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AVANT-PROJET DE CONVENTION SUR LES ACCORDS EXCLUSIFS D'ELECTION DE FOR

RAPPORT EXPLICATIF

par Masato Dogauchi et Trevor C. Hartley

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PRELIMINARY DRAFT CONVENTION ON EXCLUSIVE CHOICE OF COURT AGREEMENTS

EXPLANATORY REPORT

drawn up by Masato Dogauchi and Trevor C. Hartley

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en matière civile et commerciale

Preliminary Document No 25 of March 2004
drawn up for the attention of the Special Commission of April 2004
on Jurisdiction, Recognition and Enforcement of Foreign Judgments
in Civil and Commercial Matters

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AVANT-PROJET DE CONVENTION
SUR LES ACCORDS EXCLUSIFS D'ELECTION DE FOR

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Contents of the Report

PREFACE

References to other documents

The following documents are referred to in the abbreviated form set out below:

"**Brussels Convention**": Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. It was opened for signature in Brussels on 27 September 1968. The original parties were the six original Member States of what was then the EEC. As new States have joined the EU, as it is now called, they have become parties to the Brussels Convention. The text has been amended on a number of occasions. An amended text may be found in the *Official Journal of the European Communities* ("O.J."), 1998, Volume 27 of the "L" series, p. 1. Today, it has been largely superseded by the "Brussels Regulation" (below). It now applies only between Denmark and the other EU Member States.

"**Jenard Report**": Report by Mr Jenard on the original Brussels Convention, published in O.J. 1979 C 59, p. 1.

"**Schlosser Report**": Report by Professor Schlosser on the Accession Convention of 9 October 1978, under which Denmark, Ireland and the United Kingdom acceded to the Brussels Convention, published in O.J. 1979 C 59, p. 71.[1]

"**Lugano Convention**": *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*. It was originally opened for signature in Lugano, Switzerland on 16 September 1988. It contains similar provisions to the Brussels Convention, but the two Conventions are not identical. It applies between the EU countries and certain other States in Europe. At the time of writing, these are Iceland, Norway, Poland and Switzerland. The demarcation between the Brussels and Lugano Conventions is laid down in Article 54B of the Lugano Convention. It is based on the principle that the Lugano Convention will not apply to relations among the EU Member States, but will apply where one of the other countries mentioned above is involved. The text may be found in O.J. 1988 L 319, p. 9.

"**Jenard / Möller Report**": Report by Mr Jenard and Mr Möller on the Lugano Convention, published in O.J. 1990 C 189, p. 57.

"**Brussels Regulation**": Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2001 L 12, p. 1. It applies among all the EU Member States except Denmark and replaces the Brussels Convention in the mutual relations between those States to which it applies.

"**Preliminary draft Convention 1999**": Preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters of 1999. This was an earlier, much larger version of the present preliminary draft Convention drawn up within the Hague Conference on Private International Law in 1999. It covered much the same ground as the Brussels and Lugano Conventions. Work on it was put on hold when it became apparent that it would be difficult to obtain agreement at that time. Its text, together with a draft Report by the late Professor Peter Nygh and Professor Fausto Pocar, was published by the Permanent Bureau of the Hague Conference in August 2000.[2]

"**Nygh / Pocar Report**": Report on the preliminary draft Convention (see footnote No 2).

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[1] There are also reports on the Accession Convention for Spain and Portugal (de Almeida Cruz, Desantes Real and Jenard) O.J. 1990 C 189, p. 35; and on the Accession Convention for Greece (Evrigenis and Kerameus), O.J. 1986 C 298, p. 1.

[2] Preliminary Document No 11, available at < www.hcch.net >.

"**Schulz Report**": Report by Dr Andrea Schulz on the work of the informal working group on the Judgments Project, published by the Permanent Bureau of the Hague Conference in June 2003.[3]

Acknowledgements

The authors of the present Report would like to acknowledge their debt to the authors of these earlier reports, especially to the authors of the Nygh / Pocar Report, the late Professor Nygh and Professor Pocar. They would also like to acknowledge the assistance given by Dr Andrea Schulz of the Permanent Bureau and Dr Gottfried Musger, Chairman of the Drafting Committee.

Terminology

The following terminology is used in the Convention:

"**Court of origin**"**:** the court which granted the judgment.

"**State of origin**"**:** the State in which the court of origin is situated.

"**Court addressed**"**:** the court which is asked to recognise or enforce the judgment.

"**Requested State**"**:** the State in which the court addressed is situated.[4]

Note**:** Passages in square brackets will not form part of the final Report.

[3] Preliminary Document No 22, available at < www.hcch.net >.

[4] The preliminary draft Convention 1999 uses "State addressed" in the English version instead of "requested State" as used in this Report.

INTRODUCTION

1 **Objective of the Convention**. The objective of the Convention is to make exclusive choice of court agreements as effective as possible in the context of international business. The hope is that the Convention will do for choice of court agreements what the New York Convention of 1958[5] has done for arbitration agreements.

2 **Three key obligations**. In order to achieve this objective, it is necessary to impose three obligations on the courts of Member States: the chosen court must be obliged to hear the dispute; all other courts must be obliged to decline jurisdiction; and the judgment given by the chosen court must be recognised and enforced by courts in other countries.

3 **Three key provisions**. These obligations are laid down by three key provisions in the Convention, Articles 4, 5 and 7. Article 4, which is addressed to the chosen court, provides that the court designated in an exclusive choice of court agreement has jurisdiction and must exercise it; Article 5, which is addressed to all other courts, provides that courts other than that chosen must suspend or dismiss the proceedings before them; and Article 7, which is addressed to the court in which recognition is sought, provides that a judgment given by the court of a Contracting State designated in an exclusive choice of court agreement must be recognised and enforced.

4 **The original project: a "mixed" convention.** The original project (the preliminary draft Convention 1999) was intended to be a "mixed" convention. This is a convention in which jurisdictional grounds are divided into three categories. There is a "white list", which contains a number of specified grounds of jurisdiction; there is a "black list", which contains other specified grounds of jurisdiction; and there is the so-called "grey area", which consists of all other grounds of jurisdiction under the national law of Contracting States. The idea is that where the court has jurisdiction on a "white" ground, it can hear the case, and the resulting judgment will be recognised and enforced in other Contracting States (provided certain other requirements are satisfied). "Black list" grounds are prohibited: a court of a Contracting State cannot take jurisdiction on these grounds. Courts are permitted to take jurisdiction on the "grey list" grounds, but the resulting judgment will not be recognised under the Convention.[6]

5 As work proceeded on drafting, however, it became apparent that it would not be possible to draw up a satisfactory text for a "mixed" convention within a reasonable period of time. The reasons for this included the wide differences in the existing rules of jurisdiction in different States and the unforeseeable effects of technological developments, including the Internet, on the jurisdictional rules that might be laid down in the Convention. At the end of the First Part of the Nineteenth Session, held in June 2001, it was decided to postpone further work on the draft Convention. In order to find a way forward, the Commission I, meeting in April 2002, decided that the Permanent Bureau, assisted by an informal working group, would prepare a text to be submitted to a Special Commission. It was decided that the starting point for this process would be such core areas as jurisdiction based on choice of court agreements in business-to-business cases, submission, defendant's forum, counterclaims, trusts, physical torts and certain other possible grounds.

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[5] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958*.

[6] The European instruments in this area (the Brussels Regulation, the Brussels Convention and the Lugano Convention) are based on a slightly different idea. Where the defendant is domiciled in another State to which the instrument applies, there is no grey area: jurisdiction may be exercised only on the grounds laid down in the instrument. Where the defendant is not domiciled in such a State, however, jurisdiction may, subject to certain exceptions, be exercised on any ground permitted by national law; the resulting judgment must nevertheless be recognised and enforced in the other States.

6 After three meetings, the informal working group proposed that the objective should be scaled down to a convention on choice of court agreements in business-to-business cases. After receiving positive reactions from the Member States, a meeting of the Special Commission was held in December 2003 to discuss the draft that had been prepared by the Permanent Bureau, assisted by the informal working group. This meeting of the Special Commission produced the draft considered in this Report.[7]

7 **The relationship between the original project and the present draft**. If we apply the terminology explained in paragraph 4, we can say that the present draft provides for only one jurisdictional ground in the "white" list - an exclusive choice of court agreement. A court of a Contracting State selected in such an agreement must exercise jurisdiction, and other Contracting States must recognise and enforce the resulting judgment in accordance with the Convention. There is no "black" list in the sense previously explained, though courts of Contracting States other than that selected are not permitted to exercise jurisdiction in a case covered by the agreement. The "grey" area is accordingly very wide. It consists of all cases not covered by an exclusive choice of court agreement. Moreover, a "grey" area exists even where there *is* an exclusive choice of court agreement: since exclusive choice of court agreements concerning consumer contracts and employment contracts are excluded from the scope of the Convention, Contracting States are free to exercise, or not to exercise, jurisdiction in such cases. The courts of other Contracting States are free to recognise, or not to recognise, such judgments.

ARTICLE-BY-ARTICLE COMMENTARY

Article 1 Scope of the Convention

8 **Business-to-business transactions**. The intention, as set out in the Preamble, was to limit the Convention largely to business-to-business transactions.[8] Thus, the Convention does not apply to choice of court agreements between a business and a consumer, or between two consumers.[9] Employment contracts are also excluded.[10]

9 **Exclusive choice of court agreements**. The first paragraph of Article 1 makes clear that the scope of the Convention is limited in two ways: it applies only to exclusive choice of court agreements; and it applies only in civil or commercial matters. There were various reasons for the first limitation. Clearly, Article 5 (which prohibits courts other than that chosen from hearing the case) could not apply if the choice of court agreement was not exclusive. Moreover, Article 4 (which requires the chosen court to hear the case) could not apply as it stands, since a court other than the chosen court might have been seised first, and it would have been entitled to hear the case if the choice of court agreement was not exclusive. This would have raised issues of *lis pendens* that would have been difficult to resolve in an acceptable way.

10 **Civil or commercial matters.** The second limitation is standard in international conventions of this kind. It is clearly necessary to exclude public law and criminal law.[11] The reason for using the word "commercial" as well as "civil" is that in some legal systems "civil" and "commercial" are regarded as separate and mutually exclusive

[7] The draft on Exclusive Choice of Court Agreements. It is set out in the Annex to this Report.

[8] The main provision on the scope of the Convention is article 1 (discussed *infra*).

[9] Article 1(2)*(a)*.

[10] Article 1(2)*(b)*.

[11] However, a civil award of damages - for example, for personal injury - would be a civil matter, even if it was given in the course of criminal proceedings.

categories. The use of both terms is necessary for those legal systems.[12] It does no harm with regard to systems in which commercial proceedings are a sub-category of civil proceedings.[13] However, certain matters that clearly fall within the class of civil or commercial matters are nevertheless excluded. Thus, proceedings are outside the scope of the Convention when they have as their object one of the following: family law matters, succession, carriage of goods by sea, nuclear liability, rights *in rem* in immovable property, certain questions relating to legal persons (corporations) and the validity of certain intellectual property rights.

11 Article 1(1) of the preliminary draft Convention 1999 contained a further provision expressly stating that the Convention would not apply to revenue, customs or administrative matters. This provision was not included in the current draft because it was thought to be unnecessary: it was considered obvious that such matters could not be civil or commercial. The precise borderline between public-law and private-law matters is mainly a problem when a State or other public-law entity is a party to the contract. It is considered further below.[14]

12 **Consumer contracts.** Article 1(2)*(a)* provides that the Convention does not apply to choice of court agreements between a consumer and a party acting for the purposes of his / its trade or profession, or between two consumers. Many legal systems have mandatory rules to protect consumers, and these systems would not give effect to a choice of court agreement that required proceedings under a consumer contract to be brought in a foreign State. A "consumer" is defined as "a natural person acting primarily for personal, family or household purposes". A person who is not acting for the purposes of his trade or profession is not necessarily a consumer. Contracts concluded by a State are covered by the Convention;[15] yet a State does not act for the purposes of its trade or profession. It has no trade or profession in the normal sense of the words. The same is true of at least some public authorities and public corporations.[16] A contract between a State (or other non-commercial entity) and a consumer would, therefore, be covered by the Convention. **[If this is not what is intended, Article 1(2)*(a)* should say, "to which a natural person acting primarily for personal, family or household purposes (the [a] consumer) is a party".]**

13 **Employment contracts.** Article 1(2)*(b)* excludes choice of court agreements relating to individual or collective contracts of employment. These are excluded for the same reason as consumer contracts. An individual contract of employment is one between an employer and an individual employee; a collective contract of employment is one between an employer or a group of employers and a group of employees or an organisation such as a trade union (labour union) representing them.

14 **Other excluded matters.** Article 1(3) states that the Convention does not apply to proceedings that have as their object one of the matters listed in sub-paragraphs *a)* to *m)*.[17] This means that even if the choice of court agreement covers one of these matters,

[12] It would not be possible to use "commercial" alone because in some systems it is too vague and in others it is too narrowly defined.

[13] For further discussion of "civil or commercial matters", see pp. 29–31 of the Nygh / Pocar Report (*supra* footnote No 2).

[14] See paragraphs 38 *et seq.*

[15] Article 1(6).

[16] A charity or a religious organisation likewise has no trade or profession.

[17] This list is partly derived from Article 1(2), combined with Article 22, of the Brussels Regulation, and equivalent provisions in the Brussels and Lugano Conventions.

the Convention does not apply to proceedings that have it as their "object".[18] On the other hand, if one of the matters listed in sub-paragraphs *a)* to *m)* arises incidentally in proceedings that have some other matter as their object, the Convention will nevertheless apply.

15 Insolvency[19] provides an example. Assume that A and B enter into a contract, under which B owes A a sum of money. The contract contains a choice of court agreement in favour of the courts of State X. B then becomes insolvent. The Convention would apply to any proceedings concerning the question whether B did in fact owe A the money, but it would not apply to proceedings directly concerning the insolvency - for example, where A ranks among B's creditors - even if the choice of court agreement was interpreted as covering them.

16 There are various reasons why the matters referred to in Article 1(3) are excluded. In some cases, the public interest, or the interests of third parties, is involved, so that the parties have no right to dispose of the matter between themselves. In such cases, a particular court will often have exclusive jurisdiction that cannot be ousted by means of a choice of court agreement.

17 **Family law and succession.** Sub-paragraphs *a)* to *d)* concern personal and family matters that require special consideration.[20] In sub-paragraph *b)*, "maintenance" includes child support. In sub-paragraph *c)*, "matrimonial property" includes the special rights that a spouse has to the matrimonial home in some jurisdictions; while "similar relationships" covers a relationship between unmarried couples (including those of the same sex), to the extent that it is given legal recognition.[21]

18 **Insolvency.** Sub-paragraph *e)* excludes insolvency, composition and analogous matters. The term "insolvency" covers the bankruptcy of individuals as well as the winding-up or liquidation of corporations that are insolvent, but does not cover the winding-up or liquidation of corporations for reasons other than insolvency, which is dealt with by sub-paragraph *j)*. The term "composition" refers to procedures whereby the debtor may enter into agreements with creditors in respect of a moratorium on the payment of debts or on the discharge of those debts. The term "analogous matters" covers a broad range of other methods whereby insolvent persons or entities can be assisted to regain solvency while continuing to trade, such as Chapter 11 of the US Federal Bankruptcy Code.[22]

19 **Carriage of goods by sea.** Sub-paragraph *f)* excludes contracts for the carriage of goods by sea. This is because States that are parties to the Hague Rules on Bills of Lading[23] might be unwilling to accept a choice of court clause in a bill of lading if it granted jurisdiction to the courts of a State that was not a party to the Rules, since this could allow the ship owner to evade the mandatory provisions laid down in the Rules.[24] A

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[18] A terminological problem arises at this point. In French, there is a well understood distinction between proceedings that deal with a given matter *à titre principal* and those that deal with it *à titre incident*. This distinction cannot be expressed so clearly in English. In the English text of article 1(3), the phrase "proceedings that have as their object" is meant to convey the same idea as "*litiges portant à titre principal*" in the French text, while the phrase "arises … as an incidental question" in the English text of article 1(4) is meant to convey the same idea as "*évoquée à titre incident*" in the French text.

[19] Sub-paragraph *e)*; see below paragraph 18.

[20] Some of these matters are dealt with in other Hague Conventions.

[21] These provisions are largely taken from sub-paragraphs *a)* to *d)* of article 1(2) of the preliminary draft Convention 1999, and their scope is further examined at pp. 32–34 of the Nygh / Pocar Report.

[22] There is an identical provision in article 1(2)*(e)* of the preliminary draft Convention 1999, and its scope is further examined at pp. 34–35 of the Nygh / Pocar Report.

[23] They were adopted in 1924 and were amended by the Brussels Protocol of 1968. They are sometimes called the "Hague–Visby Rules".

[24] An alternative way of dealing with this problem would be to use article 19 (not yet drafted) to give priority to the Hague Rules as an international agreement governing a particular matter. Such a provision would have to state that, in proceedings having contracts for the carriage of goods by sea as their object, a Contracting State that was a party to the Hague Rules (or any future agreement replacing them) would not be required to give effect to a choice of court agreement in favour of the courts of a State that was not a party to those Rules.

second reason is that this matter forms the subject of a new project by UNCITRAL and the Conference did not want to interfere with that.[25] **[The question of other maritime matters is still to be resolved. Proceedings, such as the limitation of ship owners' liability or general average that affect the interests of third parties raise special issues.]**

20 **Anti-trust / competition.** Proceedings that have anti-trust / competition matters as their object are excluded by sub-paragraph *g)*. This refers to proceedings of the kind that may be brought under the Sherman and Clayton Acts in the United States, under Articles 81 and 82 (formerly Articles 85 and 86) of the EC Treaty, and under equivalent provisions in other countries. The standard term in the United States is "anti-trust law"; in Europe it is "competition law". It does not cover what Continental lawyers sometimes call "unfair competition" (*concurrence déloyale*).

21 Criminal anti-trust / competition proceedings are not civil or commercial matters; therefore, they are outside the scope of the Convention by virtue of Article 1(1).[26]

22 However, anti-trust / competition matters can form the object of private-law proceedings. An action in tort for damages for breach of anti-trust / competition law, possible both in the United States and in the European Union, is a prime example. These actions are excluded by Article 1(2)*(g)* because, though they are between private parties, they nevertheless affect the public interest, since they discourage anti-competitive behaviour.

23 Another example is the rule laid down by the European Court of Justice in *Courage Ltd* v. *Crehan*,[27] under which an economically weak party, who is forced to accept terms in a contract that infringe EC competition law, can claim damages from the other party. The purpose of this rule is twofold: to do justice to the economically weak party and to benefit the public interest. It would be wrong to allow the economically strong party to avoid it by means of a choice-of-law clause in favour of the law of a non-EU State coupled with a choice of court agreement in favour of the courts of that State.

24 On the other hand, if a person sues someone under a contract, and the defendant claims that the contract is void because it infringes anti-trust / competition law, the proceedings are *not* outside the scope of the Convention, since anti-trust / competition matters are not the object of the proceedings: the matters listed in Article 1(3) are excluded only with regard to proceedings that have one of them "as their object".[28] The object of the proceedings is the claim under the contract: the principal issue before the court is whether judgment should be given against the defendant because he or she has committed a breach of contract.

25 **Nuclear liability.** This is the subject of various international conventions, which provide that the State where the nuclear accident takes place has exclusive jurisdiction over actions for damages for liability resulting from the accident.[29] A "disconnection" clause[30] in the Convention could permit Contracting Parties to the nuclear-liability conventions to give those conventions priority over this Convention. However, there are some States with nuclear power plants that are not Parties to any of the nuclear-liability

[25] This could also be dealt with under article 19: see previous footnote.

[26] This applies both to criminal proceedings under US anti-trust law and to the quasi-criminal proceedings under Articles 81 and 82 of the EC Treaty.

[27] Case C-453/99, [2001] ECR I-6297; [2001] 3 WLR 1643.

[28] See the "*chapeau*" to paragraph 3. See also paragraph 4.

[29] The *Paris Convention on Third-Party Liability in the Field of Nuclear Energy* 1960; the Convention Supplementary to the Paris Convention 1964; the Vienna Convention 1963; the Joint Protocol relating to the Application of the Vienna Convention and the Paris Convention 1988.

[30] Article 19 (not yet drafted).

conventions.[31] Such States would be understandably reluctant to allow legal proceedings to be brought in another State by virtue of a choice of court agreement, since, where the operators of the nuclear power plants benefit from limited liability under the law of the State in question, or where compensation for damage is paid out of public funds, a single collective procedure would be necessary in order to have an uniform solution in respect of liability and an equitable distribution of a limited fund among the victims.

26 In the preliminary draft Convention 1999, there was a special provision on exclusive jurisdiction. It was contained in Article 12, and covered four matters: rights *in rem* in immovable property, legal persons, public registers, and the validity of certain intellectual property rights. Since the current Convention deals only with jurisdiction based on choice of court agreements, it was decided to exclude these matters from the scope of the Convention since choice of court agreements are not normally allowed with respect to them under national, supranational or international law.

27 **Immovable property.** Sub-paragraph *i)* excludes rights *in rem* in immovable property. This concept should be interpreted as relating only to proceedings concerning ownership or possession of, or other rights *in rem* in, the immovable, not proceedings about immovables which do not have as their object a right *in rem*.[32] It is said that one of the explanations for exclusive jurisdiction in this respect is the territorial sovereignty of the State where the immovable is situated. Thus, State A cannot allow the courts of State B to decide who is the owner of an immovable within State A's territory. Accordingly, it is natural for the State in which the immovable is situated to have exclusive jurisdiction over proceedings which have as their object rights *in rem* in immovable property: the Convention does not apply to choice of court agreements in such proceedings.

28 **Legal persons.** Sub-paragraph *j)* excludes the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs.[33] The reason for this exclusion is similar to that stated above with regard to immovable property. As legal persons are created by the sovereign power of the State, it is natural for the courts of the State where they were established to have exclusive jurisdiction over proceedings which have as their object the matters mentioned above. Accordingly, the Convention does not apply to choice of court agreements in such proceedings.

29 **Intellectual property.** Sub-paragraphs *k)* and *l)* deal with intellectual property.[34] They do not exclude intellectual property as such, but only proceedings that have the validity of certain intellectual property rights as their object. The reason for the exclusion is similar to that applicable with regard to immovable property and legal persons. The creation of intellectual property rights could be regarded as an exercise of the sovereign power of the State; so the validity of these rights should be decided solely by the courts of the State in which they were registered or under the law of which they arose.

30 The rights in question fall into two classes. The first class consists of those covered in sub-paragraph *k)*: the validity of patents, trademarks, protected industrial designs, and layout-designs of integrated circuits - rights listed in the TRIPS Agreement.[35] These

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[31] For example, Canada, China, Japan, Korea and the United States.

[32] For the meaning of a similar provision in Article 16(1)*(a)* of the Brussels Convention, see *Webb* v. *Webb*, C-294/92, [1994] ECR I-1717; *Reichert* v. *Dresdner Bank*, Case C-115/88, [1990] ECR I-27; *Lieber* v. *Göbel*, Case C-292/93, [1994] ECR I-2535; see further Dicey & Morris, *The Conflict of Laws* (13th edn, 2000 by Lawrence Collins and specialist editors, Sweet and Maxwell, London), paragraphs 23–010 to 23–015 (pp. 941–943); Hélène Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (3rd edn, 2002, LGDJ, Paris) paragraph 102 (p. 74).

[33] This same phrase appears (with purely verbal differences) in article 12(2) of the preliminary draft Convention 1999. The commentary on it in the Nygh / Pocar Report is at pp. 65–66.

[34] Although these matters were also subject to exclusive jurisdiction under article 12 of the preliminary draft Convention 1999, there are significant differences in the present text.

[35] *Agreement on Trade Related Aspects of Intellectual Property Rights* (Annex 1C to the Agreement Establishing the World Trade Organization), signed in Marrakesh / Morocco on 15 April 1994, Part II, Sections 2, 4, 5 and 6.

rights are excluded from the scope of the Convention irrespective of whether or not they are registered. Thus, proceedings having the validity of an unregistered trademark as their object are outside the scope of the Convention. The second class consists of the rights listed in sub-paragraph *l)*: the validity of other intellectual property rights the validity of which depends on, or arises from, their registration, except copyright. Thus, proceedings concerning the validity of utility model rights under Japanese law, which are registered without examination as to their substance, are excluded by virtue of sub-paragraph *l)*. Copyright can be, or even has to be, registered in some countries; nevertheless, it is not excluded from the scope of the Convention even if it is registered. The reference to copyright does not, however, include neighbouring rights. Consequently, proceedings that have the validity of neighbouring rights as their object are excluded from the scope of the Convention if they are subject to registration. **[If this was not what was intended, the words "or neighbouring rights" should be inserted after "copyright".] [It is not yet settled whether sub-paragraph *l)* will be part of the Convention and, if so, what intellectual property rights it will cover.]**

31 **Public registers.** Sub-paragraph *m)* excludes the validity of entries in public registers.[36] Some people might not regard this as a civil or commercial matter. However, as some international instruments[37] provide for exclusive jurisdiction over proceedings that have the validity of such entries as their object, it was thought better to exclude them explicitly in order to avoid any doubts.

32 **Incidental questions.** Paragraph 4 of Article 1 provides that proceedings are not excluded from the scope of the Convention if a matter referred to in paragraph 3 arises merely as an incidental question. An incidental question is a question that is not the object of the proceedings but is a question that the court has to decide in order to give judgment.[38] For example, the plaintiff may claim a sum of money due under a patent-licensing agreement. The defendant may argue that the sum is not due because the patent is invalid. Then the validity of the patent would be an incidental question: the court would have to decide it in order to be able to decide the main question (whether the money is due). Another example is an action for breach of contract in which the defendant (who is a natural person, not a corporation) claims that he lacked capacity to enter into the contract: the main question would be whether he was liable for breach of contract; the incidental question would be whether he had capacity.

33 It will be remembered that the "*chapeau*" to paragraph 3 states that the Convention does not apply to proceedings "that have as their object" any of the matters listed in paragraph 3. This indicates that proceedings are not excluded from the scope of the Convention merely because one of the matters listed arises as an incidental question.[39] This rule is so important that it is reinforced by paragraph 4.

34 In some countries, parties are precluded from re-litigating matters decided as incidental questions in a judgment given in previous proceedings. In the United States, this is known as "issue preclusion" or "collateral estoppel"; in England it is called "issue estoppel". In other countries, such matters can be re-litigated. As we shall see below, however, a ruling on an incidental question does not have to be recognised or enforced under the Convention:[40] recognition is limited to the ruling on the principal question.

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[36] This same phrase appears (with purely verbal differences) in article 12(3) of the preliminary draft Convention 1999. The commentary on it in the Nygh / Pocar Report is at p. 66.

[37] For instance, Article 22(3) of the Brussels Regulation.

[38] See paragraph 14 *supra*.

[39] The exclusion of a matter from the scope of the Convention does not of course prevent a court of a Contracting State from hearing proceedings that have it as their object, but the resulting judgment will normally be outside the scope of the Convention. The significance of the rule under discussion is that it requires the judgment to be recognised and enforced under the Convention, despite the fact that some excluded matter - for example, the validity of a patent or the capacity of a party - was decided as an incidental question.

[40] See paragraphs 125 *et seq.*

[This may be subject to further consideration.]

35 **Arbitration.** The first sentence of paragraph 5 excludes arbitration and proceedings relating thereto.[41] The purpose of this provision is to ensure that the present Convention does not interfere with existing instruments on arbitration.

36 Paragraph 5 goes on to provide that the Convention does not require a Contracting State to recognise and enforce a judgment if the exercise of jurisdiction by the court of origin was contrary to the terms of an arbitration agreement. It is unlikely that the same matter would be subject to both a choice of court agreement and an arbitration agreement, but if it was, a court would not be required under the Convention to recognise the judgment given by the court designated in the choice of court agreement, even if it was given first. It is not, however, precluded from doing so.

37 It is implicit in this provision that the arbitration agreement is valid, operative and capable of being performed. The purpose of the second sentence of Article 1(5) is also to avoid any undermining of arbitration, especially of the New York Convention of 1958.[42] However, if the arbitration agreement is null and void, inoperative or incapable of being performed, there can be no conflict.[43]

38 **Governments.** Article 1(6) provides that proceedings are not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any person acting for a State is a party thereto.[44] The proceedings will, however, be excluded if they do not concern a civil or commercial matter. As a general rule of thumb, one can say that if a public authority is doing something that an ordinary citizen could do, and is not exercising any special rights or privileges, the case probably involves a civil or commercial matter.[45]

39 Where a government or other public authority is involved, this can raise difficult questions, especially in the case of contracts. A contract does not cease to be civil or commercial just because a public authority is a party to it; nevertheless, it will not be civil or commercial if the public authority is exercising any of its public-law powers, or if the contract is closely linked to the exercise of such a power. Thus, where a public authority uses its governmental powers to force a party to enter into a contract, the contract is probably not civil or commercial. For example, if a government authority offers to release an arrested person on condition that he enters into a contract under which he will pay a large sum of money if he does not appear for trial, the contract is probably too closely related to the criminal proceedings to come within the scope of the Convention.[46]

40 **Immunities of sovereign States.** Article 1(7) provides that nothing in the Convention affects the privileges and immunities of sovereign States or of entities of

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[41] An identical provision is found in article 1(2)*(g)* of the preliminary draft Convention 1999: the relevant passage in the Nygh / Pocar Report is at p. 35.

[42] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958*.

[43] See Article II(3) of the New York Convention, under which a court of a State party to the Convention, when seised of an action in a matter in respect of which the parties have made an arbitration agreement, must, at the request of one of the parties, refer the parties to arbitration unless the agreement is "null and void, inoperative or incapable of being performed".

[44] This provision is taken (with only verbal differences) from article 1(3) of the preliminary draft Convention 1999. The commentary on it in the Nygh / Pocar Report is at pp. 35–36.

[45] For the interpretation by the European Court of Justice of a similar provision in Article 1 of the Brussels Convention, see *LTU* v. *Eurocontrol*, Case 29/76, [1976] ECR 1541; [1977] 1 CMLR 88; *Netherlands* v. *Rüffer*, Case 814/79, [1980] ECR 3807 (but see *United States of America* v. *Ivey* (1996) 130 DLR (4th) 674 (Ontario High Court, Canada), affirmed (1998) 139 DLR (4th) 570 (Ontario Court of Appeal)); *Sonntag* v. *Waidmann*, Case C-172/91, [1993] ECR I-1963. See further Dicey & Morris, *The Conflict of Laws* (13th edn, 2000 by Lawrence Collins and specialist editors, Sweet and Maxwell, London), paragraphs 11–013 to 11–016 (pp. 267–269); Hélène Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (3rd edn, 2002, LGDJ, Paris) paragraph 39 (pp. 26–28).

[46] See *United States of America* v. *Inkley* [1989] QB 255; [1988] 3 WLR 304; [1988] 3 All ER 144 (Court of Appeal, England). See also *Attorney General for the United Kingdom* v. *Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 (High Court of Australia) (where a claim by the British Government, partly based on breach of contract, to compel the defendant not to reveal intelligence secrets was not enforced in Australia).

sovereign States, or of international organisations.[47]

Article 2 Exclusive choice of court agreements

41 **Definition: four requirements**. As mentioned above,[48] the Convention applies only to exclusive choice of court agreements. Article 2(1) gives a definition, which contains the following requirements: first, there must be an agreement between two or more parties; secondly, the formal requirements of paragraph 3 must be satisfied; thirdly, the agreement must designate the courts of one State or one specific court to the exclusion of the jurisdiction of all other courts; and finally, the designation must be for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship.

42 **The first requirement**. A choice of court agreement cannot be laid down unilaterally: there must be agreement.[49] In interpreting a similar provision in the Brussels Convention,[50] the European Court of Justice has laid down autonomous, Community-law rules as to what constitutes consent for this purpose.[51] The application of autonomous rules may have been correct in the context of the Brussels Convention, but it is not correct with regard to the Hague Convention, under which the law of the State in question must decide whether there is consent: the explicit references in various articles to State law clearly indicate this.[52]

43 **The second requirement**. This concerns the form of the choice of court agreement. The relevant rules are laid down in paragraph 3, discussed below.

44 **The third requirement**. This is that the choice of court agreement must designate the courts of one State or one specific court as having exclusive jurisdiction. This will be discussed below in connection with paragraph 2.

45 **The fourth requirement**. This is that the designation must be for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship. This makes clear that the choice of court agreement can be restricted to, or include, disputes that have already arisen. It can also cover future disputes, provided they relate to a particular legal relationship. It is not limited to claims in contract, but could, for example, cover claims in tort arising out of a particular relationship. Thus, a widely-drafted choice of court clause in a joint-venture agreement could cover an action in tort for patent infringement in connection with the activities carried on under the contract; or a choice of court clause in a contract for the carriage of goods by road could cover a tort action for damage to the goods. Whether this would be so in any particular case would depend on the terms of the agreement.

46 **Agreements deemed exclusive.** Article 2(2) lays down the important rule (foreshadowed by the third requirement in paragraph 1) that a choice of court agreement which designates the courts of one State or one specific court will be deemed to be exclusive unless the parties have expressly provided otherwise.

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[47] This provision is taken from article 1(4) of the preliminary draft Convention 1999. The commentary on it in the Nygh / Pocar Report is at p. 36.

[48] Paragraph 9.

[49] For this reason, the Convention does not apply to a choice of court made by a settlor in a trust instrument.

[50] Article 17.

[51] For example, in *Estasis Salotti and Colzani* v. *RÜWA*, Case 24/76, [1976] ECR 1831; [1977] 1 CMLR 345, it held that where a person signs a contract written on one side of a sheet of paper, he or she does not consent to a choice of court agreement on the other side, unless there is an explicit reference to it on the side that he signed. This decision was based on Community law, not on the law of any of the Contracting States.

[52] In articles 4(1), 5 *a)* and 7(1)*(a)*, there is a reference to the law of the State of the chosen court; in article 5 *b)* to the law of the State of the court seised, and in article 7 *b)* to the law of the requested State.

47 The first element of this is that the choice of court agreement may refer either to the courts of a State in general, or to a specific court. Thus an agreement designating "the courts of France" is regarded as exclusive for the purposes of the Convention, even though it does not specify *which* court in France will hear the proceedings. In such a case, French law will be entitled to decide in which court or courts the action may be brought.[53] Subject to any such rule, the plaintiff can choose the court (in France) in which he brings the action.

48 An agreement referring to a particular court in France - for example, the Commercial Court of Paris - would also be exclusive.[54] Somewhat paradoxically, however, an agreement referring to *two* specific courts in the same State - for example, "either the Commercial Court of Paris or the Commercial Court of Lyon" - would not be an exclusive choice of court agreement for the purpose of the Convention. **[If this is not what was intended, the phrase "the courts of one State or one specific court" in paragraphs 1 and 2 of Article 2 should be amended to read "either the courts of one State or one or more specific courts in one State".]**

49 **One-sided (asymmetric) agreements.** Sometimes a choice of court agreement is drafted to be exclusive as regards proceedings brought by one party but not as regards proceedings brought by the other party. International loan agreements are often drafted in this way. A choice of court clause in such an agreement may provide, "Proceedings by the borrower against the lender may be brought exclusively in the courts of State X; proceedings by the lender against the borrower may be brought in the courts of State X or in the courts of any other State having jurisdiction under their own law." Such an agreement would not be covered by the Convention even when the borrower brought the proceedings: for the purpose of paragraph 1, the agreement must be exclusive irrespective of the party bringing the proceedings. **[To make this clear, it might be desirable to add to Article 2(1) the words, "Such an agreement must be exclusive irrespective of the party bringing the proceedings."]**

50 It might be thought that such an agreement would be covered by the Convention when the proceedings were brought by the borrower, but not when they were brought by the lender. However, this would produce unacceptable results. Assume, in the above example, that the lender brings proceedings in State Y. They would not be covered by the Convention, and the courts of State Y would be entitled to hear them. If the borrower then brought proceedings in State X, those proceedings would be covered; so the courts of State X would have to hear them even though the case was already pending in State Y. Moreover, a judgment given by the courts of State X would have to be recognised under the Convention in State Y, even if the courts of the latter had already given judgment in the proceedings brought by the lender, since there is [so far] no provision in Article 7 regarding conflicting judgments.

51 **Meaning of "State"[55] in the case of a non-unified legal system.** What does the word "State" mean in relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to a matter dealt with by the Convention - for example, Canada, China, the United Kingdom or the United States? According to Article 18 (discussed below at paragraphs 159 *et seq.*) it can refer either to the State as a whole - for example, Canada, China, the United Kingdom or the United States - or to a territorial unit within that State - for example, Hong Kong, Ontario, Scotland or New Jersey. Consequently, both a clause designating "the courts of the

[53] See article 4(3).

[54] The problems that arise where the court designated cannot hear the case under national law are discussed *infra*: see paragraphs 79 *et seq*.

[55] In this Report, "state" with a lower-case "s" refers to a territorial unit of a federal State (for example, a US-American state); "State" with an upper-case "S" refers to a State in the international sense.

United States" and a clause designating "the courts of New Jersey" are valid, exclusive choice of court agreements under the Convention.[56]

52 The Convention is not restricted to choice of court agreements in favour of the courts of Contracting States: an agreement in favour of the courts of a non-Contracting State is equally covered by some of its operative provisions - in particular, Articles 2 and 5.

53 Although the Convention is restricted to exclusive choice of court agreements, Article 2(2) provides that an agreement which designates the courts of one State or one specific court is deemed to be exclusive unless the parties expressly provide otherwise. As a result, the following must be regarded as exclusive choice of court agreements:

- "The courts of State X shall have jurisdiction to hear proceedings under this contract."
- "Proceedings under this contract shall be brought before the courts of State X."

54 The following would not be exclusive:

- "The courts of State X shall have non-exclusive jurisdiction to hear proceedings under this contract."
- "Proceedings under this contract may be brought before the courts of State X, but this shall not preclude proceedings before the courts of any other State having jurisdiction under its law."

55 **Formal requirements.** The third paragraph deals with formal requirements. These are both necessary and sufficient under the Convention: a choice of court agreement is not covered by the Convention[57] if it does not comply with them, but, if it does, no further requirements of a formal nature may be imposed under national law. Thus, for example, a court of a Contracting State cannot refuse to give effect to a choice of court agreement because:

- it is written in a foreign language;
- it is not in special bold type;
- it is in small type; or
- it is not signed by the parties separately from the main agreement.[58]

56 Paragraph 3 provides that the choice of court agreement must be entered into or evidenced either *a)* "in writing" or *b)* "by any other means of communication which renders information accessible so as to be usable for subsequent reference".

57 Where the agreement is in writing, its formal validity is not dependent on its being signed, though the lack of a signature might make it more difficult to prove the existence of the agreement. **[If this is not what was intended, the text should be altered.]** The other possible form is intended to cover electronic means of data transmission or storage. This includes all normal possibilities, provided that the data is retrievable so that it can be referred to on future occasions. It covers, for example, e-mail and fax.[59]

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[56] A clause designating "the state courts of the state of New Jersey or the federal courts located in that state" would also be a valid, exclusive choice of court agreement.

[57] If it is valid under the law of the State of the chosen court, that court may hear the case, but the courts of other States would not be obliged to apply the Convention with regard to the agreement (article 5) or the resulting judgment (article 7).

[58] In some legal systems, these might be requirements of national law: see, *e.g.*, *Trasporti Castelletti* v. *Hugo Trumpy*, Case C-159/97, [1999] ECR I-1597.

[59] The wording of this provision was inspired by Article 6(1) of the *UNCITRAL Model Law on Electronic Commerce* 1996.

58 The agreement must either be concluded in one or other of these forms or it must be *evidenced* in them. In interpreting a similar provision in the Brussels Convention,[60] the European Court of Justice has held that the "evidenced in writing" requirement is satisfied if the following facts are proved:

- there is an oral choice of court agreement;
- the agreement is confirmed in writing by one of the parties;
- the confirmation is received by the other party; and
- the latter raises no objection.[61]

59 It is not necessary for the party who received the confirmation expressly to accept it: if he or she did, that would constitute a new agreement in writing. The European Court has also held that it does not matter if the party who put the oral agreement into writing was the one who benefited from it - for example, because it was in favour of the courts of his State.[62] In all cases, however, there must have been consent by both parties to the original oral agreement. The position would be the same under Article 2(3) of the Convention.

60 Article 2(4) provides that an exclusive choice of court agreement that forms part of a contract must be treated as an agreement independent of the other terms of the contract for the purpose of determining its validity: the validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid. The purpose of this provision is to prevent a party from arguing that effect cannot be given to a choice of court agreement because the contract of which it is part is invalid: the validity of the choice of court agreement must be determined independently, according to the criteria set out in the Convention.[63] Thus, it is possible for the designated court to hold the contract invalid without depriving the choice of court agreement of validity. On the other hand, of course, it is also possible for the ground on which the contract is invalid to apply equally to the choice of court agreement: it all depends on the circumstances. This approach is in accordance with that normally adopted with regard to the validity of arbitration agreements.

Article 3 Other definitions

61 **"Judgment".** Article 3 contains two further definitions. The first, in Article 3(1), is of "judgment". This is widely defined so as to cover any decision on the merits, regardless of what it is called. It excludes a procedural ruling, but covers an order as to costs or expenses (even if given by an officer of the court, rather than by a judge) provided it relates to a judgment that may be recognised or enforced under the Convention. It does not cover a decision to grant interim relief (provisional and protective measures), as this is not a decision on the merits.[64]

62 **"Habitual residence"**. Article 3(2) defines "habitual residence" with regard to an entity or person other than a natural person. (It was felt unnecessary to define "habitual residence" with regard to a natural person.) The definition is primarily intended to apply to corporations and will be explained on this basis.[65]

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[60] Article 17.

[61] *Berghoefer* v. *ASA*, Case 221/84, [1985] ECR 2699; [1986] 1 CMLR 13. It was not necessary on the facts of the case for the European Court to consider the position where the written confirmation is not communicated to the other party, but Advocate General Slynn said that this would not be sufficient: [1985] ECR at p. 2702.

[62] *Ibid.*

[63] See articles 4(1), 5 and 7(1).

[64] On interim relief, see article 6.

[65] A State or a public authority of a State would be habitually resident only in the territory of that State.

63 The concept of habitual residence plays only a limited role in the Convention: it is used only to determine when a situation is wholly domestic so as to warrant its exclusion from the Convention.[66]

64 The problem faced by the Special Commission was to reconcile the different conceptions of the common law and civil law countries, as well as those within the civil law countries.[67]

65 In the common law, the law of the place of incorporation is traditionally regarded as the personal law of the corporation.[68] It is the legal system that gives birth to the corporation and endows it with legal personality. For jurisdictional purposes, however, the principal place of business and the place of its central management are also important.[69] The latter is the administrative centre of the corporation, the place where the most important decisions are taken. The principal place of business is the centre of its economic activities. Though normally in the same place, these two could be different. For example, a mining company with its headquarters in London (central administration) might carry on its mining activity in Namibia (principal place of business). Since all three concepts are important in the common law, the Convention provides that a corporation is habitually resident in all three places.

66 Although some civil law systems also look to the law of the place of incorporation as the personal law of the company,[70] the dominant view favours the law of the "corporate seat" (*siège social*). The place of the corporate seat is also regarded as the domicile of the corporation. However, there are two views as to how the corporate seat is to be determined. According to the first view, one looks to the legal document under which the corporation was constituted (the *statut* of the corporation). This will state where the corporate seat is, and should be regarded as decisive. The corporate seat thus determined is called the *siège statutaire*.

67 The *siège statutaire* may not, however, be the actual corporate headquarters. The second view is that one should look to the place where the company in fact has its central administration, sometimes called the *siège réel*. This corresponds to the common law concept of the place of central administration.

68 To cover all points of view, it was thus necessary to include the *siège statutaire*, which is translated into English as "statutory seat". However, this term does not refer to the corporation's seat as laid down by some statute (legislation)[71] but as laid down by the *statut*, the document containing the constitution of the company - for example, the articles of association. In United Kingdom law, the nearest equivalent is "registered office".[72] In practice, the State where the corporation has its statutory seat will almost always be the State under whose law it was incorporated or formed; while the State where it has its central administration will usually be that in which it has its principal place of business. On the other hand, it is not uncommon for a company to be incorporated in one State - for example, Panama - and to have its central administration and principal place of business in another.

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[66] See articles 4(4), 5 *f)* and 15.

[67] For a comparative discussion of these matters, see Stephan Rammeloo, *Corporations in Private International Law* (Oxford University Press, Oxford, England, 2001), Chaps 4 and 5.

[68] For England, see Dicey & Morris, *The Conflict of Laws* (13th edn, 2000 by Lawrence Collins and specialist editors, Sweet and Maxwell, London), Rules 152(1) and 153 (pp. 1101–1109); for the United States, see *Restatement of the Law Second, Conflict of Laws*, §§ 296–299.

[69] For English law, see Dicey & Morris, *The Conflict of Laws* (13th edn, 2000 by Lawrence Collins and specialist editors, Sweet and Maxwell, London), Rule 152(2) (p. 1101). For the purpose of diversity jurisdiction in the United States (discussed *infra* at paragraphs 80 *et seq.*), a corporation is a citizen both of the state where it was incorporated and of that in which it has its principal place of business: 28 US Code § 1332(c).

[70] For example, Japan and the Netherlands.

[71] The French for "statute" is "*loi*".

[72] See the Brussels Regulation, Article 60(2).

Article 4 Jurisdiction of the chosen court

69 Article 4 is one of the "key provisions" of the Convention. A choice of court agreement would be of little value if the chosen court did not hear the case when proceedings were brought before it. For this reason, Article 4(1) provides that the court designated by an exclusive choice of court agreement has jurisdiction to decide a dispute to which the choice of court agreement applies, unless the agreement is null and void under the law of the State of the court designated.[73]

70 **Null and void**. The "null and void" provision is the only exception to the rule that the chosen court must hear the case. The question whether the agreement is null and void is decided according to the law of the State of the chosen court. The phrase "law of the State" includes the choice-of-law rules of that State as well as its rules of internal law.[74] Thus, if the chosen court considers that the law of another State should be applied under its choice-of-law rules, it will apply that law.

71 The "null and void" provision is intended to refer primarily to generally recognised grounds of invalidity like fraud, mistake, misrepresentation, duress and lack of capacity.[75]

72 **Declining jurisdiction**. Article 4(2) provides that the chosen court must not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State. This provision reinforces the obligation laid down in Article 4(1). However, it applies only with regard to a court in another State, not to a court in the same State. It does not, therefore, affect rules for the transfer of cases between courts in the same State.[76]

73 **Meaning of "State".** What is meant by "State" in this context? In the case of a State containing a single law-district, there is no problem. Where the State contains a number of territories subject to different systems of law, such as the United States, Canada or the United Kingdom, the question is more difficult. Under Article 18(1)*(c)* of the Convention, a reference to "the court or courts of a State" means a court or courts of the relevant territorial unit. From this it follows, that the reference in Article 4(2) to "a court of another State" must be understood as referring to the relevant territorial unit.

74 What is the relevant territorial unit? This could depend on the terms of the choice of court agreement. If it referred to "the courts of England", England would be the relevant territorial unit, and Article 4(2) would preclude a transfer to a court in Scotland. If, on the other hand, the choice of court agreement referred to "the courts of the United Kingdom", the relevant territorial unit would be the United Kingdom, and a court in England would not be precluded by Article 4(2) from transferring the case to a court in Scotland.[77]

75 In the case of the United States, the position could depend on whether the chosen court was a state court or a federal court. If the choice of court agreement referred to "the courts of the state of New York", a transfer to a court in New Jersey would be precluded. Here, "state" would refer to the state of New York, not to the United States.[78]

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[73] For another exception that applies in certain cases, see article 14.

[74] If this had not been the intention, the text would have used the phrase "internal law of the State".

[75] In articles 5 *b)* and 7(1)*(b)*, lack of capacity is dealt with separately because it is determined by a different system of law from other grounds of invalidity - that of the court seised, rather than that of the chosen court. In article 4, on the other hand, the court seised *is* the chosen court; so there is no need to deal separately with it.

[76] On this see Schulz, Mechanisms for the Transfer of Cases within Federal Systems, Preliminary Document No 23, October 2003. Where the exclusive choice of court agreement designates a particular court, a judgment given by another court in the same State will not be recognised or enforced under the Convention, even if the case was transferred to that court by the designated court: it will not be "a judgment given by a court of a Contracting State designated in an exclusive choice of court agreement", as required by article 7(1). Where, on the other hand, the choice of court agreement refers in general to the courts of a Contracting State (without designating any particular court), the judgment will be recognised and enforced under the Convention, even if the case was transferred from the court where the proceedings were initiated to another court in the same State.

[77] In this case, the Scottish judgment would be entitled to be recognised and enforced under the Convention.

[78] The same would be true if the agreement referred to "the state courts of New York or the federal courts located in that state".

However, if the reference was to "the Federal District Court for the Southern District of New York", Article 4(2) would not necessarily preclude a transfer to a federal district court in a different state of the United States, since the relevant territorial unit would be the United States.[79]

76 ***Forum non conveniens***. There are two legal doctrines on the basis of which a court might consider that the dispute should be decided in a court of another State.[80] The first is *forum non conveniens.* This is a doctrine mainly applied by common law countries.[81] Its precise formulation varies from country to country, but in general one can say that it permits a court having jurisdiction to stay (suspend) or dismiss the proceedings if it considers that another court would be a more appropriate forum.[82] The granting of a stay or dismissal is discretionary and involves weighing up all relevant factors in the particular case. It applies irrespective of whether or not proceedings have been commenced in the other court (though this is a factor that may be taken into account).

77 ***Lis pendens*.** The second doctrine is that of *lis pendens*. This is applied mainly by civil law countries. It requires a court to suspend or terminate proceedings if another court has been seised first in proceedings involving the same cause of action between the same parties.[83] It is not discretionary, does not involve the weighing up of relevant factors to determine the more appropriate court and applies only when proceedings have already been commenced in the other court.

78 Article 4(2) precludes resort to either of these doctrines if the court in whose favour the proceedings would be stayed or dismissed is in another State, since under either doctrine the court would decline to exercise jurisdiction "on the ground that the dispute should be decided in a court of another State."

79 **Subject-matter jurisdiction.** Article 4(3) provides that Article 4 does not affect national rules on subject-matter jurisdiction or jurisdictional rules based on the value of the claim. The phrase "subject-matter jurisdiction" can have a variety of meanings. Here it refers to the division of jurisdiction among different courts in the same territorial unit on the basis of the subject matter of the dispute. It is not concerned with determining which State's courts will hear the case but with the question what kind of court *within* a State will hear it. For example, specialized courts may exist for matters such as divorce, tax or patents. Thus, a specialized tax court would lack subject-matter jurisdiction to hear an action for breach of contract. So even if the parties concluded an exclusive choice of court agreement designating such a court, it would not be obliged under the Convention to hear the case.

80 In the United States, subject-matter jurisdiction can also refer to the allocation of jurisdiction between state and federal courts.[84] As a general rule, one can say that state courts have subject-matter jurisdiction in all cases unless there is a specific rule depriving them of jurisdiction. Federal courts, on the other hand, have jurisdiction only if a specific rule grants them jurisdiction. The basic rules on federal jurisdiction are laid down in Article III, section 2 of the United States Constitution. The two most important

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[79] The resulting judgment would be entitled to recognition and enforcement under the Convention.

[80] See J.J. Fawcett (ed.), *Declining Jurisdiction in Private International Law* (Clarendon Press, Oxford, 1995).

[81] It actually originated in Scotland, a mixed common / civil-law country. It still applies in Scotland today and has also been adopted in civil-law jurisdictions such as Quebec. For the application of this doctrine and other statutory substitutes in the context of choice of court clauses, see Schulz, Mechanisms for the Transfer of Cases within Federal Systems, Preliminary Document No 23, October 2003.

[82] For the formulation in English law, see Dicey & Morris, *The Conflict of Laws* (13th edn, 2000 by Lawrence Collins and specialist editors, Sweet and Maxwell, London), Rule 31(2) (p. 385); for the formulation in the United States see The American Law Institute, *Second Restatement on Conflict of Laws* (The American Law Institute Publishers, St. Paul, Minn., 1971), § 84.

[83] See, for example, Article 27 of the Brussels Regulation.

[84] For a detailed discussion of federal jurisdiction in Australia, Canada and the United States, see Schulz, Mechanisms for the Transfer of Cases within Federal Systems, Preliminary Document No 23, October 2003.

cases in which federal courts have jurisdiction are cases arising under federal law[85] and cases in which there is diversity of citizenship. Diversity of citizenship arises if one party is a citizen of a different state from another party, or if one party is a citizen of a US state and the other party is a foreign national.[86]

81 The parties cannot waive these rules. If subject-matter jurisdiction does not exist, a federal court cannot hear the case, even if the parties submit to its jurisdiction. Thus, if a Japanese citizen and a German citizen, both habitually resident in their respective countries, enter into a contract for the sale of goods, and the contract contains a choice of court agreement designating "the Federal District Court for the Southern District of New York" as having exclusive jurisdiction to hear disputes arising out of the contract, the chosen court will not be able to hear the case. It will lack subject-matter jurisdiction because federal law will not govern the case[87] and there will be no diversity of citizenship.[88] The Convention will not affect this outcome. The result is that the choice of court agreement will be void: there would be no justification for treating it as referring to the *state* courts of New York. If, on the other hand, the parties designated "the courts of New York" and the plaintiff brought proceedings in a federal court in New York, the case could be transferred to a state court in New York, if the law of the United States so provided.

82 In some countries, certain courts have jurisdiction only if the value of the claim is greater, or less, than a specified amount. Since this concerns the internal allocation of jurisdiction within a single State, it is a question of subject-matter jurisdiction as defined above. However, some States do not use this terminology; so Article 4(3) refers specifically to jurisdiction based on the value of the claim. The comments in the previous paragraph on subject-matter jurisdiction apply here as well.

83 **[The last part of Article 4(3) provides that paragraphs 1 and 2 of Article 4 do not "affect the internal allocation of jurisdiction among the courts of a Contracting State [unless the parties designated a specific court]." The words in square brackets raise a policy issue. If no specific court is designated by the parties - if, for example, the choice of court agreement refers merely to "the courts of the Netherlands" or "the courts of the state of New Jersey" - there is no reason why the normal rules on the internal allocation of jurisdiction question should not apply.**

84 **What if the parties designate a specific court - for example, "the Federal District Court for the Southern District of New York"? In such a case, it might be thought wrong for the federal court in New York to transfer it to a federal court in Ohio. The parties might have had a special reason for their choice. On the other hand, rules for transferring a case within a court system fulfil a purpose - for example, spreading the workload among different courts - and it would be wrong for the Convention to interfere with that. One possible compromise would be to say that the rules apply but that in deciding whether to transfer the case, foreigners should not be treated differently from local persons.]**

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[85] Federal law covers the United States Constitution, federal statutes and international treaties concluded by the United States.

[86] There must be complete diversity: no party on one side can be a citizen of the same state as any party on the other side. To be a citizen of a state, a person must be a citizen of the United States (or an alien admitted for permanent residence) and must be resident in a state of the United States. In addition, the value of the claim must be above a specified minimum, at present $75,000. See 28 US Code § 1332. For the citizenship of a corporation, see footnote No 69 *supra*.

[87] In general, state law governs most areas of commercial law, such as sale of goods and contracts.

[88] Under US law, there is no diversity if both parties are citizens of foreign States.

85 Article 4(4) provides that the preceding paragraphs of Article 4 do not apply if all the parties to the agreement are habitually resident in the State of the chosen court. The policy behind this is to exclude the application of Article 4 in entirely internal situations. In such a case, the chosen court would not be obliged under the Convention to hear the case. **[Such a situation is not easy to define. The objection to the reference to "the relationship of the parties and all elements relevant to the dispute" is its vagueness. For example, if the parties designated a foreign system of law as the governing law of the contract, would this mean that all elements of the dispute were no longer connected with the same State? A possible compromise would be to exclude it, but to restrict the exception by saying that the parties must be habitually resident *only*[89] in the State in question and that this must be the case both when the agreement is concluded *and* when the proceedings are commenced.]**

Article 5 Obligations of a court not chosen

86 Article 5 is the second "key" provision of the Convention. Like other provisions, it applies only if the choice of court agreement is exclusive, though it applies to such agreements even if the chosen court is in a non-Contracting State. It is addressed to courts other than that chosen, and requires them to refrain from hearing the case, even if they have jurisdiction under their national law. This is essential if the exclusive character of the choice of court agreement is to be respected.

87 Article 5 requires the court to suspend or dismiss the "proceedings". It is not stated expressly what proceedings this refers to. However, it is clear from the context that it covers all proceedings inconsistent with the choice of court agreement. To determine what these are, the court must interpret the agreement. Under Article 2(1) of the Convention, the agreement applies to disputes "which have arisen or may arise in connection with a particular legal relationship". In interpreting the agreement, the court must decide what that relationship is, and which disputes the agreement applies to. It must decide, for example, whether a choice of court clause in a loan agreement covers a tort action by the borrower against the lender for enforcing the agreement in an allegedly abusive manner.[90]

88 The most common situation in which Article 5 would apply is where a party brings an action covered by the choice of court agreement in a court other than that designated.

89 Proceedings for an antisuit injunction to prevent one of the parties from suing in the chosen court would be inconsistent with the choice of court agreement. They too would be covered by Article 5.

90 The court must decide whether the party bringing the proceedings is bound by the choice of court agreement. If a person who was not an original party to the contract claims rights under it by virtue of assignment, succession or some other ground,[91] he or she would normally be bound by a choice of court agreement that forms part of it.[92]

91 If the proceedings are covered by Article 5, the court must either suspend or dismiss them, unless one of the exceptions applies. It would be appropriate to suspend the proceedings, if possible,[93] where further developments might occur that would

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[89] It must be remembered that, under article 3(2), a corporation may be habitually resident in more than one State. Accordingly, if "only" was inserted here, a choice of court agreement between domestic corporation X and corporation Y, which is incorporated domestically but has its central administration at the office of its parent company in a foreign State, would not be covered by paragraph 4.

[90] See *Continental Bank* v. *Aeakos Compania Naviera* [1994] 1 WLR 588; [1994] 2 All ER 540; [1994] 1 Lloyd's Rep. 505 (Court of Appeal, England).

[91] For example, a merger between two companies.

[92] See *Russ* v. *Nova (The Tilly Russ)*, Case 71/83, [1984] ECR 2417 (Court of Justice of the European Communities).

[93] In some countries, the court has only limited powers to stay the proceedings. For example, under the Japanese Code of Civil Procedure, a court can stay the proceedings only where the court is unable to function because of a natural disaster or similar emergency (Article 130), or where a party is, for an indefinite period of time, not in a position to continue the proceedings (Article 131).

change the situation - for example, if the chosen court has not yet heard the case and it is uncertain whether it will do so.

92 **Six exceptions.** Article 5 lays down six exceptions to the rule that the proceedings must be suspended or dismissed. The first two[94] are fairly standard, but the third and fourth[95] are intended to apply only in the most exceptional circumstances. If they were applied too widely, the whole purpose of the Convention would be undermined.

93 **The first exception: null and void.** The first exception is where the agreement is null and void under the law of the chosen court. This was discussed above.[96]

94 **The second exception: incapacity.** The second exception is where a party lacked capacity to enter into the agreement under the law of the State of the court seised. Here again "law" includes the choice-of-law rules of that State.[97] In deciding whether the choice of court agreement is null and void, the law of the chosen court must be applied by courts in all the Contracting States. In the case of capacity, however, it was considered too ambitious to lay down a uniform choice-of-law rule for all the Contracting States; accordingly, under Article 5 *b)* the court seised will apply the law designated by its own choice-of-law rules.[98] Since lack of capacity would also make the agreement null and void in terms of Article 5 *a)*, this could mean that capacity is determined *both* by the law of the chosen court *and* by the law of the court seised.[99] **[This interpretation might be contrary to the rule "*Lex specialis derogat legi generali*". Since Article 5 *a)* is a general rule applying to all grounds on which the agreement might be null and void, and Article 5 *b)* is a specific rule applying to incapacity, it could be argued that incapacity is covered only by the latter provision. The matter should be clarified. Article 5 *a)* should say either "the agreement is null and void under the law of the State of the chosen court on any ground, including incapacity" or "the agreement is null and void under the law of the State of the chosen court on some ground other than incapacity".]**

95 **The third exception (first limb): injustice.** The third exception is where giving effect to the agreement would lead to a "very serious injustice" or would be "manifestly contrary to fundamental principles of public policy". In some legal systems, the first phrase would be regarded as covered by the second. Lawyers from those systems would consider it axiomatic that an agreement leading to a very serious injustice would necessarily be contrary to public policy. In the case of such legal systems, the first phrase might be redundant.[100] In other legal systems, however, the concept of public policy refers to general interests - the interests of the public at large - rather than the interests of any particular individual, including a party. It is for this reason that both phrases are necessary.

96 The phrase "very serious injustice" would cover the case where one of the parties would not get a fair trial in the foreign State, perhaps because of bias or corruption, or where there were other reasons specific to that party that would preclude him or her from bringing or defending proceedings in the chosen court.

97 **The third exception (second limb): public policy.** The phrase "manifestly contrary to fundamental principles of public policy" would cover situations where the chosen court would not apply some rule or principle that was regarded in the State of the court seised as being manifestly part of its fundamental public policy.

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[94] In sub-paragraphs *a)* and *b)*.

[95] In sub-paragraphs *c)* and *d)*.

[96] At paragraphs 70 *et seq*.

[97] See paragraph 70 *supra*.

[98] In recognition or enforcement proceedings, the court addressed will also apply its own choice-of-law rules when deciding questions of capacity under article 7(1)*(b)*.

[99] See paragraph 71 *supra*.

[100] For lawyers from these legal systems, it would seem natural to insert the word "otherwise" before "be manifestly contrary": see footnote No 2 to the present text of the Convention.

98 **The fourth exception: incapable of performance.** The fourth exception is where for exceptional reasons the agreement cannot reasonably be performed. This is intended to apply to cases where it would not be possible to bring proceedings before the chosen court. It need not be absolutely impossible, but the situation must be exceptional. One example would be where there is a war in the State concerned and its courts are not functioning. Another example would be where the chosen court no longer exists, or has changed to such a fundamental degree that it could no longer be regarded as the same court.[101] This exception could be regarded as an application of the doctrine of frustration (or similar doctrines), under which a contract is discharged if, due to a change of circumstances after its conclusion, it is no longer possible to carry it out.[102]

99 **The fifth exception: case not heard.** The fifth exception is where the chosen court has decided not to hear the case. This could be regarded as covered by the fourth exception, but it is sufficiently different to deserve separate treatment. If the chosen court is in a Contracting State, it will be obliged under Article 4 of the Convention to hear the case unless it considers that the agreement is null and void. If the chosen court is in a non-Contracting State, however, it will be under no such obligation; so it might decide for reasons of its own not to hear it. The exception would be of particular importance in this latter case.

100 **The sixth exception: internal matters.** The sixth exception covers the case where all aspects of the matter other than the location of the chosen court are internal to the State of the court seised. In such a case, the Convention does not oblige a Contracting State to permit parties to contract out of the jurisdiction of its courts.[103] This provision mirrors that in Article 4(4), and the comments made above[104] are applicable here too.

Article 6 Interim measures of protection

101 Article 6 provides that nothing in the Convention prevents a court from granting interim measures of protection. This refers primarily to interim (temporary) measures to protect the position of one of the parties, pending judgment by the chosen court,[105] though it could also cover measures granted after judgment that are intended to facilitate its enforcement. An order freezing the defendant's assets is an obvious example. Another example is an interim injunction preventing the defendant from doing something that is alleged to be an infringement of the plaintiff's rights. A third example is an antisuit injunction precluding a party from bringing proceedings in a court other than that chosen.[106] A fourth example would be an order for the production of evidence for use in proceedings before the chosen court. All these measures are intended to support the choice of court agreement by making it more effective. They thus help to achieve the objective of the Convention.

102 Article 6 permits the granting of interim measures only if they are consistent with the choice of court agreement. Thus, an antisuit injunction precluding the bringing of proceedings in the chosen court would not be covered by Article 6.[107]

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[101] See *Carvalho* v. *Hull Blyth* [1979] 1 WLR 1228; [1979] 3 All ER 280; [1980] 1 Lloyd's Rep. 172 (Court of Appeal, England).

[102] Under German law, for example, it could be covered by the doctrine of *Wegfall der Geschäftsgrundlage.*

[103] Article 15 complements this provision by allowing a State to which article 5 *f)* applies to refuse to recognise or enforce a judgment given by the chosen court, if proceedings are brought there.

[104] See paragraph 85.

[105] The measure might be granted either before, or after, proceedings are commenced in the chosen court.

[106] See paragraph 102 *infra*.

[107] See paragraph 89 *supra*.

103 Once the chosen court has given judgment, an interim measure that is inconsistent with the judgment must be rescinded. To allow it to continue in force would conflict with the requirement to recognise the judgment laid down in Article 7. For example, if a court other than that chosen grants an interim injunction to protect a right claimed by the plaintiff, it must lift the injunction if the chosen court rules that the plaintiff has no such right (unless that judgment is not subject to recognition under the Convention). Likewise, an asset-freezing order should be lifted if the chosen court gives judgment for the defendant (unless that judgment is not subject to recognition under the Convention)

104 A court that grants a measure of this kind does so under its own law. The Convention does not require the measure to be granted but it does not preclude the court from granting it. Courts in other Contracting States are not required to recognise or enforce it; however, they are not precluded from doing so. It all depends on national law.

105 It goes without saying that the court designated in the choice of court agreement can grant any interim measure it thinks appropriate. If an interim measure - for example, an injunction - granted by that court is subsequently made permanent, it will be enforceable under the Convention in other Contracting States.[108] If it is merely temporary, it will not constitute a "judgment" as defined by Article 3.[109] In such a case, courts in other Contracting States could enforce it under their national law, but would not be obliged to do so under the Convention.

Article 7 Recognition and enforcement

106 **Reciprocity.** Article 7(1) is the third "key" provision in the Convention. It states that a judgment given by a court in a Contracting State designated in an exclusive choice of court agreement must be recognised and enforced in other Contracting States. Unlike Article 5, therefore, Article 7 operates only in favour of other Contracting States.

107 **Five exceptions.** In addition to laying down the principle of recognition, Article 7(1) also sets out five exceptions to it in sub-paragraphs *a)* to *e)*. Where these exceptions apply, the court addressed is not obliged to recognise or enforce the judgment under the Convention;[110] nevertheless, it may do so if it wishes.[111]

108 **The first exception: null and void.** The first two exceptions mirror those in Article 5. Sub-paragraph *a)* states that recognition or enforcement may be refused if the agreement was null and void under the law of the State of the chosen court.[112] However, it adds, "unless the chosen court has determined that the agreement is valid", thus indicating that the court addressed may not substitute its judgment for that of the chosen court.[113] The purpose of this is to avoid conflicting rulings on the validity of the agreement among different Contracting States: they are all required to apply the law of the State of the chosen court, and they must respect any ruling on the point by that court.

[108] Article 7(1).

[109] See paragraph 61 *supra*.

[110] This Report is concerned only with recognition and enforcement under the Convention. It does not deal with recognition or enforcement under national law. The latter always remains a possibility, even when there is a bar to recognition and enforcement under the Convention.

[111] This is indicated by the use of "may", rather than "shall", in the "*chapeau*" to article 7(1).

[112] The law of the State of the chosen court includes the choice-of-law rules of that State: see paragraph 70 *supra*.

[113] The fact that the court of origin gave judgment does not necessarily mean that it considered the choice of court agreement to be valid: it may have taken jurisdiction on some other ground permitted by its national law.

109 **The second exception: capacity.** The second exception, set out in sub-paragraph *b)*, follows the wording of Article 5 *b)*. In both provisions, capacity is determined by the law of the forum (including its choice-of-law rules). However, the forum is different in the two cases: in Article 5 *b)* it is a court before which proceedings inconsistent with the agreement are brought; in Article 7(1)*(b)* it is the court asked to recognise or enforce the judgment of the chosen court. As mentioned previously, it was thought too ambitious to attempt to unify choice-of-law rules on capacity. The point made in paragraph 94, above, applies here too: since lack of capacity would also make the agreement null and void in terms of Article 7(1)*(a)*, this could mean that capacity is determined *both* by the law of the chosen court *and* by the law of the court seised. **[This interpretation might be contrary to the rule "*Lex specialis derogat legi generali*". Since Article 7(1)*(a)* is a general rule applying to all grounds on which the agreement might be null and void, and Article 7(1)*(b)* is a specific rule applying to incapacity, it could be argued that incapacity is covered only by the latter provision. The matter should be clarified. Article 7(1)*(a)* should say either** "the agreement was null and void under the law of the State of the chosen court **on any ground, including incapacity,** unless the chosen court has determined that the agreement is valid" or "the agreement was null and void under the law of the State of the chosen court **on some ground other than incapacity,** unless the chosen court has determined that the agreement is valid**".]**

110 **The third exception: notification**. The third exception, set out in sub-paragraph *c)*, permits non-recognition if the defendant was not properly notified. **[The details of this have not yet been settled. The question is whether the Convention should itself lay down the factual requirements, as is done in the first three lines of the present text,[114] or whether reference should be made to the law of the State where notification takes place.[115] There was a difference of opinion on this matter. Those who object to the latter formulation point out that service may be invalid for some technical reason under the law of the State where it took place,[116] even though the defendant might have known perfectly well what was happening. In such a case, it may be argued, there is no reason why the judgment should not be recognised and enforced. Insistence on full compliance with the law of the State of notification would make the procedure unnecessarily technical and complicated.**

Those who support the words in the first set of square brackets, on the other hand, point out that some States take the view that rules on the notification of foreign proceedings raise issues of sovereignty. Thus, under the Service Convention,[117] Contracting States may object to the methods of service provided for in Article 10(1)*(a)*, *(b)* and *(c)*.[118] In at least some civil law countries, the service of process is considered a governmental act. Consequently, service of process by judicial officers of a foreign State directly through judicial officers of the State in which service takes place, as envisaged by Article 10 *b)* of the Service Convention, could be seen as an invasion of sovereignty. If there was no reference in Article 7(1)*(c)* to the law of the State where notification takes place (including international conventions to which it is a party), that State might be obliged to recognise and enforce foreign judgments resulting from a

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[114] This reads, "the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence".

[115] See the first passage between square brackets. The words in the second set of square brackets could be added either to the initial (unbracketed) words or to the first passage between square brackets.

[116] For example, the document may not have been translated into the language of the State where notification took place, even though it may have been in a language spoken by the defendant.

[117] *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*.

[118] Argentina, China, Germany, Korea, Norway, Switzerland and others have objected to the methods of service provided for in paragraphs *a)*, *b)* and *c)*; Finland, Ireland, Israel, Japan, Luxembourg, Sweden and others to those provided for in paragraphs *b)* and *c)*; and Denmark to that provided for in paragraph *c)*.

service of process that infringed its sovereignty.[119] Non-recognition is the only sanction that State can apply, if the State which granted the judgment overlooked the invasion of sovereignty.

A possible compromise would be to delete the words in the first set of square brackets, but to allow the State in which service took place to refuse recognition and enforcement if it considered that the method of service constituted a violation of its sovereignty.

Another unresolved question is whether it should be possible for defects in the method of notification to be cured if the defendant entered an appearance and presented his case without challenging the service of the writ, assuming such a challenge to be possible under the law of the State of origin.[120] In many countries, service of a writ in a foreign State in a manner that violates the law of that State would not be regarded as good service; consequently, in such countries, the defendant could have service set aside if this occurred. The plaintiff would then have to begin the action all over again. However, if the infringement of foreign law was not brought to the court's attention, it could not take steps to put matters right. A cynical defendant might deliberately keep quiet about it, so that he would have a ground for challenging enforcement if he lost the case. It is in order to prevent this that it was proposed to add the words, "unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested". On the other hand, it could be argued that the purpose of the rule is to protect the rights of the State in which notification takes place. If this were so, it would follow that that State's rights should not be prejudiced because of the defendant's failure to raise the matter.]

111 **The fourth exception: fraud.** The fourth exception, set out in sub-paragraph *d)*, is that the judgment was obtained by fraud in connection with a matter of procedure. Fraud is deliberate dishonesty or deliberate wrongdoing. Examples would be where the plaintiff deliberately serves the writ, or causes it to be served, on the wrong address; where the plaintiff deliberately gives the defendant wrong information as to the time and place of the hearing; or where either party seeks to corrupt a judge or juror. For the purpose of sub-paragraph *d)*, fraud may be committed by either party or by the court.

112 **The fifth exception: public policy.** The fifth exception, set out in sub-paragraph *e)*, is that recognition or enforcement would be manifestly incompatible with the public policy of the requested State, in particular if the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State. The first part of this provision simply repeats the public-policy exception normally found in conventions of this kind. The second part is intended to focus attention on serious procedural failings in the particular case at hand, thus discouraging an attack on the general procedural standards of the State that granted the judgment.

113 It will be seen that there is considerable overlap among the last three exceptions, since they all relate, partly or wholly, to procedural fairness. Thus, for example, if, owing to the plaintiff's fraud, the writ was not served on the defendant and he was unaware of the proceedings, the exceptions set out in sub-paragraphs *c)*, *d)* and *e)* could all be

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[119] In the judgment of the Japanese Supreme Court of 28 April 1998, *Minshu*, Vol. 52, No 3, p. 853 (English translation in the *Japanese Annual of International Law*, No 42, p. 155), it was held that the direct delivery of process by a Japanese lawyer, who was asked to do so by a Hong Kong lawyer, did not comply with the rules provided for in the Service Convention, and it did not satisfy the requirement of Article 118(ii) of the Japanese Code of Civil Procedure. Article 118(ii) provides as follows: "A final and conclusive judgment rendered by a foreign court shall have effect insofar as it satisfies the following conditions: … (ii) The unsuccessful defendant was served with a summons or an order necessary for the commencement of the procedure other than by service by publication, or has voluntarily appeared without being so served. …"

[120] This could be done by entering a special appearance to challenge jurisdiction.

invoked. The reason for this emphasis on procedural fairness is that in some countries procedural fairness (also known as due process of law, natural justice or the right to a fair trial) is constitutionally mandated. In such countries, it might be unconstitutional to recognise a foreign judgment obtained in proceedings in which a fundamental breach of this principle occurred.

114 In Europe, some 45 States are parties to the *European Convention on Human Rights*, Article 6 of which grants the right to a fair trial. The European Court of Human Rights has held that this precludes a court in a Contracting State to the ECHR from recognizing a judgment from a non-Contracting State if the proceedings that resulted in the judgment infringed the standard laid down in Article 6.[121] This means that none of these 45 States could recognise a judgment where the court that granted it infringed the right to a fair trial. Similar rights are laid down by the Fifth and Fourteenth Amendments to the United States Constitution and by the constitutions of many other countries.[122] For these reasons, the Convention has to ensure that it does not oblige Contracting States to do something that they are not constitutionally able to do.

115 ***Révision au fond.*** Article 7(2) prohibits review as to the merits of the judgment (though it permits such review as is necessary to apply the provisions of Chapter III of the Convention). This is a standard provision in conventions of this kind. Without it, foreign judgments might in some countries be reviewed by the court addressed as if it were an appellate court hearing an appeal from the court of origin.

116 **Findings of fact.** The second sentence of Article 7(2) provides that the court addressed is bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default. In this provision, "jurisdiction" means jurisdiction under the Convention. Since this will be based on the choice of court agreement, the provision applies to findings of fact that relate to the formal or substantive validity of the agreement, including the capacity of the parties to conclude it. It also applies to any findings of fact relevant to determining the scope of the agreement. Thus, when the court addressed is applying Article 7(1)*(a)* or 7(1)*(b)*, it will have to accept findings of fact made by the court of origin. However, the court addressed will not be bound by the legal evaluation made by the court of origin of the facts it has found. For example, if the court of origin found that the choice of court agreement was entered into by electronic means that satisfy the requirements of Article 2(3)*(b)*, the court addressed may, nevertheless, decide that Article 2(3)*(b)* was not satisfied because the text was not accessible for subsequent reference.

117 The position is different with regard to the grounds of non-recognition laid down in sub-paragraphs *c)*, *d)* and *e)* of Article 7(1). These are not concerned with jurisdiction under the Convention, but with public policy and procedural fairness. Thus, the court addressed must be able to decide for itself whether the defendant was notified; whether there was fraud; or whether there was a fair trial: a finding by the judge of origin that he did not take a bribe, for example, cannot be binding on the court addressed.[123]

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[121] *Pellegrini* v. *Italy*, judgment of 20 July 2001 (available at < www.echr.coe.int >); but see the earlier cases of *Drozd and Janousek* v. *France and Spain*, judgment of 26 June 1992, Series A, No 240; (1992) 14 EHRR 745 (paragraph 110); and *Soering* v. *United Kingdom*, judgment of 7 July 1989, Series A, No 161; (1989) 11 EHRR 439 (paragraph 113), in which the (old) European Court of Human Rights, sitting in plenary session, held that recognition had to be refused only if there was a flagrant breach of the standards laid down in Article 6. See also *Lindberg* v. *Sweden*, admissibility decision of 15 January 2004 (available at < www.echr.coe.int >), which, however, concerned a slightly different question.

[122] In the case of Japan, Article 31 of the Constitution provides that "[n]o person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."

[123] The same applies to a finding by an appeal court that the first instance judge was not guilty of corruption.

118 The same is true with regard to procedural fairness under sub-paragraph *e)*. Assume that the defendant resists recognition and enforcement on the ground that the proceedings were incompatible with the fundamental principles of procedural fairness of the requested State. He claims that he was not able to go to the State of origin to defend the case because he would have been in danger of imprisonment on political grounds. A finding by the court of origin that this was not true cannot be binding on the court addressed. Where matters of procedural fairness are concerned, the court addressed must be able to decide for itself.[124]

119 The result is as follows: rulings by the court of origin on the merits of the case cannot be reviewed by the court addressed, irrespective of whether they relate to questions of fact or law; rulings by the court of origin on the validity and scope of the choice of court agreement cannot be reviewed in so far as they relate to questions of fact; rulings by the court of origin on the grounds of non-recognition under sub-paragraphs *c)*, *d)* and *e)* are not binding on the court addressed, irrespective of whether they relate to fact or law. **[If this is not what was intended, the Convention should be amended to make this clear. If it is what is intended, it might be better to amend the text to say, "When applying sub-paragraphs *a)* and *b)* of paragraph 1 of this article, 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."]**

120 **"Recognition" and "enforcement".** Article 7(3) provides that a judgment will be recognised only if it has effect in the State of origin, and will be enforced only if it is enforceable in the State of origin. This raises the distinction between recognition and enforcement. Recognition means that the court addressed accepts the determination of the legal rights and obligations made by the court of origin. If the court of origin held that the plaintiff had, or did not have, a given right, the court addressed accepts that this is the case. Enforcement means the application of the legal procedures of the court addressed to ensure that the defendant obeys the judgment given by the court of origin. Thus, if the court of origin rules that the defendant must pay the plaintiff 1000 Euros, the court addressed will ensure that the money is handed over to the plaintiff. Since this would be legally indefensible if the defendant did not owe 1000 Euros to the plaintiff, a decision to enforce the judgment must logically be preceded or accompanied by the recognition of the judgment. However, recognition need not be accompanied or followed by enforcement. For example, if the court of origin held that the defendant did *not* owe any money to the plaintiff, the court addressed may simply recognise this finding. Therefore, if the plaintiff sues the defendant again on the same claim before the court addressed, the recognition of the foreign judgment will be enough to dispose of the case.

121 In the light of this distinction, it is easy to see why Article 7(3) says that a judgment will be recognised only if it has effect in the State of origin. Having effect means that it is legally valid or operative. If it does not have effect, it will not constitute a valid determination of the parties' rights and obligations. Thus, if it does not have effect in the State of origin, it should not be recognised under the Convention in any other Contracting State. Moreover, if it ceases to have effect in the State of origin, the judgment should not thereafter be recognised under the Convention in other Contracting States.[125]

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[124] The international and constitutional provisions on the right to a fair trial mentioned above probably require this. In paragraph 40 of its judgment in the *Pellegrini* case (footnote No 121 *supra*), the European Court of Human Rights held that the court addressed must "duly satisf[y] [itself] that the relevant proceedings fulfilled the guarantees of Article 6 [of the European Convention on Human Rights]." This would seem to preclude reliance on a finding by the court of origin.

[125] At the Diplomatic Conference held in June 2001, the following text was inserted, in square brackets, into article 25 of the preliminary draft Convention 1999: "A judgment referred to in paragraph 1 shall be recognised from the time, and for as long as, it produces its effects in the State of origin."

122 Likewise, if the judgment is not enforceable in the State of origin, it should not be enforced elsewhere under the Convention. It is of course possible that the judgment will be effective in the State of origin without being enforceable there. Enforceability may, for example, be suspended pending an appeal. In such a case, enforcement will be suspended in other Contracting States until the matter is resolved in the State of origin. Moreover, if the judgment ceases to be enforceable in the State of origin, it should not thereafter be enforced in another Contracting State under the Convention.[126]

123 **Judgments subject to review.** Article 7(4) provides that recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired.[127] This means that the court addressed may delay recognition or enforcement if the judgment might be set aside or amended by another court in the State of origin. It is not, however, obliged to do this.[128] Some courts might prefer to enforce the judgment. If it is subsequently set aside in the State of origin, the court addressed will rescind the enforcement. The judgment-creditor may be required to provide security to ensure that the judgment-debtor is not prejudiced.

124 If the court addressed does not want to enforce the judgment straight away, Article 7(4) gives it the option of either suspending the enforcement process or refusing to enforce the judgment.[129] It goes on to provide, however, that if the court addressed chooses the latter option, that will not prevent a new application for enforcement once the situation in the State of origin is clarified. Here, therefore, refusal means dismissal without prejudice.

125 **Estoppel and foreign judgments.** When the Convention requires recognition or enforcement of a judgment, all it requires is that the final order by the court of origin should be recognised or enforced. Often a court has to rule on various questions of fact or law as preliminary matters before it can rule on the plaintiff's claim. For example, if the plaintiff claims damages in a personal injury case as a result of a motor accident, the court may have to decide whether the brakes on the defendant's car were defective. Likewise, in a patent infringement case, it might have to rule whether the patent is valid. These are both preliminary rulings. They pave the way for the final judgment, which will be that the defendant is, or is not, liable to pay damages to the plaintiff. All the court addressed has to do is to recognise this final order and, if damages are awarded, to enforce the judgment. It is not required to recognise the rulings on the incidental questions. **[It seems that there is no agreement on this question: it should be considered further in the plenary.]**

126 In the civil law States, a judgment normally has effect only as regards the final ruling - for example, the *Tenor* or *Spruch* in Germany and Austria, and the *dispositif* in France. In the common-law world, however, the doctrine known variously as issue estoppel, collateral estoppel or issue preclusion permits a court in a later case to recognise rulings on incidental questions given in an earlier judgment. This can apply both where the original judgment was given by a court in the same State and where it

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[126] At the Diplomatic Conference held in June 2001, the following text was inserted, in square brackets, into article 25 of the preliminary draft Convention 1999: "A judgment referred to in the preceding paragraphs shall be enforceable from the time, and for as long as, it is enforceable in the State of origin."

[127] This rule will be applied only if enforcement of the judgment has not been suspended in the State of origin by reason of the appeal. If it has been suspended, the rule in article 7(3) will be applicable: see paragraph 122 *supra*.

[128] This assumes that the judgment is still enforceable in the State of origin.

[129] As stated in footnote No 93 *supra*, in some civil law countries the judge has only limited powers to stay the proceedings.

was given by a court in another State.[130] The Convention does not preclude a court from doing this. However, it does not require it. The application of these various forms of estoppel is outside the scope of the Convention. **[It seems that there is no agreement on this question: it should be considered further in the plenary.]**

Article 8 Documents to be produced

127 Article 8(1) lists the documents to be produced by the party seeking recognition or enforcement of a judgment under the Convention.[131] The way in which the documents must be produced depends on the procedural law of the requested State. Article 8(1)*(b)* requires documentary evidence that the defendant was notified, but this applies only in the case of a default judgment. In other cases, it is assumed that the defendant was notified unless he or she produces evidence to the contrary. The law of the requested State determines the consequences of failure to produce the required documents. Excessive formalism should, however, be avoided: if the judgment-debtor was not prejudiced, the judgment-creditor should be allowed to rectify omissions.

128 The fact that recognition is mentioned in the "*chapeau*" to Article 8 does not mean that there has to be any special procedure. Recognition of a judgment under the Convention can be entirely automatic.[132] However, if the other party disputes it, the party requesting recognition must produce the documents required by Article 8.

129 Article 8(2) provides that the court addressed may require the production of further documents or other evidence where this is necessary in order to establish that the conditions for recognition and enforcement have been satisfied. This makes clear that the list in paragraph 1 is not exhaustive. Production of further documents may be required to the extent that it is necessary to verify that the requirements of Chapter III of the Convention have been satisfied. Unnecessary burdens on the parties should be avoided.

130 Article 8(3) provides for the Hague Conference on Private International Law to recommend and publish a form which may be used by a person seeking recognition or enforcement of a judgment under the Convention. The use of such a form will not be obligatory. Information contained in it may be relied on by the court addressed in the absence of challenge. Even if there is no challenge, however, the information is not conclusive: the court addressed can decide the matter in the light of all the evidence before it. The Special Commission expressed the desire that the form should be published in the *Collection of Conventions*, though it also wanted to make it possible to amend it without undue difficulty, to meet new needs or to overcome problems that were not originally foreseen. For this reason, it was decided that the form should not constitute an Annex to the Convention. **[However, another option might be to follow the example of the 1980 *Hague Convention on Access to Justice*, which provides in Article 30, "The model forms annexed to this Convention may be amended by a decision of a Special Commission convoked by the Secretary General of the Hague Conference to which all Contracting States and all Member States shall be invited. Notice of the proposal to amend the forms shall be included in the agenda for the meeting."]**

131 Article 8(4) provides that the court addressed may require a translation of any document referred to in Article 8. This depends on the rules of procedure of the requested State.

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[130] On the latter, see Peter Barnett, *Res Judicata, Estoppel and Foreign Judgments* (Oxford University Press, Oxford, England, 2001).

[131] This provision is virtually identical to sub-paragraphs *a)* to *c)* of article 29(1) in the preliminary draft Convention 1999. The commentary on the latter in the Nygh / Pocar Report is at pp. 109–110.

[132] See paragraph 132 *infra*.

Article 9 Procedure

132 Article 9 provides that the procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment are governed by the law of the requested State unless the Convention provides otherwise.[133] Where there is no special procedure for the recognition of a foreign judgment under the law of the requested State, recognition (as distinct from enforcement) must be granted without any special procedure. In all proceedings covered by Article 9, the court addressed must act expeditiously, though there is no explicit sanction against delay. This means that the court must use the most expeditious procedure available to it. Contracting States should consider ways in which provision can be made to ensure that unnecessary delays are avoided.

Article 10 Damages

133 Article 10 deals with two issues: non-compensatory damages and excessive damages. The latter may be either compensatory or non-compensatory. The first paragraph applies only to non-compensatory damages. The second (which is concerned with excessive damages) appears to cover both, though the Nygh / Pocar Report states that it applies only to compensatory damages.[134] The third applies to both.[135]

134 Compensatory damages are intended to compensate the plaintiff for loss suffered as a result of the wrongful act of the defendant. Non-compensatory damages are intended to serve a different purpose, usually to punish the defendant for his wrongdoing, or to deter others from doing something similar. They are sometimes called "exemplary" or "punitive" damages. However, Article 10(1) is not limited to damages so called: it applies to all damages that are not compensatory.

135 **Non-compensatory damages.** The first sentence of Article 10(1) requires a court to recognise and enforce judgments for non-compensatory damages to the extent to which a court in the requested State could itself have awarded similar damages.[136] It does not expressly say that it is not obliged to recognise or enforce a judgment for non-compensatory damages if it could not itself have awarded similar or comparable damages, but this is what was intended. If non-compensatory damages cannot be awarded in any circumstances in the State addressed,[137] the part of the foreign judgment

[133] Except for purely verbal alterations, this is the same as article 30 of the preliminary draft Convention 1999. The commentary on this article is at p. 100 of the Nygh / Pocar Report.

[134] See p. 111. In practice, at least, it will be applied only to compensatory damages, since non-compensatory damages are adequately dealt with by the first paragraph.

[135] During the First Part of the Diplomatic Conference in 2001, it was inquired whether statutory damages (where a statute has determined the amount to be awarded in case of breach), liquidated damages (where a contract has determined the amount to be paid in case of breach) and fixed interest on damages awards would fall within the scope of article 33 and, if so, whether their character would be compensatory or non-compensatory. The co-reporters indicated that article 33 would be applicable in such cases and that the classification of such damages as compensatory or punitive would be determined by the requested court. That court would take into account whether the statutory provision in question of the originating forum, or the contractual provision as interpreted according to its governing law, merely sought to estimate what was required to compensate the plaintiff or sought to impose a penalty (see footnote 176 to the 2001 Interim Text).

[136] It cannot, therefore, invoke the public policy exception in article 7(1)*(e)* as a ground for refusing to recognise an award solely because the damages are non-compensatory.

[137] Generally speaking, this is the position in civil-law countries, where punishment is regarded as the business only of the criminal law.

awarding non-compensatory damages will never be recognised or enforced.[138]

136 A court in a Contracting State is required to recognise and enforce an award of non-compensatory damages if, and to the extent that, it could have awarded similar or comparable damages itself. The test is whether it could have done so if the action had originally been brought before it. "Similar" damages are damages of the same kind; "comparable" damages are non-compensatory damages of a different kind that nevertheless fulfil a comparable function.

137 The phrase "similar or comparable damages" refers not only to the circumstances in which non-compensatory damages may be awarded but also to the amount of the damages. Thus, if the court addressed could have awarded non-compensatory damages, but only for a small sum, it would not be obliged to recognise or enforce a judgment for a significantly greater sum. However, the word "comparable" makes clear that the award need not be for exactly the same amount.[139]

138 The position is, therefore, that a court is never obliged to recognise or enforce an award for non-compensatory damages if it cannot itself award non-compensatory damages. Moreover, if it can award them only in particular circumstances - for example, where the defendant deliberately commits a tort in the belief that the profit he or she will derive will outweigh any compensatory damages that could be awarded - it would not be obliged to recognise or enforce the judgment if those circumstances did not pertain. If it could have awarded non-compensatory damages in the circumstances of the case, but only for a much smaller amount, it is obliged to recognise and enforce the judgment only for that amount. In all cases, however, it is permitted to recognise and enforce it to the full amount.

139 **Excessive damages.** Article 10(2) deals with excessive damages. Even if it also applies to non-compensatory damages, its main importance derives from its application to compensatory damages. The purpose of Article 10(2)*(a)* is to allow the court addressed to cut down an award of damages - even if they are purely compensatory - if it considers them to be grossly excessive. It may do this, however, only after proceedings have taken place in which the judgment-creditor has had the opportunity to be heard and only if the judgment-debtor satisfies the court - the onus is on him - that in all the circumstances, including those existing in the State of origin, the damages *are* grossly excessive. However, as is provided by Article 10(2)*(b)*, the court must in no event recognise or enforce the judgment in an amount less than that which could have been awarded in the requested State in the same circumstances, including those existing in the State of origin. This is to prevent the abuse of Article 10(2)*(a)*.

140 In applying Article 10(2), the court addressed must assess the appropriateness of the award on the basis of all the circumstances, including those in the State of origin. It cannot reduce the amount simply because things cost more in that State. The cost of medical treatment is much greater in some States than in others. To the extent that the award reflects this, it cannot be deemed excessive. The same is true with regard to salaries. If the award is based on lost earnings, it will naturally reflect what the victim would have earned if the tort had not occurred. By the standards of the requested State,

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[138] For judgments to this effect, see BGH 4 June 1992, BGHZ 118, 312 (*Bundesgerichtshof*, Germany); Supreme Court of Japan, judgment of 11 July 1997, *Minshu*, Vol. 51, No 6, p. 2578 (English translation in the *Japanese Annual of International Law*, No 41, p. 104). In both cases, the public policy exception was invoked to deny enforcement to the part of the award in an American judgment that represented punitive damages.

[139] On the question of severability, see paragraph 149.

this might seem a great deal of money; nevertheless, the award cannot normally be reduced for this reason.

141 Article 10(2) will apply most often with regard to damages for matters that cannot be objectively assessed - for example, pain and suffering; loss of an arm, a leg or an eye; loss of reputation; hurt feelings; or similar matters. Here the court of origin will normally make an award guided solely by the level of past awards. If this level is grossly excessive, the court addressed will reduce the award.

142 The Nygh / Pocar Report states that, as a general principle, "grossly excessive" is likely to mean "grossly excessive according to the standards usually applied by the courts of the State of origin";[140] however, this view was strongly criticized by several delegations. If the court addressed had to apply the standards of the State of origin, Article 10(2) would be almost totally deprived of effect: if an award was "grossly excessive" by the standards of the State in which it was made, it would almost certainly be set aside on appeal, in which case the question of its enforcement would not arise.

143 It might be best not to use the word "standard", since it could suggest the application of rules, though if "standards" are to be applied, they must be those of the State addressed. This does not, however, mean that the court addressed can refuse to enforce an award simply because it would itself have made a smaller one, or even none at all. The test is not one of rules but of judgment. The court addressed must decide whether, in its judgment, the damages are grossly excessive.

144 The test under Article 10(2) is similar to that of public policy. The question of damages could have been left to the public policy exception in Article 7(1)*(e)*, but it was decided to devote a special provision to it, partly to introduce greater certainty, and partly to reassure those States that might have been unwilling to sign the Convention if they had had to enforce awards they regarded as excessive.[141] Thus, though public policy is expressly mentioned only in Article 7(1)*(e)* as a ground for non-recognition of a judgment, the essential question that the court must ask when applying Article 10(2) is whether the award is so excessive that its recognition or enforcement would be contrary to public policy.

145 This test must be applied to the total award: it should not be applied separately to each head of damages. It may well be that the court of origin awarded very large damages under one head, but this might have been to compensate for the fact that it could not, or did not, award damages under another head. For example, take the case of a wrongful-death action brought by the widow of the victim. One legal system might compensate her on the basis of the financial support she lost as a result of her husband's death. Another might compensate her for the emotional devastation she suffered. The final award might be much the same in both cases. It would be wrong, therefore, for the court addressed to apply the "grossly excessive" test individually to each item of compensation, since this might result in her receiving far less that she would have if the action had originally been brought before the court addressed.

146 The test is one of damages, not liability; therefore, the court addressed cannot refuse to enforce the judgment simply because it would not have regarded the defendant as liable, or because it could not have awarded damages for what he did. For example, in some legal systems defamation is a criminal offence but not a tort; in others, it is a tort

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[140] At p. 114.

[141] It was also intended to ensure that States would not use the public policy exception of the Convention to refuse to enforce an award of punitive damages if they could have awarded similar or comparable damages themselves.

but not a crime. If a court in a State where the latter system prevails grants an award of damages for libel, a court in a State that applies the former system cannot refuse to enforce it on the basis of Article 10(2)*(a)* simply because it could not have awarded damages in similar circumstances. However, if it feels that, in all the circumstances (including those in the State of origin), the sum awarded is out of all proportion to the wrong done, it will be entitled to reduce the award.[142]

147 The same would apply to actions in tort for inducing a breach of contract. Assume that A and B enter into a contract, and C induces B to break the contract. In these circumstances, most common law systems would consider that A can sue C in tort. In some other legal systems, this may not be possible. However, if a common law court were to award damages in such an action, another court ought not to refuse to enforce the judgment on the basis of Article 10(2)*(a)* simply because it would not have granted any damages if the action had originally been brought before it. However, it may cut the award down if it thinks that the amount of the award is out of all proportion to the harm inflicted on A.

148 **Legal costs and expenses.** The third paragraph of Article 10 applies to proceedings under both the first paragraph and the second paragraph. It provides that the court addressed must take into account whether, and to what extent, the award - whether stated to be compensatory or non-compensatory - is intended to cover costs and expenses relating to the proceedings. This provision was included because the rules regarding legal costs differ in different legal systems. In most countries, the successful plaintiff is entitled to "costs". This is a sum of money added to the damages to cover the costs and expenses of the legal proceedings. However, the rules for assessing costs can differ widely. In many countries, they cover lawyers' fees.[143] In the United States, they do not. To compensate for this, juries in the United States often grant higher damages, sometimes designated as punitive damages. The court addressed is obliged by Article 10(3) to take this into account in deciding whether the award is grossly excessive: it must take the amount of the judgment and compare it with the total amount it would have awarded, including costs. In doing this, it must also take into account the prevailing level of lawyers' fees in the State of origin.

Article 11 Severability

149 Article 11 provides for the recognition and enforcement of a severable part of a judgment where this is applied for, or where only part of the judgment is capable of being recognised or enforced under the Convention.[144] For example, if an award of punitive damages is not enforced by reason of Article 10(1), the remainder of the award must be enforced if it satisfies the requirements of Article 7.[145] In order to be severable, the part in question must be capable of standing alone, and it must be reasonable and appropriate to recognise or enforce it independently of the rest of the judgment.[146] In so far as this depends on a rule of law, the law of the court addressed must be applied.

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[142] If the court addressed considers, on grounds other than the size of the award or the fact that it is non-compensatory, that it would be manifestly contrary to its public policy to recognise or enforce the judgment, it can invoke the public policy exception in article 7(1)*(e)*. This might occur, for example, if it considered that a judgment for libel constituted an infringement of the right of free speech.

[143] There may, however, be considerable differences in the way in which these are assessed: they may cover more or less all that the successful party has had to pay his lawyer; or they may fall far short of this.

[144] The equivalent provision in the preliminary draft Convention 1999 is article 34. The commentary on this provision is at p. 115 of the Nygh / Pocar Report.

[145] See footnote 138 for cases in Germany and Japan where this occurred.

[146] This would normally depend on whether enforcing only one part of the judgment would significantly change the obligations of the parties: see the Nygh / Pocar Report, p. 115. If any questions of law arose, they would have to be decided by the law of the requested State: *ibid.*

Article 12 Settlements

150 Article 12 provides that settlements which, in the course of proceedings, are approved by, or concluded before, a court of a Contracting State designated in an exclusive choice of court agreement, and which are enforceable in the same manner as a judgment in that State, must be enforced in other Contracting States in the same manner as a judgment.[147]

151 Such a settlement is sometimes called a "judicial settlement", a translation of the French "*transaction judiciaire*".[148] In the sense in which the term is used here, judicial settlements are unknown in the common-law world. In France and other civil law countries, they are contracts concluded before a judge by which the parties put an end to litigation, usually by making mutual concessions. A judicial settlement is different from a consent order in the common law sense (an order made by the court with the consent of both parties), since a consent order is a judgment and may be recognised and enforced as such under Article 7 of the Convention. On the other hand, a judicial settlement is different from an out-of-court settlement, since it is made before a judge and puts an end to the proceedings. For these reasons, a special provision is devoted to it in the Convention.

152 Article 12 does not provide for the recognition of judicial settlements, but only for their enforcement.[149] The significance of this is best explained by an example.

> Assume that A and B conclude a contract with an exclusive choice of court clause in favour of the courts of State X. Subsequently, A sues B before a court in that State for 1000 Euros, a sum which he claims is due under the contract. The parties then enter into a judicial settlement under which B agrees to pay A 800 Euros, State X being a State where this may be done.

If B fails to pay, A may bring proceedings to enforce the settlement in State Y, another Contracting State. Such proceedings will be covered by Article 12 of the Convention. Assume, however, that B pays the money in compliance with the settlement without any need for enforcement proceedings. If A nevertheless brings a new action for the remaining 200 Euros before the courts of State Y, B cannot ask the court to *recognise* the settlement under the Convention as a defence to the claim. The Convention does not provide for this, mainly because the effects of settlements are so different in different legal systems. However, the Convention does not preclude a court from treating the settlement as a contractual defence to the claim, and this is what most courts would do.

Article 13 No legalisation

153 Article 13 provides that all documents forwarded or delivered under the Convention must be exempt from legalisation or any analogous formality.[150] The latter would include, for example, an *Apostille*.

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[147] The equivalent provision in the preliminary draft Convention 1999 is article 36. The commentary in the Nygh / Pocar Report is at pp. 118–119.

[148] On an analogous provision in the Brussels Regulation, see Hélène Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (3rd edn, 2002, LGDJ, Paris), Chapter 4 (pp. 387 *et seq.*).

[149] On the distinction between recognition and enforcement, see paragraph 120 *supra*.

[150] This is equivalent to article 29(2) of the preliminary draft Convention 1999. The commentary on that provision in the Nygh / Pocar Report is at p. 110, where it is stated that this is a practice that is well established in the context of the Hague Conventions.

Article 14 Limitation of jurisdiction

154 It was said above that it is the policy of the Convention to exclude wholly domestic situations from its scope. Effect is given to this policy by Articles 4(4), 5*(f)* and 15. Article 14 pursues the opposite policy: it permits a State to make a declaration that its courts will not apply Article 4 of the Convention to cases that are wholly *foreign*. It states that upon ratification, acceptance, approval or accession, a State may declare that its courts may refuse to determine disputes covered by an exclusive choice of court agreement if, except for the agreement, there is no connection between that State and the parties or the dispute.[151]

155 In practice, parties sometimes designate the courts of a State with which neither they nor the facts of the case have any connection. The reason is that neither party wants to go before the courts of the other party's State; so they agree to choose the courts of a neutral State. Some countries welcome this.[152] Others feel that it imposes an undue burden on their judicial systems. The purpose of Article 14 is to accommodate States in the latter category.

Article 15 Limitation of recognition and enforcement

156 Article 15 provides that upon ratification, acceptance, approval or accession, a State may declare that its courts may refuse to recognise or enforce a judgment of a court in another Contracting State if all parties are habitually resident [only] in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the exclusive choice of court agreement, are connected with the requested State.[153] This provision pursues the policy, discussed above, of excluding wholly domestic situations from the scope of the Convention. It complements Article 5 *f)*, the provision that permits a court other than that chosen to hear the case if the situation is wholly domestic to the State of that court. It applies where no proceedings are brought before that court. If, instead, the plaintiff brings proceedings before the chosen court, and that court gives judgment, the court that would have been entitled to invoke Article 5 *f)* could refuse to recognise or enforce the judgment on the basis of Article 15, if an appropriate declaration had been made.

Article 16 Limitation with respect to asbestos related matters

157 Article 16 provides that upon ratification, acceptance, approval or accession, a State may declare that it will not apply the provisions of the Convention to exclusive choice of court agreements in asbestos related matters. This is because personal-injury and wrongful-death claims for asbestosis have caused serious problems in certain countries, and some of these countries have limited or excluded choice of court agreements in such cases. This provision is intended to help those countries. It applies to actions concerning liability for injury or illness caused by exposure to asbestos, as well as actions (such as insurance claims) arising out of such liability.

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[151] Since the Convention uses the words "may refuse", the courts of a State that made such a declaration would have a discretion whether or not to exercise jurisdiction.

[152] For example, English courts have for many years been willing to hear such cases, and in 1984 New York adopted special provisions to facilitate them: see *New York Civil Practice Law and Rules*, Rule 327(b) and New York General Obligations Law § 5-1402.

[153] Since the Convention uses the words "may refuse", the courts of a State that made such a declaration would have discretion whether or not to recognise and enforce such judgments under the Convention.

Article 17 Uniform interpretation

158 Article 17 states that in the interpretation of the Convention regard must be had to its international character and to the need to promote uniformity in its application. This provision is addressed to courts applying the Convention. It requires them to interpret it in an international spirit so as to promote uniformity of application. Where reasonably possible, therefore, foreign decisions and writings should be taken into account. It should also be kept in mind that concepts and principles that are regarded as axiomatic in one legal system may be unknown or rejected in another. The objectives of the Convention can be attained only if all courts apply it in an open-minded way.[154]

Article 18 Non-unified legal system

159 Article 18 is concerned with the problems that result from the fact that some States are composed of two or more territorial units, each with its own judicial system. This occurs most often in the case of federations - for example, Canada or the United States - but can also occur in other States as well - for example, China or the United Kingdom. This can create a problem because one has to decide in any particular case whether the appropriate unit is the State as a whole ("State" in the international sense) or whether it is a particular territorial unit within that State.

160 Article 18(1) solves this problem by providing that, where different systems of law apply in the territorial units with regard to any matter dealt with in the Convention, the Convention is to be construed as applying to the "relevant territorial unit" - in other words, it applies either to the State in the international sense or to the relevant territorial unit, whichever is appropriate. This might seem unsatisfactory, but in fact it is usually obvious what the answer is.

161 The most important situation in which the question arises is in connection with the definition of an exclusive choice of court agreement in Article 2. The way in which Article 18 applies in this situation has already been discussed.[155] Another situation is the determination of the habitual residence of an individual or company. This is of importance under Articles 4(4), 5*(f)* and 15. It is considered further below in connection with Article 18(2).[156]

162 A reference in the Convention to the law of a State must be construed as referring to the law applicable in the circumstances of the case. Thus, the statement in Article 6 referring to interim measures under "the law of the State of the court" refers to the law applied by the court before which a request for interim measures has been made. If, as will normally be the case, interim measures are regarded as a matter of procedure, it will be the procedural law of that court. This will be either state law or federal law, depending on the system of the State in question.[157] The same applies to other provisions of the Convention which refer to procedural law.[158] It is not clear that any of the provisions of the Convention refer to the substantive law of a State, but if they do, the reference would be to the law that would be applied in the circumstances of the case.[159]

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[154] The equivalent provision in the preliminary draft Convention 1999 is article 38(1). The commentary on this in the Nygh / Pocar Report is at pp. 118–119.

[155] Paragraph 51.

[156] See paragraphs 163 *et seq*.

[157] In the United States, state courts apply state procedural law and federal courts apply federal procedural law.

[158] See, for example, articles 7(3), 7(4) and 9.

[159] For example, article 10(1) states that a court must recognise an award of punitive damages to the extent that it could itself have granted similar damages in the circumstances of the case. This is a reference to the law that the court would have applied if the proceedings had originally been brought before it. In some States, it would probably be regarded as governed by the law of procedure.

163 Article 18(2) gives further effect to the policy of not applying the Convention to wholly domestic situations. It states that a Contracting State with two or more territorial units in which different systems of law are applied is not bound to apply the Convention to situations involving solely such different territorial units.

164 There are three situations in which Article 18(2) could be relevant. The first concerns the requirement in Article 4 that the chosen court must hear the case. This requirement is subject to the qualification in Article 4(4) that it does not apply in wholly domestic situations as defined in that provision. **[The precise details of the definition have yet to be settled.]** The effect of Article 18(2) is that, when Article 4(4) is applied, "State" must be construed to mean "State" in the international sense. Thus, for example, if the chosen court is in England and the situation is entirely internal to the United Kingdom on the basis of the test laid down in Article 4(4), that provision is not rendered inapplicable by virtue of the fact that one of the parties is habitually resident in Scotland. The same would apply if the chosen court was a state court in New Jersey: "State" in Article 4(4) would nevertheless refer to the United States as a whole, so that if one party was habitually resident in the state of New York, Article 4(4) would not thereby be rendered inapplicable.[160] The case would still be purely internal to the U.S.

165 The second situation in which Article 18(2) would apply is with regard to the obligation imposed by Article 5 on courts other than that chosen not to hear the case. Under Article 5 *f)*, that obligation does not apply where, except for the location of the chosen court, the situation is wholly domestic to the State of the court seised. The effect of Article 18(2) is again to require "State" to be construed in the international sense. Consequently, if the parties choose the courts of England, but otherwise the case is wholly domestic to the United States, Article 5 *f)* will not be rendered inapplicable simply because the parties are habitually resident in different states of the United States.[161]

166 The third situation in which Article 18(2) would apply is where a court is asked to recognise or enforce a judgment under the Convention. Chapter III of the Convention contains no provision relating to wholly domestic situations; however, Article 15 allows a State to make a declaration that it will not recognise or enforce a judgment of a court in another Contracting State if, except for the location of the chosen court, the situation is wholly domestic to the requested State. The effect of Article 18(2) with regard to this question is two-fold. First of all, if the requested State has made a declaration under Article 15, the phrase "requested State" in that article must be construed to mean "State" in the international sense. Thus, for example, if the United Kingdom were to make such a declaration, it would not be obliged to recognise a judgment given by the court (outside the United Kingdom) that was designated by the parties, simply because one party is domiciled in England and the other in Scotland. Secondly, even if no declaration is made under Article 15, a court in England would never be obliged to apply the Convention with regard to the recognition of a judgment given by a Scottish court.

167 Article 18(3) provides that a court in a territorial unit of a Contracting State is not bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced under the Convention by a court in another territorial unit of the first Contracting State. This means, for example, that a court in New York is not bound to recognise a judgment from Japan solely because a court in New Jersey has done so.

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[160] The same result would follow if, on the basis of article 18(1)*(b)*, one construed the word "State" in article 3(2) to refer to "State" in the international sense. An American company would then be habitually resident in the United States as a whole, rather than in any particular state of the United States.

[161] See previous footnote.

Article 21 Non-unified legal system[162]

168 Article 21 is also concerned with States that consist of two or more territorial units. It permits such a State to declare that the Convention will extend to only some of its territorial units. Such a declaration may be modified at any time. This provision is particularly important for States in which the legislation necessary to give effect to the Convention would have to be passed by the legislatures of the units (for example, by provincial legislatures in Canada), though it could also be of use to other States. Thus, the United Kingdom could ratify for England only, and China for Hong Kong only.

[162] **[Since this title has already been used for article 18, it might be better to choose another title.]**

ANNEX

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

WORK. DOC. No 49 E

Revised*

**Commission spéciale sur la compétence,
la reconnaissance et l'exécution des jugements
étrangers en matière civile et commerciale
(du 1er au 9 décembre 2003)**

**Special Commission on Jurisdiction,
Recognition and Enforcement of Foreign Judgments
in Civil and Commercial Matters
(1 to 9 December 2003)**

Distribution: By mail

Proposal by the Drafting Committee

DRAFT ON EXCLUSIVE CHOICE OF COURT AGREEMENTS

The States signatory to the present Convention,

Desiring to promote international trade and investment through enhanced judicial cooperation,

Believing that such enhanced cooperation requires a secure international legal regime that ensures the effectiveness of exclusive choice of court agreements by parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements,

Have resolved to conclude the following *Convention on Exclusive Choice of Court Agreements* and have agreed upon the following provisions -

CHAPTER I SCOPE AND DEFINITIONS

Article 1 Scope

1. The present Convention shall apply to exclusive choice of court agreements concluded in civil or commercial matters.

2. The Convention shall not apply to exclusive choice of court agreements -

   a) between a natural person acting primarily for personal, family or household purposes (the consumer) and another party acting for the purposes of its trade or profession, or between consumers; or

   b) relating to individual or collective contracts of employment.

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* Upon request of the Special Commission, the Permanent Bureau has aligned the English and French versions of this Document with the terminology traditionally used in Hague Conventions. Changes were made in agreement with the Chairman of the Drafting Committee.

3. The Convention shall not apply to proceedings that have as their object any of the following matters -

a) the status and legal capacity of natural persons;

b) maintenance obligations;

c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;

d) wills and succession;

e) insolvency, composition and analogous matters;

f) contracts for the carriage of goods by sea [and other admiralty or maritime matters];

g) anti-trust / competition matters;

h) nuclear liability;

i) rights *in rem* in immovable property;

j) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;

k) the validity of patents, trademarks, protected industrial designs, and layout-designs of integrated circuits;

l) [the validity of other intellectual property rights the validity of which depends on, or arises from, their registration, except copyright]; or

m) the validity of entries in public registers.

4. Proceedings are not excluded from the scope of the Convention if a matter referred to in paragraph 3 arises merely as an incidental question.

5. The Convention shall not apply to arbitration and proceedings related thereto, nor shall it require a Contracting State to recognise and enforce a judgment if the exercise of jurisdiction by the court of origin was contrary to the terms of an arbitration agreement.

6. Proceedings are not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any person acting for a State is a party thereto.

7. Nothing in this Convention affects the privileges and immunities of sovereign States or of entities of sovereign States, or of international organisations.

Article 2 Exclusive choice of court agreements

1. In this Convention, “exclusive choice of court agreement” means an agreement concluded by two or more parties that meets the requirements of paragraph 3 and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one specific court to the exclusion of the jurisdiction of any other courts.

2. A choice of court agreement which designates the courts of one State or one specific court shall be deemed to be exclusive unless the parties have expressly provided otherwise.

3. An exclusive choice of court agreement must be entered into or evidenced -

a) in writing; or

b) by any other means of communication which renders information accessible so as to be usable for subsequent reference.

4. An exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

Article 3 Other definitions

1. In this Convention "judgment" means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that such determination relates to a judgment which may be recognised or enforced under this Convention.

2. For the purposes of this Convention, an entity or person other than a natural person shall be considered to be habitually resident in the State -

a) where it has its statutory seat;

b) under whose law it was incorporated or formed;

c) where it has its central administration; or

d) where it has its principal place of business.

CHAPTER II JURISDICTION

Article 4 Jurisdiction of the chosen court

1. The court or courts 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.

2. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.

3. The preceding paragraphs shall not affect rules on jurisdiction related to subject matter or to the value of the claim, or the internal allocation of jurisdiction among the courts of a Contracting State [unless the parties designated a specific court].

4. The preceding paragraphs shall not apply if all the parties to the agreement are habitually resident [only] in the State of the chosen court [and the relationship of the parties and all elements relevant to the dispute are connected with that State].[1]

[1] The relevant time for the purposes of this test (e.g. the time of the agreement and / or the time of commencement of the proceedings) remains to be discussed.

Article 5 Obligations of a court not chosen

If the parties have entered into an exclusive choice of court agreement, a court in a Contracting State other than the State of the chosen court shall suspend or dismiss the proceedings unless -

a) the agreement is null and void under the law of the State of the chosen court;

b) a party lacked the capacity to enter into the agreement under the law of the State of the court seised;

c) giving effect to the agreement would lead to a very serious injustice or would[2] be manifestly contrary to fundamental principles of public policy;

d) for exceptional reasons the agreement cannot reasonably be performed;

e) the chosen court has decided not to hear the case; or

f) the parties are habitually resident [only] in the State of the court seised, and the relationship of the parties and all other elements relevant to the dispute, other than the agreement, are connected with that State. [3]

Article 6 Interim measures of protection

Nothing in this Convention shall prevent a party from requesting an interim measure of protection from any court or prevent a court from granting such a measure under the law of the State of the court.

CHAPTER III RECOGNITION AND ENFORCEMENT

Article 7 Recognition and enforcement[4]

1. A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the following grounds[5] -

a) the 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;

b) a party lacked the capacity to enter into the agreement under the law of the requested State;

c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence [or was not notified in accordance with the law of the State where such notification took place] [, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested];

d) the judgment was obtained by fraud in connection with a matter of procedure; or

[2] One delegation suggested the inclusion of the word “otherwise” at this point.

[3] The relevant time for the purposes of this test (e.g. the time of the agreement and / or the time of commencement of the proceedings) remains to be discussed.

[4] Recognition and enforcement of judgments where a matter referred to in article 1(3) or article 16 has arisen as an incidental question remains to be discussed. Further reflection may also have to be given to the question of irreconcilable judgments.

[5] Further consideration is required as to whether the matters covered by article 5(c) and (d) are adequately reflected in this paragraph.

e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, in particular if the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State.[6]

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

3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

4. Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 8 Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce -

a) a complete and certified copy of the judgment;

b) if the judgment was rendered by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;

c) all documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin.

2. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require evidence of the exclusive choice of court agreement, and any other necessary documents.

3. An application for recognition or enforcement may be accompanied by a form recommended and published by the Hague Conference on Private International Law.

4. The court addressed may require a translation of any document referred to in this Article.

Article 9 Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.

Article 10 Damages

1. A judgment which awards non-compensatory damages, including exemplary or punitive damages, shall be recognised and enforced to the extent that a court in the requested State could have awarded similar or comparable damages. Nothing in this paragraph shall preclude the court addressed from recognising and enforcing the judgment under its law for an amount up to the full amount of the damages awarded by the court of origin.

[6] The Drafting Committee was not able to accommodate the concerns of one member with respect to this paragraph, and considers there is an issue to be resolved. An alternative text was suggested:

(e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including where the specific proceedings leading to the judgment were seriously unjust with respect to procedural fairness.

2. a) Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, recognition and enforcement may be limited to a lesser amount.

   b) In no event shall the court addressed recognise or enforce the judgment in an amount less than that which could have been awarded in the requested State in the same circumstances, including those existing in the State of origin.

3. In applying the preceding paragraphs, the court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 11 Severability

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.

Article 12 Settlements

Settlements which a court of a Contracting State designated in an exclusive choice of court agreement has approved, or which have been concluded before that court in the course of proceedings, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.

CHAPTER IV GENERAL CLAUSES

Article 13 No legalisation

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality.

Article 14 Limitation of jurisdiction

Upon ratification, acceptance, approval or accession, a State may declare that its courts may refuse to determine disputes covered by an exclusive choice of court agreement if, except for the agreement, there is no connection between that State and the parties or the dispute. [7]

Article 15 Limitation of recognition and enforcement

Upon ratification, acceptance, approval or accession, a State may declare that its courts may refuse to recognise or enforce a judgment of a court in another Contracting State if all parties are habitually resident [only] in the requested State, and the relationship of the parties and all other elements relevant

[7] The relevant time for the purposes of this test (*e.g.* the time of the agreement and / or the time of commencement of the proceedings) remains to be discussed.

to the dispute, other than the exclusive choice of court agreement, are connected with the requested State. [8]

Article 16 Limitation with respect to asbestos related matters

Upon ratification, acceptance, approval or accession, a State may declare that it will not apply the provisions of the Convention to exclusive choice of court agreements in asbestos related matters.

Article 17 Uniform interpretation

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

Article 18 Non-unified legal system[9]

1. In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention –

a) any reference to the law or procedure of a State shall be construed as referring to the law or procedure in force in the relevant territorial unit;

b) any reference to habitual residence in a State shall be construed as referring to habitual residence in the relevant territorial unit;

c) any reference to the court or courts of a State shall be construed as referring to the court or courts in the relevant territorial unit; and

d) any reference to the connection with a State shall be construed as referring to the connection with the relevant territorial unit.

2. Notwithstanding the preceding paragraphs, a Contracting State with two or more territorial units in which different systems of law are applied shall not be bound to apply this Convention to situations involving solely such different territorial units.

3. The court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law are applied shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced by the court in another territorial unit of the same Contracting State under this Convention.

Article 19 Relationship with other international instruments

This matter has not yet been discussed.

[8] The relevant time for the purposes of this test (*e.g.* the time of the agreement and / or the time of commencement of the proceedings) remains to be discussed. The time of enforcement should not be relevant.

[9] The matters dealt with in this article will require further study and discussion.

CHAPTER V FINAL CLAUSES

Article 20 Signature, ratification, acceptance, approval or accession

Article 21 Non-unified legal system

1. If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
2. Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
3. If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 22 Regional Economic Integration Organisations

Article 23 Entry into force

Article 24 Reservations

Article 25 Declarations

Article 26 Denunciation

Article 27 Notifications by the Depositary

RECOMMENDED FORM

(Sample form confirming the issuance and content of a judgment by the Court of Origin for the purposes of recognition and enforcement under the Convention on Exclusive Choice of Court Agreements (the "Convention"))

(THE COURT OF ORIGIN) .....

(ADDRESS OF THE COURT OF ORIGIN) .....

(CONTACT PERSON AT THE COURT OF ORIGIN) .....

(TEL./FAX/EMAIL OF THE COURT OF ORIGIN) .....

CASE / DOCKET NUMBER: .....

_____(PLAINTIFF)

v.

_____(DEFENDANT)

(THE COURT OF ORIGIN) hereby confirms that it rendered a judgment in the above captioned matter on (DATE) in (CITY, STATE), which is a Contracting State to the Convention. Attached to this form is a complete and certified copy of the judgment rendered by (THE COURT OF ORIGIN).

1. This Court based its jurisdiction on an exclusive choice of court agreement:

YES_____ NO_____

If so, the agreement was found in or evidenced by the following document(s):

2. This Court awarded the following payment of money *(Please indicate any relevant categories of damages included):*

3. This Court awarded interest as follows (*Please specify the rate of interest, the portion(s) of the award to which interest applies, and the date from which interest is computed*):

4. This Court included within the judgment the following court costs and expenses (including lawyers' fees) related to the proceedings *(Please specify the amounts of any such awards, including where applicable, any amount(s) within a monetary award intended to cover costs and expenses relating to the proceedings)*:

5. This Court awarded, in whole or in part, the following non-monetary remedy *(Please describe the nature of the remedy)*:

6. This judgment was rendered by default:

YES_____ NO_____

(If this judgment was rendered by default, please attach the original or a certified copy of the document verifying notice to the defendant of the proceedings.)

7. This judgment (or a part thereof) is currently the subject of review in (STATE OF THE COURT OF ORIGIN):

YES_____ NO_____

8. This judgment (or a part thereof) is enforceable in (STATE OF THE COURT OF ORIGIN):

YES_____ NO_____

List of documents annexed:

Dated this _____ day of _____, 20__.

Signature and / or stamp by an officer of the Court