



## HCCH 2019 Judgments Convention: The Jurisdictional Filters

– Lectures 5 & 7 –

Hague Academy of International Law's  
Advanced Course in Hong Kong 2024

Professor Dr. Matthias Weller,  
Mag.rer.publ., MAE  
University of Bonn, Germany



Department of Justice  
The Government of the Hong Kong  
Special Administrative Region

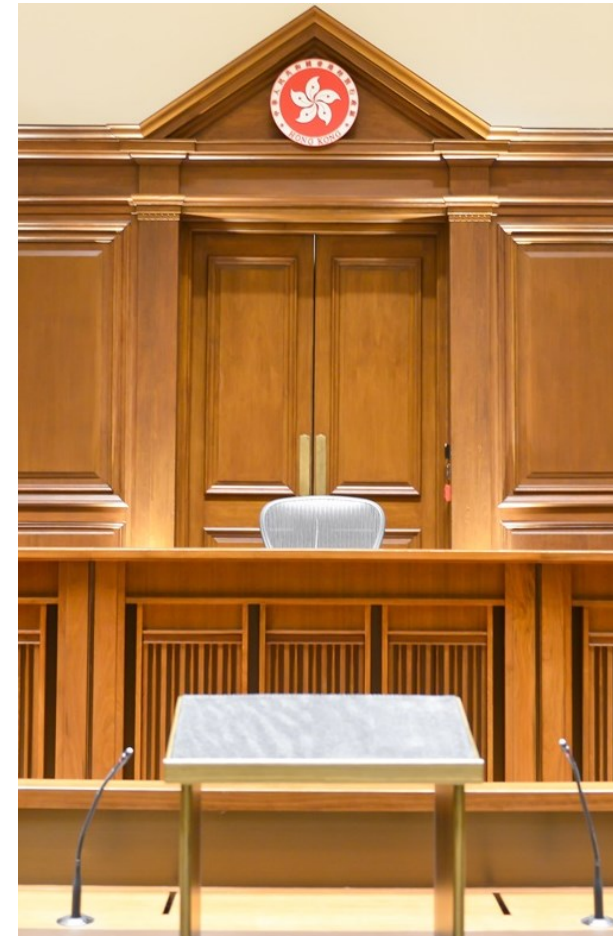


**AAIL**  ASIAN  
ACADEMY OF  
INTERNATIONAL  
LAW

## Overview

### 1. General Concepts

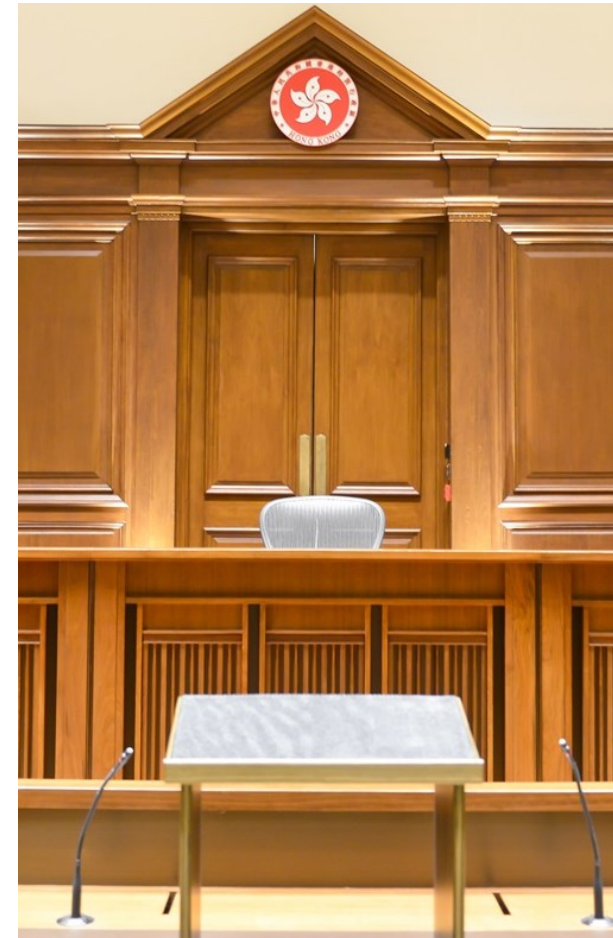
- The Concept of indirect jurisdiction
- Jurisdictional filters and alternative approaches
- Categories / groups of filters
- Common elements of all filters
  - interpretation and language / temporal scope
  - burden of proof
  - plurality of parties / plurality of claims
  - review of facts *de novo* by requested court
  - arbitration exception / anti-suit injunctions



## Overview

### 2. Grounds of Indirect Jurisdiction (more than 20....)

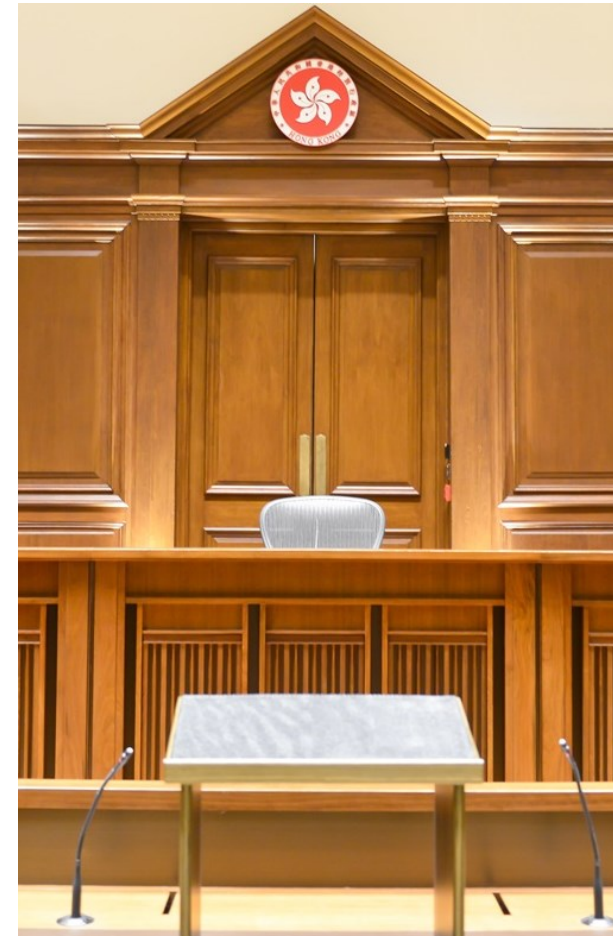
- Group 1: Connections of Judgment Debtor with State of Origin
- Group 2: Consent to proceedings in State of Origin
- Group 3: Grounds of specific jurisdiction
- Group 4: Modifications to protect weaker parties (consumers, employees)
- Group 5: Exclusive jurisdiction
- 6. Interplay of filters with Article 7, in particular public policy



## Overview

### 3. Conclusion and Outlook

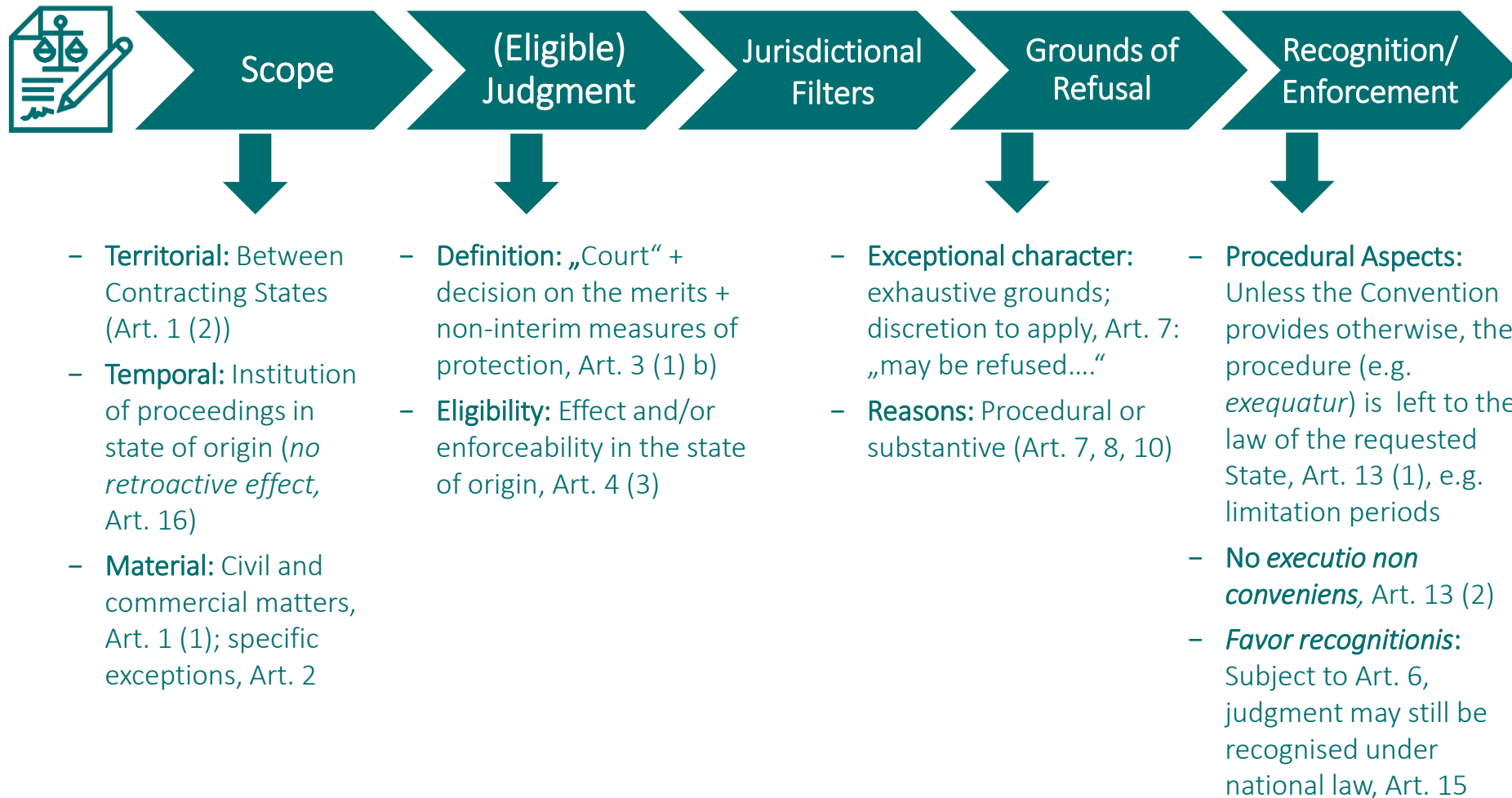
- Territorial connecting factors: Viable path in the digital age or anachronistic path dependency?
- Systemic integration: Relevance for the HCCH Jurisdiction Project?
- Flash back: UEJF et Licra v. Yahoo! Inc.:  
TGI de Paris, 22 May 2000 (Nos 00/05308, 00/05309)  
169 F. Supp. 2d 1181 (N.D. Cal. 2001) (rev.)



- I. General Concepts
  - The HCCH 2019 Judgments Convention's approach to indirect Jurisdiction

# General Concepts

## A. Filters within the mechanics of the Convention



# General Concepts

## A. Filters within the mechanics of the Convention



### Centerpiece of the Convention

All judgments must pass one of these heads of indirect jurisdiction in order to filter out decisions based on an unacceptable assumption of direct jurisdiction by the courts of the State of origin

→ „heart“ of the Convention in terms of function and policy

## B. The Concept of Indirect Jurisdiction

### 1. **Outset:** Public International Law

- Virtually no limitations to assume direct jurisdiction  
(cf. *Lotus* 1927 PCIJ Ser. A, n°1)
- No general obligation to recognize foreign judgments  
(still the basic rule in Indonesia, see Art. 436 RV (Rechtsvordering))

### 2. **State Practice: Review of jurisdiction of court of origin:**

Sufficiently close contacts with case to justify assuming  
“jurisdiction” from the perspective of requested court?

### 3. „Jurisdiction“: Same term – different concepts

- **Compétence directe:** Court of origin will only hear a case if it has jurisdiction according to its own *lex fori*.
- **Compétence indirecte:** Requested court reviews jurisdiction of court of origin for the purpose of recognition and enforcement



ÉTIENNE BARTIN  
FRENCH LEGAL SCHOLAR  
1860 – 1948



## General Concepts

### B. The Concept of Indirect Jurisdiction

#### 4. Purpose: „Trust Management“

- Requested court *indirectly* enforces its own ideas of procedural justice via the requirement of indirect jurisdiction
- **First really effective demarcation of jurisdictional spheres!**
- **No Trust:** No recognition at all, only new domestic proceedings (e.g. still the basic rule in Indonesia, see Art. 436 RV (Rechtvordering))
- **Intermediate:** No *révision au fond*, but review of jurisdiction (e.g. Art. 25 Swiss IPRG; Art. 20 MERCOSUR Protocolo de Las Leñas)
- **High Level:** No review of jurisdiction, only residual exceptions (between similar legal traditions, e.g. Art. 5 Trans-Tasman Agreement)

#### ARTICLE 45 BRUSSELS I BIS-REGULATION

(3) [T]he jurisdiction of the court of origin may not be reviewed. The test of public policy [...] may not be applied to the rules relating to jurisdiction.

#### 5. What standards for the regulation of indirect jurisdiction?

# General Concepts

## C. Indirect Jurisdiction: Standards

### 1. General Clauses: ‘sufficient connection’

- Advantage: Flexibility allows justice on a case-by-case basis
- Examples: Japan (until 2014) and Canada (since 2003)
- However, probably too uncertain to allow for uniform interpretation in a global legal instrument

#### SUPREME COURT OF JAPAN

JUDGMENT OF 28 APRIL 1998, MINSHU 52, P. 853

*[I]nternational jurisdiction [...] should be decided by reason [(Jōri)] in accordance with the idea of ensuring equal treatment of the parties and just and speedy trial.*

#### CLUB RESORTS LTD. v. VAN BREDA

[2012] 1 SCR 572

*The **real and substantial connection test** [...] was focused on [...] the recognition of decisions rendered in other jurisdictions within the Canadian federation and in other countries. [T]he party arguing that the court should assume jurisdiction has the burden of identifying a **presumptive connecting factor** that links the subject matter of the litigation to the forum.*



ARTHUR T. VON MEHREN  
U.S. LEGAL SCHOLAR  
1922-2006

## C. Indirect Jurisdiction: Standards

### 1. General Clauses

### 2. Negative List: Exorbitant grounds of jurisdiction

- Advantage: legal certainty + minimal impact on the freedom of states to regulate
- Example: Greek-German Agreement of 4 November 1961
- However, no positive harmonization of a common legal ground can be achieved that way!

#### GERMAN-GREEK AGREEMENT CONCERNING THE RECIPROCAL RECOGNITION AND ENFORCEMENT OF JUDICIAL DECISIONS

BONN 4<sup>TH</sup> NOVEMBER 1961

Article 3 Recognition may be refused only: [...]

(3) If, according to the legislation of the State in which recognition of the decision is being sought, the courts of that State alone were by law competent; or

(4) If the court which rendered the decision was competent solely by reason of its being the forum *rei sitae* and the defendant either: (a) did not participate in the proceedings, or (b) [...] was participating in the proceedings solely in respect of property situated in the State of the court to which recourse has been had.



ARTHUR T. VON MEHREN  
U.S. LEGAL SCHOLAR  
1922-2006

# General Concepts

## C. Indirect Jurisdiction: Standards

### 1. General Clauses

### 2. Negative List

### 3. “Mirror Principle”: Same standard for both concepts

- States apply their own rules of (direct) jurisdiction as standard to verify the (indirect) jurisdiction of the court of origin
- Advantages: Inherently fair as the same standards are applied for the jurisdiction of domestic and foreign courts
- However, the mirror-image application of a plethora of national *de facto* rules on indirect jurisdiction has only a very limited harmonizing effect and offers little legal certainty to citizens and business people (→ *transaction costs*).
- Examples: unilateral rules (e.g. Spain); most double conventions
- However, a double convention was not achievable at HCCH



ARTHUR T. VON MEHREN  
U.S. LEGAL SCHOLAR  
1922-2006

## C. Indirect Jurisdiction: Standards

### 1. General Clauses

### 2. Negative List

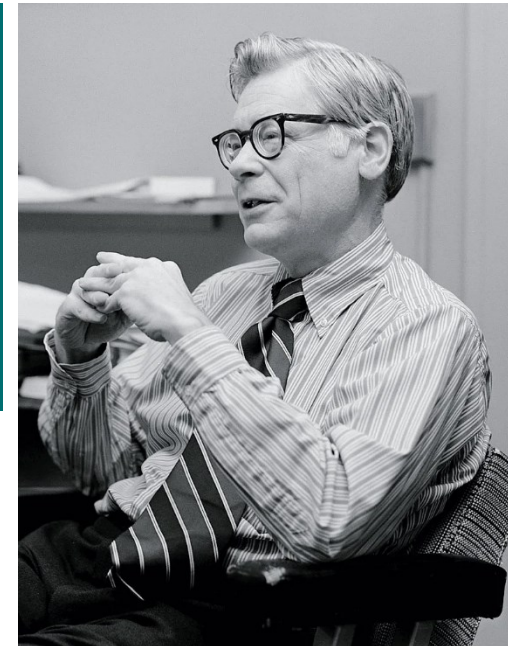
LEY DE COOPERACIÓN JURÍDICA INTERNACIONAL EN MATERIA CIVIL

ARTÍCULO 46 CAUSAS DE DENEGACIÓN DEL RECONOCIMIENTO

- (1) Las resoluciones judiciales extranjeras firmes no se reconocerán: [...]
- (c) [...] si la competencia del juez de origen no obedeciere a una **conexión razonable**. Se presumirá la existencia de una conexión razonable con el litigio cuando el órgano jurisdiccional extranjero hubiere basado su competencia judicial internacional en criterios **similares a los previstos en la legislación española**.

national *de facto* rules of indirect jurisdiction has only a very limited harmonizing effect and offers little legal certainty to citizens and business people (→ *transaction costs*).

- Examples: unilateral rules (e.g. Spain); most double conventions
- However, a double convention was not achievable at HCCH



ARTHUR T. VON MEHREN  
U.S. LEGAL SCHOLAR  
1922-2006

## C. Indirect Jurisdiction: Standards

### LEY DE COOPERACIÓN JURÍDICA INTERNACIONAL EN MATERIA CIVIL

#### ARTÍCULO 46 CAUSAS DE DENEGACIÓN DEL RECONOCIMIENTO

- (1) Las resoluciones judiciales extranjeras firmes no se reconocerán: [...]
- (c) [...] si la competencia del juez de origen no obedeciere a una **conexión razonable**. Se presumirá la existencia de una conexión razonable con el litigio cuando el órgano jurisdiccional extranjero hubiere basado su competencia judicial internacional en criterios **similares a los previstos en la legislación española**.

### HCCH 2005 CHOICE OF COURT CONVENTION

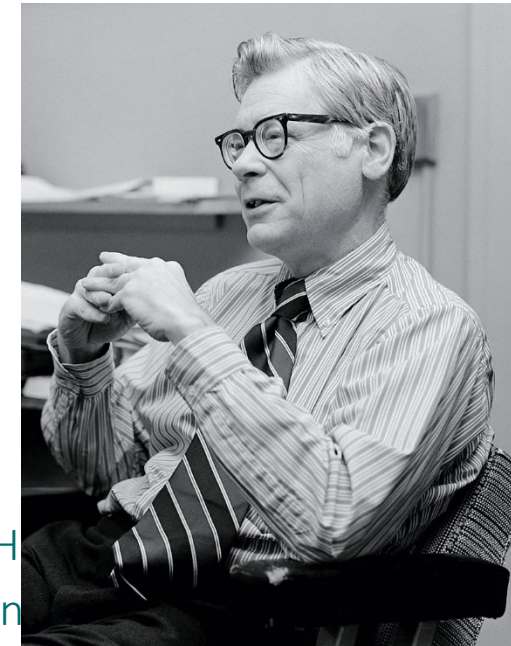
#### ARTICLE 8 RECOGNITION AND ENFORCEMENT

- (1) A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention

### REGULATION (EU) No. 1215/2012

#### ARTICLE 36 RECOGNITION

- (1) A judgment given in a Member State shall be recognized in the other Member States without any special procedure being required.



ARTHUR T. VON MEHREN  
U.S. LEGAL SCHOLAR  
1922-2006

## C. Indirect Jurisdiction: Standards

### 1. General Clauses

### 2. Negative List

### 3. Mirror Principle

### 4. (Modified) Double Control: Standard of review is foreign court's law as adjusted by domestic legal principles

- Unsuitable for an international framework for basically the same reasons as the mirror principle approach

#### CIVIL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA

#### ARTICLE 301

A people's court shall determine that a foreign court has no jurisdiction over a case under any of the following circumstances:

- (1) The foreign court has **no jurisdiction over the case according to its law**, or it has jurisdiction over the case according to its law but has **no proper connection with the dispute** involved in the case;
- (2) The provisions of this Law on exclusive jurisdiction are violated; or
- (3) The agreement by which the parties exclusively choose the court to exercise jurisdiction is violated.



ARTHUR T. VON MEHREN  
U.S. LEGAL SCHOLAR  
1922-2006

## C. Indirect Jurisdiction: Standards

### 1. General Clauses

### 2. Negative List

### 3. Mirror Principle

### 4. (Modified) Double Control

### 5. HCCH's original proposal: „*Convention mixte*“

- Combination of required („white“), prohibited („black“) and permitted („gray“) bases of jurisdiction
- Permitted grounds of jurisdiction leave recognition under national law to the discretion of the courts.
- Advantage: Negotiation difficulties may be left in gray zone; direct and indirect jurisdiction can be regulated differently.
- Example: 1999 Draft of the HCCH Judgments Convention.
- Ultimately, no consensus on such a type of convention could be reached due to overly ambitious goals and scepticism towards the new concept, esp. by European delegates (Special Comm. June 1994).

*Only [...] a true mixed convention can bridge the gap between the views and practices of the United States and the European Union*



ARTHUR T. VON MEHREN  
U.S. LEGAL SCHOLAR  
1922-2006



## General Concepts

### C. Indirect Jurisdiction: Standards

1. General Clauses
2. Negative List
3. Mirror Principle
4. (Modified) Double Control
5. HCCH's original proposal: „*Convention mixte*“

#### Conclusion:

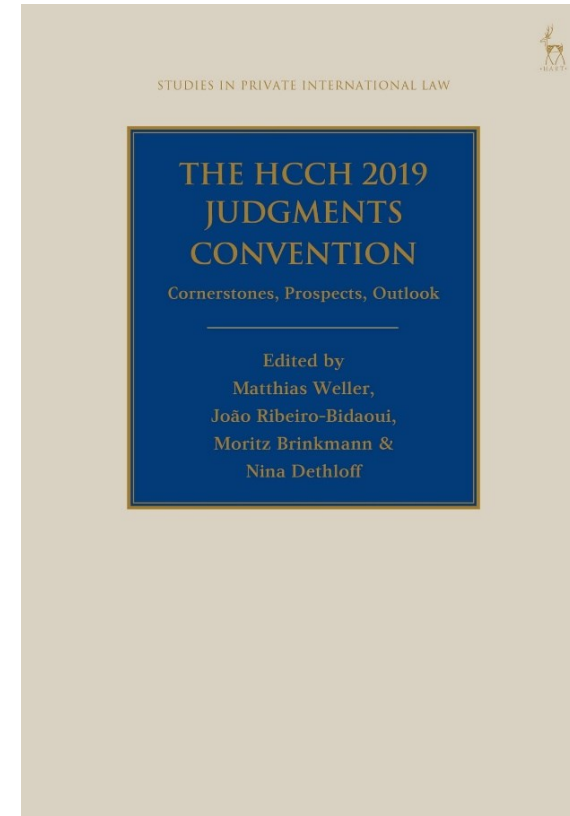
The HCCH 2019 Convention's current approach, based on an elaborated list of autonomous “filters” was by no means without alternative!

*Only [...] a true mixed convention can bridge the gap between the views and practices of the United States and the European Union*



ARTHUR T. VON MEHREN  
U.S. LEGAL SCHOLAR  
1922-2006

## D. Jurisdictional Filters: The Convention's Approach

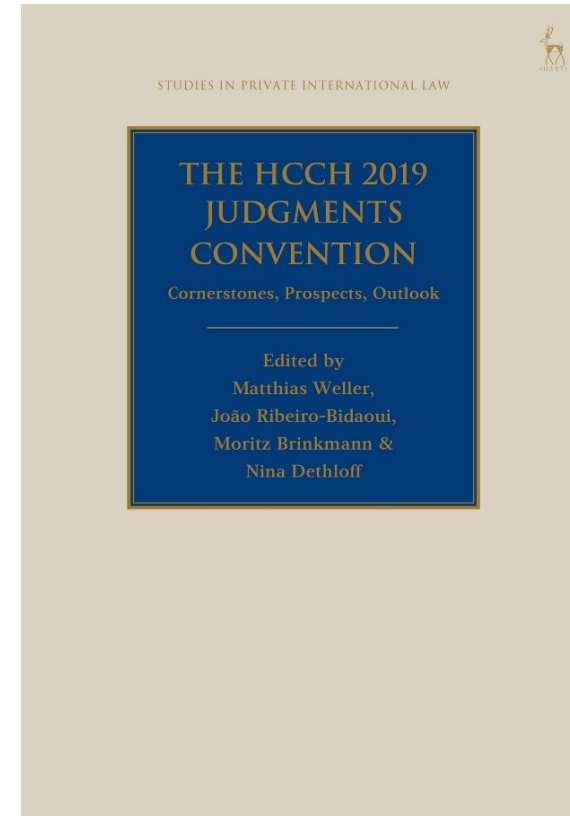


**HCCH 2019 Judgments Convention: University of Bonn's and HCCH Permanent Bureau's Conference Bonn, June 2023**

# General Concepts

## D. Jurisdictional Filters: The Convention's Approach

Matthias Weller	Marta Caceres	Zheny	Linda Nyroa
Jianghuaihua	haffnate	Abesnoti	Alex Citichky
Helena Ford P.B.HCCH		Sutarna Kola (Tepi)	Felix Risse
Jia Huias Lehman		Silvana Sinari	Giacca Matacegin
Congratulations für den Sieg	Zel. gh ELBAKT	Kiit Romanov	Gongratulations on the award agent compare in Bonn 2023
Marta Perdigão Sander			Stefan Laue
J.Holiday	M. F. J. W. van Oost	Zhen Chen	Emerit Provest
Suzanne	Andreas Stern	Marion Ho-DAC	
Fabiana Savia		Carolina Saif	Boris Policht
Thalia Kruger	Kamela S. Burg	Tess Bens	Amru Bosh
Linda Silkenma	Manu Fu	Jus	Sophia Luss
Genevieve Saunier	Auui Lehuert	Alexander Wolf	Helen Tamniku
Alison	Bulbar M	Nicholas Moutaf	Elone ULRIX
Christine Lom			Adhine Choo
Karl R. Beermann	Jonas Elh Lutz	Erdal TATLI	Abu Alon Telkani
	J. Kiehl	Thomas Bergin	Chukwura Biko
			Mahideh Brackx
		Felix W. Wille	Katharina
			Ouisap Tawana
			Christal
			Nandha R
			Lars Scharenbach



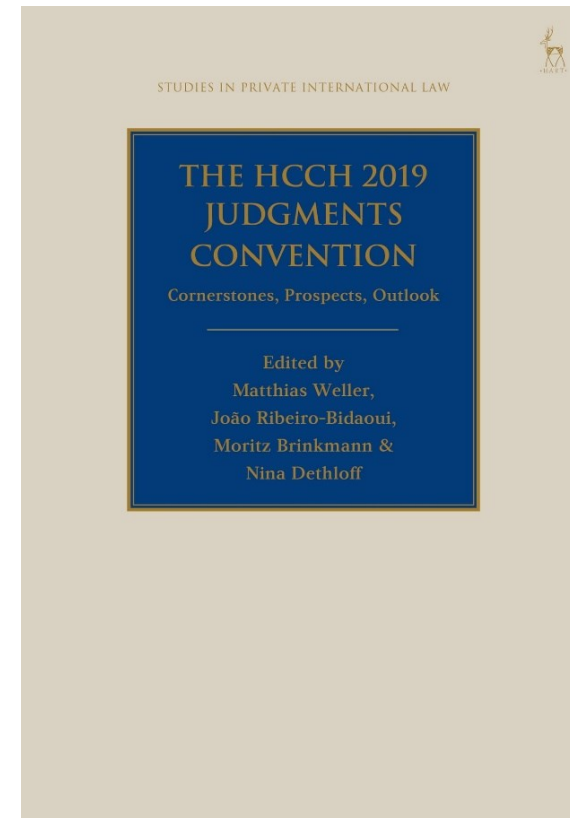
## D. Jurisdictional Filters: The Convention's Approach

**1. Key Question:** What are universally accepted minimum standards for the mutual recognition and enforcement of foreign judgments at the global level?

**2. Jurisdictional Filters:** Enumeration of required positive heads of (indirect) jurisdiction carefully tailored to fit specific situations where the sufficient link to the State of origin is virtually uncontested.

### 3. Characteristics:

- **Easy application:** Independence from foreign procedural law
- **Familiarity:** Mechanism well-known from established treaties



## D. Jurisdictional Filters: The Convention's Approach

ARRANGEMENT ON RECIPROCAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS  
IN CIVIL AND COMMERCIAL MATTERS BETWEEN THE MAINLAND AND HONG KONG

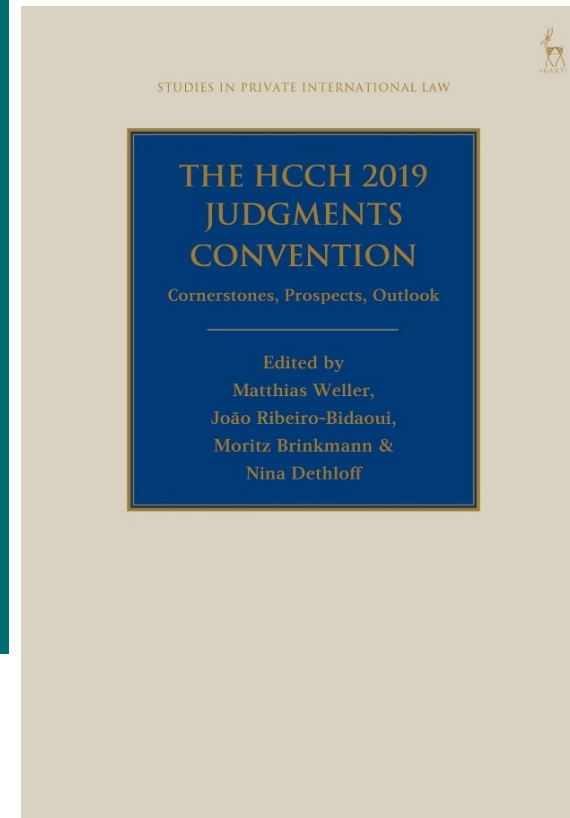
BEIJING 18<sup>TH</sup> JANUARY 2019

### ARTICLE 11 | 第十一条

The court of the requested place shall consider the original court to have jurisdiction over the relevant action if one of the following conditions is satisfied [...]:  
符合下列情形之一 [...] 被请求方法院应当认定原审法院具有管辖权：

- (1) [...] the place of residence of the defendant is within the requesting place;  
原审法院受理案件时，被告住所地在该方境内；
- (3) [...] the place of performance of the contract is in the requesting place;  
因合同纠纷提起的诉讼，合同履行地在该方境内；
- (4) [...] the infringing act was committed in the requesting place;  
因侵权行为提起的诉讼，侵权行为实施地在该方境内；

- **Easy Application:** Independence from foreign procedural law
- **Familiarity:** Mechanism well-known from established treaties
- **'Floor, not a ceiling':** National grounds of jurisdiction still permitted (Art. 15)
- **Bridging legal differences** within a limited substantive scope of application



## D. Jurisdictional Filters: The Convention's Approach

ARRANGEMENT ON RECIPROCAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS  
IN CIVIL AND COMMERCIAL MATTERS BETWEEN THE MAINLAND AND HONG KONG

BEIJING 18<sup>TH</sup> JANUARY 2019

### ARTICLE 11 | 第十一条

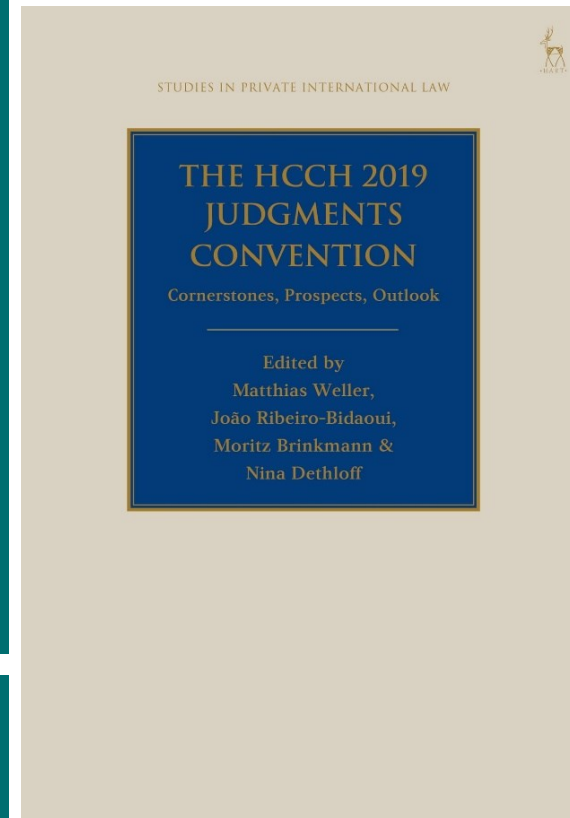
The court of the requested place shall consider the original court to have jurisdiction over the relevant action if one of the following conditions is satisfied [...]:  
符合下列情形之一 [...] 被请求方法院应当认定原审法院具有管辖权：

- (1) [...] the place of residence of the defendant is within the requesting place;  
原审法院受理案件时，被告住所地在该方境内；
- (3) [...] the place of performance of the contract is in the requesting place;  
因合同纠纷提起的诉讼，合同履行地在该方境内；
- (4) [...] the infringing act was committed in the requesting place;  
因侵权行为提起的诉讼，侵权行为实施地在该方境内；

*Place of performance (EU) vs. activity-based contract jurisdiction (US)*

### ARTICLE 5 (1) (G)

[T]he judgment ruled on a contractual obligation and [...] was given by a court of the State in which **performance of that obligation** took place, or should have taken place [...] unless the **activities of the defendant** in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State



## E. Categories/groups of filters

**Note: The Convention provides for more than 20 different jurisdictional filters!**



# General Concepts

## E. Categories/groups of filters

**Article 6**  
Exclusive basis for recognition and enforcement

Notwithstanding Article 5, 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.

**Article 5**  
Bases for recognition and enforcement

for recognition and enforcement

**第六条 承认与执行的排他性基础**

尽管有第五条的规定，对不动产物权所作的判决，当且仅当该不动产位于原审国时，才应该予以承认与执行。

**第五条 承认与执行的基础**

一、判决满足下列要求之一才能予以承认与执行：

(一) 被申请人承认与执行的人，在其成为原审法院诉讼程序一方当事人时在原审国有惯常居所；

(二) 被申请人承认与执行判决的自然人，在其成为原审法院诉讼程序的一方当事人时在原审国有主要营业地，且判决所基于的诉讼请求起因于该地的营业活动；

(三) 被申请人承认与执行判决的人，是判决所基于诉讼请求的提起人，但不是反请求的提起人；

(四) 被告成为原审法院诉讼程序的一方当事人时，其在原审国设有分支机构、代理机构或其他无独立法人资格之机构，且判决所基于的诉讼请求起因于该分支机构、代理机构或其他机构的活动；

(五) 在作出判决的诉讼程序中，被告明确同意原审法院的管辖权；

(六) 被告在原审法院就实体问题进行答辩，但在原审国法律所规定的期限内没有对法院行使管辖权的异议显然不会成功；

... agreed place of performance, unless the activities of the defendant in relation to the ... did not constitute a purposeful and

(l) le jugement

(i) dans la mesure où ... que cette demande résulte de la mesure principale ; ou

(ii) dans la mesure où il a été rendu contre le demandeur reconventionnel, sauf si le jugement a été rendu par un tribunal désigné dans un accord conclu ou documenté par écrit ou par tout autre moyen de communication qui rende l'information accessible pour être consultée ultérieurement, autre qu'un accord exclusif d'élection de for.

Aux fins du présent alinéa, un « accord exclusif d'élection de for » est un accord conclu entre une ou plusieurs parties qui désigne, pour connaître des litiges nés ou à naître à l'occasion d'un contrat de droit déterminé, soit les tribunaux d'un État, soit un ou plusieurs tribunaux d'autres États, à l'exclusion de la compétence de tout autre tribunal.

... connaissance ou l'exécution est demandée dans un but personnel, familial ou professionnel, ou contre un employé

du paragraphe premier ne s'applique que soit oralement ou par écrit

(g) et (m) du paragraphe premier ne s'applique pas à l'enregistrement d'un acte uniquement s'il a été enregistré

**Article 5**  
... ment exclusif de la reconnaissance et de l'exécution d'un jugement portant sur des droits réels dans l'État d'origine.

2. If recognition or enforcement is sought against a natural person acting primarily for personal, family or household purposes (a consumer) in matters relating to a consumer contract, or against an employee in matters relating to the employee's contract of employment –

(a) paragraph 1(e) applies only if the consent was addressed to the court, orally or in writing;

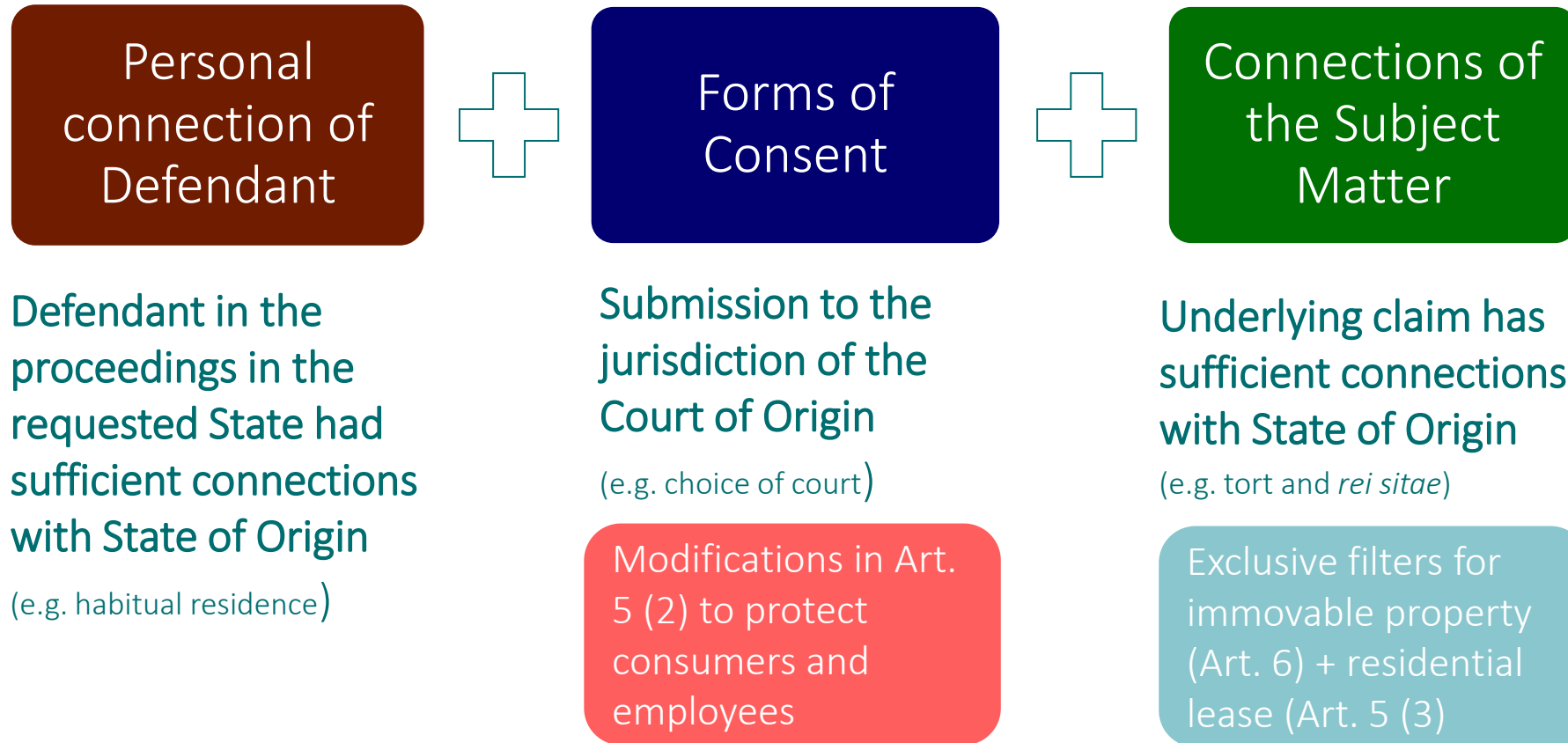
(b) paragraph 1(f), (g) and (m) do not apply.

3. Paragraph 1 does not apply to a judgment that ruled on a residential lease of immovable property (tenancy) or ruled on the registration of immovable property. Such a judgment is eligible for recognition and enforcement only if it was given by a court of the State where the property is situated.



# General Concepts

## E. Categories/groups of filters: Underlying Rationales of Art. 5 and 6



→ five „groups“ in which the 20 or so filters will be presented here...

## F. Common Aspects

### 1. Interpretation & Language

#### ARTICLE 20

##### UNIFORM INTERPRETATION

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

- **General Rule:** Terms and notions of the Convention should be given an autonomous meaning (see also Art. 31 *et seq.* Vienna Convention)
- **Explanatory Report (ER):** Not only the opinion of the authors but approved by HCCH Members ➤ Important supplemental means of interpretation
- **Exception:** Reference to national law is explicitly or implicitly allowed by the Convention

#### ARTICLE 5

##### BASES FOR RECOGNITION AND ENFORCEMENT

1. A judgment is eligible for recognition and enforcement if one of the following requirements is met – (f) the defendant argued on the merits before the court of origin without contesting jurisdiction **within the timeframe provided in the law of the State of origin**, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;

# General Concepts

## F. Common Aspects

### 1. Interpretation & Language

- **Authentic Languages:** French and English, but not Spanish, although now an official language of the HCCH
- **Translations** will nevertheless be of great significance in daily practice, especially within the European Union, which has provided translations into all 24 EU official languages!

**承认与执行外国民商事判决公约\***

本公约缔约国，希望通过司法合作，有效提升全面的司法救济，促进以规则为基础的多边贸易和投资，以及人员流动。

相信通过在外国民商事判决承认与执行方面制订一套统一的核心规则，能够加强此种合作，从而促进判决的有效承认和执行。

确认加强此种司法合作，特别需要一项国际法律机制，为判决的全球流通提供更大的可预见性和确定性，并与2005年6月30日所订立的《选择法院协议公约》相互补充。

兹决定缔结本公约，并议定条款如下：

**第一章 范围和定义**

**第一条 范围**

一、本公约适用于民商事判决的承认与执行。公约特别不适用于税收、关税或行政事项。

二、本公约适用于一缔约国对另一缔约国法院所作判决的承认和执行。

**第二条 排除的范围**

一、公约不适用于下列事项：

本公约由何其生翻译，博士学位论文评审者进行了校对。本翻译稿仅用于学术和教学目的。欢迎随时予以修正。本翻译稿未经进一步校正后将提交《中国国际私法与比较法年刊》，以作增刊使用。

特别感谢中国代表团各位成员和专家，包括陈天俊、孙晓敏、曹利娟法官、任程中副司长，以及陈奕泰、吴昊、韩爽、董珊珊和韩磊等。

Diario Oficial de la Unión Europea 14.7.2012

L 187/4

**CONVENIO SOBRE EL RECONOCIMIENTO Y LA EJECUCIÓN DE RESOLUCIONES JUDICIALES EXTRANJERAS EN MATERIA CIVIL O MERCANTIL**

Las Partes Contratantes del presente Convenio,

Deseario promover un acceso efectivo a la justicia para todos y facilitar el comercio y la inversión multilaterales basados en la cooperación judicial.

Confianza en que esta cooperación puede reforzarse estableciendo normas básicas comunes sobre el reconocimiento y la ejecución de dichas resoluciones.

Convenidas de que para reforzar la cooperación judicial se requiere, en particular, un régimen jurídico internacional que aporte una mayor predictibilidad y seguridad jurídica en relación con la circulación global de las resoluciones judiciales extranjeras, y que complementen el Convenio de 30 de junio de 2005 sobre acuerdos de elección de foro.

Han resuelto celebrar el presente Convenio y han acordado las disposiciones siguientes:

**CAPÍTULO I**

**ÁMBITO DE APLICACIÓN Y DEFINICIONES**

Artículo 1

**Ámbito de aplicación**

1. El presente Convenio se aplicará al reconocimiento y a la ejecución de resoluciones en materia civil o mercantil, No se aplicará, en particular, a las materias fiscal, aduanera ni administrativas.

2. El presente Convenio se aplicará al reconocimiento y ejecución en un Estado contratante de una resolución dictada por un tribunal de otro Estado contratante.

...en a tal efecto y han acordado las siguientes disposiciones:

Se utiliza "Convención" como sinónimo de "Convenio".

Two competing Spanish translations prepared by the European Union and the Latin American Members of the HCCH in collaboration with Prof. Marcos Dotta Salgueiro

معاهدة الاعتراف وتنفذ الأحكام الأجنبية في المسائل المدنية والتجارية  
المصادقة في 2 يولي 2012

الأطراف المتعاقدة المتعاقدة العربية

رغبة في تشجيع التفاعل الفعال بين المجتمعات المتنوعة اللغوية والثقافية والإثنية، والوصول الفعّال إلى أفراد من مختلف البلدان الذين يعانون من صعوبات في الاعتراف وتنفذ الأحكام الأجنبية في المسائل المدنية والتجارية، وبموجب هذه معاهدة واحدة من أجل أن تتمكن هذه المجتمعات المتنوعة اللغوية والثقافية والإثنية من التفاعل بشكل فعال مع بعضها البعض، وبتوافق تام مع أهدافها، وبموجب 300 من موادها،

قد قرروا إبرام ما عدا المعاهدة المذكورة، وتوافق على الأحكام الآتية:

المسائل الأولى، المصادقة والتعرفات

المسألة الأولى، الاعتراف

1. هذه الاتفاقية ستطبق على الاعتراف بالأحكام وتنفذها في المسائل المدنية أو التجارية، وإن تطبق، حتى رحا الحدود، على مسائل الاعتراف، والمصادقة، والتنفيذ الإدارية.

2. هذه الاتفاقية ستطبق على الاعتراف بالأحكام وتنفذها داخل دولة متعاقدة مستثناة من معاهدة دولية متعاقدة أخرى.

المسألة الثانية، المصطلحات المستخدمة

1. هذه الاتفاقية لن تنطبق على المسائل الآتية:

(أ) المسائل المتعلقة بالقانونية للأشخاص الطبيعيين.

(ب) النزاعات العائلية.

(ج) مسائل القانون الشخصي للأفراد، بما في ذلك المسائل المتعلقة بالجنسية والقانون والقرارات المتخذة من الزواج وما يتبعها من علاقات.

(د) الأصول والتمويل، وحل المنازعات العائلية وما يتبعها من مسائل.

(هـ) على الركب والتمويل.

(و) القواعد الحرجية المتعلقة بالعمالة، والقرارات الحرجية في مناطق محددة عن الأشخاص المرحومين، والقواعد الحرجية المتعلقة بالطلاق، وتسمية وتسوية الميراث من الوفاة الحرجية، والمنازعات المتعلقة بها.

(ز) المسائل المتعلقة بالمسائل الحرجية الدولية.

(ح) المسائل المتعلقة بالاعتراف، أو أصل الأحكام الأجنبية، أو صحتها، أو صحة توافقات الصرافة من أصولها.

(ط) صحتها، أو صحتها في الحالات الخاصة.

(ي) حقوق الضحايا.

(ج) المسائل المتعلقة بالجنسية.

من أجل ضمان القوة الملزمة، بما في ذلك لشكله الفردي عندما يصادق عليه من قبلهم أو من قبلهم.

(د) سلطة المفاوضة الآن، بما في ذلك لشكله الفردي عندما يصادق عليه من قبلهم أو من قبلهم.

(هـ) مسائل الاعتراف، والاعتراف، وما عدا ذلك من المسائل المتعلقة بالاعتراف، أو صحتها، أو صحتها في الحالات الخاصة.

(و) مسائل الاعتراف، أو الاعتراف، أو الاعتراف، أو الاعتراف، وما عدا ذلك من المسائل المتعلقة بالاعتراف، أو صحتها، أو صحتها في الحالات الخاصة.

(ز) الاعتراف، أو الاعتراف، أو الاعتراف، أو الاعتراف، وما عدا ذلك من المسائل المتعلقة بالاعتراف، أو صحتها، أو صحتها في الحالات الخاصة.

(ح) الاعتراف، أو الاعتراف، أو الاعتراف، أو الاعتراف، وما عدا ذلك من المسائل المتعلقة بالاعتراف، أو صحتها، أو صحتها في الحالات الخاصة.

(ط) الاعتراف، أو الاعتراف، أو الاعتراف، أو الاعتراف، وما عدا ذلك من المسائل المتعلقة بالاعتراف، أو صحتها، أو صحتها في الحالات الخاصة.

Arabic translation kindly provided by Prof. Yehya Badr [يحيى إكرام إبراهيم بدر]

Chinese translation kindly provided by Prof. He Qisheng [何其生]

# General Concepts

## F. Common Aspects

### 2. Temporal Scope of the Jurisdictional Filters

- **General Rule:** The Convention must have effect between the State of origin and the requested State at the date the proceedings are instituted in the State of origin, see Articles 1 (2), 16
- **“Instituting proceedings”:** Completion of the first procedural act that gives rise to the commencement of the proceedings according to the State of origin.
- Some filters provide expressly for a relevant **point of time**, thereby clearly rendering a later change of the connecting factor irrelevant (*perpetuatio fori*).

#### ARTICLE 5

#### BASES FOR RECOGNITION AND ENFORCEMENT

(1) (k) the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and –

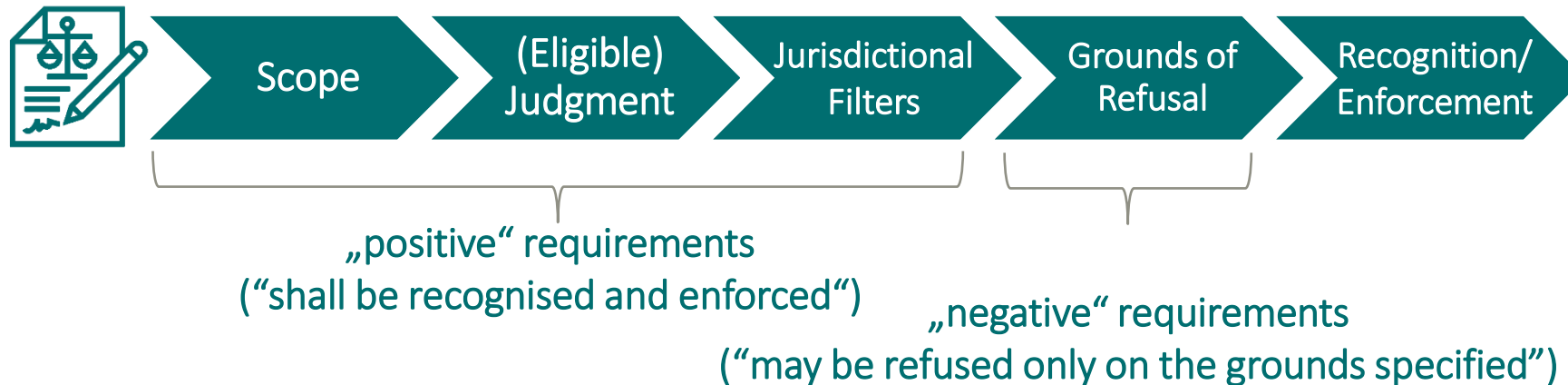
(i) **at the time the proceedings were instituted**, the State of origin was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or

(ii) **at the time the proceedings were instituted**, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.

# General Concepts

## F. Common Aspects

### 3. Burden of Proof



- **General Rule:** The risk of a *non liquet* concerning positive requirements lies with the judgment creditor, while negative requirements must be proven by the judgment debtor.
- **Standard of proof:** The applicable standard (e.g. preponderance of evidence) is determined by the procedural law of the requested State, Art. 13 (1) sentence 1.
- **Exception:** Some filters implicitly provide for a shift in the burden of proof (“... unless...”) and a higher standard of proof (“evident”).

# General Concepts

## F. Common Aspects

### 3. Burden of Proof

#### ARTICLE 5

#### BASES FOR RECOGNITION AND ENFORCEMENT

1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –  
(f) the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, **unless it is evident** that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;

- **General Rule:** The risk of a non liquet concerning positive requirements lies with the judgment creditor, while negative requirements must be proven by the judgment debtor.
- **Standard of proof:** The applicable standard (e.g. preponderance of evidence) is determined by the procedural law of the requested State, Art. 13 (1) sentence 1.
- **Exception:** Some filters implicitly provide for a shift in the burden of proof (“... unless...”) and a higher standard of proof (“evident”).

# General Concepts

## F. Common Aspects

### 3. Burden of Proof

- Is the burden of proof susceptible to **alteration by national law**?
- **More favorable rules of proof may occur in the lex fori:**

CODE OF CIVIL PROCEDURE (INDIA)

SECTION 14 PRESUMPTION AS TO FOREIGN JUDGMENTS.

**The Court shall presume** upon the production of any document purporting to be a certified copy of a foreign judgment, **that such judgment was pronounced by a Court of competent jurisdiction**, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

- Given that the convention sets only a minimum standard (Art. 15), States are free to apply a more generous rule regarding the burden of proof in accordance with Art. 13 (1).
- **Stricter rules in the lex fori:** States may not apply a more rigid burden (e.g. to show the absence of negative conditions), as this could undermine the effective implementation of the minimum standard for recognition envisaged by the Convention.
- The same applies to **unreasonably strict standards of proof** (“beyond any doubt”).

## F. Common Aspects

### 3. Burden of Proof

- Many jurisdictions qualify the requirement of indirect jurisdiction as a ground for non-recognition, thereby imposing the burden of proof on the judgment debtor.

U.S. UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS  
RECOGNITION ACT 2005

SECTION 4 STANDARDS FOR RECOGNITION OF FOREIGN-COUNTRY JUDGMENT

(b) A court of this state may not recognize a foreign-country judgment if:

- (1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
- (2) the foreign court did not have personal jurisdiction over the defendant; or
- (3) the foreign court did not have jurisdiction over the subject matter. [...]

(d) A party resisting recognition of a foreign-country judgment has the **burden of establishing** that a ground for nonrecognition stated in subsection (b) or (c) exists.



## F. Common Aspects

### 3. Burden of Proof

- Many jurisdictions qualify the requirement of indirect jurisdiction as a ground for non-recognition, thereby imposing the burden of proof on the judgment debtor.
- Convention's attribution of burden of proof preempts lex fori of requested state.

## F. Common Aspects

### 4. Plurality of Parties

- The jurisdictional filters must be evaluated for each party, including third parties (e.g. third party intervention/interpleader; assignment) individually, even if the judgment e.g. determines the joint and several liability of the defendants.

### 5. Plurality of Claims

- The jurisdictional filters must also be evaluated for each claim individually, even if there is one judgment on several claims.

# General Concepts

## F. Common Aspects

### 6. No hierarchy

- All grounds of jurisdiction are considered equivalent and can be concurrently applied, except for Art. 6, 5(3).

### 7. No binding effect of factual findings of the court of origin

- The requested court may review the foreign judgment for the purpose of making its own assessments of (indirect) jurisdiction according to Article 4 (2) cl. 2.
- In contrast to the HCCH 2005 Convention, the court is not bound by the findings of fact by the court of origin

*“[The HCCH 2005 Convention] creates a very real risk of parties being forced to litigate in, and bound to judgments by, courts to whose authority they never consented”*



GARY B. BORN  
US ARBITRATION LAWYER  
WILMER HALE LLP

HCCH 2005 CHOICE OF COURT CONVENTION  
ARTICLE 8 RECOGNITION AND ENFORCEMENT

(2) Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. **The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.**

## F. Common Aspects

### 8. Exception: Arbitration and related proceedings, Art. 2 (3)

- Policy of **absolute non-interference with arbitration** in HCCH 2019 = Art. 2(4) HCCH 2005
- Any judicial decisions in connection with arbitration are not governed by the Convention (e.g. annulment, fixing place of arbitration, other assisting measures etc.)
- refusal of judgments contrary to an arbitration agreement remains possible under national law, even if the judgment passes a filter
  - implicit limitation of Article 4 (1) by Article 2(3)
  - requested court examines validity of arbitration agreement *de novo*
- Are decisions confirming an arbitral award „judgments“?
  - whatever the answer is, the decision is covered by Article 2(3) (but see also ECJ, 2022, *H. Limited*)
- Other forms of alternative dispute resolution not covered by the exception (conciliation, mediation etc.)

## F. Common Aspects

### 9. Anti-suit injunctions (ASI) under the Convention?

- Generally, the Convention does not address interim measures of protection as recognizable judgment, Article 3 lit. b sentence 2: “An interim measure of protection is not a judgment.”
- However, issuance of an **anti-enforcement injunction** interferes with the Contracting State’s obligation to accept circulation of judgments amongst Contracting States.
- Exception: ASI in support of an arbitral award/tribunal remains admissible, Article 2(3).
- What if ASI serves to ensure a “better”/“correct” application of the jurisdictional filters of Art. 5 HCCH?
  - In principle, there is no legitimate interest in interfering with the independent assessment of the second court as long as recognition remains possible under national law (Art. 15)
  - Possible Exception: Manifest disregard of Art. 6 HCCH 2019?

## II. Specific Grounds of Jurisdiction under the HCCH 2019 Judgments Convention

## II. Specific Grounds of Jurisdiction under the HCCH 2019 Judgments Convention

Group 1: Connections of Judgment Debtor with  
State of Origin

### A. Article 5 (1) lit. a – Habitual residence

#### 1. Text:

A judgment is eligible for recognition and enforcement if one of the following requirements is met

lit. a: if the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin;



## A. Article 5 (1) lit. a – Habitual residence

### 2. Issues:

(1) Rationale: “home state jurisdiction” / “actor sequitur forum rei”

→ Note: Defendant in the recognition and enforcement proceedings in the requested Contracting State was not necessarily a defendant in the Contracting State of origin (Article 3 (1) lit. a))

→ Compare national grounds of direct jurisdiction based on habitual residence that apply to the defendant only

- e.g. GER’s Civil Procedure Act para. 13 (“Wohnsitz”);
- e.g. PRC’s Civil Procedure Act, Art. 22;
- e.g. Article 4 (1) Brussels Ibis Regulation (“domicile”).

### A. Article 5 (1) lit. a – Habitual residence

#### 2. Issues:

##### (1) Rationale: “home state jurisdiction” / “actor sequitur forum rei”

Illustration: A sues B in Contracting State A. The claim is fully rejected. B now seeks to enforce the judgment in Contracting State C against assets of A’s located there, in order to recover costs.

→ “judgment”, Article 3 (1) lit. b: “... determination of costs or expenses of the proceedings by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention.”

→ A, Claimant in the original proceedings, is now defendant in the r&e proceedings in the sense of Article 5(1) lit. a: Judgment passes lit. a and thus circulates amongst the Contracting States.

→ No „forum non conveniens“ for r&e proceedings, Article 13(2).

### A. Article 5 (1) lit. a – Habitual residence

#### 2. Issues:

##### (1) Rationale: “home state jurisdiction” / “actor sequitur forum rei”

Illustration: A sues B in Contracting State A. The claim is fully rejected. B now seeks to enforce the judgment in Contracting State C against assets of A’s located there, in order to recover costs.

→ also covered by Article 5(1) lit. c (form of consent to jurisdiction, see Group 2, below):

“...the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based.”

→ two filters apply independently of each other / no hierarchy

→ claimant/applicant in r&e proceedings will (primarily) use the filter that is easier to argue and prove

## A. Article 5 (1) lit. a – Habitual residence

### 2. Issues:

(2) Scope: All disputes

→ “general jurisdiction”

→ unless excluded by:

- Article 2 – exclusions of subject matters from general material scope (“civil and commercial”);
- Article 5(3) – residential lease;
- Article 6 – immovable property

## A. Article 5 (1) lit. a – Habitual residence

### 2. Issues:

#### (3) What is “habitual residence”?

- autonomous interpretation

-- distinguish natural and legal persons

## The Jurisdictional Filters

### A. Article 5 (1) lit. a – Habitual residence

#### 2. Issues:

#### (3) What is “habitual residence”?

- Article 3(2) defines “habitual residence” for legal persons and offers four alternative connecting factors:

(1) statutory seat (according to bylaws) “domicile”  
≈ registered office

(2) state of the law of incorporation “place of birth” (↔ Article 63 (1) Brussels Ibis)

(3) central administration “brain”

(4) principal place of business “muscles”

## A. Article 5 (1) lit. a – Habitual residence

### 2. Issues:

#### (3) What is “habitual residence”?

- Article 3(2) defines “habitual residence” for legal persons and offers four alternative connecting factors:

→ a legal person may easily have more than one “habitual residence”

→ a legal person does not necessarily show all four connecting factors

(e.g. top holding company without any distinct “principal place of business”/”muscles”)

## A. Article 5 (1) lit. a – Habitual residence

### 2. Issues:

#### (3) What is “habitual residence”?

- no definition for natural persons, but ER gives indications for autonomous concept (as used in other modern HCCH Conventions):
  - more “factual” approach (than “domicile” / “nationality”)
  - ≈ close connection between person and socio-economic environment
  - higher threshold than mere “residence” (as in Article 14 (1) and 17)



## A. Article 5 (1) lit. a – Habitual residence

### 2. Issues:

#### (3) What is “habitual residence”?

- no definition for natural persons, but ER gives indications for autonomous concept (as used in other modern HCCH Conventions):

→ “center of main interests”

→ usually only one “habitual residence”

-- in exceptional cases two or more or even none (↔ domicile of birth)

### A. Article 5 (1) lit. a – Habitual residence

#### 2. Issues:

(4) What is the relevant moment in time for “habitual residence”?

- moment in which defendant of r&e proceedings has become a party to the proceedings in the Contracting State of origin
- Alternative ways of becoming the “person against whom r&e is sought”
  - third party joinder/impleader (“active”/”passive”)
  - collective redress/class action
  - assignment/succession/merger (during proceedings before court of origin)
- “perpetuatio fori”

### A. Article 5 (1) lit. a – Habitual residence

#### 2. Issues:

(4) What is the relevant moment in time for “habitual residence”?

→ autonomous concept of the moment of time of “becoming a party” (ER):

- moment of the first action to be undertaken to become/make one a party
- irrespective of whether this action does indeed make the person a party according to the lex fori of the court of origin
- but: that lex fori determines which is the first action to be undertaken, e.g.:
  - serving statement of claim (directly) on the prospective defendant
  - sending statement of claim to the competent court

### A. Article 5 (1) lit. a – Habitual residence

#### 2. Issues:

(5) What if “habitual residence” is established during the proceedings?

Illustration: A sues B before the Courts of Contracting State A. At the moment of time B became a party to that proceedings, it had its habitual residence in Contracting State B. Later, still during the proceedings in State A, B relocated and established its habitual residence in State A.

→ not covered by black letter text of lit. a

→ general caution in interpreting the Convention extensively

→ no comparable situation to “home state” advantage by habitual residence *ab initio*

### B. Article 5 (1) lit. b – Principal place of business of a natural person

#### 1. Text:

A judgment is eligible for recognition and enforcement if one of the following requirements is met

lit. b: if the natural person against whom recognition or enforcement is sought had their principal place of business in the State of origin at the time that person became a party to the proceedings in the court of origin and the claim on which the judgment is based arose out of the activities of that business.

B. Article 5 (1) lit. b – Principal place of business of a natural person

### 2. Issues

(1) Rationale: “Home jurisdiction” / aligning (to some extent) filters for businesses of natural and legal persons

Illustration 1: A, a legal persons, runs its business in Contracting State A.

→ judgments from State A against this legal person pass the jurisdictional filter of Art. 5(1) lit. a in connection with Article 3(2) lit. d („principal place of business“).

Illustration 2: B, a natural person, runs its business in Contracting State B.

→ judgments from State B against this natural person pass the jurisdictional filter of Art. 5(1) lit. b, if the underlying claim arose from B’s business

→ If B has its habitual residence in State B, judgment also passes lit. a

### B. Article 5 (1) lit. b – Principal place of business of a natural person

#### 2. Issues

(2) Scope: underlying claim arose out of the activities of the natural person's business  
(„specific jurisdiction“)

Illustration: B, natural person, has its habitual residence in Contracting State B, the principal place of its business is in Contracting State A, but there are additional places of businesses in Contracting States C and D. The claim underlying the proceedings in State A arose from the branch in State D.

→ judgment will pass lit. b

→ judgment will not pass lit. d (branch jurisdiction, see below)

### C. Article 5 (1) lit. d – Branch jurisdiction

#### 1. Text

A judgment is eligible for recognition and enforcement if one of the following requirements is met

lit. d: if the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the claim on which the judgment is based arose out of the activities of that branch, agency, or establishment.



## C. Article 5 (1) lit. d – Branch jurisdiction

### 2. Issues

(1) Rationale: legitimate expectations of business parties; “purposeful availing”

(2) Scope: underlying claim must have arisen from that particular branch business (“specific jurisdiction”)

(3) What is a branch, agency or other establishment?

- without separate legal personality (↔ subsidiary)

- ER 157: “stable physical presence” required (↔ „flying agent“)

## C. Article 5 (1) lit. d – Branch jurisdiction

### 2. Issues

(1) Rationale: legitimate expectations of business parties; “purposeful availing”

(2) Scope: underlying claim must have arisen from that particular branch business (“specific jurisdiction”)

(3) What is a branch, agency or other establishment?

→ subsidiary does not create jurisdiction for holding company

→ but compare ECJ – Schotte/Parfums Rotschild (1987): If subsidiary appears as branch from outside, it brings about (direct) “branch jurisdiction”.

### C. Article 5 (1) lit. d – Branch jurisdiction

#### 2. Issues

Illustration: Natural person Z is habitually resident in State Z (non-Contracting), runs a business with a principal place of business in Contracting State B and a branch in Contracting State C. Business partner X of Z seeks to enforce a claim against Z that arose from Z’s business via its branch in State C. Where can X institute proceedings in order to have the judgment circulating under the Convention?

- the fact that Z is habitually resident “outside” HCCH 2019 does not matter  
(↔ Brussels Ibis Reg., Artt. 4, 7)
- but of course no r&e via HCCH 2019 in that third State (here: State Z)
- judgment will circulate “intra” HCCH 2019 if proceedings in Contracting State B (lit. b)
- or Contracting State C (lit d)

### C. Article 5 (1) lit. d – Branch jurisdiction

#### 2. Issues

#### (4) What is the relevant moment in time?

→ As above for lit. a

Illustration: A, natural person with habitual residence in Contracting State A, runs a business with a principal place of business in Contracting State B and had been running a branch in Contracting State C until 1 November 2024 from which a claim of X against A had arisen. X instituted proceedings on 1 December 2024 in Contracting State C. Will the judgment pass lit. d?

→ NO: Not sufficient that branch from which the claim had arisen existed in the Contracting State of origin at the time of the creation of the claim.

## II. Specific Grounds of Jurisdiction under the HCCH 2019 Judgments Convention

### Group 2: Consent to proceedings in State of Origin

### A. Article 5 (1) lit. e – Express Consent

#### 1. Text

A judgment is eligible for recognition and enforcement if one of the following requirements is met

lit. e: if the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given.

## A. Article 5 (1) lit. e – Express Consent

### 2. Issues

(a) Rationale: “volenti non fit iniuria”

(b) Scope: any subject matter (kind of “general jurisdiction”)

(c) What is “express consent”?

- autonomous concept:

-- high threshold (“express”)

-- no formal requirement (orally or in writing) (↔ lit. m, coca “in writing”)

-- not necessarily vis-à-vis the court (↔ Article 5(2) lit. a):

consumers/workers must have expressed their consent to the court

## A. Article 5 (1) lit. e – Express Consent

### 2. Issues

(a) Rationale: “volenti non fit iniuria”

(b) Scope: any subject matter (kind of “general jurisdiction”)

(c) What is “express consent”?

- no agreement required, unilateral action by defendant sufficient
- factual question, to be determined by the requested court *de novo* (Article 4 (2) sentence 2)



## A. Article 5 (1) lit. e – Express Consent

### 2. Issues

- (a) Rationale: “volenti non fit iniuria”
- (b) Scope: any subject matter (kind of “general jurisdiction”)
- (c) What is “express consent”?
- (d) “... in the course of the proceedings...”

## A. Article 5 (1) lit. e – Express Consent

### 2. Issues

Illustration: Which of the following judgments passes lit. e: A sues B in Contracting State C, based on a choice of court agreement designating the courts of State C, concluded:

(1) prior to the commencement of the proceedings in Contracting State C

-- no, but see lit. m (see below)

(2) during the proceedings

- yes, but see Art. 22 HCCH 2005 that allows declarations on non-exclusive choice of court agreements

→ preempting HCCH 2019? → “false conflict”?

## A. Article 5 (1) lit. e – Express Consent

### 2. Issues

Illustration: Which of the following judgments passes lit. e: A sues B in Contracting State C, based on a choice of court agreement designating the courts of State C, concluded:

(3) as an exclusive choice of court agreement during the proceedings

-- if HCCH 2005 applies: preempts HCCH 2019, Art. 23 (2)

-- if HCCH 2005 does not apply: YES (“express consent”)

### A. Article 5 (1) lit. f – Appearance without contestation

#### 1. Text

A judgment is eligible for recognition and enforcement if one of the following requirements is met

lit. f: if the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;

## A. Article 5 (1) lit. f – Appearance without contestation

### 2. Issues

(a) Rationale: Implicit consent / *volenti non fit iniuria*

(b) Scope: any subject matter (kind of “general jurisdiction”)

(c) “arguing on the merits” before the court of origin

- autonomous concept

-- arguing towards a decision on the substance of the claim

↔ arguing on procedural admissibility

## The Jurisdictional Filters

### A. Article 5 (1) lit. f – Appearance without contestation

#### 2. Issues

(a) Rationale: Implicit consent / *volenti non fit iniuria*

(b) Scope: any subject matter (kind of “general jurisdiction”)

(c) “arguing on the merits” before the court of origin

Illustration: A sues B in Contracting State C. In the proceedings, B only and exclusively files an application to release some assets of his in State C from seizure/to protect such assets from future seizure.

→ no implicit consent to jurisdiction of the court for substance of claim

→ see also Art. 10 (6) HCCH 1971

-- “arguing on the merits in order to resist seizure” does not bring about indirect jurisdiction

## A. Article 5 (1) lit. f – Appearance without contestation

### 2. Issues

#### (d) Without contesting the jurisdiction

- defendant must also contest the exercise of an existing ground of jurisdiction, e.g. according to a doctrine of *forum non conveniens* under lex fori
- within the timeframe under the lex fori
- unless evident that contestation would be unsuccessful
  - arguing on merits can no longer be taken as implicit consent
    - Problem: requested court must go deeply into the lex fori of court of origin

### A. Article 5 (1) lit. f – Appearance without contestation

#### 2. Issues

##### (d) Without contesting the jurisdiction

- see e.g.

Article 333 French Code de Procedure Civil on “mandatory third party joinder”:

*“The third party is obliged to proceed in the court in which the original claim was brought, without being able to decline the territorial jurisdiction of that court, even by invoking a forum selection clause.”*



### A. Article 5 (1) lit. f – Appearance without contestation

#### 2. Issues

Illustration: A sues B in Contracting State C. B contests the jurisdiction of the courts of Contracting State C, but then goes on pleading on the merits of the case against the claim raised by A. A obtains a judgment granting the claim and now seeks to recognize and enforce the judgment in Contracting State D. The lex fori of State D grants indirect jurisdiction whenever the defendant in the original proceedings pleaded on the merits, irrespective of whether defendant had contested jurisdiction.

- judgment does not pass lit. f, but will be nevertheless be recognized (Art. 15)
- strategically, defendant in original proceedings cannot merely rely on the standards sub lit. f

### B. Article 5 (1) lit. c – Being the claimant in the original proceedings

#### 1. Text

A judgment is eligible for recognition and enforcement if one of the following requirements is met

lit. c: if the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;

### B. Article 5 (1) lit. c – Being claimant in the original proceedings

#### 2. Issues

##### (a) Rationale: Implicit consent

→ arguing lack of indirect jurisdiction after instituting proceedings in the court of origin would amount to a self-contradiction

##### (b) Scope: any subject matter (kind of “general jurisdiction”)

##### (c) Does it matter if claimant had just one competent court?

→ prevailing view: no

##### (d) lit. c does not cover counterclaims

→ for indirect jurisdiction in respect to judgments on counterclaims see lit. I (see below)

B. Article 5 (1) lit. c – Being claimant in the original proceedings

### 2. Issues

Illustration: A sues B in Contracting State C and loses the case. B seeks to recognize and enforce the judgments on costs against A in Contracting State A where A has most of its assets

→ judgment passes lit. c

### B. Article 5 (1) lit. I – Counterclaim

#### 1. Text

A judgment is eligible for recognition and enforcement if one of the following requirements is met

lit. I: if the judgment ruled on a counterclaim –

- (i) to the extent that it was in favor of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim; or
- (ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;

## B. Article 5 (1) lit. I – Counterclaim

### 2. Issues

(a) Rationale: Implied consent, according to different constellations:

(i) judgment on counterclaim in favor of counterclaimant, if counterclaim connected to original claim:

→ to the extent that original claimant raised claim in a forum, it consented implicitly to receiving counterclaims there on the same transaction or occurrence

(ii) judgment on counterclaim against counterclaimant

→ rising the counterclaim implies consent to the forum, unless it was “required”

### B. Article 5 (1) lit. I – Counterclaim

#### 2. Issues

(b) Scope: any subject matter (kind of “general jurisdiction”)

(c) What is “required in order to avoid preclusion”?

See e.g.:

### Rule 13(a), US Federal Rules of Civil Procedure: “Compulsory Counterclaim”

(1) In General. A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:

- (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and
- (B) does not require adding another party over whom the court cannot acquire jurisdiction.

### B. Article 5 (1) lit. I – Counterclaim

#### 2. Issues

(b) Scope: any subject matter (kind of “general jurisdiction”)

(c) What is “required in order to avoid preclusion”?

-- counterclaimant might be precluded elsewhere if counterclaim were not raised

→ No implicit consent

-- Note: HCCH 2019 would not oblige Contracting States to recognize such preclusion

HCCH 2019 would neither hinder Contracting States from recognizing

-- avoidance of statute of limitations “requiring” counterclaim “in order to avoid preclusion”?



### C. Article 5 (1) lit. m – Non-exclusive choice of court agreement

#### 1. Text

A judgment is eligible for recognition and enforcement if one of the following requirements is met

lit. m: if the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement.

For the purposes of this sub-paragraph, an “exclusive choice of court agreement” means an agreement concluded by two or more parties that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction of any other courts.

## The Jurisdictional Filters

### C. Article 5 (1) lit. m – Non-exclusive choice of court agreement

#### 2. Issues

(a) Rationale: Express consent plus demarcation from HCCH 2005

(b) Scope: any subject matter (kind of “general jurisdiction”)

(c) Form

→ in writing or other means of communication that keeps information accessible (= Art 3 HCCH 2005),  
e.g. within a contract, via email etc.

(d) Validity

→ according to the law of the requested court, including its PIL (EP on Article 7 (1) lit. d)

↔ Art. 9 lit. a HCCH 2005: law of chosen court including its PIL

### C. Article 5 (1) lit. m – Non-exclusive choice of court agreement

#### 2. Issues

Illustration: Terms of Service of “X” No. 6 (<https://x.com/en/tos#current>):



“All disputes related to these Terms or the Services, including without limitation disputes related to or arising from other users’ and third parties’ use of the Services and any Content made available by other users and third parties on the Services, will be brought exclusively in the U.S. District Court for the Northern District of Texas or state courts located in Tarrant County, Texas, United States, and you consent to personal jurisdiction in those forums and waive any objection as to inconvenient forum. Without prejudice to the foregoing, you agree that, in its sole discretion, X may bring any claim, cause of action, or dispute we have against you in any competent court in the country in which you reside that has jurisdiction and venue over the claim.”

→ What is the issue here?

### C. Article 5 (1) lit. m – Non-exclusive choice of court agreement

#### 2. Issues

##### (e) “non-exclusive”

→ Definition in lit m on “exclusive” = Art. 3 lit. a HCCH 2005

→ “asymmetric” clauses are “non-exclusive” (ER 217)

→ No presumption of exclusivity (↔ Art. 3 lit. b HCCH 2005)

-- but perhaps nevertheless implicit presumption (ER 216 *in fine*)?

→ better coordination with HCCH 2005 (“package”)?

-- but perhaps via lex fori of requested Contracting State?

## C. Article 5 (1) lit. m – Non-exclusive choice of court agreement

### 2. Issues

#### (e) “non-exclusive”

→ Note: Art. 7 lit. d) allows protection of derogating effect of (not necessarily exclusive) choice of court agreements, including asymmetric clauses, even when the derogation is in favor of third state court.

### C. Article 5 (1) lit. m – Non-exclusive choice of court agreement

#### 2. Issues

Illustration: A sues B in Contracting State C based on a choice of court agreement designating the courts of C. According to the presumption for exclusivity under Art. 3 lit. b HCCH 2005 the agreement is exclusive and thus falls within the scope of HCCH 2005. Does this preclude the application of HCCH 2019?

- In the absence of a presumption in HCCH 2019, the agreement may be considered non-exclusive from the perspective of the requested court und HCCH 2019
- BUT: According to Art. 23 (2) HCCH 2019, HCCH 2005 preempts HCCH 2019 (as long as all States involved are Contracting States to both instruments, first to HCCH 2005 and then to HCCH 2019, and material scopes of each instrument covers subject matter)

### C. Article 5 (1) lit. m – Non-exclusive choice of court agreement

#### 2. Issues

Illustration: A sues B in Contracting State C based on a choice of court agreement designating the courts of C. According to the presumption for exclusivity under Art. 3 lit. b HCCH 2005 the agreement is exclusive and thus falls within the scope of HCCH 2005. Does this preclude the application of HCCH 2019?

- If States involved are only Contracting States to HCCH 2019, judgments based on exclusive choice of court agreements are unable to pass lit. m (but may pass others)
- Certain residual risk, but delegates wanted to motivate for “package” (see also Preamble of HCCH 2019: “complementary” to HCCH 2005)
- But remember Art. 22 HCCH 2005: possibility to extent HCCH 2005 Convention bilaterally to non-exclusive choice of court agreements

## II. Specific Grounds of Jurisdiction under the HCCH 2019 Judgments Convention Group 3: Grounds of specific jurisdiction



### A. Article 5 (1) lit. g – contractual relations

#### 1. Text

A judgment is eligible for recognition and enforcement if one of the following requirements is met

lit. g: if the judgment ruled on a contractual obligation and it was given by a court of the State in which performance of that obligation took place, or should have taken place, in accordance with

(i) the agreement of the parties, or

(ii) the law applicable to the contract, in the absence of an agreed place of performance,

unless the activities of the defendant in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;

## A. Article 5 (1) lit. g – contractual relations

### 2. Issues

(a) Rationale: connection between claim and State of origin

(b) Scope: contractual claims (“specific jurisdiction”)

→ Declaratory relief regarding the non-existence/non-validity of a contract covered?

-- place of performance too difficult to determine? (E.g. Brand/Herrup)

(c) “contractual”

- autonomous concept, but no definition  
(like in lit. j: “non-contractual obligation”)

→ Brussels Ibis Regulation (ECJ): “freely entered into”

## A. Article 5 (1) lit. g – contractual relations

### 2. Issues

#### (d) Connecting factor: place of performance of “that” obligation

- place of performance of each contractual obligation must be determined separately

  - no “characteristic obligation” approach

    - = Art. 7 (1) lit. a Brussels Ibis Regulation

      - ↔ Art. 7 (1) lit. b Brussels Ibis Regulation

## A. Article 5 (1) lit. g – contractual relations

### 2. Issues

#### (d) Connecting factor: place of performance of “that” obligation

- place of performance of each contractual obligation must be determined separately

→ no “characteristic obligation” approach

- a number of EU judgments rendered under Art. 7 (1) lit. b Brussels Ibis Regulation will not pass lit g
- certain risk for remote places of performance

### A. Article 5 (1) lit. g – contractual relations

#### 2. Issues

##### (d) Connecting factor: place of performance of “that” obligation

Illustration: A sues B for damages for non-performance from a sales contract before the courts of Contracting State C. According to the contract, the place of performance for delivery was in State C. The court orders B to pay damages of 1 Mio USD. The place of performance of that latter claim for money is, according to the applicable law, the creditor’s habitual residence. A’s habitual residence is in Contracting State A. Does the judgment pass lit. g?

→ Relevant for lit. g is the place of performance of the primary obligation (delivery), not the place of performance of the secondary claim for damages.

## A. Article 5 (1) lit. g – contractual relations

### 2. Issues

#### (e) “place of performance”

##### (i) from agreement on place of performance

- validity according to lex contractus (PIL of requested Contracting State)
- interpretation according to lex contractus (PIL requested Contracting State)

##### (ii) if there is no agreement, according to lex contractus (PIL of requested Contracting State)

## A. Article 5 (1) lit. g – contractual relations

### 2. Issues

#### (e) “place of performance”

Illustration: A sues B in Contracting State C for damages for non-performance from a sales contract. According to the lex contractus, the place of performance is in State C. However, B has delivered to a branch of A in Contracting State D. B submits that “the State in which performance ... took place” under lit. g is State D. Does the judgment ordering B to pay damages for non-performance pass lit. g?

→ place of performance for delivery according to the contract is State C

→ an actual performance in another State does not change this

→ unless the parties have agreed (implicitly?) on a new place (lex contractus)

## A. Article 5 (1) lit. g – contractual relations

### 2. Issues

(f) unless activities of defendant (in original proceedings, Article 3 (1) lit. a) clearly did not constitute a purposeful and substantial connection

- Rationale: Defendant must have minimum contacts with the State of the original proceedings as well, not only the claim via the place of performance, so that defendant can reasonably foresee being sued there
- Flexible minimum standard, residual “escape clause” for otherwise “European” style head of (indirect) jurisdiction, primarily with a view to 14<sup>th</sup> Amendment of US Constitution (“due process”); concern about “arbitrary” places of performance
- Concerns about predictability, but threshold is very high (“clearly”), and burden of proof is on the judgment debtor that seeks to profit from this exception



## A. Article 5 (1) lit. g – contractual relations

### 2. Issues

(f) unless activities of defendant (in original proceedings, Article 3 (1) lit. a) clearly did not constitute a purposeful and substantial connection

→ Criteria, e.g.

- contract negotiations in State of original proceedings
- business activities/actions in relation to the transaction in State of original proceedings
- direction of the transaction to State of original proceedings

### A. Article 5 (1) lit. g – contractual relations

#### 2. Issues

(f) unless activities of defendant (in original proceedings, Article 3 (1) lit. a) clearly did not constitute a purposeful and substantial connection

Illustration: A (place of business in Contracting State A) offers software for download on its website. B (habitual residence in Contracting State B) acquires a license via that website. After payment, B cannot download the license key from the website, despite the promise at the conclusion of the contract. B institutes proceedings and obtains a judgment against A in State B on damages for non-performance. B now seeks to enforce the judgment against A in State A. There is no agreement in the contract on places of performance. The choice of law rules of State A select as *lex contractus* a law that locates the default place of performance for the obligation of A in State B.

### A. Article 5 (1) lit. g – contractual relations

#### 2. Issues

(f) unless activities of defendant (in original proceedings, Article 3 (1) lit. a) clearly did not constitute a purposeful and substantial connection

#### Illustration:

→ In principle, judgment passes lit. g (ii), but the exception might apply.

- no “activities in relation to the transaction” of A’s in State B
- unless website is directed to State B, but what exactly is “directed”?
- is accepting customer from State B via A’s website enough?
- would a disclaimer on the website (“no business with State B”) be relevant?

## A. Article 5 (1) lit. g – contractual relations

### 2. Issues

#### (g) Place of performance of obligations to refrain from doing something

- If territorial reach is limited (“within State X”), then place of performance according to that limitation
- What if obligation to refrain is unlimited (global reach)?
  - place of performance “everywhere”?
    - ↔ function of “filters”
    - ↔ place of performance in lit. g always located in “a state”

## A. Article 5 (1) lit. g – contractual relations

### 2. Issues

#### (g) Place of performance of obligations to refrain from doing something

- If territorial reach is limited (“within State X”), then place of performance according to that limitation
- What if obligation to refrain is unlimited (global reach)?
  - Excluding lit. g in this scenario?
    - ECJ Case 256/00 (2002) – Besix, on direct jurisdiction:  
place of performance as connecting factor cannot be applied in such a scenario

## A. Article 5 (1) lit. g – contractual relations

### 2. Issues

#### (g) Place of performance of obligations to refrain from doing something

- If territorial reach is limited (“within State X”), then place of performance according to that limitation
- What if obligation to refrain is unlimited (global reach)?
  - Resorting to exception (“unless...”)?
    - place of performance everywhere
    - but exception excludes many states, except e.g. the one in which the obligation was infringed

### B. Article 5 (1) lit. h – lease of immovable property (tenancy)

#### 1. Text

A judgment is eligible for recognition and enforcement if one of the following requirements is met

lit. h: if the judgment ruled on a lease of immovable property (tenancy) and it was given by a court of the State in which the property is situated.

### B. Article 5 (1) lit. h – lease of immovable property (tenancy)

#### 2. Issues

(a) Rationale: Party expectation; power; closest connection; procedural efficiency

(b) Scope: lease of immovable property (“specific jurisdiction”)

(c) Note Article 5 (3):

Paragraph 1 does not apply to a judgment that ruled on a residential lease of immovable property (tenancy) or ruled on the registration of immovable property. Such a judgment is eligible for recognition and enforcement only if it was given by a court of the State where the property is situated.

→ Same connecting factor as lit. h; function of Article 5 (3) therefore to exclude all other grounds in paragraph 1 (see below).



### B. Article 5 (1) lit. h – lease of immovable property (tenancy)

#### 2. Issues

Illustration: A leases a warehouse in Contracting State A to B (habitual residence of B in Contracting State B). B does not pay rent in time. A sues B in the courts of State B and obtains a judgment. Which filters are “open”?

- lit. h does not apply (property situated in State A, not in State B where judgment comes from)
- lit. h does not block any other filters (↔ Article 5(3) – residential leases)
  - lit. a
  - lit. b if the lease was part of B’s principal business in State B
  - lit. d if lease was part of B’s branch business in State B
  - lit. g if place of performance for the money claim is in State B (debtor’s place)

### B. Article 5 (1) lit. i – contractual obligation secured by a right in rem

#### 1. Text

A judgment is eligible for recognition and enforcement if one of the following requirements is met

lit. i: if the judgment ruled against the defendant on a contractual obligation secured by a right in rem in immovable property located in the State of origin, if the contractual claim was brought together with a claim against the same defendant relating to that right in rem;

B. Article 5 (1) lit. i – contractual obligation secured by a right in rem

### 2. Issues

(a) Rationale: Close connection of claim via right in rem; supplementing Art. 6

(b) Scope: “specific”

(c) Article 6: Notwithstanding Article 5, a judgment that ruled on rights in rem in immovable property shall be recognized and enforced if and only if the property is situated in the State of origin.

→ Exclusive ground of jurisdiction for rights in rem at the situs

→ If right in rem secures a contractual claim, lit. i makes sure that claim can be litigated in the Contracting State where the securing right in rem is situated, so that both can be litigated there, resulting in a judgment that will circulate.

### C. Article 5 (1) lit. j – Non-contractual obligations

#### 1. Text

A judgment is eligible for recognition and enforcement if one of the following requirements is met

lit. j: if the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred.

## C. Article 5 (1) lit. j – Non-contractual obligations

### 2. Issues

(a) Rationale: Close connection via the place of the harmful action

## C. Article 5 (1) lit. j – Non-contractual obligations

### 2. Issues

#### (b) Scope: (very!) “specific”

- limited number of delicts: death, physical integrity, tangible property
- what about other “non-contractual” obligations than from delicts (e.g. unjust enrichment)?
- no pure economic loss (e.g. cartel damages, remember Article 2 (1) lit. p: “anti-competitive agreement or concerted practices ... where such conduct and its effect both occurred in the State of origin”)
- No personality rights (anyway excluded by Article 2 (1) lit. k (“defamation”) and l (“privacy” = data protection))
- large number of excluded subject matters in Article 2 (1) that would otherwise be relevant for lit. j (e.g. IP; transboundary marine pollution)

## C. Article 5 (1) lit. j – Non-contractual obligations

### 2. Issues

(c) “non-contractual”: autonomous concept (as “contractual”, lit. g), but no definition

### C. Article 5 (1) lit. j – Non-contractual obligations

#### 2. Issues

##### (d) Connecting factor limited to the place of the harmful action

- exclusion of the place where the harmful effect materialized, despite repeated suggestions to the contrary in the negotiations
- place of harmful effect appeared too difficult to predict, e.g. in product liability cases, no agreement how to curtail jurisdictional head properly (e.g. by a condition for predictability for defendant)
- relevant action must “directly” cause the harm; causality of more remote actions [preparatory acts] is not sufficient



## C. Article 5 (1) lit. j – Non-contractual obligations

### 2. Issues

#### (d) Connecting factor limited to the place of the harmful action

→ challenge: obligations to refrain from doing something

- place of “action” where the action should have taken place, according to the *lex loci delicti commissi*?

→ would mean resorting to local law

→ ER 198 fn. 142: “court addressed may look to” (amongst other factors)

- autonomous concept? But which?

→ predictability?

### C. Article 5 (1) lit. j – Non-contractual obligations

#### 2. Issues

#### (d) Connecting factor limited to the place of the harmful action

→ challenge: several tortfeasors

- head of jurisdiction must be given for each individually
- (probably) no attribution of actions amongst joint tortfeasors

### C. Article 5 (1) lit. j – Non-contractual obligations

#### 2. Issues

Illustration: A sues B in Contracting State A on the grounds that B is liable for damages caused by defective products. B's factories are located in Contracting State B. However, under Contracting State A's Product Liability Act, a manufacturer is required to disclose the risks associated with its products to customers.

→ lit. j applies only if the failure to warn can be construed as the harmful omission directly causing such harm and can be located in Contracting State A

### C. Article 5 (1) lit. k – Trusts

#### 1. Text

A judgment is eligible for recognition and enforcement if one of the following requirements is met

lit. k: if the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and –

(i) at the time the proceedings were instituted, the State of origin was designated in the trust instrument as a State in the courts of which disputes about such matters are to be determined; or

(ii) at the time the proceedings were instituted, the State of origin was expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.

This sub-paragraph only applies to judgments regarding internal aspects of a trust between persons who are or were within the trust relationship;

## C. Article 5 (1) lit. k – Trusts

### 2. Issues

(a) Rationale: addressing special needs of common law trusts

(b) Scope: (very!) “specific”

- judgments on validity, construction, effects, administration or variation

- judgments regarding internal aspects of a trust

(relations amongst settlor – trustee – beneficiary)

→ not judgments on external relations of the trust

### C. Article 5 (1) lit. k – Trusts

#### 2. Issues

##### (c) “Trust”

→ definition in Art. 2 (1) HCCH 1985 (applicable law to trusts)

“legal relationships created - *inter vivos* or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.”

## C. Article 5 (1) lit. k – Trusts

### 2. Issues

#### (d) Connecting factor:

At the time of the institution of the proceedings

(i) designation of a court in the State of origin in the trust instrument

→ validity of choice of court agreement is determined by the law of the requested Contracting State, including its PIL

→ see ER 269 on Article 7 (1) lit. d (will be the same for lit. k)

(ii) designation of principal place of administration in State of origin

→ validity according to law of requested State, incl. PIL

### C. Article 5 (1) lit. k – Trusts

#### 2. Issues

Illustration: A, the settler of the trust T, sues B, the trustee of that trust in Contracting State C. The trust instrument includes an exclusive choice of the courts of Contracting State D. The principal place of administration of the trust is located in State C. Does the judgment pass lit. k?

→ yes, see lit. k (ii), no preemption of lit. k (ii) by (i)

→ But beware Article 7 (1) lit. d: Recognition may be refused if the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court of a State other than the State of origin



## II. Specific Grounds of Jurisdiction under the HCCH 2019 Judgments Convention

Group 4: Modifications to protect weaker parties  
(consumers, employees)

### Article 5 (2) – Modification for protecting weaker parties

#### 1. Text

If recognition or enforcement is sought against a natural person acting primarily for personal, family or household purposes (a consumer) in matters relating to a consumer contract, or against an employee in matters relating to the employee's contract of employment –

(a) paragraph 1(e) [*express consent*] applies only if the consent was addressed to the court, orally or in writing;

(b) paragraph 1(f) [*implied consent by arguing on the merits without contesting jurisdiction*], (g) [*contractual obligations*] and (m) [*non-exclusive choice of court agreements*] do not apply.

## Article 5 (2) – Modification for protecting weaker parties

### 2. Issues

(a) Rationale: Protection by “minimally invasive” modifications of Article 5(1)

(b) Scope: “specific”

- consumers: Article 2 (1) lit. a HCCH 2005 (= Art. 2 lit. a CISG “acting primarily for personal, family or household purposes”)
- employees
  - ↔ policy holders/insured persons/beneficiaries, as in Art. 10 et seq. Brussels Ibis Regulation
- recognition / enforcement sought against these weaker parties
- consumer contracts
  - including c2c? (ER 222: “not discussed”, “left to courts”)

### Article 5 (2) – Modification for protecting weaker parties

#### 2. Issues

Illustration: Company A, “habitual residence” (Article 3 (2) lit. a – d) in Contracting States A to D, caused tortious harm to consumer C, habitual residence in State C. Since the courts in Contracting State D are very favorable for companies, Company A raises a claim there for negative declaratory judgment that there is no case for payment of damages. In the proceedings, consumer C criticizes Company A heavily and calls for a “just” decision on the issue of the damages.

- Article 5(2) does not apply (“matters relating to a consumer contract”), unless the damage “relates” to a contract, e.g. sale by the company of damaging product directly to the consumer
- Judgment passes lit. f (appearance without contestation)

### Article 5 (2) – Modification for protecting weaker parties

#### 2. Issues

Illustration: Company A, “habitual residence” (Article 3 (2) lit. a – d) in Contracting States A to D, caused tortious harm to consumer C, habitual residence in State C. Since the courts in Contracting State D are very favorable for companies, Company A raises a claim there for negative declaratory judgment that there is no case for payment of damages. In the proceedings, consumer C criticizes Company A heavily and calls for a “just” decision on the issue of the damages.

→ If consumer C had raised a counterclaim for damages against company A’s claim for negative declaratory judgment, the judgment on costs in relation to the counterclaim would circulate sub lit. I (ii) (not excluded by Article 5(2)!)

### Article 5 (2) – Modification for protecting weaker parties

#### 2. Issues

(c) No indirect jurisdiction for judgments from proceedings in the consumer's/employee's home state

↔ Art. 18 (1) Brussel Ibis Regulation, Art. 16 (1) Lugano Convention (forum actoris)

→ either another filter applies or Art. 15 plus national law

→ in a number of cases, however, this incongruence between HCCH 2019 and Brussels Ibis will lead to the result that judgments from the consumer's home state will not find a filter

### Article 5 (2) – Modification for protecting weaker parties

#### 2. Issues

Illustration: Consumer C, habitual residence in Contracting State C, sues in that State C for damages from tort against company A, habitual residence in Contracting States A to D, but loses its case. Company A now seeks to get recognized and enforced the judgment on the costs against consumer C in Contracting State D. Does the judgment circulate under HCCH 2019?

→ yes, lit. c (not excluded by Article 5(2)!)

→ if harmful action occurred in State C and if damage from death, physical injury etc., lit. h as well

## II. Specific Grounds of Jurisdiction under the HCCH 2019 Judgments Convention

### Group 5: Exclusive jurisdiction



### Article 5 (3) – Residential lease of immovable property (tenancy)

#### 1. Text

Paragraph 1 does not apply to a judgment that ruled on a residential lease of immovable property (tenancy) or ruled on the registration of immovable property. Such a judgment is eligible for recognition and enforcement only if it was given by a court of the State where the property is situated.

### Article 5 (3) – Residential lease of immovable property (tenancy)

#### 2. Issues

(a) Rationale: Exclusion of all other heads of jurisdiction within HCCH 2019 in favor of the connecting factor of where the immovable property is situated

→ Same connecting factor as in lit. h, but now exclusive vis-à-vis the filters in Article 5(1)

(b) Scope: “specific”

- “residential” lease
- registration of immovable property
- non-exclusive vis-à-vis national indirect jurisdiction (Art. 15)

### Article 5 (3) – Residential lease of immovable property (tenancy)

#### 2. Issues

(c) Does the immovable property need to be situated in a Contracting State?

Illustration: A, tenant of an apartment situated in State X, not a Contracting State, sues B, landlord, habitual residence in Contracting State B, before the courts of State B for damages that A suffered from violations of safety regulations in respect to residential leases. A now seeks to enforce the judgment against B in Contracting State B.

→ HCCH 2019 not applicable (no international case in the sense of Article 1(2)) !!

→ If it were: black letter text of Article 5(3) does not exclude this; ER 230 fn. 159 not clear

→ even if applicable, Article 5(3) would not let the judgment pass

→ Article 5 (1) lit. g – place of performance is excluded by Article 5(3)

### Article 6 – Rights in rem in immovable property

#### 1. Text

Notwithstanding Article 5, a judgment that ruled on rights in rem in immovable property shall be recognized and enforced if and only if the property is situated in the State of origin.

## Article 6 – Rights in rem in immovable property

### 2. Issues

#### (a) Rationale: “absolute” (↔ Article 5(3)) exclusivity

- against national heads of jurisdiction
- against later Conventions a Contracting State enters into, vis-à-vis Contracting States that are not party to that later Convention
  - Article 23 (3)
- against law of a REIO (e.g. EU) vis-à-vis Contracting States that are not Member States of that REIO
  - Article 24 (4)

## Article 6 – Rights in rem in immovable property

### 2. Issues

#### (b) Scope: “specific”

- rights in rem in immovable property

## Article 6 – Rights in rem in immovable property

### 2. Issues

(c) Does the immovable property need to be situated in a Contracting State?

- text of Article 6 does not require this
- HCCH 2019 does certainly not require r&e of judgment if immovable property is situated in a non-Contracting State, but does it prohibit r&e?
- Article 6 must be regarded as treaty obligation of all Contracting States vis-à-vis the Contracting State of the situs
- why should there be a treaty obligation to protect the interests of non-Parties without securing reciprocity in that protection?

### Article 6 – Rights in rem in immovable property

#### 2. Issues

Illustration: A holds immovable property in Contracting State A. B is a neighbor of A's in State A and sues against A based on his rights in rem in neighboring immovable property. Since A has its habitual residence in Contracting State C, B sues A there, successfully, and now seeks to recognize/enforce the judgment in State A. Does the judgment pass Article 6?

- text of Article 6 requires that property is situated in State of origin: not the case here.
- However: Article 6 seems to be treaty obligation of all Contracting States vis-à-vis the Contracting State where the property is situated
  - decision should be left to that Contracting State (Article 15), implicit limitation of Article 6



## Article 6 – Rights in rem in immovable property

### 2. Issues

#### (d) Article 6 and Article 29

- Article 29 allows notifications between Contracting States (within certain time frames) that Convention shall not be applicable between them
  - notification between State of origin A and requested State B, whereas immovable property is situated in Contracting State C
    - both States A and B are Contracting States in principle
      - both States are obliged vis-à-vis State C not to recognize/enforce judgments from other Contracting States (Article 6)

## Article 6 – Rights in rem in immovable property

### 2. Issues

#### (d) Article 6 and Article 29

- Article 29 allows notifications between Contracting States (within certain time frames) that Convention shall not be applicable between them

-- notification between State of origin A and requested State B, whereas immovable property is situated in Contracting State C

-- BUT: according to Article 16, the temporal scope of application requires the Convention having effect between State of origin and requested State at the time of the commencement of the original proceedings

→ no obligations from the Convention

## Article 6 – Rights in rem in immovable property

### 2. Issues

#### (d) Article 6 and Article 29

- Article 29 allows notifications between Contracting States (within certain time frames) that Convention shall not be applicable between them
  - notification between State of origin A and requested State B, whereas immovable property is situated in Contracting State C
  - same approach (no obligations from Convention) if notifications
    - between States where property situated and requested State
    - between States of origin and where property situated

## II. Specific Grounds of Jurisdiction under the HCCH 2019 Judgments Convention

### 6. Interplay of filters with Article 7, in particular public policy

## CHANGBAI COMPUTER CO. v. LG ELECTRONICS AND LG ELECTRONICS (SHENYANG)

辽宁省高级人民法院（2016）辽民初77-2号民事裁定

LIAONING HIGHER PEOPLE'S COURT,

*Facts: LG Electronics (Shenyang) is a Sino-Korean joint venture registered in Shenyang, China, with shareholders LG Electronics Inc. (56.34% stake), LG Electronics (China) Co., Ltd. (22.53%), and Changbai Computer (21.13% stake). In 2011, the tax authorities found that the 145 million US dollars in sales commissions that LG (Shenyang) had paid to LG Electronics constituted related party transactions and imposed a fine. Changbai Company learned of this immediately and sent a letter demanding that LG (Shenyang) recover the losses. LG (Shenyang) admitted that there had been related-party transactions and, on the 30th day after receiving Changbai Company's letter, sued LG Electronics in the Seoul Central District Court (서울중앙지법) of South Korea in accordance with the (choice of court) agreement governing the related-party transaction contract between LG (Shenyang) and LG Electronics.*



## The Jurisdictional Filters

### CHANGBAI COMPUTER CO. v. LG ELECTRONICS AND LG ELECTRONICS (SHENYANG)

辽宁省高级人民法院（2016）辽民初77-2号民事裁定

LIAONING HIGHER PEOPLE'S COURT,

*Facts: One week after LG (Shenyang) filed the lawsuit, Changbai Company filed a shareholder representative action with the Chinese court. The court of first instance characterized the dispute as a tort dispute and ruled that the Chinese court had jurisdiction on the **grounds of exclusive jurisdiction over joint venture disputes.***

CIVIL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA 2024

ARTICLE 279

The following civil cases shall be under the exclusive jurisdiction of the People's Courts:  
(3) Actions initiated due to disputes arising from the performance in the People's Republic of China of a Sino-foreign equity joint venture contract, a Sino-foreign cooperative joint venture contract, or a contract for Sino-foreign cooperation in the exploration and development of natural resources.



## CHANGBAI COMPUTER CO. v. LG ELECTRONICS AND LG ELECTRONICS (SHENYANG)

辽宁省高级人民法院（2016）辽民初77-2号民事裁定

LIAONING HIGHER PEOPLE'S COURT,

*Issue:* Could the Liaoning Higher People's Court refuse recognition of the ensuing South Korean Judgment under the HCCH 2019 Convention utilizing the public policy exception of Art. 7 (1) (c)?

*Analysis:* The HCCH 2019 Judgments Convention is designed to provide a uniform minimum standard of indirect jurisdiction at the global level. To this end, the required grounds of (indirect) jurisdiction must not be undermined by allowing the reintroduction of national concepts that are otherwise characterized as jurisdictional by way of the general clause in Art. 7 (1) (c) HCCH 2019. Conversely, this conclusion can also be drawn from the express limitation of substantive concerns to the protection of certain weaker parties under Art. 5 (2), (3) HCCH 2019 and the exceptions for the substantive scope of application.



## CHANGBAI COMPUTER CO. v. LG ELECTRONICS AND LG ELECTRONICS (SHENYANG)

辽宁省高级人民法院（2016）辽民初77-2号民事裁定

LIAONING HIGHER PEOPLE'S COURT,

*Analysis: Following this analysis, the exclusive jurisdiction on Sino-foreign joint ventures could still be preserved by requiring an exclusive choice of court agreement or by adding further exception to the substantive scope of application through a declaration under Art. 18 HCCH 2019 Convention.*

*Aftermath: Upon appeal, the court of second instance identified the dispute as a contractual dispute and ruled that the jurisdiction clause in the agreement was valid. At the same time, the court found that LG Electronics (Shenyang) had already filed a lawsuit in South Korea, and in accordance with Article 151 of the Company Law, it ruled that Changbai had not met the conditions for filing a shareholder representative action, and revoked the ruling of the first instance, dismissing Changbai's claim (最高人民法院（2018）最高法民辖终419号民事裁定).*





## The Jurisdictional Filters

### 6. Consequences of the Jurisdictional Filters for the interpretation of Grounds for Refusal?

- Given that the grounds for protection of weaker parties are explicitly limited to consumers and employees, these arguments are probably even more intuitive for the refusal due to the protection in insurance matters under the Brussels Ibis-Regulation

#### BRUSSELS IBIS-REGULATION

##### ARTICLE 14

(1) Without prejudice to Article 13(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary

##### ARTICLE 45

(1) On the Application of any interested party, the recognition of a judgment shall be refused: [..]  
(e) if the judgment conflicts with: (i) Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant [.]



## III. Conclusions and Outlook

## Conclusions

### A. Territorial Connections: A Viable Path...

#### 1. Jurisdictional Filters: A Model for the Modernisation of National Civil Procedure?

ADVICE OF THE DUTCH GOVERNMENT COMMITTEE ON PRIVATE INTERNATIONAL LAW  
(STAATSCOMMISSIE VOOR HET INTERNATIONAAL PRIVAATRECHT)  
TO REVISE ART. 431 RV

That (non-exhaustive) list serves as a guide for practice and contains the grounds that should in any case – according to the current state of the law – be considered "internationally acceptable" grounds. In that respect, the grounds mentioned on pages 41-46 of the [Report] and those set out in Article 5(1) (a to m) of the Convention on the recognition and enforcement of foreign judgments in civil and commercial matters of the Hague Conference on Private International Law, concluded on 2 July 2019, can be followed.

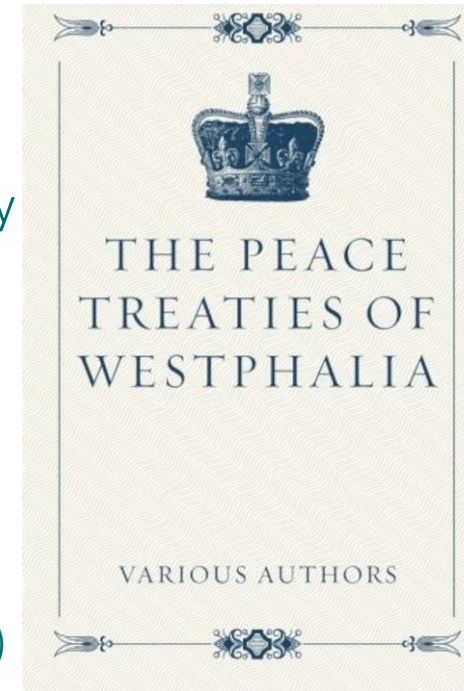
LEGISLATIVE COUNCIL BRIEF  
MAINLAND JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS  
(RECIPROCAL ENFORCEMENT) BILL

*In formulating the REJ Arrangement, reference has been drawn to the then draft version of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters [.] Taking into account the practical needs and circumstances of Hong Kong and the Mainland, and utilising the “one country two systems” policy, we have expanded the scope of application of the REJ Arrangement by covering a wider range of judgments on contractual and tortious disputes to expressly include judgments given in respect of certain types of disputes over intellectual property rights.*

## Conclusion

### B. ...Anachronistic Path Dependency?

- Territorial focus leads to logically complex rules that are likely to result in divergences between national courts
  - Prime Example: Contract jurisdiction (Art. 5 (1) (g)) requires an analysis of several sources of law and factual exceptions
- Meanwhile, technological developments in the 21<sup>st</sup> Century result in an ongoing deterritorialization and digitisation of global trade and business
  - Risk of obsolescence: already now some aspects are barely capable of localisation (e.g. negative obligations)
- However, although more modern proposals do exist ...
  - E.g. *convention mixte (v. Mehren)*; community affiliation (*Berman*)
- ... the Convention still represents a **remarkable outcome**, given the constraints imposed on global cooperation by current trends back to a narrow understanding of sovereignty



# Outlook

## C. Relevance for the HCCH Jurisdiction Project

### 1. Scope: Potential Global Grounds of Direct Jurisdiction?

- Expert Group expressed varied views on the desirability and feasibility of a binding instrument (HCCH 2021 EG)
  - Initial focus not on jurisdiction but parallel proceedings

### 2. Different Views Among Legal Scholars:

- Brand/Herrup (2021): „[A]ny effort to prepare such a convention will fail and is not needed [...] to improve [transnat.] litigation.”
  - legal development will soon render jurisdictional bases insignificant
- Lehmann (2023): It also remains important to harmonise the rules on direct jurisdiction. I[t] may be time-intensive, costly, and dangerous for a private party to be drawn before a foreign court.
  - proposing a ban of “exorbitant” grounds of jurisdiction via a “black list”
- He Qisheng **【何其生】** : Creative thinking by negotiating States is needed to strike the balance between domestic and uniform grounds of jurisdiction
  - retaining enough space for domestic law is a matter of sovereignty



KEISUKE TAKESHITA  
竹下啓介  
CHAIRMAN JURISDICTION  
WORKING GROUP

## Outlook

### C. Relevance for the HCCH Jurisdiction Project

#### 3. Expectations for the New Legal Instrument

- **Overarching goal:** Improving the concentration of parallel litigation in the “better forum” to achieve efficient and complete resolution of disputes in transnational litigation
- The better court to proceed is best ascertained through a factual determination, **not through qualitative / evaluating decisions about bases of jurisdiction**
- **Simplicity is key to success:** Criteria need to be understandable and workable globally by generalist judges and litigators. Consideration of a long list of dozens factors is unlikely to yield satisfying results in terms of intelligibility, transparency, or predictability.
- The new instrument must be **complementary in nature** to the **HCCH 2005 Choice of Court** and the **HCCH 2019 Judgments Convention** and employ the established “HCCH method”
- Success should be measured by a **significant decrease in parallel proceedings** that have limited justification
- So far, the **Jurisdictional Filters are only one of multiple aspects** in the discussion and do not appear to be decisive in shaping the design of the future instrument.

# Outlook

## D. Flash back

### UEJF ET LICRA V. YAHOO! INC.

TGI DE PARIS, 22 MAI 2000 (N<sup>OS</sup> 00/05308, 00/05309)  
169 F. SUPP. 2D 1181 (N.D. CAL. 2001) (REV.)

*Facts: The internet service provider, Yahoo!, allowed its users to post **Nazi-related propaganda and memorabilia**, the display and sale of which are illegal in France. While the French subsidiary sites do not permit such postings, end-users in France are still able to access the U.S. site which does not impose such a restriction because to do so might infringe USAs' Freedom of Speech.*

*Licra (NPO) obtained two interim orders (ordonnance de référé) from French courts requiring Yahoo! to take all necessary measures to dissuade and render impossible any access from French territory via Yahoo.com to the Nazi artifact auction service as well as subjecting Yahoo! to a penalty (“astreinte”) of EUR 100,000 per day of delay or violation of the order.*

*Subsequently, Yahoo! sought for a (negative) declaratory judgment in US courts that the interim orders be neither recognized nor enforced in the USA.*



YAHOO!



# Outlook

## D. Flash back

- Standard of int. jurisdiction: „minimum contacts“ (*Int. Shoe*): purposeful availment (*Worldwide Volkswagen; Zippo*) and/or substantial effect in the State of requested court (*Calder; Walden*)
- Arguments (*Yahoo!*): server location; website’s language, currency (USD), place of delivery of sold goods; French version without illegal material
  - French advertisements on US website
  - => knowledge of *Yahoo!* about French users (+)
  - Suffering of groups in France, but only passive website posting => sufficient effect (+)/(-)
- However, protected speech that occurs simultaneously within U.S.-borders ≠ recognition!

- In permitting users in France to participate in such a display of items for sale, *Yahoo!* committed a wrong («une faute») on French territory
- The potential difficulties of enforcement in U.S. cannot in themselves justify a lack of jurisdiction
  - The French courts possessed international jurisdiction because « le dommage étant subi en France » (Art. 46-2 Nouv. C. procedure)
- However, only in respect to harm caused in the territory of France
- Extraterritorial application of U.S. Constitution?
- No « américanisation du présent litige » (*Licra*)





## D. Flash back

### UEJF ET LICRA V. YAHOO! INC.

TGI DE PARIS, 22 MAI 2000 (N<sup>OS</sup> 00/05308, 00/05309)  
169 F. SUPP. 2D 1181 (N.D. CAL. 2001) (REV.)

*Analysis: Solution under the HCCH 2019 Judgments Convention?*

#### *1. Scope? (Art. 1, 2)*

- *Exclusion of defamation (Art. 2 lit. k) and privacy (lit. l) broadly encompass “disclosure of information in any form” (ER 62)*

#### *2. Judgment? (Art. 3 (1) lit. b)*

- *Ordonnance de référé is interim measure of protection and not a judgment under HCCH 2019*
- *Astreintes (penalty orders) serve as tools of compliance (Art. 13) → no “decisions on the merits”*

#### *3. Jurisdictional Filters? (Art. 5)*

- *Yahoo! France = separate legal entity (lit. d);*
  - *Access to information ≠ physical harm (lit. j)*
  - *Yahoo! contested jurisdiction (lit. f)*
- *Still a controversial case, even if HCCH 2019 were in effect!*

# Outlook

## D. Flash back

### Indirect Jurisdiction

*...grants a privilege...*

since the first court may issue judgments that will be recognised and enforced by the courts of the second state as long as the heads of indirect jurisdiction of the second state are respected.

Regulatory freedom of the second State is constrained more by internationally required bases of indirect jurisdiction

### Direct Jurisdiction

*... is an expression of sovereignty ...*

since no State has a right against another to refrain from the assumption of jurisdiction.

Regulatory freedom of first State is constrained more by internationally excluded bases of direct jurisdiction.



### Conclusion

- In a legal system, privileges and powers may be connected but there is no logical lien between them.
- For an international Convention, the different regulation of the two aspects opens up enormous possibilities and needs for nuanced policy considerations (*v. Mehren*).

Questions? Welcome any time!  
Please email to:  
*weller@jura.uni-bonn.de*



Professor Dr Matthias Weller, Mag.rer.publ., MAE  
University of Bonn, Germany

Hague Academy of International Law's  
Advanced Course in Hong Kong 2024