art 21 or Art 22 is a party to the arrangement, and under that arrangement, the courts of State A are to hear the claim.³
- 5 A person who has obtained a judgment in one Contracting State, State A, and wishes to enforce it in another Contracting State, State B, should be permitted to choose between the Convention regime for enforcement/recognition and any other regime which may operate between States A and B, unless (perhaps) there is an arrangement prohibiting enforcement in State B to which State A and the State of habitual residence of the person seeking enforcement are also parties.

³ As with principle 1(b), an exception may be needed where State A does not have white list jurisdiction, and the court indicated by Art 21 would have white list jurisdiction, unless State A can be treated as having delegated white list jurisdiction.

What use are these principles?

- 13 How can these principles be used – what is all this for?

Principles as a yardstick for assessing proposals

- 14 First and foremost, the principles are intended to provide a yardstick by which to measure any proposal for a “disconnection” or “connection” clause – they point to the issues that need to be considered in order to determine whether the proposed clause is consistent with the basic principles that underpin our Convention. Any departure from these principles would require clear, compelling justification, as it would be at odds with the structure we are seeking to build.
- 15 For example, the principles can be used to test the idea canvassed in the Permanent Bureau’s note that the Convention could provide that where the Convention designates any Brussels/Lugano State, the Brussels/Lugano instruments would be applied to determine which Brussels/Lugano State would hear the claim.
- 16 This proposal would raise no concerns under principles 2 or 5 or (provided exception (b) is accepted) under principle 3.
- 17 But there are potential issues in respect of principle 1, if plaintiffs could end up being referred to another State which is not a Contracting State, or which does not have white list jurisdiction so cannot give a judgment capable of recognition under the Convention.
- 18 And principle 4 would also be contravened unless the Brussels/Lugano State to which the claim was referred would also apply Articles 21 and 22 where a party from a non Brussels/Lugano State argued that another non Brussels/Lugano State was first seized, or was clearly more appropriate to hear the claim.
- 19 Since satisfaction of principle 3 depends on our accepting some sort of concept of delegated/referred white list jurisdiction, we could solve most of the concerns identified in paras 17 and 18 by adding two supplementary rules to the Permanent Bureau’s basic concept:
- 19.1 the courts to which the claim is referred under Brussels/Lugano must also apply Articles 21 and 22 where a party from a non Brussels/Lugano State argues that some non Brussels/Lugano State was first seized, or is clearly more appropriate to hear the claim;
- 19.2 the judgment of the courts of the Contracting State to which the claim is referred is enforceable under the Convention as if it had been given by the courts of the referring State.

- 20 This would mean that the only necessary limit on the effectiveness of a regime of the kind described by the Permanent Bureau would be that a refusal to hear a claim by a Brussels/Lugano State pursuant to the Brussels/Lugano arrangements would only be permitted where it is deferring to the courts of another Brussels/Lugano State which is a *Contracting State* under our Convention.
- 21 This analysis illustrates the use of the principles to assess a possible approach, and to identify the additional safeguards that would be required to ensure it is consistent with the basic scheme of our Convention.

Principles as the basis for drafting general rules?

- 22 Second, it may be possible to use the principles as the elements of a general “relationship with other arrangements” provision, applicable to all present and future arrangements. This seems appealing so far as principles 2 and 5 are concerned, and plausible (but more difficult) so far as principles 1 and 4 are concerned. Principle 3 is the most problematic: it has the potential to be “gamed” in a way that seriously undermines the black list’s effectiveness, depending on which exceptions are accepted, especially given the breadth of principle 5.
- 23 In order to stimulate debate, I thought it might be useful to describe one possible approach to establishing a general regime to address the relationship between the Convention and other arrangements, based on the five principles. It seems to me that the principles could be satisfied, and some measure of transparency in relation to other arrangements achieved, by providing in our Convention that:
- 23.1 a Contracting State can make a declaration that it is a party to another arrangement providing for matters relating to jurisdiction and/or enforcement of judgments, giving the particulars of the other States which are parties to that arrangement and of the instrument (treaty, regulation, domestic legislation etc) in which the arrangement is set out; and
- 23.2 where two or more Contracting States have declared that an arrangement is in force between them, and the parties to a dispute are all habitually resident in States which have made such a declaration (or are habitually resident in non-Contracting States), the courts of those States may apply the arrangement to questions of jurisdiction and enforcement in relation to that dispute, rather than applying the Convention;
- 23.3 where the Convention provides for jurisdiction to be exercised in a Contracting State that has made such a declaration, the other arrangement may determine whether that Contracting State exercises jurisdiction or refers the claim to another Contracting State that is a party to the arrangement. If the claim is so referred, the Contracting State to which the

claim is referred is treated as having jurisdiction under the Convention, with the result that:

23.3.1 it must apply Articles 21 and 22, if called on to do so by a party who is not habitually resident in a State which is a party to the arrangement;

23.3.2 a judgment rendered in that State is enforceable under the Convention;

23.4 where two or more Contracting States have declared that an arrangement is in force between them, enforcement and recognition in one of those States of judgments given in another is permitted pursuant to the Convention or pursuant to the arrangement, at the option of the person seeking enforcement/recognition. [However enforcement under the Convention may be denied by a Contracting State where the declared arrangement requires this, provided that the State of the court of origin and the State in which the person seeking enforcement is habitually resident are also parties to the arrangement.]

24 I have not yet attempted to draft a clause based on this approach. It seemed to me more useful to expose the principles, and their justifications, to debate and comment – if they are tested and found to be more or less sound, then drafting on the basis of those principles may be the next step.

25 Meanwhile, I have described this document as a “discussion draft” precisely because I am sure that discussion will reveal better ways of describing or resolving some of these issues – I anticipate this being an evolving document, which will be modified and improved over time in response to comments received.

26 I look forward to a vigorous debate!

David Goddard
10 April 2001

ANNEXURE – DETAILED ANALYSIS OF “CONFLICT” SITUATIONS

- 1 In this annexure I set out in some detail an analysis of the situations in which our Convention may conflict with other arrangements in relation to jurisdiction and judgments, and of the interests in play in such situations.

Issue A: Hague convention provides for jurisdiction in State A, other arrangement prohibits exercise of jurisdiction by State A

- 2 First, consider the position where the Convention provides for State A to exercise jurisdiction, but under other arrangements entered into with State B, State A is required to refrain from doing so (either as a general rule, or as the result of applying a test for declining jurisdiction provided for in that other arrangement).
- 3 Some examples may be helpful. Consider:
- 3.1 example A: a Canadian owns an apartment in Nice, which she lets for a period of 10 months to a tenant who is habitually resident in Germany. The tenant damages the apartment, and the Canadian owner proposes to sue for her loss. Under our Convention, the German courts have jurisdiction under Art 3 (and Art 12(1) would not apply, even if it is retained unaltered). Under Art 22(1) of the Brussels Regulation, my understanding is that the French courts would have exclusive jurisdiction, with the result that the German courts should decline to hear the claim;
- 3.2 example B: assume that the Australian inter-state regime under the Service and Execution of Process Act 1992 (Cth) is extended to New Zealand, with the result that proceedings issued in any Australasian court may be served anywhere in Australasia as if they were domestic proceedings, without needing to apply any special rules for service out of the jurisdiction, and with questions of venue within Australasia being determined by a statutory *forum conveniens* test. A Swiss plaintiff sues a defendant who is habitually resident in Queensland in the courts of New South Wales. Assume also that Art 22 of our Convention would not require a transfer of the proceedings away from Australia, but applying the statutory *forum conveniens* test the NSW courts determine that the proceedings would more appropriately be heard in New Zealand, where all the evidence is located.
- 4 The basic approach of our draft Convention is that each Contracting State makes a commitment to each other Contracting State that it will make white list fora available to plaintiffs from that other Contracting State in claims against any defendant, whether the defendant is a habitual resident of the forum State or of any other State. That is why Art 2(1) is expressed in the way that it currently is,

rather than confining Chapter II to disputes between parties who are habitually resident in different Contracting States.

- 5 We need not be concerned about the possibility that State A's jurisdiction under the Convention may have been exclusive, reflecting a special interest of State A in having the claim resolved by its own courts. If State A has entered into an arrangement under which the claim is to be resolved by the courts of State B, the special interest of State A in asserting exclusivity is no longer in issue.
- 6 But in general, it would be inconsistent with the approach of our Convention for the court in which the claim is brought in State A to decline jurisdiction where the plaintiff is habitually resident in another Contracting State (State P, say), and the Convention provides for State A to exercise jurisdiction. To this proposition there are two very important exceptions:
 - 6.1 if State P (the plaintiff's habitual residence) is also a party to the arrangement, and has agreed that State A will not exercise jurisdiction in these circumstances. This follows either from asking whether any other Contracting State has an interest in a different result (the answer is no), or by applying the analogy with a federal State to the relationship between State A and State P;⁴
 - 6.2 if State A and another Contracting State, State B, have agreed that such cases will be heard in State B, which also has white list jurisdiction under the Convention. In these circumstances, the hearing will still be in a Contracting State, and the judgment will still be enforceable under the Convention. The analogy with internal venue rules in a Contracting State which has jurisdiction under the Convention seems strong. The plaintiff is in a situation comparable to needing to understand the internal venue rules of such a federal State in order to know where to file in that State – the only difference is that those “internal rules” point to State B, rather than to a particular location in State A. It seems no more onerous for the plaintiff to be required to sue in State B than in a distant part of a federal State.
- 7 The conclusion that there is no prejudice to the plaintiff in the latter case depends critically on the two conditions mentioned, however, which together ensure that the resulting judgment will be just as enforceable under the Convention as if State A had exercised jurisdiction:

⁴ This exception is the one provided for in the US proposal sketched out in Basel – it is certainly appropriate, but does not cover the entire range of legitimate exceptions.

- 7.1 State B being a Contracting State;
- 7.2 State B having jurisdiction under the Convention. The need for this requirement to be satisfied could however be removed if the Convention provided for enforcement where, under an arrangement between two Contracting States, a State with white list jurisdiction referred the claim to the courts of the other Contracting State – in essence, the judgment of the courts of State B would be treated as if it had been given by the courts of State A, by virtue of the arrangement.
- 8 In example A, there is no prejudice to the Canadian plaintiff in being required to sue in France rather than Germany provided that France is a Contracting State, and the resulting judgment will be enforceable under the Convention. Similarly, in example B, the Swiss plaintiff is not prejudiced by being required to sue in New Zealand any more or less than she would be by being referred from a New York court to a Californian court under the national laws of the United States, in a case where the United States had jurisdiction under the Convention.
- 9 I am attracted by the idea mooted in the note prepared by the Permanent Bureau that if our Convention designates a Brussels/Lugano State, the particular court within the Brussels/Lugano regimes would be determined by Brussels/Lugano. The same approach might also be applied to other arrangements. But this works (in the sense of being fair to the plaintiff, and consistent with the legitimate expectations of the Contracting State in which the plaintiff is habitually resident) only if either:
- 9.1 all parties are habitually resident in Brussels/Lugano States (by virtue of the first exception, set out in para 6.1); or
- 9.2 both requirements in para 7 are satisfied. The requirement in para 7.1 that the court to which the claim is referred be in a Contracting State appears essential. The second requirement in para 7.2 could be addressed by means of some sort of concept of “delegated white list jurisdiction”, as outlined in para 7.2: this would need to be written into our Convention, if this is the preferred approach.
- 10 It seems to me that we cannot afford to relax any of these conditions in paras 6 and 7, without a real risk of future arrangements (or variations of existing arrangements) seriously undermining the scheme of the convention.

Issue B: Hague convention provides for State B to have exclusive jurisdiction, other arrangement provides for State A to exercise jurisdiction

- 11 The next context in which there is a genuine tension between the Convention and another arrangement arises where the Convention provides for State B to have exclusive jurisdiction, but another arrangement entered into by State A, also a Contracting State, provides for State A to exercise jurisdiction. When (if ever) should State A be permitted to do so?
- 12 What interests are in issue here?
- 13 In this situation we clearly need to bear in mind State B's interest in having its courts deal with an issue in which it is likely to have a particular interest, as reflected in the provision for exclusive jurisdiction in the Convention.
- 14 Thus the basic requirement that would need to be satisfied before it would be proper for State A to exercise jurisdiction in such a case appears to be an arrangement between State A and State B, under which State A is authorised by State B to exercise jurisdiction. If State B has consented to the exercise of jurisdiction by State A in such a case, its interests in exercising an exclusive jurisdiction are no longer in issue.
- 15 Are there any other conditions that should apply in this case? The plaintiff (and the State in which the plaintiff is habitually resident) have an interest in having the forum made available in State B (the same issue that arose in the context of the first issue, discussed above). But the plaintiff's interests should not concern us, if the plaintiff has chosen to pursue the claim in State A, knowing that any judgment will not be enforceable under the Convention.⁵
- 16 The Contracting State in which the defendant is habitually resident (State D, say) may also have a legitimate interest in ensuring that jurisdiction is not exercised in State A, even where State D is not the State with exclusive jurisdiction. This is most apparent where the exclusivity stems from a forum agreement entered into by the parties – each Contracting State has an interest in ensuring that valid forum clauses entered into by its habitual residents are given effect, in order to reduce uncertainty and avoid unnecessary risk and costs.
- 17 However the analogy with federal States suggests that even where a forum clause designates State B, an arrangement between States A and B under which State A

⁵ State A would not have jurisdiction under Chapter II since State B has exclusive jurisdiction, and Art 26 expressly provides that a judgment from State A must not be enforced in other Contracting States where State B had exclusive jurisdiction under the Convention.

may exercise jurisdiction should be given effect. This argument is developed in more detail in relation to Issue C below. If this analogy is appropriate, the only condition that would need to be satisfied would be that specified in para 14 above.

Issue C: Hague convention black list applies to State A, other arrangement provides for State A to exercise jurisdiction

- 18 The next (and most complex) issue to be considered arises where Contracting State A is prohibited from hearing a claim by virtue of the black list in Art 18, but another arrangement entered into by State A provides for State A's courts to hear the claim.
- 19 Although white list grounds of jurisdiction may be invoked in a Contracting State against any defendant, whether or not habitually resident in a Contracting State, the objection that jurisdiction is prohibited by the "black list" is only available to defendants who are habitually resident in a Contracting State. Art 18(1) of the October 1999 draft makes this explicit.
- 20 So there is no conflict between the black list provisions of the Convention and another arrangement where that other arrangement provides for jurisdiction to be exercised in respect of a defendant who is not habitually resident in a Contracting State, whatever the basis for jurisdiction.⁶
- 21 Where a defendant is habitually resident in a Contracting State, on the other hand, that Contracting State has an interest in black list jurisdiction not being exercised in respect of that defendant, and an expectation under the Convention that State A will decline to hear the claim.
- 22 This points us towards the first exception in which another arrangement should be permitted to override the Convention's black list: namely where the Contracting State in which the defendant is habitually resident is a party to the arrangement. If, for example, two adjacent States were to agree that proceedings issued in the courts of the other would be treated as if they were ordinary domestic proceedings, with no special rules for jurisdiction, and automatic mutual recognition and enforcement (cf the internal rules as between States in Australia, under the Service and Execution of Process Act 1992 (Cth)), there cannot be any objection to this from defendants who are habitually resident in either State. The analogy with federal States is helpful here: if two countries wish to agree to form a single "law area", akin to a federal state for jurisdiction and judgment enforcement purposes, the Convention should not preclude this at least to the

⁶ But note that enforcement of the resulting judgment in other Contracting States will be required only if jurisdiction was, or could have been, exercised on a white list ground.

extent that its operation is purely internal, and affects only habitual residents of the States which are parties to the arrangement (or habitual residents of non-Contracting States).

- 23 There is a second possible exception here, which requires consideration. It links back to the idea of “delegated Convention jurisdiction” mentioned in relation to Issue A above, and builds on the analogy with a federal State. Suppose Contracting States A and B have agreed to form a single law area, in which the courts of each are free to exercise jurisdiction, with full mutual recognition and enforcement of judgments without any need for control. There are agreed rules for determining venue, but this does not go to jurisdiction. (This is the sort of arrangement described in example B in para 5.2 above.) Now suppose that a plaintiff brings a claim in State A against a defendant who is habitually resident in State D, which is also a Contracting State, and suppose also that under the Convention the black list would prohibit State A from hearing the claim, but State B would have white list jurisdiction to hear the claim. Is it acceptable for the courts of State A to hear the claim, if the law in State B, pursuant to the arrangement with State A, provides for the claim to be referred to those courts?
- 24 From one perspective, this may not seem appropriate – if the Convention prohibits State A from hearing the claim, because there is no substantial connection between State A and the dispute or the defendant, why should the other arrangement override this? On the other hand, the Convention does not dictate to federal states where, within those states, a claim should be heard – why should this not be equally true of “legal coordination zones” formed for particular purposes? If there is a connection with part of the coordination zone, why should the Convention dictate where in that zone the claim is heard? (It might well be the case, for example, that the United States would have white list jurisdiction over a claim in respect of which California, if viewed in isolation as if it were a separate State, would have no basis for asserting jurisdiction that would not run foul of the black list: eg where a defendant who is habitually resident in New York is served with proceedings issued in the California State Court during a brief visit to California. The Convention allows the national law of the United States to determine whether the claim should be heard in California, rather than in the part of the United States more closely connected with the defendant. Why should a group of two or more countries be precluded by the Convention from implementing similar shared “internal” rules?)
- 25 This approach seems reasonable – but there may be a slight risk that adoption of a general principle along these lines would enable the black list to be impaired by bilateral and regional arrangements.

- 26 The risk of the black list being undermined would be even more acute if the analogy with a federal regime were extended to permit a third exception under which State B could authorise State A to hear the claim despite State A otherwise being precluded from doing so by the black list in any situation where State B was not itself precluded from hearing the claim – ie State B did not have white list jurisdiction, but was not prevented from asserting jurisdiction at national law by the black list. The analogy still operates – but the potential for evasion of the black list seems considerable.
- 27 Further analysis of these issues is required. Their resolution is very relevant to the approach suggested by the Permanent Bureau: it would be appropriate to provide that the Brussels/Lugano arrangements determine where a claim will be heard if our Convention indicates any Brussels/Lugano State only if the second exception described in para 23 above is considered acceptable in principle. (The third exception described in para 26 above does not seem necessary to enable such a rule to be adopted). If the second exception is not accepted, some qualification of the approach outlined by the Permanent Bureau would be required, to ensure that the black list continued to be fully effective and that Brussels/Lugano could not provide for a claim in respect of which one Brussels/Lugano State had white list jurisdiction to be heard in another Contracting State where the black list would bar the claim being heard.

Issue D: Hague convention provides for State A to decline jurisdiction, other arrangement provides for State A to exercise jurisdiction

- 28 Under the Convention, State A may be required:
- 28.1 to decline to exercise a white list or grey list jurisdiction if another Contracting State's courts are already seized on a white list ground (Art 21);
- 28.2 to decline to exercise a white list jurisdiction if another State's courts are clearly more appropriate to resolve the dispute and certain other conditions are met (Art 22);⁷

⁷ As the report of the rapporteurs suggests, the better view is that Art 22 only applies to declining white list jurisdiction, and has no application to claims that are being heard in State A under national law (grey zone) grounds. This seems sensible as a matter of policy.

It appears from the drafting of Art 22, and from the report of the rapporteurs, that every Contracting State is required to exercise the power to decline jurisdiction provided for under Art 22 where the test set out in that Article is satisfied. In other words, this is not an optional power that some States may choose not to exercise (a possibility considered at one stage by the Special Commission). This paper has been written on that basis: if this changes and the power to decline becomes optional, there would be no conflict here.

28.3 to decline to exercise a white list or grey list jurisdiction if a forum clause designates a non-Contracting State, and the courts of that State have not declined to hear the claim (Art 4(1)).

What should happen if another arrangement, to which State A is a party, requires State A to hear a claim which it ought to decline to hear under Art 21 or Art 22 or the second limb of Art 4(1)?

- 29 By hypothesis, in such a case, one party wishes to proceed in State A (usually the party who has initiated proceedings there – but not invariably so), and the other party (usually the defendant in those proceedings) is objecting to the claim being determined by the courts of State A. (Although Art 21 does not apply only on the application of a party, unlike Art 22, if both parties are willing to have the matter determined in State A then an order under Art 21(7) could be obtained in the court first seised allowing the proceedings in State A to continue.) In other words, these provisions protect a party from being pursued in a second court, where another court is already seised, and from being pursued (or being required to proceed) in an inappropriate court. The interest we are concerned with here is that party's, and the Contracting State in which that party is habitually resident has an interest in ensuring that these protections are made available to its residents.
- 30 It follows that the scheme of the Convention should be applied, and jurisdiction declined, despite any other arrangement to which State A is a party, unless either:
- 30.1 the State in which the party requesting that the proceedings be suspended is habitually resident is a party to the arrangement which provides for State A to hear the claim (in which case no Contracting State has an interest in State A applying Arts 21 or 22 or 4(1)); or
- 30.2 the State of the court to which State A is required to defer under Art 21 or 22 or 4(1) is a party to the arrangement and under that arrangement, the courts of State A are to hear the claim.
- 31 The only prejudice that a party might suffer if State A proceeds to hear a claim under the second exception (as described in para 30.2) would arise where State A does not have white list jurisdiction, but a Contracting State to which it was required to defer under Art 21 would have had white list jurisdiction, with the result that the judgment would have been enforceable under the Convention. (This difficulty cannot arise in relation to Art 22, since by hypothesis State A would have white list jurisdiction if Art 22 applied. Nor can it arise under the second limb of Art 4(1), since that limb only provides for referral to a non-Contracting State, judgments from which are never enforceable under the Convention.) This case could be excluded from any such exception. But if the

concept of delegated white list jurisdiction considered in relation to issue A above is adopted, this would solve the problem as it would ensure that the judgment given in State A is enforceable under the Convention as if the claim had been decided in the Contracting State to which State A would otherwise have deferred.

Issue E: Hague convention and other arrangement make different, inconsistent, provision for enforcement of judgment from State A in State B

- 32 Finally, let us consider questions of enforcement in State B of a judgment obtained in State A, where those States are parties to an arrangement other than the Convention which also addresses enforcement and recognition of such judgments. We are interested only in the position where both are Contracting States – otherwise the Convention does not on its face apply, and there is no issue.

Judgment enforceable under the Convention, but precluded by other arrangement

- 33 First, consider the position where the judgment is enforceable in State B under the Convention, but its enforcement is not permitted, or is prohibited, under the other arrangement. Assume, for example, that in example A in para 5.1 the German court had heard the claim and awarded damages to the Canadian plaintiff, and enforcement was sought in France. Under the Brussels regulation, the judgment would not be enforceable in France (Arts 22(1), 35(1)). Under our Convention, it would be.⁸

- 34 One of the primary interests each Contracting State has in respect of the Convention is that judgments in favour of its habitual residents should be recognised and enforced in other Contracting States. Each Contracting State also has an interest in judgments rendered by its courts being recognised and enforced in other Contracting States.

- 35 If this is right, then the basic principle here appears to be that a person should be entitled to seek recognition and enforcement of a judgment from State A in State B under the Convention unless:

35.1 the State in which that person is habitually resident has entered into an arrangement with State B under which such judgments are not enforceable in State B; *and*

35.2 State A is also a party to the arrangement.

⁸ Note that this tension would be avoided if the Convention allowed the German court to apply Brussels/Lugano and decline jurisdiction in favour of the French court, as for example the approach outlined by the Permanent Bureau would permit.

- 36 These conditions seem unlikely to be satisfied in many cases. Indeed the room for application of such an exception is so slight that it might be able to be ignored for practical purposes, in which case the basic principle would be that a person is always permitted to seek recognition and enforcement under the Convention. On the other hand, if all the parties in example A were from Brussels/Lugano States, it is not obvious that the Convention should override internal Brussels/Lugano arrangements requiring a judgment from one Brussels/Lugano State not to be enforced or recognised in other Brussels/Lugano States. This requires further discussion.

Judgment enforceable under the other arrangement, but neither required nor prohibited under the Convention

- 37 Second, what is the position if the judgment is enforceable in State B under the other arrangement, but its enforcement in State B is neither required nor prohibited under the Convention? The short answer is that there is no conflict here – this is the grey zone in operation.

Judgment enforceable under the other arrangement, but enforcement prohibited under the Convention black list

- 38 Third, suppose that the judgment from State A is enforceable in State B under the other arrangement, but its enforcement in State B is prohibited under the Convention because it was founded on a black list ground of jurisdiction (Art 26). This mirrors issues B and C above. Obviously such cases should be extremely rare, especially given opportunities for internal review within State A of the decision to hear the claim in breach of the black list prohibition – but the issue needs to be looked at nonetheless.

- 39 The prohibition on enforcement of a judgment based on the black list operates only where the judgment was entered against a defendant who is habitually resident in a Contracting State (since otherwise Art 18 would not apply): it is that Contracting State (ie the defendant’s habitual residence) which has the claim on other Contracting States that such judgments not be enforced against its habitual residents. This suggests that enforcement should not be prohibited if:

- 39.1 the Contracting State in which the person against whom enforcement/recognition is sought is habitually resident is a party to the arrangement providing for enforcement/recognition (this exception is needed to permit “single law area” arrangements); or
- 39.2 (possibly) State A is exercising “delegated” white list jurisdiction from State C, pursuant to an arrangement between States A and C, if such “delegated” jurisdiction is permitted under the Convention (compare paras 7, 9 and 24 above).

40 However the analogy with federal systems points towards an even broader exception here. If a federal State can determine the basis on which judgments will circulate and be enforced within that State, and in particular can dispense with the need for “control” of such internal judgments, as plainly it can, why should a group of States be prevented by the Convention from forming a legal coordination zone within which similar arrangements apply? Of course the initial exercise of jurisdiction will have been a breach of the obligations under the Convention of the court of origin, and this can be raised in an appropriate manner through diplomatic channels. But it seems unreasonable to expect coordination zones to retain a system of control of judgments as between themselves, when federal States need not do so internally – especially as the States in such a zone move towards a “single law area” arrangement.

41 On this approach, the black list provisions of the Convention would not limit the operation of an arrangement between States A and B in respect of recognition and enforcement of the other’s judgments.

Judgment enforceable under the other arrangement, but enforcement prohibited under the Convention’s rules on exclusive jurisdiction

42 Fourth, suppose that the judgment from State A is enforceable in State B under the other arrangement, but its enforcement is prohibited under the Convention because another Contracting State (State E) had exclusive jurisdiction (Art 26). The interests in issue here are those of the Contracting State with exclusive jurisdiction, and (at least in cases under Art 4(1)) a Contracting State in which an unsuccessful defendant is habitually resident (State D).

43 This suggests that enforcement should not be prohibited by the Convention if there is an arrangement between State A and State E and State D, under which State A is permitted to exercise jurisdiction. If States E and D have consented to the exercise of jurisdiction by State A in such a case, the objection to enforcement under the national law of State B is removed.

44 Once again, however, the analogy with federal states suggests that a broader exception is reasonable, and that States should be permitted to develop arrangements for circulation of judgments that do not require control under the convention, even where the objection to enforcement is that another Contracting State had exclusive jurisdiction. Protection of the interests of State E and of the defendant would then be focused on the initial “jurisdiction” stage, where it can be argued that State A’s courts should not hear the claim. In the rare cases where that argument is wrongly rejected, or is not made in a timely way, enforcement in State B would not be precluded.

Judgment enforceable under the other arrangement and under the Convention

- 45 Finally, suppose the judgment from State A is enforceable in State B under both the Convention and the other arrangement, but the procedures for enforcement differ, and one is more advantageous to the judgment holder than the other. (For example, Brussels/Lugano provides for enforcement without the sort of control by the court addressed contemplated by the Convention.)
- 46 It is suggested that in such cases, the person seeking recognition or enforcement should be permitted to elect to invoke the regime more favourable to him or her. The Convention is not intended to restrict legal cooperation between States: if two States wish to enable their judgments to circulate more freely, and if the Convention does not prohibit enforcement of a particular judgment, there is no objection to dispensing with any of the formalities contemplated by the Convention. The analogy with federal states, within which judgments generally circulate without corresponding controls, is irresistible here.

Summary

- 47 This rather lengthy discussion leads to the very simple conclusion that a person who has obtained a judgment in one Contracting State, State A, and wishes to enforce it in another Contracting State, State B, should be permitted to choose between the Convention regime for enforcement and any other regime which may operate between States A and B. The successful judgment creditor truly does get the “best of all worlds” at this stage.
- 48 There is one possible exception: it may be that enforcement under the Convention could be denied in Contracting State B if another arrangement required this, and both the State in which the party seeking enforcement is habitually resident and the State of the court of origin (ie State A) are parties to that arrangement. There is no principled objection to this exception: the only issue is whether it is of any practical importance.
- 49 Although this approach may impinge on the interests of other Contracting States in the protection of their habitual residents from black list jurisdiction, and in retention of exclusive jurisdiction in certain matters:
- 49.1 these issues can always be raised at the jurisdiction stage;
- 49.2 requiring each Contracting State to control for such matters at the enforcement stage would seriously undermine attempts at enhanced legal coordination, and would distinguish unjustifiably between federal States and legal coordination zones such as the EU.