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ARTICLE

Foreign Judgments and the Relationship between Direct and Indirect Jurisdiction

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Abstract
A key issue in the recognition and enforcement of foreign judgments is jurisdiction, with a distinction drawn between 'direct' jurisdictional rules, which are applied by the court of origin at the time of initial adjudication, and 'indirect' rules applied by a court at the recognition and enforcement stage. While some commentators and national laws suggest that no jurisdictional 'gap' should exist between direct and indirect rules, in this article it is contended that, outside the context of a federal system or international convention with uniform rules, no compelling justification exists for eliminating the gap.

Keywords: private international law; comparative law; foreign judgments; Hague Conventions; jurisdiction; reciprocity

1. Introduction

One of the most important and controversial issues in the law relating to the recognition and enforcement of foreign judgments is jurisdiction.[1] Specifically, which rules of jurisdiction should a court apply when requested to recognise and enforce a foreign judgment? Typically, the court of origin—the court that delivers the judgment—will apply its own 'direct' rules of adjudicatory jurisdiction to determine whether a case can proceed against the defendant. Direct jurisdiction refers to the 'authority of a domestic court to hear and adjudicate a dispute involving a foreign element'.[2] Assuming the court of origin delivers a judgment and finds that jurisdiction exists over the defendant, the claimant judgment creditor will normally take steps to enforce the award. If insufficient assets are available for execution in the jurisdiction of the court of origin, then the claimant will seek to have the judgment recognised and enforced in a foreign country

[1] For a detailed survey of the position in common law countries, see PB Kutner, 'Recognition and Enforcement of Foreign Judgments: The Common Law's Jurisdiction Requirement' (2019) 83 RabelsZ 1.

[2] R Michaels, 'Some Fundamental Jurisdictional Conceptions as Applied in Judgments Conventions' in E Gottschalk et al (eds), *Conflict of Laws in a Globalised World* (CUP 2007) 29, 35.

and an application will be made to the requested court for that purpose.[3] The defendant judgment debtor may resist the application on the basis that the court of origin had no jurisdiction over them. The question that arises is: what approach should the requested court take to assessing the jurisdiction of the court of origin?

All major systems of conflict of laws accept that a requested court may apply its own 'indirect' rules of jurisdiction to determine whether a foreign judgment should be recognised in the forum. There is, however, no international uniformity or consensus as to what these rules are or should be, although a frequent complaint[4] made is that many countries use excessively narrow indirect rules which unduly limit the number of foreign judgments that may be recognised. It has been suggested, instead, that national courts and legislatures should strive to reduce or even eliminate the 'gap' that exists between a country's rules of adjudicatory, direct jurisdiction and its principles of indirect jurisdiction. Hence, where a country, for example, has wide and generous rules for allowing cases to be heard in its courts, it should adopt a similar approach to recognition of foreign court determinations. Such an analysis is said to be justified on the grounds of consistency of approach in jurisdictional matters and equal treatment between claimants in originating and recognition proceedings. Enhanced recognition of foreign judgments also accords with a policy of comity toward foreign courts and the need to achieve finality of adjudication. Advocates of this view refer to legal systems such as the United States (US) and Canada that apply broadly parallel and symmetrical direct and indirect rules. Those who support 'mirror image' approaches to indirect jurisdiction also emphasise these factors.[5]

The purpose of this article is to reexamine the relationship between direct and indirect jurisdiction and to assess whether they should be subject to the same standards. Is the case for closing the jurisdictional 'gap' justified? It is contended that, outside the context of 'suprastate' federal constitutions or international conventions which establish uniform rules binding on all States, with reciprocity of treatment, there is no compelling reason in logic or practice for having identical rules of direct and indirect jurisdiction.[6]

First, as a matter of principle, the contexts and processes of original adjudication and recognition are separate and distinct. While direct jurisdictional rules govern the right of access of a claimant to local courts in future litigation, indirect rules determine

[3] Recognition of a foreign judgment involves a requested court accepting a judgment of the court of origin as a final adjudication of the issues that arose between the parties. Enforcement concerns the processes by which the judgment is implemented and executed in the requested State and requires recognition as a precondition: L Collins et al, *Dicey Morris and Collins on the Conflict of Laws* (16th edn, Sweet & Maxwell 2022) paras 14-003–14-006. The arguments in this article relate to when a foreign judgment should be recognised and so the term 'recognition' is used throughout.

[4] See authors cited in n 40.

[5] See, e.g. A Arzandeh, 'Reformulating the Common Law Rules on Recognition and Enforcement of Foreign Judgments' (2019) 39 LS 56 and discussion in Section 7.

[6] 'Direct … and indirect jurisdiction are distinct and unconnected legal positions': Michaels (n 2) 38; Collins (n 3) para 14-094: 'there is no obvious need for there to be symmetry' between the rules of direct and indirect jurisdiction; A Briggs, 'Recognition of Foreign Judgments: A Matter of Obligation' (2013) 129 LQR 87, 92; A Briggs, *Private International Law in English Courts* (2nd edn, OUP 2023) 370–71. Direct jurisdiction rules are 'logically different' from indirect rules: J Blom, 'The *Court Jurisdiction and Proceedings Transfer Act* and the Hague Conference's Judgments and Jurisdiction Projects' (2018) 55 OsgoodeHallLJ 257, 270.

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whether an adjudicated decision of a foreign court may be given effect in the local legal system. They address already finalised acts of a foreign State. The fact that 'jurisdiction' is relevant to both inquiries has led many courts and commentators to make a false equivalence between the two sets of circumstances. Adjudicatory jurisdiction is an 'attribute of national [State] sovereignty'[7] with each State making its own value choices in vesting jurisdiction in its courts and granting access to litigants. Rules of adjudicatory jurisdiction are therefore generally unilateral and inward looking in nature, where the forum court only decides for itself whether it is to assume jurisdiction.[8] While a State may limit its jurisdictional reach for reasons of self-restraint or comity towards a foreign court,[9] there is no necessary engagement with the foreign legal system. The existence of exorbitant forms of direct jurisdiction, such as service on a defendant while transiently present in the forum State, a claimant having the nationality of the forum State or a defendant having assets in that place, all reflect this unilateralism and local policy choices.

By contrast, recognition of foreign judgments is expressly and unavoidably bilateral: the requested State must interact with a foreign legal system and decide what effect should be given to its judgment within the requested State's own legal order. Arguably, the recognition of foreign judgments process is closer to the issue of applicable law, since the requested court must ask in both cases: under which circumstances should a foreign legal right or institution be accepted in the forum State? The fact that several defences to recognition of foreign judgments are also bases for excluding foreign laws (for example, the penal and revenue laws, foreign governmental interests and public policy exceptions) further reveals the shared space.

Second, from a pragmatic perspective, for a State to adopt the same rules for indirect jurisdiction as they apply to adjudicatory jurisdiction cases may well harm local judgment debtors[10] without any reciprocal benefit for judgment creditors. Debtors will face increased risk of recognition of foreign judgments at home while local creditors cannot assume that other countries will respond in kind with more liberal approaches to recognition.

The situation is markedly different where the States in question are under the umbrella of a 'higher law',[11] such as a federal constitution or a bilateral and multilateral convention, which imposes identical jurisdictional rules at the stages of initial adjudication and recognition of judgments, binding on both original and requested courts. Reciprocal recognition, while not absolutely guaranteed, is nevertheless the expectation and assumption due to the common membership of the instrument, which necessarily involves a relaxation of sovereignty and enhanced trust in each other's legal system.[12]

[7] P Herrup and RA Brand, 'A Hague Convention on Parallel Proceedings' (2022) 63 HarvInt'lLJ: Online.

[8] *William Jacks & Co (Singapore) Pte Ltd v Nelson Honey & Marketing (NZ) Ltd* [2015] SGHCR 21, para 60.

[9] Such as through adoption of a doctrine of forum non conveniens. Such devices are not typically applied at the stage of recognition of foreign judgments: Blom (n 6) 270–71, 288.

[10] Not all judgment debtors are residents of the country of enforcement, but the clear majority are. In any case, foreign residents who hold assets in the country of enforcement should also be entitled to protection from exorbitant exercises of jurisdiction by courts of origin.

[11] FK Juenger, 'The Recognition of Money Judgments in Civil and Commercial Matters' (1988) 36 AmJCompL 1, 14.

[12] Blom describes this as a 'principle of correlativity' between the rules of direct and indirect jurisdiction: see Blom (n 6) 271.

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In the absence of such a 'suprastate' order, however, each state is left to formulate its own rules for recognition of foreign judgments and quite properly may wish to protect the interests of local judgment debtors from excessive exposure. The football analogy of the 'own goal' is apt: this is arguably the effect of US and Canadian approaches of unifying direct and indirect jurisdiction outside treaty frameworks.[13]

The above views are strongly supported by the remarks of Lord Collins in *Rubin v Eurofinance SA*.[14] Lord Collins noted that 'there is no necessary connection between the exercise of jurisdiction by the English court and its recognition of the jurisdiction of foreign courts'.[15] While the English rules of direct jurisdiction (including the 'gateways' for service out)[16] have traditionally been wider than those employed under English law for recognition of foreign judgments, there is a good reason for this. That is, 'there is no expectation of reciprocity on the part of foreign countries. Typically today the introduction of new rules for enforcement of foreign judgments depends on a degree of reciprocity'[17] where each party sees a mutual benefit in joining a common regime.[18] For a court unilaterally to introduce jurisdictional rules extending the recognition of foreign judgments 'would only be to the detriment of businesses [in the requested State] without any corresponding benefit'.[19] Such changes should therefore be left to the legislature,[20] preferably through implementation of international agreements. The Singapore Court of Appeal has also recently warned of the dangers of unchecked unilateralism in the recognition of foreign judgments.[21] While comity and respect for foreign courts and foreign legal orders is an important objective, it 'must be balanced against the concerns of the local forum in upholding its constitutional role, to oversee the administration of justice and safeguarding the rule of law within its jurisdiction'.[22] This qualification is particularly important given 'the reality that the rule of law is not always understood and applied consistently across jurisdictions'.[23] Changes to indirect jurisdictional rules should therefore be made cautiously and preferably on a bilateral or multilateral basis.

To substantiate further the above arguments, a review will be made of the laws relating to indirect jurisdiction in several legal systems, notably Australia, the US, Canada and the European Union (EU). Australia is chosen because it broadly

[13] The suggestion that principles of indirect jurisdiction be abandoned entirely in favour of a rule that a foreign judgment be recognised simply where the judgment was final and the foreign court was competent under its own jurisdictional principles should be rejected for the same (but even stronger) reasons: cf YL Tan, 'Recognition and Enforcement of Foreign Judgments' in KS Teo et al (eds), *Current Legal Issues in International Commercial Litigation* (National University of Singapore 1997) 294, 326; Arzandeh (n 5) 67.

[14] *Rubin v Eurofinance SA* [2013] 1 AC 236 (UK Supreme Court).

[15] ibid para 126.

[16] Civil Procedure Rules (UK) rule 6.36 PD 6B para 3.1.

[17] *Rubin v Eurofinance SA* (n 14) para 128.

[18] Reciprocity 'represents a series of mutually bargained for promises between Contracting States': D Stamboulakis, *Comparative Recognition and Enforcement* (CUP 2023) 126; TM Yeo, 'The Hague Judgments Convention: A View from Singapore' (2020) 32 SAcLJ 1153, 1186; Michaels (n 2) 53.

[19] *Rubin v Eurofinance SA* (n 14) para 130.

[20] ibid para 129. See also *Almarzooqi v Salih* [2021] NZSC 161, para 11; Kutner (n 1) 69.

[21] *White v Oro Negro Drilling Pte Ltd* [2024] SGCA 9.

[22] ibid para 78.

[23] ibid para 79.

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represents the position in common law jurisdictions such as England, Singapore, New Zealand, Hong Kong SAR and Malaysia, apart from a unique bilateral jurisdiction and judgments convention that it has with New Zealand. Consideration will also be made of developments at The Hague Conference on Private International Law, particularly the 2005 Convention on Choice of Court Agreements (Choice of Court Convention) and the 2019 Convention on the Recognition and Enforcement of Judgments (Judgments Convention).

2. Australia

2.1. Interstate and New Zealand judgments

Australia is an interesting example as it exhibits the full gamut of approaches to indirect jurisdiction. At one end of the spectrum, in the case of recognition of interstate and New Zealand judgments, indirect jurisdiction is considered entirely subordinate to direct jurisdiction, while at the other end, Australian law employs few and narrow bases of indirect jurisdiction that strictly limit recognition of foreign judgments. In this second aspect, Australia embodies the traditional common law approach to recognition of foreign judgments (applied in countries other than Canada and the US).

The Australian approach to jurisdiction and foreign judgments is influenced by the fact that it is a constitutional federation of six states and several territories. An understanding of the position on recognition of interstate judgments within Australia is critical to appreciating the approach taken to foreign judgments. While for the purposes of the common law conflict of laws the states and territories have traditionally been considered as foreign States to one another,[24] the Australian federal constitution has had an important impact on the recognition of interstate judgments and orders. Section 118 provides that 'full faith and credit shall be given throughout the Commonwealth [of Australia] to the laws, public acts and records and the judicial proceedings of every State'.[25] The effect of this provision is that within the Australian federation, a judgment of the court of one state (S1) will have the same effect in another state (S2) as if the judgment had been pronounced by a court in S2.[26] An interstate judgment is therefore effectively transformed into a local judgment for the purposes of recognition.

The effect of full faith and credit has been strengthened by the Service and Execution of Process Act 1992 (SEPA), which creates a registration procedure for the recognition of judgments granted by an Australian state or territory court in another state or territory. Again, once a judgment creditor obtains registration of an interstate judgment in another state court, it has the same effect as a local judgment.[27] Most importantly also, the judgment debtor cannot raise any objection to recognition in the requested court that may exist under common law principles of private international law, such as concerning the jurisdictional competence of the court of origin.[28] There is no scope for 'indirect' jurisdictional review in the requested court. On jurisdictional matters, SEPA

[24] *Pedersen v Young* (1964) 110 CLR 162, 170 (HCA) (Windeyer J).
[25] Commonwealth of Australia Constitution Act 1900 (UK), as amended by referenda.
[26] *Harris v Harris* [1947] VLR 44 (Supreme Court of Victoria).
[27] Service and Execution of Process Act 1992 (SEPA) (Cth), section 105(2).
[28] ibid section 109.

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goes even further. Not only does it remove any indirect jurisdictional grounds at the recognition stage, but it also creates a single rule of direct jurisdiction for interstate cases throughout Australia. The rule provides that a state or territory Supreme Court will have jurisdiction in any matter where a defendant is served with an originating process while present in any state or territory in Australia.[29] No nexus is required between the cause of action and the forum. The concept of 'forum' is expanded beyond the immediate territory of the state of origin to include the entire country. Once a court exercises such jurisdiction and delivers judgment, the jurisdictional finding is binding and preclusive on all other Australian courts.[30]

SEPA could have remained a quirk of Australian constitutional law confined to intranational cases had a momentous step not been taken in 2008. In that year, Australia and New Zealand signed the Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement (TTA). The aim of the TTA was to streamline the process of resolving civil disputes between the countries and reduce the barriers to enforcing civil judgments. The TTA came into force in 2013 and was enacted in Australia in the Trans-Tasman Proceedings Act 2010 (TTPA). The key point for present purposes is that the TTA adopts the SEPA model in Trans-Tasman litigation. Australian courts apply only a single direct jurisdiction rule based on service on a defendant present in New Zealand, again with no nexus between the cause of action and the Australian forum required.[31] New Zealand courts employ the same rule with respect to Australian-based defendants. Further, and also consistently with SEPA, any judgment rendered by an Australian or New Zealand court will be recognised in the other country's courts without any scope for review on jurisdictional grounds. Indirect jurisdiction is therefore again removed at the stage of recognition, with the decision by the court of origin as to its jurisdiction preclusive and binding.[32]

The SEPA and TTA examples are consistent with the earlier expressed view regarding the relationship between direct and indirect jurisdiction. In both cases there is a suprastate order imposed from above, which establishes a uniform regime for recognition based on a single binding rule of direct jurisdiction. In the case of SEPA, the regime is based on a national governing instrument—the Australian federal Constitution—to which all states acceded out of regard for their shared cultural, political and economic interests and trust in each other's judicial and legislative bodies. Similarly, with the TTA, Australia and New Zealand saw a mutual interest in integrating each other's systems for cross-border litigation, again due to the trust and confidence in their respective legal orders, shared history, close economic relationship and geographical proximity.[33] Relinquishing indirect jurisdictional checks on recognition of judgments is hence perfectly understandable in such

[29] ibid sections 15(1), 12.

[30] Note that for intra-Australian judgments outside the SEPA regime, constitutional full faith and credit also likely precludes the reopening of jurisdictional determinations made by the court of origin at the recognition stage: *Harris* (n 26); *Rose v Silverstein* [1996] 1 VR 509 (Supreme Court of Victoria).

[31] Trans-Tasman Proceedings Act 2010 (Cth), sections 9, 10.

[32] ibid section 66 (definition of 'registrable New Zealand judgment'), section 72 (grounds for setting aside New Zealand judgment), section 79 (private international law rules not applicable).

[33] See generally R Mortensen, 'A Trans-Tasman Judicial Area: Civil Jurisdiction and Judgments in the Single Economic Market' (2010) 16 CantaLR 61.

circumstances, particularly where, again, reciprocity of treatment is guaranteed. The result is enhanced circulation of cross-border judgments, although unlike the Brussels Convention model in the EU,[34] there is no common superior court such as the European Court of Justice to ensure a uniform interpretation of the shared instrument.

2.2. Other foreign judgments

Apart from the TTA, Australia has not adopted any other significant conventions on the recognition of foreign judgments. For all countries' judgments, other than those from New Zealand, a version of the traditional English common law approach to recognition applies. While recognition for one group of countries' judgments is based on statute and the remainder arises under the common law, the jurisdictional principles applied are almost the same in each case.

The first category concerns the States that fall under the Foreign Judgments Act 1991 (FJA), which is based on the Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK).[35] Such States are included because, apparently, they have agreed to give reciprocal treatment to Australian judgments. This observation is, however, rather unverifiable since a perusal of the countries on the list shows that, apart from some Commonwealth countries, many have very different approaches to Australia on the issue of indirect jurisdiction. The stated assumption that reciprocity of treatment applies thus seems slightly speculative.[36] In any event, the grounds of indirect jurisdiction under the FJA are almost identical to those applicable to judgments from the remaining countries which are subject to common law principles of recognition. For example, under both the FJA and the common law, broadly speaking, a foreign judgment will only be capable of recognition when the defendant judgment debtor was present or resident in the foreign country[37] at the time the foreign proceedings were commenced or voluntarily submitted to the foreign court's jurisdiction.[38]

The grounds of indirect jurisdiction under Australian law for all foreign judgments from countries other than New Zealand are therefore very limited and do create a

[34] See Section 5.

[35] Foreign Judgments Act 1991 (Cth) (FJA).

[36] An exception is the UK, where a bilateral treaty with Australia on recognition exists: see the Agreement between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (23 August 1990) [1994] ATS 27.

[37] Interestingly, section 7(3)(a)(iv) FJA (n 35) refers to the judgment debtor being 'resident' in the foreign place, but no mention is made of 'presence'. This omission suggests that the common law rule allowing presence has been discarded: J Allsop and D Ward, 'Incoherence in Australian Private International Laws' [2013] FedJSchol 8, 10, although the authors of *Nygh* assert that the term 'residence' also includes presence: M Davies et al, *Nygh's Conflict of Laws in Australia* (10th edn, LexisNexis Butterworths 2020) para 41.20. The 'residence' requirement for corporations under the FJA also appears to be more restrictively framed than the common law rule, which simply requires that the debtor be carrying on business in the foreign place. By contrast, under the FJA, the debtor must have its 'principal place of business' in the foreign place (section 7(3)(a)(iv)) or the foreign proceedings must be 'in respect of a transaction effected through or at a place of business' of the debtor in the foreign place (section 7(3)(a)(v)). Both these ambiguities urgently require judicial or legislative clarification.

[38] FJA (n 35) section 7(3)(a)(i)–(iii).

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significant 'gap' with the rules for direct jurisdiction. In terms of direct rules, apart from the common law bases of presence and submission, there are now 31 'gateways' allowing claimants to serve abroad without the leave of a court.[39]

Some commentary has been critical of this discrepancy and suggested that Australian (and other common law countries') rules of indirect jurisdiction should be widened. The allegation is that such a gap discriminates against foreign judgment creditors relative to local claimants who are given generous access to Australian courts to commence actions.[40] Three possibilities for expansion have been proposed: the adoption of a 'real and substantial connection' or appropriate forum test; the addition of further bases of indirect jurisdiction; or the employment of a 'mirror image'/equivalence approach. Each will be explored in greater detail later but, for present purposes, it suffices to say that these criticisms are not generally accepted. First, as noted in Section 1, there is no necessary correspondence or identity between direct and indirect jurisdiction given the different purposes of each and the unilateral nature of direct jurisdiction. Second, any move to dramatically expand the categories of indirect jurisdiction without a promise of reciprocal treatment for Australian judgments abroad would only serve to unduly penalise predominantly Australian judgment debtors. Instead, greater energy should be directed by the Australian Government to acceding to the Choice of Court Convention and Judgments Convention (considered in Section 6) and entering further bilateral treaties on the TTA model with trusted State partners with reputable legal and judicial systems. In this way, any concessions made on the issue of indirect jurisdiction will not be unnecessarily one-sided and self-defeating.

3. The US

3.1. Interstate judgments

Like Australia, the US has a constitutional full faith and credit clause that provides that a judgment given by one state court has the same preclusive effect in another state as it would have in the state of origin.[41] The key question again is the extent to which preclusion applies to the issue of jurisdiction determined in the court of origin. As noted in Section 2, preclusion is effectively absolute in Australia in the case of recognition of interstate judgments. SEPA establishes a single rule of direct jurisdiction based on service on a defendant present within any state or territory in Australia and then

[39] See, e.g. Supreme Court (General Civil Procedure) Rules 2015 (Victoria) rule 7.02.

[40] Most of the criticism has come from American commentators: see, e.g. RA Brand, 'The Hague Judgments Convention in the United States: A "Game Changer" or a New Path to the Old Game?' (2021) 82 UPittLRev 847; Jones Day, 'Comparative Study of Jurisdictional Gaps and their Effect on the Judgments Project' (Note to the Permanent Bureau of The Hague Conference on Private International Law, 1 July 2015) <https://assets.hcch.net/docs/7ebd2982-351a-4ca7-b6b3-356c8cdc1778.pdf>. Concerns, however, have also been expressed by Australian lawyers: J Hogan-Doran, 'Enforcing Australian Judgments in the United States (and Vice Versa): How the Long Arm of Australian Courts Reaches across the Pacific' (2006) 80 Australian Law Journal 361; T McEvoy, 'Common Law versus Statutory Approaches to Enforcing Foreign Judgments: The Australian Experience' in PB Stephan (ed), *Foreign Court Judgments and the United States Legal System* (Brill 2014) 179, 184, who describes the gap in Australian law as a 'double standard'.

[41] United States Constitution, art 4(1); see also Uniform Enforcement of Foreign Judgments Act 1948 (implementing full faith and credit clause).

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provides that a judgment based on such a rule cannot be attacked on jurisdictional grounds in a recognition proceeding in another state or territory court. Indirect jurisdiction is effectively removed.

In the US, the position is more nuanced. First, there is no uniform single rule of direct jurisdiction applicable throughout the US: each state is entitled to apply its own direct rules if they broadly comply with the constitutional requirement of due process. To satisfy due process, there must first be a sufficient connection between the defendant and the state of origin ('minimum contacts') and, secondly, the assertion of jurisdiction should not be so unreasonable and unfair as to violate traditional notions of fair play and substantial justice.[42] Once a judgment has been given by the court of origin and recognition is sought in another state, the judgment debtor has, however, only limited options to contest jurisdiction. The basic rule is that, where the defendant appeared in the proceedings in the court of origin and either contested or had the opportunity to contest the question of jurisdiction, it is precluded from doing so in the recognition proceeding.[43] The jurisdictional finding is res judicata, which means that, like the Australian position, the rules of direct jurisdiction operate without constraint. Where, however, the defendant did not appear in the original proceedings and never submitted to the jurisdiction of the court of origin, it is not bound by that court's decision on jurisdiction and can seek to review it at the recognition stage.[44] In such a case the defendant may argue that the court of origin lacked jurisdiction under its own direct rules, constitutional due process principles or both.

Hence, like the Australian position, substantial suprastate control is imposed by the US Constitution on jurisdictional matters in interstate judgment recognition. Again, the application of the direct jurisdictional rules of the court of origin is generally incapable of being questioned, outside the context of default judgments. Such an approach is logical given that all states of the US are part of the same constitutional order.

3.2. Foreign judgments

The US approach to recognition of truly foreign judgments, by contrast, differs markedly from the Anglo-Australian common law view. Recognition is solely governed by state not federal law and, according to the US Supreme Court,[45] 'international comity' is the rationale for recognition, a standard that lies somewhere between international courtesy and strict obligation. This requirement has been referred to in subsequent decisions involving recognition of foreign judgments at common law as well as under model recognition legislation that codified the common law rules, for example, the Uniform Foreign Money Judgments Recognition Act 1962 (UFMJRA), in force in 16 states.

[42] *International Shoe Co v Washington* 326 US 310, 316 (1945) (SCOTUS).

[43] *Firstar Bank Milwaukee NA v Cole* 287 Ill App 3d 381, 383–84 (1997) (Illinois Appellate Court); *Underwriters National Assurance Co v North Carolina Life and Accident Health Insurance Guarantee Association* 455 US 691, 706 (1982) (SCOTUS); *Durfee v Duke* 375 US 106, 111 (1963) (SCOTUS). See generally SC Symeonides, *American Private International Law* (Wolters Kluwer 2008) 327–39.

[44] *Baldwin v Iowa State Travelling Men's Association* 283 US 522, 524–26 (1931) (SCOTUS); *Falcon v Faulkner* 209 Ill App 3d 1 (1991) (Illinois Appellate Court).

[45] *Hilton v Guyot* 159 US 113 (1895) (SCOTUS).

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The UFMJRA provides that a requested court may refuse recognition of a judgment where the foreign court did not have personal jurisdiction over the defendant according to various grounds listed in section 5(a), which broadly correspond to the constitutional due process standard. Few commentators have suggested that countries outside the US should adopt the minimum contacts approach to recognition of foreign judgments. This reticence is understandable since the principle is strongly rooted in US constitutional jurisprudence and would be difficult to translate elsewhere. The test also suffers from a similar problem as the Canadian 'real and substantial connection' test considered in Section 4, in that it is highly fact-specific and indeterminate and so unlikely to aid certainty and predictability. Section 5(b) UFMJRA then allows a court to accept other jurisdictional grounds, which has been interpreted to mean that a US court can recognise a foreign judgment where that court would have exercised direct jurisdiction had the matter arisen before it. This approach is known as the 'mirror image' or equivalence doctrine and applies regardless of the direct jurisdictional grounds relied upon by the foreign court.[46] Consequently, there have been many US cases where a foreign court's exercise of direct jurisdiction over US defendants was held to be appropriate because the decision complied with US due process standards.[47]

4. Canada

4.1. Interprovincial judgments

Canada is an interesting example of a predominantly English common law country that has abandoned the restrictive approach to indirect jurisdiction under Anglo-Australian law in favour of a model which unifies direct and indirect jurisdiction in a broadly similar way to the US. The change in Canadian law originated in the context of the recognition of inter-provincial judgments.

In *Morguard Investments Ltd v De Savoye* (*Morguard*),[48] the Supreme Court of Canada held that a default judgment from Alberta was enforceable against a defendant in British Columbia, despite the defendant not having submitted to the jurisdiction of the Albertan courts or having been served with process in that province. The court relied expressly on the full faith and credit principle, despite there being no such clause in the Canadian Constitution, to declare that a provincial court should recognise a judgment of another provincial court so long as the court of origin has 'properly or appropriately exercised jurisdiction in the action'.[49] The court then stated that a court of origin properly assumes jurisdiction where there is a 'real and substantial connection' between the dispute and the adjudicating forum. The rationale for this approach was Canadian federalism: 'the obvious intention of the Constitution [was] to create a single country'.[50]

[46] *Nippon Emo-Trans Co Ltd v Emo Trans* 744 F Supp 1215, 1230–31 (1990) (US District Court for the Eastern District of New York); TJ Monestier, 'Whose Law of Personal Jurisdiction? The Choice of Law Problem in the Recognition and Enforcement of Foreign Judgments' (2016) 96 BULRev 1729, 1737, 1739–40.

[47] *Somportex Ltd v Philadelphia Chewing Gum Corp* 453 F 2d 435 (3rd Cir 1971) (US Court of Appeals for the Third Circuit); *Koster v Automark Industries Inc* 640 F 2d 77 (7th Cir 1981) (US Court of Appeals for the Seventh Circuit); *Nippon Emo-Trans Co Ltd* (n 46).

[48] *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 (Supreme Court of Canada).

[49] ibid 1102.

[50] ibid 1079.

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It was inappropriate to apply restrictive common law indirect rules of jurisdiction to the recognition of judgments within a single federation.

In subsequent decisions, the principle in *Morguard* was extended to direct jurisdiction as well, thus unifying direct and indirect jurisdiction in interprovincial cases. Such an analysis is unremarkable and entirely accords with the position taken in parallel federations such as Australia and the US for interstate cases.

4.2. Foreign judgments

Fourteen years later in *Beals v Saldanha* (*Beals*),[51] the Supreme Court made the quantum leap of applying the real and substantial connection test to the recognition of foreign judgments. Despite the court admitting that foreign judgments raise 'different issues' to interprovincial determinations,[52] the court nevertheless considered that the test was equally appropriate in the foreign context. The court relied on comity to support the extension of the principle, noting that 'the need to accommodate the flow of wealth across state lines is as much an imperative internationally as it is inter-provincially'.[53] Hence, if a Canadian court would have exercised jurisdiction to adjudicate had the same facts arisen before it, then a real and substantial connection exists between the case and the foreign court and the foreign judgment will be recognised.

The application of the real and substantial connection test to the recognition of foreign judgments has been controversial. Specifically, it transposes the constitutional 'enforcement imperatives' from the interprovincial context to the international context without regard for their distinct characteristics.[54] Comity towards foreign States should not involve the same deference as constitutionally mandated integration. More pragmatically, commentators have suggested that the *Beals* approach exposes Canadian judgment debtors to wider recognition in Canada without any reciprocal benefit to Canadian judgment creditors abroad that would flow from a treaty-based suprastate approach. The approach may therefore be seen as a unilateral 'own goal' for Canadian litigants.[55] This criticism has resonance given that the real and substantial connection test is arguably wider and more open-ended in its conferral of jurisdiction than the US minimum contacts approach. While the Canadian test looks at the contacts between the action and the State of origin, the American principle focuses on contacts between the defendant and that State.[56]

[51] *Beals v Saldanha* [2003] 3 SCR 416 (Supreme Court of Canada) (*Beals*).

[52] ibid para 26 (Major J).

[53] ibid.

[54] TJ Monestier, 'Foreign Judgments at Common Law: Rethinking the Enforcement Rules' (2005) 28 DalLJ 163, 179–80.

[55] ibid 183; S Atrill, 'The Enforcement of Foreign Judgments in Canada' (2004) 63 CLJ 574; A Briggs, *Civil Jurisdiction and Judgments* (6th edn, Routledge 2015) 712–15; J Blom and E Edinger, 'The Chimera of the Real and Substantial Connection Test' (2005) 38 UBCLRev 373, 416; J Blom, 'Constitutionalizing Canadian Private International Law–25 Years since *Morguard*' (2017) 13 JPrivInt'lL 259, 281–83; Kutner (n 1) 68; cf P Torremans (ed), *Cheshire, North and Fawcett, Private International Law* (15th edn, OUP 2017) 544; SGA Pitel, '*Morguard Investments Ltd v De Savoye 1990*' in W Day and L Merritt (eds), *Landmark Cases in Private International Law* (Bloomsbury 2023) 289.

[56] Monestier (n 54) 183.

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The breadth of the test creates uncertainty,[57] in particular, for a defendant who must decide whether to defend the action in the foreign court or allow the judgment to be obtained by default. For a defendant to determine whether the court of origin will ultimately be closely connected with the dispute will be 'somewhere between impossible and inconceivable'[58] given that the factual matrix may well change in the time between service of process and adjudication.[59] It is largely for these reasons that the real and substantial connection test has been rejected by English,[60] Irish,[61] Hong Kong,[62] New Zealand[63] and South African[64] courts.[65]

Hence, while the real and substantial connection test may have utility in Canadian interprovincial cases and at the direct jurisdiction stage in international disputes, in the context of recognition of foreign judgments it is arguably an act of misplaced comity and self-harm. If Canadian lawmakers wish to narrow the jurisdictional gap, other strategies are more appropriate.

5. EU

The 1968 Brussels Convention[66] (now substantially replicated in the 2012 Brussels Ia Regulation)[67] was intended to replace a complex and convoluted system of bilateral recognition and enforcement treaties throughout Europe.[68] The Brussels Convention was a fulfilment of the Treaty of Rome's objective of creating an integrated European common market where free circulation of judgments would complement the movement

[57] Arzandeh (n 5) 64; A Dickinson, '*Schibsby v Westenholz* and the Recognition and Enforcement of Judgments in England' (2018) 134 LQR 426, 449; Briggs (n 6) 94–96; TJ Monestier, '(Still) A Real and Substantial Mess: The Law of Jurisdiction in Canada' (2013) 36 FordhamInt'lLJ 397, 455–58.

[58] A Briggs, *Private International Law in English Courts* (2nd edn, OUP 2023) 325; A Briggs 'Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments' (2004) 8 SYBIL 1, 13–14.

[59] Note that for direct jurisdiction, the global real and substantial connection principle is now expressed in terms of more tangible 'presumptive connecting factors' such as that the tort was committed in the province, the contract was made in that province or the defendant was domiciled, resident or carried on business there. The Supreme Court of Canada, however, has not clearly determined that such an approach also applies to indirect jurisdiction: cf *Club Resorts Ltd v Van Breda* [2012] SCC 17, paras 16, 92. Blom argues that the application of such 'PCFs' would make enforcement more predictable: Blom (n 55) 283, while Monestier considers that they are ill-suited to a post-judgment situation: TJ Monestier, 'Jurisdiction and the Effect of Foreign Judgments' (2013) 42 AdvocQ 107, 128–29.

[60] *Rubin v Eurofinance SA* (n 14)

[61] *Re Flightlease* [2012] IESC 12 (Supreme Court of Ireland).

[62] *Islamic Republic of Iran Shipping Lines v Phiniqia International Shipping LLC* [2014] HKCFI 1280 (Hong Kong Court of First Instance) paras 33–35.

[63] *Almarzooqi v Salih* [2021] NZSC 161, para 11.

[64] *Supercat Incorporated v Two Oceans Marine CC* 2001 (4) SA 27 (C) 31.

[65] Pitel, however, asserts that there is no evidence that Canadian litigants have been treated unfairly by the principle or that 'foreign judgments have been enforced against them inappropriately': Pitel (n 55) 304.

[66] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1968] OJ L299 (Brussels Convention).

[67] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351 (Brussels Ia Regulation).

[68] RC Reuland, 'The Recognition of Judgments in the European Community: The Twenty Fifth Anniversary of the Brussels Convention' (1993) 14 MichJIL 559, 561.

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of goods, persons and capital. The drafters therefore aimed to achieve a maximum level of recognition, based on uniform rules providing predictable outcomes for litigants.[69] Consequently, the Brussels Convention has been described as the European equivalent of the full faith and credit principle.[70]

A novel feature of the Brussels Convention was that it departed from the traditional practice in existing bilateral treaty regimes, which had addressed recognition of judgments alone. In those instruments, the focus was on indirect jurisdiction only, not the rules of direct jurisdiction that would apply in the court of origin. The drafters instead created a multilateral 'double' convention with uniform rules of direct jurisdiction binding all EU Member States, accompanied by rules requiring generally automatic recognition of other Member States' judgments without scope for jurisdictional review in the requested court.[71] The certainty created by the Brussels Convention is reinforced by the role of the European Court of Justice, which has supervisory authority to interpret the instrument. The overall result is similar to the TTA, although on a much wider regional scale. Article 45(1)(e) Brussels Ia Regulation provides only a limited exception to the above prohibition on review of the court of origin's jurisdiction: where the matter concerns insurance, consumer or employment contracts or involves exclusive jurisdiction such as rights in rem over immovable property.[72] In all other cases, the court of origin's decision on direct jurisdiction binds all requested courts at the recognition stage. Recognition is therefore governed solely by rules of direct jurisdiction[73] or, put another way, 'multilateral rules of direct jurisdiction … become rules of indirect jurisdiction'.[74]

Once again, an approach that resolves the question of recognition entirely by rules of direct jurisdiction is entirely appropriate in the context of an instrument binding all Member States. Reciprocal recognition of judgments is the expectation and assumption in such a context.

The strict Brussels model however, only applies in the case of defendants domiciled in an EU Member State. Where the defendant is a non-EU domiciliary, the position differs and is less defensible. In that context, an EU Member State court may apply its own national law rules of direct jurisdiction (not the harmonised rules in the Brussels Ia Regulation), however exorbitant, and then receive the windfall result that its judgment will be recognised in all other Member States' courts under the Brussels Ia Regulation. Here, there are no special categories of cases where indirect jurisdictional review is permissible. The contentious issue, of course, is that non-EU Member States never

[69] T Hartley, 'The European Court, the Brussels Convention/Regulation and the Establishment of an Efficient System for International Litigation in Europe' in A Arnull et al, *Continuity and Change in EU Law* (OUP 2008) 385, 386.

[70] LS Bartlett, 'Full Faith and Credit Comes to the Common Market: An Analysis of the Provisions of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters' (1975) 24 ICLQ 44; P North, 'Rethinking Jurisdiction and Recognition of Judgments' (2002) 55 CLP 395, 400.

[71] Brussels Ia Regulation (n 67) art 45(3).

[72] ibid Title II, sections 3–6.

[73] M Lehmann, 'Incremental International Law-Making: The Hague Jurisdiction Project in Context' (2023) 19 JPrivInt'lL 25, 28–29.

[74] C Wasserstein Fassberg, 'Judicial and Legislative Jurisdiction in the Hague Conventions on Private International Law' (1993) 27 IsLR 460, 463.

signed up to the constitutional/suprastate order of the Brussels Ia Regulation, with generous reciprocal recognition of judgments, uniform direct jurisdiction rules and protection from exorbitant national direct rules. Yet non-EU judgment debtors are subject to the automatic judgment enforcement regime under the Brussels Ia Regulation without the protection of the instrument's direct jurisdiction rules. American commentators have rightly decried the model as oppressive and protectionist.[75]

6. The Hague Conference instruments

6.1. The period of deadlock: 1992–2002

Negotiations relating to The Hague Jurisdiction Project (Project) commenced in 1992, when the US requested The Hague Conference on Private International Law (HCCH) to consider the development of a global treaty on adjudicatory jurisdiction and recognition of foreign judgments. From the beginning, the Project was plagued with division, principally between the EU and the US, as to the appropriate model for such a convention. The US' main aim was to secure greater recognition of its judgments abroad; it argued with some force that while US courts were relatively accommodating to foreign judgments, many other countries were restrictive and protectionist. Hence the US would most likely have been content for a single convention on recognition and enforcement,[76] which would liberalise recognition standards on a global level. The EU, instead, saw the Project as an opportunity to tame the perceived excesses of the US' direct jurisdiction rules and considered that recognition should only be examined after direct jurisdiction had been resolved.

Not surprisingly, perhaps, the EU proposed the Brussels Convention as the model for negotiations. As noted in Section 5, the text is a double convention, based on a fixed and limited set of direct jurisdictional rules with little scope for review of the jurisdiction of the court of origin at the recognition stage. The US was reluctant to accept a text based on a set of required direct jurisdictional rules that were likely to sharply diverge from its national law and instead proposed, as a compromise, a 'mixed' convention model.[77] Under a mixed convention, there would be three categories of direct jurisdiction—required, excluded and permitted—with the last category embracing most grounds under existing national laws. For recognition purposes, a requested court generally would be obliged to recognise judgments given on a required basis, prevented from

[75] A Von Mehren, 'Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions' (1998) 24 BrookJIL 17, 20–22; Bartlett (n 70) 49, 55–56; RA Brand, 'Jurisdiction over Non-EU Defendants: The Brussels I Article 79 Review' in T Lutzi, E Piovesani and D Zgrabljic Rotar (eds), *Jurisdiction over Non-EU Defendants: Should the Brussels 1a Regulation Be Extended?* (Bloomsbury 2023) 271, 277–78. Brussels Convention (n 66) art 59 allowed a Contracting State to agree with a non-Party State that the Contracting State would not recognise a judgment of another Contracting State against a domiciliary of the non-Party State where an exorbitant direct jurisdiction ground had been relied upon. Few such conventions were, however, agreed although one example was the Australia-UK bilateral treaty on recognition referred to in n 36.

[76] A Von Mehren, 'Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project Succeed?' (2001) 49 AmJCompL 191, 197.

[77] ibid 197–98; see also Von Mehren (n 75).

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recognising judgments based on a prohibited ground and allowed to recognise judgments under its domestic law where the court of origin relied on a permitted basis. In this way, the proposed instrument would intrude less on national law and preserve the generous approaches to recognition under domestic law that exist in some countries such as the US. The EU sought to accommodate this approach to a limited extent in the 1999 Preliminary Draft Convention,[78] by allowing Contracting States to recognise judgments under national law that would not have been capable of recognition under its provisions.[79] Ultimately, however, the US could not accept the controls on direct jurisdiction in the double convention model[80] and the negotiations ended.[81]

6.2. The Choice of Court Convention

Out of the impasse, however, fresh deliberations commenced on a more limited jurisdiction and judgments instrument, which became the 2005 Choice of Court Convention.[82] Emboldened by this achievement, members of the Hague Conference then embarked on negotiations to create a single convention on recognition of foreign judgments, which was realised in the 2019 Judgments Convention, discussed in Section 6.3.[83] The article now explores how these instruments have impacted the relationship between direct and indirect jurisdiction, beginning with the Choice of Court Convention.

The Member States of the Choice of Court Convention are Albania, Bahrain, Denmark, the EU, Mexico, Moldova, Montenegro, North Macedonia, Singapore, Switzerland, Ukraine and the United Kingdom (UK). The Choice of Court Convention is a double instrument which deals with both adjudicatory jurisdiction and recognition of judgments. The basic rule of direct jurisdiction is found in Article 5(1), which provides that 'the court of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State'.[84] Such a chosen court is therefore required to exercise jurisdiction unless the choice of court agreement is invalid. While direct jurisdiction had been a highly controversial issue in the earlier Hague negotiations, the drafters of the Choice of Court Convention

[78] Special Commission on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters, 'Preliminary Draft Convention on Jurisdiction and the Effects of Judgments in Civil and Commercial Matters' (HCCH, Working Doc No 241, 18 June 1999).

[79] ibid art 24.

[80] RA Brand, 'Jurisdiction and Judgments Recognition at the Hague Conference: Choices Made, Treaties Completed and the Path Ahead' (2020) 67 NILR 3, 12; C Kessedjian, 'Is the Hague Convention of 2 July 2019 a Useful Tool for Companies Who Are Conducting International Activities?' (2020) 38(1) NIPR 19, 20.

[81] North attributes the failure to the fact that 'there was no international political environment exerting pressure' on States to make major concessions: North (n 70) 400.

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

[83] Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (adopted 2 July 2019, entered into force 1 September 2023) (Judgments Convention).

[84] Choice of Court Convention (n 82) art 5(1).

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avoided the problem by employing a single, widely accepted jurisdictional ground: an exclusive choice of court agreement based on party autonomy.[85]

The basic rule for recognition of judgments is found in Article 8(1), which provides that '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'.[86] The Choice of Court Convention also does not exclude any jurisdictional bases. Hence, provided that the judgment in the court of origin involves an exclusive choice of court agreement, the precise basis of direct jurisdiction invoked by the court is irrelevant.[87] This factor also facilitates acceptance of the Choice of Court Convention. Article 8(2) provides that 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. Consequently, factual determinations on jurisdictional matters such as the existence or consent to a choice of court agreement and whether the agreement was exclusive are preclusive and cannot be challenged at the enforcement stage.[88] Finally, Article 9(a) provides that recognition of the judgment may be refused if the choice of court agreement was null and void under the law of the State of the chosen court unless the chosen court has determined that the agreement is valid.

The effect of these provisions is similar to the Brussels Convention and Brussels Ia Regulation: once direct jurisdiction has been established by the court of origin, through upholding the existence and validity of the choice of court agreement, there is no scope for review of jurisdiction at the recognition stage. In essence, recognition is determined by the direct jurisdiction rules. The exception to this principle is where the judgment is given in default of appearance by the defendant.

A matter that is not entirely clear is whether review of the validity or existence of a choice of court agreement at the recognition stage is possible where no explicit ruling was made by the court of origin on such questions, but the parties and court assumed that the agreement was valid. The better view is that such a judgment should also have preclusive effect to deter defendants from opportunistically keeping jurisdictional objections up their sleeve to raise at the recognition stage. The discretion in Article 9(a) to refuse recognition should therefore be exercised rarely. Some commentators have been highly critical of this approach,[89] arguing that the requested court should be entitled to review the questions of validity and existence of the agreement afresh. The concern is that Contracting States to the Choice of Court Convention will be essentially bound to enforce judgments from legal systems of 'doubtful integrity, independence and competence'.[90] In response, it may be said that if parties have voluntarily entrusted a court with jurisdiction to determine their disputes, then concerns about the probity or

[85] Stamboulakis (n 18) 149, 173.

[86] Choice of Court Convention (n 82) art 8(1).

[87] Stamboulakis (n 18) 143.

[88] RA Brand and P Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (CUP 2005) 103.

[89] G Born, 'The Hague Convention on Choice of Court Agreements: A Critical Assessment' (2021) 169 UPaLRev 2079, 2117–118.

[90] Born also laments the absence of a 'bilateralisation'-type provision in the Choice of Court Convention, similar to that found in art 29 of the Judgments Convention (n 83). Art 29 enables a State to disapply the Judgments Convention in respect of any other Contracting State: ibid 2112–113.

quality of such courts have presumably been assessed and accepted by the parties at the time of contracting. It would also be inimical to the efficiency of adjudication and trust and confidence in courts of Contracting States to allow a requested court to undertake a further review of the court of origin's jurisdiction. This conclusion is particularly compelling where the court of origin has considered and rejected a challenge to the validity of the choice of court agreement. Analogously, common law doctrines such as issue estoppel are increasingly applied to recognise jurisdictional determinations by foreign courts, out of concern for comity and finality of adjudication.[91] Giving primacy to the direct rules of jurisdiction is therefore justified in an instrument with reciprocal rights and obligations.

6.3. The Judgments Convention

The Judgments Convention was the next accomplishment of the Project—a single instrument focusing entirely on the recognition of judgments rather than regulating direct jurisdictional rules. The Judgments Convention entered into force in September 2023. The current Contracting States are the EU (except Denmark), Ukraine, the UK and Uruguay.[92] It will enter into force for Albania and Montenegro on 1 March 2026 and Andorra on 1 June 2026.

The key provision for jurisdictional purposes is Article 5(1), which provides a list of 13 jurisdictional filters or bases of indirect jurisdiction. If one of these grounds is satisfied, then the resulting judgment will generally be entitled to recognition in other Contracting States. Cumulatively, the jurisdictional grounds in Article 5 go far beyond the existing bases of recognition under Anglo-Australian common law. For example, bases include personal connections between the judgment debtor and the State of origin such as habitual residence[93] and principal place of business,[94] links between the subject-matter of the claim and the State[95] such as the place where the contract was to be performed,[96] the place where the act or omission in relation to a non-contractual obligation occurred[97] or the place where a trust was administered[98]

[91] R Garnett, 'Recognition of Jurisdictional Determinations by Foreign Courts' (2019) 15 JPrivInt'lL 490. Stamboulakis (n 18) 175–76 also refers to the importance of finality and the need to 'deepen relationships between states and enforcing courts'.

[92] Judgments Convention (n 83). A particular reason for the UK's accession to the Judgments Convention was the need, post-Brexit, to have a uniform and predictable basis for the recognition and enforcement of English judgments in the EU: M McIntosh, 'The Hague 2019 Judgments Convention: Will it Fill the Post-Brexit Enforcement Gap?' (2023) 42 CJQ 420, 436; UK Ministry of Justice, 'The Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters: Response to Consultation' (23 November 2023). Such a move would help to ensure that the UK remained a forum of choice for foreign litigants: P Beaumont, 'Some Reflections on the Way Ahead for UK Private International Law after Brexit' (2021) 17 JPrivInt'lL 1, 4.

[93] Judgments Convention (n 83) art 5(1)(a).

[94] ibid art 5(1)(b).

[95] Adopting the connection between the cause of action and the State of origin as a jurisdictional filter is the 'real novelty' of the Judgments Convention for common lawyers: A Briggs, 'The Hague Judgments Convention 2019' [2024] Lloyds Maritime and Commercial Law Quarterly 458, 469.

[96] Judgments Convention (n 83) art 5(1)(g).

[97] ibid art 5(1)(j).

[98] ibid art 5(1)(k).

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and bases dealing with express and implied submission to the jurisdiction of the court of origin.[99]

A requested court is not bound by any findings of fact of the court of origin as to matters of jurisdiction and must make an 'independent'[100] assessment of whether any basis or filter in Article 5(1) is satisfied. The common law doctrine of issue estoppel, however, may be called into aid, for example, if the court of origin found a defendant to be habitually resident in that State.[101]

The only current basis of indirect jurisdiction under common law principles not included in the Judgments Convention is 'tag' jurisdiction, that is, service on a defendant temporarily present in the country of the court of origin. As discussed in Section 9, however, Anglo-Australian common law could happily lose this ground since it is based on slender and occasionally fortuitous links with the State of origin. The Judgments Convention also contains very few grounds of 'excluded' jurisdiction: for example, Article 6 provides that 'if a judgment rules on a right in rem in immovable property it shall be recognised and enforced if and only if the property is situated in the state of origin'.[102] Like the Choice of Court Convention, a policy of reducing excluded grounds of jurisdiction is likely to facilitate acceptance of the instrument due to its limited intrusion into national law.

From the perspective of countries with currently narrow indirect grounds of jurisdiction, such as Australia, Singapore, New Zealand and England, the main benefit of acceding to the Judgments Convention is that it will increase the opportunities for local judgment creditors to secure recognition of their judgments abroad.[103] Such a conclusion, however, depends on a significant number of fellow 'restrictive' States joining the instrument.[104]

With the ratification of the Judgments Convention by the EU, progress on this issue has been made, since several European countries have traditionally been resistant to recognise foreign judgments. The flipside, of course, of a more generous recognition policy is that local judgment debtors will be more exposed to recognition of foreign judgments. Such concerns should, however, not be exaggerated. The indirect grounds of jurisdiction under the Judgments Convention are precise, balanced and reflect international consensus on jurisdiction. There also exist several defences to recognition in Article 7 of the Judgments Convention, such as

[99] ibid art 5(1)(e), (f).

[100] P Franzina, 'The Jurisdictional Filters' in M Weller, J Ribeiro-Bidaoui and N Dethloff (eds), *The HCCH 2019 Judgments Convention: Cornerstones, Prospects, Outlook* (Hart Publishing 2023) 41, 45.

[101] Briggs (n 95) 467; Garnett (n 91).

[102] This provision reflects the 'common and uncontroversial' position 'that a state will consider itself to have exclusive jurisdiction on claims relating to rights in rem over immovable property located in that state': F Garcimartin and G Saumier, 'Explanatory Report on the 2019 HCCH Judgments Convention' (HCCH, 2020) para 233.

[103] M Douglas et al, 'The HCCH Judgments Convention in Australian Law' (2019) 47 FLR 420, 435–36.

[104] M Wilderspin and L Vysoka, 'The 2019 Hague Judgments Convention through European Lenses' (2020) 38(1) NIPR 34, 42. For the US and Canada, with liberal recognition and enforcement laws, the incentive for ratifying the Judgments Convention is clear: to improve the position for their judgment creditors. See G Saumier and L Silberman, 'The HCCH 2019 Judgments Convention: Perspectives from the United States and Canada' in M Weller et al (eds), *The HCCH 2019 Judgments Convention: Cornerstones, Prospects, Outlook* (Bloomsbury 2023) 163.

fraud, denial of natural justice and public policy, if the foreign court process has been unconscionable or unjust. Moreover, there is Article 29 of the Convention, which provides that a State may make a declaration to prevent the application of the Convention to judgments emanating from a particular State. This bilateralisation clause allows States to 'accommodate different degrees of mutual trust within a single legal framework'[105] and goes some way to protecting local judgment debtors from legal systems of doubtful integrity, independence and competence. Hence, protections exist for judgment debtors in the Convention at both the systemic and individual case levels.[106] These facts, together with the advantages of a shared uniform text, reciprocity of treatment and clear notification to litigants of the indirect grounds,[107] make adoption of the Judgments Convention a balanced and cautious way of reducing the jurisdictional gap.[108]

For common law jurisdictions such as Australia, New Zealand, Singapore, Hong Kong SAR and Malaysia, acceding to the Judgments Convention will not simplify the law or eliminate the jurisdictional gap. Several grounds of direct jurisdiction do not appear in the Judgments Convention, such as where the claim is founded on a tortious act or omission in respect of which damage was suffered wholly or partly in the forum[109] or where the defendant is a necessary or proper party to an action against some other person who was subject to the court's jurisdiction.[110] Judgments based on such direct grounds of jurisdiction may still circulate under the Judgments Convention if the factual circumstances in the litigation in the court of origin complied with a filter under Article 5(1). For example, if an English court in its judgment relied on damage suffered in the forum as the basis of direct jurisdiction but the defendant was also habitually resident in England, the judgment could still be recognised in other Contracting States.

Alternatively, the judgment may be capable of recognition under the national laws for recognition of Contracting States. The Judgments Convention preserves this possibility by providing in Article 15 that 'this Convention does not prevent the recognition or enforcement of judgments under national law'.[111] Such a provision may be particularly relevant in countries such as the US or Canada which have more generous standards of recognition under domestic law than under Article 5(1).[112] Hence, if a judgment of a Contracting State did not satisfy an indirect ground under Article 5(1) it could still be recognised if the factual matrix in the case would satisfy a

[105] T Lutzi, 'Judgments Convention – No Thanks?' (*Conflict of Laws*, 2023) <https://conflictoflaws.net/2023/judgments-convention-no-thanks/?print=pdf>.

[106] This point was made by the UK Ministry of Justice (n 92) para 18.

[107] Unlike the 'minimum contacts' or 'real and substantial connection' approaches.

[108] Commentators have recommended its adoption in Australia (Douglas et al (n 103)); New Zealand (M Hook and J Wass, *The Conflict of Laws in New Zealand* (LexisNexis 2020) para 5.46); Singapore (Yeo (n 18) 1153); and India and South Africa (S Khanderia, 'The Prevalence of "Jurisdiction" in the Recognition and Enforcement of Foreign Civil and Commercial Judgments in India and South Africa: A Comparative Analysis' (2021) 21 OUCLJ 181, 208, 210–11).

[109] Supreme Court (General Civil Procedure) Rules 2015 (n 39) rule 7.02(a)(ii). See also, in England, CPR (n 16) rule 6.36 PD 6B para 3.1(9)(a).

[110] Supreme Court (General Civil Procedure Rules) (n 39) rule 7.02(h)(i); for England, see CPR (n 16) rule 6.36 PD 6B para 3.1(3).

[111] Judgments Convention (n 83) art 15.

[112] Saumier and Silberman (n 104).

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ground of indirect jurisdiction under the domestic law of the requested court. In this way, the Judgments Convention can be seen to encourage those States who maintain little or no gap in their jurisdictional rules by expanding the range of judgments that may be recognised.[113]

An interesting observation of both the rapporteurs of the Convention and commentators[114] is that while the Convention does not expressly refer to rules of direct jurisdiction, the indirect jurisdictional grounds may have a 'channelling' effect on national direct rules. The argument suggests that parties wanting to maximise the possibilities for recognition of a judgment under the Judgments Convention will be encouraged to sue in a forum whose direct jurisdictional rules are compatible with the filters in Article 5(1). Contracting States will in turn wish to nurture this sentiment by aligning their direct rules with the indirect grounds in the Judgments Convention so that the judgment will be recognised in other Contracting States.[115] Two responses may be made to this argument. The first is that in many cases litigants will choose to sue in forums where local assets are situated, which obviates the need for recognition and enforcement abroad.[116] Channelling will have little relevance in such a case. Secondly, it is unlikely that the Judgments Convention will have the effect of modifying the scope of direct jurisdictional rules in countries such as Australia, Singapore, New Zealand and England.[117] As noted in Section 1, there is no necessary connection or relationship between direct and indirect jurisdictional rules as they serve different purposes. Direct rules determine the right of access to the local courts for litigants; indirect rules govern when a foreign judicial order should be given effect in local legal space. There is no reason in logic or practice why such rules should be identical and claims of discrimination and unequal treatment between litigants ignore the different contexts involved.

Obviously, a Contracting State to the Judgments Convention will have an interest in ensuring that its judgments are recognised in other Contracting States and so providing that its direct jurisdiction rules include all the grounds in Article 5(1). Yet this is already the position in common law countries such as Australia. To suggest that the Judgments Convention may have the further effect of encouraging Contracting States to 'trim' their direct jurisdictional rules that go beyond the filters in Article 5(1) seems unrealistic. More likely, Contracting States will retain the gap as it represents a policy choice to grant wide access to local courts for claimants. The fact that maintaining the gap may complicate judgment creditors' capacity to achieve recognition of their judgments abroad is irrelevant. Any other approach is likely only to harm local claimants without compensating benefit. A similar observation was noted in Section 4 in the parallel case of countries who have sought to render their indirect jurisdictional rules

[113] Brand (n 40) 876–79.

[114] See authors cited in n 115.

[115] Brand (n 80) 17; N Zhao, 'Completing a Long-Awaited Puzzle in the Landscape of Cross-Border Recognition and Enforcement of Judgments: An Overview of the HCCH 2019 Judgments Convention' (2020) 30 Swiss Review of International and European Law 345, 349; Garcimartin and Saumier (n 102) para 135.

[116] Lehmann (n 73) 31.

[117] Blom also sees 'no real benefit' to Canada in modifying its direct jurisdictional rules to be consistent with the Judgments Convention as doing so would not 'gain wider acceptance for [its] judgments abroad': Blom (n 6) 288.

identical to the direct rules; there, the risk of harm was to local judgment debtors by increased recognition of foreign judgments. It is far better for a State simply to ensure that its direct rules are compatible with the indirect grounds in the Judgments Convention to maximise recognition opportunities under the instrument. If the State's direct jurisdictional rules go beyond the grounds in the Judgments Convention, then this will be a matter for claimants to consider when choosing a forum in which to sue.

Overall, the combined effect of the Choice of Court and Judgments Conventions is to create harmonised regimes for recognition of foreign judgments that increase certainty and predictability for parties and reduce risk for cross-border trade and investment. Litigants will be able to assess more accurately at the stage of commencement of an action whether a judgment from that court would be recognised in another State Party to the Convention(s),[118] at least on jurisdictional grounds. Such a position contrasts favourably with the other less determinate methods for expanding common law rules of indirect jurisdiction, namely, minimum contacts and real and substantial connection. Of course, however, the Hague instruments will not succeed without substantial participation by States.

7. Alternative approaches: the mirror image doctrine

In substance, US and Canadian law adopt the same test for indirect jurisdiction in recognition cases as they do for direct jurisdiction in original adjudication matters. Hence, if in the circumstances of a foreign proceeding a US or Canadian court would itself have exercised direct jurisdiction, then the foreign judgment will be recognised in those countries. This is an example of the 'mirror image' doctrine where a requested court applies its own direct jurisdiction rules to the recognition context. This mirror image approach represents a marked contrast to the Anglo-Australian common law view and has also not been adopted in EU law or in the Hague Conventions. The doctrine has, however, been championed by commentators for its elimination of the jurisdictional gap.[119] Should the principle be more widely adopted? While the majority of courts in common law countries outside the US and Canada have rejected the mirror image principle, it was said to be accepted in English law[120] in *Re Dulles Settlement (No 2)* (*Re Dulles*), in which Denning LJ said:

> I do not doubt that our courts would recognise a judgment obtained in the Manx courts for a tort committed there, whether the defendant voluntarily submitted to the jurisdiction or not; just as we would expect the Manx courts in a converse case to recognise a judgment obtained in our courts against a resident in the Isle of Man, on his being properly served out of our jurisdiction for a tort committed here.[121]

[118] V Bath, 'The Exercise of Jurisdiction and the Role of Enforcement' in M Douglas et al, *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing 2019) 45, 59.

[119] O Kahn-Freund, *The Growth of Internationalism in English Private International Law* (Magnes Press 1960) 30–32; Brand (n 40) 858–59, 869, 873; Arzandeh (n 5); M Keyes, *Jurisdiction in International Litigation* (Federation Press 2005) 288; CW Fassberg, 'Rule and Reason in the Common Law of Foreign Judgments' (1999) 12 CJLJ 194, 210, 221.

[120] German Code of Civil Procedure, art 328(1) also adopts the principle.

[121] *Re Dulles Settlement (No 2)* [1951] Ch 842 (CA) 851.

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The above passage may be interpreted in two distinct ways, which may weaken its force as precedent. First, it can be seen to support the principle that an English court may recognise a foreign judgment where the foreign court would have been competent to adjudicate under the English rules of direct jurisdiction, regardless of which basis of jurisdiction the foreign court in fact applied. This is the mirror image principle or what Arzandeh describes as the 'corresponding jurisdictional bases' model.[122] Alternatively, the passage may be demanding something stricter: that the foreign court must have specifically relied on a ground of jurisdiction in its judgment that exists under English rules of direct jurisdiction. This is more accurately a 'jurisdictional equivalence' approach,[123] whose application in practice would appear to be more limited given the diversity of national law rules on direct jurisdiction. Courts in subsequent decisions have applied both interpretations, although (with one exception) have unanimously rejected them on principle.

For example, in two cases,[124] it was noted that the English court of origin had relied upon a ground for service out of the jurisdiction that also existed under the direct jurisdictional rules of the requested court, which suggests an equivalence analysis. By contrast, in other cases,[125] *Re Dulles* was seen as supporting a mirror image principle. The single case where *Re Dulles* was applied is itself ambiguous on the point. In *Travers v Holley*,[126] an English court recognised a divorce decree pronounced by a court in the state of New South Wales, Australia, with the court stating that 'it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which mutatis mutandis they claim for themselves'.[127] The court then found that the jurisdictional rule applied by the New South Wales court was substantially similar to that under the English direct rules, although not identical. The decision, rather like *Re Dulles* itself, therefore may support both the jurisdictional equivalence and mirror image principles. The most significant fact, however, is that neither view has been accepted in a subsequent case, other than in the area of foreign divorce decrees.[128]

Putting the dearth of authority to one side, there are also strong reasons in principle why the mirror image and equivalence tests should not be adopted in the law on foreign judgments. First, as argued in Section 1, there is no necessary relationship between

[122] Arzandeh (n 5) 69.

[123] For support, see GD Kennedy, '"Reciprocity" in the Recognition of Foreign Judgments' (1954) 32 CanBarRev 359. The principle was rejected in the early case of *Turnbull v Walker* (1892) 67 LT 767 (QB).

[124] *Crick v Hennessy* [1973] WAR 74, 76 (Supreme Court of Western Australia); *Sharps Commercials Ltd v Gas Turbines Ltd* [1956] NZLR 819.

[125] *Re Trepca Mines Ltd* [1960] I WLR 1273 (CA) 1281–82; *Société Co-operative Sidmetal v Titan International Ltd* [1966] 1 QB 828; *Malaysia-Singapore Airlines Ltd v Parker* (1972) 3 SASR 300 (Supreme Court of South Australia) (although the mirror image principle *was* applied there to recognise a foreign judgment under a now-repealed statutory power to accord 'comity' to judgments); *Gordon Pacific Developments Pty Ltd v Conlon* [1993] 3 NZLR 760, 765; *Rubin v Eurofinance SA* (n 14) para 127; *Almarzooqi v Salih* [2021] NZCA 330, para 37.

[126] *Travers v Holley* [1953] P 246.

[127] ibid 257.

[128] R Mortensen, R Garnett and M Keyes, *Private International Law in Australia* (5th edn, LexisNexis 2023) para 18.38.

direct and indirect jurisdiction; they serve different purposes[129] and unilateral steps taken by a court to bridge the gap may be simply misplaced comity. Second, for the mirror image or equivalence tests to be accurately applied, it is not enough simply to identify a parallel ground of direct jurisdiction under the law of the requested court. For example, in common law countries, a claimant may only be served out of the jurisdiction where a gateway for service out exists and the court is an appropriate forum. Application of the mirror image and equivalence tests at the recognition stage where service out occurred would therefore require the requested court to apply a full forum non conveniens analysis to the decision of the court of origin.[130] Such a task would be difficult for courts to perform and uncertain, given the multiple versions of the test[131] and the open-ended nature of the inquiry.[132] Finally, legitimate criticisms may be made of some countries' direct jurisdictional rules, for example, the gateways for service out of the jurisdiction which may rely on slender links between the court and the cause of action[133] to the prejudice of foreign defendants. Arguably, the mirror image approach simply transplants these exorbitant rules, 'however outrageous',[134] to the recognition stage, only this time at the expense of local defendants. Sheltering litigants from oppressive and expansive exercises of jurisdiction should be the goal at both the adjudicatory jurisdiction and recognition stages of litigation.[135]

8. The relevance of the defences to recognition and enforcement

Some commentators have suggested that the defences to recognition of foreign judgments act, or should act, as a counterbalance to the indirect jurisdictional rules.[136] Any move to widen the rules of indirect jurisdiction should therefore be offset by the provision of new defences or an expanded interpretation of existing ones to provide a balanced regime for recognition. In response, however, it may be said that there is little evidence in practice that either national or international laws of recognition provide for such a trade-off or interconnection between the jurisdictional rules and defences. Indeed, what is remarkable is that while there may be differences in the scope of indirect jurisdiction, the defences are highly similar across the various regimes. Hence, States such as Canada and the US with liberal rules of indirect

[129] Kutner (n 1) 59.

[130] TM Yeo, 'The Changing Global Landscape for Foreign Judgments' (Yong Pung How Professorship of Law Lecture, Singapore Management University, 6 May 2021) para 65.

[131] For example, compare 'the more appropriate forum' test in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 with the 'clearly inappropriate forum' approach in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (HCA).

[132] PRH Webb, 'Comity and Reciprocity' (1966) 15 ICLQ 269, 275–76.

[133] For example, in Australia, service out is permitted if the proceeding was 'caused by a tortious act or omission in respect of which damage was suffered wholly or partly in the forum': Supreme Court (General Civil Procedure) Rules (n 39) rule 7.02(a)(ii). See also, in England, CPR (n 16) rule 6.36 PD 6B para 3.1(9)(a).

[134] Juenger (n 11) 15. Von Mehren agrees that the mirror image principle leads to anomalous results where States have exorbitant and unrestrained direct rules: A Von Mehren, 'Recognition and Enforcement of Foreign Judgments—General Theory and the Role of Jurisdictional Requirements' (1980) 167 Recueil des Cours 9, 59.

[135] PJ Loree, 'The Recognition and Enforcement of US Judgments in the Canadian Common Law Provinces: The Problem of Personal Jurisdiction' (1989) 15 BrookJIL 317, 345.

[136] Briggs (2004) (n 58) 14.

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jurisdiction broadly apply the same defences as those in more restrictive countries, such as England and Australia.

For example, under Australian, Canadian and English law, relevant defences to recognition include that the judgment was obtained by fraud,[137] involved a denial of natural justice, including where the defendant did not receive adequate notification of the proceedings in the court of origin[138] and where enforcement of the judgment would violate the public policy (fundamental values) of the requested State.[139] US law has similar provisions.[140] Article 7 Judgments Convention is also consistent with the above national law principles. Under Article 7, recognition may be refused if (among other things): (a) the defendant was not notified of the document which instituted the proceedings in sufficient time and in such a way as to enable it to prepare its defence; (b) the judgment was obtained by fraud; or (c) recognition would be manifestly incompatible with the public policy of the requested State.

A comment should, however, be made about the fraud defence given that it has been interpreted slightly differently in the abovementioned national laws. In US law, the defence is limited to 'extrinsic' matters of procedure, such as where the fraud deprived the judgment debtor of an adequate opportunity to present its case before the court of origin. An example would be where the debtor was fraudulently enticed into accepting service of process.[141] In Canada and Australia, this extrinsic basis is accepted but additionally a defendant may argue, at the stage of recognition, that fraud impugned the merits of the case in the foreign court. That is, that the judgment was procured by perjured or forged evidence. To satisfy this defence, the defendant must, however, produce 'fresh evidence' of such fraud: that is material that has only became available after the rendering of the foreign judgment.[142] In England, by contrast, both procedural and substantive fraud may be pleaded, but with no obligation on the defendant to produce newly discovered evidence.[143]

The differences in the scope of the fraud defence between jurisdictions do not, however, detract from the fact that the above defences to recognition, when considered as a whole, provide sufficient protection in each jurisdiction for judgment debtors from serious unfairness or injustice in foreign proceedings.[144] The current defences are flexible enough to address this issue whatever rules of indirect jurisdiction are applied.[145]

[137] For Australia, see FJA (n 35) section 7(2)(a)(vi); for Canada, see *Beals* (n 51) para 51; and for England, see *JSC VTB Bank v Skurikhin* [2014] EWHC 271 (Comm); *GFH Capital Ltd v Haigh* [2020] EWHC 1269.

[138] For Australia, see FJA (n 35) section 7(2)(a)(v); for Canada, see *Beals* (n 51), para 59; and for England, see *Adams v Cape Industries Plc* [1990] Ch 433.

[139] For Australia, see FJA (n 35) section 7(2)(a)(xi); for Canada, see *Beals* (n 51) paras 71–72; and for England, see *Re Macartney* [1921] 1 Ch 522.

[140] Uniform Foreign Money Judgments Recognition Act (1962) sections 4(b)(1)–(3).

[141] Restatement (Second) of Conflicts, section 482.

[142] For Australia, see *Quarter Enterprise Pty Ltd v Allardyce Lumber Co Ltd* (2014) 85 NSWLR 404 (Supreme Court of New South Wales); for Canada, see *Beals* (n 51) para 51.

[143] *JSC VTB Bank v Skurikhin* [2014] EWHC 271 (Comm).

[144] Arzandeh (n 5) 72–73.

[145] It is true that in some countries (for example, China, Japan and Russia) reciprocity exists as a requirement for recognition and enforcement of foreign judgments (in the absence of a treaty with the country of origin). The significance of this principle as a barrier to enforcement is, however, declining as an

Finally, there is no reason in any case why defences to recognition should be adjusted to accommodate rules of jurisdiction. As has been noted in this article, States take various approaches to recognition of foreign judgments as a whole based on their own national interest. Some States, such as the US, have a very liberal policy while others are more restrictive; this policy embraces both jurisdictional rules and defences and is a choice best left to the individual jurisdiction concerned.

9. Conclusion

The contention in this article is that the gap between indirect and direct jurisdiction in English common law countries, other than Canada and the US, is justified both in principle and in practice. Not only are the purposes of the two forms of jurisdiction distinct, but attempts to expand indirect jurisdiction to match the scope of direct jurisdiction are likely only to harm local judgment debtors without any reciprocal benefit for local claimants seeking to have their judgments recognised abroad. The preferred method for widening the scope of indirect jurisdiction is to enter bilateral and multilateral conventions whereby States agree to confer reciprocal rights and obligations upon one another. Current examples include the TTA, the Brussels Convention and Brussels Ia Regulation and the Hague Choice of Court and Judgments Conventions. Such instruments also have the advantage of creating certain, predictable and harmonised rules for recognition and enforcement of foreign judgments.

It is acknowledged, however, that conventions can never be a complete solution to the problem, since they depend upon widespread State participation, which may be difficult to achieve. Hence, there will still be a substantial number of cases in which the common law rules of recognition will have to be employed. Are such rules fit for purpose? While submission to the jurisdiction of the court of origin either by agreement or appearance to contest the merits is an internationally accepted rule of indirect jurisdiction, the same cannot be said for service on a defendant while present in the country of origin. While some have sought to defend this principle[146] on the basis that it reflects an obligation or 'allegiance' owed by the defendant to the country of origin, this is tenuous, particularly in the context of fleeting or transient presence.[147] A more substantial link between the defendant and the foreign court is required, which would be achieved by replacing presence with habitual residence, which is also a much more widely accepted connecting factor. The consequence would be that foreign judgments would be recognised at common law where either the defendant was habitually resident

approach of 'presumed' reciprocity is increasingly adopted. That is, a requested court will presume that the court of origin would enforce a judgment of the requested court in the absence of a clear precedent in the country of origin to the contrary. See B Elbalti, 'Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark But Not Much Bite' (2017) 13 JPrivInt'lL 184; V Yang and Q Chen, 'Recognition and Enforcement of Foreign Judgments in the People's Republic of China' (*Clyde & Co*, 10 January 2025) <https://www.clydeco.com/en/insights/2025/01/recognition-and-enforcement-of-foreign-court>. Hence, the difference in position between these countries and the jurisdictions and instruments considered in the article (where reciprocity is not required) is less than it first appears.

[146] Briggs (n 6) 90–94.

[147] J Harris, 'Recognition of Foreign Judgments at Common Law: The Anti-Suit Injunction Link' (1997) 17 OJLS 478, 491–92; Fassberg (n 119) 198–99; Keyes (n 119) 289; Torremans (n 55) 529; Hook and Wass (n 108) para 5-106.

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in the country of origin or submitted to the jurisdiction of its courts. Both filters represent substantial links and engagement with the country of origin on the part of the defendant and so are defensible on that basis. Any further widening of the indirect grounds, however, should be undertaken only pursuant to international agreements or treaties.

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