

# Enforcement of Court Decisions under the Cape Town Convention

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## Abstract

*The purpose of this article is to explore the influence of the Cape Town Convention on the enforcement of foreign judgments. Although the issue is not expressly addressed by the Convention, the article argues that the jurisdictional rules of the Convention should be interpreted as entailing an implicit obligation to enforce the resulting judgments. After demonstrating that such conclusion would be consistent with the rules of interpretation of the Convention, the article explains what the regime of the implicit obligation to enforce judgments made under the Convention would be.*

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## I. Introduction

While the main goal of the 2001 Convention on International Interests in Mobile Equipment (the 'Convention' or 'CTC') is to lay down uniform substantive rules, it contains a number of procedural rules.<sup>1</sup> In particular, it includes several jurisdictional provisions.<sup>2</sup> In contrast, the Convention is silent on the enforcement of foreign judgments.<sup>3</sup> The purpose of this article is to explore whether such silence should be interpreted as an exclusion from the scope of the CTC or whether, in contrast, the Convention could be interpreted as containing implicit obligations in this respect.

There are three jurisdictional provisions in the CTC. Article 42 provides for the jurisdiction of the court chosen by the parties for any claim brought under the Convention. Article 43 identifies the courts having jurisdiction to grant relief pending final determination under Article 13.<sup>4</sup> Finally, Article 44 provides for the jurisdiction of the court of the place where the registrar of the international registry has its centre of administration to make orders against the registrar.

The operation and purpose of those jurisdictional rules could be jeopardized by conservative rules on enforcement and recognition of foreign judgments. This is easy to understand by looking

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<sup>1</sup> In the context of this article, the term 'procedure' will be used to refer to court or judicial procedure.

<sup>2</sup> See next paragraph.

<sup>3</sup> It appears, however, that the three protocols to the CTC contain a rule validating waivers of sovereign immunities both from the jurisdiction of courts and relating to enforcement. See Article XXII of the Aircraft Protocol, Article XVIII of the Rail Protocol, and Article XXXIII of the Space Protocol. Although enforcement is not defined in the context of these provisions, it seems clear that, in the context of sovereign immunity, it refers to enforcement of judgments, arbitral awards, and other enforceable titles.

<sup>4</sup> Article 55 affords the possibility to contracting states to exclude the application of Article 43, but such power was only used exceptionally (Australia and New Zealand are the only exceptions). Article XXI of the Aircraft Protocol provides for an additional head of jurisdiction under Article 43. Other provisions of the three protocols modify certain aspects of Article 43.

at the interaction between Article 42 and the rules on enforcement of judgments. As a default rule, choice of court agreements under Article 42 are exclusive.<sup>5</sup> This means that only the chosen court will have jurisdiction to decide any dispute arising under the Convention, and that the courts of other contracting states will not. Thus, from the perspective of the legal orders of other contracting states, the dispute cannot be settled by local courts. The rights and obligations of the parties must be settled by a judgment of the chosen court. If such judgment is denied recognition and enforcement in another contracting state, the dispute will remain unsettled from the perspective of that other contracting state. Any rights recognized by the judgment will be inexistent in that contracting state, and no enforcement will be possible over assets located on the territory of that contracting state. Such a problem is not rare in international litigation, but the remedy, which is to initiate fresh proceedings in the state which denied recognition to the foreign judgment, is unavailable in the context of an exclusive clause concluded under Article 42, as local courts lack jurisdiction to entertain the claim. By granting exclusive jurisdiction to the court of one contracting state, Article 42 must implicitly mean that the judgment delivered by that court will be, in principle at least, recognized and enforced in other contracting states. The purpose of Article 42 seems to entail some sort of obligation to recognize and enforce the resulting judgments.

The issue could be resolved by the participation of most contracting states in international conventions on the mutual recognition of judgments, and it could be that rules on international jurisdiction were included in international commercial conventions on that assumption. Like the CTC, the 1929<sup>6</sup> and the 1999<sup>7</sup> conventions on international carriage by air provide jurisdictional rules but are silent on the enforcement of foreign judgments. In this context, an English judge still concluded that there was a strong link between granting jurisdiction to a court and expecting enforcement of the resulting judgments. Mustill J (as he was then) held:

International conventions of this kind tend to prescribe jurisdiction in narrow terms, on the assumption that the case where the defendant has insufficient assets to satisfy the claims in any of the stipulated countries is catered for by the ready availability of enforcement in other countries which is available via the various conventions on mutual recognition of judgments.<sup>8</sup>

However, with respect to Lord Mustill, the truth of the matter is that there are not many such conventions on the mutual recognition of judgments.<sup>9</sup> So, from a practical point of view, the most important question is whether, in the absence of such conventions, obligations to enforce foreign judgments can be deduced from jurisdictional rules.<sup>10</sup>

Below, I explore whether such a proposition could be reconciled with the interpretative rules applicable to the CTC (section II), and what the extent and the regime of such an implicit obligation to enforce foreign judgments could be (section III).

<sup>5</sup> See Article 42(1), last sentence.

<sup>6</sup> 1929 Convention for the Unification of Certain Rules for International Carriage by Air.

<sup>7</sup> 1999 Convention for the Unification of Certain Rules for International Carriage by Air ('Montreal Convention').

<sup>8</sup> *Rothmans v Saudi Arabian Airlines* [1981] QB 368, 375.

<sup>9</sup> The great judge might have had in mind the specific situation of the Commonwealth and the European Union, where special schemes derived from international agreements apply.

<sup>10</sup> There are also examples of international commercial conventions which have provided not only for jurisdictional rules, but also for a general obligation to enforce judgments: see, eg, Article 31 of the 1956 Convention on the Contract for the International Carriage of Goods by Road, reproduced below in section III(B).

## II. Interpretation of the Convention

### A. Interpreting silence under the Convention

The proposition that the CTC may include some form of obligation to enforce foreign judgments is one which needs to be justified under the applicable principles of interpretation. There is no doubt that the Convention does not contain any provision expressly addressing the issue of enforcement or recognition of foreign judgments. One could therefore be tempted to immediately conclude that there is no need to interpret an instrument which seems clear enough.

Such conclusion could be supported by the general principles of treaty interpretation, which insist on the importance of language and the terms employed by the relevant treaty.<sup>11</sup> But recent international commercial conventions include their own provisions on treaty interpretation, which no doubt derogate from the general rules.<sup>12</sup> The CTC is no exception, and offers a special provision on the interpretation of this convention, which was clearly inspired by a similar provision contained in the 1980 Vienna Convention on Contracts for the International Sale of Goods ('CISG'). The rules of interpretation of the CTC appear in Articles 5(1)-(2), which read:

1. In the interpretation of this Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application.
2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.

Article 5(1) provides several factors for interpreting the provisions of the Convention but does not mention literal interpretation. While this should not be interpreted as an authorization to ignore express provisions of the instrument, it has a direct consequence on the idea that the absence of express provisions on a given issue should necessarily mean that such issue is outside the scope of the CTC and thus not governed by it. Article 5(2) specifically contemplates the possibility that certain questions which are not expressly settled in the Convention might be governed by it. It is therefore possible that the CTC implicitly provides for certain rules.

It could be argued, however, that the situation is different for procedural matters. The Convention addresses a number of procedural issues. The latter are complex, however, and deserve rules and regimes detailed accordingly. Arbitration, for instance, is governed by specialized instruments, whether international conventions<sup>13</sup> or model laws.<sup>14</sup> There are fewer international regimes on inter-

<sup>11</sup> See Article 31 of the 1969 Vienna Convention on the Law of Treaties. While Article 31 is based on several approaches to treaty interpretation, the first one is to be faithful to the text of the treaty (As underlined by the International Court of Justice in the *Libya/Chad* case stating that 'interpretation must be based above all upon the text of the treaty'). See *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (Judgment) [1994] ICJ Rep 6, 22.

<sup>12</sup> There is wide agreement among scholars in this respect. See Stefan Kröll, Loukas Mistelis and Maria del Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods – A Commentary* (2<sup>nd</sup> edn, Beck-Hart-Nomos 2018) Art 7 para 9; Roy Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law – Text, Cases and Materials* (2<sup>nd</sup> edn, OUP 2015) para 3.53.

<sup>13</sup> I refer here essentially to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

<sup>14</sup> I refer here to the 1985 UNCITRAL Model Law on International Commercial Arbitration.

national jurisdiction and enforcement of foreign judgments,<sup>15</sup> but European regimes<sup>16</sup> demonstrate that the field raises complex issues which equally deserve detailed rules in order to address most of these issues. In contrast, procedural rules appearing in international commercial law instruments are necessarily shorter. They thus logically raise the issue of their interaction with existing regimes, whether of international or national origins. In particular, such short provisions raise the problem of their precise scope and whether they might govern implicitly (the many) matters that they do not expressly address.

The idea of implicit regulation will be fueled by provisions on interpretation providing special rules to identify solutions for issues covered by a given instrument, but not expressly settled by it, such as Article 5(2) of the CTC. In contrast, some provisions might have been introduced to clarify that, in certain fields, the drafters did not intend to provide for solutions beyond the express provisions of the treaty. This is often the case for procedure, where drafters quickly realize that they simply cannot address the vast majority of procedural issues that the parties may be confronted with. They then often refer back to the law of the forum. One such example is the Montreal Convention whereby Article 33 sets out jurisdictional rules, but the last paragraph clarifies that all other 'questions of procedure' are to be governed by national law, ie the law of the forum. In effect, this provision excludes that any implicit procedural rules could be found in the Montreal Convention. The CTC contains a similar provision, but its scope is expressly limited to the context of remedies provided by Chapter III of the Convention. Article 14 of the CTC reads:

Subject to Article 54(2), any remedy provided by this Chapter shall be exercised in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised.

It cannot be concluded, therefore, that the principles of interpretation in Article 5(2) of the CTC do not apply to procedural matters. The principles are limited by Article 14, but only within its material scope.

### ***B. Rules of interpretation under the CTC***

Article 5(1) of the CTC insists that, in its interpretation, regard is to be had to several goals.<sup>17</sup> Because of the international character of the instrument, it is important to ensure uniformity of interpretation, in order to prevent different jurisdictions from adopting conflicting interpretations that would harm predictability. Article 5(1) also refers to the purposes of the Convention as set forth in its preamble. One such purpose is 'to ensure that interests in [high value mobile] equipment are recognised and protected universally'. The goal of universal recognition and protection of the international interest established by the CTC will be fulfilled not only by a wide adoption of the instrument, but also by the widest recognition of the judicial determination of the existence and extent of such interest by the competent court. It seems clear that this purpose of the Convention can only be achieved by

<sup>15</sup> With the recent exception of the 2005 Hague Convention on Choice of Court Agreements (Convention on Choice of Court Agreements signed in the Hague on 30 June 2005, in force since 1 October 2015), which has now been ratified by a few states.

<sup>16</sup> To only name the most important instruments applicable to civil and commercial matters in general, see 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 [2012] OJ L351/1 and the mirror 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (concluded between Switzerland, Norway, Island and the European Union).

<sup>17</sup> Article 5(1) is reproduced in section II(A) above.

ensuring recognition and enforcement of judgments related to the international interests established by the CTC among the contracting states.

An argument to the same effect could have been made on the ground of good faith. A contracting state which would recognise the exclusive jurisdiction of the court of another contracting state, but would deny enforcement to the resulting judgment, would not appear to act in good faith. It seems clear, however, that the intent of the drafters of the Convention was to exclude good faith as an interpretative principle of the instrument. As already alluded to, the origin of the interpretation provision in the CTC is clearly Article 7 of the CISG. In this respect, it is thus worthy of note that the wording of Article 5(1) is not identical to that of Article 7 of the CISG. The former refers to the purposes of the CTC and the predictability of its application (while Article 7 of the CISG does not) and omits the reference to 'the observance of good faith in international trade'. It is thus logical to conclude that the drafters intended to avoid the reference to good faith, as is confirmed by the official commentary to the CTC.<sup>18</sup>

Finally, Article 5(2) explains that 'questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based'. The official commentary asserts that those principles are 'prompt enforcement, visibility of transactions through registration in the International Registry and clear priorities, together with predictability and party autonomy'.<sup>19</sup> These principles appear to be essentially substantive in character, which probably explains why they do not seem to be helpful to determine whether the CTC might include an implicit obligation to enforce foreign judgments.

### III. Enforcement of court decisions made under the CTC

The existence of an obligation to enforce foreign judgments should be considered as a direct consequence of the jurisdictional provisions of the CTC. The idea of establishing a close relationship between consent to jurisdiction and enforcement of judgments is not new. It has been the foundation of the enforcement of foreign judgments in many states for more than a century. By way of background, I first present the English doctrine of obligation (section III(A)). I then explore what the extent of the obligation to enforce judgments under the CTC should be (section III(B)).

#### A. The doctrine of obligation

The idea that the foundation for the enforcement of foreign judgments is a direct consequence of a party agreement on the jurisdiction of a foreign court is central to the English law of foreign judgments, and to the law of the many jurisdictions which follow the English legal tradition. Under English law, the enforcement of foreign judgments is founded on the doctrine of obligation.<sup>20</sup> The doctrine of obligation was first expressed in a dictum in 1845<sup>21</sup> and confirmed in two decisions concerned with foreign judgments delivered on the same day of 1870, *Godard v Gray*<sup>22</sup> and *Schibsby v*

<sup>18</sup> See Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters Specific to Aircraft Equipment: Official Commentary* (3<sup>rd</sup> edn, International Institute for the Unification of Private Law (UNIDROIT) 2013), para 4.61 ('Official Commentary'). It is true that the general rules on treaty interpretation provided by Article 31 of the Vienna Convention on the Law of Treaties insist that a treaty 'shall be interpreted in good faith', but the clear exclusion of the concept by the drafters of the CTC should be interpreted as a derogation from those rules in this respect.

<sup>19</sup> Official Commentary (n 18), para 4.63.

<sup>20</sup> See generally Adrian Briggs, 'Recognition of Foreign Judgments: A Matter of Obligation' (2013) 129 LQR 87.

<sup>21</sup> *Williams v Jones* (1845) 13 M & W 627.

<sup>22</sup> (1870-71) LR 6 QB 139.

*Westenholz*.<sup>23</sup> English courts have since then repeatedly referred to the doctrine as the foundation of the enforcement of judgments, including the Court of Appeal<sup>24</sup> and the Supreme Court.<sup>25</sup> The doctrine of obligation is also applied throughout the Commonwealth, in particular in Australia,<sup>26</sup> New Zealand,<sup>27</sup> Singapore,<sup>28</sup> Hong Kong<sup>29</sup> and Nigeria.<sup>30</sup>

The doctrine of obligation posits that obligations may arise upon foreign judgments, and that, when they do, they can be enforced in the forum. The most important reason why an obligation may arise upon a foreign judgment is that the defendant implicitly promised to pay the judgment. So, in *Grant v Easton*, it was held that ‘the liability of the defendant arises upon an implied contract to pay the amount of the foreign judgment.’<sup>31</sup>

Under the English doctrine, it is therefore an autonomous obligation which can be enforced in the forum. This obligation is distinct from the foreign judgment itself. This means that, as such, foreign judgments cannot be enforced in England. Only the obligations that may arise from such judgments can and, for that purpose, proceedings will have to be started on the merits in England.<sup>32</sup> A logical consequence is that the time limit which applies to an action to enforce a foreign judgment is not the time limit applicable to judgments, but the time limit applicable to obligations.<sup>33</sup>

The doctrine of obligation also provides a rationale for English courts to identify which foreign judgments should be (indirectly) enforced in England. It is only those which generate an obligation to that effect – something that not all foreign judgments do. Under English law, obligations arise upon only two categories of judgments. The first category are those judgments where the defendant was physically present within the jurisdiction of the foreign court when the proceedings were initiated there. This is a consequence of the territorial approach of the Common Law.<sup>34</sup> The second category of judgments includes cases where the defendant consented to the jurisdiction of the foreign court, whether implicitly<sup>35</sup> or expressly.<sup>36</sup> This analysis is consistent with the narrow definition of the jurisdiction of the foreign court as a requirement for enforcing foreign judgments. A foreign court will only be considered as having jurisdiction if 1) the defendant was present within the jurisdiction of the foreign court, 2) the judgment debtor was in fact the claimant, or counterclaimant, 3) the defendant had submitted to the jurisdiction of the foreign court, or 4) the defendant had expressly

<sup>23</sup> (1870-71) LR 6 QB 155. On this case, see Andrew Dickinson, ‘Schibsy v Westenholz and the Recognition and Enforcement of Judgments in England’ (2018) 134 LQR 426.

<sup>24</sup> *Adams v Cape Industries Plc* [1990] Ch 433; *Goldstein v Conley* [2002] 1 WLR 281 (CA) [51]; *Lewis v Eliades* [2003] EWCA Civ 1758 [48].

<sup>25</sup> *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 [9]. See also *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 484 (HL).

<sup>26</sup> See Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (3<sup>rd</sup> edn, LexisNexis 2015) para 5.8.

<sup>27</sup> *Eilenberg v Gutierrez* [2017] NZCA 270, [2017] NZFLR 471 [32]. See also Anthony Angelo, *Private International Law in New Zealand* (Wolters Kluwer 2012) para 360.

<sup>28</sup> *Giant Light Metal Technology (Kunshan) v Aksa Far East*, [2014] SGHC 16, [2014] 2 SLR 545 [59]. See also T.M. Yeo, *Halsbury’s Laws of Singapore*, vol 6(2) Conflict of Laws (Lexisnexis 2013) para 75-150.

<sup>29</sup> *Hung Fung Enterprises Holdings Ltd v Agricultural Bank of China* [2012] 3 HKLRD 679 (CA).

<sup>30</sup> *Alfred C. Toepfer Inc v Edokpolor* (1965) NCLR 89, 91-2.

<sup>31</sup> (1883) 13 QBD 302, 303. See also *Berliner Industriebank AG v Jost* [1971] 2 QB 463 (CA).

<sup>32</sup> In practical terms, it will typically be possible to seek a summary judgment: see Richard Fentiman, *International Commercial Litigation* (2<sup>nd</sup> edn, OUP 2015) para 18.08.

<sup>33</sup> *Re Flynn (Deceased) (No 2)* [1969] 2 Ch 403; *Berliner Industriebank AG v Jost* [1971] 2 QB 463 (CA).

<sup>34</sup> Briggs (n 20) 90; Pippa Rogerson, *Collier’s Conflict of Laws* (CUP 2013) 220.

<sup>35</sup> By submitting to the jurisdiction of the foreign court, or by filing a counterclaim, for instance.

<sup>36</sup> By subscribing a jurisdiction clause.



agreed to the jurisdiction of the foreign court.<sup>37</sup> There is a clear and close connection between the definition of the jurisdiction of the foreign court and the foundation of the enforcement of the foreign judgment.<sup>38</sup>

The English doctrine confirms that the idea of deducing an obligation to enforce foreign judgments from an agreement on the jurisdiction of a foreign court is sound. In the context of the English doctrine, the agreement on the jurisdiction of the foreign court is a private agreement between the parties to the litigation. Such private agreement entails an implicit promise to pay the resulting judgment. This implicit promise also results in a private obligation binding the parties to pay the judgment. By analogy, in the context of an international convention, the original agreement on jurisdiction would be the jurisdictional provisions of the relevant convention. The agreement would thus be between the contracting states, and public in nature. The implicit obligation resulting from this agreement on jurisdiction would also be public in nature and binding on the states. It would be a treaty obligation to enforce the judgments made by the courts having jurisdiction under the relevant international convention.

It must be underscored, however, that two of the three jurisdictional provisions of the CTC require that the parties to the transaction consent to the jurisdiction of the foreign court. This is the case not only where the parties have chosen the court having jurisdiction to handle any claim brought under the Convention under Article 42, but also for the jurisdiction to grant relief pending final determination under Article 43. The agreement of the parties to the relevant transaction on the jurisdiction of the court of a contracting state could thus also be regarded as generating an obligation to enforce the resulting judgment, which would be binding on the parties. It must be recognized, however, that this analysis is not widely shared in comparative private international law, but remains peculiar to the English legal tradition. It is submitted, therefore, that such obligation would be governed not by the Convention, but rather by the law of the enforcing state, which would have to determine its relevance (high in states following the English legal tradition, inexistent in jurisdictions which do not found enforcement of foreign judgments on the doctrine of obligation).

### ***B. The extent of the obligation to enforce under the CTC***

It has been argued above that the jurisdictional provisions of the CTC could be interpreted as a commitment by the contracting states to respect the judgments delivered by the relevant courts and the foundation of some sort of obligation to enforce them. This is not to say, however, that all judgments rendered by these courts should be enforced in other contracting states without any further requirements. The precise extent and the regime of this obligation should be assessed. In this respect, it is necessary to distinguish between final judgments (i) and interim orders (ii). It is also necessary to explore whether the nature of the remedy may impact the enforceability of the decision granting it (iii).

#### *(i) Regime applicable to final judgments*

It would be legitimate to deduce from the jurisdictional provisions an obligation to enforce the resulting judgments in principle. This means that a contracting state could not deny enforcement to these judgments on the basis of a general rule prohibiting recognition and enforcement of foreign

<sup>37</sup> The origin of this definition is to be found in *Emanuel v Symon* [1908] 1 KB 302 (CA). The original cases have evolved over time. For a modern statement of the law, see Lord Collins of Mapesbury (ed), *Dicey, Morris & Collins on the Conflict of Laws* (15<sup>th</sup> edn, Sweet & Maxwell 2012) Rule 43.

<sup>38</sup> Briggs (n 20) 90; Rogerson (n 34) 220; Jonathan Hill and Adeline Chong, *International Commercial Disputes* (4<sup>th</sup> edn, Hart 2010) para 12.1.2.

judgments. Today, there are very few states which, as a rule, outright refuse to enforce foreign judgments. But such states still exist, and some are contracting states to the CTC. They include, in particular, Indonesia,<sup>39</sup> and Thailand,<sup>40</sup> which do not enforce foreign judgments. While this position is permissible under customary international law,<sup>41</sup> ratification of an international convention providing for the jurisdiction of certain courts could legitimately be perceived as an exception. Within the scope of the CTC, it could be argued that all contracting states are under the obligation to be open in principle to the enforcement of foreign judgments. This international obligation should trump any national provision to the contrary.<sup>42</sup>

The obligation to enforce foreign judgments arising out of the jurisdictional provisions of an international convention should also trump any reciprocity requirement. A significant number of states, in particular in Asia<sup>43</sup> and the Middle East<sup>44</sup>, have a reciprocity requirement in their law of foreign judgments. At the same time, an international convention providing for an obligation to enforce foreign judgments within its scope could be viewed as an exception to the reciprocity requirement. It could also be interpreted as an implementation of such requirement, which should be deemed satisfied, as the convention would create a reciprocal obligation binding on the contracting states. Indeed, the law of certain states expressly provides that foreign judgments can be enforced either on the basis of reciprocity, or on the basis of an international convention concluded with the state of origin of the judgment.<sup>45</sup>

Finally, in many states, the law of foreign judgments is liberal: in principle, foreign judgments can be enforced, and indeed often are. This is, however, only if they satisfy certain requirements. While these requirements vary from one jurisdiction to another, the most important ones are common to the vast majority of the laws of these liberal states. The first is that the forum should consider whether the foreign court had jurisdiction. This does not mean that the forum should check whether the foreign court properly applied its own rules of jurisdiction, but rather implies that it should verify whether the jurisdiction of the foreign court was legitimate. This assessment will be conducted by applying tests which vary a great deal between states. The second requirement is that the foreign judgment should not violate the public policy of the enforcing state. The words ‘public policy’ are misleading. They do not imply review of foreign judgments on the merits to verify whether the outcome was right. Instead, liberal states will only verify that the foreign judgment comports with the most fundamental principles of the forum. These principles can be substantive (such as prohibition of cartels under competition law) or procedural (such as due process and equivalent guarantees).

<sup>39</sup> See Yu Un Oppusunggu and Gary Bell, ‘Indonesia’ in Jurgen Basedow, Giesela Rühl, Franco Ferrari and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017) vol 3, 2172; Yu Un Oppusunggu, ‘Indonesia’ in Adeline Chong (ed), *Recognition and Enforcement of Foreign Judgments in Asia* (ABLI 2017) 91; Hendronoto Soesabdo, Reno Hirdarisvita and Ferry Artionang, ‘Indonesia’ in Alejandro Carballo Leyda (ed), *Asian Conflict of Laws – East and South East Asia* (Wolters Kluwer 2015) 64.

<sup>40</sup> See Poomintr Sooksripaisarnkit, ‘Thailand’ in Chong (ed) (n 39) 202ff; Chinnawat Thongpackdee and Vanina Sucharitkul, ‘Thailand’ in Alejandro Carballo Leyda (ed) (n 39) 244.

<sup>41</sup> See, eg, Heinrich Nagel and Peter Gottwald, *Internationales Zivilprozessrecht* (7<sup>th</sup> edn, Ottoschmidt 2013) para 102.

<sup>42</sup> Such as, for instance, the express provision of Article 436 of the Indonesian regulation of civil procedure excluding the enforcement of foreign judgments (Article 436, Het Reglement op de Burgelijke Rechtsvordering voor de Rad van Justitie op Java en het Hoogerechtshof van Nederlandsh – Indië).

<sup>43</sup> This is the case in the People’s Republic of China and Japan, for instance.

<sup>44</sup> This is the case in Egypt, Kuwait, Qatar and the United Arab Emirates, for instance.

<sup>45</sup> This is the case in the People’s Republic of China, for instance: see Law of the PRC on Civil Procedure of 1991, Articles 281 and 282; Weizuo Chen, ‘China’ in Basedow, Rühl, Ferrari and de Miguel Asensio (eds) (n 39) vol 3, 1979; Wenliang Zhang, ‘Sino–Foreign Recognition and Enforcement of Judgments: A Promising “Follow-Suit” Model?’ (2017) 16 Chinese JIL 515, 518.



Finally, more specific grounds of denial of enforcement can be found, such as the prior recognition of a contradictory judgment in the forum or fraud.

It is submitted that an obligation to enforce foreign judgments arising out of the jurisdictional provisions of an international convention should mostly leave these requirements intact, with one exception, and one qualification. The principle should be that the requirements contained in the law of foreign judgments of the enforcing state should remain applicable. This is because, while the existence of jurisdictional provisions in the relevant international convention could be interpreted as generating an obligation to enforce foreign judgments, it could not possibly establish a regime which would be dramatically more liberal than the regime of the most liberal states in this respect. If this had been the intent and the goal of the drafters, they would have provided so expressly.<sup>46</sup> As they have not done so, it must be accepted that they assumed that a regime consistent with international standards would be adopted. It is submitted that these international standards consist in the requirements for the enforcement of foreign judgments found in the majority of liberal states. The exception is that, if the jurisdiction of the court of origin would have a basis in a convention binding on the enforcing state, it should not be possible for any contracting state to challenge the legitimacy of the jurisdiction of the court of origin. In other words, the requirement that the foreign court has jurisdiction should be deemed satisfied where the court of origin applies the jurisdictional provision of the relevant convention. Finally, the qualification is that, should the law of the enforcing state provide for a requirement inconsistent with international standards, it could be argued that such standard would be trumped by the obligation to enforce foreign judgments arising out of the jurisdictional provisions of the international convention. An example of a requirement which would not be consistent with international practice would be a rule allowing the enforcing court to deny enforcement on the basis of mere difference between the law of the forum and the law applied by the foreign court.<sup>47</sup> This would amount to a review on the merits of the foreign judgment and should be considered as a violation of the obligation to enforce the foreign judgment.

In this respect, it is interesting to discuss the specific provision of the 1956 Convention on the Contract for the International Carriage of Goods by Road ('CMR Convention') which regulates the enforcement of foreign judgments: Article 31(3) provides for an obligation to enforce judgments made under the jurisdictional rules of the treaty. Understandably, it does not establish an exhaustive regime of foreign judgments and, in particular, does not list the requirements for enforcing foreign judgments under the CMR Convention. But it cares to specifically exclude any rule which would allow the enforcing court to review a foreign judgment on the merits. Article 31 reads:

1. In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory:
  - (a) The defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or

<sup>46</sup> But they could not have agreed, as demonstrated by the negotiations for a world Judgments Convention in civil and commercial matters, which retains the most commonly used requirements in liberal states: see Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (not yet in force).

<sup>47</sup> This is the case, for instance, in the Indian law of foreign judgments: Section 13 of the Indian Code of Civil Procedure empowers Indian courts to deny enforcement on the ground that the judgment amounts to 'a breach of any law in force in India'.

- (b) The place where the goods were taken over by the carrier or the place designated for delivery is situated.
2. Where in respect of a claim referred to in paragraph 1 of this article an action is pending before a court or tribunal competent under that paragraph, or where in respect of such a claim a judgement has been entered by such a court or tribunal no new action shall be started between the same parties on the same grounds unless the judgement of the court or tribunal before which the first action was brought is not enforceable in the country in which the fresh proceedings are brought.
  3. When a judgement entered by a court or tribunal of a contracting country in any such action as is referred to in paragraph 1 of this article has become enforceable in that country, it shall also become enforceable in each of the other contracting States, as soon as the formalities required in the country concerned have been complied with. These formalities shall not permit the merits of the case to be re-opened.
  4. The provisions of paragraph 3 of this article shall apply to judgements after trial, judgements by default and settlements confirmed by an order of the court, but shall not apply to interim judgements or to awards of damages, in addition to costs against a plaintiff who wholly or partly fails in his action.
  5. Security for costs shall not be required in proceedings arising out of carriage under this Convention from nationals of contracting countries resident or having their place of business in one of those countries.

*(ii) Regime applicable to interim judgments*

Enforcement of foreign judgments issuing provisional measures has traditionally raised difficulties. Under the law of foreign judgments of many jurisdictions, it is simply excluded. In many countries, a traditional requirement for declaring foreign judgments as enforceable is that such judgments be final. This is the case under English law<sup>48</sup> and under the uniform laws applicable in most US states,<sup>49</sup> for instance. In the context of the CTC, Article 43 lays down jurisdictional rules to grant relief pending final determination under Article 13 of the Convention. The nature of the remedies granted under Article 13 is debated among scholars.<sup>50</sup> In particular, it is not clear whether they are provisional in nature<sup>51</sup> or final.<sup>52</sup> What is clear, however, is that, if they are provisional in nature, they would typically be unenforceable in a number of jurisdictions.

The few international commercial conventions which have specifically provided for an obligation to enforce foreign judgments exclude interim orders from the scope of such obligation. This

<sup>48</sup> See, eg. Lord Collins of Mapesbury (ed) (n 37) Rule 35; Rogerson (n 34) 249.

<sup>49</sup> See the 1962 Foreign Money Judgments Recognition Act, s 2 (adopted by more than 30 states); and the 2005 Foreign-Country Money Judgments Recognition Act, s 3(a)(2) (adopted by more than 20 states).

<sup>50</sup> See Gilles Cuniberti, 'Advance Relief Under the Cape Town Convention' (2012) 1 Cape Town Convention Journal 79; Anna Veneziano, 'Advance Relief Under the Cape Town Convention and its Aircraft Protocol: A Comment on Gilles Cuniberti's Interpretative Proposal' (2013) 2 Cape Town Convention Journal 185.

<sup>51</sup> Many versions of the CTC (French, Spanish and Russian, in particular) actually label them 'provisional measures': see Cuniberti (n 50).

<sup>52</sup> As suggested by several features of the regime of the remedies envisioned by Article 13: see Cuniberti (n 50).

is the case in the CMR Convention: while Article 31(3) of this instrument lays down an obligation to enforce judgments made under the treaty, Article 31(4) specifically excludes ‘interim judgments’ from the scope of such obligation.<sup>53</sup> Recent international conventions establishing an obligation to enforce foreign judgments have carefully avoided addressing the issue of enforcement of foreign provisional measures. Article 7 of the 2005 Hague Convention on Choice of Court Agreements<sup>54</sup> provides that ‘Interim measures of protection are not governed by this Convention.’ The 2019 Hague Judgments Convention also excludes provisional measures from its scope. It defines judgments eligible for recognition and enforcement, but then provides that ‘[a]n interim measure of protection is not a judgment’,<sup>55</sup> thereby excluding interim judgments from the scope of the treaty. These two instruments reveal that where states actually negotiate regimes of enforcement of foreign judgments, they do not include interim measures.<sup>56</sup> The likely reason is that there is no consensus at a global level on the cross-border enforcement of interim measures. This confirms that the traditional difficulties in this respect remain. In contrast to final judgments, enforcement of foreign provisional measures is not widely accepted.

It follows that, if remedies afforded by Article 13 of the CTC are characterized as provisional measures, it would be unreasonable to consider that the contracting states to the Convention implicitly contemplated the cross-border enforcement of such remedies when they adopted the jurisdictional rules in Article 43 of the CTC.

*(iii) Court decisions granting non-monetary remedies*

A related issue is whether the nature of the remedy granted by a foreign court may be relevant to determine the scope of the obligation to enforce under the CTC. A number of countries only enforce foreign money judgments and would therefore refuse to enforce a judgment granting a remedy other than damages. This has been the traditional rule in England.<sup>57</sup> Similarly, the uniform laws which govern the enforcement of foreign judgments in the United States apply only to ‘foreign (country) money judgments’.<sup>58</sup> This requirement, however, is increasingly challenged in many parts of the Commonwealth.<sup>59</sup> The Supreme Court of Canada abandoned it in 2006,<sup>60</sup> and was followed by a few countries belonging to the English legal tradition.<sup>61</sup> It is interesting to note that, while the origin of the requirement is to be found in the procedural forms (writs) which were thought to be available for seeking enforcement of foreign judgments in the English Common law courts in the 19<sup>th</sup>

<sup>53</sup> See the text of Article 31 in section III(B)(i) above.

<sup>54</sup> See n 15.

<sup>55</sup> Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (n 46), Article 3(1)(b).

<sup>56</sup> I deliberately refrain from discussing here the instruments governing the enforcement of foreign judgments between the Member states of the European Union. The federal nature of the EU project makes such instruments inconclusive for the purpose of determining a truly global regime of enforcement of foreign judgments.

<sup>57</sup> *Sadler v Robins* (1808) 170 ER 948; Lord Collins of Mapesbury (ed) (n 37) Rule 42.

<sup>58</sup> See the 1962 Foreign Money Judgments Recognition Act, s 3; the 2005 Foreign-Country Money Judgments Recognition Act, s 3(a)(1).

<sup>59</sup> See, eg, Stephen Pitel, ‘Enforcement of Foreign Non-Monetary Judgments in Canada (and Beyond)’ (2007) J Priv Int L 241; Richard Frimpong Oppong, ‘Enforcing Foreign Non-Money Judgments: an Examination of Some Recent Developments in Canada and Beyond’ (2006) 39 UBC Law Rev 257; Kim Pham, ‘Enforcement of Non-Monetary Foreign Judgments in Australia’ (2008) 30 Syd LR 663; Vaughan Black, ‘Enforcement of Foreign Non-Money Judgments: Pro Swing V. Elta’ (2005) 42 CBLJ 81.

<sup>60</sup> *Pro Swing Inc. v Elta Golf Inc.* 2006 SCC 52.

<sup>61</sup> See, eg, *Brunei v Fidelis* [2008] JRC 152 (Jersey) and *Miller v Gianne* [2007] CILR 18 (Cayman Islands).

century, non-monetary remedies could be enforced in the English Chancery court for some years.<sup>62</sup> In other words, English law initially accepted to enforce foreign non-monetary remedies, but this equitable power was remarkably forgotten by English courts without considering properly the precedents which had previously ruled otherwise. As a consequence, some scholars have argued, both in the British Common law world and in the United States, that the equitable power to enforce foreign injunctions should be reinstalled.<sup>63</sup>

In many Civil law jurisdictions, there is no comparable requirement. It is interesting to note that international conventions which have established an international regime of reciprocal recognition and enforcement of foreign judgments have not provided for any limitation related to the nature of the remedies granted by the foreign judgment. In particular, there is no such limitation in Article 31 of the CMR Convention, in the 2005 Hague Convention on Choice of Court Agreements<sup>64</sup> or in the 2019 Hague Judgments Convention.<sup>65</sup> It seems, therefore, that the requirement has not appeared as essential to the drafters of these instruments.

It is thus reasonable to conclude that there is no international consensus to limit the enforcement of foreign court decisions to money judgments. Consequently, judgments granting remedies other than damages should be regarded as falling within the scope of the implicit obligation to enforce judgments arising out of the jurisdictional provisions of the CTC.

#### IV. Conclusion

This Article has argued that the jurisdictional provisions of the CTC could be interpreted as a commitment from the contracting states to respect the judgments delivered by the relevant courts.

Article 42 of the Convention grants jurisdiction to the court chosen by the parties to handle any claim brought under the CTC, subject to the two other jurisdictional provisions of the Convention. The purpose of the provision is to clarify that the parties may validly select the forum competent to entertain any claim brought on the merits under the Convention. The agreement of all contracting states on this provision logically entails an implicit agreement to respect judgments delivered by the chosen court. Where the applicable law of foreign judgments of the enforcing state is liberal, it should be applied. This could be, for instance, the 2005 Hague Convention on Choice of Court Agreements or, in the European Union, the Brussels Ibis Regulation.<sup>66</sup> Where the applicable law of foreign judgments of the enforcing state is not liberal, its restrictive rules should be replaced by the rules most commonly found in comparative private international law.

Article 43 of the CTC grants jurisdiction to issue relief pending final determination under Article 13 of the Convention. The nature of Article 13 remedy is disputed. If it is characterised as provisional in character, it would be unreasonable to consider that the contracting states to the CTC implicitly contemplated the cross-border enforcement of such remedy. However, if it is characterized either as

<sup>62</sup> *Houlditch v Marquis of Donegal* (1834) 8 Bligh NS 301, 5 ER 955 (Ch); *Henderson v Henderson* (1844) 6 QB 288, 115 ER 111, which states that '[t]he decrees of foreign Courts of Equity may indeed, in some instances, be enforceable no where but in Courts of Equity, because they may involve collateral and provisional matters to which a Court of Law can give no effect' (emphasis added); *Paul v Roy* (1852) 15 Beavan 433, 51 ER 605 (Ch), which states: 'I have no doubt that this Court [of Chancery] has jurisdiction to enforce a foreign judgment'.

<sup>63</sup> See R.W. White, 'Enforcement of Foreign Judgments in Equity' (1980-1982) 9 Syd LR 630; David Buzard, 'U.S. Recognition and Enforcement of Foreign Country Injunctive and Specific Performance Decrees' (1989-90) 20 Cal W Int L J 91.

<sup>64</sup> See n 15.

<sup>65</sup> See n 46.

<sup>66</sup> 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 [2012] OJ L351/1.

an advance enforcement remedy, or as a *sui generis* remedy,<sup>67</sup> then it should not be denied enforcement on the ground that it would be provisional in nature. The agreement of all contracting states on this provision should also be considered as entailing an implicit agreement to respect judgments delivered by the competent court under Article 43. Finally, the nature of the remedy granted by the competent court should not be regarded as an obstacle for enforcement in other contracting states.

Article 44 grants exclusive jurisdiction to the courts of the place of the centre of administration of the Registrar to award damages or make orders against the Registrar. Given that jurisdiction is granted to the court of the country where the order against the Registrar should be enforced, the issue of its enforcement in other contracting states seems largely academic. Should it arise, it does not seem that there would be any obstacle to applying the same reasoning and to consider that other contracting states should enforce orders made under Article 44.

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<sup>67</sup> This is the view supported by the Official Commentary (n 18), para 2.104 and by Veneziano (n 50).

