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LE PROJET DE LA HAYE SUR LES JUGEMENTS :

AVANCEMENT DES TRAVAUX DEPUIS LA COMMISSION SUR LES AFFAIRES GENERALES ET LA POLITIQUE

D'AVRIL 2003

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THE HAGUE PROJECT ON JUDGMENTS:

PROGRESS MADE SINCE THE MEETING OF THE COMMISSION ON GENERAL AFFAIRS AND POLICY

OF APRIL 2003

Document préliminaire No 10 de février 2004
à l'intention de la Commission spéciale d'avril 2004
sur les affaires générales et la politique de la Conférence

Preliminary Document No 10 of February 2004
for the attention of the Special Commission of April 2004
on General Affairs and Policy of the Conference

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NOTE BY THE PERMANENT BUREAU

In accordance with the Decision of Commission I (General Affairs and Policy) of the Nineteenth Session of the Conference of 24 April 2002, the Permanent Bureau set up an informal working group to prepare a text on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters to be submitted to a Special Commission. Among the core areas identified by Commission I,[1] the informal group chose to start working on choice of court agreements for commercial transactions. The group held three meetings of three days each. It drafted a text focussed on choice of forum and the recognition and enforcement of judgments in civil and commercial matters, which was submitted to the Special Commission on General Affairs and Policy of the Hague Conference at its meeting held in The Hague from 1-3 April 2003.[2]

The Special Commission took the following decision:

> "The Special Commission on General Affairs and Policy requests the Secretary General to communicate to the Member States the draft text on choice of court agreements elaborated by the informal working group on the Judgments Project. He should at the same time ask them to inform him, before the end of July 2003, whether they would agree that this text should be put as the basis for work before a Special Commission to be convened in December 2003, with a view, in due course, to be forwarded to a Diplomatic Conference. On the basis of the reaction by Governments to such letter, the Secretary General shall determine whether there is sufficient support for the reference of the draft to a Special Commission and, if so, convoke it.
>
> The Special Commission on General Affairs and Policy affirms that any decision to convene a Special Commission in December 2003 concerning the draft text on choice of court agreements shall not preclude any subsequent work on the remaining issues with regard to jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters."

The Permanent Bureau subsequently submitted an overall Report on the work carried out by the informal working group and on the individual provisions elaborated.[3]

By circular letter L.c. ON No 25(03), the Secretary General transmitted the draft text on choice of court agreements in B2B cases to the Member States of the Hague Conference and invited them to inform the Permanent Bureau, preferably before 1 July but in any event no later than 31 July 2003, whether they agreed that the attached text should be put as the basis for work before a Special Commission to be convened. Member States were also invited to submit, by the same date or at any later time, any comments and observations on the substance of the text they may have.

As of 18 August 2003, the Permanent Bureau had received replies from Australia, Canada, China, the Czech Republic, the European Community[4], Hungary, Japan, Malaysia, Mexico, New Zealand, Norway, Poland, Romania, Slovakia, Switzerland and the United States of America.

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[1] Commission I identified as core areas choice of court agreements in B2B cases, submission, defendant's forum, counterclaims, trusts, and physical torts (*see* Preliminary Document No 19 of August 2002, p. 6).

[2] See Preliminary Document No 8 (corrected) of March 2003 for the attention of the Special Commission of April 2003 on General Affairs and Policy of the Conference.

[3] See Report on the work of the informal working group on the Judgments Project, in particular on the Preliminary Text achieved at its third meeting – 25-28 March 2003, Preliminary Document No 22 of June 2003.

[4] The reply was submitted on behalf of both the European Commission and the Council of the European Union, the latter consisting of the 15 EU Member States.

Even though some replies indicated that further clarification and/or improvements would be needed, all replies concurred in the view that the draft text should be put forward as the basis for the work of a Special Commission to be convened in December 2003. In the light of the number and the nature of the replies received, the Secretary General concluded that there was, in effect, sufficient support for the reference of the draft to such a Special Commission. By circular letter L.c. ON No 35(03) he therefore convened the Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

The Special Commission met from 1 to 9 December 2003 and was chaired by Mr Allan Philip from Denmark. Mr Andreas Bucher from Switzerland was elected Vice-Chairman. Mr Trevor Hartley from the United Kingdom and Mr Masato Dogauchi from Japan were elected Co-Rapporteurs. At its meeting, the Special Commission had a first reading of the 19 Articles as reflected in the Proposal by the Drafting Committee which is contained in Working Document No 49 – Revised (see Annex).

The main principles of the draft text are –

?? that the court designated in an exclusive choice of court agreement which is valid has jurisdiction to hear the case once it is seized, and may not exercise any discretion that may exist under national law to decline jurisdiction in favour of a more appropriate forum;

?? that a court seized but not chosen must suspend proceedings or dismiss the case if the court of another State has been designated in an exclusive choice of court agreement which is valid, and

?? that a judgment rendered by the court of a Contracting State that was designated in an exclusive choice of court agreement is entitled to be recognized and enforced in all other Contracting States.

By circular letter L.c. ON No 54(03), the Secretary General informed the Member States of the Hague Conference that the Special Commission had made very substantial progress, and that the Special Commission was of the view that a further meeting of 4 to 5 days would be needed to finalise the text of the preliminary draft Convention before submitting it to the XXth Session.

It was also pointed out that since such a further meeting had not been foreseen, it would require additional funding, and all Member States were invited to participate in the costs estimated at 41,775 Euros.

Thanks to the generosity of four Member States, namely the United Kingdom, Norway, Austria and Croatia, nearly 23,000 Euros are now ensured. A few Governments have expressed regret that they are not in a position to participate in the funding of the Special Commission, several of them having already generously contributed to the current supplementary budget for special projects of the Hague Conference.

Therefore, Member States, in particular those who have not yet contributed to the supplementary budget[*], are still invited to fund together the remaining amount of 18,860 Euros and to make their contribution, if possible, **before 19 April 2004** to the following account number: 51.75.27.979 (for international payment see details below[**]).

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[*] *See* Prel. Doc. No 16 of Feburary 2002 for the attention of the Special Commission on General Affairs and Policy of the Conference.

[**] **Payment by bank transfer only:** please transfer the amount to the Hague Conference's International Bank Account No (IBAN) NL15ABNA0517527979, SWIFT-code (BIC) ABNANL2A, ABN-AMRO Bank, Javastraat 1, 2585 AA The Hague (Netherlands), in the name of "Conférence de La Haye de droit international privé".

In order to facilitate future work of the Special Commission, the Permanent Bureau has prepared two research papers, which are also brought to the attention of the Special Commission on General Affairs and Policy of the Conference:

?? A comparative law study on "Mechanisms for the Transfer of Cases within Federal Systems", Preliminary Document No 23 of October 2003 for the attention of the Special Commission of December 2003 (now Preliminary Document No 18 for the attention of the Special Commission on General Affairs and Policy of the Conference, and

?? A paper on the rules established by Public International Law concerning "The Relationship between the Judgments Project and other International Instruments", Preliminary Document No 24 of December 2003 for the attention of the Special Commission of December 2003 (now Preliminary Document No 19 for the attention of the Special Commission on General Affairs and Policy of the Conference).

In the event of a successful outcome of the Special Commission to be held in April 2004, a Diplomatic Conference could possibly take place in early 2005.

A N N E X

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]

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;

[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.

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

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

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[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.

[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.

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.

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 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.

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[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.

[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.

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.

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.

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

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