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**The 2005 Hague Choice of Court and the
2019 Hague Judgments Conventions
versus the New York Convention:
Rivals, Alternatives or Something Else?**

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The 2005 Hague Choice of Court and the 2019 Hague Judgments Conventions versus the New York Convention: Rivals, Alternatives or Something Else?

Lucas Clover Alcolea*

The 2019 Hague Judgments Convention is the culmination of almost 50 years of work in this area by the Hague Conference on Private International Law (HCCH) and together with the 2005 Choice of Court Convention (hereafter the 'Hague Conventions') creates a system which operates as the litigation equivalent to the New York Convention enabling harmonised recognition and enforcement of judgments throughout the globe. The aim of this essay is to compare the Hague Conventions with the New York Convention and establish whether the former are a rival, alternative or something else altogether for the latter. In order to do so, this essay will look at four main issues (i) the obligations imposed on states under the Hague Conventions and the New York Convention, (ii) the scope of the Hague Conventions and the New York Convention, (iii) grounds for refusal of recognition or enforcement under the Hague Conventions and the New York Convention, and (iv) reservations available under the Hague and New York Conventions.

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La Convention sur les jugements de La Haye de 2019 est l'aboutissement de près de 50 ans de travail dans ce domaine par la Conférence de La Haye de droit international privé (HCCH) et, conjointement avec la Convention d'élection de for de 2005 (ci-après les 'Conventions de La Haye'), crée un système qui fonctionne en tant que litige équivalent à la Convention de New York permettant une reconnaissance et une exécution harmonisées des jugements dans le monde entier. Le but de cet essai est de comparer les Conventions de La Haye avec la Convention de New York et de déterminer si les premières sont un rival, une alternative ou autre chose complètement pour la seconde. Pour ce faire, cet essai examinera quatre questions principales (i) les obligations imposées aux États en vertu des Conventions de La Haye et de la Convention de New York, (ii) le champ d'application des Conventions de La Haye et de la Convention de New York, (iii) les motifs pour le refus de reconnaissance ou d'exécution en vertu des Conventions de La Haye et de la Convention de New York, et (iv) les réserves disponibles en vertu des Conventions de La Haye et de New York.

1. Introduction

The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (The Judgments Convention)¹ is the culmination of almost 50 years of work in this area by the Hague Conference on Private International Law (HCCH).² Its predecessor, the 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (The 1971 Judgments Convention)³ was, unfortunately, an abject failure having only five acceding parties and never entering into operation.⁴ The 2019 Judgments Convention's elder sister, the 2005 Choice of Court Convention (The Choice of Court Convention)⁵ has been slightly more successful as the member states of the EU, Mexico and Singapore have all ratified it.

It is impossible to look at either convention in isolation as they complement one another very well. The 2019 Judgments Convention covers judgments rendered on a number of non-consensual grounds,⁶ as well as non-exclusive choice of court agreements,⁷ asymmetric dispute resolution agreements⁸ and trust jurisdiction clauses whilst the 2005 Choice of Court Convention,⁹ except in special circumstances,¹⁰ only covers judgments rendered in an exclusive choice of court agreement. As will be seen below, the complementary nature of the Conventions also extends to their wording with several articles of the 2019 Judgments Convention being copied from the 2005 Choice of Court Convention and extensive reference in the 2019 Convention's explanatory report to the 2005 Convention's explanatory

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1 *Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters*, 2 July 2019 [Judgments Convention].

2 See generally Ronald A Brand, "Jurisdiction and Judgments Recognition at the Hague Conference: Choices Made, Treaties Completed, and the Path Ahead" (2020) 67:1 *Nethl Intl L Rev* 3; Cf David P Stewart, "The Hague Conference Adopts a New Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters" (2019) 113:4 *Am J Intl L* 772 at 773.

3 *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, 1 February 1971 (entered into force 20 August 1979).

4 See Brand, *supra* note 3 at 6.

5 *Convention on Choice of Court Agreements*, 30 June 2005 (entered into force 1 October 2015) [Choice of Court Convention].

6 See e.g. Judgments Convention, *supra* note 2 at Art 5(1)(a)–(e), (h)–(l).

7 See Francisco Garcimartín & Geneviève Saumier, *Judgments Convention: Revised Draft Explanatory Report* (The Hague: Hague Conference on Private International Law, 2018) at paras 221–22.

8 See *ibid*.

9 See *ibid* at paras 206–12.

10 See Choice of Court Convention, *supra* note 6 at Art 22.

report. In consequence, the common claim that the 2019 Judgments Convention is the litigation equivalent or counterpart¹¹ of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) is not correct. It is only the 2005 and 2019 Conventions together which can claim to be a litigation equivalent to the New York Convention as neither of them on their own cover all that the NYC does; although, taken together, they also cover significantly more than the NYC.

In any event, if the two Hague Conventions intend to become the litigation equivalent of the NYC, they have their work cut out for them as the New York Convention is one of the great success stories of transnational commercial law¹² with over 160 states having ratified it to date,¹³ and it is commonly referred to as “the foundation upon which the international arbitral process is built.”¹⁴

The aim of this article is to analyse whether the Hague Conventions really can act as the litigation equivalent of the New York Convention by looking at four key issues: (i) the obligations imposed on states under the Hague Conventions and the New York Convention; (ii) the scope of the respective Conventions; (iii) the respective grounds for refusal of recognition and enforcement; and, (iv) the derogations of which states can avail themselves under the two systems. Each issue will be analysed in turn below. As a preliminary point, it should be noted this article will only address the enforcement of judgments based on a jurisdiction agreement under the Hague Conventions and the enforcement of arbitral awards (which

11 See Michael Huertas & Courtney Lotfi, “The New Hague Judgments Convention: a timely tool for financial services firms?”, (10 July 2019) online (blog): *Dentons* < www.dentons.com/en/insights/articles/2019/july/10/the-new-hague-judgments-convention-a-timely-tool-for-financial-services-firms>; Sapna Jhangiani & Rosehana Amin, “The Hague Convention on Choice of Court Agreements: A Rival to the New York Convention and a ‘Game-Changer’ for International Disputes?” (23 September 2016), online (blog): *Kluwer Arbitration Blog* < arbitrationblog.kluwerarbitration.com/2016/09/23/the-hague-convention-on-choice-of-court-agreements-a-rival-to-the-new-york-convention-and-a-game-changer-for-international-disputes/>; Michael Douglas, “The Culmination of the Judgments Project: The HCCH Judgments Convention”, (16 August 2019), online (blog): *Oxford Law Faculty* < www.law.ox.ac.uk/business-law-blog/blog/2019/08/culmination-judgments-project-hcch-judgments-convention>; Luisa Cassar Pullicino & Antoine Cremona, “New Hague Judgments Convention – A Timely Counterpart To The 1958 New York Convention - International Law - Malta” (28 August 2019), online (blog): *Ganado Advocates* < www.mondaq.com/international-courts-tribunals/840682/new-hague-judgments-convention-a-timely-counterpart-to-the-1958-new-york-convention>.

12 See Emmanuel Gaillard & Domenico Di Pietro, eds, *Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice* (London: Cameron May, 2008) at 19–21; Herbert Kronke et al, eds, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Netherlands: Kluwer Law International, 2010) at 1–2.

13 See New York Arbitration Convention, “Contracting States”, online: *New York Arbitration Convention* < www.newyorkconvention.org/countries> [NYC Contracting States].

14 Marike RP Paulsson, *The 1958 New York Convention in Action* (Netherlands: Kluwer Law International, 2016) at 1.

are necessarily based on an arbitration clause) under the NYC. It will not address the enforcement of judgments on non-consensual grounds or the enforcement of jurisdiction or arbitration clauses themselves.

2. Obligations Imposed on States under the New York Convention and the Hague Conventions

2.1 The New York Convention

The New York Convention imposes two primary obligations on states. The first obligation, imposed under Art. II, is to enforce arbitration agreements and the second, imposed under Art III, is to recognize and enforce arbitral awards. This article is exclusively concerned with the latter obligation. The wording of Art III provides that:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.¹⁵

The primary effect of Art III is that awards falling within the scope of the Convention are presumptively binding and, unless certain narrow exceptions apply, must be recognised and enforced by courts.¹⁶ The article, therefore, does away with the double exequatur requirement which existed under the earlier Geneva Convention¹⁷ which held that “one had to get the courts of the seat to approve the award before it could be exported.”¹⁸ It should also be noted that the narrow exceptions on the obligation to recognise and enforce foreign arbitral awards, dealt with in Art. V of the Convention, do not encompass disagreements by the enforcement court purely as regards the substantive merits of the decision.¹⁹

The secondary effect of Art. III is that the procedure for recognising and enforcing arbitral awards should not be more onerous than that of recognising and enforcing domestic awards; one might think of it as a ‘no discrimination’ clause. Unfortunately, as the wording was the result of “compromise,”²⁰ it “can be interpreted in many ways.”²¹ For example, some

¹⁵ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958 at Art III (entered into force 7 June 1959) [New York Convention].

¹⁶ See Paulsson, *supra* note 15 at 97.

¹⁷ See Gaillard & Di Pietro, *supra* note 13 at 7–8; *Ibid* at 4.

¹⁸ Teresa Cheng, “Features of Arbitral Practice that Contribute to System-Building” (2012) 106 *Proceedings of the Annual Meeting (American Society of International Law)* 292 at 292.

¹⁹ See Kronke et al, *supra* note 13 at 11.

²⁰ Paulsson, *supra* note 15 at 132.

²¹ *Ibid*.

courts have interpreted the article to mean that identical treatment must be given to domestic and foreign awards. In contrast, some scholars argue that, while one may treat convention awards more favourably than domestic awards, one cannot treat foreign awards less favourably.²²

2.2 The Hague Conventions

The primary obligation under the Judgments Convention is set out in Article 4(1) which provides that “[a] judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.”²³ The wording is similar in effect to that of the New York Convention and is described by the explanatory report as providing for “the mutual recognition and enforcement of judgments.”²⁴ As with the New York Convention, the Judgments Convention prohibits a court from refusing to recognise or enforce an award purely on the basis of the merits of a decision. Art. 4(2) of the Judgments Convention states, “[t]here shall be no review of the merits of the judgment in the requested State. There may only be such consideration as is necessary for the application of this Convention.”²⁵ Unfortunately, the Judgments Convention does not have an equivalent ‘no discrimination’ clause to that found in the New York Convention.

The wording of the equivalent provision in Article 8 of the Choice of Court Convention is identical to that of Article 4 of the Judgments Convention, with the exception of subparagraph 5, which addresses situations in which the chosen court in an exclusive choice of court agreement has the discretion to transfer a case.²⁶ It applies where the choice of court agreement specifies a particular court (i.e., “the Stockholm District Court” as opposed to “the courts of Sweden,”)²⁷ and the chosen court transfers the case to another court (i.e., “the Göteborg district court”).²⁸ The provision specifies that where the court had the discretion to transfer the case, usually on the basis of “the convenience of parties and witnesses, in the interests of justice”,²⁹ enforcement of the resulting judgment “may be refused against a party who objected to the transfer in a timely manner in the State of origin.”³⁰

22 See *ibid* at 133–34.

23 Judgments Convention, *supra* note 2 at Art 4(1).

24 Garcimartin & Saumier, *supra* note 8 at para 97.

25 Judgments Convention, *supra* note 2 at Art 4(2).

26 See Choice of Court Convention, *supra* note 6 at Art 8.

27 Trevor C Hartley & Masato Dōgauchi, *Convention of 30 June 2005 on Choice of Court Agreements Explanatory Report* (The Hague: Hague Conference on Private International Law, 2013) at para 175 [Hartley & Dōgauchi, “Explanatory Report”].

28 *Ibid*.

29 *Ibid* at para 177.

30 *Ibid* at para 176.

3. Scope of the New York Convention and the Judgments Convention

In discussing scope we are looking at two different issues: (i) the territorial scope of the conventions (i.e. which states have ratified it and in the case of federal states or states with overseas territories which territorial units apply the conventions) and (ii) the juridical scope of the conventions (i.e. which decisions, whether judgments, arbitral awards or something else, can be enforced under the two convention systems). For the sake of convenience, these sub-issues will be discussed separately below.

3.1 The Territorial Scope of the New York Convention and the Hague Conventions

It should be noted as a preliminary point that it is somewhat unfair to compare the territorial scope of the three conventions. Whilst the New York Convention has existed for over 60 years, the Judgments Convention is barely a year old and the Choice of Court Convention is only 15 years old. However, it is challenging to make predictions about the future, and thus, in general, one must assess the state of the conventions as they currently are, not as they might be in the future. In that vein, it is unfortunate to note that the Judgments Convention currently has no ratifying states and only two signatory states, Ukraine and Uruguay.³¹ The Choice of Court Convention, on the other hand, is ratified by the EU (and thereby its member states), Mexico and Singapore.³² The practical effect of the EU's accession to the Convention is somewhat limited by the fact that the EU already has its own regime governing intra-EU enforcement of judgments³³ and, therefore, the Choice of Court Convention only applies to the enforcement of non-EU judgments within the EU and vice-versa.

In the interest of fairness, it should be noted that there is a significant possibility both Australia and the EU may ratify the Judgments Convention in the future.³⁴ Additionally, in the context of Brexit, the UK may also seriously

31 See Hague Convention on Private International Law, "Status Table 41: Convention on 30 June 2005 on Choice of Court Agreements" (4 February 2020), online: *Hague Convention on Private International Law* <www.hcch.net/en/instruments/conventions/status-table/?cid=137>.

32 See Hague Convention on Private International Law, "Status Table 37: Convention on 30 June 2005 on Choice of Court Agreements" (4 February 2020), online: *Hague Conference on Private International Law* <www.hcch.net/en/instruments/conventions/status-table/?cid=98>.

33 For a general comparison of the two regimes see Matthias Weller, "Choice of court agreements under Brussels Ia and under the Hague convention: coherences and clashes" (2017) 13:1 J Priv Intl L 91.

34 See Michael Douglas et al, "The HCCH Judgments Convention in Australian Law" (2019) 47:3 Federal L Rev 420 at 420–21; European Commission, "International Enforcement of

consider doing so, particularly as it has manifested a desire to accede to the Choice of Court Convention once its transition period with the EU comes to an end.³⁵ It is difficult to make any further predictions about future ratifying states and, thus, no attempt will be made to do so. However, the failure of the 1971 Judgments Convention and the limited success of the Choice of Court Convention, suggest the Hague Conventions regime faces an uphill battle.

In contrast to the Hague Conventions regime, the NYC boasts over 160 ratifying states³⁶ and the actual number of legal jurisdictions in which it applies is considerably higher if one considers that it has been extended to 'overseas territories' by several countries, such as the USA, the UK and the Netherlands. For example, the legal systems of Gibraltar, the Isle of Man, the Channel Islands, the British Virgin Islands, Puerto Rico and Curaçao are all separate legal jurisdictions to their respective 'mother countries,' and yet, are also legal systems in which the NYC applies.

Moreover, despite the NYC's age, the number of countries party to the Convention continues to grow, with six new accessions occurring in the last two years. Therefore, it is evident that the territorial scope of the NYC is presently far superior to that of the Hague Conventions, but, as noted above, this is an unfair comparison given the relative youth of the latter. It is worth noting that it was decades before the NYC could be considered as having quasi-global coverage, and several major economies did not accede until the 1970s and 1980s. For example, the USA acceded in 1970, the UK in 1975 and Canada only acceded in 1986. In sum, it will be several decades before it is possible to judge with certainty whether the Judgments Convention is on course to replicate the New York Convention. However, if in five or ten years it cannot match the number of ratifications its sister Choice of Court Convention achieved during that time, this would be a clear indication of the trajectory of its scope. It is worth noting it may be challenging to achieve such ratifications in the current environment where there is substantive scepticism regarding international law, shown for example in the widespread opposition to investment arbitration provisions in international investment and free trade agreements.³⁷

Court Rulings (Judgments Convention)" (2020), online: *European Commission* <ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12166-Accession-to-the-Judgments-Convention>.

35 See Hague Convention on Private International Law, "Declaration/Reservation/Notification" (31 January 2020), online: *Hague Conference on Private International Law* <www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=resdn> ["Declaration/Reservation/Notification"].

36 See NYC Contracting States, *supra* note 13.

37 See generally Thomas Dietz, Marius Dotzauer & Edward S Cohen, "The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System" (2019) 26:4 *Rev Intl Political Econ* 749; Council of Foreign Relations, "NAFTA and the USMCA: Weighing the Impact of North American Trade" (1 July 2020), online: *Council on Foreign Relations* <www.cfr.org/backgrounder/nafta-and-usmca-weighing-impact-north-american-trade>; Giorgio Sacerdoti, "Solving the WTO Dispute Settlement System Crisis: An Introduction" (2019)

3.2 The Juridical Scope of the New York Convention and the Hague Conventions

The Judgments Convention

The juridical scope of the Judgments Convention is laid down in detail in Arts. 1-2 and 4-6 with each article building on those which come before it. Article 1 provides that the Convention applies to “the recognition and enforcement of judgments in civil or commercial matters” and “[i]t shall not extend in particular to revenue, customs or administrative matters.”³⁸ No definition is given to the term ‘civil and commercial’ except that it excludes revenue, customs and administrative matters.³⁹ However, the draft explanatory report explains that the terms ‘civil’ and ‘commercial’ are interchangeable⁴⁰ and are intended to “distinguish public and criminal law, where the State acts in its sovereign capacity.”⁴¹ This is further explained as being a situation where “one of the parties is exercising governmental or sovereign powers that are not enjoyed by ordinary persons”⁴², and the Convention is not intended to apply to such situations.⁴³ Another fundamental point is that the Convention only applies between states, not between territorial units of a state,⁴⁴ e.g. Scotland, England and Northern Ireland in the case of the UK.

Article 2 of the Judgments Convention sets out 13 exclusions from the scope of the Convention including insolvency, maintenance obligations, wills and succession, defamation, intellectual property and family law matters.⁴⁵ There are two general justifications for these exclusions: (i) that an excluded matter is already governed by another international instrument and it was necessary to avoid conflicts between the Convention and that instrument; or, (ii) that an excluded matter is “of particular sensitivity for many States and it would be difficult to reach broad acceptance on how the Draft Convention should deal with them.”⁴⁶ Regardless of the justification, it cannot be denied that such an extensive list of exclusions significantly narrows the scope of the Convention and complicates its application.

20:6 J World Investment & Trade 785.online: {\i}Council on Foreign Relations} <<https://www.cfr.org/backgrounder/nafta-and-usmca-weighing-impact-north-american-trade>>; Giorgio Sacerdoti, \u00u8220Solving the WTO Dispute Settlement System Crisis: An Introduction\u00u8221 (2019

38 Judgments Convention, *supra* note 2 at Art 1.

39 See Stewart, *supra* note 3 at 775.

40 See Garcimartín & Saumier, *supra* note 8 at para 27.

41 *Ibid* at para 28.

42 *Ibid* at para 29.

43 See *ibid*.

44 See Judgments Convention, *supra* note 2 at Art 1(2); Garcimartín & Saumier, *supra* note 8 at para 33.

45 See Judgments Convention, *supra* note 2 at Art 2.

46 Garcimartín & Saumier, *supra* note 8 at para 38.

Article 4(3) of the Convention provides that “[a] judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of Origin.”⁴⁷ It seems that the aim of this paragraph is to prevent the judgment-creditor from gaining greater rights through enforcing the judgment abroad via the Convention than he would have had otherwise had he enforced the award domestically. It is intended to, *inter alia*, cover situations where a judgment “will be effective in the State of origin without being enforceable there, for example, because enforceability has been suspended pending an appeal...”⁴⁸

Article 5 provides a set of ‘filters’⁴⁹ which define “the jurisdictional bases that are recognised as legitimate for the purposes of recognition and enforcement of judgments from States, as provided for in Article 4.”⁵⁰ The section set outs no less than 15 main rules which can justify a court’s exercising jurisdiction over a matter with special provisions for trusts, jurisdiction agreements, employment contracts and residential leases.⁵¹ Article 6 goes one step further than Article 5 and provides that “a judgment that ruled on rights *in rem* in immovable property shall be recognised and enforced if and only if the property is situated in the State of Origin.”⁵²

The Choice of Court Convention

The provisions in the Choice of Court Convention are significantly more streamlined than those of the Judgments Convention; something that is unsurprising given the latter regulates numerous non-consensual grounds of jurisdiction while the former, except in special cases, only regulates exclusive choice of court agreements. Article 1 of the Choice of Court Convention is similar to Article 1 of the Judgments Convention and provides that the Convention “shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters.”⁵³ It does not, however, contain the Judgment Convention’s caveat that it does not apply to “revenue, customs or administrative matters.”⁵⁴ However, as the Choice of Court Convention only applies to international and not domestic matters, this caveat is arguably unnecessary.

Article 2 of the Choice of Court Convention, like Article 2 of the Judgments Convention, sets out a lengthy list of matters to which the Convention will not

47 Judgments Convention, *supra* note 2 at Art 2.

48 Garcimartín & Saumier, *supra* note 8 at para 112.

49 See Stewart, *supra* note 3 at 777.

50 Judgments Convention, *supra* note 2 at Art 5; Garcimartín & Saumier, *supra* note 8 at para 143.

51 See Stewart, *supra* note 3 at 778.

52 Judgments Convention, *supra* note 2 at Art 6.

53 Choice of Court Convention, *supra* note 6 at Art 1.

54 Judgments Convention, *supra* note 2 at Art 1.

apply; most of which are also excluded from the Judgments Convention.⁵⁵ Indeed, the Choice of Court Convention excludes more matters than the Judgments Convention (16 versus 13), including such issues as wills and succession,⁵⁶ insolvency,⁵⁷ anti-trust,⁵⁸ IP (except for copyright and related rights unless the proceedings arose or could have arisen from a breach of contract regarding such rights),⁵⁹ the carriage of passengers and goods,⁶⁰ and rights *in rem* in immovable property and tenancies of immovable property.⁶¹ Unlike the Judgments Convention, Article 2 also provides that the Convention does not apply to consumer and employment contracts.⁶²

The Choice of Court Convention equivalent to Article 5 (Article 3) is significantly different as it only deals with one jurisdictional ‘filter’; viz, an exclusive choice of court agreement. Thus, there is no need for a lengthy list of acceptable grounds of jurisdiction. The article proceeds by setting out a straightforward definition of what constitutes an ‘exclusive choice of court agreement’⁶³ and setting out a presumption that a choice of court agreement, providing for a contracting state’s particular court or courts to have jurisdiction, will have an exclusive jurisdiction clause, unless the parties provide otherwise.⁶⁴ It also sets out a writing requirement⁶⁵ that is significantly more liberalised than the writing requirement under the NYC.

The New York Convention

The provisions in the New York Convention concerning its juridical scope are more straightforward than those of The Hague Conventions and consist of two articles, Arts. I and II both of which have three paragraphs. Article 1 provides that the NYC applies to the recognition and enforcement of foreign arbitral awards “arising out of differences between persons, whether physical or legal.”⁶⁶ Unfortunately, this laconic wording conceals two major issues. (i) How does one determine the nationality of an award? For example, what is the nationality of an award deriving from an arbitration which is seated in Stockholm but with all the hearings in London and the award itself written in Bali? (ii) Are consent awards or awards embodying the result of a mediation

55 See Garcimartín & Saumier, *supra* note 8 at para 38.

56 See Choice of Court Convention, *supra* note 6 at Art 2(2)(d).

57 See *ibid* at Art 2(2)(e).

58 See *ibid* at Art 2(2)(h).

59 See *ibid* at Art 2(2)(n)–(o).

60 See *ibid* at Art 2(2)(f).

61 See *ibid* at Art 2(2)(l).

62 See *ibid* at Art 2(1).

63 See *ibid* at Art 3(a).

64 See *ibid* at Art 3(b).

65 See *ibid* at Art 3(c).

66 New York Convention, *supra* note 16 at Art I(1).

excluded? Unfortunately, there is not much caselaw or academic commentary on the issue and what little there is, is contradictory.⁶⁷

Article II sets out a writing requirement for arbitration agreements and further states that “[t]he term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”⁶⁸ This definition is significantly less liberal than the one contained in the Choice of Court Convention and it has, in fact, proven to be one of the most problematic articles of the NYC.⁶⁹ The principal problem is that the wording of the provision has not kept up with the immense technological changes of the late 20th and early 21st centuries where telegrams have been completely replaced by electronic forms of communication such as fax or email.⁷⁰ As the wording in Art. II(2) is not exclusive (“shall include...” rather than “will only include”), different courts have adopted different approaches to the article. For example, whilst most courts adopt a functional equivalent test so that the reference to letters and telegrams includes modern equivalent technology,⁷¹ others have not. At least one court has refused to uphold an arbitration agreement exchanged via email.⁷²

Another interpretative difficulty posed by Article II is that it only applies to agreements concerning “a subject matter capable of settlement by arbitration.”⁷³ The problem is that the NYC nowhere defines what subject matters are so capable and, thus, the types of claims that are arbitrable differ from state to state.⁷⁴ This represents a major ‘hole’ in the Convention as parties cannot know merely from looking at the Convention whether a particular matter is capable of being arbitrated.

In sum, the major weakness of the New York Convention, compared to the Hague Conventions, is its lack of detail. As noted by one scholar, “what the New York Convention leaves unsaid could fill volumes.”⁷⁵ Whether this is a good or a bad thing is something arbitration practitioners still disagree about as can be seen from the debate regarding whether the NYC should be revised in order to, *inter alia*, update it and clear up the ambiguities pregnant in its text.⁷⁶

67 See generally Yaraslau Kryvoi & Dmitry Davydenko, “Consent Awards in International Arbitration: From Settlement to Enforcement” (2015) 40:3 Brook J Intl L 827.

68 New York Convention, *supra* note 16 at Art II(2).

69 See Kronke et al, *supra* note 13 at 75.

70 See Gaillard & Di Pietro, *supra* note 13 at 192.

71 See *ibid* at 193.

72 See *ibid*.

73 New York Convention, *supra* note 16 at Art II(1).

74 See Gary Born, *International commercial arbitration*, 2nd ed (Alphen aan den Rijn: Kluwer Law International, 2014) at 945.

75 Paulsson, *supra* note 15 at 2.

76 Albert Jan Van den Berg, “Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards: Explanatory Note” (Keynote address delivered at the

Comparison of the Two Conventions

It is evident even at this stage that the New York Convention is far from perfect. How then can one explain the fact that it is one of the most successful treaties ever created and acts as the keystone of the international commercial dispute resolution system? The answer likely lies in the fact that the Convention embodies a ‘pro-enforcement attitude’, as explained by one scholar:

[The Convention] simply requires that unless they are found to be fundamentally defective, awards must be enforced. The appraisal of defects is ultimately left to the discernment of national courts, as are the consequences of annulment... In a phrase, it is impossible to violate the New York Convention by enforcing an award, only when not doing so.⁷⁷

In this author’s view, this is the critical difference between the New York Convention and the Hague Conventions; one could hardly think of calling conventions with no fewer than 16 or 13 exceptions conventions with a ‘pro-enforcement attitude [or bias]’.⁷⁸ Moreover, because of this pro-enforcement attitude, the lack of detailed drafting in the Convention becomes a sort of ‘creative ambiguity’, allowing courts to resolve doubts about enforceability or recognition *in favorem validatatis*.

It is also important to note that whereas the Hague Conventions exclude a vast range of matters from their scope, the New York Convention, as will be addressed later, contents itself with only excluding matters on the grounds of public policy or arbitrability and providing optional reservations for non-commercial matters and an optional reciprocity obligation. This can perhaps be explained by the fact that, at the time the NYC was signed, no one could imagine IP or antitrust or company law matters being arbitrated as is routinely done today; therefore, at the time, there was no need to explicitly exclude them.⁷⁹ The consequence today is that, while such matters can be enforced internationally via the NYC if they are arbitrated, they cannot be enforced internationally via the Hague Conventions if they are litigated.

In the interest of fairness, it is worth noting that Art. 15 of the Judgments Convention permits states to recognise and enforce judgments that fall outside the scope of the Convention on the basis of national law, with the

ICCA International Arbitration Conference: 50 Years of the New York Convention, Dublin, 2008) (Alphen aan den Rijn: Kluwer Law International, 2009) at 649–66; See generally V V Veeder, “Is there a Need to Revise the New York Convention?” (2010) 1:2 J Intl Disp Settlement 499.

⁷⁷ Paulsson, *supra* note 15 at 2.

⁷⁸ See *ibid*.

⁷⁹ See Karim Abou Youssef, “The Death of Inarbitrability” in Loukas A Mistelis & Stavros Brekoulakis, eds, *Arbitrability: International and Comparative Perspectives*, International Arbitration Law Library (Alphen aan den Rijn: Kluwer Law International, 2009) at 52.

one exception being the rule laid down in Art. 6 regarding *in rem* rights in immovable property.⁸⁰ However, the provision merely preserves the status quo, i.e. if such rights were enforceable under national law they are not rendered unenforceable by the Convention. It does nothing to enhance the enforceability of such rights internationally or promote uniformity in this regard.

A further issue with the model adopted by the Hague Conventions is that states will individually have to interpret each of the 16 or 13 exceptions to the scope of the respective Convention in order to decide whether a judgment arising from a jurisdiction agreement comes within the ambit of that Convention. However, the courts of ratifying states should enter into a dialogue with one another when interpreting the Conventions, as Arts. 20 of the Judgments Convention and 23 of the Choice of Court Convention provide that, “[i]n the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.”⁸¹ In a similar vein, Arts. 21 of the Judgments Convention and 24 of the Choice of Court Convention allow for the Secretary-General of the HCCH to make provisions for periodic review of the operation of the Conventions.⁸² As confirmed by the explanatory report to the Judgments Convention, these provisions are intended to ensure “a proper and uniform application of the draft Convention,”⁸³ and it is entirely possible that they will successfully achieve this goal. However, one must admit, there is a not insignificant possibility of courts adopting divergent interpretations when they are faced with 16 or 13 different sub-paragraphs; particularly considering that “concepts and principles that are axiomatic in one legal system may be unknown or rejected in another.”⁸⁴

In light of the above, it is clear, even at this stage, that the Judgments Convention and the New York Convention have adopted very different approaches to the issues which come within their scope. Whilst the former has addressed issues with great specificity, the latter has adopted a sort of ‘creative ambiguity’. In a way, this mirrors the difference in approach between those who wish to revise the NYC and those who wish to leave it well alone, as discussed above. Only time will tell what the consequences of the differing approach of the Hague Conventions will be.

80 See Judgments Convention, *supra* note 2 at Arts 6, 15.

81 Judgments Convention, *supra* note 2 at Art 20; Choice of Court Convention, *supra* note 6 at Art 23.

82 See Judgments Convention, *supra* note 2 at Art 21; Choice of Court Convention, *supra* note 6 at Art 24.

83 Garcimartín & Saumier, *supra* note 8 at para 394.

84 *Ibid* at para 393.

4. Grounds for Refusal of Recognition or Enforcement under the New York Convention and the Hague Conventions

4.1 The New York Convention

The grounds on which a court can refuse to recognise or enforce an arbitral award falling within the scope of the NYC are set out in Art. V of that Convention. That article provides six separate grounds as follows:

- I. The parties to the arbitration agreement were under some incapacity, or the agreement was otherwise invalid under their chosen law or the law of the country in which the award was made;⁸⁵
- II. The judgment-debtor was not given proper notice of an arbitrator's appointment or the arbitral proceedings or "was otherwise unable to present his case;"⁸⁶
- III. The award addressed "a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;"⁸⁷
- IV. The composition of the arbitral authority or the procedure it followed was contrary to the agreement of the parties or, where there is no such agreement, is contrary to the law of the seat;⁸⁸
- V. The award is not yet binding on the parties or was set aside or suspended "by a competent authority of the country in which, or under the law of which, that award was made;"⁸⁹
- VI. The subject matter of the award is inarbitrable under the law of the enforcement state;⁹⁰
- VII. The recognition or enforcement of the award would be contrary to the public policy of the enforcement state.⁹¹

The drafting of this article is closer to that of the Hague Conventions as it provides a detailed and lengthy list of circumstances in which the court of an enforcing state can refuse to recognise or enforce an arbitral award. In the interest of space, only the most important of these grounds will be addressed, but, before doing so, it is necessary to make some general comments regarding them. Firstly, grounds I–V must be invoked by the judgment-debtor. Consequently, if the judgment-debtor fails to raise one of the grounds as a defence, they will not be considered by the enforcement court.⁹²

85 See New York Convention, *supra* note 16 at Art II(1).

86 *Ibid* at Art V(1)(b).

87 *Ibid* at Art V(1)(c).

88 See *ibid* at Art V(1)(d).

89 *Ibid* at Art V(1)(e).

90 See *ibid* at Art V(2)(a).

91 See *ibid* at Art V(2)(b).

92 Paulsson, *supra* note 22 at 157, 217–18.

On the other hand, grounds VI and VII are considered by an enforcement court *ex-proprrio motu* with the result that, even if none of the parties raise either ground as a defence, a court can still refuse to recognise or enforce an award under these provisions.⁹³ Secondly, the grounds set out in Art. V are exhaustive; a court or state may not add to them and remain compliant with the Convention.⁹⁴ Thirdly, the grounds set out in Art. V were intended to “be interpreted and applied narrowly”⁹⁵ with the result that “refusal should be granted in serious cases only”.⁹⁶ This has, in fact, been the practice adopted by most courts called upon to interpret this provision.⁹⁷ Fourthly, and lastly, some courts have held that they have discretion to enforce an award, even if one of the Art. V grounds is proven, based on the fact that the Convention uses the word ‘may’ in certain languages, which implies discretion. However, in other languages, the Convention uses terms closer to ‘shall.’ The issue is, therefore, controversial.⁹⁸

Incapacity of a Party or Invalidity of the Arbitration Agreement Under the Applicable Law or the Law of the State where the Award was Made

This provision addresses two issues: (i) party capacity and (ii) validity of the arbitration agreement. Each issue will be addressed in turn. It is unfortunate the Convention does not define capacity and, as there is a certain degree of ambiguity regarding the law applicable to the matter, this provision raises several interpretative problems.⁹⁹ However, in general, one can say that incapacity refers to “a general restriction on persons who are not deemed fit to administer their own rights, or as a prohibition that prevents certain persons lacking capacity from entering into some specific legal relationships.”¹⁰⁰ The clearest example where this would apply is where a person of unsound mind enters into an arbitration agreement,¹⁰¹ but it could also apply to minors and other legally incapable parties.¹⁰² While generally, one can say this issue has arisen relatively rarely in arbitral practice, this is clearly not the case

93 See *ibid* at 217.

94 See *ibid* at 166; Pieter Sanders, ed, ICCA’s Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges (The Netherlands: International Council for Commercial Arbitration & Kluwer Law International, 2011) at 79–80.

95 Sanders, *supra* note 95 at 80.

96 *Ibid*.

97 *Ibid* at 80–81.

98 *Ibid* at 83; Born, *supra* note 75 at §17.04[D]; Paulsson, *supra* note 15 at 218–19.

99 See Gaillard & Di Pietro, *supra* note 13 at 615.

100 *Ibid* at 621.

101 See *ibid*.

102 See Sarah Ganz, “Enforcement of Foreign Arbitral Awards Arising from an Internal Trust Arbitration: Issues Under the New York Convention” in Stacie Strong & Tony Molloy, eds, *Arbitration of Trust Disputes: Issues in National and International Law* (Oxford: Oxford University Press, 2016) at para 21.55.

for certain types of arbitration, e.g. trust arbitration, where such issues are highly relevant.¹⁰³

On the other hand, the invalidity objection “plays an important part in practice.”¹⁰⁴ It is important to note that the article encompasses two types of validity: formal and material. The requirements set out in Article II govern the formal validity of an arbitration agreement,¹⁰⁵ so, for example, an arbitration award which followed from an arbitral agreement which did not meet the writing requirement could be objected to under this provision. Examples of material invalidity include error, duress, where a party fails to raise the existence of an arbitration agreement as an objection to court proceedings or even due to the impecuniosity of a party.¹⁰⁶

Lack of Proper Notice or Other Inability for a Party to Present their Case

This provision is one of the most popular grounds invoked in order to avoid recognition or enforcement,¹⁰⁷ but it is rarely successful, being rejected in the vast majority of cases in which it is invoked.¹⁰⁸ As is evident from the wording of this provision, it can be split into two limbs. The first deals only with failures to give proper notice and the second deals with all other failures which result in a party being unable to present his case. The first limb is reasonably straightforward. Examples of a lack of proper notice include where the notice did not contain the names of the arbitrators, resulting in the parties being unable to evaluate any impartiality issues, or where a party was given a very short time limit in which to present his defence.¹⁰⁹ In general, courts apply the notice provisions found in the arbitration clause or the relevant rules. However, they are unlikely to rely on strict notice formalities if it is clear that a party has been notified.¹¹⁰ Moreover, courts will usually require that it be shown that the late or otherwise imperfect notice would have affected the result of the arbitration in order to refuse recognition or enforcement.¹¹¹

The second limb of the provision is much broader in scope and includes a vast range of situations, including where a party could not comment on evidence or arguments, where a party was denied his right of reply, surprise

103 See *ibid.*

104 Kronke et al, *supra* note 13 at 221.

105 See *ibid* at 226; *Contra* UN, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) (New York: United Nations, 2016) at 145 (Italian Court of Cassation).

106 See Kronke et al, *supra* note 13 at 227–28.

107 See *ibid* at 233.

108 See Gaillard & Di Pietro, *supra* note 13 at 727–28.

109 See Kronke et al, *supra* note 13 at 241.

110 See *ibid* at 242–44.

111 See *ibid* at 245; Paulsson, *supra* note 15 at 186.

decisions and a refusal to allow cross-examination.¹¹² It is worth noting, however, that if a party refuses to appear at hearings or negligently fails to do so, they are unlikely to be able to argue a breach of this limb of the provision.¹¹³

Inarbitrability

This ground has been held to run parallel to the inarbitrability exception to the enforcement of arbitral agreements in Art. II, in that, if the subject matter of an arbitration agreement is inarbitrable, it is not enforceable under Art. II and neither is any resultant award enforceable under Art. III.¹¹⁴ The inarbitrability exception “applies to categories of subjects or disputes which are deemed by a particular national law to be incapable of resolution by arbitration, even if the parties have otherwise validly agreed to arbitrate such matters.”¹¹⁵ The term is not defined in the New York Convention with the result being that the type of claims held to be inarbitrable differs from state to state.¹¹⁶ Specific examples of disputes regarded as inarbitrable include bankruptcy, employment, consumer and natural resource disputes, although the approach varies substantially from state to state.¹¹⁷ In general, the modern trend has been to interpret the inarbitrability provisions narrowly¹¹⁸ and, perhaps as a result, there are relatively few cases of an award being refused recognition or enforcement on this ground.¹¹⁹

Breach of Public Policy

The concept of public policy is central to the NYC and it has been said that, without it, “Contracting States would not have accepted the obligations of the Convention,”¹²⁰ but it is, unfortunately, not defined in the text of the Convention. Three main alternatives were identified by the Interim International Law Association Report on the topic as follows:

- I. A violation of basic norms of morality and justice;
- II. International public policy, drawing a distinction between domestic and international public policy with the latter imposing a higher bar for refusal of recognition or enforcement;¹²¹ or

112 See Born, *supra* note 75 at 3515–30.

113 See Gaillard & Di Pietro, *supra* note 59 at 709–11.

114 See Born, *supra* note 75 at §6.02[A].

115 *Ibid* at § 6.00.

116 See *ibid* at § 6.01.

117 See *ibid* at 995–1027.

118 See Sanders, *supra* note 95 at 105.

119 *Ibid* at 105–06.

120 Paulsson, *supra* note 15 at 217.

121 See Audley Sheppard, “Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards” 19:2 Arb Intl 219.

III. Transnational or “truly international” public policy;¹²² this sets an even higher bar for refusals of recognition or enforcement as it only includes “fundamental rules of natural law; principles of universal justice, jus cogens in public international law and the general principles of morality accepted by what are referred to as ‘civilized nations’.”¹²³

Of these three possibilities, the international public policy approach is generally accepted as the correct one¹²⁴ and it has been adopted by the ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards.¹²⁵ It is important to note that, in general, the relevant public policy is that of the state in which enforcement is sought; although some state courts will consider the public policy of another state where that state “has a materially closer connection to the matter than the recognition forum.”¹²⁶ Notwithstanding the high bar set by this conception of public policy, the term is still amorphous and, therefore, covers a range of situations including a lack of impartiality by an arbitrator, bribery or illegality, fraud, an award rendered without reasons and a lack of due process.¹²⁷

4.2 The Hague Conventions

The reasons for which a state may refuse to recognise or enforce a judgment are not much higher in number than those available under the NYC and consist of the following grounds:

- I. The document which instituted the proceedings was (a) not notified to the defendant in sufficient time and in a way that enabled them to arrange for their defence, unless they consented to this by entering an appearance and failing to contest notification;¹²⁸ or, (b) was notified to the defendant in a way that “is incompatible with fundamental principles of the requested State concerning service of documents;”¹²⁹
- II. Fraud;¹³⁰
- III. Recognising or enforcing the judgment would be manifestly incompatible with the public policy of the requested state;¹³¹
- IV. The proceedings in the court of origin were contrary to a jurisdiction

¹²² *Ibid* at 220.

¹²³ *Ibid*.

¹²⁴ See Born, *supra* note 75 at 3655.

¹²⁵ See Pierre Mayer & Audley Sheppard, “Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards” (2003) 19:2 *Arb Intl* 249 at 251.

¹²⁶ See Born, *supra* note 75 at 3666.

¹²⁷ See Paulsson, *supra* note 15 at 217–32.

¹²⁸ See Judgments Convention, *supra* note 2 at Art 7(1)(a)(i); Choice of Court Convention, *supra* note 6 at Art 9(c)(i).

¹²⁹ Judgments Convention, *supra* note 2 at Art 7(1)(a)(ii); Choice of Court Convention, *supra* note 6 at Art 9(c)(ii).

¹³⁰ See Judgments Convention, *supra* note 2 at Art 7(1)(c); Choice of Court Convention, *supra* note 6 at Art 9(d) (albeit only as regards fraud in connection with a matter of procedure).

¹³¹ See Judgments Convention, *supra* note 2 at Art 7(1)(c); Choice of Court Convention, *supra*

agreement;¹³²

V. *Res judicata*;¹³³

VI. *Lis Pendens*;¹³⁴

VII. The jurisdiction agreement was null and void under the law of the State of the Chosen Court, unless the chosen court has decided otherwise;¹³⁵

VIII. A party lacked capacity to conclude the jurisdiction agreement under the law of the seized courts state.¹³⁶

Each of these grounds will now be briefly examined.

Failure to Give Proper Notice

This provision is split into two limbs: the first is designed to cover the right to be heard by ensuring “the defendant was made aware in a timely manner of the claim brought in the State of origin”¹³⁷ and the second acts as a protection for the requested state, as some “States consider service of documents instituting proceedings a sovereign act.”¹³⁸ In consequence, “unauthorised service of foreign documents [is] an infringement [of] their sovereignty and ineffective.”¹³⁹ The draft explanatory note to the Choice of Court Convention explicitly refers to each limb being for the “Protection of the defendant” and the “Protection of the State of notification” respectively.¹⁴⁰

Judgment Was Obtained by Fraud

There is no equivalent to this provision in the NYC but, as discussed above, fraud would likely be a ground for refusing to enforce or recognise an arbitral award due to a breach of public policy. The explanatory report defines fraud as “behaviour that deliberately seeks to deceive in order to secure an unfair or unlawful gain or to deprive another of a right” and notes that “most States would subsume this defence within the public policy defence in subparagraph (c).”¹⁴¹

note 6 at Art 9(e).

132 See Judgments Convention, *supra* note 2 at Art 7(1)(d).

133 See *ibid* at Art 7(1)(e); Choice of Court Convention, *supra* note 6 at Art 9(f)–(g).

134 See Judgments Convention, *supra* note 2 at Art 7(2).

135 See Choice of Court Convention, *supra* note 6 at Art 9(a).

136 See *ibid* at Art 9(b).

137 Garcimartín & Saumier, *supra* note 8 at para 279.

138 *Ibid* at para 282.

139 *Ibid*.

140 Masato Dōgauchi & Trevor C Hartley, *Preliminary Draft Convention on Exclusive Choice of Court Agreements - Explanatory Report* (Preliminary Document No 26, prepared for Twentieth Diplomatic Session on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters) (The Hague: Hague Conference on Private International Law, 2004) at paras 140–41.

141 Garcimartín & Saumier, *supra* note 8 at para 284.

Manifest Incompatibility with Public Policy

It would appear this provision sets a higher bar than its equivalent in the New York Convention as it requires a breach of public policy to be ‘manifest’. The explanatory report confirms that this “is a high threshold, intended to ensure judgments of States are recognised and enforced by other States unless there is a compelling public policy reason not to do so in a particular case.”¹⁴² Moreover, as is the case under the New York Convention, “the concept of public policy must be ‘interpreted strictly’ and recourse thereto, ‘is to be had only in exceptional cases’.”¹⁴³

Proceedings in Breach of a Jurisdiction Agreement

This provision is relatively straightforward and “allows the requested court to give effect to a judgment rendered by a court when the proceedings in the State of origin were contrary to a choice of court agreement or a designation in a trust instrument.”¹⁴⁴ The justification for this is the need “to uphold the agreement or the designation, and therefore to respect party autonomy.”¹⁴⁵ The equivalent provision in the New York Convention is that which requires courts to stay any proceedings when the matter is covered by a valid arbitration agreement.¹⁴⁶ This provision only appears in the Judgments Convention, something which is explained by the fact that the Choice of Court Convention only addresses judgments which follow from an exclusive choice of court agreement.

Res Judicata

This ground is split into two paragraphs and only the latter of these two fulfils the traditional requirements for *res judicata*, but it is clear that both have similar predicates. The first paragraph applies where “the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties.”¹⁴⁷ As the explanatory report confirms that the domestic judgment does not need to have been rendered prior to the foreign judgment,¹⁴⁸ this provision is not, strictly speaking, *res judicata*, but is clearly closely related to it. The second paragraph applies where “the judgment is inconsistent with an earlier judgment given by a court of another State between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the

¹⁴² *Ibid* at para 289.

¹⁴³ *Ibid*.

¹⁴⁴ *Ibid* at para 297.

¹⁴⁵ *Ibid*.

¹⁴⁶ See New York Convention, *supra* note 16 at Art II(3).

¹⁴⁷ Judgments Convention, *supra* note 2 at Art 7(1)(e); Choice of Court Convention, *supra* note 6 at Art 9(f).

¹⁴⁸ See Garcimartín & Saumier, *supra* note 8 at para 301.

requested State” and is clearly, therefore, what would traditionally be called *res judicata*.¹⁴⁹

Curiously, however, the explanatory report at no point uses the term, even though this principle is encompassed in the two paragraphs and is well recognised internationally. This is likely because, as explained in the draft explanatory report to the Judgments Convention, the term is used in differing ways across legal systems and, thus, avoiding the term prevents unnecessary confusion.¹⁵⁰ It should also be noted that neither paragraph has an equivalent in the New York Convention and the issue of whether, and if so how, *res judicata* is covered by the NYC or applies to arbitral awards is unsettled.¹⁵¹ In this regard, the Judgments Convention can be said to be superior to the New York Convention as it explicitly addresses the issue in a relatively transparent manner.

Lis Pendens

As a preliminary point, it is important to note that this ground differs from all others discussed so far in that it allows a court to postpone or refuse recognition and enforcement of a judgment. As with the *lis pendens* rule generally,¹⁵² the provision only applies if the proceedings pending before the domestic court are “between the same parties on the same subject matter.”¹⁵³ The provision also requires that the domestic court be the first court seized of the matter, as is the case under the Brussels Regulation;¹⁵⁴ however, it ameliorates this rule by requiring that there is “a close connection between the dispute and the requested State.”¹⁵⁵ The aim of this additional condition is “to prevent strategic or opportunistic behaviour. For example, without the condition, a potential defendant in one State could move to another State and sue the other party there, seeking a so called ‘negative declaration’ just to prevent the future recognition or enforcement of the foreign judgment.”¹⁵⁶ One also thinks of the ‘Italian Torpedo’, where a party starts an action in Italy, known for taking an inordinate amount of time to render decisions, purely in order to frustrate the other party through excessive delay.¹⁵⁷ As with

149 William S Dodge, *Max Planck Encyclopedias of International Law* (Oxford: Oxford University Press, 2006) sub vergo “res judicata”.

150 See Garcimartín & Saumier, *supra* note 8 at para 127.

151 See generally Maximilian Pika, *Third-party Effects of Arbitral Awards: Res Judicata Against Privies, Non-Mutual Preclusion and Factual Effects* (Alphen aan den Rijn: Kluwer Law International, 2019).

152 See Linda Silberman, “Lis alibi pendens” in Jürgen Badedow et al, eds, *Encyclopedia of Private International Law* (Cheltenham, UK: Edward Elgar Publishing Limited, 2017) at 1158.

153 Judgments Convention, *supra* note 2 at Art 7(1)(f).

154 See Silberman, *supra* note 153 at 1158.

155 Judgments Convention, *supra* note 2 at Art 7(2)(b).

156 Garcimartín & Saumier, *supra* note 8 at para 311.

157 See generally David Kenny & Rosemary Hennigan, “Choice Of Court Agreements, The Italian Torpedo, And The Recast Of The Brussels 1 Regulation” (2015) 64:1 ICLQ 197.

res judicata, there is no equivalent provision in the New York Convention and the extent to which *lis pendens* can apply to arbitral proceedings is the subject of academic debate.¹⁵⁸ In consequence, this provision is a welcome addition to the Judgments Convention and represents an improvement on the NYC in this regard.

It is important to note that this provision only appears in the Judgment Convention. As with the provision regarding proceedings in breach of a jurisdiction agreement, this results from the fact that the Choice of Court Convention only addresses judgments which result from an exclusive choice of court agreement.

Agreement is Null and Void under the Law of the State of the Chosen Court

The wording of the provision is very similar to Art II(3) of the NYC, although its role as an objection to enforcement is closest to Art V(1)(a) of the NYC as discussed above. The provision requires that all Contracting States “apply the law of the State of the chosen court, and they must respect any ruling on the point by that court.”¹⁵⁹ The provision “applies only to substantive (not formal) grounds of invalidity. It is intended to refer primarily to generally recognised grounds like fraud, mistake, misrepresentation, duress....”¹⁶⁰

Party lacked Capacity under the Law of the State of the Court Seized

This provision is relatively straightforward and applies “where a party lacked capacity to enter into the agreement under the law of the State of the court seized.”¹⁶¹ It, therefore, differs from the null and void ground of refusal as the seized court may abide by its own law and is not required to abide by that of the State of the chosen court. As lack of capacity would also render an agreement null and void,¹⁶² the combined effect of the two provisions is that “capacity is determined both by the law of the chosen court *and* by the law of the court seized.”¹⁶³

4.3 Comparison of the Grounds for Refusal of Recognition and Enforcement under the Conventions

As is to be expected, the Hague and New York Conventions share several grounds of refusal of recognition and enforcement; namely the public policy defence and the due process or right to be heard defence. Although these

158 See generally Christer Soderlund, “Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings” (2005) 22:4 J Intl Arb 301.

159 Dōgauchi & Hartley, “Preliminary Explanatory Report”, *supra* note 141 at para 137.

160 Hartley & Dōgauchi, “Explanatory Report”, *supra* note 28 at para 126.

161 *Ibid* at para 150.

162 See *ibid*.

163 *Ibid*.

two grounds are shared by both regimes and are likely to be invoked, applied and interpreted by the same parties (namely claimants and respondents in international commercial disputes, as well as state court judges, lawyers and academics in the international dispute resolution field), they are not identical.

The main difference in the public policy defence between the two regimes is that, as discussed above, the bar under the Judgments Convention is set much higher, as it requires recognising or enforcing a judgment to be 'manifestly' against public policy in order for a refusal to be justified. In theory, this should mean that it will be harder for a court to justify refusing to recognise or enforce a judgment on the grounds of public policy under the Hague Conventions than under the NYC. As regards the due process or right to be heard defence, the main difference is that the Hague Conventions protect not just the rights of the parties but also the sovereignty of the enforcement state by limiting the means of service which are considered valid under the Conventions. In consequence, one expects that the question of whether a party has been duly notified of proceedings is more likely to arise under the Hague Conventions than under the NYC.

The Hague Conventions also go beyond the New York Convention, recognising fraud as a separate ground for refusal of recognition and enforcement, discouraging parties from breaching jurisdiction clauses by making a breach of those clauses a ground for refusal, and providing that both *res judicata* and (in the case of the Choice of Court Convention) *lis pendens* are grounds for refusal of recognition and enforcement. Notwithstanding the greater specificity of the Hague Conventions, they still compare favourably to the New York Convention as the additional grounds do not unreasonably add to their complexity, unlike the provisions for exclusions from the Hague Conventions and the grounds upon which jurisdiction can be exercised. Moreover, the additional grounds, such as fraud, breach of a jurisdiction agreement, *res judicata* and *lis pendens*, are serious issues which are not adequately addressed by the New York Convention. The fact they are addressed under the Hague Conventions provides greater clarity for future users of the Hague Conventions by answering many of the unanswered questions under the NYC.

5. Reservations Available Under the New York Conventions and the Hague Convention

5.1 The New York Convention

There are only two possible derogations from the NYC, both of which are set out in Art I(3). The first is self-explanatory, merely providing that "any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of

another Contracting State.”¹⁶⁴ The second derogation is more complex and provides that a State “may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.”¹⁶⁵ The reciprocity reservation is an exception to the NYC’s general ‘principle of universality,’ as a result of which “awards made in both Contracting and non-Contracting States must be enforced and recognized alike.”¹⁶⁶ Over 100 states have availed themselves of this derogation, but as the Convention has been ratified by so many countries, it is not relevant in most cases.¹⁶⁷

Though the commercial reservation has been applied by far fewer states (approximately 40), there is still a sufficient number for it to retain some significance when applying the Convention. The most serious problem caused by this reservation is “the fact that each Contracting State may determine for itself which relationships it deems “commercial” in nature.”¹⁶⁸ This “has caused some problems in the uniform interpretation and application of the Convention.”¹⁶⁹ Particularly problematic interpretations include an Indian case holding that “technical ‘know-how’ and ‘turn-key’” contracts were not commercial,¹⁷⁰ an Argentine case finding that a shipbuilding contract signed by a provincial authority was not commercial¹⁷¹ and a Tunisian case stating that “architectural and urbanization public works were not commercial.”¹⁷² On the other hand, the general approach of courts globally is to adopt a broad interpretation of the term “commercial,” with the result that it includes “all relationships involving an economic exchange where one (or both) parties contemplate realizing a profit or other benefit.”¹⁷³ On occasion, an even broader interpretation including all “disputes relating to any pecuniary or economic interest” is applied.¹⁷⁴

5.2 The Hague Conventions

The provisions regarding possible derogations to the Judgments Convention are considerably more complex than those in the NYC and are contained in four different articles, each of which will be examined in turn.

164 New York Convention, *supra* note 16 at Art I(3).

165 *Ibid.*

166 Kronke et al, *supra* note 13 at 32.

167 See *ibid.*

168 *Ibid* at 33.

169 *Ibid.*

170 *Ibid.*

171 See *ibid* at 35.

172 *Ibid* at 34–35.

173 Ganz, *supra* note 103 at para 21.07.

174 *Ibid.*

Article 17 of the Judgments Convention and Article 20 of the Choice of Court Convention

Article 17 provides that “[a] State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the court of origin, were connected only with the requested State.”¹⁷⁵ The provision is a copy of Art. 20 of the Choice of Court Convention¹⁷⁶ and allows a state to relieve itself from its obligation to recognise or enforce a judgment addressing situations which, from its point of view, are wholly domestic.¹⁷⁷ It is designed to prevent parties from artificially engineering the internationality required for the Convention to apply when “on a proper analysis of the connecting elements of the dispute, the dispute ought to have been heard in the requested State.”¹⁷⁸

For obvious reasons, there is no equivalent provision in the NYC, but other Hague Conventions have similar provisions. For example, Art. 13 of the Hague Trusts Convention¹⁷⁹ (HTC) possesses a clause to prevent trusts based in a jurisdiction which does not recognise the trust, but are governed by a law which recognises the trust, from circulating under that Convention. In the HTC’s case, it is worth noting that the article has not been effective in some cases. For example, it is now common for trusts with Italian trustees, settlors and beneficiaries encompassing Italian property but governed by, say, English law to be upheld by the Italian courts, notwithstanding the fact Italy does not have the concept of the trust in its law.¹⁸⁰ It is clear, therefore, that this provision serves a real purpose, but it is unclear how effective it will be in practice.

Article 18 of the Judgments Convention and Article 21 of the Choice of Court Convention

This provision provides that “[w]here a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.”¹⁸¹ Present in both Conventions, this article, if widely used, could potentially undermine all of

¹⁷⁵ Judgments Convention, *supra* note 2 at Art 17.

¹⁷⁶ See Garcimartín & Saumier, *supra* note 8 at para 372.

¹⁷⁷ *Ibid* at para 373.

¹⁷⁸ *Ibid*.

¹⁷⁹ *Convention on the Law Applicable to Trusts and on their Recognition*, 1 July 1985 at Art 13 (entered into force 1 January 1992).

¹⁸⁰ See David J Hayton, ed, *The International Trust* (Bristol: Jordans, 2011) at para 15.7.

¹⁸¹ Judgments Convention, *supra* note 2 at Art 17; Choice of Court Convention, *supra* note 6 at Art 21(1).

the Conventions' efforts to achieve uniformity. This is because, as confirmed by the explanatory report to the Judgments Convention,¹⁸² the article allows states to provide for any additional reservations to "discrete areas of law"¹⁸³ that they like. The only limit seems to be that "the declaration cannot use any criterion other than subject matter."¹⁸⁴ For example, whilst a State could "exclude 'contracts of marine insurance', [it could not exclude] 'contracts of marine insurance where the chosen court is situated in another State'.¹⁸⁵ Another restriction is that such reservations cannot be retroactive,¹⁸⁶ but this does little to stem the damage from possible complications such reservations would cause.

The articles were justified on the basis that "if such opt-outs were not possible, some States might not be able to become Parties to the Draft Convention."¹⁸⁷ This justification is not, however, completely convincing given the numerous exclusions under the Judgments Convention and Choice of Court Convention. It is unclear what additional exclusions a State could legitimately require. However, it is worth noting that only the EU has made a reservation under this section to the Choice of Court Convention, and this was narrowly worded to exclude only certain insurance contracts.¹⁸⁸ Arguably, this tells us little about the likelihood of future ratifying States making such reservations given that the Choice of Court Convention has been ratified by relatively few States to date. Moreover, the history of the NYC tells us that even limited reservations can be fairly popular and, thus, it is unreasonable to assume that few States will avail themselves of such a potentially far-reaching reservation. The fact the NYC permits only two fairly narrow reservations as opposed to this article's numerous very broad reservations also indicates that the Hague Conventions compare unfavourably in this regard.

Article 19

In a similar vein to Article 18, this article provides that:

- A State may declare that it shall not apply this Convention to judgments arising from proceedings to which any of the following is a party –
- (a) that State, or a natural person acting for that State; or
 - (b) a government agency of that State, or a natural person acting for such a government agency.

The State making such a declaration shall ensure that the declaration is not

182 See Garcimartín & Saumier, *supra* note 8 at para 376.

183 Hartley & Dōgauchi, "Explanatory Report" *supra* note 28 at para 235.

184 *Ibid.*

185 *Ibid.*

186 Garcimartín & Saumier, *supra* note 8 at para 381.

187 *Ibid* at para 377.

188 See "Declaration/Reservation/Notification", *supra* note 36.

broader than necessary and that the exclusion from scope is clearly and precisely defined. The declaration shall not distinguish between judgments where the State, a government agency of that State or a natural person acting for either of them is a defendant or claimant in the proceedings before the court of origin.¹⁸⁹

This provision signifies a state can “make a declaration excluding the application of the draft Convention to judgments which arose from proceedings to which such a State was a party, even where the judgment relates to civil or commercial matters.”¹⁹⁰ Although the article does not apply to state-owned enterprises purely because they are state-owned,¹⁹¹ it may apply to those which “perform some distinct public functions.”¹⁹² It goes without saying that this a recipe for litigation and, aside from a restriction against retroactivity, the provision contains no further restrictions. The justification for the provision was the fact that “several delegations were reluctant to include judgments involving State parties within the scope of the draft convention,” notwithstanding the fact “the draft Convention expressly applies only to civil or commercial matters.”¹⁹³ However, it is difficult to see how these concerns could be justified, given that the Convention is designed to exclude situations where sovereign powers are being exercised and given the explicit exclusions in Art 1. The derogation goes beyond what is necessary to assuage such concerns and, if widely adopted, would render the Convention of little use in proceedings where States or State bodies, or what could be argued to be State bodies, are involved.

The Choice of Court Convention does not have an equivalent article and, indeed, Art 2(5) provides that “proceedings are not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party thereto.”¹⁹⁴ The explanatory report confirms that “a public authority is entitled to the benefits of the Convention, and assumes its burdens, when engaging in commercial transactions but not when acting in its sovereign capacity.”¹⁹⁵ Moreover, “as a general rule, one can say that if a public authority is doing something that an ordinary citizen could do, the case probably involves a civil or commercial matter”¹⁹⁶ and, thus, falls within the scope of the Convention.

As the Judgments Convention will only apply in consensual matters where there is a trust jurisdiction instrument or a non-exclusive choice court of agreement, and these might be thought to be rare in disputes

189 Judgments Convention, *supra* note 2 at Art 19.

190 Garcimartín & Saumier, *supra* note 8 at para 384.

191 See *ibid* at para 387.

192 *Ibid* at para 388.

193 *Ibid* at para 385.

194 Choice of Court Convention, *supra* note 6 at Art 2(5).

195 Hartley & Dōgauchi, “Explanatory Report” *supra* note 28 at para 85.

196 *Ibid*.

involving States, the correct point of comparison with the NYC is the Choice of Court Convention. In this regard, the Choice of Court Convention compares favourably to the NYC as, although the latter does not have an explicit provision regarding arbitration agreements involving States or State authorities, arguments have been made that such disputes are inarbitrable or that a State authority did not have capacity to enter into an arbitration agreement.¹⁹⁷ Thus, the fact that the Choice of Court Convention explicitly provides that States and State authorities fall within the scope of the Convention, as long as the subject matter of the dispute is civil or commercial, represents a significant improvement over the NYC.

Article 29

This article, only found in the Judgments Convention, provides that “[t]his Convention shall have effect between two Contracting States only if neither of them has notified the depositary regarding the other in accordance with paragraph 2 or 3. In the absence of such a notification, the Convention has effect between two Contracting States from the first day of the month following the expiration of the period during which notifications may be made.”¹⁹⁸ The article does not feature in the draft explanatory report and would appear to be a reversal of the system under the 1971 Judgments Convention where, in order for the Convention to apply, states would need to enter into a bilateral agreement, an opt-in system.¹⁹⁹ Under the 2019 Judgments Convention, an opt-out system applies. Consequently, the Convention applies between states who have ratified the Convention unless a State chooses to opt-out as regards one or more States.²⁰⁰

The provision clearly addresses a real need. The recognition of judgments from other States could imply an acceptance of the legitimacy of that State and there are several states who do not wish to recognise the legitimacy, or even the existence, of other States. In consequence, without such a provision there might be a reluctance among such States to ratify the Convention. Equally awkward situations might arise if there is a revolution or a *coup d'état* and member states of the Convention were required to recognise judgments given by the courts of an arguably illegitimate regime. In recent times, the issue has arisen in the context of arbitral awards against Venezuela and the question of who has the right to represent Venezuela in enforcement proceedings before US courts.²⁰¹

197 See generally Born, *supra* note 75 at 727–33.

198 Judgments Convention, *supra* note 2 at Art 29.

199 See Saloni Khanderia, “The Hague Conference on Private International Law’s Proposed Draft Text on the Recognition and Enforcement of Foreign Judgments: Should South Africa Endorse it?” (2019) 63:3 J Afr L 413 at 414.

200 See Stewart, *supra* note 3 at 780.

201 See Tom Jones, “Venezuela’s Rival Governments Clash in US Court”, *Global Arbitration Review* (26 February 2019), online: < globalarbitrationreview.com/article/1180830/venezue-

Notwithstanding the evident utility of the provision, it has the unfortunate effect of further undermining the uniformity intended by the Convention as parties now not only have to consider whether the Convention applies to both their state and the state in which they are seeking enforcement, but also whether their state or the state in which they are seeking enforcement has declined to establish relations under the Convention. As with the previous two articles, there is no equivalent provision in the New York Convention and the Judgments Convention, therefore, compares unfavourably in this regard.

6. Conclusion

The Hague Conventions represent the culmination of an almost 50-year effort to harmonise an extremely complex area of conflict of laws, namely the recognition and enforcement of foreign judgments. In several respects, the Hague Conventions improve on their arbitration equivalent, the New York Convention, for example, by providing clarity regarding actions brought in breach of jurisdiction agreements, applying the principles of *lis pendens* and *res judicata* and explicitly listing fraud as a ground for not recognising or enforcing a judgment. However, it cannot be denied that the complexity of the Hague Conventions, listing numerous exclusions from their scope, renders it unwieldy in comparison to the NYC and is likely to lead to a lack of uniformity in practice. Most problematic of all, however, are the broad potential derogations provided in Articles 18 and 21 of the Judgments Convention and the Choice of Court Convention respectively. If these articles are widely applied, they risk seriously undermining the uniformity desired by the Conventions.

In fairness, the danger posed by Articles 18 and 21 was recognised by the drafters of the Hague Conventions who provided for means to address this risk in Articles 20 and 21 of the Judgments Convention and 23 and 24 of the Choice of Court Convention. However, it remains to be seen how effective these provisions will be in practice. Equally, it may be that some state courts interpret the exceptions and derogations in a manner which limits for effect. For example, in the context of the Hague Trusts Convention, Italian Courts have notoriously ignored provisions preventing wholly domestic trusts from being enforced under that Convention.²⁰²

It is also important to note that it was perhaps inevitable that conventions appertaining to the recognition and enforcement of state court judgments, thereby involving the conferral of legitimacy upon States by other States, would possess numerous exceptions and exclusions and, in that regard, a comparison with the NYC is not entirely fair. However, such a comparison

la%E2%80%99s-rival-governments-clash-in-us-court>.
202 See Hayton, *supra* note 181 at para 15.7.

is inevitable given that the Hague Conventions regime is the international and transnational litigation equivalent of the New York Convention and will be used by parties in such litigations in the same way that the NYC is used by parties involved in international arbitrations. Therefore, it is unfortunate that the Hague Conventions compare unfavourably to the NYC in several respects, such as the exclusion of IP and carriage of goods from its scope and the inclusion of a potentially unlimited derogation as regards the subject matter covered by the Conventions.

In conclusion, the Hague Conventions are not (yet) a rival to the New York Convention, but rather an alternative with regard to the areas of law not excluded from those Conventions. Whether the regime established by the Hague Conventions becomes a rival to the NYC depends on a number of factors, which have been discussed in detail; including how many States avail themselves of the wide reservations in Articles 18/21 and how broadly the reservation in Articles 17/20 is interpreted by courts in the future. However, the most important factor of all will be how many States ratify the Hague Conventions in the future as, at the moment, both lag significantly behind the New York Convention.