Conférence de La Haye de droit international privé
Hague Conference on Private International Law

# Actes et documents

## de la Vingt-deuxième session

# Proceedings

## of the Twenty-Second Session

**Tome I**

**Jugements**
**Judgments**

**Cahier 4** **Session diplomatique**
**Book 4** **Diplomatic Session**

Actes et documents de la Vingt-deuxième session
Proceedings of the Twenty-Second Session

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## de la Vingt-deuxième session
## 18 juin au 2 juillet 2019

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## Tome I

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## Avis au lecteur

La présente publication est la première d'une série de deux tomes intitulés *Actes et documents de la Vingt-deuxième session*. Cette série contient l'ensemble des procès-verbaux et documents de travail ayant trait à la Vingt-deuxième session de la HCCH, ainsi que les documents afférents aux réunions préparatoires de la Commission spéciale et aux études préliminaires menées par le Bureau Permanent. Sa forme et son contenu ont été définis dans un souci de mettre à la disposition de toutes les personnes intéressées – juges, universitaires, avocats, particuliers, administrations nationales – les travaux qui ont conduit à l'adoption de la *Convention du 2 juillet 2019 sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale*, en vue de permettre au lecteur de mieux comprendre le texte et les débats qui ont déterminé les solutions consacrées dans la Convention.

Ce premier tome, divisé en cinq cahiers, rassemble les documents directement liés au texte final de la Convention HCCH Jugements de 2019, dont le Rapport explicatif élaboré par les Professeurs Francisco Garcimartín et Geneviève Saumier.

Le tome II, consacré aux matières diverses, renferme des informations générales telles que la composition des délégations et les procès-verbaux des séances d'ouverture et de clôture. La suite est consacrée au texte intégral de l'Acte final de la Vingt-deuxième session, ainsi qu'aux propositions de travail et procès-verbaux de la Commission II sur les affaires générales et la politique. Tous les documents afférents aux réunions annuelles du CAGP, qui se sont tenues entre les Vingt et unième et Vingt-deuxième sessions, ne sont pas inclus dans le tome II mais sont disponibles sur le site web de la HCCH (<www.hcch.net>).

La HCCH est une organisation bilingue, l'anglais et le français étant ses langues officielles au moment de la tenue de la Vingt-deuxième session. Par conséquent, les documents contenus dans les *Actes et documents* sont reproduits, dans la mesure du possible, dans les deux langues. Conformément à la pratique de la HCCH, les interventions formulées par les délégués lors de la Vingt-deuxième session ont été rendues en français ou en anglais selon la langue dans laquelle l'intervention a été prononcée.

Les travaux d'édition afférents à la publication des *Actes et documents* ont été assurés par Mmes Hélène Guérin, Lydie De Loof, Sandrine Brard et Anna Koelewijn.

## Notice to the reader

This publication is the first in a series of two Tomes entitled *Proceedings of the Twenty-Second Session*. This series contains all the minutes and working documents of the Twenty-Second Session of the HCCH as well as relevant documents from the preparatory Special Commission meetings and the preliminary studies carried out by the Permanent Bureau. Its form and its content have been determined by the concern to render accessible to all interested persons – including judges, academics, lawyers, private individuals, and national administrations – the working materials which led to the *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, with the aim of enhancing the reader's comprehension of the text and the thinking that determined which solutions were to be embodied in the Convention.

This first Tome, which is divided into five books, encompasses the documents directly related to the final text of the HCCH 2019 Judgments Convention, including the Explanatory Report drawn up by Professor Francisco Garcimartín and Professor Geneviève Saumier.

Tome II concerning Miscellaneous matters includes general information such as the membership of the delegations and the minutes of the Opening and Closing Sessions. The complete text of the Final Act of the Twenty-Second Session appears thereafter. It also contains the documents relating to the Twenty-Second Session's Commission on General Affairs and Policy. All documents related to the annual CGAP meetings that were held between the Twenty-First and Twenty-Second Sessions are not included in Tome II but are available on the HCCH website (<www.hcch.net>).

The HCCH is a bilingual organisation with both English and French being its official languages at the time of the Twenty-Second Session. Thus, the documents included in the *Proceedings* are reproduced to the extent possible in both languages. In accordance with the practice of the HCCH, the remarks made by delegates during the Twenty-Second Session have been rendered in French or in English depending on the language in which the intervention was made.

Editing of the *Proceedings* was carried out by Ms Helene Guerin, Mrs Lydie De Loof, Mrs Sandrine Brard and Mrs Anna Koelewijn.

La collection complète des *Actes et documents de la Vingt-deuxième session (2019)* se présente comme suit :

*Tome I – Jugements (cinq cahiers)*

*Tome II – Matières diverses*

Le présent Cahier rassemble les textes produits lors de la Vingt-deuxième session, qui s'est tenue du 18 juin au 2 juillet 2019. Parmi ces textes figurent les Documents de travail et les Procès-verbaux de la Commission I sur les jugements, ainsi que les documents pertinents des Séances plénières.

Les *Actes et documents de la Vingt-deuxième session* sont uniquement disponibles en format électronique.

Les publications de la HCCH peuvent être consultées sur le site web (<www.hcch.net>). Le Bureau Permanent peut être contacté à l'adresse suivante : Churchillplein 6b, 2517 JW La Haye, Pays-Bas (courrier électronique : secretariat@hcch.net).

Le Secrétaire général de la HCCH,

C. BERNASCONI

Le Président de la Vingt-deuxième session,

P. VLAS

The complete collection of the *Proceedings of the Twenty-Second Session (2019)* is as follows:

*Tome I – Judgments (five books)*

*Tome II – Miscellaneous matters*

This Book assembles the texts that were produced during the Twenty-Second Diplomatic Session held from 18 June to 2 July 2019. These include the Working Documents and Minutes of Commission I on Judgments, as well as the relevant documents from the Plenary Sessions.

The *Proceedings of the Twenty-Second Session* are only available in electronic format.

Publications of the HCCH can be consulted on the website (<www.hcch.net>). The Permanent Bureau can be contacted at Churchillplein 6b, 2517 JW The Hague, The Netherlands (e-mail: secretariat@hcch.net).

The Secretary General of the HCCH,

C. BERNASCONI

The President of the Twenty-Second Session,

P. VLAS

Vingt-deuxième session

Twenty-Second Session

# Actes
# Acts

## Note du Bureau Permanent

Conformément à une pratique qui a pris naissance lors de la Session extraordinaire de 1966, les interventions ont été résumées dans la langue, anglaise ou française, utilisée par les orateurs. Étant donné que les travaux de la Première commission ont été ouverts à tous les délégués à la Session diplomatique, aucune liste des membres de cette Commission n'est établie (voir le tome II, *Matières diverses*, pour la liste intégrale des participants à la Session diplomatique).

Les Documents de travail sont également reproduits dans la langue utilisée par leur auteur, le Bureau Permanent ne pouvant assurer la traduction des documents produits par les délégations. Sont toutefois diffusés dans les deux langues les documents produits par le Président et les co-Rapporteurs, le Secrétariat et les Comités de rédaction.

## Notice by the Permanent Bureau

In accordance with a practice begun during the Extraordinary Session of 1966, the speakers' remarks have been summarised in the languages they employed, respectively English or French. Since the work of the First Commission was open to all delegates to the Diplomatic Session, a list of Commission members has not been drawn up (see Tome II, *Miscellaneous matters*, for the complete list of Diplomatic Session participants).

Working Documents are also reproduced in the languages employed by their authors, since the Permanent Bureau has no translation service. However, documents emanating from the Chair, the co-Reporters, the Secretariat or the Drafting Committees have been distributed in both languages.

# Documents de travail de la Première commission

# Working Documents of the First Commission

*Distribué le 29 novembre 2018*

**No 1 – Projet de Convention préparé par la Commission spéciale de mai 2018**

PROJET DE CONVENTION SUR LA RECONNAISSANCE ET L'EXÉCUTION DES JUGEMENTS ÉTRANGERS EN MATIÈRE CIVILE OU COMMERCIALE

CHAPITRE I – CHAMP D'APPLICATION ET DÉFINITIONS

Article premier
*Champ d'application*

1 La présente Convention s'applique à la reconnaissance et à l'exécution des jugements en matière civile ou commerciale. Elle ne recouvre notamment pas les matières fiscales, douanières ou administratives.

2 La présente Convention s'applique à la reconnaissance et à l'exécution, dans un État contractant, d'un jugement rendu par un tribunal d'un autre État contractant.

Article 2
*Exclusions du champ d'application*

1 La présente Convention ne s'applique pas aux matières suivantes :

(a) l'état et la capacité des personnes physiques ;

(b) les obligations alimentaires ;

(c) les autres matières du droit de la famille, y compris les régimes matrimoniaux et les autres droits ou obligations découlant du mariage ou de relations similaires ;

(d) les testaments et les successions ;

(e) l'insolvabilité, les concordats, la résolution d'établissements financiers, et les matières analogues ;

(f) le transport de passagers et de marchandises ;

(g) la pollution marine, la limitation de responsabilité pour des demandes en matière maritime, les avaries communes, ainsi que le remorquage et le sauvetage d'urgence ;

(h) la responsabilité pour les dommages nucléaires ;





*Distributed on 29 November 2018*

**No 1 – Draft Convention prepared by the Special Commission of May 2018**

DRAFT CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS

CHAPTER I – SCOPE AND DEFINITIONS

Article 1
*Scope*

1 This Convention shall apply to the recognition and enforcement of judgments relating to civil or commercial matters. It shall not extend in particular to revenue, customs or administrative matters.

2 This Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State.

Article 2
*Exclusions from scope*

1 This Convention shall not apply to 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, resolution of financial institutions, and analogous matters;

(f) the carriage of passengers and goods;

(g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;

(h) liability for nuclear damage;

(i) la validité, la nullité ou la dissolution des personnes morales ou des associations entre personnes physiques ou personnes morales, ainsi que la validité des décisions de leurs organes ;

(j) la validité des inscriptions sur les registres publics ;

(k) la diffamation ;

[(l) le droit à la vie privée[, à l'exception des litiges portant sur la violation d'un contrat entre les parties] ;]

[(m) la propriété intellectuelle [et les matières analogues] ;]

[(n) les activités des forces armées, y compris celles de leur personnel dans l'exercice de ses fonctions officielles ;]

[(o) les activités relatives au maintien de l'ordre, y compris celles du personnel chargé du maintien de l'ordre dans l'exercice de ses fonctions officielles ;]

[(p) les entraves à la concurrence].

2 Un jugement n'est pas exclu du champ d'application de la présente Convention lorsqu'une question relevant d'une matière à laquelle elle ne s'applique pas est soulevée seulement à titre préalable et non comme objet du litige. En particulier, le seul fait qu'une telle matière ait été invoquée dans le cadre d'un moyen de défense n'exclut pas le jugement du champ d'application de la Convention, si cette question n'était pas l'objet du litige.

3 La présente Convention ne s'applique pas à l'arbitrage et aux procédures y afférentes.

4 Un jugement n'est pas exclu du champ d'application de la présente Convention du seul fait qu'un État, y compris un gouvernement, une agence gouvernementale ou toute personne agissant pour le compte d'un État, était partie au litige.

5 La présente Convention n'affecte pas les privilèges et immunités dont jouissent les États ou les organisations internationales, pour eux-mêmes et pour leurs biens.

Article 3
*Définitions*

1 Au sens de la présente Convention :

(a) le terme « défendeur » signifie la personne contre laquelle la demande ou la demande reconventionnelle a été introduite dans l'État d'origine ;

(b) le terme « jugement » signifie toute décision sur le fond rendue par un tribunal, quelle que soit la dénomination donnée à cette décision, telle qu'un arrêt ou une ordonnance, de même que la fixation des frais et dépens du procès par le tribunal (y compris le greffier du tribunal), à condition qu'elle ait trait à une décision sur le fond susceptible d'être reconnue ou exécutée en vertu de la présente Convention. Les mesures provisoires et conservatoires ne sont pas des jugements.

2 Une entité ou une personne autre qu'une personne physique est réputée avoir sa résidence habituelle dans l'État :

(a) de son siège statutaire ;

(i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs;

(j) the validity of entries in public registers;

(k) defamation;

[(l) privacy[, except where the proceedings were brought for breach of contract between the parties];]

[(m) intellectual property [and analogous matters];]

[(n) activities of armed forces, including the activities of their personnel in the exercise of their official duties;]

[(o) law enforcement activities, including the activities of law enforcement personnel in the exercise of official duties;]

[(p) anti-trust (competition) matters].

2 A judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings. In particular, the mere fact that such a matter arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.

3 This Convention shall not apply to arbitration and related proceedings.

4 A judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings.

5 Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3
*Definitions*

1 In this Convention –

(a) "defendant" means a person against whom the claim or counterclaim was brought in the State of origin;

(b) "judgment" means any decision on the merits given by a court, whatever that decision 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 the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

2 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) selon le droit duquel elle a été constituée ;

(c) de son administration centrale ; ou

(d) de son principal établissement.

(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.

## CHAPITRE II – RECONNAISSANCE ET EXÉCUTION

### Article 4
*Dispositions générales*

1 Un jugement rendu par un tribunal d'un État contractant (État d'origine) est reconnu et exécuté dans un autre État contractant (État requis) conformément aux dispositions du présent chapitre. La reconnaissance ou l'exécution ne peut être refusée qu'aux motifs énoncés dans la présente Convention.

2 Le jugement ne peut pas faire l'objet d'une révision au fond dans l'État requis. [Ceci n'exclut pas l'examen nécessaire à l'application de la présente Convention.]

3 Un jugement n'est reconnu que s'il produit ses effets dans l'État d'origine et n'est exécuté que s'il est exécutoire dans l'État d'origine.

4 Si le jugement visé au paragraphe 3 fait l'objet d'un recours dans l'État d'origine ou si le délai pour exercer un recours ordinaire n'a pas expiré, le tribunal requis peut :

(a) accorder la reconnaissance ou l'exécution, voire subordonner cette exécution à la constitution d'une sûreté qu'il détermine ;

(b) surseoir à statuer sur la reconnaissance ou l'exécution ; ou

(c) refuser la reconnaissance ou l'exécution.

Le refus visé à l'alinéa (c) n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.

[[5 Aux fins du paragraphe premier, un jugement rendu par un tribunal commun à deux ou plusieurs États est réputé l'avoir été par le tribunal d'un État contractant si cet État a désigné ce tribunal commun dans une déclaration à cet effet, et si l'une des conditions suivantes est remplie :

(a) tous les membres du tribunal commun sont des États contractants pour lesquels ce tribunal exerce les fonctions judiciaires relatives à la matière concernée et le jugement est susceptible d'être reconnu ou exécuté conformément à l'article 5(1)(c), (e), (f), (l), ou (m) ; ou

(b) le jugement est susceptible d'être reconnu ou exécuté conformément à un autre alinéa de l'article 5(1)[, l'article 5(3),] ou conformément à l'article 6, et ces exigences d'admissibilité sont remplies dans l'État contractant pour lequel ce tribunal exerce les fonctions judiciaires relatives à la matière concernée.]

OU

[5 Aux fins du paragraphe premier, un jugement rendu par un tribunal commun à deux ou plusieurs États est réputé l'avoir été par le tribunal d'un État contractant si cet État a désigné ce tribunal commun dans une déclaration à cet effet, et si l'une des conditions suivantes est remplie :

## CHAPTER II – RECOGNITION AND ENFORCEMENT

### Article 4
*General provisions*

1 A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

2 There shall be no review of the merits of the judgment in the requested State.[ This does not preclude such examination as is necessary for the application of this Convention.]

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 If a judgment referred to in paragraph 3 is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired, the court addressed may –

(a) grant recognition or enforcement, which enforcement may be made subject to the provision of such security as it shall determine;

(b) postpone the decision on recognition or enforcement; or

(c) refuse recognition or enforcement.

A refusal under sub-paragraph (c) does not prevent a subsequent application for recognition or enforcement of the judgment.

[[5 For purposes of paragraph 1, a judgment given by a court common to two or more States shall be deemed to be a judgment given by a court of a Contracting State if the Contracting State has identified the common court in a declaration to that effect, and either of the following conditions are met –

(a) all members of the common court are Contracting States whose judicial functions in relation to the relevant matter are exercised by the common court, and the judgment is eligible for recognition and enforcement under Article 5(1)(c), (e), (f), (l), or (m); or

(b) the judgment is eligible for recognition and enforcement under another sub-paragraph of Article 5(1)[, Article 5(3),] or under Article 6, and those eligibility requirements are met in a Contracting State whose judicial functions in relation to the relevant matter are exercised by the common court.]

OR

[5 For purposes of paragraph 1, a judgment given by a court common to two or more States shall be deemed to be a judgment given by a court of a Contracting State if the Contracting State has identified the common court in a declaration to that effect, and either of the following conditions are met –

(a) tous les membres du tribunal commun sont des États contractants pour lesquels ce tribunal exerce les fonctions judiciaires relatives à la matière concernée et le jugement est susceptible d'être reconnu ou exécuté conformément à l'article 5(1)(c), (e), (f), (l), ou (m) ; ou

(b) le jugement est susceptible d'être reconnu ou exécuté conformément à un autre alinéa de l'article 5(1)[, l'article 5(3),] ou conformément à l'article 6, et ces exigences d'admissibilité sont remplies dans l'État contractant pour lequel ce tribunal exerce les fonctions judiciaires relatives à la matière concernée.

6 Un État contractant peut déclarer qu'il ne reconnaîtra ou n'exécutera pas les jugements rendus par un tribunal commun qui fait l'objet d'une déclaration en vertu du paragraphe 5 pour les matières couvertes par cette déclaration.

ou

6 La déclaration visée au paragraphe 5 n'aura d'effet qu'entre l'État contractant l'ayant faite et les autres États contractants ayant déclaré l'accepter. Ces déclarations doivent être déposées auprès du Ministère des Affaires étrangères des Pays-Bas, lequel transmettra, par voie diplomatique, une copie certifiée à chacun des États contractants.]]

(a) all members of the common court are Contracting States whose judicial functions in relation to the relevant matter are exercised by the common court, and the judgment is eligible for recognition and enforcement under Article 5(1)(c), (e), (f), (l), or (m); or

(b) the judgment is eligible for recognition and enforcement under another sub-paragraph of Article 5(1)[, Article 5(3),] or under Article 6, and those eligibility requirements are met in a Contracting State whose judicial functions in relation to the relevant matter are exercised by the common court.

6 A Contracting State may declare that it shall not recognise or enforce judgments of a common court that is the object of a declaration under paragraph 5 in respect of any of the matters covered by that declaration.

or

6 The declaration referred to in paragraph 5 shall have effect only between the Contracting State that made the declaration and other Contracting States that have declared their acceptance of the declaration. Such declarations shall be deposited at the Ministry of Foreign Affairs of the Netherlands, which will forward, through diplomatic channels, a certified copy to each of the Contracting States.]]

Article 5
*Fondements de la reconnaissance ou de l'exécution*

1 Un jugement est susceptible d'être reconnu ou exécuté si l'une des exigences suivantes est satisfaite :

(a) la personne contre laquelle la reconnaissance ou l'exécution est demandée avait sa résidence habituelle dans l'État d'origine lorsqu'elle est devenue partie à la procédure devant le tribunal d'origine ;

(b) la personne physique contre laquelle la reconnaissance ou l'exécution est demandée avait son établissement professionnel principal dans l'État d'origine lorsqu'elle est devenue partie à la procédure devant le tribunal d'origine et la demande à l'origine du jugement portait sur son activité professionnelle ;

(c) la personne contre laquelle la reconnaissance ou l'exécution est demandée est celle qui a saisi le tribunal de la demande, autre que reconventionnelle, à l'origine du jugement ;

(d) le défendeur avait une succursale, une agence ou tout autre établissement sans personnalité juridique propre dans l'État d'origine, au moment où il est devenu une partie à la procédure devant le tribunal d'origine, et la demande à l'origine du jugement résultait des activités de cette succursale, de cette agence ou de cet établissement ;

(e) le défendeur a expressément consenti à la compétence du tribunal d'origine au cours de la procédure dans laquelle le jugement a été rendu ;

(f) le défendeur a fait valoir ses arguments sur le fond devant le tribunal d'origine sans en contester la compétence dans les délais prescrits par le droit de l'État d'origine, à moins qu'il ne soit évident qu'une contestation de la compétence ou de son exercice aurait échoué en vertu de ce droit ;

Article 5
*Bases for recognition and enforcement*

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

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

(b) the natural person against whom recognition or enforcement is sought had his or her principal place of business in the State of origin at the time that person became a party to the proceedings in the court of origin and the claim on which the judgment is based arose out of the activities of that business;

(c) the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;

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

(e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;

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

(g) le jugement porte sur une obligation contractuelle et a été rendu dans l'État dans lequel l'obligation a été ou aurait dû être exécutée, conformément :

(i) à l'accord des parties ou,

(ii) à la loi applicable au contrat, à défaut d'un accord sur le lieu d'exécution,

sauf si les activités du défendeur en relation avec la transaction ne présentaient manifestement pas de lien intentionnel et substantiel avec cet État ;

(h) le jugement porte sur un bail immobilier et a été rendu dans l'État où est situé l'immeuble ;

(i) le jugement rendu contre le défendeur porte sur une obligation contractuelle garantie par un droit réel relatif à un immeuble situé dans l'État d'origine, à condition qu'une demande contractuelle concernant ce droit réel ait également été dirigée contre ce défendeur ;

(j) le jugement porte sur une obligation non contractuelle résultant d'un décès, d'un dommage corporel, d'un dommage subi par un bien corporel ou de la perte d'un bien corporel et l'acte ou l'omission directement à l'origine du dommage a été commis dans l'État d'origine, quel que soit le lieu où le dommage est survenu ;

(k) le jugement porte sur la validité, l'interprétation, les effets, l'administration ou la modification d'un trust constitué volontairement et documenté par écrit, et :

(i) au moment de l'introduction de l'instance, l'État d'origine est celui désigné dans l'acte constitutif du trust comme étant un État dans lequel les litiges relatifs à ces questions doivent être tranchés ; ou

(ii) au moment de l'introduction de l'instance, l'État d'origine était celui désigné, de façon expresse ou implicite, dans l'acte constitutif du trust, comme étant l'État dans lequel est situé le lieu principal d'administration du trust.

Cet alinéa ne s'applique qu'aux jugements portant sur des aspects internes d'un trust, entre personnes étant ou ayant été au sein de la relation établie par le trust ;

(l) le jugement porte sur une demande reconventionnelle :

(i) dans la mesure où il est rendu en faveur du demandeur reconventionnel, à condition que cette demande porte sur la même transaction ou les mêmes faits que la demande principale ;

(ii) dans la mesure où il est rendu contre le demandeur reconventionnel, sauf si le droit de l'État d'origine exigeait une demande reconventionnelle à peine de forclusion ;

(m) le jugement a été rendu par un tribunal désigné dans un accord conclu ou documenté par écrit ou par tout autre moyen de communication qui rende l'information accessible pour être consultée ultérieurement, autre qu'un accord exclusif d'élection de for.

(g) the judgment ruled on a contractual obligation and it was given in the State in which performance of that obligation took place, or should have taken place, in accordance with –

(i) the parties' agreement, or

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

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

(h) the judgment ruled on a tenancy of immovable property and it was given in the State in which the property is situated;

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

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

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

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

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

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

(l) the judgment ruled on a counterclaim –

(i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim;

(ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;

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

Aux fins de cet alinéa, un « accord exclusif d'élection de for » est un accord conclu entre deux ou plusieurs parties, pour connaître des litiges nés ou à naître à l'occasion d'un rapport de droit déterminé, soit les tribunaux d'un État contractant, soit un ou plusieurs tribunaux particuliers d'un État contractant, à l'exclusion de la compétence de tout autre tribunal.

2 Si la reconnaissance ou l'exécution est requise contre une personne physique agissant principalement dans un but personnel, familial ou domestique (un consommateur) en matière de contrat de consommation, ou contre un employé relativement à son contrat de travail :

(a) le paragraphe 1(e) ne s'applique que si le consentement a été donné devant le tribunal, que ce soit oralement ou par écrit ;

(b) les paragraphes 1(f), (g) et (m) ne s'appliquent pas.

[3 Le paragraphe premier ne s'applique pas à un jugement portant sur un droit de propriété intellectuelle ou analogue. Un tel jugement est susceptible d'être reconnu ou exécuté si l'une des exigences suivantes est satisfaite :

(a) le jugement porte sur la contrefaçon, dans l'État d'origine, d'un droit de propriété intellectuelle nécessitant délivrance, octroi ou enregistrement et a été rendu par un tribunal de l'État dans lequel la délivrance, l'octroi ou l'enregistrement du droit en question a été effectué, ou est réputé avoir été effectué conformément aux dispositions d'un instrument international ou régional[, sauf si le défendeur n'a pas agi dans cet État aux fins d'initier ou de poursuivre la contrefaçon ou que son activité ne peut raisonnablement être considérée comme ayant spécifiquement visé cet État] ;

(b) le jugement porte sur la contrefaçon, dans l'État d'origine, d'un droit d'auteur ou droit voisin, d'une marque non enregistrée ou d'un dessin ou modèle industriel non enregistré, et a été rendu par un tribunal de l'État pour lequel la protection était revendiquée[, sauf si le défendeur n'a pas agi dans cet État aux fins d'initier ou de poursuivre la contrefaçon ou que son activité ne peut raisonnablement être considérée comme ayant spécifiquement visé cet État] ;

(c) le jugement porte sur la validité[, l'existence ou la titularité], dans l'État d'origine, d'un droit d'auteur ou droit voisin, d'une marque non enregistrée ou d'un dessin ou modèle industriel non enregistré, et a été rendu par un tribunal de l'État pour lequel la protection était revendiquée.]

Article 6
*Fondements exclusifs de la reconnaissance ou de l'exécution*

Nonobstant l'article 5 :

[(a) un jugement portant sur [l'enregistrement ou] la validité d'un droit de propriété intellectuelle nécessitant délivrance, octroi ou enregistrement n'est reconnu ou exécuté que si l'État d'origine est celui dans lequel la délivrance, l'octroi ou l'enregistrement a été effectué, ou est réputé avoir été effectué conformément aux dispositions d'un instrument international ou régional ;]

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

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

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

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

[3 Paragraph 1 does not apply to a judgment that ruled on an intellectual property right or an analogous right. Such a judgment is eligible for recognition and enforcement if one of the following requirements is met –

(a) the judgment ruled on an infringement in the State of origin of an intellectual property right required to be granted or registered and it was given by a court in the State in which the grant or registration of the right concerned has taken place or, under the terms of an international or regional instrument, is deemed to have taken place[, unless the defendant has not acted in that State to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State];

(b) the judgment ruled on an infringement in the State of origin of a copyright or related right, an unregistered trademark or unregistered industrial design, and it was given by a court in the State for which protection was claimed[, unless the defendant has not acted in that State to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State];

(c) the judgment ruled on the validity[, subsistence or ownership] in the State of origin of a copyright or related right, an unregistered trademark or unregistered industrial design, and it was given by a court in the State for which protection was claimed.]

Article 6
*Exclusive bases for recognition and enforcement*

Notwithstanding Article 5 –

[(a) a judgment that ruled on the [registration or] validity of an intellectual property right required to be granted or registered shall be recognised and enforced if and only if the State of origin is the State in which grant or registration has taken place, or, under the terms of an international or regional instrument, is deemed to have taken place;]

(b) un jugement portant sur des droits réels immobiliers n'est reconnu ou exécuté que si l'immeuble est situé dans l'État d'origine ;

(c) un jugement portant sur un bail immobilier pour une période de plus de six mois ne peut être reconnu ou exécuté si l'immeuble n'est pas situé dans l'État d'origine et les tribunaux de l'État dans lequel se trouve l'immeuble ont compétence exclusive en vertu du droit de cet État.

Article 7
*Refus de reconnaissance ou d'exécution*

1 La reconnaissance ou l'exécution peut être refusée si :

(a) l'acte introductif d'instance ou un acte équivalent contenant les éléments essentiels de la demande :

(i) n'a pas été notifié au défendeur en temps utile et de telle manière qu'il puisse organiser sa défense, à moins que le défendeur ait comparu et présenté sa défense sans contester la notification devant le tribunal d'origine, à condition que le droit de l'État d'origine permette de contester la notification ; ou

(ii) a été notifié au défendeur dans l'État requis de manière incompatible avec les principes fondamentaux de l'État requis relatifs à la notification de documents ;

(b) le jugement résulte d'une fraude ;

(c) la reconnaissance ou l'exécution est manifestement incompatible avec l'ordre public de l'État requis, notamment dans le cas où la procédure appliquée en l'espèce pour obtenir le jugement était incompatible avec les principes fondamentaux d'équité procédurale de cet État et en cas d'atteinte à la sécurité ou à la souveraineté de cet État ;

(d) la procédure devant le tribunal d'origine était contraire à un accord, ou à une clause figurant dans l'acte constitutif d'un trust, en vertu duquel le litige en question devait être tranché par un tribunal autre que le tribunal d'origine ;

(e) le jugement est incompatible avec un jugement rendu dans l'État requis dans un litige entre les mêmes parties ; ou

(f) le jugement est incompatible avec un jugement rendu antérieurement dans un autre État entre les mêmes parties dans un litige ayant le même objet, lorsque le jugement rendu antérieurement réunit les conditions nécessaires à sa reconnaissance dans l'État requis ;

[(g) le jugement porte sur la contrefaçon d'un droit de propriété intellectuelle et applique à [ce droit/cette contrefaçon] un autre droit que le droit interne de l'État d'origine].

2 La reconnaissance ou l'exécution peut être différée ou refusée si une procédure ayant le même objet est pendante entre les mêmes parties devant un tribunal de l'État requis lorsque :

(b) a judgment that ruled on rights *in rem* in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin;

(c) a judgment that ruled on a tenancy of immovable property for a period of more than six months shall not be recognised and enforced if the property is not situated in the State of origin and the courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State.

Article 7
*Refusal of recognition or enforcement*

1 Recognition or enforcement may be refused if –

(a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim –

(i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, 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; or

(ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

(b) the judgment was obtained by fraud;

(c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State;

(d) the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court other than the court of origin;

(e) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or

(f) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same subject matter, provided that the earlier judgment fulfills the conditions necessary for its recognition in the requested State;

[(g) the judgment ruled on an infringement of an intellectual property right, applying to that [right/infringement] a law other than the internal law of the State of origin].

2 Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –

(a) ce dernier a été saisi avant le tribunal de l'État d'origine ; et

(b) il existe un lien étroit entre le litige et l'État requis.

Le refus visé au présent paragraphe n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.

Article 8
*Questions préalables*

1 Une décision rendue à titre préalable sur une matière à laquelle la présente Convention ne s'applique pas, ou une décision rendue à titre préalable sur une matière visée à l'article 6 par un autre tribunal que celui désigné dans cette disposition, n'est pas reconnue ou exécutée en vertu de la présente Convention.

2 La reconnaissance ou l'exécution d'un jugement peut être refusée si, et dans la mesure où, le jugement est fondé sur une décision relative à une matière à laquelle la présente Convention ne s'applique pas, ou sur une décision relative à une matière visée à l'article 6 qui a été rendue par un autre tribunal que celui désigné dans cette disposition.

[3 Toutefois, dans le cas d'une décision relative à la validité d'un droit visé à l'article 6(a), la reconnaissance ou l'exécution d'un jugement ne peut être différée, ou refusée en vertu du paragraphe précédent, que si :

(a) cette décision est incompatible avec un jugement ou une décision rendu(e) sur ce point par l'autorité compétente de l'État mentionné à l'article 6(a) ; ou

(b) une procédure relative à la validité de ce droit est pendante dans cet État.

Le refus en vertu de l'alinéa (b) n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.]

Article 9
*Divisibilité*

La reconnaissance ou l'exécution d'une partie dissociable d'un jugement est accordée si la reconnaissance ou l'exécution de cette partie est demandée ou si seule une partie du jugement peut être reconnue ou exécutée en vertu de la présente Convention.

Article 10
*Dommages et intérêts*

1 La reconnaissance ou l'exécution d'un jugement peut être refusée si, et dans la mesure où, le jugement accorde des dommages et intérêts, y compris des dommages et intérêts exemplaires ou punitifs, qui ne compensent pas une partie pour la perte ou préjudice réellement subis.

2 Le tribunal requis prend en considération, si, et dans quelle mesure, le montant accordé à titre de dommages et intérêts par le tribunal d'origine est destiné à couvrir les frais et dépens du procès.

(a) the court of the requested State was seised before the court of origin; and

(b) there is a close connection between the dispute and the requested State.

A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 8
*Preliminary questions*

1 A ruling on a preliminary question shall not be recognised or enforced under this Convention if the ruling is on a matter to which this Convention does not apply or on a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled.

2 Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply, or on a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled.

[3 However, in the case of a ruling on the validity of a right referred to in Article 6, paragraph (a), recognition or enforcement of a judgment may be postponed, or refused under the preceding paragraph, only where –

(a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State referred to in Article 6, paragraph (a); or

(b) proceedings concerning the validity of that right are pending in that State.

A refusal under sub-paragraph (b) does not prevent a subsequent application for recognition or enforcement of the judgment.]

Article 9
*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 10
*Damages*

1 Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.

2 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
*Mesures non pécuniaires en matière de propriété intellectuelle*

En matière de propriété intellectuelle, un jugement portant sur une contrefaçon n'est [reconnu ou] exécuté que dans la mesure où il a statué sur des condamnations pécuniaires liées au préjudice subi dans l'État d'origine.]

Article 12
*Transactions judiciaires*

Les transactions judiciaires homologuées par un tribunal d'un État contractant, ou qui ont été conclues au cours d'une instance devant un tribunal d'un État contractant, et qui sont exécutoires au même titre qu'un jugement dans l'État d'origine, sont exécutées en vertu de la présente Convention aux mêmes conditions qu'un jugement.

Article 13
*Pièces à produire*

1 La partie qui requiert la reconnaissance ou qui demande l'exécution produit :

(a) une copie complète et certifiée conforme du jugement ;

(b) si le jugement a été rendu par défaut, l'original ou une copie certifiée conforme du document attestant que l'acte introductif d'instance ou un acte équivalent a été notifié à la partie défaillante ;

(c) tout document nécessaire pour établir que le jugement produit ses effets dans l'État d'origine ou, le cas échéant, qu'il est exécutoire dans cet État ;

(d) dans le cas prévu à l'article 12, un certificat délivré par un tribunal de l'État d'origine attestant que la transaction judiciaire est exécutoire, en tout ou en partie, aux mêmes conditions qu'un jugement dans l'État d'origine.

2 Si le contenu du jugement ne permet pas au tribunal requis de vérifier que les conditions du présent chapitre sont remplies, ce tribunal peut exiger tout document nécessaire.

3 Une demande de reconnaissance ou d'exécution peut être accompagnée d'un document relatif au jugement, délivré par un tribunal (y compris par une personne autorisée du tribunal) de l'État d'origine, sous la forme recommandée et publiée par la Conférence de La Haye de droit international privé.

4 Si les documents mentionnés dans le présent article ne sont pas rédigés dans une langue officielle de l'État requis, ils sont accompagnés d'une traduction certifiée dans une langue officielle, sauf si le droit de l'État requis en dispose autrement.

Article 14
*Procédure*

1 La procédure tendant à obtenir la reconnaissance, l'exequatur ou l'enregistrement aux fins d'exécution, et l'exécution du jugement sont régies par le droit de l'État requis sauf si la présente Convention en dispose autrement. Le tribunal requis agit avec célérité.

[Article 11
*Non-monetary remedies in intellectual property matters*

In intellectual property matters, a judgment ruling on an infringement shall be [recognised and] enforced only to the extent that it rules on a monetary remedy in relation to harm suffered in the State of origin.]

Article 12
*Judicial settlements (*transactions judiciaires*)*

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, 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.

Article 13
*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 given 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) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;

(d) in the case referred to in Article 12, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment 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 any necessary documents.

3 An application for recognition or enforcement may be accompanied by a document relating to the judgment, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.

4 If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 14
*Procedure*

1 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.

2 Le tribunal de l'État requis ne peut refuser de reconnaître ou d'exécuter un jugement en vertu de la présente Convention au motif que la reconnaissance ou l'exécution devrait être requise dans un autre État.

Article 15
*Frais de procédure*

1 Aucune sûreté, caution ou dépôt, sous quelque dénomination que ce soit, ne peut être imposée en raison, soit de sa seule qualité d'étranger, soit du seul défaut de domicile ou de résidence dans l'État requis, à la partie qui demande l'exécution dans un État contractant d'une décision rendue dans un autre État contractant.

2 Toute condamnation aux frais et dépens, rendue dans un État contractant contre toute personne dispensée du versement d'une sûreté, d'une caution ou d'un dépôt en vertu du paragraphe premier est, à la demande du créancier, déclarée exécutoire dans tout autre État contractant.

3 Un État peut déclarer qu'il n'appliquera pas le paragraphe premier ou désigner dans une déclaration lesquels de ses tribunaux ne l'appliqueront pas.

Article 16
*Reconnaissance ou exécution en application du droit national*

Sous réserve de l'article 6, la présente Convention ne fait pas obstacle à la reconnaissance ou l'exécution d'un jugement en application du droit national.

CHAPITRE III – CLAUSES GÉNÉRALES

Article 17
*Disposition transitoire*

La Convention s'applique à la reconnaissance et à l'exécution de jugements si, au moment de l'introduction de l'instance dans l'État d'origine, la Convention était en vigueur dans cet État et dans l'État requis.

Article 18
*Déclarations limitant la reconnaissance et l'exécution*

Un État peut déclarer que ses tribunaux peuvent refuser de reconnaître ou d'exécuter un jugement rendu par un tribunal d'un autre État contractant, lorsque les parties avaient leur résidence dans l'État requis et que les relations entre les parties, ainsi que tous les autres éléments pertinents du litige, autres que le lieu du tribunal d'origine, étaient liés uniquement à l'État requis.

Article 19
*Déclarations relatives à des matières particulières*

1 Lorsqu'un État a un intérêt important à ne pas appliquer la présente Convention à une matière particulière, il peut déclarer qu'il ne l'appliquera pas à cette matière. L'État qui fait une telle déclaration s'assure que la portée de celle-ci n'est pas plus étendue que nécessaire et que la matière particulière exclue est définie de façon claire et précise.

2 The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

Article 15
*Costs of proceedings*

1 No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given in another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.

2 An order for payment of costs or expenses of proceedings, made in a Contracting State against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 shall, on the application of the person entitled to the benefit of the order, be rendered enforceable in any other Contracting State.

3 A State may declare that it shall not apply paragraph 1 or designate by a declaration which of its courts shall not apply paragraph 1.

Article 16
*Recognition or enforcement under national law*

Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.

CHAPTER III – GENERAL CLAUSES

Article 17
*Transitional provision*

This Convention shall apply to the recognition and enforcement of judgments if, at the time the proceedings were instituted in the State of origin, the Convention was in force in that State and in the requested State.

Article 18
*Declarations limiting recognition and enforcement*

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the court of origin, were connected only with the requested State.

Article 19
*Declarations with respect to specific matters*

1 Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

2 À l'égard d'une telle matière, la Convention ne s'applique pas :

(a) dans l'État contractant ayant fait la déclaration ;

(b) dans les autres États contractants, lorsque la reconnaissance ou l'exécution d'un jugement rendu dans un État contractant ayant fait la déclaration est demandée.

[Article 20
*Déclarations relatives aux jugements concernant des gouvernements*

1 Un État peut déclarer qu'il n'appliquera pas la présente Convention aux jugements issus de procédures auxquelles est partie :

(a) cet État ou une personne agissant au nom de celui-ci ; ou

(b) une des agences gouvernementales de cet État ou toute personne agissant au nom de celle-ci.

Cette déclaration n'est pas plus étendue que nécessaire et l'exclusion du champ d'application y est définie de façon claire et précise.

2 Une déclaration faite en application du paragraphe premier ne peut exclure du champ d'application de la présente Convention les jugements issus de procédures auxquelles une entreprise publique est partie.

3 Si un État a fait une déclaration en application du paragraphe premier, la reconnaissance ou l'exécution d'un jugement rendu dans cet État peut être refusée par un autre État contractant si le jugement est issu d'une procédure à laquelle est partie cet État contractant, ou une de ses agences gouvernementales, ou les personnes assimilées à celles mentionnées au paragraphe premier, dans les limites prévues par cette déclaration.]

Article 21
*Interprétation uniforme*

Aux fins de l'interprétation de la présente Convention, il sera tenu compte de son caractère international et de la nécessité de promouvoir l'uniformité de son application.

Article 22
*Examen du fonctionnement de la Convention*

Le Secrétaire général de la Conférence de La Haye de droit international privé prend périodiquement des dispositions en vue de :

(a) l'examen du fonctionnement pratique de la présente Convention, y compris de toute déclaration ; et

(b) l'examen de l'opportunité d'apporter des modifications à la présente Convention.

2 With regard to that matter, the Convention shall not apply –

(a) in the Contracting State that made the declaration;

(b) in other Contracting States, where recognition or enforcement of a judgment given in a Contracting State that made the declaration is sought.

[Article 20
*Declarations with respect to judgments pertaining to governments*

1 A State may declare that it shall not apply this Convention to judgments arising from proceedings to which any of the following is a party –

(a) that State, or a person acting on behalf of that State, or

(b) a government agency of that State, or a person acting on behalf of such a government agency.

The declaration shall be no broader than necessary and the exclusion from scope shall be clearly and precisely defined.

2 A declaration pursuant to paragraph 1 shall not exclude from the application of this Convention judgments arising from proceedings to which an enterprise owned by a State is a party.

3 If a State has made a declaration pursuant to paragraph 1, recognition or enforcement of a judgment originating from that State may be refused by another Contracting State if the judgment arose from proceedings to which that other Contracting State, one of its government agencies, or equivalent persons to those referred to in paragraph 1 is a party, to the same extent as specified in the declaration.]

Article 21
*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 22
*Review of operation of the Convention*

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for –

(a) review of the operation of this Convention, including any declarations; and

(b) consideration of whether any amendments to this Convention are desirable.

Article 23
*Systèmes juridiques non unifiés*

1 Au regard d'un État contractant dans lequel deux ou plusieurs systèmes de droit ayant trait aux questions régies par la présente Convention s'appliquent dans des unités territoriales différentes :

(a) toute référence à la loi ou à la procédure d'un État vise, le cas échéant, la loi ou la procédure en vigueur dans l'unité territoriale considérée ;

(b) toute référence à la résidence habituelle dans un État vise, le cas échéant, la résidence habituelle dans l'unité territoriale considérée ;

(c) toute référence au tribunal ou aux tribunaux d'un État vise, le cas échéant, le tribunal ou les tribunaux de l'unité territoriale considérée ;

(d) toute référence au lien avec un État vise, le cas échéant, le lien avec l'unité territoriale considérée.

2 Nonobstant le paragraphe précédent, un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu d'appliquer la présente Convention aux situations qui impliquent uniquement ces différentes unités territoriales.

3 Un tribunal d'une unité territoriale d'un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu de reconnaître ou d'exécuter un jugement d'un autre État contractant au seul motif que le jugement a été reconnu ou exécuté dans une autre unité territoriale du même État contractant selon la présente Convention.

4 Cet article ne s'applique pas à une Organisation régionale d'intégration économique.

Article 24
*Rapport avec d'autres instruments internationaux*

1 La présente Convention doit être interprétée de façon qu'elle soit, autant que possible, compatible avec d'autres traités en vigueur pour les États contractants, conclus avant ou après cette Convention.

2 La présente Convention n'affecte pas l'application par un État contractant d'un traité [ou de tout autre instrument international] conclu avant l'entrée en vigueur de cette Convention pour cet État contractant [entre les Parties à cet instrument].

3 La présente Convention n'affecte pas l'application par un État contractant d'un traité [ou de tout autre instrument international] conclu après l'entrée en vigueur de cette Convention pour cet État contractant, aux fins de reconnaissance ou d'exécution d'un jugement rendu par le tribunal d'un État contractant qui est également Partie à cet instrument. [Aucune disposition de l'autre instrument n'a d'incidence sur les obligations prévues à l'article 6 eu égard aux États contractants qui ne sont pas Parties à cet instrument.]

4 La présente Convention n'affecte pas l'application des règles d'une Organisation régionale d'intégration économique Partie à cette Convention, que ces règles aient été

Article 23
*Non-unified legal systems*

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, where appropriate, 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, where appropriate, to habitual residence in the relevant territorial unit;

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

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

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

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

4 This Article shall not apply to a Regional Economic Integration Organisation.

Article 24
*Relationship with other international instruments*

1 This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2 This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] that was concluded before this Convention entered into force for that Contracting State [as between Parties to that instrument].

3 This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] concluded after this Convention entered into force for that Contracting State for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that instrument. [Nothing in the other instrument shall affect the obligations under Article 6 towards Contracting States that are not Parties to that instrument.]

4 This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or

adoptées avant ou après cette Convention, en ce qui a trait à la reconnaissance ou l'exécution de jugements entre les États membres de l'Organisation régionale d'intégration économique.

[5 Un État contractant peut déclarer que la présente Convention n'affecte pas les instruments internationaux énumérés dans la déclaration.]

CHAPITRE IV – CLAUSES FINALES

Article 25
*Signature, ratification, acceptation, approbation ou adhésion*

1 La présente Convention est ouverte à la signature de tous les États.

2 La présente Convention est sujette à la ratification, à l'acceptation ou à l'approbation par les États signataires.

3 Tout État pourra adhérer à la présente Convention.

4 Les instruments de ratification, d'acceptation, d'approbation ou d'adhésion sont déposés auprès du Ministère des Affaires étrangères du Royaume des Pays-Bas, dépositaire de la Convention.

Article 26
*Déclarations relatives aux systèmes juridiques non unifiés*

1 Un État qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par la présente Convention peut, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer que la Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles, et pourra à tout moment modifier cette déclaration en faisant une nouvelle déclaration.

2 Toute déclaration est notifiée au dépositaire et indique expressément les unités territoriales auxquelles la Convention s'applique.

3 Si un État ne fait pas de déclaration en vertu du présent article, la Convention s'applique à l'ensemble du territoire de cet État.

4 Le présent article ne s'applique pas à une Organisation régionale d'intégration économique.

Article 27
*Organisations régionales d'intégration économique*

1 Une Organisation régionale d'intégration économique constituée seulement par des États souverains et ayant compétence sur certaines ou toutes les matières régies par la présente Convention peut également signer, accepter ou approuver cette Convention ou y adhérer. En pareil cas, l'Organisation régionale d'intégration économique aura les mêmes droits et obligations qu'un État contractant, dans la mesure où cette Organisation a compétence sur des matières régies par cette Convention.

after this Convention as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

[5 A Contracting State may declare that other international instruments listed in the declaration shall remain unaffected by this Convention.]

CHAPTER IV – FINAL CLAUSES

Article 25
*Signature, ratification, acceptance, approval or accession*

1 This Convention is open for signature by all States.

2 This Convention is subject to ratification, acceptance or approval by the signatory States.

3 This Convention is open for accession by all States.

4 Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 26
*Declarations with respect to non-unified legal systems*

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 A 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 shall extend to all territorial units of that State.

4 This Article shall not apply to a Regional Economic Integration Organisation.

Article 27
*Regional Economic Integration Organisations*

1 A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

2 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, l'Organisation régionale d'intégration économique notifie au dépositaire, par écrit, les matières régies par la présente Convention pour lesquelles ses États membres ont transféré leur compétence à cette Organisation. L'Organisation notifie aussitôt au dépositaire, par écrit, toute modification intervenue dans la délégation de compétence précisée dans la notification la plus récente faite en vertu du présent paragraphe.

3 Aux fins de l'entrée en vigueur de la présente Convention, tout instrument déposé par une Organisation régionale d'intégration économique n'est pas compté, à moins que l'Organisation régionale d'intégration économique déclare, en vertu de l'article 28(1), que ses États membres ne seront pas Parties à cette Convention.

4 Toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, à une Organisation régionale d'intégration économique qui y est Partie.

2 The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3 For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 28, paragraph 1, that its Member States will not be Parties to this Convention.

4 Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation that is a Party to it.

Article 28
*Adhésion par une Organisation régionale d'intégration économique sans ses États membres*

1 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, une Organisation régionale d'intégration économique peut déclarer qu'elle a compétence pour toutes les matières régies par la présente Convention et que ses États membres ne seront pas Parties à cette Convention mais seront liés par celle-ci en raison de la signature, de l'acceptation, de l'approbation ou de l'adhésion de l'Organisation.

2 Lorsqu'une déclaration est faite par une Organisation régionale d'intégration économique en conformité avec le paragraphe premier, toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, aux États membres de l'Organisation.

Article 28
*Accession by a Regional Economic Integration Organisation without its Member States*

1 At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

2 In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 29
*Entrée en vigueur*

1 La présente Convention entrera en vigueur le premier jour du mois suivant l'expiration d'une période de [trois] [six] mois après le dépôt du deuxième instrument de ratification, d'acceptation, d'approbation ou d'adhésion visé à l'article 25.

2 Par la suite, la présente Convention entrera en vigueur :

(a) pour chaque État ou Organisation régionale d'intégration économique ratifiant, acceptant, approuvant ou y adhérant postérieurement, le premier jour du mois suivant l'expiration d'une période de [trois] [six] mois après le dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion ;

(b) pour les unités territoriales auxquelles la présente Convention a été étendue conformément à l'article 26, le premier jour du mois suivant l'expiration d'une période de [trois] [six] mois après la notification de la déclaration visée par ledit article.

Article 29
*Entry into force*

1 This Convention shall enter into force on the first day of the month following the expiration of [three] [six] months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 25.

2 Thereafter this Convention shall enter into force –

(a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of [three] [six] months after the deposit of its instrument of ratification, acceptance, approval or accession;

(b) for a territorial unit to which this Convention has been extended in accordance with Article 26 on the first day of the month following the expiration of [three] [six] months after the notification of the declaration referred to in that Article.

Article 30
*Déclarations*

1 Les déclarations visées aux articles [4, ]15, 18, 19, [20,] [24,] 26 et 28 peuvent être faites lors de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion ou à tout moment ultérieur et pourront être modifiées ou retirées à tout moment.

2 Les déclarations, modifications et retraits sont notifiés au dépositaire.

3 Une déclaration faite au moment de la signature, de la ratification, de l'acceptation, de l'approbation de la Convention ou de l'adhésion à celle-ci prendra effet au moment de l'entrée en vigueur de la Convention pour l'État concerné.

4 Une déclaration faite ultérieurement, ainsi qu'une modification ou le retrait d'une déclaration, prendra effet le premier jour du mois suivant l'expiration d'une période de six mois après la date de réception de la notification par le dépositaire.

5 Une déclaration faite ultérieurement, ainsi qu'une modification ou le retrait d'une déclaration, ne produira pas d'effet sur les jugements rendus à l'issue d'instances déjà introduites devant le tribunal d'origine au moment où la déclaration prend effet.

Article 31
*Dénonciation*

1 La présente Convention pourra être dénoncée par une notification écrite au dépositaire. La dénonciation pourra se limiter à certaines unités territoriales d'un système juridique non unifié auxquelles s'applique la présente Convention.

2 La dénonciation prendra effet le premier jour du mois suivant l'expiration d'une période de douze mois après la date de réception de la notification par le dépositaire. Lorsqu'une période plus longue pour la prise d'effet de la dénonciation est précisée dans la notification, la dénonciation prendra effet à l'expiration de la période en question après la date de réception de la notification par le dépositaire.

Article 32
*Notifications par le dépositaire*

Le dépositaire notifiera aux Membres de la Conférence de La Haye de droit international privé, ainsi qu'aux autres États et aux Organisations régionales d'intégration économique qui ont signé, ratifié, accepté, approuvé ou adhéré conformément aux articles […] les renseignements suivants :

(a) les signatures, ratifications, acceptations, approbations et adhésions prévues à l'article 25 ;

(b) la date d'entrée en vigueur de la présente Convention conformément à l'article 29 ;

(c) les notifications, déclarations, modifications et retraits des déclarations prévus à l'article 30 ;

(d) les dénonciations prévues à l'article 31.

Article 30
*Declarations*

1 Declarations referred to in Articles [4, ]15, 18, 19, [20,] [24,] 26 and 28 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2 Declarations, modifications and withdrawals shall be notified to the depositary.

3 A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of six months following the date on which the notification is received by the depositary.

5 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall not apply to judgments resulting from proceedings that have already been instituted before the court of origin when the declaration takes effect.

Article 31
*Denunciation*

1 This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2 The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 32
*Notifications by the depositary*

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles […] of the following –

(a) the signatures, ratifications, acceptances, approvals and accessions referred to in Article 25;

(b) the date on which this Convention enters into force in accordance with Article 29;

(c) the notifications, declarations, modifications and withdrawals of declarations referred to in Article 30; and

(d) the denunciations referred to in Article 31.

# Documents de travail Nos 2 et 3

# Working Documents Nos 2 and 3

*Distribué le jeudi 29 novembre 2018*

*Distributed on Thursday 29 November 2018*

**No 2 – Proposition du Bureau Permanent – Proposal of the Permanent Bureau**

*Projet de préambule conformément à la Convention sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale*

Les Parties contractantes à la présente Convention,

Désireuses de promouvoir un accès effectif à la justice et de faciliter le commerce, les investissements et la mobilité à l'échelle internationale et fondés sur des règles, grâce à la coopération judiciaire,

Convaincues que cette coopération peut être renforcée grâce à la mise en place d'un ensemble uniforme de règles fondamentales sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale,

Convaincues que cette coopération renforcée nécessite, en particulier, un régime juridique international offrant une plus grande sécurité et prévisibilité en matière de reconnaissance et d'exécution des jugements étrangers, et qui soit complémentaire de la *Convention du 30 juin 2005 sur les accords d'élection de for*,

Sont résolues de conclure une Convention à cet effet et sont convenues des dispositions suivantes :

* * *

*Draft Preamble under the Convention on the recognition and enforcement of foreign judgments in civil or commercial matters*

The Contracting Parties to the present Convention,

Desiring to promote effective access to justice for all and to facilitate ~~the~~ rule-based multilateral trade, investment and mobility, through judicial co-operation,

Believing that such co-operation can be enhanced through the creation of a uniform set of core rules on recognition and enforcement of foreign judgments in civil or commercial matters, to facilitate the effective recognition and enforcement of such judgments,

Convinced that such enhanced multilateral judicial co-operation requires, in particular, an international legal regime that provides greater predictability and certainty in relation to the global circulation of foreign judgments, and that is complementary to the *Convention of 30 June 2005 on Choice of Court Agreements*,

Have~~d~~ resolved to conclude this Convention to this effect and have agreed upon the following provisions –

**No 2 REV – Proposition du Bureau Permanent**[*]

*Projet de préambule de la Convention sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale*

Les Parties contractantes à la présente Convention,

Désireuses de promouvoir un accès effectif de tous à la justice et de faciliter le commerce, les investissements et la mobilité à ~~l'échelle internationale~~ l'échelon multilatéral et fondés sur des règles, grâce à la coopération judiciaire,

~~Convaincues~~ Estimant que cette coopération peut être renforcée grâce à la mise en place d'un ensemble uniforme de règles fondamentales sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale, afin de faciliter la reconnaissance et l'exécution efficaces de ces jugements,

Convaincues que cette coopération judiciaire renforcée nécessite, en particulier, un régime juridique international offrant une plus grande prévisibilité et sécurité ~~et prévisibilité~~ en matière de ~~reconnaissance et d'exécution~~ circulation des jugements étrangers à l'échelle mondiale, et qui soit complémentaire de la *Convention du 30 juin 2005 sur les accords d'élection de for*,

Sont résolues de conclure ~~une~~ la présente Convention à cet effet et sont convenues des dispositions suivantes :

**No 2 REV REV – Proposal of the Permanent Bureau**[**]

*Draft Preamble under the Convention on the recognition and enforcement of foreign judgments in civil or commercial matters*

The Contracting Parties to the present Convention,

Desiring to promote effective access to justice for all and to facilitate rule-based multilateral trade, investment and mobility, through judicial co-operation,

Believing that such co-operation can be enhanced through the creation of a uniform set of core rules on recognition and enforcement of foreign judgments in civil or commercial matters, to facilitate the effective recognition and enforcement of such judgments,

Convinced that such enhanced judicial co-operation requires, in particular, an international legal regime that provides greater predictability and certainty in relation to the global circulation of foreign judgments, and that is complementary to the *Convention of 30 June 2005 on Choice of Court Agreements*,

Have resolved to conclude this Convention to this effect and have agreed upon the following provisions –

[*] Le Doc. trav. No 2 REV a été distribué le 27 juin 2019.
[**] Work. Doc. No 2 REV REV was distributed on 27 June 2019.

**No 3 REV REV – Proposition du Bureau Permanent – Proposal of the Permanent Bureau***

**Projet de Formulaire recommandé conformément à la Convention sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale**

**FORMULAIRE RECOMMANDÉ**
**CONFORMÉMENT À LA CONVENTION SUR**
**LA RECONNAISSANCE ET L'EXÉCUTION DES JUGEMENTS ÉTRANGERS**
**EN MATIÈRE CIVILE OU COMMERCIALE**
**(« LA CONVENTION »)**

(Exemple de Formulaire confirmant la délivrance et le contenu d'un jugement rendu par le tribunal d'origine dans le but de sa reconnaissance et de son exécution en vertu de la Convention)

**1. COORDONNÉES DU TRIBUNAL D'ORIGINE**

Nom du tribunal .....

Ville (et état, le cas échéant) .....

Pays .....

**2. RÉFÉRENCE DE L'AFFAIRE DU TRIBUNAL D'ORIGINE / NUMÉRO DE DOSSIER** .....

**3. PARTIES**

.....(DEMANDEUR(S))

c.

..... (DÉFENDEUR(S))

**4. DATE DE L'INTRODUCTION DE L'INSTANCE ET DU JUGEMENT**

4.1 L'instance a été introduite (article 17) le ..... *(jj/mm/aaaa)*

4.2 Le jugement a été rendu le .....*(jj/mm/aaaa)*

**5. DISPOSITIF DU JUGEMENT**

5.1 Ce tribunal a accordé le paiement du montant suivant *(le cas échéant, veuillez indiquer toute catégorie de dommages et intérêts, la monnaie, ainsi que toute modalité de paiement prescrite telle que la date et le montant des versements)* :

5.2 Ce tribunal a accordé les intérêts comme suit *(veuillez indiquer le (ou les) taux d'intérêt, la (ou les) partie(s) des indemnités auxquelles s'appliquent les intérêts, la date à partir de laquelle les intérêts sont comptés, ainsi que toute information supplémentaire relative aux intérêts qui pourrait aider le tribunal requis)* :

5.3 Ce tribunal a accordé le dédommagement non pécuniaire comme suit *(veuillez décrire la nature du dédommagement)* :

* Le Doc. trav. No 3 REV REV a été distribué le 27 juin 2019./Work. Doc. No 3 REV REV was distributed on 27 June 2019.

**6. EFFET DU JUGEMENT**

6.1 Ce jugement est exécutoire dans l'État d'origine :

☐ OUI (article 4(3)) ☐ NON
☐ Impossible à confirmer

6.2 Ce jugement, en tout ou en partie, fait actuellement l'objet d'un recours dans l'État d'origine :

☐ OUI *(veuillez préciser la nature et le statut de ce recours)* (article 4(4))
☐ NON ☐ Impossible à confirmer

**7. TOUTE AUTRE INFORMATION PERTINENTE**

**8. PIÈCES JOINTES**

*Les pièces jointes doivent être fournies dans la langue officielle ou accompagnées d'une traduction certifiée conforme dans une langue officielle de l'État requis, sauf disposition contraire de la loi de l'État requis (article 13(3) et (4)).*

Sont annexées au présent Formulaire les pièces énoncées dans la liste suivante (si disponibles) :

☐ une copie complète et certifiée conforme du jugement (article 13(1)(a)) ;

☐ si le jugement a été rendu par défaut, l'original ou une copie certifiée conforme du document attestant que l'acte introductif d'instance ou un acte équivalent a été notifié à la partie défaillante (article 13(1)(b)) ;

☐ tout document nécessaire pour établir que le jugement produit ses effets dans l'État d'origine ou, le cas échéant, qu'il est exécutoire dans cet État (article 13(1)(c)) ;

☐ dans le cas prévu à l'article 12 de la Convention, un certificat délivré par un tribunal (y compris par une personne autorisée du tribunal) de l'État d'origine attestant que la transaction judiciaire est exécutoire, en tout ou en partie, aux mêmes conditions qu'un jugement dans l'État d'origine (article 13(1)(d)).

**9.** Fait à ……, le ……, 20 ……

**10.** Signature et cachet (le cas échéant) du tribunal ou d'une personne autorisée du tribunal :

**11. COORDONNÉES**

PERSONNE DE CONTACT DANS LE TRIBUNAL D'ORIGINE : .....

TÉL. : .....

TÉLÉCOPIE : .....

COURRIEL : .....

LANGUE(S) DE COMMUNICATION DE LA PERSONNE DE CONTACT : .....

* * *

**Draft recommended form under the Convention on the recognition and enforcement of foreign judgments in civil or commercial matters**

**RECOMMENDED FORM**
**UNDER THE CONVENTION ON THE**
**RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS**
**IN CIVIL OR COMMERCIAL MATTERS**
**("THE CONVENTION")**

(Sample form confirming the issuance and content of a judgment given by the court of origin for the purposes of recognition and enforcement under the Convention)

**1. DETAILS OF THE COURT OF ORIGIN**

Name of Court .....

City (and state, if applicable) .....

Country .....

**2. COURT OF ORIGIN CASE REFERENCE / DOCKET NUMBER**.....

**3. PARTIES**

..... (PLAINTIFF(S))

v.

.....(DEFENDANT(S))

**4. DATE OF THE PROCEEDINGS AND THE JUDGMENT**

4.1 The proceedings were instituted (Article 17) on .....*(dd/mm/yyyy)*

4.2 The judgment was rendered on ..... *(dd/mm/yyyy)*

**5. AWARD DELIVERED IN THE JUDGMENT**

5.1 This Court awarded the following payment of money *(please indicate, where applicable, any relevant categories of damages, the currency of the award; and any prescribed terms of payment of the monetary award such as the date and amount of any instalments)*:

5.2 This Court awarded interest as follows *(please specify the rate(s) of interest, the portion(s) of the award to which interest applies, the date from which interest is computed, and any further information regarding interest that would assist the court addressed)*:

5.3 This Court included within the judgment the following costs and expenses relating 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)*:

5.4 This Court awarded the following non-monetary relief *(please describe the nature of such relief)*:

**6. THE EFFECT OF THE JUDGMENT**

6.1 This judgment is enforceable in the State of origin:

☐ YES (Article 4(3)) ☐ NO
☐ Unable to confirm

6.2 This judgment (or a part thereof) is currently the subject of review in the State of origin:

☐ YES *(please specify the nature and status of such review)* (Article 4(4))
☐ NO ☐ Unable to confirm

**7. ANY OTHER RELEVANT INFORMATION**

**8. ATTACHMENTS**

*The attached documents should be provided in the official language or accompanied by a certified translation into an official language of the requested State, unless otherwise provided for by the law of the requested State (Article 13(3) and (4)).*

Attached to this form are the documents marked in the following list (if available):

☐ a complete and certified copy of the judgment (Article 13(1)(a));

☐ if the judgment was given 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 (Article 13(1)(b));

☐ any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin (Article 13(1)(c));

☐ in the case referred to in Article 12 of the Convention, a certificate of a court (including an officer of the court) of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin (Article 13(1)(d)).

**9.** Dated this …… day of ……, 20 …… at ……

**10.** Signature and/or stamp by the Court or officer of the Court:

**11. CONTACT DETAILS**

CONTACT PERSON IN THE COURT OF ORIGIN: .....

TEL.: .....

FAX: .....

E-MAIL: .....

CONTACT PERSON COMMUNICATION LANGUAGE(S): .....

# Documents de travail Nos 4 à 27

# Working Documents Nos 4 to 27

*Distribués le vendredi 17 mai 2019*

*Distributed on Friday 17 May 2019*

**No 4 – Proposition des délégations de l'Union européenne, d'Israël et du Japon – Proposal of the delegations of the European Union, Israel and Japan**

*Article 2(1) – Exclusions du champ d'application*

~~[(p) les entraves à la concurrence]~~

*Note explicative*

Il est considéré que les entraves à la concurrence devraient être incluses dans le champ d'application de la Convention, étant donné que les actions d'exécution à caractère privé, tant en responsabilité contractuelle qu'en responsabilité délictuelle, sont des matières civiles et commerciales.

* * *

*Article 2(1) – Exclusions from scope*

~~[(p) anti-trust (competition) matters]~~

*Explanation*

It is submitted that competition matters should be included under the scope of application of the Convention since private enforcement actions, both in contract and in torts, are civil or commercial matters.

**No 5 – Proposal of the delegation of the Republic of Korea**

Article 5
*Bases for recognition and enforcement*

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

[…]

(j) the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act ~~or omission~~ directly causing such harm occurred in the State of origin, irrespective of where that harm occurred, unless, in the case of joint or concurrent tort, the person claimed to be responsible could not reasonably have foreseen that the act of another person claimed to have committed the act in that State would occur in that State;

*Explanation*

The Article 5 provision on special jurisdiction adopts a careful approach to cover highly common and predictable bases only, leaving other possible bases to national rules. This sub-paragraph on non-contractual obligations follows this basic scheme, only providing for limited types of torts and the place of wrongful act, but not of harm. It is proposed to consistently apply this careful approach to the following two issues as well.

*[Proposal to delete "omission"]*

First issue is the uncertainty in determining where "omission" took place. Opinions may differ in identifying the place where a preventive measure should have been made but was omitted. Courts will need to make a legal reasoning in order to determine where an "omission" occurred, and the court of origin and the courts requested may reach a different conclusion. Deleting "omission" will help minimize uncertainty and conflict in interpretation. Moreover, if the defendant not only made the alleged omission but also acted positively in the State of origin, the court of origin may make it clear in its judgment, which the court requested may recognize and enforce with greater ease.

*[Proposed solution for joint and concurrent torts]*

Second issue is the possibility of attributing one tortfeasor's territorial contact to the other tortfeasors in a joint or concurrent tort. Example: After a physical injury is inflicted by a harmful medicine in another State, a surgeon makes a negligent medical treatment in the State of origin; but the producer of a harmful medicine could not reasonably have foreseen this territorial connection with the State of origin. The latter tortfeasors would be concerned about this possible application of sub-paragraph (j) over them. From their viewpoint, this forum may be unforeseeable, in a similar way as a place of harm may be unpredictable. The 1999 Preliminary Draft, Article 10(1)(b),[1] resolves this problem by requiring reasonable predictability about the place of harm. It is proposed to extend this solution to the place of "act" of other tortfeasors involved in joint and concurrent tort.

In the suggested proviso, the concern over an unpredictable forum could be perceived by both concurrent and joint tortfeasors, although the concern could be a little nuanced for joint tortfeasors in the strict sense. Meanwhile, national substantive laws differ in sub-dividing legal categories,[2] and an attempt to distinguish between joint and concurrent torts may invite a "review on the merits" ("*révision au fond*"). For this reason, the proposed text mentions both categories indifferently.

In Working Document No 201, the Korean delegation proposed the following textual change:

> (j) the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the defendant's act ~~or omission~~ directly causing such harm occurred in the State of origin, irrespective of where that harm occurred;

This earlier proposal suggested a simpler solution of clarifying that the Article 5(1)(j) test will apply to each defendant, so that one tortfeasor's act (or act or omission) may not

[1] Article 10 – *Torts or delicts*
1 A plaintiff may bring an action in tort or delict in the courts of the State –
(a) in which the act or omission that caused injury occurred, or
(b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.

[2] The laws of some States use the term "joint tort" in a broad sense, *i.e.*, to include concurrent tort.


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subject other tortfeasors to Article 5(1)(j). In comparison, the current proposal proposes a more nuanced revision.

**No 6 – Proposal of the delegation of the Republic of Korea**

Article 5
*Bases for recognition and enforcement*

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

[…]

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

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

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

This sub-paragraph only applies where the designation was made expressly or appears clearly from the provisions of the trust instrument, and to judgments regarding internal aspects of a trust between persons who are or were within the trust relationship;

*Explanation*

1) Reasons for proposing a textual clarification in (k)(i):

Quite evidently, the rationale for (k)(i) appears to be limited to the choice of "court", to the exclusion of the choice of conciliation or arbitration in the State of origin. If (k)(i) should cover an arbitration clause as well, it would effectively allow bypassing the 1958 New York Convention's requirement of an agreement by both parties. Example: a settlor designates a certain State as the place of arbitration. Under the New York Convention, this agreement will not satisfy the writing requirement (Art. 2). Whether a substantive agreement exists may also be suspect (Art. 5(1)(a) of the New York Convention). However, if the settlor sues in a court of the same State, would the resulting judgment satisfy Article 5(1)(k)(i)? If we construe this provision literally, we would have to affirm this result. Indeed, the current text of (k)(i) may appear to cover agreements to resolve disputes by conciliation, arbitration, etc. in a specific State. Logically, they might also qualify as a designation of "State in which disputes […] are to be determined". But this must not have been the intention of the Special Commission when it provided for (k)(i). Preferably, it could be clarified that the designation in (k)(i) refers only to the designation of "court or courts of" a State.

2) Reasons for proposing to clarify the limits on "implied" designations:

2.1) The current (k)(ii) puts no limit on the possibility of "implied" designation. This may result in an unnecessary controversy and create an uncertainty regarding the enforceability of a judgment. The second part of the proposal attempts to resolve this concern.

2.2) Typically, a designation of the court(s) or the principal place of administration will be express. Requiring an express designation would not necessarily mean the use of the exact phrase of "principal place of administration" in the trust instrument. Moreover, an express designation can be made, if there is any ambiguity in the designation. So the additional value of giving effect to an implied designation will be minimal.

2.3) The reference to an "implied" designation might create an unnecessary controversy, by possibly motivating a search for a "presumed" designation. Indeed, the current language of (k)(ii) mentions "impliedly", not "impliedly or presumptively". But examples abound in national courts where a search for a "presumed" choice is made in the name of identifying an "implied" choice.

Therefore, it is proposed to clarify the limit on the finding of an "implied" designation. The wording is borrowed from the Hague Principles on Choice of Law in International Commercial Contracts, Article 4.[1]

**No 7 – Proposal of the delegation of the Republic of Korea**

Article 10
*Damages*

1b Recognition or enforcement of a judgment may also be refused if, and to the extent that, the judgment in anti-trust (competition) matters awards damages which compensate for the type of harm unknown to the law of the State requested and are calculated according to the standard unknown to the law of the State requested.

~~[~~Article 11
*Non-monetary remedies in intellectual property and anti-trust (competition) matters*

1 […]

2 A judgment granting a remedy other than monetary damages in anti-trust (competition) matters shall not be recognised or enforced under this Convention.~~]~~

*Explanation*

We would like to propose these changes to Articles 10 and 11, if a consensus should be formed to include these matters within the scope either wholly or partially. The proposed additions are bracketed to reflect this context.

*[Article 10, paragraph 1b]*

In anti-trust (competition) area, the type of compensable harm and the method of calculating pure economic loss (or financial loss) are very diverse. In private anti-trust litigations, they are the points of severe controversy in judgment stage. These issues may also be raised in the stage of recognition and enforcement. The draft text of paragraph 1b is proposed as a modest safety valve to relieve the court requested of these sensitive issues.

[1] Article 4 – *Express and tacit choice*
A choice of law, or any modification of a choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law.

*[Article 11, paragraph 2]*

Anti-trust (competition) is an area of considerations of economic policy. Public regulation will be the dominant factor in defining the civil and commercial aspects of the anti-trust (competition) law. This dominance of economic policy and public regulation will not dissipate in the private side of anti-trust (competition) law, *i.e.*, its effects on rights and liabilities of civil and commercial nature. Therefore, non-monetary remedies, injunction in particular, will often serve a tool of realizing the economic regulation at the initiative of a private individual or enterprise. Of course, these remedies take the form of civil remedies. But the question of form may not wholly overturn the question of substance. Undeniably, even these civil remedies serve to attain the goals imposed by state regulation. It could be said that this public flavor of civil remedies is clearly stronger in anti-trust (competition) law than in intellectual property law. Anti-trust (competition) law intervenes to regulate private relations. In anti-trust (competition) law, private right of action is rather a side effect of public regulation. Meanwhile, intellectual property law looks to a private individual's intellectual input to create a private right. For this reason, it appears even more appropriate in the anti-trust (competition) area to relieve the State requested from a treaty obligation to recognise and enforce foreign non-monetary remedies.

In intellectual property infringement cases, injunction is more a private law remedy than a regulatory tool. Analogy may be drawn between injunction for intellectual law infringement and injunction for infringing ownership of land, for example. For this reason, the current Article 11 exempts the State requested from a treaty obligation of execution, but not recognition. However, injunction for violating anti-trust (competition) law is something different. Indeed, in anti-trust (competition) law, injunction is not just a tool of realising a preexisting private right, but a tool of pushing the regulatory philosophy into the private law realm. Therefore, in anti-trust (competition) matters, not only execution but also recognition should better be left to the national rules at this stage of development of conflicts law in this field.

**No 8 – Proposal of the delegation of the Republic of Korea**

Article 30
*Declarations*

4 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of six months following the date on which the notification is received by the depositary. However, a declaration referred to in Article 4(5) shall take effect on the first day of the month following the expiration of twelve months following the date on which the notification is received by the depositary.

*Explanation*

This proposal is made under the assumption that an opt-out declaration mechanism would be adopted regarding common courts. The proposed change is intended to allow the States other than the State making a declaration under Article 4(5) ("transparency declaration") more time to consider whether or not to make an opt-out declaration. Once a Contracting State makes a transparency declaration, other States would be put under a time pressure to decide whether to make an opt-out declaration. If these States take time (*e.g.*, a few months) to deliberate whether to make an opt-out declaration, they will be bound by the transparency declaration for some transitory period. It will be the case unless the opt-out declaration is made within the same month when the transparency declaration is made. This may have the unintended effect of unnecessarily encouraging an opt-out declaration, at least for the time being. This problem could be solved by requiring a little longer waiting period for a transparency declaration.

**No 9 – Proposal of the delegation of Singapore**

*Article 5(3)*

[3 Paragraph 1 does not apply to a judgment that ruled on an intellectual property right or an analogous right. Such a judgment is eligible for recognition and enforcement if one of the following requirements is met –

(a) the judgment ruled on an infringement in the State of origin of an intellectual property right required to be granted or registered and it was given by a court in the State in which the grant or registration of the right concerned has taken place or, under the terms of an international or regional instrument, is deemed to have taken place[, unless the defendant has not acted in that State to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State];

(b) the judgment ruled on an infringement in the State of origin of a copyright or related right, an unregistered trademark or unregistered industrial design, and it was given by a court in the State for which protection was claimed[, unless the defendant has not acted in that State to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State];

(c) the judgment ruled on an infringement of an intellectual property right required to be granted or registered, or of a copyright or related right, an unregistered trademark or unregistered industrial design, and it was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement[, unless,

(i) for an intellectual property right required to be granted or registered, the defendant has not acted in the State in which grant or registration of the right has taken place, or under the terms of an international or regional instrument, is deemed to have taken place; or

(ii) for a copyright or related right, an unregistered trademark or unregistered industrial design, the defendant has not acted in the State for which protection was claimed

to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State].

(d) the judgment ruled on the validity[, subsistence or ownership] in the State of origin of a copyright or related right, an unregistered trademark or unregistered industrial design, and it was given by a court in the State for which protection was claimed.]


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*Article 7(1)(g)*

1 Recognition or enforcement may be refused if –

[…]

~~[(g) the judgment ruled on an infringement of an intellectual property right, applying to that [right/infringement] a law other than the internal law of the State of origin.]~~

[(g) the judgment ruled on an infringement of –

(i) an intellectual property right required to be granted or registered, applying to that [right/infringement] a law other than the internal law of the State in which the grant or registration of the right has taken place or, under the terms of an international or regional instrument, is deemed to have taken place; or

(ii) a copyright or related right, an unregistered trademark or unregistered industrial design, applying to that [right/infringement] a law other than the internal law of the State for which protection was claimed.]

*Article 11*

[Article 11
*Non-monetary remedies in intellectual property matters*

In intellectual property matters, a judgment ruling on an infringement shall be [recognised and] enforced only to the extent that it rules on a monetary remedy in relation to harm suffered ~~in the State of origin~~.]

*Explanation*

1) We support the bases for recognition and enforcement of infringement judgments in Article 5(3)(a) and (b). In addition, we would like to propose that for *infringement judgments*, judgments originating from a court in which *all parties involved in the dispute have agreed* to have the dispute heard should also be eligible for recognition and enforcement. This basis is similar to Article 5(1)(m).

2) As a safeguard, recognition and enforcement may be refused where the judgment *did not apply* the law of the State of grant or registration of the right (in the case of registered rights) or the State where the protection is claimed (in the case of unregistered rights).

3) We believe this proposal is effective, practical and addresses concerns that have been raised.

a. *Agreement of the parties* is a well-established basis for jurisdiction. This is because the parties involved in the dispute are the ones with the greatest interest in resolving the dispute, therefore their unanimous decision on this issue would reflect the most appropriate forum. This proposal therefore provides parties with the autonomy and flexibility to, on a case-by-case basis, make the decision based on the specific factors surrounding each case.

b. The concern with regard to territoriality or sovereignty is addressed as validity, subsistence, etc. (*i.e.*, *in rem* judgments), as determined by the State under which the right arose (no amendments are proposed to Art. 5(3)(c) or to Art. 6(a)). The relevant disputes here are *in personam* – directly affecting only the parties involved in the dispute.

c. The concern regarding whether a court may not be familiar with and therefore incorrectly apply the law of the State where the IP right arose is addressed as parties would only choose a court if they have confidence in that court's ability to correctly apply the relevant law.

4) To effect the above proposal, amendments to Articles 5(3), 7(1)(g) and 11 would be required.

**No 10 – Proposition de la délégation de l'Union européenne – Proposal of the delegation of the European Union**

Article 15
*Frais de procédure*

1 Aucune sûreté, caution ou dépôt, sous quelque dénomination que ce soit, ne peut être imposée en raison, soit de la seule qualité d'étranger, soit du seul défaut de domicile ou de résidence dans l'État requis, à la partie qui demande l'exécution dans un État contractant d'une décision rendue dans un autre État contractant.

2 Toute condamnation aux frais et dépens, rendue dans un État contractant contre toute personne dispensée du versement d'une sûreté, d'une caution ou d'un dépôt en vertu du paragraphe premier ou du droit de l'État dans lequel la procédure a été engagée est, à la demande du créancier, déclarée exécutoire dans tout autre État contractant.

3 Un État peut déclarer qu'il n'appliquera pas le paragraphe premier ou désigner dans une déclaration lesquels de ses tribunaux ne l'appliqueront pas.

*Note explicative*

À la note de bas de page 257 du projet de Rapport explicatif (Doc. prél. No 1 de décembre 2018), les co-Rapporteurs ont invité à réfléchir sur le point suivant :

> « [L]'art. 15(2) prévoit la circulation d'une condamnation aux dépens lorsqu'elle a été prononcée contre une partie qui était *dispensée du versement d'une sûreté* en vertu de l'art. 15(1). Dans les États contractants qui n'imposent pas de sûreté pour les frais et dépens exclusivement fondée sur la nationalité/le domicile/la résidence, il n'y a pas d'exemption du paiement de la sûreté en vertu de l'art. 15(1) ; de ce fait, les condamnations aux frais et dépens prononcées dans ces États ne circuleraient pas en vertu de l'art. 15(2). Ce résultat est contraire au principe d'absence de sûreté pour les frais et dépens exclusivement fondée sur la nationalité/le domicile/la résidence qui sous-tend l'art. 15(1). »

La proposition de l'UE résout le problème susmentionné dans le droit fil de la Convention de 1980 tendant à faciliter l'accès international à la justice (art. 15, para. 2), en ajoutant les termes « ou du droit de l'État dans lequel la procédure a été engagée » après « en vertu du paragraphe premier », garantissant ainsi que les États contractants dans lesquels il n'existe pas de caution *judicatum solvi* bénéficient également de la circulation des injonctions sur la base de l'article 15, paragraphe 2.

* * *

Article 15
*Costs of proceedings*

1 No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given in another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.

2 An order for payment of costs or expenses of proceedings, made in a Contracting State against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 or of the law of the State where proceedings have been commenced shall, on the application of the person entitled to the benefit of the order, be rendered enforceable in any other Contracting State.

3 A State may declare that it shall not apply paragraph 1 or designate by a declaration which of its courts shall not apply paragraph 1.

*Explanation*

In footnote 257 of the draft Explanatory Report (Prel. Doc. No 1 of December 2018), the *co-Rapporteurs* invited consideration of the following point:

> "Art. 15(2) provides for circulation of a cost award where it was granted against a party who was *exempted from security by virtue of Art. 15(1)*. In Contracting States that do not impose security for costs based solely on nationality/domicile/residence, there is no exemption from security by virtue of Art. 15(1), and thus costs orders granted in those States would not circulate under Art. 15(2). This result is inconsistent with the policy against the imposition of security for costs based solely on nationality/domicile/residence underlying Art. 15(1)."

The EU proposal solves the above-mentioned problem along the lines of the 1980 Convention on international access to justice (Art. 15(2)), by adding the words "or of the law of the State where proceedings have been commenced" after "by virtue of paragraph 1", thus ensuring that those Contracting States where the caution *judicatum solvi* does not exist benefit from the circulation of orders under Article 15(2) as well.

**No 11 – Proposition de la délégation de l'Union européenne – Proposal of the delegation of the European Union**

*Texte du Rapport explicatif concernant la Cour de justice de l'Union européenne*

124 **Exemples.** Il existe des tribunaux communs qui peuvent être clairement qualifiés comme tels : la Cour commune de justice et d'arbitrage (CCJA) de l'Organisation pour l'harmonisation en Afrique du droit des affaires, la Cour de justice des Caraïbes (*Caribbean Court of Justice*, CCJ), la Cour suprême de la Caraïbe orientale (*Eastern Caribbean Supreme Court*, ECSC), la Cour de justice de la Communauté andine (*Tribunal de Justicia de la Comunidad Andina*, TJCA), le Comité judiciaire du Conseil privé (*Judicial Committee of the Privy Council*, JCPC), la Cour de justice du Benelux, ou la future Juridiction unifiée du brevet[100]. À l'inverse, des juridictions internationales comme la Cour internationale de justice (CIJ), la Cour européenne des droits de l'homme (CrEDH), la Cour interaméricaine des droits de l'homme (CIDH) ou l'Organe d'appel de l'Organisation mondiale du commerce (OMC) ne constituent pas des tribunaux communs aux fins de l'article 4(5). Ces tribunaux connaissent de litiges de droit international public, non de matières civiles et commerciales, et de ce fait, ils n'exercent pas la compétence *des* États mais exercent leur compétence *sur* les États en tant que sujets de droit international. De même, les tribunaux établis en vertu de traités bilatéraux d'investissement pour connaître des différends entre investisseurs et États ne constituent pas eux non plus des tribunaux communs parce qu'ils exercent leur compétence *sur* l'État en tant que sujet de droit international[101]. ~~Le cas de la Cour de justice de l'Union européenne (CJUE, constituée de la Cour de justice et du Tribunal) est discutable, car elle peut avoir une double fonction ; en tant qu'institution de l'Union européenne, c'est une juridiction supranationale qui, toutefois, exerce également sa compétence en matière civile et commerciale dans le cadre de certains différends portant sur des droits de propriété intellectuelle dans l'UE. La CJUE est également compétente pour connaître de litiges contractuels et non contractuels entre l'Union européenne et des personnes privées. Toutefois, le fait que l'Union européenne, en tant qu'Organisation régionale d'intégration économique (ci-après, « ORIE »), puisse devenir Partie au projet de Convention et être considérée comme un État contractant (voir art. 27(4)), permet de conclure que la CJUE est le tribunal d'un État contractant et non un tribunal commun à deux ou plusieurs États contractants[102].~~

444 **Sens du terme « État ».** Une ORIE contractante a, dans les limites de sa compétence, les mêmes droits et obligations qu'un État contractant. Ainsi, le paragraphe 4 dispose que lorsqu'une ORIE devient Partie au projet de Convention, soit en vertu de l'article 27, soit en vertu de l'article 28, toute référence à un « État contractant » ou à un « État » s'applique également, le cas échéant, à l'ORIE. Cela signifie que, selon le cas, le terme « État » peut, dans le contexte européen, désigner soit l'Union européenne, soit l'un de ses États membres. En conséquence, puisque l'Union européenne, en tant qu'Organisation régionale d'intégration économique, peut devenir partie au projet de Convention et être considérée comme un État contractant, son pouvoir judiciaire, à savoir la Cour de justice de l'Union européenne, devrait être considéré comme la juridiction d'un État contractant aux fins de la présente Convention[1].

445 ~~Cette disposition~~ Le paragraphe 4 est parallèle à l'article 23(1). Ses effets ont déjà été analysés (voir, *supra*, para. 398 à 400). Il convient toutefois de souligner que l'article 24(4) est une *lex specialis* par rapport aux articles 27 et 28 dans la mesure où l'application des instruments juridiques d'une ORIE est concernée. Lorsque la Convention ne cède pas à un tel instrument en vertu de l'article 24(4), les articles 27 ou 28 ne peuvent être invoqués pour justifier l'application de l'instrument au lieu de la Convention.

*Note explicative*

Comme dans le Rapport explicatif sur la Convention Élection de for, il est souligné qu'il serait plus approprié de préciser la position de la Cour de justice de l'Union européenne dans la partie traitant des Organisations régionales d'intégration économique. Pour des raisons de sécurité juridique, il convient de préciser dans le Rapport que, comme la référence à un État contractant s'applique le cas échéant, dans le contexte européen, à l'Union européenne, la CJUE,

[1] Voir également le Rapport Hartley/Dogauchi, para. 17: « Il s'ensuit qu'un accord d'élection de for désignant 'les tribunaux de la Communauté européenne' ou visant particulièrement 'la Cour de justice des Communautés européennes (Tribunal de première instance)' relèverait de la Convention. »


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en tant que pouvoir judiciaire de l'UE, devrait être considérée comme la juridiction d'un État contractant.

* * *

*Explanatory Report text with regard to the Court of Justice of the European Union*

124 **Examples.** There are examples of common courts that can be clearly characterised as such: the Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law (CCJA); the Caribbean Court of Justice (CCJ); the Eastern Caribbean Supreme Court (ECSC); the Court of Justice of the Andean Community (TJCA); the Judicial Committee of the Privy Council (JCPC); the Benelux Court of Justice; or the future Unified Patent Court.[100] Conversely, international courts, such as the International Court of Justice (ICJ), the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (CIDH) or the World Trade Organisation (WTO) Appellate Body do not qualify as common courts for the purpose of Article 4(5). These courts deal with public international law disputes, not with civil and commercial matters, and accordingly do not exercise jurisdiction *of* the States but *over* the States as subjects of international law. Similarly, courts established under Bilateral Investment Treaties (BIT) to deal with investor-State disputes do not qualify as common courts because they exercise jurisdiction *over* the State as a subject of international law.[101] ~~The case of the European Court of Justice (ECJ) (including the Court of First Instance) is debatable, since it may have a double function: as an institution of the European Union it is a supra-national court, but it also exercises jurisdiction on civil and commercial matters regarding certain EU intellectual property right disputes. The ECJ also has jurisdiction to adjudicate in cases related to contractual and non-contractual disputes between the European Union and private persons. However, since the European Union as a Regional Economic Integration Organisation (hereinafter, "REIO") may become a party to the draft Convention and qualify as a Contracting State (see Art. 27(4)), there are reasons to conclude that the ECJ is the court of a Contracting State, and not a court common to two or more Contracting States.~~[102]

444 **Meaning of "State".** A Contracting REIO has, within the limits of its competence, the same rights and duties as a Contracting State. Thus, paragraph 4 provides that where an REIO becomes a Party to the Convention, whether under Article 27 or under Article 28, any reference in the Convention to "Contracting State" or to "State" applies equally, where appropriate, to the REIO. This means that, depending on what is appropriate, "State" in the European context could mean either the European Union, or one of its Member States. It follows that, since the European Union as a Regional Economic Integration Organisation may become a party to the draft Convention and qualify as a Contracting State, its judicial arm, the Court of Justice of the European Union, should be considered as the court of a Contracting State for the purposes of this Convention.[1]

445 ~~This provision~~ Paragraph 4 parallels Article 23(1). Its effect has already been discussed (see *supra* paras 398-400). It should be noted, however, that Article 24(4) is a *lex specialis* to Articles 27 and 28 as far as the application of legal instruments of an REIO is concerned. Where the Convention does not give way to such an instrument under Article 24(4), it is not possible to use Article 27 or 28 to justify the application of the instrument instead of the Convention.

*Explanation*

Just like in the Explanatory Report to the Choice of Court Convention, it is submitted that it would be more appropriate to clarify the position of the Court of Justice of the European Union in the part dealing with Regional Economic Integration Organisations. For the sake of legal certainty, the Report should clarify that, since in the European context the reference to a Contracting State applies, where appropriate, to the European Union, the CJEU, as the judicial arm of the EU, should be considered as the court of a Contracting State.

**No 12 – Proposition de la délégation de l'Union européenne – Proposal of the delegation of the European Union**

Article X
*Réserves*

Aucune réserve à la présente Convention n'est admise.

* * *

Article X
*Reservations*

No reservation to this Convention shall be permitted.

**No 13 – Proposition de la délégation de l'Union européenne – Proposal of the delegation of the European Union**

Article 2
*Exclusions du champ d'application*

[~~(~~m) la propriété intellectuelle[ et les matières analogues], à l'exception des droits d'auteur et droits voisins ;~~]~~

Article 5
*Fondements de la reconnaissance ou de l'exécution*

~~[~~3 Le paragraphe premier ne s'applique pas à un jugement portant sur ~~un droit de propriété intellectuelle ou analogue~~ un droit d'auteur ou droit voisin. Un tel jugement est susceptible d'être reconnu ou exécuté si l'une des exigences suivantes est satisfaite :

~~(a) le jugement porte sur la contrefaçon, dans l'État d'origine, d'un droit de propriété intellectuelle nécessitant délivrance, octroi ou enregistrement et a été rendu par un tribunal de l'État dans lequel la délivrance, l'octroi ou l'enregistrement du droit en question a été effectué, ou est réputé avoir été effectué conformément aux dispositions d'un instrument international ou régional[, sauf si le défendeur n'a pas agi dans cet État aux fins d'initier ou de poursuivre la contrefaçon ou que son activité ne peut raisonnablement être considérée comme ayant spécifiquement visé cet État] ;~~

(~~b~~a) le jugement porte sur la contrefaçon, dans l'État d'origine, d'un droit d'auteur ou droit voisin~~, d'une marque non enregistrée ou d'un dessin ou modèle industriel non enregistré,~~ et a été rendu par un tribunal de l'État pour lequel la protection était revendiquée~~[~~, sauf si le défendeur n'a pas agi dans cet État aux fins d'initier ou de poursuivre la contrefaçon ou que son activité ne

[1] See also Hartley/Dogauchi Report, para. 17: "It follows from this that a choice of court agreement designating 'the courts of the European Community' or referring specifically to 'the Court of Justice of the European Communities (Court of First Instance)' would be covered by the Convention."

peut raisonnablement être considérée comme ayant spécifiquement visé cet État~~]~~ ;

(e~~b~~) le jugement porte sur ~~la validité[~~, l'existence ou la titularité~~]~~, dans l'État d'origine, d'un droit d'auteur ou droit voisin~~, d'une marque non enregistrée ou d'un dessin ou modèle industriel non enregistré,~~ et a été rendu par un tribunal de l'État pour lequel la protection était revendiquée.~~]~~

Article 6
*Fondements exclusifs de la reconnaissance ou de l'exécution*

Nonobstant l'article 5 :

~~[(a) un jugement portant sur [l'enregistrement ou] la validité d'un droit de propriété intellectuelle nécessitant délivrance, octroi ou enregistrement n'est reconnu ou exécuté que si l'État d'origine est celui dans lequel la délivrance, l'octroi ou l'enregistrement a été effectué, ou est réputé avoir été effectué conformément aux dispositions d'un instrument international ou régional ;]~~

(~~b~~a) un jugement portant sur des droits réels immobiliers n'est reconnu ou exécuté que si l'immeuble est situé dans l'État d'origine ;

(e~~b~~) un jugement portant sur un bail immobilier pour une période de plus de six mois ne peut être reconnu ou exécuté si l'immeuble n'est pas situé dans l'État d'origine et les tribunaux de l'État dans lequel se trouve l'immeuble ont compétence exclusive en vertu du droit de cet État.

Article 7
*Refus de reconnaissance ou d'exécution*

1 La reconnaissance ou l'exécution peut être refusée si :

[…]

~~[(g) le jugement porte sur la contrefaçon d'un droit de propriété intellectuelle et applique à [ce droit/cette contrefaçon] un autre droit que le droit interne de l'État d'origine.]~~

Article 8
*Questions préalables*

1 Une décision rendue à titre préalable sur une matière à laquelle la présente Convention ne s'applique pas, ou une décision rendue à titre préalable sur une matière visée à l'article 6 par un autre tribunal que celui désigné dans cette disposition, n'est pas reconnue ou exécutée en vertu de la présente Convention.

2 La reconnaissance ou l'exécution d'un jugement peut être refusée si, et dans la mesure où, le jugement est fondé sur une décision relative à une matière à laquelle la présente Convention ne s'applique pas, ou sur une décision relative à une matière visée à l'article 6 qui a été rendue par un autre tribunal que celui désigné dans cette disposition.

[3 Toutefois, dans le cas d'une décision relative à la validité ~~d'un droit visé à l'article 6(a),~~ d'un droit de propriété intellectuelle autre qu'un droit d'auteur ou droit voisin, la reconnaissance ou l'exécution d'un jugement ne peut être différée, ou refusée en vertu du paragraphe précédent, que si :

(a) cette décision est incompatible avec un jugement ou une décision rendu(e) sur ce point par l'autorité compétente de l'État ~~mentionné à l'article 6(a)~~ du droit duquel découle ce droit de propriété intellectuelle ; ou

(b) une procédure relative à la validité de ce droit de propriété intellectuelle est pendante dans cet État.

Le refus en vertu de l'alinéa (b) n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.]

~~[~~Article 11
~~*Mesures non pécuniaires en matière de propriété intellectuelle*~~ *Injonctions relatives à la contrefaçon d'un droit d'auteur ou d'un droit voisin*

~~En matière de propriété intellectuelle,~~ Des injonctions accordées dans un jugement portant sur une contrefaçon d'un droit d'auteur ou droit voisin ~~n'est~~ ne sont ~~[reconnu ou]~~ exécutées que dans la mesure où

(a) ~~il~~ elles ~~a statué sur~~ se rapportent à un comportement dans l'État d'origine, et

(b) le droit de l'État requis prévoit la possibilité d'exécuter ces injonctions par des condamnations pécuniaires en cas de non-respect. ~~liées au préjudice subi dans l'État d'origine.]~~

*Note explicative*

Jusqu'à présent, l'UE a défendu la position selon laquelle les jugements portant sur des questions de propriété intellectuelle devraient être pleinement inclus dans le champ d'application du projet de Convention relative aux jugements (la Convention), parce qu'il est particulièrement nécessaire, dans ce domaine du droit important d'un point de vue économique, de disposer d'une sécurité juridique et de règles applicables aux cas transfrontières. Alors que plusieurs délégations y étaient opposées au départ, le nombre d'opposants a considérablement diminué après la limitation de la Convention à une approche fondée sur une stricte territorialité. Les réunions et les consultations informelles de la Commission spéciale ont toutefois montré qu'une approche « tout compris » n'est de toute façon pas susceptible de faire consensus à ce stade. Cela s'explique en grande partie par l'argument selon lequel, dans le domaine des droits de propriété industrielle et des brevets en particulier, le manque d'harmonisation des règles de droit matériel, conjugué à l'obligation de reconnaître et d'exécuter les jugements étrangers dans le cadre de la Convention, produirait des effets indésirables. Pour remédier à cette situation et ouvrir la voie à un consensus, l'UE suggère donc de limiter le champ d'application de la Convention aux droits d'auteur et droits voisins, à l'exclusion de tous les autres jugements en matière de propriété intellectuelle. Dans le domaine des droits d'auteur et droits voisins, des instruments internationaux tels que la Convention de Berne et les traités de l'OMPI ont permis de parvenir à une harmonisation conséquente des règles de droit matériel. Les parties prenantes sont également favorables à l'inclusion – pour autant que les injonctions, qui revêtent une importance pratique considérable dans ce domaine, soient couvertes par la Convention.

Dès lors, la présente proposition suggère une modification de l'article 2 limitant en conséquence le champ d'applica-


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tion de la Convention. En ce qui concerne l'article 11, la proposition vise également à ouvrir la voie à un compromis entre ceux qui s'opposent à ce que des injonctions dans des affaires de contrefaçon de droits de propriété intellectuelle circulent dans le cadre de la Convention et ceux pour qui une telle circulation est essentielle. Le point (a) met en exergue le principe de territorialité en précisant que la Convention ne prévoit aucune obligation de reconnaître et d'exécuter une injonction interdisant certains comportements hors de l'État d'origine du jugement. Le point (b) garantira que seuls les États contractants disposant d'outils dans leur législation nationale pour exécuter des injonctions (par ex. des amendes pécuniaires infligées à titre de mesure d'exécution) seront tenus par la Convention d'exécuter une injonction étrangère. Les modifications proposées pour les autres articles sont de simples adaptations techniques de l'approche exposée dans la présente note explicative. Les changements proposés à l'article 8 reflètent la rédaction de l'article 10 de la Convention sur l'élection de for de 2005 qui couvre également le droit d'auteur et les droits voisins. En outre, s'il est possible de trouver un terrain d'entente sur cette approche, une règle relative à des juridictions communes pourrait ne plus être nécessaire, étant donné que les deux juridictions communes dont l'inclusion a été demandée par l'UE et examinée en détail jusqu'à présent sont la juridiction unifiée du brevet (JUB) et la Cour de Justice Benelux, qui jouit de certaines compétences pour rendre des jugements dans le domaine des marques.

* * *

Article 2
*Exclusions from scope*

~~[~~(m) intellectual property[ and analogous matters], except for copyright and related rights;~~]~~

Article 5
*Bases for recognition and enforcement*

~~[~~3 Paragraph 1 does not apply to a judgment that ruled on ~~an intellectual property right or an analogous right~~ a copyright or related right. Such a judgment is eligible for recognition and enforcement if one of the following requirements is met:

~~(a) the judgment ruled on an infringement in the State of origin of an intellectual property right required to be granted or registered and it was given by a court in the State in which the grant or registration of the right concerned has taken place or, under the terms of an international or regional instrument, is deemed to have taken place[, unless the defendant has not acted in that State to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State];~~

(~~b~~a) the judgment ruled on an infringement in the State of origin of a copyright or related right~~, an unregistered trademark or unregistered industrial design,~~ and it was given by a court in the State for which protection was claimed~~[~~, unless the defendant has not acted in that State to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State~~]~~;

(~~c~~b) the judgment ruled on the ~~validity[, subsistence or ownership]~~ in the State of origin of a copyright or related right~~, an unregistered trademark or unregistered industrial design,~~ and it was given by a court in the State for which protection was claimed.~~]~~

Article 6
*Exclusive bases for recognition and enforcement*

Notwithstanding Article 5 –

~~[(a) a judgment that ruled on the [registration or] validity of an intellectual property right required to be granted or registered shall be recognised and enforced if and only if the State of origin is the State in which grant or registration has taken place, or, under the terms of an international or regional instrument, is deemed to have taken place;]~~

(~~b~~a) a judgment that ruled on rights *in rem* in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin;

(~~c~~b) a judgment that ruled on a tenancy of immovable property for a period of more than six months shall not be recognised and enforced if the property is not situated in the State of origin and the courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State.

Article 7
*Refusal of recognition and enforcement*

1 Recognition and enforcement may be refused if –

[…]

~~[(g) the judgment ruled on an infringement of an intellectual property right, applying to that [right/infringement] a law other than the internal law of the State of origin.]~~

Article 8
*Preliminary questions*

1 A ruling on a preliminary question shall not be recognised or enforced under this Convention if the ruling is on a matter to which this Convention does not apply or on a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled.

2 Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply, or on a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled.

[3 However, in the case of a ruling on the validity of ~~a~~ right referred to in Article 6, paragraph (a) an intellectual property right other than copyright or a related right, recognition or enforcement of a judgment may be postponed, or refused under the preceding paragraph, only where –

(a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State ~~referred to in Article 6, paragraph (a)~~ under the law of which the intellectual property right arose; or

(b) proceedings concerning the validity of ~~that~~ the intellectual property right are pending in that State.

A refusal under sub-paragraph (b) does not prevent a subsequent application for recognition or enforcement of the judgment.]

[Article 11
~~*Non-monetary remedies in intellectual property matters*~~
*Injunctive relief relating to the infringement of a copyright or related right*

~~In intellectual property matters,~~ Injunctive relief granted in a judgment ruling on an infringement of a copyright or related right shall be ~~[recognised and]~~ enforced only to the extent that –

(a) it ~~rules on~~ relates to conduct in the State of origin, and

(b) the law of the requested State provides for the possibility to enforce such injunctive relief through a monetary remedy in case of non-compliance. ~~in relation to harm suffered in the State of origin.~~]

*Explanation*

Up to now, the EU has advocated the position that judgments on intellectual property matters should be fully included within the scope of the draft Judgments Convention (the Convention) because in this economically important area of law there is a particular need for legal certainty and rules for cross-border cases. While a number of delegations were opposed to this at the outset, the number of opponents has decreased considerably following the limitation of the Convention to an approach based on strict territoriality. However, the Special Commission meetings and informal consultations have shown that an "all-in approach" is still not likely to reach consensus at this stage. This is to a large extent due to the claim that in the area of industrial property rights and in particular patents, the lack of substantive-law harmonisation in combination with the obligation to recognise and enforce foreign judgments under the Convention would produce unintended side-effects. In order to resolve this situation and pave the way towards consensus, the EU therefore suggests limiting the Convention to copyright and related rights, excluding all other intellectual property-related judgments from scope. In the area of copyright and related rights, considerable harmonisation of substantive law has been achieved by international instruments such as the Berne Convention and the WIPO Treaties. There is also stakeholder support for the inclusion – provided that injunctions, which are of utmost practical importance in this area, are covered by the Convention.

Therefore, this proposal suggests a change to Article 2, limiting the scope of the Convention accordingly. With regard to Article 11, the proposal equally seeks to pave the way for a compromise between those who would not want to see injunctions in IP infringement cases to circulate under the Convention, and those for whom the circulation of injunctions is essential. Point (a) underlines the principle of territoriality in clarifying that there is no obligation under the Convention to recognise and enforce an injunction prohibiting certain conduct outside the State of origin of the judgment. Point (b) will ensure that only Contracting States which do have tools in their national law to enforce injunctions (*e.g.*, monetary fines imposed as an enforcement measure) will be under an obligation established by the Convention to enforce a foreign injunction. The adaptations proposed to the other Articles are mere technical adaptations to the policy outlined in this explanation. The changes proposed to Article 8 follow the wording of Article 10 of the 2005 Choice of Court Convention which also covers copyright and related rights. Moreover, if common ground can be reached on this approach, there may no longer be a need for a rule on common courts because the two common courts whose inclusion has been requested by the EU and discussed in detail so far are the Unified Patent Court (UPC) and the Benelux Court of Justice which has certain competences to give judgments related to trademarks.

**No 14 – Proposition de la délégation de l'Union européenne – Proposal of the delegation of the European Union**

Article X
*Tribunaux communs*

1 Sans préjudice de l'article 4, paragraphe 5, aux fins de la présente Convention, chacun des tribunaux communs à plusieurs États (un « tribunal commun ») qui sont mentionnés ci-dessous est réputé être un tribunal d'un État contractant lorsque, en vertu de l'acte qui l'institue, un tel tribunal commun exerce sa compétence dans des matières relevant du champ d'application de la présente Convention :

(a) la juridiction unifiée du brevet instituée par l'accord relatif à une juridiction unifiée du brevet, signé le 19 février 2013[1] ;

(b) la Cour de Justice Benelux instituée par le traité du 31 mars 1965 relatif à l'institution et au statut d'une Cour de Justice Benelux.

2 Les déclarations visées à l'article 4, paragraphes 6 et 7, ne s'appliquent pas aux tribunaux communs mentionnés au paragraphe 1 du présent article[2].

*Note explicative*

L'article 4, paragraphes 5, 6 et 7, traite de la question des tribunaux communs. Tandis que le paragraphe 5 précise de quelle manière les filtres juridictionnels de l'article 5 s'appliquent dans le cas des tribunaux communs, le paragraphe 6 établit des règles relatives à un mécanisme de déclaration permettant d'informer les autres États contractants des tribunaux communs rendant des jugements susceptibles de circuler dans le cadre de la Convention. Enfin, le paragraphe 7 offre aux États contractants la possibilité d'accepter ou de refuser de reconnaître ou d'exécuter de tels jugements dans le cadre de la Convention.

La délégation de l'UE a présenté un document explicatif volumineux sur la nature et le fonctionnement des tribunaux communs pertinents pour l'Union européenne. Ce document contient des informations générales concernant la création, les membres et la compétence de la juridiction unifiée du brevet et de la Cour Benelux. Il fournit également des exemples de la manière dont l'article 4, paragraphe 5, s'appliquerait aux jugements rendus par ces tribunaux.

Étant donné que des informations détaillées sont déjà disponibles pour ces tribunaux, il n'est plus nécessaire de présenter une déclaration de transparence supplémentaire en ce qui les concerne. L'application du mécanisme d'acceptation/de refus à ces tribunaux pose problème, car elle soulèverait d'importantes questions de réciprocité. Il est donc proposé d'exempter ces deux tribunaux de l'application des paragraphes 6 et 7 de l'article 4. Tout autre tribunal commun *existant* et *futur* non mentionné à l'article X serait soumis aux paragraphes 6 et 7 de l'article 4.

* * *

[1] La liste définitive des tribunaux mentionnés dans la présente disposition dépendra de la question de savoir si, et dans quelle mesure, la propriété intellectuelle est incluse dans le champ d'application de la Convention.
[2] La référence aux paragraphes 6 et 7 de l'article 4 prend en compte la proposition de texte soumise dans le rapport final du Groupe de travail informel II sur les tribunaux communs.


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Article X
*Common courts*

1 Without prejudice to Article 4, paragraph 5, for the purposes of this Convention each of the following courts common to several States (a "common court") shall be deemed to be a court of a Contracting State when, pursuant to the instrument establishing it, such a common court exercises jurisdiction in matters coming within the scope of this Convention:

(a) the Unified Patent Court established by the Agreement on a Unified Patent Court signed on 19 February 2013;[1]

(b) the Benelux Court of Justice established by the Treaty of 31 March 1965 concerning the establishment and statute of a Benelux Court of Justice.

2 The declarations referred to in Article 4, paragraphs 6 and 7, shall not apply to the common courts listed under paragraph 1 of this Article.[2]

*Explanation*

Article 4, paragraphs 5, 6 and 7, deals with the issue of common courts. While paragraph 5 clarifies how the jurisdictional filters of Article 5 apply in the case of common courts, paragraph 6 lays down rules for a declaration mechanism informing other Contracting States about the common courts which would deliver judgments that could circulate under the Convention. Finally, paragraph 7 provides Contracting States with the possibility to either opt-in or opt-out from recognising or enforcing such judgments under the Convention.

The EU delegation has submitted an extensive explanatory paper on the nature and workings of common courts relevant for the European Union. This paper contains background information as to the establishment, membership and jurisdiction of the Unified Patent Court and the Benelux Court. In addition, the paper contains examples on how Article 4(5) would apply to judgments delivered by these courts.

As extensive information is already available for these courts, submitting an additional transparency declaration with regard to these courts is no longer necessary. The application of the opt-in/opt-out mechanism to these courts is problematic as it would raise significant reciprocity questions. It is therefore proposed to exempt these two courts from the application of paragraphs 6 and 7 of Article 4. Any other existing and future common courts, not listed in Article X, would be subject to both paragraphs 6 and 7 of Article 4.

**No 15 – Proposition de la délégation de l'Union européenne – Proposal of the delegation of the European Union**

Article 18
*Déclarations limitant la reconnaissance et l'exécution*

Un État peut déclarer que ses tribunaux peuvent refuser de reconnaître ou d'exécuter un jugement rendu par un tribunal d'un autre État contractant, lorsque la compétence du tribunal d'origine reposait sur l'article 5, paragraphe 1, alinéas (c), (e), (f), (k)(i) ou (m), et lorsque les parties avaient leur résidence dans l'État requis et que les relations entre les parties, ainsi que tous les autres éléments pertinents du litige, autres que le lieu du tribunal d'origine, étaient liés uniquement à l'État requis.

*Note explicative*

S'il n'est pas indispensable que l'article 18 dans son intégralité figure dans la Convention, il y a lieu, pour ne pas semer la confusion ou ne pas permettre une éventuelle application abusive de cette disposition, de limiter expressément les possibilités d'utilisation de celle-ci aux situations dans lesquelles il n'existe pas de critères de rattachement géographique qui indiqueraient un lien avec le tribunal d'origine. Il convient par conséquent de n'utiliser cette disposition que lorsque le tribunal d'origine a fondé sa compétence sur la soumission ou sur le consentement exprès, comme indiqué dans le renvoi aux filtres que la délégation propose d'ajouter. Il est souligné que cet ajout rendrait l'utilisation de cette disposition plus prévisible, contribuant de la sorte à une sécurité juridique accrue pour les parties à des contentieux internationaux.

* * *

Article 18
*Declarations limiting recognition and enforcement*

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if jurisdiction in the court of origin was based on sub-paragraphs (c), (e), (f), (k)(i), (l), or (m) of paragraph 1 of Article 5 and if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the court of origin, were connected only with the requested State.

*Explanation*

While Article 18 in its entirety is not indispensable in the Convention, in order not to create confusion or allow the possible abuse of this provision it is necessary to expressly confine the possibilities of using it to the situations where there are no geographical connecting factors which would indicate a link to the court of origin. Therefore, this provision should be used only where the court of origin based its jurisdiction on submission or express consent, as set out in the reference to the filters that this delegation proposes to add. It is submitted that with this addition the use of this provision would be more predictable, thereby contributing to increased legal certainty for parties in international litigation.

**No 16 – Proposition de la délégation de l'Union européenne – Proposal of the delegation of the European Union**

Article 2
*Exclusions du champ d'application*

[…]

[(l) le droit à la vie privée[, à l'exception des litiges portant sur la violation d'un contrat entre les parties]] ;]

*Note explicative*

Au même titre que la diffamation, le droit à la vie privée devrait être exclu du champ d'application de la Convention,

[1] The final list of courts listed in this provision depends on whether and to what extent IP is included in the scope of application.
[2] The reference to paras 6 and 7 of Art. 4 takes into account the text proposal made in the final report of informal working group II on common courts.


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car il suscite des préoccupations similaires liées à la nécessité de concilier le droit des individus à la vie privée avec les droits fondamentaux tels que la liberté d'expression. Une exclusion du champ d'application de la Convention préviendrait tout recours abusif au motif de refus fondé sur l'ordre public.

L'exclusion du droit à la vie privée devrait être limitée aux actions en responsabilité délictuelle, tandis que les actions en responsabilité contractuelle qui ont trait au droit à la vie privée devraient relever du champ d'application de la Convention.

De nouveaux éclaircissements concernant la signification de l'exclusion devraient être fournis dans le Rapport explicatif. Il conviendrait de réviser le paragraphe 55 de la version actuelle du Rapport explicatif préliminaire en cas d'adoption de l'exclusion telle qu'énoncée actuellement à l'article 2, paragraphe 1, alinéa (l), du projet de Convention.

* * *

Article 2
*Exclusions from scope*

[…]

~~[~~(l) privacy~~[~~, except where the proceedings were brought for breach of contract between the parties~~]~~;~~]~~

*Explanation*

Like defamation, privacy should be excluded from the scope of the Convention, as similar concerns of balancing an individual's right to privacy with the fundamental rights, like freedom of expression, arise. Exclusion from the scope of the Convention would prevent a possible overuse of the public policy ground of refusal.

The exclusion of privacy should be limited to tort-based actions, while contract-based actions relating to privacy should be within the scope of the Convention.

Further clarifications on the meaning of the exclusion should be given in the Explanatory Report. Paragraph 55 in the current draft Explanatory Report would have to be revised if the exclusion, as worded in the current Article 2(1)(l) of the draft Convention, is adopted.

**No 17 – Proposal of the delegations of Israel and Brazil**

*Intellectual property*

Article 5
*Bases for recognition and enforcement*

[…]

3(a) Paragraph 1 does not apply to a judgment ~~that ruled~~ on an intellectual property right or an analogous right. ~~Such a judgment is eligible for recognition and enforcement if one of the following requirements is met –~~

(b) A ~~the~~ judgment ~~ruled~~ on an infringement in the State of origin, of an intellectual property right required to be granted or registered is eligible for recognition and enforcement if ~~and~~ it was given by a court in the State in which the grant or registration of the right concerned has taken place, or, under the terms of an international or regional instrument, is deemed to have taken place~~[, unless~~. [However, such a judgment is not eligible for recognition and enforcement if the defendant has not acted in ~~that~~ the State of origin to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State~~];~~].

(c) A ~~the~~ judgment ~~ruled~~ on an infringement in the State of origin, of a copyright or related right, an unregistered trademark or an unregistered industrial design~~,~~ ~~and~~ is eligible for recognition and enforcement if it was given by a court in the State for which protection was claimed~~[, unless~~. [However, such a judgment is not eligible for recognition and enforcement if the defendant has not acted in ~~that~~ the State of origin to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State~~];~~].

(d) A ~~the~~ judgment ~~ruled~~ on the validity~~[,~~ or subsistence ~~or ownership]~~ in the State of origin of a copyright or related right, an unregistered trademark or an unregistered industrial design is eligible for recognition if~~,~~ ~~and~~ it was given by a court in the State for which protection was claimed.~~]~~.

Article 6
*Exclusive bases for recognition and enforcement*

Notwithstanding Article 5 –

(a) a judgment that ruled on the ~~[registration or]~~ validity of an intellectual property right required to be granted or registered shall be recognised and enforced if and only if the State of origin is the State in which grant or registration has been applied for, has taken place, or, under the terms of an international or regional instrument, is deemed to have been applied for or to have taken place;

Article 8
*Rulings on ~~P~~preliminary questions*

~~1~~ A ruling on a preliminary question shall not be recognised or enforced under this Convention if the ruling is on a matter to which this Convention does not apply or on a matter referred to in Article 6 on which a court of a State other than the ~~court~~ State referred to in that Article ruled.

Article 8a
*Judgments based on rulings on preliminary questions*

~~2~~1 Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply, or on a matter referred to in Article 6, sub-paragraphs (b) and (c), on which a court of a State other than the ~~court~~ State referred to in ~~that Article~~ those sub-paragraphs ruled.

[~~3 However, in the case of a ruling on the validity of a right referred to in Article 6, paragraph (a)~~ 2 Rrecognition or enforcement of a judgment may be postponed~~,~~ or refused ~~under the preceding paragraph,~~ if and to the extent that the judgment was based on a ruling on the validity of a right referred to in Article 6, sub-paragraph (a), and was given by a court of a State other than the State referred to in Article 6, sub-paragraph (a)~~, only~~ where –


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(a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State referred to in Article 6, sub-paragraph (a); or

(b) proceedings concerning the validity of that right are pending in that State.

A refusal under sub-paragraph (b) does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 11
*~~Non-monetary r~~Remedies in intellectual property matters*

~~In~~ A judgment on an infringement of an intellectual property ~~matters, a judgment ruling on an infringement~~ right shall be ~~[~~recognised and~~]~~ enforced only to the extent that it ~~rules on~~ imposes a monetary remedy, including a monetary remedy deriving from an injunction that orders or prohibits behaviour in the State of origin ~~in relation to harm suffered in the State of origin~~.

**No 18 – Proposal of the delegations of Israel and the People's Republic of China**

~~[~~Article 20
*Declarations with respect to judgments pertaining to governments*

1 A State may declare that it shall not apply this Convention to judgments arising from proceedings to which any of the following is a party –

(a) that State, or a person acting ~~on behalf~~ in the name of that State, or

(b) a government agency of that State, or a person acting ~~on behalf~~ in the name of such a government agency.

The declaration shall be no broader than necessary and the exclusion from scope shall be clearly and precisely defined.

*Option A:*[1]

~~2 A declaration pursuant to paragraph 1 shall not exclude from the application of this Convention judgments arising from proceedings to which an enterprise owned by a State is a party.~~

*Option B:*

2 A declaration pursuant to paragraph 1 shall not exclude from the application of this Convention judgments arising from proceedings to which an enterprise owned by a State is a party, where such enterprise is not acting in the name of the State or in the name of a government agency of that State in accordance with paragraph 1.

3 If a State has made a declaration pursuant to paragraph 1, recognition or enforcement of a judgment originating from that State may be refused by another Contracting State if the judgment arose from proceedings to which that other Contracting State, one of its government agencies, or equivalent persons to those referred to in paragraph 1 is a party, to the same extent as specified in the declaration.[2]~~]~~

[1] This is the preferred option.
[2] This paragraph is included in both options.



**No 19 – Proposal of the delegations of Israel, the United States of America and the Republic of Korea**

*Article 2(1) – Exclusions from scope*

~~[~~(n) activities of armed forces, including the activities of their personnel in the exercise of their official duties;~~]~~

~~[~~(o) law enforcement activities, including the activities of law enforcement personnel in the exercise of official duties;~~]~~

**No 20 – Proposal of the delegation of Israel**

Article 4
*General provisions*

[…]

~~[[5 For purposes of paragraph 1, a judgment given by a court common to two or more States shall be deemed to be a judgment given by a court of a Contracting State if the Contracting State has identified the common court in a declaration to that effect, and either of the following conditions are met –~~

~~(a) all members of the common court are Contracting States whose judicial functions in relation to the relevant matter are exercised by the common court, and the judgment is eligible for recognition and enforcement under Article 5(1)(c), (e), (f), (l), or (m); or~~

~~(b) the judgment is eligible for recognition and enforcement under another sub-paragraph of Article 5(1)[, Article 5(3),] or under Article 6, and those eligibility requirements are met in a Contracting State whose judicial functions in relation to the relevant matter are exercised by the common court.]~~

~~OR~~

~~[5 For purposes of paragraph 1, a judgment given by a court common to two or more States shall be deemed to be a judgment given by a court of a Contracting State if the Contracting State has identified the common court in a declaration to that effect, and either of the following conditions are met –~~

~~(a) all members of the common court are Contracting States whose judicial functions in relation to the relevant matter are exercised by the common court, and the judgment is eligible for recognition and enforcement under Article 5(1)(c), (e), (f), (l), or (m); or~~

~~(b) the judgment is eligible for recognition and enforcement under another sub-paragraph of Article 5(1)[, Article 5(3),] or under Article 6, and those eligibility requirements are met in a Contracting State whose judicial functions in relation to the relevant matter are exercised by the common court.~~

~~6 A Contracting State may declare that it shall not recognise or enforce judgments of a common court that is the object of a declaration under paragraph 5 in respect of any of the matters covered by that declaration.~~

~~or~~

~~6 The declaration referred to in paragraph 5 shall have effect only between the Contracting State that made the declaration and other Contracting States that have declared their acceptance of the declaration. Such declarations shall be deposited at the Ministry of Foreign Affairs of the Neth-~~

~~erlands, which will forward, through diplomatic channels, a certified copy to each of the Contracting States.]]~~

*Explanatory note*

Discussions thus far on common courts have raised various complicated questions and uncertainties, particularly with respect to future common courts, as evidenced by the convoluted and complex text currently in square brackets as well as the additional proposals and controversies emerging from the informal working group on the issue (see report of IWG II – Prel. Doc. No 8 of April 2019).

It is also still very unclear what type of courts could be included in this definition, as noted by the Permanent Bureau in Preliminary Document No 7 of April 2019, para. 17:

> "In addition, although courts established under Bilateral Investment Treaties (BIT) to deal with investor-State disputes do not qualify as common courts because they exercise jurisdiction *over* the State as a subject of international law, as highlighted in the revised draft Explanatory Report, it cannot be completely ruled out that in the future there might be cases in which these courts function as common courts."

Accordingly, due to the uncertainty in respect of future common courts it is suggested not to include provisions in the Convention on the general issue of common courts. Deleting these provisions is also likely to avoid concerns by potential Contracting States in regards to obligations to apply the Convention to judgments originating from common courts which are yet unknown (and have yet to be formed) at the time of their accession to the Convention.

In order to address the need for reference to specific existing courts arising out of the discussions in the Special Commission and IWG II, it is suggested to refer to the Judicial Committee of the Privy Council (JCPC) in the Explanatory Report discussing Article 4(1) (for example by clarifying that judgments originating from the JCPC are also considered as "judgments" according to this provision).

With regards to the Benelux Court and the future EU Unified Patent Court, it is proposed to specifically reference judgments originating from these courts in the provisions on intellectual property (IP) in the Convention. Adopting this approach could also allow Member States which do not wish to view the Convention as applying to these two particular courts to opt out of their application or not to opt in according to the mechanism which will be adopted for IP under the Convention (in the event IP will not be included in the Convention, these courts will presumably not be a matter of concern).

**No 21 – Proposal of the delegations of the United States of America and Canada**

The United States of America and Canada propose that all references to intellectual property matters be eliminated from this Convention, as shown in amended Article 2(1)(m):

Article 2
*Exclusions from Scope*

1 This Convention shall not apply to the following matters –

[…]

~~[~~(m) intellectual property ~~[~~and analogous matters~~]~~;~~]~~

Consistent with the above proposal, Articles 5(3), 6(a), 7(1)(g), 8(3), and 11 would be deleted.

*Explanation*

The proponents are proposing to not apply the Convention to judgments on intellectual property and analogous matters. This proposal reflects the practical, policy and technical concerns raised by the application of the Convention to judgments on intellectual property (territorially limited rights based on national policy considerations).

In developing the proposal, reference was made to the registered and unregistered rights that are recognized under the *Paris Convention for the Protection of Industrial Property*, as revised at Stockholm in 1967 (the "Paris Convention"), the *Convention Establishing the World Intellectual Property Organization* ("WIPO") (as amended September 28, 1979), and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS"). In addition, consideration was given to rights under other existing and future international instruments under the auspices of WIPO and other matters that are the subject of discussions at international intellectual property forums.

Overall, the term "intellectual property and analogous matters" is intended to cover both rights that are internationally accepted as intellectual property and also other similar or tangential matters, such as matters that are treated by some, but not all, States as intellectual property.

Specifically, the term includes at least patents, utility models, registered and unregistered designs, registered and unregistered trademarks, trade names, plant variety protection (also known as plant breeders' certificates), geographical indications, appellations of origin, copyright and related rights, rights seeking to prevent unfair competition (as understood with reference to Art. 10*bis* of the Paris Convention), rights that protect undisclosed information (as understood with reference to Art. 39 of TRIPS), trade secrets, databases, moral rights, traditional knowledge, genetic resources, traditional cultural expressions, technological protection measures and rights management information.

The foregoing text should be considered for inclusion in the Explanatory Report accompanying Article 2(1)(m).

**No 22 – Proposal of the delegation of Switzerland**

*Relationship with the Choice of Court Convention*

Article 5(1): A judgment is eligible for recognition and enforcement if […]

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

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


*Doc.trav./Work.Docs Nos 4-27*

*Explanation*

The current exclusion of exclusive choice of court agreements from the Judgments Project is intended to "protect" the Choice of Court Convention. Those who suggested the current wording of this Article believe that the success of the Choice of Court Convention would be jeopardized if judgments rendered by exclusively chosen courts could be recognized under the Judgments Project. They argue that recognition of such judgments under the Judgments Project would diminish the likelihood of ratifying the Choice of Court Convention.

We are not convinced by these arguments and suggest to recognize all judgments under the Judgments Project that were given by a designated court.

The approach currently taken in sub-paragraph (m) "punishes" private parties (by not recognizing their judgment) for an "omission" (the non-ratification of the Choice of Court Convention) imputable to a State. One means the donkey, but hits the bag.

Several of the jurisdictional filters currently contained in Article 5(1) relate *indirectly* to consent (sub-paras (c), (e), (f)); if such form of indirect consent is sufficient to recognize a judgment, it is in consequence not convincing to exclude recognition of a judgment that *directly* relates to consent, for the sole reason that the consent is limited to one State. Indeed, a judgment given in a chosen State (*e.g.*, Switzerland) would be recognized despite this State not having ratified the Choice of Court Convention if, in addition, also the courts of another State (*e.g.*, Vatican) are mentioned in the choice of court agreement; this shows a lack of consistency in the rationale behind the current wording of sub-paragraph (m), as the "punishment" of non-ratifying States can easily be circumvented by choosing any additional – be it purely hypothetical – State, even if this additional State would not accept the choice of its courts.

We believe that applying Article 5(1)(m) to all choice of court agreements, regardless of their exclusive or non-exclusive nature, would do no harm. Indeed, if a State or REIO has ratified both Conventions, then the Choice of Court Convention would prevail (Art. 24(2) JP). And the Choice of Court Convention keeps all its unique selling-points, such as its rules on direct jurisdiction.

Applying Article 5(1)(m) to all choice of court agreements would on the contrary bring huge benefits, as it would be consistent with the rationale of the Judgments Project: promoting international trade and investment through enhanced judicial cooperation and recognition and enforcement of judgments in civil and commercial matters.

**No 23 – Proposal of the delegation of Switzerland**

*Proposal re non-discrimination*

*Proposal for a new Article 14(3)*

The court of the requested State shall not refuse the recognition or enforcement of a judgment that is still effective or enforceable in the State of origin on the basis that the applicant has failed to meet a time limit imposed in the requested State's national law for the recognition or enforcement of foreign judgments if such time limit is shorter than the one applied to domestic judgments.

**No 24 – Proposal of the delegations of Japan, Switzerland and the United States of America**

*Paper on treaty relationship mechanisms*

The HCCH Judgments Convention will revolutionize the recognition and enforcement of judgments. Recognition/enforcement may be refused only on the very limited grounds specified in the Convention, and according to the Project, Contracting Parties have no role in determining which other States can join. This represents a major change from the established practice in many States and in a broad number of successful HCCH Conventions, which require reciprocal agreements or which provide at least for some sort of "entry-control mechanism".

While the approach proposed in the Project, which currently provides for no entry-control mechanism, is open-minded and commendable, there is a risk that the Convention, as drafted now, will not pass the reality-check of national legislatures, which could jeopardize the success of the entire project.

In order to enhance the likeliness of ratification of this Convention, the State of enforcement should have a role in determining which States' judgments will be recognized and enforced. A mechanism that allows for the objection to the establishment of treaty relations with other Parties to the Convention could respond to this concern and represent a safety valve.

Unlike in the "old" HCCH Conventions, where entry-control mechanisms only applied to those States that acceded to the Convention but not to those (few) States that did participate in the special commissions or diplomatic conferences leading to the adoption of the instruments, the entry-control mechanism of the Judgments Convention should operate vis-à-vis *all* States, as the large number of States participating in the diplomatic conference blurs the distinction between the two circles of States.

Including an entry-control mechanism should be expected to increase the circulation of judgments. In the absence of such a provision, it is expected that many States will not be able to become Contracting States, thereby not creating an obligation for those States to recognize and enforce foreign judgments. With such a provision, these States should be expected to be in a position to become Contracting States. Although these States might not have treaty relations with all Contracting States, they would have relations with many other States, thereby creating an obligation to recognize and enforce judgments coming from those States.

Below are two proposals for Article 25(5). The first provides for the establishment of treaty relations in the absence of an objection. The second provides for the establishment of treaty relations upon acceptance by each State. The difference between the two proposals is a diplomatic one, based on whether a State will accept or object to treaty relations with another State.

*Article 25*

*[opt-out mechanism]*

5 This Convention shall have effect between any two Contracting States unless either of the two States has notified an objection to the establishment of treaty relations under the Convention with the other Contracting State.

OR

*[opt-in mechanism]*

5 This Convention shall not have effect between any two Contracting States unless both States have notified the depositary that they accept the establishment of treaty relations with each other under the Convention. For purposes of this paragraph, a Contracting State may notify the depositary that it accepts the establishment of treaty relations with all Contracting States.

*Article 32(a)*

The depositary shall notify […] of the following –

(a) the signatures, ratifications, acceptances, approvals, ~~and~~ accessions, objections and withdrawals thereof referred to in Article 25;

**No 24 REV – Proposal of the delegations of Japan, Switzerland, Turkey and the United States of America***

Article 29 *bis*
*Objections*

1 The Convention shall have effect only as regards relations between States neither of which have raised an objection with respect to the other State in accordance with paragraph 2, 3 or 4.

2 A Contracting State may notify the depositary of its objection to the establishment of treaty relations with a ratifying, accepting, approving or acceding State within 12 months after the receipt of the notification by the depositary referred to in Article 32(a).

3 A ratifying, accepting, approving or acceding State may, upon deposit of its instrument under Article 25(4), notify the depositary of its objection to the establishment of treaty relations with any Contracting State.

*4 A Contracting State may at any time notify the depositary of its objection to the continuation of treaty relations with another Contracting State. Such an objection shall take effect on the first day of the month following the expiration of three months following the date on which the objecting State notifies the depositary of the objection. An objection made under this paragraph shall not apply to judgments resulting from proceedings that have already been instituted in the State of origin when the objection takes effect.

5 A Contracting State may at any time withdraw an objection that it has made under paragraph 2, 3 or 4. Such a withdrawal shall take effect on the first day of the month following the expiration of three months following the date on which the objecting State notifies the depositary of the withdrawal of the objection. The Convention shall apply to the recognition and enforcement of judgments resulting from proceedings that are instituted in the State of origin on or after the date on which the withdrawal of the objection takes effect.

6 Objections and withdrawals of objections shall be notified to the depositary.

*Comment*

* The proponents of this proposal have consulted with other delegations and have been advised of the desire of some to note the exceptional nature of Article 29 *bis*(4). We are hesitant to do so, however, as we believe that the entirety of Article 29 *bis* is exceptional and we would not want to suggest that there are specific limits to the reliance on any part of this Article as it is a sovereign decision to exercise this authority. We would also be concerned with language in the Explanatory Report illustrating examples of circumstances justifying an objection under this Article.

**No 24 REV REV – Proposal of the delegations of Japan, Switzerland and the United States of America****

*Option 1*

Article 29 *bis*
*Establishment of relations pursuant to the Convention*

1 The Convention shall have effect only as regards relations between States neither of which have notified the depositary in accordance with paragraph 2, 3 or 4.

2 A Contracting State may notify the depositary, within 12 months after the receipt of the notification by the depositary referred to in Article 32(a), that the ratification, acceptance, approval or accession of another State shall not have the effect of establishing relations between the two States pursuant to the Convention.

3 A State may notify the depositary, upon the deposit of its instrument pursuant to Article 25(4), that its ratification, acceptance, approval or accession shall not have the effect of establishing relations with a Contracting State pursuant to the Convention.

4 A Contracting State may at any time notify the depositary that relations with another State pursuant to the Convention shall not continue. Such notification shall take effect on the first day of the month following the expiration of three months following the date of notification. A notification made under this paragraph shall not apply to judgments resulting from proceedings that have already been instituted in the State of origin on or after the date on which the notification takes effect.

5 A Contracting State may at any time withdraw a notification that it has made under paragraph 2, 3 or 4. Such a withdrawal shall take effect on the first day of the month following the expiration of three months following the date of notification. The Convention shall apply to the recognition and enforcement of judgments resulting from proceedings that are instituted in the State of origin on or after the date on which the notification takes effect.

*Option 2 (resulting from consultations with some delegations)*

Article 29 *bis*
*Establishment of relations pursuant to the Convention*

1 The Convention shall have effect only as regards relations between States neither of which have notified the depositary in accordance with paragraph 2 or 3.

2 A Contracting State may notify the depositary, within 12 months after the receipt of the notification by the depositary referred to in Article 32(a), that the ratification, acceptance, approval or accession of another State shall not have the effect of establishing relations between the two States pursuant to the Convention.

* Work. Doc. No 24 REV was distributed on 25 June 2019.

** Work. Doc. No 24 REV REV was distributed on 27 June 2019.


*Doc.trav./Work.Docs Nos 4-27*

3 A State may notify the depositary, upon the deposit of its instrument pursuant to Article 25(4), that its ratification, acceptance, approval or accession shall not have the effect of establishing relations with a Contracting State pursuant to the Convention.

4 A Contracting State may at any time withdraw a notification that it has made under paragraph 2 or 3. Such a withdrawal shall take effect on the first day of the month following the expiration of three months following the date of notification. The Convention shall apply to the recognition and enforcement of judgments resulting from proceedings that are instituted in the State of origin on or after the date on which the notification takes effect.

*Additional explanations*

– We are aware that option 2 does not accommodate all views expressed.

– We do acknowledge that there is a proposal to utilize instead a mechanism drafted in the form of reservations; however, due to the specific meaning that the term "reservation" has under (customary) public international law (instruments), and the effect of such an approach on existing Conventions of the Hague Conference, we do believe that the abovementioned form of the mechanism raises less questions than a "reservation approach".

– The Explanatory Report could specify that the abovementioned mechanism, when applied with respect to an REIO, would always be understood as covering the REIO as such (and therefore could not target an individual Member State of the REIO). We are aware that the language of this sentence may be further improved, but it is important to clarify this point.

**No 25 – Proposal of the delegation of Brazil**

Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

[…]

~~(p) anti-trust (competition) matters~~.

Brazil's proposal is to include anti-trust (competition) matters within the scope of the Judgments Convention. Therefore, the Brazilian delegation supports the exclusion of Article 2(1)(p).

The main goal of the Convention is to facilitate the global circulation of judgments. The matters excluded from scope in Article 2(1) deal with very exceptional situations. Those topics shall be determined in the stricter possible manner, so that the uniform framework is applied to a broader range of cases.

There are no legal grounds to justify the exclusion of anti-trust (competition) matters, in particular considering its limited effect in cases of private anti-trust (competition) enforcement.

First, the Convention applies to judgments relating to civil or commercial matters, and therefore all regulatory matters fall outside the scope of the Convention (Art. 1(1)).

Second, a judgment means any decision on the merits given by a court, and consequently decisions issued by administrative authorities (regulatory authorities) also fall outside the scope of the Convention (Art. 3(2)).

Third, the inclusion of anti-trust (competition) matters would enhance the cross-border effectiveness of judgments related to private enforcement. As a consequence, we should expect a decrease of violation in a contractual context considering that the judgment issued by a certain court would easily circulate to other jurisdictions.

Fourth, the very detailed and precise indirect bases of jurisdiction assure that the court of origin is reasonably connected to the case. If one of the grounds listed is verified, this means the case is sufficiently connected to the State of origin and there is a legitimate ground for the purpose of recognition (Art. 5). The discrepancies in judgments recognition law have created opportunities for forum shopping and litigation strategy, as is the current global scenario today. The opposite perspective, meaning that the inclusion of anti-trust (competition) matter will create a unique possibility of forum shopping, does not seem proper. In many other cases relating to foreign judgments in civil and commercial matters falling within the scope of Article 1, there will be potentially more than one jurisdictional filter applicable to the circulation of the decision.

Fifth, the inclusion of anti-trust (competition) matters would reduce the need for duplicative proceedings in two or more States, considering the judgments deciding the claim would be effective in other States.

Sixth, States that do not accept the inclusion of anti-trust (competition) matters in the scope of the Convention may make a declaration excluding such matter (Art. 19).

The delegation of Brazil supports a restrictive approach with respect to the matters excluded from the Judgments Convention.

**No 26 – Proposal of the delegation of Brazil**

*Civil and commercial matters, collective actions and public law*

*Explanatory Report*

29 The key element distinguishing public law matters from "civil or commercial" matters is whether one of the parties is exercising ~~governmental or~~ sovereign powers that are not enjoyed by ordinary persons. <u>The exercise of sovereign powers, moreover, might not be assumed by the mere fact that a State, including a government or a governmental agency, was a party to the proceeding.</u> It is therefore necessary to identify the legal relationship between the parties to the dispute and to examine the legal basis of the action brought before the court of origin to establish whether the judgment relates to civil or commercial matters. If the action derives from the exercise of ~~public~~ <u>sovereign</u> powers (or duties), the draft Convention does not apply. […]

31 Conversely, if neither of the parties is exercising ~~public~~ <u>sovereign</u> powers, the draft Convention applies. [Thus, for example, it applies to private claims for harm caused by [anti-competitive conduct (see, however, *infra* paras 61-62),] <u>corruption and other illicit activities</u>. By the same token, when a government agency <u>or a public body</u> is acting on behalf of private parties, such as consumers<u>, victims of illicit activities</u> or investors<u>~~, without that agency exercising extraordinary powers or privileges~~, including through a</u>

collective action, the draft Convention will also apply (see *infra* commentary to Art. 2(4)).

71 Unless a declaration under Article 20 is made, the draft Convention applies when a State or a governmental agency is acting as a private person, *i.e.*, without exercising sovereign powers, and regardless of whether the public entity is the judgment creditor or the judgment debtor. Again, assessing the nature of the dispute is determinative (see *supra* paras 29-31). ~~Three core criteria are relevant to determining the application of the draft Convention to disputes involving government parties:~~

~~(i) the conduct upon which the claim is based is conduct in which a private person can engage;~~

~~(ii) the injury alleged is injury which can be sustained by a private person;~~

~~(iii) the relief requested is of a type available to private persons seeking a remedy for the same injury as the result of the same conduct.~~

*Explanation*

Under the scope limitation and the jurisdictional and procedural conditions provided by the draft Convention, a foreign judgment in a civil or commercial matter will be recognized and enforced, even if a State is a party to the dispute, provided that the State was not exercising sovereign powers. In those circumstances, there are interactions between the concepts of "civil and commercial matter", "public law" and "collective action", to which the Explanatory Report might still lead to unintended consequences. The suggestions above aim to enhance its clarity and efficiency in this regard.

First, for the alternate use of "public powers" and "sovereign powers" (paras 29-30), Brazil suggests a uniform use of "sovereign powers". "Public powers" seems to be an unclear concept and well covered by the latter.

Second, Brazil suggests more examples of private claims for harm caused by conducts also subject to public law (para. 31), in order to give more practical impact and clarity on what the Report wants to clarify (relationship between private claims and public law).

Third, bearing in mind that there is no reference to collective actions in the current draft Convention and only one reference in the draft Explanatory Report,[1] Brazil suggests a clarification that a judgment on a civil or commercial matter in a collective action does not fall outside the scope by the fact that such action was brought by a governmental agency or public body on behalf of individuals.[2]

Finally, for the situations in which a governmental agency is a judgment creditor, Brazil believes that it is still premature to deliver some core criteria limiting the interpretation of a future Convention (para. 71 *in fine*). The future review of operation of the Convention (Art. 22) might lead Contracting States, based on practical experiences, to develop a common understanding on it.

[1] Prel. Doc. No 1 of December 2018, para. 82.
[2] For an excellent overview on private enforcement through collective actions brought by public bodies in competition matters, see Prel. Doc. No 2 of December 2018.

**No 27 – Proposal of the delegations of Brazil and Israel**

*Rights* in personam *(tenancies) of immovable property*

Article 5
*Bases for recognition and enforcement*

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

[…]

(h) the judgment ruled on rights *in personam* ~~a tenancy~~ of immovable property for a period of six months or less and it was given in the State in which the property is situated;

Article 6
*Exclusive bases for recognition and enforcement*

Notwithstanding Article 5 –

[(a) a judgment that ruled on the [registration or] validity of an intellectual property right required to be granted or registered shall be recognised and enforced if and only if the State of origin is the State in which grant or registration has taken place, or, under the terms of an international or regional instrument, is deemed to have taken place;]

(b) a judgment that ruled on rights *in rem* in immovable property or rights *in personam* of immovable property for a period of more than six months shall be recognised and enforced if and only if the property is situated in the State of origin;

(c) a judgment that ruled on ~~a tenancy~~ rights *in personam* of immovable property for a period of ~~more than~~ six months or less shall not be recognised and enforced if the property is not situated in the State of origin and the courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State.

*Explanatory note*

The proposal first aims to replace the phrase "tenancy" which in some jurisdictions is not used as a standalone criterion for differentiating between applicable legal regimes to property rights with the phrase "*in personam*". This term reflects a concept which most, if not all, jurisdictions are familiar with, and would be therefore likely more clearly understood by requested courts. In order to reflect the notion of "tenancy", which appears to be of importance to some delegations, it is proposed that the Explanatory Report can specifically refer to the concept to avoid any misunderstandings.

The proposal's second aim is to widen the scope of protection afforded to Contracting States to address concerns that judgments rendered by a court of a Contracting State other than the State in which the property is situated in relation to rights *in personam* will be circulated under the Convention or national law.

In that respect the proposal aims for a balanced approach, suggesting to extend the protection (beyond rights *in rem* in the current text) only for rights in immovable property for a period of more than six months (Art. 6(b)), and for rights for a shorter period only if the State where the property is situated has exclusive jurisdiction under its law (Art. 6(c)).


*Doc.trav./Work.Docs Nos 4-27*

## Document de travail No 28

## Working Document No 28

*Distribué le mardi 22 mai 2019*

*Distributed on Tuesday 22 May 2019*

**No 28 – Proposal of the delegation of the United States of America**

*Article 2(1) – Exclusions from scope*

(g) ~~marine pollution,~~ limitation of liability for maritime claims, general average~~, and emergency towage and salvage~~;

*Explanation*

This Working Document proposes removing the exclusion from scope for "marine pollution" and for "emergency towage and salvage". The current exclusion from scope on these two points works against strong public interests – interests perhaps rising to the level of common policy. Yet, at present, there is a significant hole in provisions in international instruments for recognition and enforcement of judgments in these matters. The proposed Convention may fill those holes, and may do so with relative ease. On the other hand, no convincing reason has been provided to support the draft exclusions in these areas.

*Marine pollution:*

Internationally, there are strong commitments both to avoid marine pollution and to have those responsible for pollution events compensate those who have borne the resulting costs. Failure to provide effective compensation from polluters works against these public interests by allowing polluters to externalize the costs of their pollution, may encourage lack of vigilance and implementation of proper measures to prevent pollution, and burdens with costs those who respond to an incident or are otherwise affected by it. There are very few international Conventions that have entered into force that provide for recognition or enforcement of judgments in matters of marine pollution, and those few that have entered into force are very specific and targeted, and do not apply to the great bulk of sources of marine pollution. We have an opportunity to take significant steps to rectify this gap in the international regime, we can do so relatively easily, and should do so. (Insofar as the proposed Convention and the few other applicable Conventions might yield conflicting results with respect to recognition or enforcement of a particular judgment, the matter is best handled through the Article on relationship with other instruments rather than through a blanket exclusion from scope that can serve to deprive strong public policy from having its full effect.)

*Emergency towage and salvage:*

The provision of emergency towage and salvage saves lives, cargo, and prevents pollution. There are strong reasons to encourage provision of these services, while failure to effectively compensate their providers can lead to a diminution in the willingness to take the risks and bear the costs of providing emergency towage or salvage. In this area, we have not identified any agreements that provide for recognition or enforcement of judgments in this matter. As with marine pollution, we have an opportunity to make a contribution in this area, can do so relatively easily, and should do so.

Simply put, deterrence of pollution and encouragement of the availability of emergency towage and salvage services may depend on the ability to realize judgments for costs against polluters or for compensation for services rendered. This, in turn, may depend on the ability to enforce those judgments, both in terms of providing legal obligations for recognition and enforcement and in lowering the transaction costs involved. The current exclusions work against these public interests and should not be maintained in the text of this Convention.



## Document de travail No 29

## Working Document No 29

*Distribué le vendredi 7 juin 2019*

*Distributed on Friday 7 June 2019*

**No 29 – Proposal of the delegation of the United States of America**

*Primary proposal*

Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

[…]

(p) anti-trust (competition) matters<u>, except where the judgment is based on conduct that constitutes an anti-competitive agreement among competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories, or lines of commerce</u>.

*Alternative proposal*

Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

[…]

(p) anti-trust (competition) matters.

*Explanation*

The United States of America submits that judgments in antitrust (competition) matters should only be recognized under the Convention where such judgments relate to conduct that is almost universally considered as anti-competitive. If no consensus can be reached on such limited inclusion, antitrust (competition) matters should be excluded altogether from the scope of the Convention.

The antitrust (competition) laws of a State are closely linked to important economic policy objectives and other public interests, as defined individually by each State. The recognition of foreign judgments in antitrust (competition) matters may result in serious conflicts with a State's own antitrust (competition) law, where fundamental differences exist between the antitrust (competition) laws and implementing policies of the State of origin and those of the requested State. For example, certain business practices may be considered anti-competitive and thus illegal in the State of origin, whereas the same practices may be considered pro-competitive in the requested State, such that the recognition of a judgment based on antitrust (competition) law in the State of origin could conflict with the requested State's antitrust (competition) law and policy regime. The United States does not believe that it is appropriate to rely on the Article 7(1)(c) basis for refusal to recognize or enforce a judgment in such situations. Instead the negotiators of the Convention should seek to limit reliance on the Article 7(1)(c) basis for refusal by excluding matters that will foreseeably raise public policy concerns.

Although there have been efforts and progress toward reaching international consensus on fundamental antitrust (competition) law principles over the last decades, differences between the laws and implementing policies of individual States across the world remain in many areas of antitrust (competition) law, including with respect to: (i) the assessment of vertical agreements between companies operating at different levels of the distribution chain; (ii) the analysis of unilateral practices by companies with market power ("monopolization" or "abuse of dominance" matters); (iii) merger review (including with respect to rights of private parties to challenge anticompetitive mergers); (iv) horizontal agreements other than the hard core agreements described below (*e.g.*, certain trade association practices, certain information sharing, certain joint ventures); and (v) unilateral practices by certain companies without market power (many antitrust (competition) laws proscribe abuse of a superior bargaining position). In light of these differences, judgments in antitrust (competition) matters should not generally be recognizable under the Convention.

There is, however, one area of antitrust (competition) law in which widespread consensus exists, namely the treatment of agreements among competitors solely to fix prices, rig bids, restrict output, or divide markets. Such agreements (typically referred to as "hard core cartels") are almost universally considered to be anti-competitive *per se* (or, by their objective), and have been declared illegal in essentially any State that has enacted antitrust (competition) laws. Due to the widespread consensus on the treatment of these anti-competitive agreements, as reflected in the work of international organizations,[1] judgments based on such illegal agreements should be recognizable under the Convention. Indeed, the recognition of foreign judgments related to such anti-competitive agreements would simplify the enforcement of judgments across borders, and thus increase the effectiveness of antitrust (competition) law enforcement against such hard core cartels.

If, however, no consensus can be reached on a limited inclusion, antitrust (competition) matters should be excluded altogether from the scope of the Convention in order to avoid potential conflicts resulting from the differences between the various antitrust (competition) law regimes around the world in areas outside of hard core cartels.

# Document de travail No 30

# Working Document No 30

*Distribué le mardi 11 juin 2019*

*Distributed on Tuesday 11 June 2019*

**No 30 – Proposal of the delegation of Israel**

Article 15
*Costs*

1 No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given in another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.

2 A State may declare that it shall not apply paragraph 1 or designate by a declaration which of its courts shall not apply paragraph 1.

3 If a party in one Contracting State applies for enforcement of a judgment given in another Contracting State, and a~~A~~n order for payment of costs or expenses of proceedings in respect of the application is issued against that party, that order~~, made in a Contracting State against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 or of the law of the State where proceedings have been commenced shall, on the application of the person entitled to the benefit of the order,~~ shall be rendered enforceable in any other Contracting State, so long as no security, bond or deposit was required from that party.

[1] See, for example, Organisation for Economic Co-operation and Development (OECD), Recommendation of the OECD Council Concerning Effective Action against Hard Core Cartels (25 March 1998); available at http://www.oecd.org/daf/competition/2350130.pdf.

~~3 A State may declare that it shall not apply paragraph 1 or designate by a declaration which of its courts shall not apply paragraph 1.~~

*Explanatory note*

Paragraph 15(2) in the 2018 draft text (para. 15(3) in this proposal) enables circulation of a "costs order" in respect of enforcement proceedings, but only if the order was made in a State that applies paragraph 15(1). If a State declared that it will not apply paragraph 15(1), for example, because it views the matter as relevant only to the frameworks under the 1954 Hague Convention on civil procedure or the 1980 *Hague Convention on International Access to Justice*, the costs order does not circulate pursuant to paragraph 2 (in the 2018 draft text).

Working Document No 10 (proposal by the European Union) seeks to broaden the circulation of these cost orders, by including cases where domestic law does not *a priori* impose a security, bond or deposit solely due to foreign residency of an applicant.

The present proposal would further broaden circulation of those cost orders in such cases, to include also instances where a State's domestic law *allows* the court to impose a security, bond or deposit due to residency of the applicant, but does not *require* it. In States where this matter is left to the discretion of the court, the cost order should be able to circulate so long as no security, bond or deposit was requested in that specific instance (even if the State made a declaration regarding the possibility of requiring a security, bond or deposit).

The wording of this proposal is intended to cover the proposal set forth in Working Document No 10. In addition, it is proposed to move former paragraph 15(3) up and renumber it as paragraph (2), since the two provisions are closely inter-related.

## Document de travail No 31

## Working Document No 31

*Distribué le mercredi 12 juin 2019*

*Distributed on Wednesday 12 June 2019*

**No 31 – Proposal of the delegation of the Argentine Republic**

Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

[…]

4 A judgment is ~~not~~ excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings, unless such State has consented to the jurisdiction of the court of origin.

This exclusion does not apply to proceedings to which an enterprise owned by a State is a party.

## Documents de travail Nos 32 à 34

## Working Documents Nos 32 to 34

*Distribués le lundi 17 juin 2019*

*Distributed on Monday 17 June 2019*

**No 32 REV – Proposal of the delegations of Israel and the United States of America**

Article 4
*General provisions*

[…]

2 There shall be no review of the merits of the judgment in the requested State. ~~[~~This does not preclude such examination as is necessary for the application of this Convention.~~]~~

*Explanatory note*

Retention of the second sentence explicitly in the text of the Convention is vital to avoid a possible misconception by judges in requested States that no examination of the merits of the judgment is allowed, even if for the purposes of determining whether the Convention applies or not.

**No 33 – Proposal of the delegation of Brazil**

Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

[…]

~~[~~(n) activities of armed forces, including the activities of their personnel in the exercise of their official duties;

(o) law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties;~~]~~

*Explanatory note*

Brazil agrees with the exclusions expressed in Article 2(1)(n) and (o) and would like to see the brackets removed.

For the sake of clarity, however, Brazil's proposal is to see included in the Explanatory Report an explanation of what type of personnel is comprised in both referred activities: *armed forces* and *law enforcement*.

As the Convention applies to judgments relating to civil or commercial matters, all issues relating to foreign immunity of officials are necessarily out of the scope of the Convention, as they relate to actions known as acts *ius imperii*.

Nonetheless, it would be desirable to clarify the definition of personnel of sub-paragraph (n) as to relate to the uniformed members as well as civilians enrolled, employed and maintained in duty for their respective armed forces by each State.

Likewise, in relation to sub-paragraph (o), personnel should relate to law enforcement members that are exclusively committed to law enforcement activities.

**No 34 – Proposal of the delegation of the United States of America**

Article 2
*Exclusions from scope*

[…]

~~[~~(l) privacy~~[, except where the proceedings were brought for breach of contract between the parties];]~~

*Explanation*

"Privacy" should be excluded completely from scope at this time due to the consequences of the rapidly changing legal regimes, both multinational and national in this area. To do otherwise creates substantial risks of uncertainty in outcomes, inconsistent application of the Convention, difficult questions of the stance of local courts towards aspects of foreign public law, and frequent recourse to the public policy exception, all of which will complicate ratification discussions in some States.

The current proposal to except from the general exclusion of privacy proceedings brought for breach of contract between the parties illustrates some of these problems. For example, does a statement of policy posted on a website in one country create contractual terms which may be deemed to be breached under the law of another country? Indeed, the answer to this question may vary with the laws of multiple jurisdictions from which the website may be accessed. Can a court in one country in determining the existence or terms of a contract, imply terms into the contract, including terms not known in the laws of another country? Furthermore, given that much of the rapidly developing law in this area is statutory, or even constitutional, will mandatory terms of law be inserted into these contracts in one country with a subsequent legal obligation under this Convention to recognize and enforce these mandatory obligations in a resulting judgment? Significant strains on the public policy exception will result – including invocation of constitutional grounds of the State requested to bar recognition and enforcement. These and many more considerations will arise in ratification debates in each country, and make the Convention less attractive to a number of countries.



# Documents de travail Nos 35 à 39

# Working Documents Nos 35 to 39

*Distribués le mardi 18 juin 2019*

*Distributed on Tuesday 18 June 2019*

**No 35 – Proposal of the delegation of Brazil**

Article 5
*Bases for recognition and enforcement*

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

[…]

(j *bis*) the judgment ruled on a non-contractual obligation arising from environmental damage, and the harm occurred in the State of origin, irrespective of where the act or omission directly causing such harm occurred;

*Explanatory note*

The proposal aims to add a new jurisdictional requirement applied *only* when a judgment rules on a non-contractual obligation arising from environmental damage, taking into consideration the following reasons:

First, according to the current draft Convention and unless a Contracting State makes a declaration pursuant to Article 19, there will be a general obligation of recognition and enforcement of foreign judgments ruling on non-contractual obligations arising from environmental damage, except for marine pollution (Art. 2(1)(g)) and nuclear damage (Art. 2(1)(h)). *Therefore, the proposal does not enlarge the scope of the Convention.*

Second, there are several multilateral treaties already establishing that a judgment rendered by the State in which the damage occurred should be recognized and enforced abroad. *Therefore, the proposal reproduces a widely recognized jurisdictional requirement for judgments on environmental damage.*

Third, the future Hague Convention on Recognition and Enforcement of Foreign Judgments will not affect the application of other treaties of the environment legal regime (Art. 24(2)). *Therefore, the proposal is compatible with other treaty solutions already in force.*

**No 36 – Proposal of the delegation of Uruguay**

*Article 4(2)*

2 There shall be no review of the merits of the judgment in the requested State. ~~[This does not preclude such examination as is necessary for the application of this Convention.]~~

*Explanation*

The second part of the paragraph is unnecessary, and may lead to confusion and/or misunderstandings. This provision should be limited to clearly state the principle of no review of the merits, as a conceptual pillar of the whole Convention. The so called "examination", only and to the extent necessary for the application of the Convention, is self-evident, and each provision that may need it has already its own ground of application.

**No 37 – Proposal of the delegation of Uruguay**

*Article 5(1)(j)*

(j) the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm and/or the harm itself occurred in the State of origin~~, irrespective of where that harm occurred~~;

*Explanation*

This proposal aims to review the narrow basis for indirect jurisdiction for non-contractual obligations, and include the recognition of the jurisdiction exercised by the courts of the State where the harm occurred, something widely accepted by national and regional legal systems, and whose exclusion could leave to unfair and inconsistent situations, and may lead to renovate the traditional discussion on the relevance and meaning of the "act or omission" versus the "harm" for non-contractual obligations in private international law.

**No 38 – Proposal of the delegation of the Republic of Korea**

Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

[…]

*[Option A]*

~~[~~(p) anti-trust (competition) matters~~]~~, except the invalidity, unenforceability or modification of a contractual obligation under the direct or indirect intervention of an anti-trust (competition) law made subject to a valid choice-of-court agreement to which Article 5(1)(m) applies.

*[Option B]*

~~[~~(p) anti-trust (competition) matters~~]~~, except the invalidity, unenforceability or modification of a contractual obligation under the direct or indirect intervention of an anti-trust (competition) law, or non-contractual obligation accrued under the direct or indirect intervention of an anti-trust (competition) law made subject to a valid choice-of-court agreement to which Article 5(1)(m) applies.

*Explanation*

This delegation prefers to exclude anti-trust (competition) matters as a whole, noting various practical concerns[1] remain unresolved. We cannot simply equate anti-trust contract actions and anti-trust tort actions with traditional actions in contract and tort. The economic policy consideration underlying anti-trust laws cannot be wiped out. An over-ambitious imposition of a treaty obligation, before the accumulation of experience in recognition and enforcement under national rules, will prompt Article 19 declarations and the frequent use of public policy defense (Art. 7(1)(c)). In this way, even the development of national rules (Art. 16) through domestic legislation or case law may be hampered. At this stage, it is preferable to leave the whole matter out of the scope and wait for the development of national rules and State practice.

However, if the Diplomatic Session should decide to partially include anti-trust matters, it would have to consider the following two directions of compromise regarding the scope.[2]

First, a choice of court agreement will tend to relieve practical concerns about having anti-trust within the scope. This compromise solution would also cover exclusive choice of court agreements, if Article 5(1)(m) should be expanded to cover exclusive choice of court agreements as well, as proposed by the delegation of Switzerland (Work. Doc. No 22).

Second, there will be two ways of characterizing the prohibition of certain behavior in anti-trust laws: (i) intervention of "public" law in civil or commercial relationships, or (ii) statutory definition of illegality within the private law realm. Regardless of which way of thinking is followed, the court requested should be able to invoke Article 8 fully, when it comes to the question of violation (*i.e.*, illegality) itself. Otherwise, the State requested may find itself unnecessarily interfered with in giving effect to its anti-trust laws (or anti-trust laws of another country of which intra- or extra-territorial application may be invoked in the State requested). For example, a court of State A, when asked to decide whether a commercial practice of Company C (habitually resident in State B) in State A constitutes an unreasonable abuse of dominant position under the law of State A, should not be confined by the finding of a court of State B that the same commercial practice of Company C should or should not be so evaluated under the law of State B. Therefore, there would be a value in distinguishing the anti-trust law violation itself and its effects on contracts (*e.g.*, denying the validity or enforceability of or modifying contractual obligations) or the accrual of non-contractual obligations (*e.g.*, tort liability or obligation to disgorge profits), resulting from the direct or indirect intervention of an anti-trust law.

Further, it should be noted that anti-trust law's intervention in a contractual relationship would often cause less surprise to the parties than the intervention to create a non-contractual obligation, especially between strangers. While contract cases raise a specific concern of imbalance of means between contracting parties,[3] anti-trust tort (or claims for disgorgement of profits) raises more serious concerns, for several reasons. First, anti-trust tort (or disgorgement) action will be more unpredictable for defendants claimed to be liable, as compared to contract cases.

[1] See this delegation's earlier submission to the Special Commission: Work. Doc. No 198.
[2] On the other hand, the effects of possible inclusion of anti-trust (competition), whether wholly or partly, will also need to be moderated. Regarding this aspect, this delegation has submitted a separate proposal: Work. Doc. No 7.
[3] See Work. Doc. No 198, submitted to the Special Commission, point 2.

Second, collective dispute resolution, including class action, will be more frequently used in tort or disgorgement cases. Third, depending on the method adopted by the relevant conflict-of-laws rule, a judgment in an anti-trust tort (or disgorgement) action may have a very broad preclusive effect beyond the normal expectation of a plaintiff. This problem may apparently be encountered under Article 6(3)(a) of the Rome II Regulation of the European Union.[4]

[Illustration] A plaintiff unsuccessfully sued in a State A, invoking State A's anti-trust law. State A is a Member State of the European Union. The plaintiff is unfamiliar with the Rome II Regulation's approach and argued nothing about the laws of States B and C, assuming that they are not part of his or her case. The court pointed to the anti-trust laws of States B and C as the applicable law, but the plaintiff did not take it seriously, thinking he or she would be able to sue under the anti-trust laws of States B and C in separate lawsuits in States B and C. However, the preclusive effect of the judgment, if recognized under this Convention, will disallow the plaintiff any further opportunity to litigate in any Contracting States.

Option A includes anti-trust (competition) matters only where a choice of court agreement covers these matters and only to the extent of "private law effects" in contract of an anti-trust law violation. Option A covers contractual obligations, as long as both are covered by a choice of court agreement.

Option B expands the scope beyond option A to include the invalidity, unenforceability or modification of a contractual obligation, even where there is no choice of court agreement.

Between the two options, this delegation would prefer option A.

**No 38 REV – Proposal of the delegation of the Republic of Korea**

Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

[…]

*[Option A]*

~~[~~(p) anti-trust (competition) matters~~]~~, except the invalidity, unenforceability or modification of a contractual obligation under the direct or indirect intervention of an anti-trust (competition) law made subject to a valid choice of court agreement to which Article 5(1)(m) applies.

*[Option B]*

~~[~~(p) anti-trust (competition) matters~~]~~, except the invalidity, unenforceability or modification of a contractual obligation under the direct or indirect intervention of an anti-trust (competition) law.

*Explanation*

This delegation prefers to exclude anti-trust (competition) matters as a whole, noting various practical concerns[1] remain unresolved. We cannot simply equate anti-trust contract actions and anti-trust tort actions with traditional actions in contract and tort. The economic policy consideration underlying anti-trust laws cannot be wiped out. An over-ambitious imposition of a treaty obligation, before the accumulation of experience in recognition and enforcement under national rules, will prompt Article 19 declarations and the frequent use of public policy defense (Art. 7(1)(c)). In this way, even the development of national rules (Art. 16) through domestic legislation or case law may be hampered. At this stage, it is preferable to leave the whole matter out of the scope and wait for the development of national rules and State practice.

However, if the Diplomatic Session should decide to partially include anti-trust matters, it would have to consider the following two directions of compromise regarding the scope.[2]

First, a choice of court agreement will tend to relieve practical concerns about having anti-trust within the scope. This compromise solution would also cover exclusive choice of court agreements, if Article 5(1)(m) should be expanded to cover exclusive choice of court agreements as well, as proposed by the delegation of Switzerland (Work. Doc. No 22).

Second, there will be two ways of characterizing the prohibition of certain behavior in anti-trust laws: (i) intervention of "public" law in civil or commercial relationship, or (ii) statutory definition of illegality within the private law realm. Regardless of which way of thinking is followed, the court requested should be able to invoke Article 8 fully, when it comes to the question of violation (*i.e.*, illegality) itself. Otherwise, the State requested may find itself unnecessarily interfered with in giving effect to its anti-trust laws (or anti-trust laws of another country of which intra- or extra-territorial application may be invoked in the State requested). For example, a court of State A, when asked to decide whether a commercial practice of Company C (habitually resident in State B) in State A constitutes an unreasonable abuse of dominant position under the law of State A, should not be confined by the finding of a court of State B that the same commercial practice of Company C should or should not be so evaluated under the law of State B. Therefore, there would be a value in distinguishing the anti-trust law violation itself and its effects on contracts (*e.g.*, denying the validity or enforceability of or modifying contractual obligations) or the accrual of non-contractual obligations (*e.g.*, tort liability or obligation to disgorge profits), resulting from the direct or indirect intervention of an anti-trust law.

Further, it should be noted that anti-trust law's intervention in a contractual relationship would often cause less surprise to the parties than the intervention to create a non-contractual obligation, especially between strangers. While

[4] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). Art. 6(3) reads:
"(a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.
(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court."

[1] See this delegation's earlier submission to the Special Commission: Work. Doc. No 198.

[2] On the other hand, the effects of possible inclusion of anti-trust (competition), whether wholly or partly, will also need to be moderated. Regarding this aspect, this delegation has submitted a separate proposal: Work. Doc. No 7.


*Doc.trav./Work.Docs Nos 35-39*

contract cases raise a specific concern of imbalance of means between contracting parties,[3] anti-trust tort (or claims for disgorgement of profits) raises more serious concerns, for several reasons. First, anti-trust tort (or disgorgement) action will be more unpredictable for defendants claimed to be liable, as compared to contract cases. Second, collective dispute resolution, including class action, will be more frequently used in tort or disgorgement cases. Third, depending on the method adopted by the relevant conflict-of-laws rule, a judgment in an anti-trust tort (or disgorgement) action may have a very broad preclusive effect beyond the normal expectation of a plaintiff. This problem may apparently be encountered under Article 6(3)(a) of the Rome II Regulation of the European Union.[4]

[Illustration] A plaintiff unsuccessfully sued in a State A, invoking State A's anti-trust law. State A is a Member State of the European Union. The plaintiff is unfamiliar with the Rome II Regulation's approach and argued nothing about the laws of States B and C, assuming that they are not part of his or her case. The court pointed to the anti-trust laws of States B and C as the applicable law, but the plaintiff did not take it seriously, thinking he or she would be able to sue under the anti-trust laws of States B and C in separate lawsuits in States B and C. However, the preclusive effect of the judgment, if recognized under this Convention, will disallow the plaintiff any further opportunity to litigate in any Contracting States.

Option A includes anti-trust (competition) matters only where a choice of court agreement covers these matters and only to the extent of "private law effects" in contract of an anti-trust law violation. Option A covers contractual obligations, as long as both are covered by a choice of court agreement.

Option B expands the scope beyond option A to include the invalidity, unenforceability or modification of a contractual obligation, even where there is no choice of court agreement.

Between the two options, this delegation would prefer option A.

**No 39 – Proposal of the delegation of Singapore**

*Article 7(1)(d)*

1 Recognition or enforcement may be refused if –

[…]

(d) the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court other than the court of origin, or resolved in a manner other than through litigation in the court of origin.

[3] See Work. Doc. No 198, submitted to the Special Commission, point 2.

[4] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). Art. 6(3) reads:

"(a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.

(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court."



**No 39 REV – Proposal of the delegation of Singapore**[*]

*Article 7(1)(d)*

1 Recognition or enforcement may be refused if –

[…]

(d) the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court other than the court of origin, or under which the dispute in question has been resolved in a manner other than through litigation in the court of origin.

*Explanation*

The purpose of Article 7(1)(d) is to preserve party autonomy, by ensuring that any judgment obtained in breach of the parties' agreement will not be entitled to recognition under the Convention.

There are three situations where a judgment may be obtained in breach of the parties' agreement.

The first situation arises when the agreement provides that the dispute should be resolved by arbitration. This is dealt with by Article 2(3), which excludes arbitration from the scope of the Convention.

The second situation arises when the agreement contains a choice of court agreement, whether exclusive or non-exclusive, which validly excludes the jurisdiction of the court of origin. This is dealt with by the current draft of Article 7(1)(d).

There is a third situation which is not dealt with by either the current draft of Article 7(1)(d), or by other Articles in the Convention. This arises when parties have settled their dispute amicably, and the settlement agreement contains a non-suit clause preventing either party from suing each other in respect of the dispute. We are of the view that the principle of upholding party autonomy should apply equally to such a situation, by providing that any judgment obtained in breach of such agreements should not circulate under the Convention.

[*] Work. Doc. No 39 REV was distributed on 20 June 2019.

# Documents de travail Nos 40 à 45

# Working Documents Nos 40 to 45

*Distribués le mercredi 19 juin 2019*

*Distributed on Wednesday 19 June 2019*

**No 40 – Proposal of the delegation of Peru**

Article 4
*General provisions*

[…]

4 If a judgment referred to in paragraph 3 is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired, the court addressed may, within the limits of the law of the requested State, in accordance with Article 14(1) –

(a) grant recognition or enforcement, which enforcement may be made subject to the provision of such security as it shall determine;

(b) postpone the decision on recognition or enforcement; or

(c) refuse recognition or enforcement.

A refusal under sub-paragraph (c) does not prevent a subsequent application for recognition or enforcement of the judgment.

*Explanation*

The Article provides three options when dealing with judgments that are subject to review in the State of origin. Many legislations only allow option (c) to be applied, only granting recognition and enforcement to judgments that are *res judicata*, and as so no longer subject to review.

It is our concern that the text, as it is currently in the draft Convention, might be interpreted by judges in these legislations as broadening their possibilities of action, to include options (a) and (b), particularly because of the reference to the judge's discretion in "the court addressed may".

In this regard, the new text would provide clarity for judges, in the sense that they should apply the Convention in a way that it should not conflict with national law provisions. And to clarify that it does not broaden their scope of action beyond what national legislation provides. It also makes reference to Article 14, which states that procedures are governed by the law of the requested State.

The proposal also continues to permit countries that currently allow for options (a) and (b) to apply these provisions if their legislation allows it.

**No 41 – Proposal of the delegation of Japan**

Article 24
*Relationship with other international instruments*

1 This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2 This Convention shall not affect the application by a Contracting State of a treaty ~~[or other international instrument]~~ that was concluded before this Convention [entered into force for that Contracting State] ~~[as between Parties to that instrument]~~.

3 This Convention shall not affect the application by a Contracting State of a treaty ~~[or other international instrument]~~ concluded after this Convention [entered into force for that Contracting State] ~~for the purposes of obtaining~~ as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that instrument. ~~[~~Nothing in the other instrument shall affect the obligations under Article 6 towards Contracting States that are not Parties to that instrument.~~]~~

4 This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention as concerns the recognition or enforcement of judgments ~~as between~~ given by a court of a Contracting State that is also a Member State~~s~~ of the Regional Economic Integration Organisation. Nothing in the rules of a Regional Economic Integration Organisation shall affect the obligations under Article 6 towards Contracting States that are not Member States of the Regional Economic Integration Organisation.

~~[5 A Contracting State may declare that other international instruments listed in the declaration shall remain unaffected by this Convention.]~~

*Explanation*

The bracketed words "or other international instrument" in paragraphs 2 and 3 should be deleted. The second sentence of paragraph 3 should be retained to protect the legitimate interest of a Contracting State that is not a Party to another instrument. Paragraph 4 should be revised to realize parallelism between paragraphs 3 and 4. Paragraph 5 should be deleted.

This proposal does not intend to touch on the issue of time regarding the distinction between other international instruments concluded earlier or later than the draft Convention.

**No 42 – Proposal of the delegations of Israel, the United States of America and Uruguay**

*Article 4(2)*

There shall be no review of the merits of the judgment in the requested State. This does not preclude such consideration as necessary solely for the application of this Convention.

**No 43 – Proposal of the delegation of Singapore**

*Deletion of Article 6(c):*

Notwithstanding Article 5 –



*Doc.trav./Work.Docs Nos 40-45*

[…]

~~(c) a judgment that ruled on a tenancy of immovable property for a period of more than six months shall not be recognised and enforced if the property is not situated in the State of origin and the courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State~~.

*New Article 7(1)(h):*

1 Recognition or enforcement may be refused if –

[…]

(h) the judgment ruled on a tenancy of immovable property for a period of more than six months, where the property is not situated in the State of origin, and the courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State.

*Explanation*

The concept of exclusive jurisdiction in relation to tenancies of more than six months is not universally recognised. We propose, as a compromise, that States be given the discretion to refuse recognition of such judgments if their national laws require so.

**No 44 – Proposal of the delegation of Uruguay**

*Article 7(1)(e)*

Article 7
*Refusal of recognition or enforcement*

1 Recognition or enforcement may be refused if –

[…]

(e) the judgment is inconsistent with an earlier judgment given in the requested State in a dispute between the same parties; or

*Explanation*

The proposal aims to frame the provision to the cases of *res iudicata*, as they are in Article 7(1)(f), and to be consistent with the *litis pendentia* of Article 7(2).

**No 45 – Proposal of the delegation of Saudi Arabia**

*New Article 7(1)(h)*

(h) immovable property where it is not situated in the State of origin.

*Explanation*

Immovable property might be subject to the exclusive jurisdiction of the State where the property is situated, so we suggest adding it under Article 7

# Document de travail No 46

# Working Document No 46

*Distribué le jeudi 20 juin 2019*

*Distributed on Thursday 20 June 2019*

**No 46 – Proposal of the delegations of Japan, the European Union and Switzerland**

Article 24
*Relationship with other international instruments*

1 This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2 This Convention shall not affect the application by a Contracting State of a treaty ~~[or other international instrument]~~ that was concluded before this Convention ~~entered into force for that Contracting State [as between Parties to that instrument]~~.

3 This Convention shall not affect the application by a Contracting State of a treaty ~~[or other international instrument]~~ concluded after this Convention ~~entered into force for that Contracting State for the purposes of obtaining~~ as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that instrument. ~~[~~Nothing in the other instrument shall affect the obligations under Article 6 towards Contracting States that are not Parties to that instrument.~~]~~

4 This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention, as concerns the recognition or enforcement of a judgment~~s as between~~ given by a court of a Contracting State that is also a Member State~~s~~ of the Regional Economic Integration Organisation. Nothing in the rules of a Regional Economic Integration Organisation shall affect the obligations under Article 6 towards Contracting States that are not Member States of the Regional Economic Integration Organisation.

~~[5 A Contracting State may declare that other international instruments listed in the declaration shall remain unaffected by this Convention.]~~

*Explanation*

This proposal builds upon Working Document No 41 and proposes a solution for the timing issues in paragraphs 2 and 3. For each treaty, there should be just one single point in time that is decisive for distinguishing between earlier and later treaties in paragraphs 2 and 3, and not a different date in relation to each State Party to it.

**No 46 REV – Proposal of the delegations of Japan, the European Union and Switzerland***

Article 24
*Relationship with other international instruments*

1 This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2 This Convention shall not affect the application by a Contracting State of a treaty ~~[or other international instrument]~~ that was concluded before this Convention ~~entered into force for that Contracting State [as between Parties to that instrument]~~.

3 This Convention shall not affect the application by a Contracting State of a treaty ~~[or other international instrument]~~ concluded after this Convention ~~entered into force for that Contracting State for the purposes of obtaining~~ as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that instrument. ~~[Nothing in the other instrument shall affect the obligations under Article 6 towards Contracting States that are not Parties to that instrument.]~~

4 This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention, as concerns the recognition or enforcement of a judgments ~~as between~~ given by a court of a Contracting State that is also a Member States of the Regional Economic Integration Organisation.

~~[5 A Contracting State may declare that other international instruments listed in the declaration shall remain unaffected by this Convention.]~~

*Explanation*

This proposal builds upon Working Document No 41 and proposes a solution for the timing issues in paragraphs 2 and 3. For each treaty, there should be just one single point in time that is decisive for distinguishing between earlier and later treaties in paragraphs 2 and 3, and not a different date in relation to each State Party to it.

In addition, it is proposed to align paragraphs 3 and 4 by deleting the reference to Article 6 in paragraph 4.

* Work. Doc. No 46 REV was distributed on 26 June 2019.



# Documents de travail Nos 47 à 49

# Working Documents Nos 47 to 49

*Distribués le vendredi 21 juin 2019*

*Distributed on Friday 21 June 2019*

**No 47 – Proposal of the delegations of Australia and the United States of America**

*Article 2(1)(l)*

~~[~~(l) privacy~~[~~, except where the proceedings were brought for breach of ~~contract between the parties~~ an obligation in a commercial contract between the parties to the proceedings to protect personal information~~]~~;~~]~~

**No 48 – Proposal of the delegations of the European Union, Norway and Switzerland**

Article 4
*General provisions*

[…]

4 If a judgment referred to in paragraph 3 is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired, recognition or enforcement may be –

(a) granted, however enforcement may be made subject to the provision of security;

(b) postponed; or

(c) refused.

A refusal under sub-paragraph (c) does not prevent a subsequent application for recognition or enforcement of the judgment.

**No 49 – Proposal of the delegation of Peru**

*Article 4(4)*

~~4 If a judgment referred to in paragraph 3 is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired, the court addressed may –~~

~~(a) grant recognition or enforcement, which enforcement may be made subject to the provision of such security as it shall determine;~~

~~(b) postpone the decision on recognition or enforcement; or~~

~~(c) refuse recognition or enforcement.~~

~~A refusal under sub-paragraph (c) does not prevent a subsequent application for recognition or enforcement of the judgment.~~

*OPTION 1 – Return to the language of the Choice of Court Convention (Art. 8(4)) and former sub-paragraph (a), while recognizing limitation by national law*

4 Recognition or enforcement may be postponed or refused if a judgment referred to under paragraph 3 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. To the extent allowed by national law, recognition and enforcement of such a judgment may be granted, and may be subject to the provision of such security as may be determined.

*OPTION 2 – Return to the language of the Choice of Court Convention, as well as language from the Explanatory Report on the Choice of Court Convention*

4 Recognition or enforcement may be postponed or refused if a judgment referred to under paragraph 3 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.

Include language in the Explanatory Report derived from paragraph 173 of the Explanatory Report on the Choice of Court Convention:

**Judgments subject to review**

Article 4(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. This means that the court addressed may postpone or refuse recognition or enforcement if, and as long as, the judgment might be set aside or amended by another court in the State of origin. It is not, however, obliged to do this. 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.

*Explanatory note*

Article 4(4) of the draft Convention derives from Article 8(4) of the Choice of Court Convention. The aim of the proposals is to return to the language of Article 8(4) of the Choice of Court Convention.

The proposals are presented because the main difference between the Choice of Court Convention and the draft Judgments Convention is that the latter provides for a new possibility for judges, namely, for recognition of a judgment that is still subject to review, as long as there is a security provided (the "new clause").

It is our view that adding this new clause without a reference to national law in the Convention could be interpreted by some national legislations as increasing the powers of a judge, allowing them to recognize a judgment subject to securities beyond what is allowed in their domestic law.

In this regard, we do not oppose adding of the new clause as long as the Article would make it clear for Contracting States and their judges that this is an option – to be limited by national law – and not an authorization for judges to use at their discretion.

In this regard we kindly suggest two options, both of which keep the language of the Choice of Court Convention in their main paragraph.

– Option 1, while returning to the language of the Choice of Court Convention, we aim to make it clear, by adding a reference "to the extent allowed by national law", that judges and operators are only permitted to recognize a judgment subject to securities if permitted by domestic law.

– In option 2 we return almost completely to the language of the Choice of Court Convention, while reproducing similar language of paragraph 173 of the Explanatory Report on the Choice of Court Convention in order to guarantee that Contracting States that have the option to recognize a judgment subject to securities in these cases still continue applying it. This option is presented as an alternative to delegations that might have problems with adding a reference to national law in the text, as a possible way forward.

For illustration, Article 8(4) of the Choice of Court Convention reads:

"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."

*Distribué le dimanche 23 juin 2019*

**No 50 – Proposition du Comité de rédaction***

CHAPITRE I – CHAMP D'APPLICATION ET DÉFINITIONS

Article premier
*Champ d'application*

1 La présente Convention s'applique à la reconnaissance et à l'exécution des jugements en matière civile ou commerciale. Elle ne recouvre notamment pas les matières fiscales, douanières ou administratives.

2 La présente Convention s'applique à la reconnaissance et à l'exécution, dans un État contractant, d'un jugement rendu par un tribunal d'un autre État contractant.

Article 2
*Exclusions du champ d'application*

1 La présente Convention ne s'applique pas aux matières suivantes :

(a) l'état et la capacité des personnes physiques ;

(b) les obligations alimentaires ;

(c) les autres matières du droit de la famille, y compris les régimes matrimoniaux et les autres droits ou obligations découlant du mariage ou de relations similaires ;

(d) les testaments et les successions ;

(e) l'insolvabilité, les concordats, la résolution d'établissements financiers, ainsi que les matières analogues ;

(f) le transport de passagers et de marchandises ;

(g) la pollution marine, la limitation de responsabilité pour des demandes en matière maritime, ainsi que les avaries communes ;

(h) la responsabilité pour les dommages nucléaires ;

(i) la validité, la nullité ou la dissolution des personnes morales ou des associations entre personnes physiques ou personnes morales, ainsi que la validité des décisions de leurs organes ;

(j) la validité des inscriptions sur les registres publics ;

* Texte issu de la réunion du Comité de rédaction du 22 juin 2019.





*Distributed on Sunday 23 June 2019*

**No 50 – Proposal of the Drafting Committee***

CHAPTER I – SCOPE AND DEFINITIONS

Article 1
*Scope*

1 This Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters. It shall not extend in particular to revenue, customs or administrative matters.

2 This Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State.

Article 2
*Exclusions from scope*

1 This Convention shall not apply to 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, resolution of financial institutions, and analogous matters;

(f) the carriage of passengers and goods;

(g) marine pollution, limitation of liability for maritime claims, and general average;

(h) liability for nuclear damage;

(i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs;

(j) the validity of entries in public registers;

* Text derived from the Drafting Committee meeting of 22 June 2019.

(k) la diffamation ;

[(l) le droit à la vie privée[, à l'exception des litiges portant sur la violation d'un contrat entre les parties] ;]

(m) la propriété intellectuelle [et les matières analogues] ;

(n) les activités des forces armées, y compris celles de leur personnel dans l'exercice de ses fonctions officielles ;

(o) les activités relatives au maintien de l'ordre, y compris celles du personnel chargé du maintien de l'ordre dans l'exercice de ses fonctions officielles ;

[(p) les entraves à la concurrence].

2 Un jugement n'est pas exclu du champ d'application de la présente Convention lorsqu'une question relevant d'une matière à laquelle elle ne s'applique pas est soulevée seulement à titre préalable et non comme objet du litige. En particulier, le seul fait qu'une telle matière ait été invoquée dans le cadre d'un moyen de défense n'exclut pas le jugement du champ d'application de la Convention, si cette question n'était pas l'objet du litige.

3 La présente Convention ne s'applique pas à l'arbitrage et aux procédures y afférentes.

4 Un jugement n'est pas exclu du champ d'application de la présente Convention du seul fait qu'un État, y compris un gouvernement, une agence gouvernementale ou toute personne agissant pour le compte d'un État, était partie au litige.

5 La présente Convention n'affecte pas les privilèges et immunités dont jouissent les États ou les organisations internationales, pour eux-mêmes et pour leurs biens.

Article 3
*Définitions*

1 Au sens de la présente Convention :

(a) le terme « défendeur » signifie la personne contre laquelle la demande ou la demande reconventionnelle a été introduite dans l'État d'origine ;

(b) le terme « jugement » signifie toute décision sur le fond rendue par un tribunal, quelle que soit la dénomination donnée à cette décision, telle qu'un arrêt ou une ordonnance, de même que la fixation des frais et dépens du procès par le tribunal (y compris le greffier du tribunal), à condition qu'elle ait trait à une décision sur le fond susceptible d'être reconnue ou exécutée en vertu de la présente Convention. Les mesures provisoires et conservatoires ne sont pas des jugements.

2 Une entité ou une personne autre qu'une personne physique est réputée avoir sa résidence habituelle dans l'État :

(a) de son siège statutaire ;

(b) selon le droit duquel elle a été constituée ;

(c) de son administration centrale ; ou

(d) de son principal établissement.

(k) defamation;

[(l) privacy[, except where the proceedings were brought for breach of contract between the parties];]

(m) intellectual property [and analogous matters];

(n) activities of armed forces, including the activities of their personnel in the exercise of their official duties;

(o) law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties;

[(p) anti-trust (competition) matters].

2 A judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings. In particular, the mere fact that such a matter arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.

3 This Convention shall not apply to arbitration and related proceedings.

4 A judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings.

5 Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3
*Definitions*

1 In this Convention –

(a) "defendant" means a person against whom the claim or counterclaim was brought in the State of origin;

(b) "judgment" means any decision on the merits given by a court, whatever that decision 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 the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

2 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.

Article 4
*Dispositions générales*

1 Un jugement rendu par un tribunal d'un État contractant (État d'origine) est reconnu et exécuté dans un autre État contractant (État requis) conformément aux dispositions du présent chapitre. La reconnaissance ou l'exécution ne peut être refusée qu'aux motifs énoncés dans la présente Convention.

2 Le jugement ne peut pas faire l'objet d'une révision au fond dans l'État requis. Ceci n'exclut pas toute appréciation nécessaire à l'application de la présente Convention.

3 Un jugement n'est reconnu que s'il produit ses effets dans l'État d'origine et n'est exécuté que s'il est exécutoire dans l'État d'origine.

4 Si le jugement visé au paragraphe 3 fait l'objet d'un recours dans l'État d'origine ou si le délai pour exercer un recours ordinaire n'a pas expiré, le tribunal requis peut :

(a) accorder la reconnaissance ou l'exécution, voire subordonner cette exécution à la constitution d'une sûreté qu'il détermine ;

(b) surseoir à statuer sur la reconnaissance ou l'exécution ; ou

(c) refuser la reconnaissance ou l'exécution.

Le refus visé à l'alinéa (c) n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.

[[5 Aux fins du paragraphe premier, un jugement rendu par un tribunal commun à deux ou plusieurs États est réputé l'avoir été par le tribunal d'un État contractant si cet État a désigné ce tribunal commun dans une déclaration à cet effet, et si l'une des conditions suivantes est remplie :

(a) tous les membres du tribunal commun sont des États contractants pour lesquels ce tribunal exerce les fonctions judiciaires relatives à la matière concernée et le jugement est susceptible d'être reconnu ou exécuté conformément à l'article 5(1)(c), (e), (f), (l), ou (m) ; ou

(b) le jugement est susceptible d'être reconnu ou exécuté conformément à un autre alinéa de l'article 5(1)[, l'article 5(3),] ou conformément à l'article 6, et ces exigences d'admissibilité sont remplies dans l'État contractant pour lequel ce tribunal exerce les fonctions judiciaires relatives à la matière concernée.]

OU

[5 Aux fins du paragraphe premier, un jugement rendu par un tribunal commun à deux ou plusieurs États est réputé l'avoir été par le tribunal d'un État contractant si cet État a désigné ce tribunal commun dans une déclaration à cet effet, et si l'une des conditions suivantes est remplie :

(a) tous les membres du tribunal commun sont des États contractants pour lesquels ce tribunal exerce les fonctions judiciaires relatives à la matière concernée et le jugement est susceptible d'être reconnu ou exécuté conformément à l'article 5(1)(c), (e), (f), (l), ou (m) ; ou





Article 4
*General provisions*

1 A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

2 There shall be no review of the merits of the judgment in the requested State. This does not preclude such consideration as may be necessary for the application of this Convention.

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 If a judgment referred to in paragraph 3 is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired, the court addressed may –

(a) grant recognition or enforcement, which enforcement may be made subject to the provision of such security as it shall determine;

(b) postpone the decision on recognition or enforcement; or

(c) refuse recognition or enforcement.

A refusal under sub-paragraph (c) does not prevent a subsequent application for recognition or enforcement of the judgment.

[[5 For purposes of paragraph 1, a judgment given by a court common to two or more States shall be deemed to be a judgment given by a court of a Contracting State if the Contracting State has identified the common court in a declaration to that effect, and either of the following conditions are met –

(a) all members of the common court are Contracting States whose judicial functions in relation to the relevant matter are exercised by the common court, and the judgment is eligible for recognition and enforcement under Article 5(1)(c), (e), (f), (l), or (m); or

(b) the judgment is eligible for recognition and enforcement under another sub-paragraph of Article 5(1)[, Article 5(3),] or under Article 6, and those eligibility requirements are met in a Contracting State whose judicial functions in relation to the relevant matter are exercised by the common court.]

OR

[5 For purposes of paragraph 1, a judgment given by a court common to two or more States shall be deemed to be a judgment given by a court of a Contracting State if the Contracting State has identified the common court in a declaration to that effect, and either of the following conditions are met –

(a) all members of the common court are Contracting States whose judicial functions in relation to the relevant matter are exercised by the common court, and the judgment is eligible for recognition and enforcement under Article 5(1)(c), (e), (f), (l), or (m); or

(b) le jugement est susceptible d'être reconnu ou exécuté conformément à un autre alinéa de l'article 5(1)[, l'article 5(3),] ou conformément à l'article 6, et ces exigences d'admissibilité sont remplies dans l'État contractant pour lequel ce tribunal exerce les fonctions judiciaires relatives à la matière concernée.

6 Un État contractant peut déclarer qu'il ne reconnaîtra ou n'exécutera pas les jugements rendus par un tribunal commun qui fait l'objet d'une déclaration en vertu du paragraphe 5 pour les matières couvertes par cette déclaration.

ou

6 La déclaration visée au paragraphe 5 n'aura d'effet qu'entre l'État contractant l'ayant faite et les autres États contractants ayant déclaré l'accepter. Ces déclarations doivent être déposées auprès du Ministère des Affaires étrangères des Pays-Bas, lequel transmettra, par voie diplomatique, une copie certifiée à chacun des États contractants.]]

Article 5
*Fondements de la reconnaissance ou de l'exécution*

1 Un jugement est susceptible d'être reconnu ou exécuté si l'une des exigences suivantes est satisfaite :

(a) la personne contre laquelle la reconnaissance ou l'exécution est demandée avait sa résidence habituelle dans l'État d'origine lorsqu'elle est devenue partie à la procédure devant le tribunal d'origine ;

(b) la personne physique contre laquelle la reconnaissance ou l'exécution est demandée avait son établissement professionnel principal dans l'État d'origine lorsqu'elle est devenue partie à la procédure devant le tribunal d'origine et la demande à l'origine du jugement portait sur son activité professionnelle ;

(c) la personne contre laquelle la reconnaissance ou l'exécution est demandée est celle qui a saisi le tribunal de la demande, autre que reconventionnelle, à l'origine du jugement ;

(d) le défendeur avait une succursale, une agence ou tout autre établissement sans personnalité juridique propre dans l'État d'origine, au moment où il est devenu une partie à la procédure devant le tribunal d'origine, et la demande à l'origine du jugement résultait des activités de cette succursale, de cette agence ou de cet établissement ;

(e) le défendeur a expressément consenti à la compétence du tribunal d'origine au cours de la procédure dans laquelle le jugement a été rendu ;

(f) le défendeur a fait valoir ses arguments sur le fond devant le tribunal d'origine sans en contester la compétence dans les délais prescrits par le droit de l'État d'origine, à moins qu'il ne soit évident qu'une contestation de la compétence ou de son exercice aurait échoué en vertu de ce droit ;

(g) le jugement porte sur une obligation contractuelle et a été rendu dans l'État dans lequel l'obligation a été ou aurait dû être exécutée, conformément :

(b) the judgment is eligible for recognition and enforcement under another sub-paragraph of Article 5(1)[, Article 5(3),] or under Article 6, and those eligibility requirements are met in a Contracting State whose judicial functions in relation to the relevant matter are exercised by the common court.

6 A Contracting State may declare that it shall not recognise or enforce judgments of a common court that is the object of a declaration under paragraph 5 in respect of any of the matters covered by that declaration.

or

6 The declaration referred to in paragraph 5 shall have effect only between the Contracting State that made the declaration and other Contracting States that have declared their acceptance of the declaration. Such declarations shall be deposited at the Ministry of Foreign Affairs of the Netherlands, which will forward, through diplomatic channels, a certified copy to each of the Contracting States.]]

Article 5
*Bases for recognition and enforcement*

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

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

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

(c) the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;

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

(e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;

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

(g) the judgment ruled on a contractual obligation and it was given in the State in which performance of that obligation took place, or should have taken place, in accordance with

(i) à l'accord des parties ou,

(ii) à la loi applicable au contrat, à défaut d'un accord sur le lieu d'exécution,

sauf si les activités du défendeur en relation avec la transaction ne présentaient manifestement pas de lien intentionnel et substantiel avec cet État ;

(h) le jugement porte sur un bail immobilier et a été rendu dans l'État où est situé l'immeuble ;

(i) le jugement rendu contre le défendeur porte sur une obligation contractuelle garantie par un droit réel relatif à un immeuble situé dans l'État d'origine, à condition qu'une demande contractuelle concernant ce droit réel ait également été dirigée contre ce défendeur;

(j) le jugement porte sur une obligation non contractuelle résultant d'un décès, d'un dommage corporel, d'un dommage subi par un bien corporel ou de la perte d'un bien corporel et l'acte ou l'omission directement à l'origine du dommage a été commis dans l'État d'origine, quel que soit le lieu où le dommage est survenu ;

(k) le jugement porte sur la validité, l'interprétation, les effets, l'administration ou la modification d'un trust constitué volontairement et documenté par écrit, et :

(i) au moment de l'introduction de l'instance, l'État d'origine est celui désigné dans l'acte constitutif du trust comme étant un État dont les tribunaux sont appelés à trancher les litiges relatifs à ces questions; ou

(ii) au moment de l'introduction de l'instance, l'État d'origine était celui désigné, de façon expresse ou implicite, dans l'acte constitutif du trust, comme étant l'État dans lequel est situé le lieu principal d'administration du trust.

Cet alinéa ne s'applique qu'aux jugements portant sur des aspects internes d'un trust, entre personnes étant ou ayant été au sein de la relation établie par le trust ;

(l) le jugement porte sur une demande reconventionnelle :

(i) dans la mesure où il est rendu en faveur du demandeur reconventionnel, à condition que cette demande porte sur la même transaction ou les mêmes faits que la demande principale ;

(ii) dans la mesure où il est rendu contre le demandeur reconventionnel, sauf si le droit de l'État d'origine exigeait une demande reconventionnelle à peine de forclusion ;

(m) le jugement a été rendu par un tribunal désigné dans un accord conclu ou documenté par écrit ou par tout autre moyen de communication qui rende l'information accessible pour être consultée ultérieurement, autre qu'un accord exclusif d'élection de for.

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

(i) the parties' agreement, or

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

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

(h) the judgment ruled on a tenancy of immovable property and it was given in the State in which the property is situated;

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

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

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

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

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

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

(l) the judgment ruled on a counterclaim –

(i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim;

(ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;

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

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

2 Si la reconnaissance ou l'exécution est requise contre une personne physique agissant principalement dans un but personnel, familial ou domestique (un consommateur) en matière de contrat de consommation, ou contre un employé relativement à son contrat de travail :

(a) le paragraphe 1(e) ne s'applique que si le consentement a été donné devant le tribunal, que ce soit oralement ou par écrit ;

(b) les paragraphes 1(f), (g) et (m) ne s'appliquent pas.

Article 6
*Fondements exclusifs de la reconnaissance ou de l'exécution*

Nonobstant l'article 5 :

(b) un jugement portant sur des droits réels immobiliers n'est reconnu ou exécuté que si l'immeuble est situé dans l'État d'origine ;

(c) un jugement portant sur un bail immobilier pour une période de plus de six mois ne peut être reconnu ou exécuté si l'immeuble n'est pas situé dans l'État d'origine et les tribunaux de l'État dans lequel se trouve l'immeuble ont compétence exclusive en vertu du droit de cet État.

Article 7
*Refus de reconnaissance ou d'exécution*

1 La reconnaissance ou l'exécution peut être refusée si :

(a) l'acte introductif d'instance ou un acte équivalent contenant les éléments essentiels de la demande :

(i) n'a pas été notifié au défendeur en temps utile et de telle manière qu'il puisse organiser sa défense, à moins que le défendeur ait comparu et présenté sa défense sans contester la notification devant le tribunal d'origine, à condition que le droit de l'État d'origine permette de contester la notification ; ou

(ii) a été notifié au défendeur dans l'État requis de manière incompatible avec les principes fondamentaux de l'État requis relatifs à la notification de documents ;

(b) le jugement résulte d'une fraude ;

(c) la reconnaissance ou l'exécution est manifestement incompatible avec l'ordre public de l'État requis, notamment dans le cas où la procédure appliquée en l'espèce pour obtenir le jugement était incompatible avec les principes fondamentaux d'équité procédurale de cet État et en cas d'atteinte à la sécurité ou à la souveraineté de cet État ;

(d) la procédure devant le tribunal d'origine était contraire à un accord, ou à une clause figurant dans l'acte constitutif d'un trust, en vertu duquel le litige en question devait être tranché par un tribunal autre que le tribunal d'origine ;

(e) le jugement est incompatible avec un jugement rendu dans l'État requis dans un litige entre les mêmes parties ; ou

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

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

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

Article 6
*Exclusive bases for recognition and enforcement*

Notwithstanding Article 5 –

(b) a judgment that ruled on rights *in rem* in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin;

(c) a judgment that ruled on a tenancy of immovable property for a period of more than six months shall not be recognised and enforced if the property is not situated in the State of origin and the courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State.

Article 7
*Refusal of recognition or enforcement*

1 Recognition or enforcement may be refused if –

(a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim –

(i) was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence, unless the defendant entered an appearance and presented their case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

(ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

(b) the judgment was obtained by fraud;

(c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State;

(d) the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court other than the court of origin;

(e) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or

(f) le jugement est incompatible avec un jugement rendu antérieurement dans un autre État entre les mêmes parties dans un litige ayant le même objet, lorsque le jugement rendu antérieurement réunit les conditions nécessaires à sa reconnaissance dans l'État requis.

2 La reconnaissance ou l'exécution peut être différée ou refusée si une procédure ayant le même objet est pendante entre les mêmes parties devant un tribunal de l'État requis lorsque :

(a) ce dernier a été saisi avant le tribunal de l'État d'origine ; et

(b) il existe un lien étroit entre le litige et l'État requis.

Le refus visé au présent paragraphe n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.

Article 8
*Questions préalables*

1 Une décision rendue à titre préalable sur une matière à laquelle la présente Convention ne s'applique pas, ou une décision rendue à titre préalable sur une matière visée à l'article 6 par un autre tribunal que celui désigné dans cette disposition, n'est pas reconnue ou exécutée en vertu de la présente Convention.

2 La reconnaissance ou l'exécution d'un jugement peut être refusée si, et dans la mesure où, le jugement est fondé sur une décision relative à une matière à laquelle la présente Convention ne s'applique pas, ou sur une décision relative à une matière visée à l'article 6 qui a été rendue par un autre tribunal que celui désigné dans cette disposition.

[3 Toutefois, dans le cas d'une décision relative à la validité d'un droit visé à l'article 6(a), la reconnaissance ou l'exécution d'un jugement ne peut être différée, ou refusée en vertu du paragraphe précédent, que si :

(a) cette décision est incompatible avec un jugement ou une décision rendu(e) sur ce point par l'autorité compétente de l'État mentionné à l'article 6(a) ; ou

(b) une procédure relative à la validité de ce droit est pendante dans cet État.

Le refus en vertu de l'alinéa (b) n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.]

Article 9
*Divisibilité*

La reconnaissance ou l'exécution d'une partie dissociable d'un jugement est accordée si la reconnaissance ou l'exécution de cette partie est demandée ou si seule une partie du jugement peut être reconnue ou exécutée en vertu de la présente Convention.

Article 10
*Dommages et intérêts*

1 La reconnaissance ou l'exécution d'un jugement peut être refusée si, et dans la mesure où, le jugement accorde des dommages et intérêts, y compris des dommages et intérêts exemplaires ou punitifs, qui ne compensent pas une partie pour la perte ou préjudice réellement subis.

(f) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

2 Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –

(a) the court of the requested State was seised before the court of origin; and

(b) there is a close connection between the dispute and the requested State.

A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 8
*Preliminary questions*

1 A ruling on a preliminary question shall not be recognised or enforced under this Convention if the ruling is on a matter to which this Convention does not apply or on a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled.

2 Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply, or on a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled.

[3 However, in the case of a ruling on the validity of a right referred to in Article 6, paragraph (a), recognition or enforcement of a judgment may be postponed, or refused under the preceding paragraph, only where –

(a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State referred to in Article 6, paragraph (a); or

(b) proceedings concerning the validity of that right are pending in that State.

A refusal under sub-paragraph (b) does not prevent a subsequent application for recognition or enforcement of the judgment.]

Article 9
*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 10
*Damages*

1 Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.

2 Le tribunal requis prend en considération, si, et dans quelle mesure, le montant accordé à titre de dommages et intérêts par le tribunal d'origine est destiné à couvrir les frais et dépens du procès.

Article 12
*Transactions judiciaires*

Les transactions judiciaires homologuées par un tribunal d'un État contractant, ou qui ont été conclues au cours d'une instance devant un tribunal d'un État contractant, et qui sont exécutoires au même titre qu'un jugement dans l'État d'origine, sont exécutées en vertu de la présente Convention aux mêmes conditions qu'un jugement.

Article 13
*Pièces à produire*

1 La partie qui requiert la reconnaissance ou qui demande l'exécution produit :

(a) une copie complète et certifiée conforme du jugement ;

(b) si le jugement a été rendu par défaut, l'original ou une copie certifiée conforme du document attestant que l'acte introductif d'instance ou un acte équivalent a été notifié à la partie défaillante ;

(c) tout document nécessaire pour établir que le jugement produit ses effets dans l'État d'origine ou, le cas échéant, qu'il est exécutoire dans cet État ;

(d) dans le cas prévu à l'article 12, un certificat délivré par un tribunal [(y compris par une personne autorisée du tribunal)] de l'État d'origine attestant que la transaction judiciaire est exécutoire, en tout ou en partie, aux mêmes conditions qu'un jugement dans l'État d'origine.

2 Si le contenu du jugement ne permet pas au tribunal requis de vérifier que les conditions du présent chapitre sont remplies, ce tribunal peut exiger tout document nécessaire.

3 Une demande de reconnaissance ou d'exécution peut être accompagnée d'un document relatif au jugement, délivré par un tribunal (y compris par une personne autorisée du tribunal) de l'État d'origine, sous la forme recommandée et publiée par la Conférence de La Haye de droit international privé.

4 Si les documents mentionnés dans le présent article ne sont pas rédigés dans une langue officielle de l'État requis, ils sont accompagnés d'une traduction certifiée dans une langue officielle, sauf si le droit de l'État requis en dispose autrement.

Article 14
*Procédure*

1 La procédure tendant à obtenir la reconnaissance, l'exequatur ou l'enregistrement aux fins d'exécution, et l'exécution du jugement sont régies par le droit de l'État requis sauf si la présente Convention en dispose autrement. Le tribunal requis agit avec célérité.

2 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 12
*Judicial settlements (*transactions judiciaires*)*

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, 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.

Article 13
*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 given 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) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;

(d) in the case referred to in Article 12, a certificate of a court [(including an officer of the court)] of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment 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 any necessary documents.

3 An application for recognition or enforcement may be accompanied by a document relating to the judgment, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.

4 If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 14
*Procedure*

1 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.

2 Le tribunal de l'État requis ne peut refuser de reconnaître ou d'exécuter un jugement en vertu de la présente Convention au motif que la reconnaissance ou l'exécution devrait être requise dans un autre État.

Article 15
*Frais de procédure*

1 Aucune sûreté, caution ou dépôt, sous quelque dénomination que ce soit, ne peut être imposée en raison, soit de sa seule qualité d'étranger, soit du seul défaut de domicile ou de résidence dans l'État requis, à la partie qui demande l'exécution dans un État contractant d'une décision rendue dans un autre État contractant.

2 Toute condamnation aux frais et dépens, rendue dans un État contractant contre toute personne dispensée du versement d'une sûreté, d'une caution ou d'un dépôt en vertu du paragraphe premier ou du droit de l'État dans lequel l'instance a été introduite est, à la demande du créancier, déclarée exécutoire dans tout autre État contractant.

3 Un État peut déclarer qu'il n'appliquera pas le paragraphe premier ou désigner dans une déclaration lesquels de ses tribunaux ne l'appliqueront pas.

Article 16
*Reconnaissance ou exécution en application du droit national*

Sous réserve de l'article 6, la présente Convention ne fait pas obstacle à la reconnaissance ou l'exécution d'un jugement en application du droit national.

CHAPITRE III – CLAUSES GÉNÉRALES

Article 17
*Disposition transitoire*

La Convention s'applique à la reconnaissance et à l'exécution de jugements si, au moment de l'introduction de l'instance dans l'État d'origine, la Convention était en vigueur dans cet État et dans l'État requis.

Article 18
*Déclarations limitant la reconnaissance et l'exécution*

Un État peut déclarer que ses tribunaux peuvent refuser de reconnaître ou d'exécuter un jugement rendu par un tribunal d'un autre État contractant, lorsque les parties avaient leur résidence dans l'État requis et que les relations entre les parties, ainsi que tous les autres éléments pertinents du litige, autres que le lieu du tribunal d'origine, étaient liés uniquement à l'État requis.

Article 19
*Déclarations relatives à des matières particulières*

1 Lorsqu'un État a un intérêt important à ne pas appliquer la présente Convention à une matière particulière, il peut déclarer qu'il ne l'appliquera pas à cette matière. L'État qui fait une telle déclaration s'assure que la portée de celle-ci n'est pas plus étendue que nécessaire et que la matière particulière exclue est définie de façon claire et précise.

2 À l'égard d'une telle matière, la Convention ne s'applique pas :

2 The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

Article 15
*Costs of proceedings*

1 No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given in another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.

2 An order for payment of costs or expenses of proceedings, made in a Contracting State against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 or of the law of the State where proceedings have been instituted, shall, on the application of the person entitled to the benefit of the order, be rendered enforceable in any other Contracting State.

3 A State may declare that it shall not apply paragraph 1 or designate by a declaration which of its courts shall not apply paragraph 1.

Article 16
*Recognition or enforcement under national law*

Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.

CHAPTER III – GENERAL CLAUSES

Article 17
*Transitional provision*

This Convention shall apply to the recognition and enforcement of judgments if, at the time the proceedings were instituted in the State of origin, the Convention was in force in that State and in the requested State.

Article 18
*Declarations limiting recognition and enforcement*

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the court of origin, were connected only with the requested State.

Article 19
*Declarations with respect to specific matters*

1 Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

2 With regard to that matter, the Convention shall not apply –

(a) dans l'État contractant ayant fait la déclaration ;

(b) dans les autres États contractants, lorsque la reconnaissance ou l'exécution d'un jugement rendu dans un État contractant ayant fait la déclaration est demandée.

[Article 20
*Déclarations relatives aux jugements concernant des gouvernements*

1 Un État peut déclarer qu'il n'appliquera pas la présente Convention aux jugements issus de procédures auxquelles est partie :

(a) cet État ou une personne agissant au nom de celui-ci ; ou

(b) une des agences gouvernementales de cet État ou toute personne agissant au nom de celle-ci.

Cette déclaration n'est pas plus étendue que nécessaire et l'exclusion du champ d'application y est définie de façon claire et précise.

2 Une déclaration faite en application du paragraphe premier ne peut exclure du champ d'application de la présente Convention les jugements issus de procédures auxquelles une entreprise publique est partie.

3 Si un État a fait une déclaration en application du paragraphe premier, la reconnaissance ou l'exécution d'un jugement rendu dans cet État peut être refusée par un autre État contractant si le jugement est issu d'une procédure à laquelle est partie cet État contractant, ou une de ses agences gouvernementales, ou les personnes assimilées à celles mentionnées au paragraphe premier, dans les limites prévues par cette déclaration.]

Article 21
*Interprétation uniforme*

Aux fins de l'interprétation de la présente Convention, il sera tenu compte de son caractère international et de la nécessité de promouvoir l'uniformité de son application.

Article 22
*Examen du fonctionnement de la Convention*

Le Secrétaire général de la Conférence de La Haye de droit international privé prend périodiquement des dispositions en vue de :

(a) l'examen du fonctionnement pratique de la présente Convention, y compris de toute déclaration ; et

(b) l'examen de l'opportunité d'apporter des modifications à la présente Convention.

Article 23
*Systèmes juridiques non unifiés*

1 Au regard d'un État contractant dans lequel deux ou plusieurs systèmes de droit ayant trait aux questions régies par la présente Convention s'appliquent dans des unités territoriales différentes :

(a) toute référence à la loi ou à la procédure d'un État vise, le cas échéant, la loi ou la procédure en vigueur dans l'unité territoriale considérée ;

(a) in the Contracting State that made the declaration;

(b) in other Contracting States, where recognition or enforcement of a judgment given in a Contracting State that made the declaration is sought.

[Article 20
*Declarations with respect to judgments pertaining to governments*

1 A State may declare that it shall not apply this Convention to judgments arising from proceedings to which any of the following is a party –

(a) that State, or a person acting on behalf of that State, or

(b) a government agency of that State, or a person acting on behalf of such a government agency.

The declaration shall be no broader than necessary and the exclusion from scope shall be clearly and precisely defined.

2 A declaration pursuant to paragraph 1 shall not exclude from the application of this Convention judgments arising from proceedings to which an enterprise owned by a State is a party.

3 If a State has made a declaration pursuant to paragraph 1, recognition or enforcement of a judgment originating from that State may be refused by another Contracting State if the judgment arose from proceedings to which that other Contracting State, one of its government agencies, or equivalent persons to those referred to in paragraph 1 is a party, to the same extent as specified in the declaration.]

Article 21
*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 22
*Review of operation of the Convention*

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for –

(a) review of the operation of this Convention, including any declarations; and

(b) consideration of whether any amendments to this Convention are desirable.

Article 23
*Non-unified legal systems*

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, where appropriate, to the law or procedure in force in the relevant territorial unit;

(b) toute référence à la résidence habituelle dans un État vise, le cas échéant, la résidence habituelle dans l'unité territoriale considérée ;

(c) toute référence au tribunal ou aux tribunaux d'un État vise, le cas échéant, le tribunal ou les tribunaux de l'unité territoriale considérée ;

(d) toute référence au lien avec un État vise, le cas échéant, le lien avec l'unité territoriale considérée.

2 Nonobstant le paragraphe précédent, un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu d'appliquer la présente Convention aux situations qui impliquent uniquement ces différentes unités territoriales.

3 Un tribunal d'une unité territoriale d'un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu de reconnaître ou d'exécuter un jugement d'un autre État contractant au seul motif que le jugement a été reconnu ou exécuté dans une autre unité territoriale du même État contractant selon la présente Convention.

4 Cet article ne s'applique pas à une Organisation régionale d'intégration économique.

Article 24
*Rapport avec d'autres instruments internationaux*

1 La présente Convention doit être interprétée de façon qu'elle soit, autant que possible, compatible avec d'autres traités en vigueur pour les États contractants, conclus avant ou après cette Convention.

2 La présente Convention n'affecte pas l'application par un État contractant d'un traité [ou de tout autre instrument international] conclu avant l'entrée en vigueur de cette Convention pour cet État contractant [entre les Parties à cet instrument].

3 La présente Convention n'affecte pas l'application par un État contractant d'un traité [ou de tout autre instrument international] conclu après l'entrée en vigueur de cette Convention pour cet État contractant, aux fins de reconnaissance ou d'exécution d'un jugement rendu par le tribunal d'un État contractant qui est également Partie à cet instrument. [Aucune disposition de l'autre instrument n'a d'incidence sur les obligations prévues à l'article 6 eu égard aux États contractants qui ne sont pas Parties à cet instrument.]

4 La présente Convention n'affecte pas l'application des règles d'une Organisation régionale d'intégration économique Partie à cette Convention, que ces règles aient été adoptées avant ou après cette Convention, en ce qui a trait à la reconnaissance ou l'exécution de jugements entre les États membres de l'Organisation régionale d'intégration économique.

[5 Un État contractant peut déclarer que la présente Convention n'affecte pas les instruments internationaux énumérés dans la déclaration.]

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

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

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

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

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

4 This Article shall not apply to a Regional Economic Integration Organisation.

Article 24
*Relationship with other international instruments*

1 This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2 This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] that was concluded before this Convention entered into force for that Contracting State [as between Parties to that instrument].

3 This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] concluded after this Convention entered into force for that Contracting State for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that instrument. [Nothing in the other instrument shall affect the obligations under Article 6 towards Contracting States that are not Parties to that instrument.]

4 This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

[5 A Contracting State may declare that other international instruments listed in the declaration shall remain unaffected by this Convention.]

Article 25
*Signature, ratification, acceptation, approbation ou adhésion*

1 La présente Convention est ouverte à la signature de tous les États.

2 La présente Convention est sujette à la ratification, à l'acceptation ou à l'approbation par les États signataires.

3 Tout État pourra adhérer à la présente Convention.

4 Les instruments de ratification, d'acceptation, d'approbation ou d'adhésion sont déposés auprès du Ministère des Affaires étrangères du Royaume des Pays-Bas, dépositaire de la Convention.

Article 26
*Déclarations relatives aux systèmes juridiques non unifiés*

1 Un État qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par la présente Convention peut, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer que la Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles, et pourra à tout moment modifier cette déclaration en faisant une nouvelle déclaration.

2 Toute déclaration est notifiée au dépositaire et indique expressément les unités territoriales auxquelles la Convention s'applique.

3 Si un État ne fait pas de déclaration en vertu du présent article, la Convention s'applique à l'ensemble du territoire de cet État.

4 Le présent article ne s'applique pas à une Organisation régionale d'intégration économique.

Article 27
*Organisations régionales d'intégration économique*

1 Une Organisation régionale d'intégration économique constituée seulement par des États souverains et ayant compétence sur certaines ou toutes les matières régies par la présente Convention peut également signer, accepter ou approuver cette Convention ou y adhérer. En pareil cas, l'Organisation régionale d'intégration économique aura les mêmes droits et obligations qu'un État contractant, dans la mesure où cette Organisation a compétence sur des matières régies par cette Convention.

2 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, l'Organisation régionale d'intégration économique notifie au dépositaire, par écrit, les matières régies par la présente Convention pour lesquelles ses États membres ont transféré leur compétence à cette Organisation. L'Organisation notifie aussitôt au dépositaire, par écrit, toute modification intervenue dans la délégation de compétence précisée dans la notification la plus récente faite en vertu du présent paragraphe.

3 Aux fins de l'entrée en vigueur de la présente Convention, tout instrument déposé par une Organisation régionale d'intégration économique n'est pas compté, à moins que



Article 25
*Signature, ratification, acceptance, approval or accession*

1 This Convention is open for signature by all States.

2 This Convention is subject to ratification, acceptance or approval by the signatory States.

3 This Convention is open for accession by all States.

4 Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 26
*Declarations with respect to non-unified legal systems*

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 A 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 shall extend to all territorial units of that State.

4 This Article shall not apply to a Regional Economic Integration Organisation.

Article 27
*Regional Economic Integration Organisations*

1 A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

2 The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3 For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the

l'Organisation régionale d'intégration économique déclare, en vertu de l'article 28(1), que ses États membres ne seront pas Parties à cette Convention.

4 Toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, à une Organisation régionale d'intégration économique qui y est Partie.

Article 28
*Adhésion par une Organisation régionale d'intégration économique sans ses États membres*

1 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, une Organisation régionale d'intégration économique peut déclarer qu'elle a compétence pour toutes les matières régies par la présente Convention et que ses États membres ne seront pas Parties à cette Convention mais seront liés par celle-ci en raison de la signature, de l'acceptation, de l'approbation ou de l'adhésion de l'Organisation.

2 Lorsqu'une déclaration est faite par une Organisation régionale d'intégration économique en conformité avec le paragraphe premier, toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, aux États membres de l'Organisation.

Article 29
*Entrée en vigueur*

1 La présente Convention entrera en vigueur le premier jour du mois suivant l'expiration d'une période de [trois] [six] mois après le dépôt du deuxième instrument de ratification, d'acceptation, d'approbation ou d'adhésion visé à l'article 25.

2 Par la suite, la présente Convention entrera en vigueur :

(a) pour chaque État ou Organisation régionale d'intégration économique ratifiant, acceptant, approuvant ou y adhérant postérieurement, le premier jour du mois suivant l'expiration d'une période de [trois] [six] mois après le dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion ;

(b) pour les unités territoriales auxquelles la présente Convention a été étendue conformément à l'article 26, le premier jour du mois suivant l'expiration d'une période de [trois] [six] mois après la notification de la déclaration visée par ledit article.

Article 30
*Déclarations*

1 Les déclarations visées aux articles [4, ]15, 18, 19, [20,] [24,] 26 et 28 peuvent être faites lors de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion ou à tout moment ultérieur et pourront être modifiées ou retirées à tout moment.

2 Les déclarations, modifications et retraits sont notifiés au dépositaire.

3 Une déclaration faite au moment de la signature, de la ratification, de l'acceptation, de l'approbation de la Convention ou de l'adhésion à celle-ci prendra effet au moment de l'entrée en vigueur de la Convention pour l'État concerné.

Regional Economic Integration Organisation declares in accordance with Article 28, paragraph 1, that its Member States will not be Parties to this Convention.

4 Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation that is a Party to it.

Article 28
*Accession by a Regional Economic Integration Organisation without its Member States*

1 At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

2 In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 29
*Entry into force*

1 This Convention shall enter into force on the first day of the month following the expiration of [three] [six] months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 25.

2 Thereafter this Convention shall enter into force –

(a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of [three] [six] months after the deposit of its instrument of ratification, acceptance, approval or accession;

(b) for a territorial unit to which this Convention has been extended in accordance with Article 26 on the first day of the month following the expiration of [three] [six] months after the notification of the declaration referred to in that Article.

Article 30
*Declarations*

1 Declarations referred to in Articles [4, ]15, 18, 19, [20,] [24,] 26 and 28 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2 Declarations, modifications and withdrawals shall be notified to the depositary.

3 A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4 Une déclaration faite ultérieurement, ainsi qu'une modification ou le retrait d'une déclaration, prendra effet le premier jour du mois suivant l'expiration d'une période de six mois après la date de réception de la notification par le dépositaire.

5 Une déclaration faite ultérieurement, ainsi qu'une modification ou le retrait d'une déclaration, ne produira pas d'effet sur les jugements rendus à l'issue d'instances déjà introduites devant le tribunal d'origine au moment où la déclaration prend effet.

Article 31
*Dénonciation*

1 La présente Convention pourra être dénoncée par une notification écrite au dépositaire. La dénonciation pourra se limiter à certaines unités territoriales d'un système juridique non unifié auxquelles s'applique la présente Convention.

2 La dénonciation prendra effet le premier jour du mois suivant l'expiration d'une période de douze mois après la date de réception de la notification par le dépositaire. Lorsqu'une période plus longue pour la prise d'effet de la dénonciation est précisée dans la notification, la dénonciation prendra effet à l'expiration de la période en question après la date de réception de la notification par le dépositaire.

Article 32
*Notifications par le dépositaire*

Le dépositaire notifiera aux Membres de la Conférence de La Haye de droit international privé, ainsi qu'aux autres États et aux Organisations régionales d'intégration économique qui ont signé, ratifié, accepté, approuvé ou adhéré conformément aux articles […] les renseignements suivants :

(a) les signatures, ratifications, acceptations, approbations et adhésions prévues à l'article 25 ;

(b) la date d'entrée en vigueur de la présente Convention conformément à l'article 29 ;

(c) les notifications, déclarations, modifications et retraits des déclarations prévus à l'article 30 ;

(d) les dénonciations prévues à l'article 31.

4 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of six months following the date on which the notification is received by the depositary.

5 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall not apply to judgments resulting from proceedings that have already been instituted before the court of origin when the declaration takes effect.

Article 31
*Denunciation*

1 This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2 The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 32
*Notifications by the depositary*

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles […] of the following –

(a) the signatures, ratifications, acceptances, approvals and accessions referred to in Article 25;

(b) the date on which this Convention enters into force in accordance with Article 29;

(c) the notifications, declarations, modifications and withdrawals of declarations referred to in Article 30; and

(d) the denunciations referred to in Article 31.

# Documents de travail Nos 51 à 60

# Working Documents Nos 51 to 60

*Distribués le lundi 24 juin 2019*

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**No 51 – Proposal of the delegation of Argentina**

*Explanatory Report, paragraph 71*

*Alternative A:*

71 Unless a declaration under Article 20 is made, in those jurisdictions that adhere to a restrictive immunity theory, the draft Convention applies when a State or a governmental agency is acting as a private person, *i.e.*, without exercising sovereign powers, and regardless of whether the public entity is the judgment creditor or the judgment debtor. Three core criteria are relevant to determining the application of the draft Convention to disputes involving government parties.

*Alternative B:*

71 Unless a declaration under Article 20 is made, and subject to the applicable rules on immunities (see *infra* para. 73), the draft Convention applies when a State or a governmental agency is acting as a private person, *i.e.*, without exercising sovereign powers, and regardless of whether the public entity is the judgment creditor or the judgment debtor. Three core criteria are relevant to determining the application of the draft Convention to disputes involving government parties.

**No 52 – Proposal of the delegation of Israel**

Article 14
*Procedure*

1 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.

2 The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

[3 Language on the imposition of an obligation on Contracting States to modify, if necessary, their domestic statute of limitations concerning applications to declare the enforceability of foreign judgements.]

4 A State may declare that it shall not apply paragraph 3.

*Explanatory note*

Imposing an obligation on States to modify domestic statutes of limitations in respect of foreign judgements in an international instrument with universal application is an innovative and almost precedential mechanism. Accordingly, if it is decided to include such an exceptional provision in the Convention it will be appropriate to allow Contracting States to declare that they will not apply this obligation.

For the avoidance of doubt, the proposal does not seek to amend the current language in paragraphs 355 and 356 of the draft Explanatory Report.

**No 53 – Proposal of the delegations of the European Union and Norway**

Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

[…]

[(m) intellectual property[ and analogous matters][, except for copyright and related rights insofar as the judgment ruled on a contractual matter;]]

**No 54 – Proposal of the delegation of Switzerland**

Article 14
*Procedure*

[…]

3 The court of the requested State shall not refuse the recognition or enforcement of a judgment that is still effective or enforceable in the State of origin on the basis that the applicant has failed to meet a time limit imposed in the requested State's national internal law for the recognition or enforcement of foreign judgments if such time limit is shorter than the one applied to the effectiveness or enforcement of domestic judgments.

*Explanation*

This proposal aims to address a very specific form of discrimination, namely imposing a specific time limit for the recognition or enforcement of foreign judgments that leads to a discrimination of such judgments compared to domestic judgments or judgments that can be recognised and enforced on the basis of bilateral treaties (as opposed to the draft Convention).

Example: The requested State requires that the application for recognition or enforcement of a foreign judgment is filed within five years after the day when the judgment was given, while domestic judgments are still effective and enforceable after that period has expired.

The proposal does not intend to interfere with general issues of limitation, including conflict-of-laws issues in that field. It only addresses cases where the internal law of the requested State contains specific rules that lead to a discrimination of foreign judgments.



*Doc.trav./Work.Docs Nos 51-60*

**No 55 – Proposal of the delegation of Switzerland**

Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

[…]

[(m) validity and infringement of intellectual property rights;]

**No 56 – Proposal of the delegations of Brazil and Israel**

*Intellectual property*

Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

[…]

[(m) intellectual property rights [and analogous ~~matters~~ rights], except for infringement of intellectual property rights;]

Article 5
*Bases for recognition and enforcement*

[…]

[3(a) Paragraph 1 does not apply to a judgment ~~that ruled~~ on an intellectual property right or an analogous right. ~~Such a judgment is eligible for recognition and enforcement if one of the following requirements is met –~~

(~~a~~b) ~~the~~ A judgment ~~ruled~~ on an infringement in the State of origin, of an intellectual property right required to be granted or registered is eligible for recognition and enforcement if ~~and~~ it was given by a court in the State in which the grant or registration of the right concerned has taken place, or, under the terms of an international or regional instrument, is deemed to have taken place[~~, unless~~. [However, such a judgment is not eligible for recognition and enforcement if the defendant has not acted in ~~that~~ the State of origin to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State];].

(~~b~~c) ~~the~~ A judgment ~~ruled~~ on an infringement in the State of origin, of a copyright or related right, an unregistered trademark or an unregistered industrial design~~, and it~~ is eligible for recognition and enforcement if it was given by a court in the State for which protection was claimed[~~, unless~~. [However, such a judgment is not eligible for recognition and enforcement if the defendant has not acted in ~~that~~ the State of origin to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State];].

~~(d) A the judgment ruled on the validity[, or subsistence or ownership] in the State of origin of a copyright or related right, an unregistered trademark or an unregistered industrial design is eligible for recognition if, and it was given by a court in the State for which protection was claimed.]~~

Article 6
*Exclusive bases for recognition and enforcement*

Notwithstanding Article 5 –

~~[(a) a judgment that ruled on the [registration or] validity of an intellectual property right required to be granted or registered shall be recognised and enforced if and only if the State of origin is the State in which grant or registration has been applied for, has taken place, or, under the terms of an international or regional instrument, is deemed to have been applied for or to have taken place;]~~

[…]

Article 11
*~~Non-monetary r~~Remedies in intellectual property matters*

~~In~~ A judgment on an infringement of an intellectual property ~~matters, a judgment ruling on an infringement~~ right shall be [recognised and] enforced only to the extent that it ~~rules on~~ imposes a monetary remedy, including a monetary remedy deriving from an injunction that orders or prohibits behaviour in the State of origin ~~in relation to harm suffered in the State of origin~~.

**No 57 – Proposal of the delegation of Uruguay**

*Article 4(2)*

2 There shall be no review of the merits of the judgment in the requested State. This does not preclude such consideration only as may be necessary ~~solely~~ for the application of this Convention.

*Explanatory note*

The proposal aims to better and clearly reflect in the text of the Article the political consensus reached by the Plenary on this issue, and takes into account the grammar suggestions from the Drafting Committee.

**No 58 – Proposal of the delegation of the People's Republic of China**

*Article 2(1)(m)*

1 This Convention shall not apply to the following matters –

[…]

[(m) intellectual property [~~and analogous matters~~];]

*Explanation*

According to the *Convention Establishing the World Intellectual Property Organization*:

> "'intellectual property' shall include the rights relating to:
>
> – literary, artistic and scientific works, […] and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields."

This means intellectual property itself is a relatively broad concept and there is no exhaustive enumeration. Each country may have its considerations as to whether certain matters can be protected under its intellectual property law.


*Doc.trav./Work.Docs Nos 51-60*

"Analogous matters" may expand the scope of exclusion and cause uncertainty. Actually, what kind of matters should be regarded as "analogous matters" are not required to be regulated by this Convention.

Therefore, this proposal suggests to delete "and analogous matters". For the avoidance of doubt, we may clarify the term "intellectual property" in the Explanatory Report that "intellectual property " is intended to cover at least patents, utility models, registered and unregistered designs, registered and unregistered trademarks, trade names, plant variety protection (also known as plant breeders' certificates), geographical indications, appellations of origin, copyright and related rights, rights seeking to prevent unfair competition (as understood with reference to Art. 10*bis* of the Paris Convention), rights that protect undisclosed information (as understood with reference to Art. 39 of TRIPS), trade secrets, databases, moral rights, traditional knowledge, genetic resources, traditional cultural expressions, technological protection measures and rights management information, and also other similar or tangential matters such as matters that are treated by some, but not all, States as intellectual property (this text is mainly excerpted from Work. Doc. No 21).

**No 59 – Proposal of the delegations of Israel and the Republic of Korea**

Article 24
*Relationship with other international instruments*

1 This Convention shall be interpreted so far as possible to be compatible with other treaties in force for a Contracting State~~s~~, the court of which is being asked to recognise or enforce a judgment, regardless of whether the treaty was concluded before or after this Convention.

2 If this Convention and another treaty apply to the recognition or enforcement of a judgment, that treaty shall apply to the extent of the incompatibility only to judgments given by a court of a Contracting State that is also a Party to that treaty. This notwithstanding, the court in the requested State shall apply Article 6 in respect of Contracting States that are not Parties to that instrument.

~~2 This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] that was concluded before this Convention entered into force for that Contracting State [as between Parties to that instrument].~~

~~3 This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] concluded after this Convention entered into force for that Contracting State for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that instrument. [Nothing in the other instrument shall affect the obligations under Article 6 towards Contracting States that are not Parties to that instrument.]~~

4~~3~~ This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

**No 60 – Proposal of the *co-Rapporteurs***

*Explanatory Report – Article 14*

353 Paragraph 1 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 draft Convention provides otherwise. Thus, the law of the requested State determines whether recognition is automatic or requires a special procedure. Where the law of the requested State does not require a special procedure for the recognition of a foreign judgment, a judgment will be recognised automatically, *i.e.*, by operation of law, based on Article 4 of the draft Convention.[250]

354 **Enforcement process.** Article 14 refers to distinct phases of the enforcement process in the requested State.[251] In many States, enforcement of a foreign judgment will proceed in two phases: first, proceedings will be instituted by the judgment-creditor to obtain, from the competent authority of the requested State, a confirmation or declaration that the foreign judgment is enforceable in that State. Such a declaration of enforceability procedure is called "*exequatur*" in many States; in other States a registration procedure may be provided. The second phase of enforcement refers to the legal procedure by which the courts (or competent authorities) of the requested State ensure that the judgment debtor obeys the foreign judgment. It includes measures such as seizure, confiscation, attachment, or judicial sale. This second phase of enforcement of the judgment – often referred to more precisely as "execution" of the judgment – presupposes a declaration of enforceability or a registration for enforcement. Typically, once the first phase has been completed, the foreign origin of the judgment is no longer relevant, and the judgment-creditor will have access to the same measures of execution (the second phase of enforcement) in the requested State that would be available for a domestic judgment. In other States, these two phases can be combined into a single proceeding, where the court may grant a declaration of enforceability of the foreign judgment and also order measures of execution. Regardless of the precise process in a given State, paragraph 1 subjects both phases of the enforcement process to the law of the requested State.

355 **Limitation periods.** In referring to the procedure for enforcement, Article 14 is intended to include the rules of the law of the requested State that provide a limitation period for enforcement of a judgment.[252] Such rules are applicable, unless, as expressly stated in Article 14, the "Convention provides otherwise". The draft Convention does provide, in Article 4(3), that enforcement in the requested State depends on the judgment being enforceable in the State of origin. As a consequence, a longer period of limitation for enforcement in the requested State shall not extend the enforceability of a foreign judgment that is no longer enforceable in the State of origin.[253]

356 This does not address however the situation where a shorter limitation period is applicable to the enforcement of judgments in the requested State. A judgment-creditor might seek to bring enforcement proceedings in the requested State during the period of enforceability of the judgment under the law of the State of origin but after the limitation period for enforcement under the law of the requested State has expired. Even if the foreign judgment remains enforceable under the law of the State of origin, Article 14 does not prevent the application of a shorter limitation period for enforcement of a judgment under the law of the requested State. For example, if according to the


*Doc.trav./Work.Docs Nos 51-60*

law of the State of origin (State A) the judgment remains enforceable for 15 years but the law of the requested State (State B) establishes a 5-year period, the latter will prevail. That is, once this latter period has expired, the judgment given in State A will no longer be enforceable in State B.

357 The reference to the law of the requested State in Article 14 is not necessarily to be understood as a direct reference to its internal law. Indeed, the law of the requested State may instead identify the relevant limitation period by reference back to the law of the State of origin or even apply the limitation period governing the substantive right on which the judgment rules. The approaches to this issue vary significantly among jurisdictions and the draft Convention takes no position on the way the applicable limitation period is determined under the law of the requested State.

358 **General principle under the Law of Treaties.** However, the reference to the law of the requested State is not a blanket reference. In accordance with Article 31(1) of the *Vienna Convention of 1969 on the Law of Treaties* (hereinafter, "Vienna Convention of 1969"), a treaty must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". An essential element to ensure the effectiveness of the draft Convention is the principle of non-discrimination: judgments given in other States, if they are recognised and enforced, are to be treated in the same manner as domestic judgments. Thus, a national law that provides for shorter limitation periods for enforcement of foreign judgments than it does for domestic judgment would not be compatible with this principle.

[250] *Ibid.* [Hartley/Dogauchi Report], para. 215; Nygh/Pocar Report, para. 355.

[251] Note, however, that in other provisions of the draft Convention, the term "enforcement" is used with the meaning of "declaration of enforceability or registration for enforcement" (see, *e.g.*, Art. 5 or 7).

[252] The limitation period referred to here only relates to the enforcement of a foreign judgment and should not be conceptually confused with the limitation period governing the original substantive right or claim at stake, *i.e.*, the limitation period to bring a legal action on the merits before a court. This matter relates to the merits of the judgment given by the court of origin and may not be reviewed by the requested State in accordance with Art. 4(2).

[253] Distinct limitation periods may apply under national law to the two phases of enforcement. An initial limitation period may apply to the time limit for instituting proceedings to seek a declaration or confirmation of enforceability (this may apply equally in those States where the two phases are combined in a single proceeding). Once that judgment is obtained, its concrete execution may become subject to a different limitation period. In such a case, the eventual execution of the judgment in the requested State may be possible beyond the limitation period in the State of origin. This may be explained by the fact that once a judgment is declared enforceable under the draft Convention in the requested State, the judgment becomes equivalent to a domestic judgment and the draft Convention no longer has any application to its treatment in the requested State.

# Documents de travail Nos 61 à 67

# Working Documents Nos 61 to 67

*Distribués le mardi 25 juin 2019*

*Distributed on Tuesday 25 June 2019*

**No 61 – Non-paper from the chair of the informal working group on general and final clauses**

[Article 29 *bis*
*Objections*

1 The Convention shall have effect only as regards relations between States neither of which have raised an objection with respect to the other State in accordance with paragraph 2, 3 or 4.

2 A Contracting State may notify the depositary of its objection to the establishment of treaty relations with a ratifying, accepting, approving or acceding State within 12 months after the receipt of the notification by the depositary referred to in Article 32(a).

3 A ratifying, accepting, approving or acceding State may, upon deposit of its instrument under Article 25(4), notify the depositary of its objection to the establishment of treaty relations with any Contracting State.

4 A Contracting State may [*possibly qualifying language that refers to exceptional circumstances or strong objection*] at any time notify the depositary of its objection to the continuation of treaty relations with another Contracting State. Such an objection shall take effect on the first day of the month following the expiration of three months following the date on which the objecting State notifies the depositary of the objection. An objection made under this paragraph shall not apply to judgments resulting from proceedings that have already been instituted in the State of origin when the objection takes effect.

5 A Contracting State may at any time withdraw an objection that it has made under paragraph 2, 3 or 4. Such a withdrawal shall take effect on the first day of the month following the expiration of three months following the date on which the objecting State notifies the depositary of the withdrawal of the objection. The Convention shall apply to the recognition and enforcement of judgments resulting from proceedings that are instituted in the State of origin on or after the date on which the withdrawal of the objection takes effect.

6 Objections and withdrawals of objections shall be notified to the depositary.]

**No 62 – Proposition du Bureau Permanent – Proposal of the Permanent Bureau**

Article 22
*Examen du fonctionnement de la Convention*

Le Secrétaire général de la Conférence de La Haye de droit international privé prend périodiquement des dispositions en vue de~~:~~

~~(a)~~ l'examen du fonctionnement ~~pratique~~ de la présente Convention, y compris de toute déclaration~~,~~~~;~~ et en fera rapport au Conseil sur les affaires générales et la politique.

~~(b) l'examen de l'opportunité d'apporter des modifications à la présente Convention.~~

*Note explicative*

La modification proposée vise à mieux refléter le cadre de gouvernance de la HCCH en vertu duquel le Conseil sur les affaires générales et la politique (CAGP) est chargé du programme de travail de la HCCH et de son BP.

Il n'y a pas de référence expresse à une Commission spéciale sur le fonctionnement pratique de la Convention (comme c'est le cas dans d'autres Conventions) étant donné que la convocation d'une telle Commission spéciale résulterait dans tous les cas des discussions tenues lors du CAGP. La Commission spéciale serait convoquée par le Secrétaire général mais il n'est pas nécessaire de le mentionner expressément dans la Convention.

De même, il ne semble pas nécessaire de faire référence à d'éventuelles modifications à la Convention (ancien al. (b)). Là encore, toute modification éventuelle à la Convention serait discutée et décidée par le CAGP.

* * *

Article 22
*Review of operation of the Convention*

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for— a

~~(a)~~ review of the operation of this Convention, including any declarations~~,~~~~;~~ and report to the Council on General Affairs and Policy.

~~(b) consideration of whether any amendments to this Convention are desirable.~~

*Explanation*

The proposed change is designed to reflect more adequately the governance framework of the HCCH, under which the Council on General Affairs and Policy (CGAP) is in charge of the Work Programme of the HCCH and its PB.

There is no explicit reference to a Special Commission (SC) on the practical operation of the Convention (as in other Conventions) as the convening of such an SC would in any case result from the discussions held at CGAP. The SC would be convened by the SG, but there is no need to mention this explicitly in the Convention.

Similarly, it does not seem necessary to refer to possible amendments to the Convention (former sub-para. (b)). Again, any need for a possible amendment to the Convention would be discussed, and decided, by CGAP.

**No 63 – Proposition du Groupe de travail informel sur les clauses générales et les clauses finales – Proposal of the informal working group on general and final clauses**

Article 23
*Systèmes juridiques non unifiés*

1 Au regard d'un État contractant dans lequel deux ou plusieurs systèmes de droit ayant trait aux questions régies par la présente Convention s'appliquent dans des unités territoriales différentes :

(a) toute référence à la loi, au droit ou à la procédure d'un État vise, le cas échéant, la loi ou la procédure en vigueur dans l'unité territoriale considérée ;

~~(b) toute référence à la résidence habituelle dans un État vise, le cas échéant, la résidence habituelle dans l'unité territoriale considérée ;~~

(c) toute référence au tribunal ou aux tribunaux d'un État vise, le cas échéant, le tribunal ou les tribunaux de l'unité territoriale considérée ;

~~(d) toute référence au lien avec un État vise, le cas échéant, le lien avec l'unité territoriale considérée.~~

(c *bis*) toute référence à un facteur de rattachement dans un État vise, le cas échéant, ce facteur de rattachement dans l'unité territoriale considérée.

* * *

Article 23
*Non-unified legal systems*

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, where appropriate, 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, where appropriate, to habitual residence in the relevant territorial unit;~~

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

~~(d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.~~

(c *bis*) any reference to a connecting factor in a State shall be construed as referring, where appropriate, to that connecting factor in the relevant territorial unit.


*Doc.trav./Work.Docs Nos 61-67*

**No 64 – Proposal of the delegations of the European Union, Singapore and the Republic of Korea**

*Suggestion for the Explanatory Report regarding the trusts filter (adding an explanation to Art. 5(1)(k)(ii))*

Sub-paragraph (k)(ii) refers to designation of the trust's principal place of administration in the trust instrument itself. In the absence of an express designation, the task of the requested court is to identify whether there is an implied designation in the trust instrument by interpreting the terms of that instrument, taken as a whole. The court may consider other circumstances of the case only as an aid to interpreting whether the terms of the trust instrument disclose an implied designation. In each case, the court should determine whether the intentions of the settlor are apparent from the terms of the trust instrument in question, without references to any presumptions as to those intentions.

Without prejudice to this, the following are non-exhaustive examples of terms that might provide evidence as to the implied intentions of the settlor:

(i) where the trustee or trustees are resident in one State, and their identity was stipulated in the trust instrument itself;

(ii) where a trustee is a company established in a particular jurisdiction specifically to hold the trust assets;

(iii) where a trust is established for a particular purpose stipulated in the trust instrument (for instance, to benefit a charity in a particular country);

(iv) where a clause in the trust instrument stipulates that the trust assets are to be retained or invested in a particular jurisdiction.

**No 65 – Proposal of the delegation of the European Union**

*Draft Preamble under the Convention on the recognition and enforcement of foreign judgments in civil or commercial matters*

The Contracting Parties to the present Convention,

Desiring to promote effective access to justice and to facilitate rule-based international trade, investment and mobility, through judicial cooperation,

Believing that such co-operation can be enhanced through a uniform set of core rules on recognition and enforcement of foreign judgments in civil or commercial matters, to facilitate the effective recognition and enforcement of such judgments,

Convinced that such enhanced co-operation requires, in particular, an international legal regime that provides greater certainty and predictability in relation to the recognition and enforcement of foreign judgments, and that is complementary to the *Convention of 30 June 2005 on Choice of Court Agreements*,

Have resolved to conclude this Convention to this effect and have agreed upon the following provisions –

**No 66 – Proposal of the delegation of Switzerland**

*Article 8*

*Option 1*

Article 8
*Preliminary questions*

[…]

[3 However, in the case of a ruling on the validity of ~~a right referred to in Article 6, paragraph(a)~~ an intellectual property right, recognition or enforcement of a judgment may be postponed, or refused under the preceding paragraph, only where –

(a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State ~~referred to in Article 6, paragraph (a)~~ under the law of which the right arose; or

(b) proceedings concerning the validity of that right are pending in that State. A refusal under sub-paragraph (b) does not prevent a subsequent application for recognition or enforcement of the judgment.]

*Option 2*

Article 8
*Preliminary questions*

[…]

[3 However, in the case of a ruling on the validity of ~~a right referred to in Article 6, paragraph(a)~~ an intellectual property right required to be granted or registered, recognition or enforcement of a judgment may be postponed, or refused under the preceding paragraph, only where –

(a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State ~~referred to in Article 6, paragraph (a)~~ in which grant or registration has taken place, or, under the terms of an international or regional instrument, is deemed to have taken place; or

(b) proceedings concerning the validity of that right are pending in that State. A refusal under sub-paragraph (b) does not prevent a subsequent application for recognition or enforcement of the judgment.]

*Option 3*

Article 8
*Preliminary questions*

[…]

~~2 Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply, or on a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled.~~

~~[3 However, in the case of a ruling on the validity of a right referred to in Article 6, paragraph (a), recognition or enforcement of a judgment may be postponed, or refused under the preceding paragraph, only where –~~



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~~(a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State referred to in Article 6, paragraph (a); or~~

~~(b) proceedings concerning the validity of that right are pending in that State.~~

~~A refusal under sub-paragraph (b) does not prevent a subsequent application for recognition or enforcement of the judgment.]~~

**No 67 – Proposal of the delegation of Australia**

*Article 5(1) and Article 6(c)*

Article 5
*Bases for recognition and enforcement*

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

[…]

(h) the judgment ruled on a ~~tenancy~~ lease of immovable property (tenancy) and it was given in the State in which the property is situated;

Article 6
*Exclusive bases for recognition and enforcement*

Notwithstanding Article 5 –

[…]

(c) a judgment that ruled on a ~~tenancy~~ lease of immovable property (tenancy) for a period of more than six months shall not be recognised and enforced if the property is not situated in the State of origin and the courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State.

## Documents de travail Nos 68 à 76

## Working Documents Nos 68 to 76

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*Distributed on Wednesday 26 June 2019*

**No 68 – Proposal of the delegation of the European Union**

Article 7
*Refusal of recognition or enforcement*

1 Recognition or enforcement may be refused if –

[…]

(d) the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court of a State other than the ~~court~~ State of origin;

*Explanation*

The proposal concerns a drafting matter: the way that Article 7(1)(d) is currently drafted, it would also apply if court X within Contracting State Y was designated, but a different court within the same Contracting State Y has decided the case. This should however not be a matter for the Convention which should only deal with international jurisdiction (and not with subject matter or venue rules within a Contracting State).

**No 69 – Proposal of the delegations of Japan, Singapore, Switzerland and the United States of America**

*Immovable property*

*Option 1*

Article 5
*Bases for recognition and enforcement*

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

[…]

~~(h) the judgment ruled on a tenancy of immovable property and it was given in the State in which the property is situated;~~

[…]

3 Paragraph 1 does not apply to a judgment that ruled on a right in respect of immovable property. Such a judgment is eligible for recognition and enforcement if it was given in the State where the immovable property is situated.

~~Article 6~~
~~*Exclusive bases for recognition and enforcement*~~

~~Notwithstanding Article 5 –~~

~~(b) a judgment that ruled on rights *in rem* in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin;~~

~~(c) a judgment that ruled on a tenancy of immovable property for a period of more than six months shall not be recognised and enforced if the property is not situated in the State of origin and the courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State.~~

Article 16
*Recognition or enforcement under national law*

~~Subject to Article 6, t~~This Convention does not prevent the recognition or enforcement of judgments under national law.



*Doc.trav./Work.Docs Nos 68-76*

*Option 2*

Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

[…]

(h *bis*) rights *in rem* in immovable property, and leases (tenancies) of immovable property;

Article 5
*Bases for recognition and enforcement*

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

[…]

~~(h) the judgment ruled on a tenancy of immovable property and it was given in the State in which the property is situated.~~

~~Article 6~~
~~*Exclusive bases for recognition and enforcement*~~

~~Notwithstanding Article 5 –~~

~~(b) a judgment that ruled on rights *in rem* in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin;~~

~~(c) a judgment that ruled on a tenancy of immovable property for a period of more than six months shall not be recognised and enforced if the property is not situated in the State of origin and the courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State.~~

Article 16
*Recognition or enforcement under national law*

~~Subject to Article 6, t~~This Convention does not prevent the recognition or enforcement of judgments under national law.

**No 70 – Proposal of the *co-Rapporteurs***

*Explanatory Report: Article 23 – Non-unified legal systems*

396 Article 23 is concerned with potential difficulties that result from the fact that some States are composed of two or more territorial units, each with its own judicial or legal system. This may refer to States where individual territorial units have separate courts and civil procedure (non-unified judicial system) or distinct substantive law rules (non-unified legal system) such that the references to "courts of State X" or the "law of State X" are either meaningless or insufficiently precise. In principle, since the draft Convention deals with procedural matters (recognition and enforcement), this Article will typically be relevant only for States that are composed of two or more territorial units, each with its own judicial system.[1]

397 This occurs most often in the case of federations – for example, Canada or the United States of America – but can also occur in other States as well – for example, China or the United Kingdom. In these cases, the question may arise whether a reference to a State in the draft Convention is to the State as a whole ("State" in the international sense) or whether it is to a particular territorial unit within that State.

398 **Interpretive rule.** Article 23(1) provides that where different systems of law apply in the territorial units with regard to any matter dealt with in the draft Convention, the draft Convention is to be construed as applying either to the State in the international sense or to the relevant territorial unit, whichever is appropriate. Article 23(1) serves as an interpretive guide to those provisions of the draft Convention that require the identification of a geographical or territorial location. It has no implications on the scope of the draft Convention.

399 The words "where appropriate" in the four paragraphs of Article 23(1) do not indicate that any discretion on the issue is accorded to the court in the requested State. Rather it refers to the fact that the reference to the territorial unit rather than to the Contracting State will only occur where such a reference is appropriate because of the non-unified characteristic of the Contracting State that is relevant in the particular circumstances.

400 **General principle of recognition and enforcement.** The draft Convention applies to a judgment given by a court of a Contracting State (Art. 1(2)) if it has effect or is enforceable in the State of origin (Art. 4(3)). Where the judgment in question comes from a State with a non-unified judicial system, it may be the case that a judgment from a court in a territorial unit has effect or is enforceable as a domestic judgment only in the territorial unit whose court issued the judgment and not throughout the State as a whole. In other words, while the judgment from the territorial unit may become effective or enforceable in other territorial units within the State, it is not regarded as a domestic judgment in those other territorial units.[2] Depending on the particular nature of the non-unified State's judicial system, judgments from its courts may be considered instead as domestic judgments throughout the State.[3] This distinction assists in the application of Article 23 to relevant articles of the draft Convention.

401 **Jurisdictional filters.** The application of jurisdictional filters in Articles 5 and 6 may involve recourse to the interpretive rules provided in Article 23. The use of the words "where appropriate" in Article 23 indicates that reliance on the interpretive rule is restricted to those situations where the non-unified characteristic of the State is relevant. In cases where the filter refers to a connecting factor with a State, (for example in Art. 5(1)(a) and (d)), the analysis provided in the previous paragraph will be relevant to the interpretation of that filter. Thus, where the judgment from the territorial unit is a domestic judgment only for that territorial unit and not for the State as a whole, it would be appropriate to treat the reference to "State" in the filter as a reference to the territorial unit. Conversely, if the judgment is one that is effective and enforceable as a domestic judgment throughout the State, then it would be appropriate to treat the reference to "State" in the filter as a reference to the State as a whole.

402 Not all filters include connecting factors. Some only refer to the law of the State. For example, Article 5(1)(f) refers to contesting jurisdiction within the timeframe provided by the "law of the State of origin". In such a case, it

[1] Hartley/Dogauchi Report para. 258.

[2] Art. 23(2) specifies that the draft Convention does not apply to situations involving recognition and enforcement between territorial units of non-unified States (see para. 404 below).

[3] An example would be judgments from the Federal Court in Canada.

would be appropriate to refer to the procedural law of the territorial unit in the non-unified judicial system of that State the law applicable to the issue varies from one territorial unit to the other. Indeed, a reference to the law of the State as a whole would be ineffectual to determine if the filter is met.

403 **Other provisions of the draft Convention.** The issue of interpretation may also arise when the *requested* State is a non-unified State. For example, under Article 14, the rule that the procedure for recognition or enforcement is governed by the law of the requested State may appropriately be a reference to the law of the territorial unit in a State with a non-unified judicial system.

404 Under Article 7(2), recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State. The interpretive rule in Article 23(1)(c) would allow for a restrictive reading of this provision by limiting its application to parallel proceedings before a court of the territorial unit, if this is the appropriate consequence of the non-unified judicial system of the Contracting State. Without Article 23(1)(c), it might be open to the court of a territorial unit to refuse to enforce a judgment because of parallel proceedings before the courts of a different territorial unit within the Contracting State, even though this would not normally be an option available within its domestic law.

405 **Recognition between territorial units.** Article 23(2) specifies that a Contracting State with two or more territorial units in which different systems of law are applied is not bound to apply the draft Convention to situations involving solely such different territorial units.

406 This is consistent with Article 2 of the draft Convention that defines the scope of the draft Convention in terms of recognition and enforcement in one Contracting State of judgments rendered in another Contracting State. The recognition and enforcement obligations under the draft Convention only arise with respect to foreign judgments, understood in the international sense.

407 **Recognition across territorial units.** Article 23(3) states that there is no obligation of recognition or enforcement in one territorial unit flowing from the recognition or enforcement of a foreign judgment in another territorial unit of the same Contracting State. This will only be relevant for judgments of courts in territorial units that are not treated as domestic judgments throughout the State as a whole.

408 **Regional Economic Integration Organisation.** Finally, Article 23(4) indicates that these special rules applying to non-unified legal systems do not apply to a REIO, which is instead governed by its own rules in Articles 27 and 28 (see below).

**No 71 – Proposal of the informal working group on general and final clauses**

CHAPTER IV – FINAL CLAUSES

Article 27
*Regional Economic Integration Organisations*

1 A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may ~~similarly~~ sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

2 The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3 For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 28, paragraph 1, that its Member States will not be Parties to this Convention.

4 Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation ~~that is a Party to it~~.

Article 30
*Declarations*

1 Declarations referred to in Articles [4, ]15, 18, 19, [20,] [24,] 26 and 28 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2 Declarations, modifications and withdrawals shall be notified to the depositary.

3 A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of six months following the date on which the notification is received by the depositary.

5 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall not apply to judgments resulting from proceedings that have already been instituted ~~before the court~~ in the State of origin when the declaration takes effect.

**No 72 – Proposal of the delegations of Norway, the European Union and Uruguay**

Article 8
*Preliminary questions*

1 […]

2 Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply, or on a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled, provided that the court of the requested State would have decided this matter differently.

3 […]


*Doc.trav./Work.Docs Nos 68-76*

*Explanation*

The added wording is meant to clarify the content of the provision and to enhance predictability in its application. We consider this addition to be desirable because the current draft does not give any criteria for the exercise of the requested court's discretion to refuse recognition or enforcement. This may be an opening for abusive conduct. Assume, for example, that a defendant in a dispute regarding breach of contract raised before the court of origin a frivolous defence relating to an excluded area (*e.g.*, alleging that it did not have the legal capacity to sign the contract). If the court of origin considered and dismissed this defence, the current draft of the provision seems to open the possibility that the requested court refuse recognition and enforcement of the judgment.

The added wording is based on the text of the Explanatory Report, paragraph 322 (referred to below). Paragraph 322 of the Explanatory Report refers in turn to the Hartley/Dogauchi Report to the 2005 Choice of Court Convention.

Whether and in which form a reference to Article 6 is needed will depend on the outcome of the discussions on that Article.

Paragraph 322 of the Explanatory Report reads:

[…] The Hartley/Dogauchi Report clarifies that this exception should be used only where the court of the requested State would have decided the preliminary question in a different way,[220] and therefore the decision on the main object would also have been different.[221]

[220] *Ibid.* [Hartley/Dogauchi Report], para. 197.

[221] The *co-Rapporteurs* wish to note that given that this is a substantive requirement, it may be preferable for it to be explicitly mentioned in the text.

**No 73 – Proposal of the delegations of Brazil and Israel**

*Amend Article 6(b)*

(b) a judgment that ruled on rights *in rem* in immovable property, including the right to possession and the right to use, shall be recognised and enforced if and only if the property is situated in the State of origin;

**No 74 – Proposal of the delegation of Argentina**

Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

[…]

(q) sovereign debt and sovereign debt restructuring processes;

(r) measures taken by central banks and/or monetary authorities in the exercise of their sovereign functions.

**No 75 – Proposal of the delegation of Japan**

*Explanatory Report with regard to the term "intellectual property"*

The term "intellectual property" should be interpreted as an autonomous concept in this Convention. The term covers a broad range of matters and includes both rights that are internationally accepted as intellectual property and also other similar or analogous matters (as they are called by some States),[1] such as matters that are (or will be) treated by some, but not all, States as intellectual property. Traditional knowledge, genetic resources and traditional cultural expressions are commonly invoked as examples of this latter category. To understand the breadth of the term, a non-exhaustive reference can be made to relevant international instruments and matters discussed under those instruments or under specific national laws.

Article 2(1)(m) does not exclude all contractual matters that have an intellectual property aspect. For example, a dispute on a distribution contract regarding under-reporting of sales, a dispute on a (non-standard essential) patent licensing agreement on the determination of royalty fees, a payment claim in a trademark/copyright licensing or a security agreement on the basis of an intellectual property right may be included. However, a judgment is excluded if the dispute is better characterized as an intellectual property matter instead of as a contractual matter. For example, a dispute to seek a judicial decision on a standard essential patent (SEP) with a fair, reasonable, and non-discriminatory (FRAND) licensing obligation or a dispute involving a determination of patent ownership of an invention made in the course of an employment relationship, that has to be decided on the basis of substantive intellectual property law, would be excluded.

There was a common understanding in the Commission that certain judgments on contract law matters that have an intellectual property aspect are included in the scope of the Convention. However, Contracting States may refuse recognition or enforcement of those judgments in accordance with Article 8(2) [and (3)] if those judgments are based on a ruling on "intellectual property" as a preliminary question.

If a judgment for a dispute of a contract related to a patent includes a ruling on the validity of the patent as a preliminary question, the judgment may be –

(a) out of the scope of the Convention if the contractual matter in the dispute is characterized as an intellectual property matter;

(b) in the scope of the Convention and refused recognition or enforcement in the requested State in accordance with Article 8(2) [and (3)]; or

(c) in the scope of the Convention and recognised or enforced in the requested State under this Convention.

In any case, the ruling on "intellectual property" matters as a preliminary question in those judgments shall not be recognised or enforced under this Convention (Art. 8(1)).

[1] There was a long discussion about whether to include in the text of the Convention an express reference to "analogous matters". Eventually, the Commission opted for not mentioning these words to keep the parallelism with the 2005 Choice of Court Convention.

**No 76 – Proposal of the delegation of the Russian Federation**

*Article 20 and Article 2*

[Article 20
*Declarations with respect to judgments pertaining to governments*

1 A State may declare that it shall not apply this Convention to judgments arising from proceedings to which any of the following is a party –

(a) that State, or a person acting on behalf of that State, or

(b) a government agency of that State, or a person acting on behalf of such a government agency.

The declaration shall be no broader than necessary and the exclusion from scope shall be clearly and precisely defined.

2 A declaration pursuant to paragraph 1 shall not exclude from the application of this Convention judgments arising from proceedings to which an enterprise owned by a State is a party.

3 If a State has made a declaration pursuant to paragraph 1, recognition or enforcement of a judgment originating from that State may be refused by another Contracting State if the judgment arose from proceedings to which that other Contracting State, one of its government agencies, or equivalent persons to those referred to in paragraph 1 is a party, to the same extent as specified in the declaration.

4 With regard to a declaration made pursuant to paragraph 1, the Convention shall not apply in the Contracting State that made the declaration and in all other Contracting States to judgments specified and defined in the declaration.]

OR

Article 2
*Exclusions from scope*

1 This Convention shall not apply to 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, resolution of financial institutions, and analogous matters;

(f) the carriage of passengers and goods;

(g) marine pollution, limitation of liability for maritime claims, and general average;

(h) liability for nuclear damage;

(i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs;

(j) the validity of entries in public registers;

(k) defamation;

[(l) privacy[, except where the proceedings were brought for breach of contract between the parties];]

(m) intellectual property;

(n) activities of armed forces, including the activities of their personnel in the exercise of their official duties;

(o) law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties;

[(p) anti-trust (competition) matters].

2 A judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings. In particular, the mere fact that such a matter arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.

3 This Convention shall not apply to arbitration and related proceedings.

~~4 A judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings.~~

~~5~~4 Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.



# Documents de travail Nos 77 à 85

# Working Documents Nos 77 to 85

*Distribués le jeudi 27 juin 2019*

*Distributed on Thursday 27 June 2019*

**No 77 – Proposal of the delegation of the People's Republic of China**

Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

[…]

(g) transboundary marine pollution and marine pollution beyond national jurisdiction, limitation of liability for maritime claims, and general average;

**No 78 – Proposal of the delegation of the People's Republic of China**

*Draft proposal of the Preamble of the Judgments Convention*

The States Parties to the present Convention,

Desiring to promote easy and effective access to justice and to facilitate the rules-based multilateral trade and investment, and free mobility through enhanced judicial co-operation,

Believing that such co-operation can be enhanced by a set of internationally unified core rules on recognition and enforcement of foreign judgments in civil or commercial matters,

Convinced that such enhanced multilateral judicial co-operation requires in particular an international legal regime that provides possibility, predictability and certainty in relation to the global circulation of foreign judgments, and that is complementary to the *Convention of 30 June 2005 on Choice of Court Agreements*.

Have resolved to conclude this Convention and have agreed upon the following provisions –

**No 79 – Proposal of the informal working group on general and final clauses**

Article 23
*Non-unified legal systems*

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, where appropriate, 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, where appropriate, to habitual residence in the relevant territorial unit;~~

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

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

(c *bis*) any reference to a connecting factor in relation to a State shall be construed as referring, where appropriate, to that connecting factor in relation to the relevant territorial unit.

**No 80 – Proposal of the delegation of the People's Republic of China**

*Explanatory Report text with regard to the term "intellectual property"*

The term covers a broad range of matters and includes both rights that are internationally accepted as intellectual property and also other similar or tangential matters, or "analogous matters" as called by a couple of States, such as matters that are treated by some, but not all, States as intellectual property. To understand the scope of the term, a non-exhaustive reference can be made to relevant international instruments[FN1] and matters discussed under those instruments.[FN2] This exclusion does not exclude all contractual matters that have an intellectual property aspect.

A judgment is excluded if the dispute is better characterized as an intellectual property matter instead of as a contractual matter.

Optional examples: [For example, a dispute to seek a judicial decision on a mandatory license on the basis of a fair, reasonable, and non-discriminatory (FRAND) or an employment dispute involving a determination of ownership issues on the basis of substantive intellectual property legislation would be excluded. However, a dispute on the sale of a patent or a security agreement on the basis of an intellectual property right may be included.]

[FN1] For example, *Paris Convention for the Protection of Industrial Property*, as revised at Stockholm in 1967 (the "Paris Convention"), the *Convention establishing the World Intellectual Property Organization* ("WIPO") (as amended September 28, 1979), the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS"), the *Berne Convention for the Protection of Literary and Artistic Works* (the Berne Convention), the WIPO copyright treaties, and other existing and future international instruments under the auspices of WIPO.

[FN2] For example, the term includes at least rights that protect patents, utility models, registered and unregistered designs, registered and unregistered trademarks, trade names, plant variety protection (also known as plant breeders' certificates), geographical indications, appellations of origin, copyright and related rights, rights seeking to prevent unfair competition (as understood with reference to Art. 10*bis* of the Paris Convention), rights to protect undisclosed information (as understood with reference to Art. 39 of TRIPS), trade secrets, databases, moral rights, traditional knowledge, genetic resources, traditional cultural expressions, technological protection measures and rights management information.

**No 80 REV – Proposal of the delegations of the People's Republic of China and the United States of America***

*Explanatory Report text with regard to the term "intellectual property"*

The term covers a broad range of matters and includes both rights that are internationally accepted as intellectual property and also other similar or tangential matters, or "analogous matters" as called by a couple of States, such as matters that are treated by some, but not all, States as intellectual property. To understand the scope of the term, a non-exhaustive reference can be made to relevant international instruments[FN1] and matters discussed under those instruments.[FN2] This exclusion does not exclude all contractual matters that have an intellectual property aspect.

* Work. Doc. No 80 REV was distributed on 28 June 2019.

A judgment is excluded if the dispute is better characterized as an intellectual property matter instead of as a contractual matter. In characterizing such judgments, a substantive intellectual property law matter at issue necessarily indicates the matter is best deemed an intellectual property matter rather than a contractual matter.

For example, a licensing dispute over a standard essential patent (SEP) with a fair, reasonable, and non-discriminatory (FRAND) licensing commitment or a dispute involving a determination of ownership issues on the basis of substantive intellectual property law would be excluded. However, a contractual dispute on the sale of intellectual property or a security agreement on the basis of an intellectual property right may be included if not raising substantive intellectual property law issues.

[FN1] For example, *Paris Convention for the Protection of Industrial Property*, as revised at Stockholm in 1967 (the "Paris Convention"), the *Convention establishing the World Intellectual Property Organization* ("WIPO") (as amended September 28, 1979), the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS"), the *Berne Convention for the Protection of Literary and Artistic Works* (the Berne Convention), the WIPO copyright treaties, and other existing and future international instruments under the auspices of WIPO.

[FN2] For example, the term includes at least rights that protect patents, utility models, registered and unregistered designs, registered and unregistered trademarks, trade names, plant variety protection (also known as plant breeders' certificates), geographical indications, appellations of origin, copyright and related rights, rights seeking to prevent unfair competition (as understood with reference to Art. 10*bis* of the Paris Convention), rights to protect undisclosed information (as understood with reference to Art. 39 of TRIPS), trade secrets, databases, moral rights, traditional knowledge, genetic resources, traditional cultural expressions, technological protection measures and rights management information.

**No 81 – Proposal of the delegation of the People's Republic of China**

Article X
*Reservation*

Reservation is allowed under this Convention.

**No 82 – Proposal of the delegation of the People's Republic of China**

*Explanatory Report on Article 20*

~~387 **Scope – Enterprise owned by a State.** Paragraph 2 specifies that the declaration under Article 20 shall not extend to judgments arising from proceedings to which an enterprise owned by a State is a party. An entity primarily engaged in commercial activities will not fall within the parties described in paragraph 1 merely because it is wholly or partly owned by a State.~~

~~388 But an enterprise owned by the State that also performs some distinct public functions may fall within paragraph 1 in relation to those functions. A declaration under Article 20 could thus target an enterprise owned by a State but only with respect to its distinct public functions. The declaration should be very specific and precise in such cases.~~

**No 83 REV – Proposal of the delegations of Australia, the European Union, Japan and Norway**

Article 5
*Bases for recognition and enforcement*

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

[…]

(h) the judgment ruled on a ~~tenancy~~ lease of immovable property (tenancy) and it was given in the State in which the property is situated;[1]

[…]

3 Paragraph 1 does not apply to a judgment that ruled on a residential lease of immovable property (tenancy) ~~for a period of more than six consecutive months~~ or ruled on a contractual right relating to registration of immovable property. Such a judgment is eligible for recognition and enforcement only if it was given in the State where the immovable property is situated.

Article 6
*Exclusive bases for recognition and enforcement*

Notwithstanding Article 5, ~~(b)~~ a judgment that ruled on rights *in rem* in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin~~;~~.

[…]

~~(c) a judgment that ruled on a tenancy of immovable property for a period of more than six months shall not be recognised and enforced if the property is not situated in the State of origin and the courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State.~~

**No 83 REV REV – Proposal of the delegations of Australia, the European Union, Japan, Norway, the United States of America, Switzerland and Israel***

Article 5
*Bases for recognition and enforcement*

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

[…]

(h) the judgment ruled on a lease of immovable property (tenancy) and it was given in the State in which the property is situated;

[…]

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

[1] Text modified based on the proposal made by Australia in Work. Doc. No 67.
* Work. Doc. No 83 REV REV was distributed on 28 June 2019.


*Doc.trav./Work.Docs Nos 77-85*

Article 6
*Exclusive bases for recognition and enforcement*

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

*Explanatory Report on Article 6:*

266 **Scope: rights *in rem*.** […] proceedings which have as their object rights *in rem*, *i.e.*, rights that directly concern an immovable property and are enforceable "against everybody (*erga omnes*)" in accordance with the law of the State where the immovable property is situated. […]

*Explanation*

The deletion of the words "a contractual right relating to" is meant to avoid misunderstandings as to the scope of the provision. The provision is intended to apply only to rulings on the act of registration itself.

The polite suggestion relating to the Explanatory Report is meant to confirm that reference in Article 5(1)(h) to a judgment on a lease (tenancy) of immovable property covers only those contracts of lease (tenancy) that have a contractual nature, *i.e.*, that have obligatory effects between the parties to the contract (*inter partes*).

If a lease (tenancy), under the law of the State where the immovable property is situated, is effective against third parties (*erga omnes*), it is considered to be a right *in rem*, and is subject to Article 6.

**No 84 – Proposal of the delegation of Israel**

*Explanatory Report with regard to the term "intellectual property"*

The term "intellectual property" should be interpreted to have an autonomous meaning in this Convention, as explained above (see *supra*, para 26). For the purposes of this Convention, the Commission agreed that the autonomous meaning of the term covers a broad range of matters and includes both rights that are internationally accepted as intellectual property and also other similar or "analogous" matters (as they are referred to by some States),[1] such as matters that are (or will be) treated by some, but not all, States as intellectual property. Traditional knowledge, genetic resources and traditional cultural expressions are commonly invoked as examples of this latter category. [For useful purposes, relevant international instruments and matters discussed under those instruments or under specific national laws are understood to be covered by the breadth of the term in this Convention.]

With regard to the application of the exclusion in Article 2(1)(m) to contracts, the Commission agreed that this Article does not exclude all civil or commercial [contractual/contract law matters] [contractual-based judgments] that have an intellectual property aspect.

Such [[judgment] [or] [matter]] is excluded in the following cases:

a. The dispute is better characterized as an intellectual property matter instead of as a contractual matter, or, alternatively –

b. [the judgment is on] a contractual matter that requires substantive intellectual property determinations.

For example, a dispute to seek a judicial decision on a Standard Essential Patent (SEP) with a Fair, Reasonable, and Non-Discriminatory (FRAND) licensing obligation or a dispute involving a determination of patent ownership of an invention made in the course of an employment relationship, that has to be decided on the basis of substantive intellectual property law, would be excluded.

In contrast, for example, a dispute on a distribution contract regarding a non-accurate reporting of sales, a dispute on a (non-standard essential) patent licensing agreement on the determination of royalty fees, a payment claim in a trademark/copyright licensing or a security agreement on the basis of an intellectual property right might be included.

It is to be noted that Contracting States may refuse recognition or enforcement of the judgments that are included under the scope of this Convention as described above, if the judgments meet the criteria set forth in Article 8(2), *i.e.*, if those judgments are based on a ruling on intellectual property as a preliminary question.

In any case, the ruling on the intellectual property matter as a preliminary question shall not be recognised or enforced under this Convention (see Art. 8(1)).

**No 85 – Proposal of the delegations of Australia, the European Union and the United States of America**

Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

[…]

[(p) anti-trust(competition) matters, except where the proceedings were instituted in relation to an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce].

*Explanation in the Explanatory Report:*

Article 2(1)(p) does not apply to agreements or concerted practices that are reasonably related to a legitimate efficiency-enhancing integration of economic activity. The concept of "divide markets" applies to agreements or concerted practices to exclude a party from markets.

**No 85 REV – Proposal of the delegations of Australia, the People's Republic of China, the European Union and the United States of America***

Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

[1] There was a long discussion about whether to include in the text of the Convention an express reference to "analogous matters". Eventually, the Commission opted for not mentioning these words in the text of the Convention, in order to keep the parallelism with the 2005 Choice of Court Convention, and instead to clarify the autonomous meaning of "intellectual property" for the purposes of this Convention, in this Explanatory Report.

* Work. Doc. No 85 REV was distributed on 28 June 2019.

[…]

[(p) anti-trust (competition) matters, except where the judgment is based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the State of origin].

# Documents de travail Nos 86 à 90

# Working Documents Nos 86 to 90

*Distribués le vendredi 28 juin 2019*

*Distributed on Friday 28 June 2019*

**No 86 – Proposal of the delegation of Switzerland**

Article 24
*Relationship with other international instruments*

[…]

4 This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention, as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Member State of the Regional Economic Integration Organisation where –

(a) the rules were adopted before this Convention was concluded, or

(b) the rules were adopted after this Convention was concluded, to the extent that they do not affect the obligations under Article 6 towards Contracting States that are not Member States of the Regional Economic Integration Organisation.

*Explanation*

There must be equal treatment of States and of Regional Economic Integration Organisations with respect to the impact of Article 6.

**No 87 – Proposal of the delegation of the European Union**

Article 30
*Declarations*

1 Declarations referred to in Articles [4,] 15, 18, 19, [20,] [24,] and 26 and 28 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

[…]

Article 32
*Notifications by the depositary*

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles […] of the following –

(a) the signatures, ratifications, acceptances, approvals and accessions referred to in Article 25;

(a *bis*) the notifications referred to in Article 27;

(b) the date on which this Convention enters into force in accordance with Article 29;

(c) the notifications, declarations, modifications and withdrawals of declarations referred to in Article 30; and

(d) the denunciations referred to in Article 31.

*Explanation*

Article 30 contains rules on the time at which declarations may be made, and that they shall be notified to the depositary. For the REIO declarations referred to in Article 28, these details are already specified there. Hence, the reference to Article 28 can be deleted from Article 30. The parallel Article in the Choice of Court Convention does not apply to REIO declarations either.

Article 27(2) provides that an REIO shall notify the depositary, at the time of signature, acceptance, approval or accession, of the matters governed by the Convention in respect of which competence has been transferred to the Organisation by its Member States, and that it shall promptly notify the depositary of any changes to its competence thereafter. For the sake of transparency, the EU proposes that these notifications should also be added to the list in Article 32 of communications which the depositary shall notify to the Members of HCCH and other States and REIOs which have joined this Convention, even though this does not exist under the Choice of Court Convention. The intention of the obligation to notify under Article 27 is certainly not intended for only the depositary to know.

**No 87 REV – Proposal of the delegation of the European Union**

Article 30
*Declarations*

1 Declarations referred to in Articles [4,] 15, 18, 19, [20,] [24,] and 26 and 28 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

[…]

Article 32
*Notifications by the depositary*

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles […] of the following –

(a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 25, 27 and 28;

(b) the date on which this Convention enters into force in accordance with Article 29;

(c) the notifications, declarations, modifications and withdrawals of declarations referred to in Articles 27, 28 and 30; and

(d) the denunciations referred to in Article 31.

*Explanation*

Article 30 contains rules on the time at which declarations may be made, and that they shall be notified to the depositary. For the REIO declarations referred to in Article 28, these details are already specified there. Hence, the reference to Article 28 can be deleted from Article 30. The parallel Article in the Choice of Court Convention does not apply to REIO declarations either.

In Article 32, the signatures, acceptances, approvals or accessions of REIOs should be added to the list in subparagraph (a) (Arts 27 and 28) like in the Choice of Court Convention.

Moreover, Article 32(c) should include the declarations and notifications which REIOs can make under Articles 27 and 28 and oblige the depositary to notify them as mentioned in this Article.

**No 88 – Proposal of the delegation of Brazil**

*Follow-up to Working Document No 83 REV REV*

Article 5
*Bases for recognition and enforcement*

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

[…]

(h) the judgment ruled on a lease of immovable property (tenancy) and it was given in the State in which the property is situated;

[…]

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

Article 6
*Exclusive bases for recognition and enforcement*

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

*Explanatory Report on Article 6:*

266 **Scope: rights *in rem*.** […] The concept of rights *in rem* includes, for example, ownership, mortgages, usufructs or servitudes. In a considerable number of States, it also includes, for instance, rights arising out of possession and use of immovable property, as well as long-term leases.

**No 89 – Proposal of the delegations of Japan, Switzerland and the United States of America**

*Consequential amendments to Article 29* bis

Article 17
*Transitional provision*

This Convention shall apply to the recognition and enforcement of judgments if, at the time the proceedings were instituted in the State of origin, the Convention was in force ~~in~~ as between that State and ~~in~~ the requested State.

Article 29
*Entry into force*

1 This Convention shall enter into force on the first day of the month following the expiration of ~~[~~three~~]~~ ~~[six]~~ months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 25.

2 Thereafter this Convention shall enter into force –

(a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the ~~first day of the month following the expiration of [three] [six] months after the deposit of its instrument of ratification, acceptance, approval or accession~~ day after the end of the period during which notifications may be made in accordance with Article 29 *bis*(2);

(b) for a territorial unit to which this Convention has been extended in accordance with Article 26 on the first day of the month following the expiration of ~~[~~three~~]~~ ~~[six]~~ months after the notification of the declaration referred to in that Article.

Article 32
*Notifications by the depositary*

The depositary shall notify the Members [...] of the following –

[…]

(c) the notifications, declarations, modifications and withdrawals ~~of declarations~~ referred to in Articles *[add a reference to Article 29* bis*]*;


*Doc.trav./Work.Docs Nos 86-90*

**No 90 – Proposal of the delegations of the Republic of Korea and Uruguay**

*Suggested text in the Explanatory Report, either at the end of paragraph 301 or paragraph 353:*

Considering the principle of non-discrimination of foreign and internal judgments, parties and Contracting States may justifiably expect that the effect of a pre-existing judgment, regardless of its origin, would not be nullified by a conflicting judgment subsequently given in the requested State without a justifiable ground. This expectation is particularly relevant in the context of Article 7(1)(e). While Article 14(1) leaves the procedure for recognition to the law of the requested State, and Article 7(1)(e), unlike (f), does not require that a conflicting judgment of the requested State be an earlier judgment, it would be problematic if a judgment that already satisfies the substantive requirements of recognition would be refused recognition for the sole reason that the party who lost in the State of origin obtained a conflicting judgment in the requested State in a fraudulent attempt, during the time when a formal decision of recognition, required under the law of the requested State as the case may be, is yet to be obtained in the requested State.

*Distribué le samedi 29 juin 2019*

**No 91 – Proposition du Comité de rédaction***

Les Parties contractantes à la présente Convention,

Désireuses de promouvoir un accès effectif de tous à la justice et de faciliter le commerce et l'investissement multilatéral fondés sur des règles, ainsi que la mobilité par le biais de la coopération judiciaire,

Estimant que cette coopération peut être renforcée par la mise en place d'un ensemble uniforme de règles fondamentales sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale, afin de faciliter la reconnaissance et l'exécution effectives de ces jugements,

Convaincues que cette coopération judiciaire renforcée nécessite notamment un régime juridique international offrant une plus grande prévisibilité et sécurité en matière de circulation des jugements étrangers à l'échelle mondiale, qui soit complémentaire de la *Convention du 30 juin 2005 sur les accords d'élection de for*,

Ont résolu de conclure la présente Convention à cet effet et sont convenues des dispositions suivantes :

CHAPITRE I – CHAMP D'APPLICATION ET DÉFINITIONS

Article premier
*Champ d'application*

1 La présente Convention s'applique à la reconnaissance et à l'exécution des jugements en matière civile ou commerciale. Elle ne recouvre notamment pas les matières fiscales, douanières ou administratives.

2 La présente Convention s'applique à la reconnaissance et à l'exécution, dans un État contractant, d'un jugement rendu par un tribunal d'un autre État contractant.

Article 2
*Exclusions du champ d'application*

1 La présente Convention ne s'applique pas aux matières suivantes :

(a) l'état et la capacité des personnes physiques ;

(b) les obligations alimentaires ;

* Texte du projet de Convention issu de la réunion du Comité de rédaction du 28 juin 2019.





*Distributed on Saturday 29 June 2019*

**No 91 – Proposal of the Drafting Committee***

The Contracting Parties to the present Convention,

Desiring to promote effective access to justice for all and to facilitate rule-based multilateral trade and, investment, and mobility, through judicial co-operation,

Believing that such co-operation can be enhanced through the creation of a uniform set of core rules on recognition and enforcement of foreign judgments in civil or commercial matters, to facilitate the effective recognition and enforcement of such judgments,

Convinced that such enhanced judicial co-operation requires, in particular, an international legal regime that provides greater predictability and certainty in relation to the global circulation of foreign judgments, and that is complementary to the *Convention of 30 June 2005 on Choice of Court Agreements*,

Have resolved to conclude this Convention to this effect and have agreed upon the following provisions –

CHAPTER I – SCOPE AND DEFINITIONS

Article 1
*Scope*

1 This Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters. It shall not extend in particular to revenue, customs or administrative matters.

2 This Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State.

Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

(a) the status and legal capacity of natural persons;

(b) maintenance obligations;

* Text of the draft Convention derived from the Drafting Committee meeting of 28 June 2019.

(c) les autres matières du droit de la famille, y compris les régimes matrimoniaux et les autres droits ou obligations découlant du mariage ou de relations similaires ;

(d) les testaments et les successions ;

(e) l'insolvabilité, les concordats, la résolution d'établissements financiers, ainsi que les matières analogues ;

(f) le transport de passagers et de marchandises ;

(g) la pollution marine transfrontière, la pollution marine dans les zones ne relevant pas de la juridiction nationale, la pollution marine causée par les navires, la limitation de responsabilité pour des demandes en matière maritime, ainsi que les avaries communes ;

(h) la responsabilité pour les dommages nucléaires ;

(i) la validité, la nullité ou la dissolution des personnes morales ou des associations entre personnes physiques ou personnes morales, ainsi que la validité des décisions de leurs organes ;

(j) la validité des inscriptions sur les registres publics ;

(k) la diffamation ;

[(l) le droit à la vie privée ;[, à l'exception des litiges portant sur la violation d'un contrat entre les parties] ;]

(m) la propriété intellectuelle [et les matières analogues] ;

(n) les activités des forces armées, y compris celles de leur personnel dans l'exercice de ses fonctions officielles ;

(o) les activités relatives au maintien de l'ordre, y compris celles du personnel chargé du maintien de l'ordre dans l'exercice de ses fonctions officielles ;

[(p) les entraves à la concurrence, sauf lorsque le jugement porte sur un comportement qui constitue un accord anticoncurrentiel ou une pratique concertée entre concurrents réels ou potentiels visant à fixer les prix, procéder à des soumissions concertées, établir des restrictions ou des quotas à la production, ou diviser des marchés par répartition de la clientèle, de fournisseurs, de territoires ou de lignes d'activité, et lorsque ce comportement et ses effets se sont tous deux produits dans l'État d'origine ;]

(q) la restructuration de la dette souveraine par des mesures étatiques unilatérales.

2 Un jugement n'est pas exclu du champ d'application de la présente Convention lorsqu'une question relevant d'une matière à laquelle elle ne s'applique pas est soulevée seulement à titre préalable et non comme objet du litige. En particulier, le seul fait qu'une telle matière ait été invoquée dans le cadre d'un moyen de défense n'exclut pas le jugement du champ d'application de la Convention, si cette question n'était pas un l'objet du litige.

3 La présente Convention ne s'applique pas à l'arbitrage et aux procédures y afférentes.

4 Un jugement n'est pas exclu du champ d'application de la présente Convention du seul fait qu'un État, y compris un gouvernement, une agence gouvernementale ou toute personne agissant pour le compte d'un État, était partie au litige.

(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, resolution of financial institutions, and analogous matters;

(f) the carriage of passengers and goods;

(g) transboundary marine pollution, marine pollution in areas beyond national jurisdiction, ship-source marine pollution, limitation of liability for maritime claims, and general average;

(h) liability for nuclear damage;

(i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs;

(j) the validity of entries in public registers;

(k) defamation;

[(l) privacy;[, except where the proceedings were brought for breach of contract between the parties];]

(m) intellectual property [and analogous matters];

(n) activities of armed forces, including the activities of their personnel in the exercise of their official duties;

(o) law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties;

[(p) anti-trust (competition) matters, except where the judgment is based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the State of origin;]

(q) sovereign debt restructuring through unilateral State measures.

2 A judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings. In particular, the mere fact that such a matter arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.

3 This Convention shall not apply to arbitration and related proceedings.

4 A judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings.

5 La présente Convention n'affecte pas les privilèges et immunités dont jouissent les États ou les organisations internationales, pour eux-mêmes et pour leurs biens.

Article 3
*Définitions*

1 Au sens de la présente Convention :

(a) le terme « défendeur » signifie la personne contre laquelle la demande ou la demande reconventionnelle a été introduite dans l'État d'origine ;

(b) le terme « jugement » signifie toute décision sur le fond rendue par un tribunal, quelle que soit la dénomination donnée à cette décision, telle qu'un arrêt ou une ordonnance, de même que la fixation des frais et dépens du procès par le tribunal (y compris le greffier du tribunal), à condition qu'elle ait trait à une décision sur le fond susceptible d'être reconnue ou exécutée en vertu de la présente Convention. Les mesures provisoires et conservatoires ne sont pas des jugements.

2 Une entité ou une personne autre qu'une personne physique est réputée avoir sa résidence habituelle dans l'État :

(a) de son siège statutaire ;

(b) selon le droit duquel elle a été constituée ;

(c) de son administration centrale ; ou

(d) de son principal établissement.

CHAPITRE II – RECONNAISSANCE ET EXÉCUTION

Article 4
*Dispositions générales*

1 Un jugement rendu par un tribunal d'un État contractant (État d'origine) est reconnu et exécuté dans un autre État contractant (État requis) conformément aux dispositions du présent chapitre. La reconnaissance ou l'exécution ne peut être refusée qu'aux motifs énoncés dans la présente Convention.

2 Le jugement ne peut pas faire l'objet d'une révision au fond dans l'État requis. ~~Ceci n'exclut pas toute~~ Il ne peut y avoir d'appréciation qu'au regard de ce qui est nécessaire pour ~~à~~ l'application de la présente Convention.

3 Un jugement n'est reconnu que s'il produit ses effets dans l'État d'origine et n'est exécuté que s'il est exécutoire dans l'État d'origine.

4 La reconnaissance ou l'exécution peut être différée ou refusée si le jugement visé au paragraphe 3 fait l'objet d'un recours dans l'État d'origine ou si le délai pour exercer un recours ordinaire n'a pas expiré. Un tel refus n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.

~~4 Si le jugement visé au paragraphe 3 fait l'objet d'un recours dans l'État d'origine ou si le délai pour exercer un recours ordinaire n'a pas expiré, le tribunal requis peut :~~

5 Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3
*Definitions*

1 In this Convention –

(a) "defendant" means a person against whom the claim or counterclaim was brought in the State of origin;

(b) "judgment" means any decision on the merits given by a court, whatever that decision 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 the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

2 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~~ the law of which it was incorporated or formed;

(c) where it has its central administration; or

(d) where it has its principal place of business.

CHAPTER II – RECOGNITION AND ENFORCEMENT

Article 4
*General provisions*

1 A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

2 There shall be no review of the merits of the judgment in the requested State. ~~This does not preclude such consideration only as may be necessary for the application of this Convention.~~ There may only be such consideration ~~of the judgment~~ as is necessary for the application of this Convention.

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 a judgment referred to under paragraph 3 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.

~~4 If a judgment referred to in paragraph 3 is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired, the court addressed may –~~

(a) accorder la reconnaissance ou l'exécution, voire subordonner cette exécution à la constitution d'une sûreté qu'il détermine ;

(b) surseoir à statuer sur la reconnaissance ou l'exécution ; ou

(c) refuser la reconnaissance ou l'exécution.

Le refus visé à l'alinéa (c) n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.

[[5 Aux fins du paragraphe premier, un jugement rendu par un tribunal commun à deux ou plusieurs États est réputé l'avoir été par le tribunal d'un État contractant si cet État a désigné ce tribunal commun dans une déclaration à cet effet, et si l'une des conditions suivantes est remplie :

(a) tous les membres du tribunal commun sont des États contractants pour lesquels ce tribunal exerce les fonctions judiciaires relatives à la matière concernée et le jugement est susceptible d'être reconnu ou exécuté conformément à l'article 5(1)(c), (e), (f), (l), ou (m) ; ou

(b) le jugement est susceptible d'être reconnu ou exécuté conformément à un autre alinéa de l'article 5(1)[, l'article 5(3),] ou conformément à l'article 6, et ces exigences d'admissibilité sont remplies dans l'État contractant pour lequel ce tribunal exerce les fonctions judiciaires relatives à la matière concernée.]

OU

[5 Aux fins du paragraphe premier, un jugement rendu par un tribunal commun à deux ou plusieurs États est réputé l'avoir été par le tribunal d'un État contractant si cet État a désigné ce tribunal commun dans une déclaration à cet effet, et si l'une des conditions suivantes est remplie :

(a) tous les membres du tribunal commun sont des États contractants pour lesquels ce tribunal exerce les fonctions judiciaires relatives à la matière concernée et le jugement est susceptible d'être reconnu ou exécuté conformément à l'article 5(1)(c), (e), (f), (l), ou (m) ; ou

(b) le jugement est susceptible d'être reconnu ou exécuté conformément à un autre alinéa de l'article 5(1)[, l'article 5(3),] ou conformément à l'article 6, et ces exigences d'admissibilité sont remplies dans l'État contractant pour lequel ce tribunal exerce les fonctions judiciaires relatives à la matière concernée

6 Un État contractant peut déclarer qu'il ne reconnaîtra ou n'exécutera pas les jugements rendus par un tribunal commun qui fait l'objet d'une déclaration en vertu du paragraphe 5 pour les matières couvertes par cette déclaration.

ou

6 La déclaration visée au paragraphe 5 n'aura d'effet qu'entre l'État contractant l'ayant faite et les autres États contractants ayant déclaré l'accepter. Ces déclarations doivent être déposées auprès du Ministère des Affaires étrangères des Pays-Bas, lequel transmettra, par voie diplomatique, une copie certifiée à chacun des États contractants.]]

(a) grant recognition or enforcement, which enforcement may be made subject to the provision of such security as it shall determine;

(b) postpone the decision on recognition or enforcement; or

(c) refuse recognition or enforcement.

A refusal under sub-paragraph (c) does not prevent a subsequent application for recognition or enforcement of the judgment.

[[5 For purposes of paragraph 1, a judgment given by a court common to two or more States shall be deemed to be a judgment given by a court of a Contracting State if the Contracting State has identified the common court in a declaration to that effect, and either of the following conditions are met –

(a) all members of the common court are Contracting States whose judicial functions in relation to the relevant matter are exercised by the common court, and the judgment is eligible for recognition and enforcement under Article 5(1)(c), (e), (f), (l), or (m); or

(b) the judgment is eligible for recognition and enforcement under another sub-paragraph of Article 5(1)[, Article 5(3),] or under Article 6, and those eligibility requirements are met in a Contracting State whose judicial functions in relation to the relevant matter are exercised by the common court.]

OR

[5 For purposes of paragraph 1, a judgment given by a court common to two or more States shall be deemed to be a judgment given by a court of a Contracting State if the Contracting State has identified the common court in a declaration to that effect, and either of the following conditions are met –

(a) all members of the common court are Contracting States whose judicial functions in relation to the relevant matter are exercised by the common court, and the judgment is eligible for recognition and enforcement under Article 5(1)(c), (e), (f), (l), or (m); or

(b) the judgment is eligible for recognition and enforcement under another sub-paragraph of Article 5(1)[, Article 5(3),] or under Article 6, and those eligibility requirements are met in a Contracting State whose judicial functions in relation to the relevant matter are exercised by the common court.

6 A Contracting State may declare that it shall not recognise or enforce judgments of a common court that is the object of a declaration under paragraph 5 in respect of any of the matters covered by that declaration.

or

6 The declaration referred to in paragraph 5 shall have effect only between the Contracting State that made the declaration and other Contracting States that have declared their acceptance of the declaration. Such declarations shall be deposited at the Ministry of Foreign Affairs of the Netherlands, which will forward, through diplomatic channels, a certified copy to each of the Contracting States.]]

Article 5
*Fondements de la reconnaissance et ~~ou~~ de l'exécution*

1 Un jugement est susceptible d'être reconnu et ~~ou~~ exécuté si l'une des exigences suivantes est satisfaite :

(a) la personne contre laquelle la reconnaissance ou l'exécution est demandée avait sa résidence habituelle dans l'État d'origine lorsqu'elle est devenue partie à la procédure devant le tribunal d'origine ;

(b) la personne physique contre laquelle la reconnaissance ou l'exécution est demandée avait son établissement professionnel principal dans l'État d'origine lorsqu'elle est devenue partie à la procédure devant le tribunal d'origine et la demande à l'origine du jugement portait sur son activité professionnelle ;

(c) la personne contre laquelle la reconnaissance ou l'exécution est demandée est celle qui a saisi le tribunal de la demande, autre que reconventionnelle, à l'origine du jugement ;

(d) le défendeur avait une succursale, une agence ou tout autre établissement sans personnalité juridique propre dans l'État d'origine, au moment où il est devenu une partie à la procédure devant le tribunal d'origine, et la demande à l'origine du jugement résultait des activités de cette succursale, de cette agence ou de cet établissement ;

(e) le défendeur a expressément consenti à la compétence du tribunal d'origine au cours de la procédure dans laquelle le jugement a été rendu ;

(f) le défendeur a fait valoir ses arguments sur le fond devant le tribunal d'origine sans en contester la compétence dans les délais prescrits par le droit de l'État d'origine, à moins qu'il ne soit évident qu'une contestation de la compétence ou de son exercice aurait échoué en vertu de ce droit ;

(g) le jugement porte sur une obligation contractuelle et a été rendu ~~dans le~~ par un tribunal de l'État dans lequel l'obligation a été ou aurait dû être exécutée, conformément :

(i) à l'accord des parties, ou,

(ii) à la loi applicable au contrat, à défaut d'un accord sur le lieu d'exécution,

sauf si les activités du défendeur en relation avec la transaction ne présentaient manifestement pas de lien intentionnel et substantiel avec cet État ;

(h) le jugement porte sur un bail immobilier et a été rendu par un tribunal de ~~dans~~ l'État où est situé l'immeuble ;

(i) le jugement rendu contre le défendeur porte sur une obligation contractuelle garantie par un droit réel relatif à un immeuble situé dans l'État d'origine, à condition qu'une demande contractuelle concernant ce droit réel ait également été dirigée contre ce défendeur;

(j) le jugement porte sur une obligation non contractuelle résultant d'un décès, d'un dommage corporel, d'un dommage subi par un bien corporel ou de la perte d'un bien corporel et l'acte ou l'omission directement à l'origine du dommage a été commis dans l'État d'origine, quel que soit le lieu où le dommage est survenu ;

Article 5
*Bases for recognition and enforcement*

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

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

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

(c) the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;

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

(e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;

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

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

(i) the ~~parties'~~ agreement of the parties, or

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

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

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

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

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

(k) le jugement porte sur la validité, l'interprétation, les effets, l'administration ou la modification d'un trust constitué volontairement et documenté par écrit, et :

(i) au moment de l'introduction de l'instance, l'État d'origine était ~~est~~ celui désigné dans l'acte constitutif du trust comme étant un État dont les tribunaux sont appelés à trancher les litiges relatifs à ces questions ; ou

(ii) au moment de l'introduction de l'instance, l'État d'origine était celui désigné, de façon expresse ou implicite, dans l'acte constitutif du trust~~,~~ comme étant l'État dans lequel est situé le lieu principal d'administration du trust.

Le présent ~~Cet~~ alinéa ne s'applique qu'aux jugements portant sur des aspects internes d'un trust, entre personnes étant ou ayant été au sein de la relation établie par le trust ;

(l) le jugement porte sur une demande reconventionnelle :

(i) dans la mesure où il est rendu en faveur du demandeur reconventionnel, à condition que cette demande porte sur la même transaction ou les mêmes faits que la demande principale ;

(ii) dans la mesure où il est rendu contre le demandeur reconventionnel, sauf si le droit de l'État d'origine exigeait une demande reconventionnelle à peine de forclusion ;

(m) le jugement a été rendu par un tribunal désigné dans un accord conclu ou documenté par écrit ou par tout autre moyen de communication qui rende l'information accessible pour être consultée ultérieurement, autre qu'un accord exclusif d'élection de for.

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

2 Si la reconnaissance ou l'exécution est requise contre une personne physique agissant principalement dans un but personnel, familial ou domestique (un consommateur) en matière de contrat de consommation, ou contre un employé relativement à son contrat de travail :

(a) l'alinéa ~~le paragraphe 1~~(e) du paragraphe premier ne s'applique que si le consentement a été donné devant le tribunal, que ce soit oralement ou par écrit ;

(b) les alinéas ~~les paragraphes 1~~(f), (g) et (m) du paragraphe premier ne s'appliquent pas.

3 Le paragraphe premier ne s'applique pas à un jugement portant sur un bail immobilier résidentiel ou sur l'enregistrement d'un immeuble. Un tel jugement est susceptible d'être reconnu et exécuté uniquement s'il a été rendu par un tribunal de l'État où est situé l'immeuble.

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

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

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

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

(l) the judgment ruled on a counterclaim –

(i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim;

(ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;

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

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

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

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

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

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

Article 6
*Fondements ~~exclusifs~~ ~~ou~~ et de l'exécution*

Nonobstant l'article 5, ~~: (b)~~ un jugement portant sur des droits réels immobiliers n'est reconnu ou exécuté que si l'immeuble est situé dans l'État d'origine. ~~;~~

~~(c) un jugement portant sur un bail immobilier pour une période de plus de six mois ne peut être reconnu ou exécuté si l'immeuble n'est pas situé dans l'État d'origine et les tribunaux de l'État dans lequel se trouve l'immeuble ont compétence exclusive en vertu du droit de cet État.~~

Article 7
*Refus de reconnaissance ou d'exécution*

1 La reconnaissance ou l'exécution peut être refusée si :

(a) l'acte introductif d'instance ou un acte équivalent contenant les éléments essentiels de la demande :

(i) n'a pas été notifié au défendeur en temps utile et de telle manière qu'il puisse organiser sa défense, à moins que le défendeur ait comparu et présenté sa défense sans contester la notification devant le tribunal d'origine, à condition que le droit de l'État d'origine permette de contester la notification ; ou

(ii) a été notifié au défendeur dans l'État requis de manière incompatible avec les principes fondamentaux de l'État requis relatifs à la notification de documents ;

(b) le jugement résulte d'une fraude ;

(c) la reconnaissance ou l'exécution est manifestement incompatible avec l'ordre public de l'État requis, notamment dans le cas où la procédure appliquée en l'espèce pour obtenir le jugement était incompatible avec les principes fondamentaux d'équité procédurale de cet État et en cas d'atteinte à la sécurité ou à la souveraineté de cet État ;

(d) la procédure devant le tribunal d'origine était contraire à un accord, ou à une clause figurant dans l'acte constitutif d'un trust, en vertu duquel le litige en question devait être tranché par un tribunal d'un État autre que l'État ~~le tribunal~~ d'origine ;

(e) le jugement est incompatible avec un jugement rendu ~~dans~~ par un tribunal de l'État requis dans un litige entre les mêmes parties ; ou

(f) le jugement est incompatible avec un jugement rendu antérieurement ~~dans~~ par un tribunal d'un autre État entre les mêmes parties dans un litige ayant le même objet, lorsque le jugement rendu antérieurement réunit les conditions nécessaires à sa reconnaissance dans l'État requis.

2 La reconnaissance ou l'exécution peut être différée ou refusée si une procédure ayant le même objet est pendante entre les mêmes parties devant un tribunal de l'État requis lorsque :

Article 6
*Exclusive base~~is~~ for recognition and enforcement*

Notwithstanding Article 5, ~~(b)~~ a judgment that ruled on rights *in rem* in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin. ~~;~~

~~(c) a judgment that ruled on a tenancy of immovable property for a period of more than six months shall not be recognised and enforced if the property is not situated in the State of origin and the courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State.~~

Article 7
*Refusal of recognition or enforcement*

1 Recognition or enforcement may be refused if –

(a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim –

(i) was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence, unless the defendant entered an appearance and presented their case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

(ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

(b) the judgment was obtained by fraud;

(c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State;

(d) the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court of a State other than the ~~court~~ State of origin;

(e) the judgment is inconsistent with a judgment given by a court of ~~in~~ the requested State in a dispute between the same parties; or

(f) the judgment is inconsistent with an earlier judgment given by a court of ~~in~~ another State between the same parties on the same subject matter, provided that the earlier judgment fulfil~~ls~~ the conditions necessary for its recognition in the requested State.

2 Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –

(a) ce dernier a été saisi avant le tribunal de l'État d'origine ; et

(b) il existe un lien étroit entre le litige et l'État requis.

Le refus visé au présent paragraphe n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.

Article 8
*Questions préalables*

1 Une décision rendue à titre préalable sur une matière à laquelle la présente Convention ne s'applique pas, ou ~~une décision rendue à titre préalable~~ sur une matière visée à l'article 6 par un ~~autre~~ tribunal d'un État autre que celui désigné dans cette disposition, n'est pas reconnue ou exécutée en vertu de la présente Convention.

2 La reconnaissance ou l'exécution d'un jugement peut être refusée si, et dans la mesure où, le jugement est fondé sur une décision relative à une matière à laquelle la présente Convention ne s'applique pas, ou sur une décision relative à une matière visée à l'article 6 qui a été rendue par un ~~autre~~ tribunal d'un État autre que celui désigné dans cette disposition.

~~[3 Toutefois, dans le cas d'une décision relative à la validité d'un droit visé à l'article 6(a), la reconnaissance ou l'exécution d'un jugement ne peut être différée, ou refusée en vertu du paragraphe précédent, que si :~~

~~(a) cette décision est incompatible avec un jugement ou une décision rendu(e) sur ce point par l'autorité compétente de l'État mentionné à l'article 6(a) ; ou~~

~~(b) une procédure relative à la validité de ce droit est pendante dans cet État.~~

~~Le refus en vertu de l'alinéa (b) n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.]~~

Article 9
*Divisibilité*

La reconnaissance ou l'exécution d'une partie dissociable d'un jugement est accordée si la reconnaissance ou l'exécution de cette partie est demandée ou si seule une partie du jugement peut être reconnue ou exécutée en vertu de la présente Convention.

Article 10
*Dommages et intérêts*

1 La reconnaissance ou l'exécution d'un jugement peut être refusée si, et dans la mesure où, le jugement accorde des dommages et intérêts, y compris des dommages et intérêts exemplaires ou punitifs, qui ne compensent pas une partie pour la perte ou le préjudice ~~réellement~~ réels subis.

2 Le tribunal requis prend en considération~~,~~ si, et dans quelle mesure, le montant accordé à titre de dommages et intérêts par le tribunal d'origine est destiné à couvrir les frais et dépens du procès.

(a) the court of the requested State was seised before the court of origin; and

(b) there is a close connection between the dispute and the requested State.

A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 8
*Preliminary questions*

1 A ruling on a preliminary question shall not be recognised or enforced under this Convention if the ruling is on a matter to which this Convention does not apply or on a matter referred to in Article 6 on which a court of a State other than the ~~court~~ State referred to in that Article ruled.

2 Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply, or on a matter referred to in Article 6 on which a court of a State other than the ~~court~~ State referred to in that Article ruled.

~~[3 However, in the case of a ruling on the validity of a right referred to in Article 6, paragraph (a), recognition or enforcement of a judgment may be postponed, or refused under the preceding paragraph, only where~~

~~(a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State referred to in Article 6, paragraph (a); or~~

~~(b) proceedings concerning the validity of that right are pending in that State.~~

~~A refusal under sub-paragraph (b) does not prevent a subsequent application for recognition or enforcement of the judgment.]~~

Article 9
*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 10
*Damages*

1 Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.

2 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 12
*Transactions judiciaires*

Les transactions judiciaires homologuées par un tribunal d'un État contractant, ou qui ont été conclues au cours d'une instance devant un tribunal d'un État contractant, et qui sont exécutoires au même titre qu'un jugement dans l'État d'origine, sont exécutées en vertu de la présente Convention aux mêmes conditions qu'un jugement.

Article 13
*Pièces à produire*

1 La partie qui requiert la reconnaissance ou qui demande l'exécution produit :

(a) une copie complète et certifiée conforme du jugement ;

(b) si le jugement a été rendu par défaut, l'original ou une copie certifiée conforme du document attestant que l'acte introductif d'instance ou un acte équivalent a été notifié à la partie défaillante ;

(c) tout document nécessaire pour établir que le jugement produit ses effets dans l'État d'origine ou, le cas échéant, qu'il est exécutoire dans cet État ;

(d) dans le cas prévu à l'article 12, un certificat délivré par un tribunal (y compris par une personne autorisée du tribunal) de l'État d'origine attestant que la transaction judiciaire est exécutoire, en tout ou en partie, aux mêmes conditions qu'un jugement dans l'État d'origine.

2 Si le contenu du jugement ne permet pas au tribunal requis de vérifier que les conditions du présent chapitre sont remplies, ce tribunal peut exiger tout document nécessaire.

3 Une demande de reconnaissance ou d'exécution peut être accompagnée d'un document relatif au jugement, délivré par un tribunal (y compris par une personne autorisée du tribunal) de l'État d'origine, sous la forme recommandée et publiée par la Conférence de La Haye de droit international privé.

4 Si les documents mentionnés dans le présent article ne sont pas rédigés dans une langue officielle de l'État requis, ils ~~sont~~ doivent être accompagnés d'une traduction certifiée dans une langue officielle, sauf si le droit de l'État requis en dispose autrement.

Article 14
*Procédure*

1 La procédure tendant à obtenir la reconnaissance, l'exequatur ou l'enregistrement aux fins d'exécution, et l'exécution du jugement sont régies par le droit de l'État requis sauf si la présente Convention en dispose autrement. Le tribunal requis agit avec célérité.

2 Le tribunal de l'État requis ne peut refuser de reconnaître ou d'exécuter un jugement en vertu de la présente Convention au motif que la reconnaissance ou l'exécution devrait être requise dans un autre État.

Article 12
*Judicial settlements (*transactions judiciaires*)*

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, 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.

Article 13
*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 given 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) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;

(d) in the case referred to in Article 12, a certificate of a court (including an officer of the court) of the State of origin stating that the judicial settlement or a part of it is enforceable in the same manner as a judgment 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 any necessary documents.

3 An application for recognition or enforcement may be accompanied by a document relating to the judgment, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.

4 If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 14
*Procedure*

1 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.

2 The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

Article 15
*Frais de procédure*

1 Aucune sûreté, caution ou dépôt, sous quelque dénomination que ce soit, ne peut être imposée en raison, soit de sa seule qualité d'étranger, soit du seul défaut de domicile ou de résidence dans l'État requis, à la partie qui demande l'exécution dans un État contractant d'une décision rendue ~~dans~~ par un tribunal d'un autre État contractant.

2 Toute condamnation aux frais et dépens, rendue dans un État contractant contre toute personne dispensée du versement d'une sûreté, d'une caution ou d'un dépôt en vertu du paragraphe premier ou du droit de l'État dans lequel l'instance a été introduite est, à la demande du créancier, déclarée exécutoire dans tout autre État contractant.

3 Un État peut déclarer qu'il n'appliquera pas le paragraphe premier ou désigner dans une déclaration lesquels de ses tribunaux ne l'appliqueront pas.

Article 16
*Reconnaissance ~~ou~~ et exécution en application du droit national*

Sous réserve de l'article 6, la présente Convention ne fait pas obstacle à la reconnaissance ou à l'exécution d'un jugement en application du droit national.

CHAPITRE III – CLAUSES GÉNÉRALES

Article 17
*Disposition transitoire*

La présente Convention s'applique à la reconnaissance et à l'exécution de jugements si, au moment de l'introduction de l'instance dans l'État d'origine, la Convention produisait des ~~en vigueur~~ effets ~~dans~~ entre cet État et ~~dans~~ l'État requis.

Article 18
*Déclarations limitant la reconnaissance et l'exécution*

Un État peut déclarer que ses tribunaux peuvent refuser de reconnaître ou d'exécuter un jugement rendu par un tribunal d'un autre État contractant, lorsque les parties avaient leur résidence dans l'État requis et que les relations entre les parties, ainsi que tous les autres éléments pertinents du litige, autres que le lieu du tribunal d'origine, étaient liés uniquement à l'État requis.

Article 19
*Déclarations relatives à des matières particulières*

1 Lorsqu'un État a un intérêt important à ne pas appliquer la présente Convention à une matière particulière, il peut déclarer qu'il ne l'appliquera pas à cette matière. L'État qui fait une telle déclaration s'assure que la portée de celle-ci n'est pas plus étendue que nécessaire et que la matière particulière exclue est définie de façon claire et précise.

2 À l'égard d'une telle matière, la Convention ne s'applique pas :

(a) dans l'État contractant ayant fait la déclaration ;

Article 15
*Costs of proceedings*

1 No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given by a court of ~~in~~ another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.

2 An order for payment of costs or expenses of proceedings, made in a Contracting State against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 or of the law of the State where proceedings have been instituted, shall, on the application of the person entitled to the benefit of the order, be rendered enforceable in any other Contracting State.

3 A State may declare that it shall not apply paragraph 1 or designate by a declaration which of its courts shall not apply paragraph 1.

Article 16
*Recognition ~~or~~ and enforcement under national law*

Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.

CHAPTER III – GENERAL CLAUSES

Article 17
*Transitional provision*

This Convention shall apply to the recognition and enforcement of judgments if, at the time the proceedings were instituted in the State of origin, the Convention had effect ~~was in force effective as~~ between ~~in~~ that State and ~~in~~ the requested State.

Article 18
*Declarations limiting recognition and enforcement*

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the court of origin, were connected only with the requested State.

Article 19
*Declarations with respect to specific matters*

1 Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

2 With regard to that matter, the Convention shall not apply –

(a) in the Contracting State that made the declaration;

(b) dans les autres États contractants, lorsque la reconnaissance ou l'exécution d'un jugement rendu ~~dans~~ par un tribunal d'un État contractant ayant fait la déclaration est demandée.

[~~[~~Article 20
*Déclarations relatives aux jugements concernant des gouvernements*

1 Un État peut déclarer qu'il n'appliquera pas la présente Convention aux jugements issus de procédures auxquelles est partie :

(a) cet État ou une personne physique agissant ~~au nom de~~ pour celui-ci ; ou

(b) une ~~des~~ agences ~~gouvernementales~~ de cet État ou toute personne physique agissant ~~au nom de~~ pour celle-ci.

L'État qui fait une telle déclaration s'assure que la portée de celle-ci n'est pas plus étendue que nécessaire et que l'exclusion du champ d'application y est définie de façon claire et précise. La déclaration ne peut pas faire de distinction selon que l'État, une agence gouvernementale de cet État ou une personne physique agissant pour l'un ou l'autre est le défendeur ou le demandeur à la procédure devant le tribunal d'origine [ou est la partie qui demande la reconnaissance ou l'exécution ou la partie contre laquelle la reconnaissance ou l'exécution est demandée].

~~2 Une déclaration faite en application du paragraphe premier ne peut exclure du champ d'application de la présente Convention les jugements issus de procédures auxquelles une entreprise publique est partie.~~

2 La reconnaissance ou l'exécution d'un jugement rendu par un tribunal d'un État qui a fait une déclaration en vertu du paragraphe premier peut être refusée si le jugement est issu d'une procédure à laquelle est partie l'État qui a fait la déclaration ou l'État requis, l'une de leurs agences gouvernementales ou une personne physique agissant pour l'un d'entre eux, dans les limites prévues par cette déclaration.

~~3 Si un État a fait une déclaration en application du paragraphe premier, la reconnaissance ou l'exécution d'un jugement rendu dans cet État peut être refusée par un autre État contractant si le jugement est issu d'une procédure à laquelle est partie cet État contractant, ou une de ses agences gouvernementales, ou les personnes assimilées à celles mentionnées au paragraphe premier, dans les limites prévues par cette déclaration.~~]

Article 21
*Interprétation uniforme*

Aux fins de l'interprétation de la présente Convention, il sera tenu compte de son caractère international et de la nécessité de promouvoir l'uniformité de son application.

Article 22
*Examen du fonctionnement de la Convention*

Le Secrétaire général de la Conférence de La Haye de droit international privé prend périodiquement des dispositions en vue de ~~:~~

~~(a)~~ l'examen du fonctionnement ~~pratique~~ de la présente Convention, y compris de toute déclaration, ~~;~~ et en fait rapport au Conseil sur les affaires générales et la politique.

(b) in other Contracting States, where recognition or enforcement of a judgment given by a court of ~~in~~ a Contracting State that made the declaration is sought.

[~~[~~Article 20
*Declarations with respect to judgments pertaining to governments*

1 A State may declare that it shall not apply this Convention to judgments arising from proceedings to which any of the following is a party –

(a) that State, or a natural person acting ~~on behalf of~~ for that State, or

(b) a government agency of that State, or a natural person acting ~~on behalf of~~ for such a government agency.

The State making such a ~~The~~ declaration shall ~~be~~ ensure that the declaration is no broader than necessary and that the exclusion from scope ~~shall be~~ is clearly and precisely defined. The declaration shall not distinguish between judgments where the State, a government agency of that State or a natural person acting for either of them is a defendant or claimant in the proceedings before the court of origin[, or is the party seeking recognition or enforcement or the party against whom recognition or enforcement is sought in the requested State].

~~2 A declaration pursuant to paragraph 1 shall not exclude from the application of this Convention judgments arising from proceedings to which an enterprise owned by a State is a party.~~

2 Recognition or enforcement of a judgment given by a court ~~from~~ of a State that made a declaration pursuant to paragraph 1 may be refused if the judgment arose from proceedings to which either the State that made the declaration or the requested State, one of their government agencies or a natural person acting for either of them is a party, to the same extent as specified in the declaration.

~~3 If a State has made a declaration pursuant to paragraph 1, recognition or enforcement of a judgment originating from that State may be refused by another Contracting State if the judgment arose from proceedings to which that other Contracting State, one of its government agencies, or equivalent persons to those referred to in paragraph 1 is a party, to the same extent as specified in the declaration.~~]

Article 21
*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 22
*Review of operation of the Convention*

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for ~~a~~ —

~~(a)~~ review of the operation of this Convention, including any declarations, and shall report to the Council on General Affairs and Policy.~~; and~~

~~(b) l'examen de l'opportunité d'apporter des modifications à la présente Convention.~~

Article 23
*Systèmes juridiques non unifiés*

1 Au regard d'un État contractant dans lequel deux ou plusieurs systèmes de droit ayant trait aux questions régies par la présente Convention s'appliquent dans des unités territoriales différentes :

(a) toute référence à la loi, au droit ou à la procédure d'un État vise, le cas échéant, la loi, le droit ou la procédure en vigueur dans l'unité territoriale considérée ;

~~(b) toute référence à la résidence habituelle dans un État vise, le cas échéant, la résidence habituelle dans l'unité territoriale considérée ;~~

(c) toute référence au tribunal ou aux tribunaux d'un État vise, le cas échéant, le tribunal ou les tribunaux de l'unité territoriale considérée ;

(d) toute référence au lien avec un État vise, le cas échéant, le lien avec l'unité territoriale considérée ~~.~~;

(~~c *bis*~~e) toute référence à un facteur de rattachement à l'égard d'un État vise, le cas échéant, ce facteur de rattachement à l'égard de l'unité territoriale considérée. ~~;~~

2 Nonobstant le paragraphe ~~précédent~~ premier, un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu d'appliquer la présente Convention aux situations qui impliquent uniquement ces différentes unités territoriales.

3 Un tribunal d'une unité territoriale d'un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu de reconnaître ou d'exécuter un jugement d'un autre État contractant au seul motif que le jugement a été reconnu ou exécuté dans une autre unité territoriale du même État contractant selon la présente Convention.

4 ~~Cet~~ Le présent article ne s'applique pas à une Organisation régionale d'intégration économique.

Article 24
*Rapport avec d'autres instruments internationaux*

1 La présente Convention doit être interprétée de façon qu'elle soit, autant que possible, compatible avec d'autres traités en vigueur pour les États contractants, conclus avant ou après cette Convention.

2 La présente Convention n'affecte pas l'application par un État contractant d'un traité ~~[ou de tout autre instrument international]~~ conclu avant ~~l'entrée en vigueur de~~ cette Convention ~~pour cet État contractant [entre les Parties à cet instrument]~~.

3 La présente Convention n'affecte pas l'application par un État contractant d'un traité ~~[ou de tout autre instrument international]~~ conclu après ~~l'entrée en vigueur de~~ cette Convention ~~pour cet État contractant, aux fins de~~ en ce qui a trait à la reconnaissance ou à l~~d~~'exécution d'un jugement rendu par ~~le~~ un tribunal d'un État contractant qui est éga-

~~(b) consideration of whether any amendments to this Convention are desirable.~~

Article 23
*Non-unified legal systems*

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, where appropriate, 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, where appropriate, to habitual residence in the relevant territorial unit;~~

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

(d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit;~~.~~

(~~c *bis*~~e) any reference to a connecting factor in relation to a State shall be construed as referring, where appropriate, to that connecting factor in relation to the relevant territorial unit.

2 Notwithstanding ~~the preceding~~ paragraph 1, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

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

4 This Article shall not apply to a Regional Economic Integration Organisation.

Article 24
*Relationship with other international instruments*

1 This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2 This Convention shall not affect the application by a Contracting State of a treaty ~~[or other international instrument]~~ that was concluded before this Convention ~~entered into force for that Contracting State [as between Parties to that instrument]~~.

3 This Convention shall not affect the application by a Contracting State of a treaty ~~[or other international instrument]~~ concluded after this Convention ~~entered into force for that Contracting State for the purposes of obtaining~~ as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party

lement Partie à cet traité ~~instrument~~. [Aucune disposition de l'autre ~~instrument~~ traité n'affecte ~~d'incidence sur~~ les obligations prévues à l'article 6 ~~eu~~ à l'égard ~~aux~~ des États contractants qui ne sont pas Parties à cet traité ~~instrument~~.]

4 La présente Convention n'affecte pas l'application des règles d'une Organisation régionale d'intégration économique Partie à cette Convention~~, que ces règles aient été adoptées avant ou après cette Convention,~~ en ce qui a trait à la reconnaissance ou à l'exécution d'une jugements rendu par un tribunal d'un État contractant qui est également un ~~entre les~~ États membres de l'Organisation régionale d'intégration économique lorsque :

(a) ces règles ont été adoptées avant la conclusion de la présente Convention ; ou

(b) ces règles ont été adoptées après la conclusion de la présente Convention, dans la mesure où elles n'affectent pas les obligations découlant de l'article 6 à l'égard des États contractants qui ne sont pas des États membres de l'Organisation régionale d'intégration économique.

~~[5 Un État contractant peut déclarer que la présente Convention n'affecte pas les instruments internationaux énumérés dans la déclaration.]~~

to that ~~instrument~~ treaty. [Nothing in the other ~~instrument~~ treaty shall affect the obligations under Article 6 towards Contracting States that are not Parties to that ~~instrument~~ treaty.]

4 This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention~~, whether adopted before or after this Convention~~ as concerns the recognition or enforcement of a judgment~~s as between~~ given by a court of a Contracting State that is also a Member State~~s~~ of the Regional Economic Integration Organisation where –

(a) the rules were adopted before this Convention was concluded; or

(b) the rules were adopted after this Convention was concluded, to the extent that they do not affect the obligations under Article 6 towards Contracting States that are not Member States of the Regional Economic Integration Organisation.

~~[5 A Contracting State may declare that other international instruments listed in the declaration shall remain unaffected by this Convention.]~~

## CHAPITRE IV – CLAUSES FINALES

### Article 25
*Signature, ratification, acceptation, approbation ou adhésion*

1 La présente Convention est ouverte à la signature de tous les États.

2 La présente Convention est sujette à la ratification, à l'acceptation ou à l'approbation par les États signataires.

3 Tout État peut~~ourra~~ adhérer à la présente Convention.

4 Les instruments de ratification, d'acceptation, d'approbation ou d'adhésion sont déposés auprès du Ministère des Affaires étrangères du Royaume des Pays-Bas, dépositaire de la Convention.

### Article 26
*Déclarations relatives aux systèmes juridiques non unifiés*

1 Un État qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par la présente Convention peut~~, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion,~~ déclarer que la Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles~~, et pourra à tout moment modifier cette déclaration en faisant une nouvelle déclaration~~. La
2 déclaration ~~est notifiée au dépositaire et~~ indique expressément les unités territoriales auxquelles la Convention s'applique.

3 Si un État ne fait pas de déclaration en vertu du présent article, la Convention s'applique à l'ensemble du territoire de cet État.

4 Le présent article ne s'applique pas à une Organisation régionale d'intégration économique.

## CHAPTER IV – FINAL CLAUSES

### Article 25
*Signature, ratification, acceptance, approval or accession*

1 This Convention ~~is~~ shall be open for signature by all States.

2 This Convention is subject to ratification, acceptance or approval by the signatory States.

3 This Convention ~~is~~ shall be open for accession by all States.

4 Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

### Article 26
*Declarations with respect to non-unified legal systems*

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 Such a ~~A~~ 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 shall extend to all territorial units of that State.

4 This Article shall not apply to a Regional Economic Integration Organisation.

Article 27
*Organisations régionales d'intégration économique*

1 Une Organisation régionale d'intégration économique constituée seulement par des États souverains et ayant compétence sur certaines ou toutes les matières régies par la présente Convention peut ~~également~~ signer, accepter, ~~ou~~ approuver cette Convention ou y adhérer. En pareil cas, l'Organisation régionale d'intégration économique aura les mêmes droits et obligations qu'un État contractant, dans la mesure où cette Organisation a compétence sur des matières régies par ~~cette~~ la présente Convention.

2 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, l'Organisation régionale d'intégration économique notifie au dépositaire, par écrit, les matières régies par la présente Convention pour lesquelles ses États membres lui ont transféré leur compétence ~~à cette Organisation~~. L'Organisation notifie aussitôt au dépositaire, par écrit, toute modification intervenue dans la délégation de compétence précisée dans la notification la plus récente faite en vertu du présent paragraphe.

3 Aux fins de l'entrée en vigueur de la présente Convention, tout instrument déposé par une Organisation régionale d'intégration économique n'est pas compté, à moins que l'Organisation régionale d'intégration économique déclare, en vertu de l'article 28(1), que ses États membres ne seront pas Parties à cette Convention.

4 Toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, à une Organisation régionale d'intégration économique ~~qui y est Partie~~.

Article 28
*~~Adhésion par une~~ Organisation régionale d'intégration économique en tant que Partie contractante sans ses États membres*

1 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, une Organisation régionale d'intégration économique peut déclarer qu'elle a compétence pour toutes les matières régies par la présente Convention et que ses États membres ne seront pas Parties à cette Convention mais seront liés par celle-ci en raison de la signature, de l'acceptation, de l'approbation ou de l'adhésion de l'Organisation.

2 Lorsqu'une déclaration est faite par une Organisation régionale d'intégration économique en conformité avec le paragraphe premier, toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, aux États membres de l'Organisation.

Article 29
*Entrée en vigueur*

1 La présente Convention entre~~ra~~ en vigueur le premier jour du mois suivant l'expiration d'une période de ~~[~~trois~~]~~ ~~[six]~~ mois après le dépôt du deuxième instrument de ratification, d'acceptation, d'approbation ou d'adhésion visé à l'article 25.

2 Par la suite, la présente Convention entre~~ra~~ en vigueur :

Article 27
*Regional Economic Integration Organisations*

1 A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may ~~similarly~~ sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

2 The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3 For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 28(1)~~, paragraph 1~~, that its Member States will not be Parties to this Convention.

4 Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation ~~that is a Party to it~~.

Article 28
*~~Accession by a~~ Regional Economic Integration Organisation as a Contracting Party without its Member States*

1 At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

2 In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 29
*Entry into force*

1 This Convention shall enter into force on the first day of the month following the expiration of ~~[~~three~~]~~ ~~[six]~~ months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 25.

2 Thereafter this Convention shall enter into force –

(a) pour chaque État ou Organisation régionale d'intégration économique la ratifiant, l'acceptant, l'approuvant ou y adhérant postérieurement, le premier jour du mois suivant l'expiration de la période pendant laquelle des notifications peuvent être faites en vertu de l'article 29 *bis*(2) ~~[trois] [six] mois après le dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion~~ ;

(b) pour les unités territoriales auxquelles la présente Convention a été étendue conformément à l'article 26, le premier jour du mois suivant l'expiration d'une période de ~~[~~trois~~] [six]~~ mois après la notification de la déclaration visée par ledit article.

Article 29 *bis*
*Établissement de relations en vertu de la Convention*

1 La Convention ne produit des effets entre deux États contractants que si aucun d'entre eux n'a transmis de notification au dépositaire à l'égard de l'autre conformément aux paragraphes 2 ou 3.

2 Un État contractant peut notifier au dépositaire, dans les 12 mois suivant la notification par le dépositaire visée à l'article 32(a), que la ratification, l'acceptation, l'approbation ou l'adhésion d'un autre État n'aura pas pour effet d'établir des relations entre ces deux États en vertu de la Convention.

3 Un État peut notifier au dépositaire, lors du dépôt de son instrument en vertu de l'article 25(4), que sa ratification, son acceptation, son approbation ou son adhésion n'aura pas pour effet d'établir des relations avec un État contractant en vertu de la Convention.

4 Un État contractant peut à tout moment retirer une notification qu'il a faite en vertu des paragraphes 2 ou 3. Ce retrait prendra effet le premier jour du mois suivant l'expiration d'une période de trois mois à compter de la date de notification.

Article 30
*Déclarations*

1 Les déclarations visées aux articles ~~[4,]~~ 15, 18, 19, ~~[~~20,~~] [~~24,~~]~~ et 26 ~~et 28~~ peuvent être faites lors de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion ou à tout moment ultérieur et ~~pourront~~ être modifiées ou retirées à tout moment.

2 Les déclarations, modifications et retraits sont notifiés au dépositaire.

3 Une déclaration faite au moment de la signature, de la ratification, de l'acceptation, de l'approbation de la présente Convention ou de l'adhésion à celle-ci prend~~ra~~ effet au moment de l'entrée en vigueur de la Convention pour l'État concerné.

4 Une déclaration faite ultérieurement, ainsi ~~qu'une~~ que toute modification ou ~~le~~ tout retrait d'une déclaration, prend~~ra~~ effet le premier jour du mois suivant l'expiration d'une période de ~~six~~ trois mois après la date de réception de la notification par le dépositaire.

(a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of ~~[three][six] months after the deposit of its instrument of ratification, acceptance, approval or accession~~ the period during which notifications may be made in accordance with Article 29 *bis*(2);

(b) for a territorial unit to which this Convention has been extended in accordance with Article 26, on the first day of the month following the expiration of ~~[~~three~~] [six]~~ months after the notification of the declaration referred to in that Article.

Article 29 *bis*
*Establishment of ~~R~~relations ~~P~~pursuant to the Convention*

1 The Convention shall have effect ~~only as regards relations~~ between two Contracting States only if neither of ~~which~~ them has~~ve~~ notified the depositary regarding the other in accordance with paragraph 2 or 3.

2 A Contracting State may notify the depositary, within 12 months after the ~~receipt of the~~ notification by the depositary referred to in Article 32(a), that the ratification, acceptance, approval or accession of another State shall not have the effect of establishing relations between the two States pursuant to the Convention.

3 A State may notify the depositary, upon the deposit of its instrument pursuant to Article 25(4), that its ratification, acceptance, approval or accession shall not have the effect of establishing relations with a Contracting State pursuant to the Convention.

4 A Contracting State may at any time withdraw a notification that it has made under paragraph 2 or 3. Such a withdrawal shall take effect on the first day of the month following the expiration of three months following the date of notification. ~~The Convention shall apply to the recognition and enforcement of judgments resulting from proceedings that are instituted in the State of origin on or after the date on which the notification takes effect.~~

Article 30
*Declarations*

1 Declarations referred to in Articles ~~[4,]~~ 15, 18, 19, ~~[~~20,~~] [~~24,~~]~~ and 26 ~~and 28~~ may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2 Declarations, modifications and withdrawals shall be notified to the depositary.

3 A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of ~~six~~ three months following the date on which the notification is received by the depositary.

5 Une déclaration faite ultérieurement, ainsi ~~qu'une~~ que toute modification ou ~~le~~ tout retrait d'une déclaration, ne ~~produira~~ produit pas d'effet ~~sur les~~ à l'égard des jugements rendus à l'issue d'instances déjà introduites devant le tribunal d'origine au moment où la déclaration prend effet.

Article 31
*Dénonciation*

1 La présente Convention ~~pourra~~ peut être dénoncée par une notification écrite au dépositaire. La dénonciation ~~pourra~~ peut se limiter à certaines unités territoriales d'un système juridique non unifié auxquelles s'applique la présente Convention.

2 La dénonciation prend~~ra~~ effet le premier jour du mois suivant l'expiration d'une période de ~~douze~~ 12 mois après la date de réception de la notification par le dépositaire. Lorsqu'une période plus longue pour la prise d'effet de la dénonciation est précisée dans la notification, la dénonciation prend~~ra~~ effet à l'expiration de la période en question après la date de réception de la notification par le dépositaire.

Article 32
*Notifications par le dépositaire*

Le dépositaire notifi~~era~~ aux Membres de la Conférence de La Haye de droit international privé, ainsi qu'aux autres États et aux Organisations régionales d'intégration économique qui ont signé, ratifié, accepté, approuvé la présente Convention ou y ont adhéré conformément aux articles ~~[…]~~ 25, 27 et 28 les renseignements suivants :

(a) les signatures, ratifications, acceptations, approbations et adhésions prévues aux ~~à l'~~articles 25, 27 et 28 ;

(b) la date d'entrée en vigueur de la présente Convention conformément à l'article 29 ;

(c) les notifications, déclarations, modifications et retraits ~~des déclarations~~ prévus aux ~~à l'~~articles 27, 28, 29 *bis* et 30 ; et

(d) les dénonciations prévues à l'article 31.

En foi de quoi, les soussignés, dûment autorisés, ont signé la présente Convention.

Fait à La Haye, le 2 juillet 2019, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement du Royaume des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Membres de la Conférence de La Haye de droit international privé lors de sa Vingt-deuxième session ainsi qu'à chacun des autres États ayant participé à cette Session.

5 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall not apply to judgments resulting from proceedings that have already been instituted before the court of origin when the declaration takes effect.

Article 31
*Denunciation*

1 This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2 The denunciation shall take effect on the first day of the month following the expiration of ~~twelve~~ 12 months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 32
*Notifications by the depositary*

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded to this Convention in accordance with Articles 25, 27 and 28 ~~[…]~~ of the following –

(a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 25, 27 and 28;

(b) the date on which this Convention enters into force in accordance with Article 29;

(c) the notifications, declarations, modifications and withdrawals ~~of declarations~~ referred to in Articles 27, 28, 29 *bis* and 30; and

(d) the denunciations referred to in Article 31.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 2nd day of July 2019, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Members of the Hague Conference on Private International Law at its Twenty-Second Session and to each of the other States which have participated in that Session.

*Distribué le samedi 29 juin 2019*

**No 92 – Proposition du Comité de rédaction***

Les Parties contractantes à la présente Convention,

Désireuses de promouvoir un accès effectif de tous à la justice et de faciliter le commerce et l'investissement multilatéral fondés sur des règles, ainsi que la mobilité par le biais de la coopération judiciaire,

Estimant que cette coopération peut être renforcée par la mise en place d'un ensemble uniforme de règles fondamentales sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale, afin de faciliter la reconnaissance et l'exécution effectives de ces jugements,

Convaincues que cette coopération judiciaire renforcée nécessite notamment un régime juridique international offrant une plus grande prévisibilité et sécurité en matière de circulation des jugements étrangers à l'échelle mondiale, qui soit complémentaire de la *Convention du 30 juin 2005 sur les accords d'élection de for*,

Ont résolu de conclure la présente Convention à cet effet et sont convenues des dispositions suivantes :

CHAPITRE I – CHAMP D'APPLICATION ET DÉFINITIONS

Article premier
*Champ d'application*

1 La présente Convention s'applique à la reconnaissance et à l'exécution des jugements en matière civile ou commerciale. Elle ne recouvre notamment pas les matières fiscales, douanières ou administratives.

2 La présente Convention s'applique à la reconnaissance et à l'exécution, dans un État contractant, d'un jugement rendu par un tribunal d'un autre État contractant.

Article 2
*Exclusions du champ d'application*

1 La présente Convention ne s'applique pas aux matières suivantes :

(a) l'état et la capacité des personnes physiques ;

(b) les obligations alimentaires ;

* Version provisoire renumérotée basée sur la version en mode suivi des modifications (« *tracked changes* ») du projet de Convention issu de la réunion du Comité de rédaction du 28 juin 2019 (Doc. trav. No 91).





*Distributed on Saturday 29 June 2019*

**No 92 – Proposal of the Drafting Committee***

The Contracting Parties to the present Convention,

Desiring to promote effective access to justice for all and to facilitate rule-based multilateral trade and investment, and mobility, through judicial co-operation,

Believing that such co-operation can be enhanced through the creation of a uniform set of core rules on recognition and enforcement of foreign judgments in civil or commercial matters, to facilitate the effective recognition and enforcement of such judgments,

Convinced that such enhanced judicial co-operation requires, in particular, an international legal regime that provides greater predictability and certainty in relation to the global circulation of foreign judgments, and that is complementary to the *Convention of 30 June 2005 on Choice of Court Agreements*,

Have resolved to conclude this Convention to this effect and have agreed upon the following provisions –

CHAPTER I – SCOPE AND DEFINITIONS

Article 1
*Scope*

1 This Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters. It shall not extend in particular to revenue, customs or administrative matters.

2 This Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State.

Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

(a) the status and legal capacity of natural persons;

(b) maintenance obligations;

* Provisional renumbered text with provisions based on the tracked-changes version of the draft Convention produced by the Drafting Committee meeting of 28 June 2019 (Work. Doc. No 91).

(c) les autres matières du droit de la famille, y compris les régimes matrimoniaux et les autres droits ou obligations découlant du mariage ou de relations similaires ;

(d) les testaments et les successions ;

(e) l'insolvabilité, les concordats, la résolution d'établissements financiers, ainsi que les matières analogues ;

(f) le transport de passagers et de marchandises ;

(g) la pollution marine transfrontière, la pollution marine dans les zones ne relevant pas de la juridiction nationale, la pollution marine causée par les navires, la limitation de responsabilité pour des demandes en matière maritime, ainsi que les avaries communes ;

(h) la responsabilité pour les dommages nucléaires ;

(i) la validité, la nullité ou la dissolution des personnes morales ou des associations entre personnes physiques ou personnes morales, ainsi que la validité des décisions de leurs organes ;

(j) la validité des inscriptions sur les registres publics ;

(k) la diffamation ;

(l) le droit à la vie privée ;

(m) la propriété intellectuelle ;

(n) les activités des forces armées, y compris celles de leur personnel dans l'exercice de ses fonctions officielles ;

(o) les activités relatives au maintien de l'ordre, y compris celles du personnel chargé du maintien de l'ordre dans l'exercice de ses fonctions officielles ;

(p) les entraves à la concurrence, sauf lorsque le jugement porte sur un comportement qui constitue un accord anticoncurrentiel ou une pratique concertée entre concurrents réels ou potentiels visant à fixer les prix, procéder à des soumissions concertées, établir des restrictions ou des quotas à la production, ou diviser des marchés par répartition de la clientèle, de fournisseurs, de territoires ou de lignes d'activité, et lorsque ce comportement et ses effets se sont tous deux produits dans l'État d'origine ;

(q) la restructuration de la dette souveraine par des mesures étatiques unilatérales.

2 Un jugement n'est pas exclu du champ d'application de la présente Convention lorsqu'une question relevant d'une matière à laquelle elle ne s'applique pas est soulevée seulement à titre préalable et non comme objet du litige. En particulier, le seul fait qu'une telle matière ait été invoquée dans le cadre d'un moyen de défense n'exclut pas le jugement du champ d'application de la Convention, si cette question n'était pas un objet du litige.

3 La présente Convention ne s'applique pas à l'arbitrage et aux procédures y afférentes.

4 Un jugement n'est pas exclu du champ d'application de la présente Convention du seul fait qu'un État, y compris un gouvernement, une agence gouvernementale ou toute personne agissant pour le compte d'un État, était partie au litige.

(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, resolution of financial institutions, and analogous matters;

(f) the carriage of passengers and goods;

(g) transboundary marine pollution, marine pollution in areas beyond national jurisdiction, ship-source marine pollution, limitation of liability for maritime claims, and general average;

(h) liability for nuclear damage;

(i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs;

(j) the validity of entries in public registers;

(k) defamation;

(l) privacy;

(m) intellectual property;

(n) activities of armed forces, including the activities of their personnel in the exercise of their official duties;

(o) law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties;

(p) anti-trust (competition) matters, except where the judgment is based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the State of origin;

(q) sovereign debt restructuring through unilateral State measures.

2 A judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings. In particular, the mere fact that such a matter arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.

3 This Convention shall not apply to arbitration and related proceedings.

4 A judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings.

5 La présente Convention n'affecte pas les privilèges et immunités dont jouissent les États ou les organisations internationales, pour eux-mêmes et pour leurs biens.

Article 3
*Définitions*

1 Au sens de la présente Convention :

(a) le terme « défendeur » signifie la personne contre laquelle la demande ou la demande reconventionnelle a été introduite dans l'État d'origine ;

(b) le terme « jugement » signifie toute décision sur le fond rendue par un tribunal, quelle que soit la dénomination donnée à cette décision, telle qu'un arrêt ou une ordonnance, de même que la fixation des frais et dépens du procès par le tribunal (y compris le greffier du tribunal), à condition qu'elle ait trait à une décision sur le fond susceptible d'être reconnue ou exécutée en vertu de la présente Convention. Les mesures provisoires et conservatoires ne sont pas des jugements.

2 Une entité ou une personne autre qu'une personne physique est réputée avoir sa résidence habituelle dans l'État :

(a) de son siège statutaire ;

(b) selon le droit duquel elle a été constituée ;

(c) de son administration centrale ; ou

(d) de son principal établissement.

CHAPITRE II – RECONNAISSANCE ET EXÉCUTION

Article 4
*Dispositions générales*

1 Un jugement rendu par un tribunal d'un État contractant (État d'origine) est reconnu et exécuté dans un autre État contractant (État requis) conformément aux dispositions du présent chapitre. La reconnaissance ou l'exécution ne peut être refusée qu'aux motifs énoncés dans la présente Convention.

2 Le jugement ne peut pas faire l'objet d'une révision au fond dans l'État requis. Il ne peut y avoir d'appréciation qu'au regard de ce qui est nécessaire pour l'application de la présente Convention.

3 Un jugement n'est reconnu que s'il produit ses effets dans l'État d'origine et n'est exécuté que s'il est exécutoire dans l'État d'origine.

4 La reconnaissance ou l'exécution peut être différée ou refusée si le jugement visé au paragraphe 3 fait l'objet d'un recours dans l'État d'origine ou si le délai pour exercer un recours ordinaire n'a pas expiré. Un tel refus n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.

Article 5
*Fondements de la reconnaissance et de l'exécution*

1 Un jugement est susceptible d'être reconnu et exécuté si l'une des exigences suivantes est satisfaite :

5 Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3
*Definitions*

1 In this Convention –

(a) "defendant" means a person against whom the claim or counterclaim was brought in the State of origin;

(b) "judgment" means any decision on the merits given by a court, whatever that decision 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 the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

2 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 the law of which it was incorporated or formed;

(c) where it has its central administration; or

(d) where it has its principal place of business.

CHAPTER II – RECOGNITION AND ENFORCEMENT

Article 4
*General provisions*

1 A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

2 There shall be no review of the merits of the judgment in the requested State. There may only be such consideration as is necessary for the application of this Convention.

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 a judgment referred to under paragraph 3 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 5
*Bases for recognition and enforcement*

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

(a) la personne contre laquelle la reconnaissance ou l'exécution est demandée avait sa résidence habituelle dans l'État d'origine lorsqu'elle est devenue partie à la procédure devant le tribunal d'origine ;

(b) la personne physique contre laquelle la reconnaissance ou l'exécution est demandée avait son établissement professionnel principal dans l'État d'origine lorsqu'elle est devenue partie à la procédure devant le tribunal d'origine et la demande à l'origine du jugement portait sur son activité professionnelle ;

(c) la personne contre laquelle la reconnaissance ou l'exécution est demandée est celle qui a saisi le tribunal de la demande, autre que reconventionnelle, à l'origine du jugement ;

(d) le défendeur avait une succursale, une agence ou tout autre établissement sans personnalité juridique propre dans l'État d'origine, au moment où il est devenu une partie à la procédure devant le tribunal d'origine, et la demande à l'origine du jugement résultait des activités de cette succursale, de cette agence ou de cet établissement ;

(e) le défendeur a expressément consenti à la compétence du tribunal d'origine au cours de la procédure dans laquelle le jugement a été rendu ;

(f) le défendeur a fait valoir ses arguments sur le fond devant le tribunal d'origine sans en contester la compétence dans les délais prescrits par le droit de l'État d'origine, à moins qu'il ne soit évident qu'une contestation de la compétence ou de son exercice aurait échoué en vertu de ce droit ;

(g) le jugement porte sur une obligation contractuelle et a été rendu par un tribunal de l'État dans lequel l'obligation a été ou aurait dû être exécutée, conformément :

(i) à l'accord des parties, ou,

(ii) à la loi applicable au contrat, à défaut d'un accord sur le lieu d'exécution,

sauf si les activités du défendeur en relation avec la transaction ne présentaient manifestement pas de lien intentionnel et substantiel avec cet État ;

(h) le jugement porte sur un bail immobilier et a été rendu par un tribunal de l'État où est situé l'immeuble ;

(i) le jugement rendu contre le défendeur porte sur une obligation contractuelle garantie par un droit réel relatif à un immeuble situé dans l'État d'origine, à condition qu'une demande contractuelle concernant ce droit réel ait également été dirigée contre ce défendeur;

(j) le jugement porte sur une obligation non contractuelle résultant d'un décès, d'un dommage corporel, d'un dommage subi par un bien corporel ou de la perte d'un bien corporel et l'acte ou l'omission directement à l'origine du dommage a été commis dans l'État d'origine, quel que soit le lieu où le dommage est survenu ;

(k) le jugement porte sur la validité, l'interprétation, les effets, l'administration ou la modification d'un trust constitué volontairement et documenté par écrit, et :

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

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

(c) the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;

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

(e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;

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

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

(i) the agreement of the parties, or

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

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

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

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

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

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

(i) au moment de l'introduction de l'instance, l'État d'origine était celui désigné dans l'acte constitutif du trust comme étant un État dont les tribunaux sont appelés à trancher les litiges relatifs à ces questions ; ou

(ii) au moment de l'introduction de l'instance, l'État d'origine était celui désigné, de façon expresse ou implicite, dans l'acte constitutif du trust comme étant l'État dans lequel est situé le lieu principal d'administration du trust.

Le présent alinéa ne s'applique qu'aux jugements portant sur des aspects internes d'un trust, entre personnes étant ou ayant été au sein de la relation établie par le trust ;

(l) le jugement porte sur une demande reconventionnelle :

(i) dans la mesure où il est rendu en faveur du demandeur reconventionnel, à condition que cette demande porte sur la même transaction ou les mêmes faits que la demande principale ;

(ii) dans la mesure où il est rendu contre le demandeur reconventionnel, sauf si le droit de l'État d'origine exigeait une demande reconventionnelle à peine de forclusion ;

(m) le jugement a été rendu par un tribunal désigné dans un accord conclu ou documenté par écrit ou par tout autre moyen de communication qui rende l'information accessible pour être consultée ultérieurement, autre qu'un accord exclusif d'élection de for.

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

2 Si la reconnaissance ou l'exécution est requise contre une personne physique agissant principalement dans un but personnel, familial ou domestique (un consommateur) en matière de contrat de consommation, ou contre un employé relativement à son contrat de travail :

(a) l'alinéa (e) du paragraphe premier ne s'applique que si le consentement a été donné devant le tribunal, que ce soit oralement ou par écrit ;

(b) les alinéas (f), (g) et (m) du paragraphe premier ne s'appliquent pas.

3 Le paragraphe premier ne s'applique pas à un jugement portant sur un bail immobilier résidentiel ou sur l'enregistrement d'un immeuble. Un tel jugement est susceptible d'être reconnu et exécuté uniquement s'il a été rendu par un tribunal de l'État où est situé l'immeuble.

Article 6
*Fondement exclusif de la reconnaissance et de l'exécution*

Nonobstant l'article 5, un jugement portant sur des droits réels immobiliers n'est reconnu ou exécuté que si l'immeuble est situé dans l'État d'origine.

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

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

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

(l) the judgment ruled on a counterclaim –

(i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim;

(ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;

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

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

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

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

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

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

Article 6
*Exclusive basis for recognition and enforcement*

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

Article 7
*Refus de reconnaissance ou d'exécution*

1 La reconnaissance ou l'exécution peut être refusée si :

(a) l'acte introductif d'instance ou un acte équivalent contenant les éléments essentiels de la demande :

(i) n'a pas été notifié au défendeur en temps utile et de telle manière qu'il puisse organiser sa défense, à moins que le défendeur ait comparu et présenté sa défense sans contester la notification devant le tribunal d'origine, à condition que le droit de l'État d'origine permette de contester la notification ; ou

(ii) a été notifié au défendeur dans l'État requis de manière incompatible avec les principes fondamentaux de l'État requis relatifs à la notification de documents ;

(b) le jugement résulte d'une fraude ;

(c) la reconnaissance ou l'exécution est manifestement incompatible avec l'ordre public de l'État requis, notamment dans le cas où la procédure appliquée en l'espèce pour obtenir le jugement était incompatible avec les principes fondamentaux d'équité procédurale de cet État et en cas d'atteinte à la sécurité ou à la souveraineté de cet État ;

(d) la procédure devant le tribunal d'origine était contraire à un accord, ou à une clause figurant dans l'acte constitutif d'un trust, en vertu duquel le litige en question devait être tranché par un tribunal d'un État autre que l'État d'origine ;

(e) le jugement est incompatible avec un jugement rendu par un tribunal de l'État requis dans un litige entre les mêmes parties ; ou

(f) le jugement est incompatible avec un jugement rendu antérieurement par un tribunal d'un autre État entre les mêmes parties dans un litige ayant le même objet, lorsque le jugement rendu antérieurement réunit les conditions nécessaires à sa reconnaissance dans l'État requis.

2 La reconnaissance ou l'exécution peut être différée ou refusée si une procédure ayant le même objet est pendante entre les mêmes parties devant un tribunal de l'État requis lorsque :

(a) ce dernier a été saisi avant le tribunal de l'État d'origine ; et

(b) il existe un lien étroit entre le litige et l'État requis.

Le refus visé au présent paragraphe n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.

Article 8
*Questions préalables*

1 Une décision rendue à titre préalable sur une matière à laquelle la présente Convention ne s'applique pas, ou sur une matière visée à l'article 6 par un tribunal d'un État autre que celui désigné dans cette disposition, n'est pas reconnue ou exécutée en vertu de la présente Convention.

Article 7
*Refusal of recognition or enforcement*

1 Recognition or enforcement may be refused if –

(a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim –

(i) was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence, unless the defendant entered an appearance and presented their case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

(ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

(b) the judgment was obtained by fraud;

(c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State;

(d) the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court of a State other than the State of origin;

(e) the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties; or

(f) the judgment is inconsistent with an earlier judgment given by a court of another State between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

2 Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –

(a) the court of the requested State was seised before the court of origin; and

(b) there is a close connection between the dispute and the requested State.

A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 8
*Preliminary questions*

1 A ruling on a preliminary question shall not be recognised or enforced under this Convention if the ruling is on a matter to which this Convention does not apply or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.

2 La reconnaissance ou l'exécution d'un jugement peut être refusée si, et dans la mesure où, le jugement est fondé sur une décision relative à une matière à laquelle la présente Convention ne s'applique pas, ou sur une décision relative à une matière visée à l'article 6 qui a été rendue par un tribunal d'un État autre que celui désigné dans cette disposition.

Article 9
*Divisibilité*

La reconnaissance ou l'exécution d'une partie dissociable d'un jugement est accordée si la reconnaissance ou l'exécution de cette partie est demandée ou si seule une partie du jugement peut être reconnue ou exécutée en vertu de la présente Convention.

Article 10
*Dommages et intérêts*

1 La reconnaissance ou l'exécution d'un jugement peut être refusée si, et dans la mesure où, le jugement accorde des dommages et intérêts, y compris des dommages et intérêts exemplaires ou punitifs, qui ne compensent pas une partie pour la perte ou le préjudice réels subis.

2 Le tribunal requis prend en considération si, et dans quelle mesure, le montant accordé à titre de dommages et intérêts par le tribunal d'origine est destiné à couvrir les frais et dépens du procès.

Article 11
*Transactions judiciaires*

Les transactions judiciaires homologuées par un tribunal d'un État contractant, ou qui ont été conclues au cours d'une instance devant un tribunal d'un État contractant, et qui sont exécutoires au même titre qu'un jugement dans l'État d'origine, sont exécutées en vertu de la présente Convention aux mêmes conditions qu'un jugement.

Article 12
*Pièces à produire*

1 La partie qui requiert la reconnaissance ou qui demande l'exécution produit :

(a) une copie complète et certifiée conforme du jugement ;

(b) si le jugement a été rendu par défaut, l'original ou une copie certifiée conforme du document attestant que l'acte introductif d'instance ou un acte équivalent a été notifié à la partie défaillante ;

(c) tout document nécessaire pour établir que le jugement produit ses effets dans l'État d'origine ou, le cas échéant, qu'il est exécutoire dans cet État ;

(d) dans le cas prévu à l'article 11, un certificat délivré par un tribunal (y compris par une personne autorisée du tribunal) de l'État d'origine attestant que la transaction judiciaire est exécutoire, en tout ou en partie, aux mêmes conditions qu'un jugement dans l'État d'origine.

2 Si le contenu du jugement ne permet pas au tribunal requis de vérifier que les conditions du présent chapitre sont remplies, ce tribunal peut exiger tout document nécessaire.

2 Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply, or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.

Article 9
*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 10
*Damages*

1 Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.

2 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
*Judicial settlements (*transactions judiciaires*)*

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, 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.

Article 12
*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 given 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) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;

(d) in the case referred to in Article 11, a certificate of a court (including an officer of the court) of the State of origin stating that the judicial settlement or a part of it is enforceable in the same manner as a judgment 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 any necessary documents.

3 Une demande de reconnaissance ou d'exécution peut être accompagnée d'un document relatif au jugement, délivré par un tribunal (y compris par une personne autorisée du tribunal) de l'État d'origine, sous la forme recommandée et publiée par la Conférence de La Haye de droit international privé.

4 Si les documents mentionnés dans le présent article ne sont pas rédigés dans une langue officielle de l'État requis, ils doivent être accompagnés d'une traduction certifiée dans une langue officielle, sauf si le droit de l'État requis en dispose autrement.

Article 13
*Procédure*

1 La procédure tendant à obtenir la reconnaissance, l'exequatur ou l'enregistrement aux fins d'exécution, et l'exécution du jugement sont régies par le droit de l'État requis sauf si la présente Convention en dispose autrement. Le tribunal requis agit avec célérité.

2 Le tribunal de l'État requis ne peut refuser de reconnaître ou d'exécuter un jugement en vertu de la présente Convention au motif que la reconnaissance ou l'exécution devrait être requise dans un autre État.

Article 14
*Frais de procédure*

1 Aucune sûreté, caution ou dépôt, sous quelque dénomination que ce soit, ne peut être imposée en raison, soit de sa seule qualité d'étranger, soit du seul défaut de domicile ou de résidence dans l'État requis, à la partie qui demande l'exécution dans un État contractant d'une décision rendue par un tribunal d'un autre État contractant.

2 Toute condamnation aux frais et dépens, rendue dans un État contractant contre toute personne dispensée du versement d'une sûreté, d'une caution ou d'un dépôt en vertu du paragraphe premier ou du droit de l'État dans lequel l'instance a été introduite est, à la demande du créancier, déclarée exécutoire dans tout autre État contractant.

3 Un État peut déclarer qu'il n'appliquera pas le paragraphe premier ou désigner dans une déclaration lesquels de ses tribunaux ne l'appliqueront pas.

Article 15
*Reconnaissance et exécution en application du droit national*

Sous réserve de l'article 6, la présente Convention ne fait pas obstacle à la reconnaissance ou à l'exécution d'un jugement en application du droit national.

CHAPITRE III – CLAUSES GÉNÉRALES

Article 16
*Disposition transitoire*

La présente Convention s'applique à la reconnaissance et à l'exécution de jugements si, au moment de l'introduction de l'instance dans l'État d'origine, la Convention produisait des effets entre cet État et l'État requis.

3 An application for recognition or enforcement may be accompanied by a document relating to the judgment, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.

4 If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 13
*Procedure*

1 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.

2 The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

Article 14
*Costs of proceedings*

1 No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given by a court of another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.

2 An order for payment of costs or expenses of proceedings, made in a Contracting State against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 or of the law of the State where proceedings have been instituted, shall, on the application of the person entitled to the benefit of the order, be rendered enforceable in any other Contracting State.

3 A State may declare that it shall not apply paragraph 1 or designate by a declaration which of its courts shall not apply paragraph 1.

Article 15
*Recognition and enforcement under national law*

Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.

CHAPTER III – GENERAL CLAUSES

Article 16
*Transitional provision*

This Convention shall apply to the recognition and enforcement of judgments if, at the time the proceedings were instituted in the State of origin, the Convention had effect between that State and the requested State.

Article 17
*Déclarations limitant la reconnaissance et l'exécution*

Un État peut déclarer que ses tribunaux peuvent refuser de reconnaître ou d'exécuter un jugement rendu par un tribunal d'un autre État contractant, lorsque les parties avaient leur résidence dans l'État requis et que les relations entre les parties, ainsi que tous les autres éléments pertinents du litige, autres que le lieu du tribunal d'origine, étaient liés uniquement à l'État requis.

Article 18
*Déclarations relatives à des matières particulières*

1 Lorsqu'un État a un intérêt important à ne pas appliquer la présente Convention à une matière particulière, il peut déclarer qu'il ne l'appliquera pas à cette matière. L'État qui fait une telle déclaration s'assure que la portée de celle-ci n'est pas plus étendue que nécessaire et que la matière particulière exclue est définie de façon claire et précise.

2 À l'égard d'une telle matière, la Convention ne s'applique pas :

(a) dans l'État contractant ayant fait la déclaration ;

(b) dans les autres États contractants, lorsque la reconnaissance ou l'exécution d'un jugement rendu par un tribunal d'un État contractant ayant fait la déclaration est demandée.

Article 19
*Déclarations relatives aux jugements concernant des gouvernements*

1 Un État peut déclarer qu'il n'appliquera pas la présente Convention aux jugements issus de procédures auxquelles est partie :

(a) cet État ou une personne physique agissant pour celui-ci ; ou

(b) une agence gouvernementale de cet État ou toute personne physique agissant pour celle-ci.

L'État qui fait une telle déclaration s'assure que la portée de celle-ci n'est pas plus étendue que nécessaire et que l'exclusion du champ d'application y est définie de façon claire et précise. La déclaration ne peut pas faire de distinction selon que l'État, une agence gouvernementale de cet État ou une personne physique agissant pour l'un ou l'autre est le défendeur ou le demandeur à la procédure devant le tribunal d'origine[, ou est la partie qui demande la reconnaissance ou l'exécution ou la partie contre laquelle la reconnaissance ou l'exécution est demandée].

2 La reconnaissance ou l'exécution d'un jugement rendu par un tribunal d'un État qui a fait une déclaration en vertu du paragraphe premier peut être refusée si le jugement est issu d'une procédure à laquelle est partie l'État qui a fait la déclaration ou l'État requis, l'une de leurs agences gouvernementales ou une personne physique agissant pour l'un d'entre eux, dans les limites prévues par cette déclaration.

Article 20
*Interprétation uniforme*

Aux fins de l'interprétation de la présente Convention, il sera tenu compte de son caractère international et de la nécessité de promouvoir l'uniformité de son application.

Article 17
*Declarations limiting recognition and enforcement*

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the court of origin, were connected only with the requested State.

Article 18
*Declarations with respect to specific matters*

1 Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

2 With regard to that matter, the Convention shall not apply –

(a) in the Contracting State that made the declaration;

(b) in other Contracting States, where recognition or enforcement of a judgment given by a court of a Contracting State that made the declaration is sought.

Article 19
*Declarations with respect to judgments pertaining to governments*

1 A State may declare that it shall not apply this Convention to judgments arising from proceedings to which any of the following is a party –

(a) that State, or a natural person acting for that State, or

(b) a government agency of that State, or a natural person acting for such a government agency.

The State making such a declaration shall ensure that the declaration is no broader than necessary and that the exclusion from scope is clearly and precisely defined. The declaration shall not distinguish between judgments where the State, a government agency of that State or a natural person acting for either of them is a defendant or claimant in the proceedings before the court of origin[, or is the party seeking recognition or enforcement or the party against whom recognition or enforcement is sought in the requested State].

2 Recognition or enforcement of a judgment given by a court of a State that made a declaration pursuant to paragraph 1 may be refused if the judgment arose from proceedings to which either the State that made the declaration or the requested State, one of their government agencies or a natural person acting for either of them is a party, to the same extent as specified in the declaration.

Article 20
*Uniform interpretation*

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

Article 21
*Examen du fonctionnement de la Convention*

Le Secrétaire général de la Conférence de La Haye de droit international privé prend périodiquement des dispositions en vue de l'examen du fonctionnement de la présente Convention, y compris de toute déclaration, et en fait rapport au Conseil sur les affaires générales et la politique.

Article 22
*Systèmes juridiques non unifiés*

1 Au regard d'un État contractant dans lequel deux ou plusieurs systèmes de droit ayant trait aux questions régies par la présente Convention s'appliquent dans des unités territoriales différentes :

(a) toute référence à la loi, au droit ou à la procédure d'un État vise, le cas échéant, la loi, le droit ou la procédure en vigueur dans l'unité territoriale considérée ;

(b) toute référence au tribunal ou aux tribunaux d'un État vise, le cas échéant, le tribunal ou les tribunaux de l'unité territoriale considérée ;

(c) toute référence au lien avec un État vise, le cas échéant, le lien avec l'unité territoriale considérée ;

(d) toute référence à un facteur de rattachement à l'égard d'un État vise, le cas échéant, ce facteur de rattachement à l'égard de l'unité territoriale considérée.

2 Nonobstant le paragraphe premier, un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu d'appliquer la présente Convention aux situations qui impliquent uniquement ces différentes unités territoriales.

3 Un tribunal d'une unité territoriale d'un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu de reconnaître ou d'exécuter un jugement d'un autre État contractant au seul motif que le jugement a été reconnu ou exécuté dans une autre unité territoriale du même État contractant selon la présente Convention.

4 Le présent article ne s'applique pas à une Organisation régionale d'intégration économique.

Article 23
*Rapport avec d'autres instruments internationaux*

1 La présente Convention doit être interprétée de façon qu'elle soit, autant que possible, compatible avec d'autres traités en vigueur pour les États contractants, conclus avant ou après cette Convention.

2 La présente Convention n'affecte pas l'application par un État contractant d'un traité conclu avant cette Convention.

3 La présente Convention n'affecte pas l'application par un État contractant d'un traité conclu après cette Convention en ce qui a trait à la reconnaissance ou à l'exécution d'un jugement rendu par un tribunal d'un État contractant qui est également Partie à ce traité. Aucune disposition de l'autre traité n'affecte les obligations prévues à l'article 6 à l'égard des États contractants qui ne sont pas Parties à ce traité.

Article 21
*Review of operation of the Convention*

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for review of the operation of this Convention, including any declarations, and shall report to the Council on General Affairs and Policy.

Article 22
*Non-unified legal systems*

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, where appropriate, to the law or procedure in force in the relevant territorial unit;

(b) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;

(c) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit;

(d) any reference to a connecting factor in relation to a State shall be construed as referring, where appropriate, to that connecting factor in relation to the relevant territorial unit.

2 Notwithstanding paragraph 1, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

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

4 This Article shall not apply to a Regional Economic Integration Organisation.

Article 23
*Relationship with other international instruments*

1 This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2 This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention.

3 This Convention shall not affect the application by a Contracting State of a treaty concluded after this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. Nothing in the other treaty shall affect the obligations under Article 6 towards Contracting States that are not Parties to that treaty.

4 La présente Convention n'affecte pas l'application des règles d'une Organisation régionale d'intégration économique Partie à cette Convention en ce qui a trait à la reconnaissance ou à l'exécution d'un jugement rendu par un tribunal d'un État contractant qui est également un État membre de l'Organisation régionale d'intégration économique lorsque :

(a) ces règles ont été adoptées avant la conclusion de la présente Convention ; ou

(b) ces règles ont été adoptées après la conclusion de la présente Convention, dans la mesure où elles n'affectent pas les obligations découlant de l'article 6 à l'égard des États contractants qui ne sont pas des États membres de l'Organisation régionale d'intégration économique.

CHAPITRE IV – CLAUSES FINALES

Article 24
*Signature, ratification, acceptation, approbation ou adhésion*

1 La présente Convention est ouverte à la signature de tous les États.

2 La présente Convention est sujette à la ratification, à l'acceptation ou à l'approbation par les États signataires.

3 Tout État peut adhérer à la présente Convention.

4 Les instruments de ratification, d'acceptation, d'approbation ou d'adhésion sont déposés auprès du Ministère des Affaires étrangères du Royaume des Pays-Bas, dépositaire de la Convention.

Article 25
*Déclarations relatives aux systèmes juridiques non unifiés*

1 Un État qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par la présente Convention peut déclarer que la Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles. La déclaration indique expressément les unités territoriales auxquelles la Convention s'applique.

2 Si un État ne fait pas de déclaration en vertu du présent article, la Convention s'applique à l'ensemble du territoire de cet État.

3 Le présent article ne s'applique pas à une Organisation régionale d'intégration économique.

Article 26
*Organisations régionales d'intégration économique*

1 Une Organisation régionale d'intégration économique constituée seulement par des États souverains et ayant compétence sur certaines ou toutes les matières régies par la présente Convention peut signer, accepter, approuver cette Convention ou y adhérer. En pareil cas, l'Organisation régionale d'intégration économique aura les mêmes droits et obligations qu'un État contractant, dans la mesure où cette Organisation a compétence sur des matières régies par la présente Convention.

4 This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Member State of the Regional Economic Integration Organisation where –

(a) the rules were adopted before this Convention was concluded; or

(b) the rules were adopted after this Convention was concluded, to the extent that they do not affect the obligations under Article 6 towards Contracting States that are not Member States of the Regional Economic Integration Organisation.

CHAPTER IV – FINAL CLAUSES

Article 24
*Signature, ratification, acceptance, approval or accession*

1 This Convention shall be open for signature by all States.

2 This Convention is subject to ratification, acceptance or approval by the signatory States.

3 This Convention shall be open for accession by all States.

4 Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 25
*Declarations with respect to non-unified legal systems*

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 declare that the Convention shall extend to all its territorial units or only to one or more of them. Such a declaration shall state expressly the territorial units to which the Convention applies.

2 If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.

3 This Article shall not apply to a Regional Economic Integration Organisation.

Article 26
*Regional Economic Integration Organisations*

1 A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

2 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, l'Organisation régionale d'intégration économique notifie au dépositaire, par écrit, les matières régies par la présente Convention pour lesquelles ses États membres lui ont transféré leur compétence. L'Organisation notifie aussitôt au dépositaire, par écrit, toute modification intervenue dans la délégation de compétence précisée dans la notification la plus récente faite en vertu du présent paragraphe.

3 Aux fins de l'entrée en vigueur de la présente Convention, tout instrument déposé par une Organisation régionale d'intégration économique n'est pas compté, à moins que l'Organisation régionale d'intégration économique déclare, en vertu de l'article 27(1), que ses États membres ne seront pas Parties à cette Convention.

4 Toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, à une Organisation régionale d'intégration économique.

Article 27
*Organisation régionale d'intégration économique en tant que Partie contractante sans ses États membres*

1 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, une Organisation régionale d'intégration économique peut déclarer qu'elle a compétence pour toutes les matières régies par la présente Convention et que ses États membres ne seront pas Parties à cette Convention mais seront liés par celle-ci en raison de la signature, de l'acceptation, de l'approbation ou de l'adhésion de l'Organisation.

2 Lorsqu'une déclaration est faite par une Organisation régionale d'intégration économique en conformité avec le paragraphe premier, toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, aux États membres de l'Organisation.

Article 28
*Entrée en vigueur*

1 La présente Convention entre en vigueur le premier jour du mois suivant l'expiration d'une période de trois mois après le dépôt du deuxième instrument de ratification, d'acceptation, d'approbation ou d'adhésion visé à l'article 24.

2 Par la suite, la présente Convention entre en vigueur :

(a) pour chaque État ou Organisation régionale d'intégration économique la ratifiant, l'acceptant, l'approuvant ou y adhérant postérieurement, le premier jour du mois suivant l'expiration de la période pendant laquelle des notifications peuvent être faites en vertu de l'article 29(2) ;

(b) pour les unités territoriales auxquelles la présente Convention a été étendue conformément à l'article 25, le premier jour du mois suivant l'expiration d'une période de trois mois après la notification de la déclaration visée par ledit article.

Article 29
*Établissement de relations en vertu de la Convention*

1 La Convention ne produit des effets entre deux États contractants que si aucun d'entre eux n'a transmis de notification au dépositaire à l'égard de l'autre conformément aux paragraphes 2 ou 3.

2 The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3 For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 27(1), that its Member States will not be Parties to this Convention.

4 Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation.

Article 27
*Regional Economic Integration Organisation as a Contracting Party without its Member States*

1 At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

2 In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 28
*Entry into force*

1 This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 24.

2 Thereafter this Convention shall enter into force –

(a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of the period during which notifications may be made in accordance with Article 29(2);

(b) for a territorial unit to which this Convention has been extended in accordance with Article 25, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 29
*Establishment of relations pursuant to the Convention*

1 The Convention shall have effect between two Contracting States only if neither of them has notified the depositary regarding the other in accordance with paragraph 2 or 3.

2 Un État contractant peut notifier au dépositaire, dans les 12 mois suivant la notification par le dépositaire visée à l'article 32(a), que la ratification, l'acceptation, l'approbation ou l'adhésion d'un autre État n'aura pas pour effet d'établir des relations entre ces deux États en vertu de la Convention.

3 Un État peut notifier au dépositaire, lors du dépôt de son instrument en vertu de l'article 24(4), que sa ratification, son acceptation, son approbation ou son adhésion n'aura pas pour effet d'établir des relations avec un État contractant en vertu de la Convention.

4 Un État contractant peut à tout moment retirer une notification qu'il a faite en vertu des paragraphes 2 ou 3. Ce retrait prendra effet le premier jour du mois suivant l'expiration d'une période de trois mois à compter de la date de notification.

Article 30
*Déclarations*

1 Les déclarations visées aux articles 14, 17, 18, 19 et 25 peuvent être faites lors de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion ou à tout moment ultérieur et être modifiées ou retirées à tout moment.

2 Les déclarations, modifications et retraits sont notifiés au dépositaire.

3 Une déclaration faite au moment de la signature, de la ratification, de l'acceptation, de l'approbation de la présente Convention ou de l'adhésion à celle-ci prend effet au moment de l'entrée en vigueur de la Convention pour l'État concerné.

4 Une déclaration faite ultérieurement, ainsi que toute modification ou tout retrait d'une déclaration, prend effet le premier jour du mois suivant l'expiration d'une période de trois mois après la date de réception de la notification par le dépositaire.

5 Une déclaration faite ultérieurement, ainsi que toute modification ou tout retrait d'une déclaration, ne produit pas d'effet à l'égard des jugements rendus à l'issue d'instances déjà introduites devant le tribunal d'origine au moment où la déclaration prend effet.

Article 31
*Dénonciation*

1 La présente Convention peut être dénoncée par une notification écrite au dépositaire. La dénonciation peut se limiter à certaines unités territoriales d'un système juridique non unifié auxquelles s'applique la présente Convention.

2 La dénonciation prend effet le premier jour du mois suivant l'expiration d'une période de 12 mois après la date de réception de la notification par le dépositaire. Lorsqu'une période plus longue pour la prise d'effet de la dénonciation est précisée dans la notification, la dénonciation prend effet à l'expiration de la période en question après la date de réception de la notification par le dépositaire.

Article 32
*Notifications par le dépositaire*

Le dépositaire notifie aux Membres de la Conférence de La Haye de droit international privé, ainsi qu'aux autres États et aux Organisations régionales d'intégration économique qui ont signé, ratifié, accepté, approuvé la présente Con-

2 A Contracting State may notify the depositary, within 12 months after the notification by the depositary referred to in Article 32(a), that the ratification, acceptance, approval or accession of another State shall not have the effect of establishing relations between the two States pursuant to the Convention.

3 A State may notify the depositary, upon the deposit of its instrument pursuant to Article 24(4), that its ratification, acceptance, approval or accession shall not have the effect of establishing relations with a Contracting State pursuant to the Convention.

4 A Contracting State may at any time withdraw a notification that it has made under paragraph 2 or 3. Such a withdrawal shall take effect on the first day of the month following the expiration of three months following the date of notification.

Article 30
*Declarations*

1 Declarations referred to in Articles 14, 17, 18, 19 and 25 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2 Declarations, modifications and withdrawals shall be notified to the depositary.

3 A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months following the date on which the notification is received by the depositary.

5 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall not apply to judgments resulting from proceedings that have already been instituted before the court of origin when the declaration takes effect.

Article 31
*Denunciation*

1 This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2 The denunciation shall take effect on the first day of the month following the expiration of 12 months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 32
*Notifications by the depositary*

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded to this Con-

vention ou y ont adhéré conformément aux articles 24, 26 et 27 les renseignements suivants :

(a) les signatures, ratifications, acceptations, approbations et adhésions prévues aux articles 24, 26 et 27 ;

(b) la date d'entrée en vigueur de la présente Convention conformément à l'article 28 ;

(c) les notifications, déclarations, modifications et retraits prévus aux articles 26, 27, 29 et 30 ; et

(d) les dénonciations prévues à l'article 31.

En foi de quoi, les soussignés, dûment autorisés, ont signé la présente Convention.

Fait à La Haye, le 2 juillet 2019, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement du Royaume des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Membres de la Conférence de La Haye de droit international privé lors de sa Vingt-deuxième session ainsi qu'à chacun des autres États ayant participé à cette Session.

vention in accordance with Articles 24, 26 and 27 of the following –

(a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 24, 26 and 27;

(b) the date on which this Convention enters into force in accordance with Article 28;

(c) the notifications, declarations, modifications and withdrawals referred to in Articles 26, 27, 29 and 30; and

(d) the denunciations referred to in Article 31.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 2nd day of July 2019, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Members of the Hague Conference on Private International Law at its Twenty-Second Session and to each of the other States which have participated in that Session.

*Distribué le samedi 29 juin 2019*

**No 92 REV – Proposition du Comité de rédaction***

Les Parties contractantes à la présente Convention,

Désireuses de promouvoir un accès effectif de tous à la justice et de faciliter le commerce et l'investissement multilatéral fondés sur des règles, ainsi que la mobilité par le biais de la coopération judiciaire,

Estimant que cette coopération peut être renforcée par la mise en place d'un ensemble uniforme de règles fondamentales sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale, afin de faciliter la reconnaissance et l'exécution effectives de ces jugements,

Convaincues que cette coopération judiciaire renforcée nécessite notamment un régime juridique international offrant une plus grande prévisibilité et sécurité en matière de circulation des jugements étrangers à l'échelle mondiale, qui soit complémentaire de la *Convention du 30 juin 2005 sur les accords d'élection de for*,

Ont résolu de conclure la présente Convention à cet effet et sont convenues des dispositions suivantes :

## CHAPITRE I – CHAMP D'APPLICATION ET DÉFINITIONS

### Article premier
*Champ d'application*

1 La présente Convention s'applique à la reconnaissance et à l'exécution des jugements en matière civile ou commerciale. Elle ne recouvre notamment pas les matières fiscales, douanières ou administratives.

2 La présente Convention s'applique à la reconnaissance et à l'exécution, dans un État contractant, d'un jugement rendu par un tribunal d'un autre État contractant.

### Article 2
*Exclusions du champ d'application*

1 La présente Convention ne s'applique pas aux matières suivantes :

(a) l'état et la capacité des personnes physiques ;

(b) les obligations alimentaires ;

* Version provisoire renumérotée basée sur la version en mode suivi des modifications (« *tracked changes* ») du projet de Convention issu de la réunion du Comité de rédaction du 28 juin 2019 (Doc. trav. No 91)





*Distributed on Saturday 29 June 2019*

**No 92 REV – Proposal of the Drafting Committee***

The Contracting Parties to the present Convention,

Desiring to promote effective access to justice for all and to facilitate rule-based multilateral trade and investment, and mobility, through judicial co-operation,

Believing that such co-operation can be enhanced through the creation of a uniform set of core rules on recognition and enforcement of foreign judgments in civil or commercial matters, to facilitate the effective recognition and enforcement of such judgments,

Convinced that such enhanced judicial co-operation requires, in particular, an international legal regime that provides greater predictability and certainty in relation to the global circulation of foreign judgments, and that is complementary to the *Convention of 30 June 2005 on Choice of Court Agreements*,

Have resolved to conclude this Convention to this effect and have agreed upon the following provisions –

## CHAPTER I – SCOPE AND DEFINITIONS

### Article 1
*Scope*

1 This Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters. It shall not extend in particular to revenue, customs or administrative matters.

2 This Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State.

### Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

(a) the status and legal capacity of natural persons;

(b) maintenance obligations;

* Provisional renumbered text with provisions based on the tracked-changes version of the draft Convention produced by the Drafting Committee meeting of 28 June 2019 (Work. Doc. No 91)

(c) les autres matières du droit de la famille, y compris les régimes matrimoniaux et les autres droits ou obligations découlant du mariage ou de relations similaires ;

(d) les testaments et les successions ;

(e) l'insolvabilité, les concordats, la résolution d'établissements financiers, ainsi que les matières analogues ;

(f) le transport de passagers et de marchandises ;

(g) la pollution marine transfrontière, la pollution marine dans les zones ne relevant pas de la juridiction nationale, la pollution marine causée par les navires, la limitation de responsabilité pour des demandes en matière maritime, ainsi que les avaries communes ;

(h) la responsabilité pour les dommages nucléaires ;

(i) la validité, la nullité ou la dissolution des personnes morales ou des associations entre personnes physiques ou personnes morales, ainsi que la validité des décisions de leurs organes ;

(j) la validité des inscriptions sur les registres publics ;

(k) la diffamation ;

(l) le droit à la vie privée ;

(m) la propriété intellectuelle ;

(n) les activités des forces armées, y compris celles de leur personnel dans l'exercice de ses fonctions officielles ;

(o) les activités relatives au maintien de l'ordre, y compris celles du personnel chargé du maintien de l'ordre dans l'exercice de ses fonctions officielles ;

(p) les entraves à la concurrence, sauf lorsque le jugement porte sur un comportement qui constitue un accord anticoncurrentiel ou une pratique concertée entre concurrents réels ou potentiels visant à fixer les prix, procéder à des soumissions concertées, établir des restrictions ou des quotas à la production, ou diviser des marchés par répartition de la clientèle, de fournisseurs, de territoires ou de lignes d'activité, et lorsque ce comportement et ses effets se sont tous deux produits dans l'État d'origine ;

(q) la restructuration de la dette souveraine par des mesures étatiques unilatérales.

2 Un jugement n'est pas exclu du champ d'application de la présente Convention lorsqu'une question relevant d'une matière à laquelle elle ne s'applique pas est soulevée seulement à titre préalable et non comme objet du litige. En particulier, le seul fait qu'une telle matière ait été invoquée dans le cadre d'un moyen de défense n'exclut pas le jugement du champ d'application de la Convention, si cette question n'était pas un objet du litige.

3 La présente Convention ne s'applique pas à l'arbitrage et aux procédures y afférentes.

4 Un jugement n'est pas exclu du champ d'application de la présente Convention du seul fait qu'un État, y compris un gouvernement, une agence gouvernementale ou toute personne agissant pour le compte d'un État, était partie au litige.

(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, resolution of financial institutions, and analogous matters;

(f) the carriage of passengers and goods;

(g) transboundary marine pollution, marine pollution in areas beyond national jurisdiction, ship-source marine pollution, limitation of liability for maritime claims, and general average;

(h) liability for nuclear damage;

(i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs;

(j) the validity of entries in public registers;

(k) defamation;

(l) privacy;

(m) intellectual property;

(n) activities of armed forces, including the activities of their personnel in the exercise of their official duties;

(o) law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties;

(p) anti-trust (competition) matters, except where the judgment is based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the State of origin;

(q) sovereign debt restructuring through unilateral State measures.

2 A judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings. In particular, the mere fact that such a matter arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.

3 This Convention shall not apply to arbitration and related proceedings.

4 A judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings.

5 La présente Convention n'affecte pas les privilèges et immunités dont jouissent les États ou les organisations internationales, pour eux-mêmes et pour leurs biens.

Article 3
*Définitions*

1 Au sens de la présente Convention :

(a) le terme « défendeur » signifie la personne contre laquelle la demande ou la demande reconventionnelle a été introduite dans l'État d'origine ;

(b) le terme « jugement » signifie toute décision sur le fond rendue par un tribunal, quelle que soit la dénomination donnée à cette décision, telle qu'un arrêt ou une ordonnance, de même que la fixation des frais et dépens du procès par le tribunal (y compris le greffier du tribunal), à condition qu'elle ait trait à une décision sur le fond susceptible d'être reconnue ou exécutée en vertu de la présente Convention. Les mesures provisoires et conservatoires ne sont pas des jugements.

2 Une entité ou une personne autre qu'une personne physique est réputée avoir sa résidence habituelle dans l'État :

(a) de son siège statutaire ;

(b) selon le droit duquel elle a été constituée ;

(c) de son administration centrale ; ou

(d) de son principal établissement.

CHAPITRE II – RECONNAISSANCE ET EXÉCUTION

Article 4
*Dispositions générales*

1 Un jugement rendu par un tribunal d'un État contractant (État d'origine) est reconnu et exécuté dans un autre État contractant (État requis) conformément aux dispositions du présent chapitre. La reconnaissance ou l'exécution ne peut être refusée qu'aux motifs énoncés dans la présente Convention.

2 Le jugement ne peut pas faire l'objet d'une révision au fond dans l'État requis. Il ne peut y avoir d'appréciation qu'au regard de ce qui est nécessaire pour l'application de la présente Convention.

3 Un jugement n'est reconnu que s'il produit ses effets dans l'État d'origine et n'est exécuté que s'il est exécutoire dans l'État d'origine.

4 La reconnaissance ou l'exécution peut être différée ou refusée si le jugement visé au paragraphe 3 fait l'objet d'un recours dans l'État d'origine ou si le délai pour exercer un recours ordinaire n'a pas expiré. Un tel refus n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.

Article 5
*Fondements de la reconnaissance et de l'exécution*

1 Un jugement est susceptible d'être reconnu et exécuté si l'une des exigences suivantes est satisfaite :

5 Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3
*Definitions*

1 In this Convention –

(a) "defendant" means a person against whom the claim or counterclaim was brought in the State of origin;

(b) "judgment" means any decision on the merits given by a court, whatever that decision 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 the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

2 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 the law of which it was incorporated or formed;

(c) where it has its central administration; or

(d) where it has its principal place of business.

CHAPTER II – RECOGNITION AND ENFORCEMENT

Article 4
*General provisions*

1 A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

2 There shall be no review of the merits of the judgment in the requested State. There may only be such consideration as is necessary for the application of this Convention.

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 a judgment referred to under paragraph 3 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 5
*Bases for recognition and enforcement*

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

(a) la personne contre laquelle la reconnaissance ou l'exécution est demandée avait sa résidence habituelle dans l'État d'origine lorsqu'elle est devenue partie à la procédure devant le tribunal d'origine ;

(b) la personne physique contre laquelle la reconnaissance ou l'exécution est demandée avait son établissement professionnel principal dans l'État d'origine lorsqu'elle est devenue partie à la procédure devant le tribunal d'origine et la demande à l'origine du jugement portait sur son activité professionnelle ;

(c) la personne contre laquelle la reconnaissance ou l'exécution est demandée est celle qui a saisi le tribunal de la demande, autre que reconventionnelle, à l'origine du jugement ;

(d) le défendeur avait une succursale, une agence ou tout autre établissement sans personnalité juridique propre dans l'État d'origine, au moment où il est devenu une partie à la procédure devant le tribunal d'origine, et la demande à l'origine du jugement résultait des activités de cette succursale, de cette agence ou de cet établissement ;

(e) le défendeur a expressément consenti à la compétence du tribunal d'origine au cours de la procédure dans laquelle le jugement a été rendu ;

(f) le défendeur a fait valoir ses arguments sur le fond devant le tribunal d'origine sans en contester la compétence dans les délais prescrits par le droit de l'État d'origine, à moins qu'il ne soit évident qu'une contestation de la compétence ou de son exercice aurait échoué en vertu de ce droit ;

(g) le jugement porte sur une obligation contractuelle et a été rendu par un tribunal de l'État dans lequel l'obligation a été ou aurait dû être exécutée, conformément :

(i) à l'accord des parties, ou,

(ii) à la loi applicable au contrat, à défaut d'un accord sur le lieu d'exécution,

sauf si les activités du défendeur en relation avec la transaction ne présentaient manifestement pas de lien intentionnel et substantiel avec cet État ;

(h) le jugement porte sur un bail immobilier et a été rendu par un tribunal de l'État où est situé l'immeuble ;

(i) le jugement rendu contre le défendeur porte sur une obligation contractuelle garantie par un droit réel relatif à un immeuble situé dans l'État d'origine, à condition qu'une demande contractuelle concernant ce droit réel ait également été dirigée contre ce défendeur;

(j) le jugement porte sur une obligation non contractuelle résultant d'un décès, d'un dommage corporel, d'un dommage subi par un bien corporel ou de la perte d'un bien corporel et l'acte ou l'omission directement à l'origine du dommage a été commis dans l'État d'origine, quel que soit le lieu où le dommage est survenu ;

(k) le jugement porte sur la validité, l'interprétation, les effets, l'administration ou la modification d'un trust constitué volontairement et documenté par écrit, et :

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

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

(c) the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;

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

(e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;

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

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

(i) the agreement of the parties, or

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

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

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

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

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

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

(i) au moment de l'introduction de l'instance, l'État d'origine était celui désigné dans l'acte constitutif du trust comme étant un État dont les tribunaux sont appelés à trancher les litiges relatifs à ces questions ; ou

(ii) au moment de l'introduction de l'instance, l'État d'origine était celui désigné, de façon expresse ou implicite, dans l'acte constitutif du trust comme étant l'État dans lequel est situé le lieu principal d'administration du trust.

Le présent alinéa ne s'applique qu'aux jugements portant sur des aspects internes d'un trust, entre personnes étant ou ayant été au sein de la relation établie par le trust ;

(l) le jugement porte sur une demande reconventionnelle :

(i) dans la mesure où il est rendu en faveur du demandeur reconventionnel, à condition que cette demande porte sur la même transaction ou les mêmes faits que la demande principale ;

(ii) dans la mesure où il est rendu contre le demandeur reconventionnel, sauf si le droit de l'État d'origine exigeait une demande reconventionnelle à peine de forclusion ;

(m) le jugement a été rendu par un tribunal désigné dans un accord conclu ou documenté par écrit ou par tout autre moyen de communication qui rende l'information accessible pour être consultée ultérieurement, autre qu'un accord exclusif d'élection de for.

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

2 Si la reconnaissance ou l'exécution est requise contre une personne physique agissant principalement dans un but personnel, familial ou domestique (un consommateur) en matière de contrat de consommation, ou contre un employé relativement à son contrat de travail :

(a) l'alinéa (e) du paragraphe premier ne s'applique que si le consentement a été donné devant le tribunal, que ce soit oralement ou par écrit ;

(b) les alinéas (f), (g) et (m) du paragraphe premier ne s'appliquent pas.

3 Le paragraphe premier ne s'applique pas à un jugement portant sur un bail immobilier résidentiel ou sur l'enregistrement d'un immeuble. Un tel jugement est susceptible d'être reconnu et exécuté uniquement s'il a été rendu par un tribunal de l'État où est situé l'immeuble.

Article 6
*Fondement exclusif de la reconnaissance et de l'exécution*

Nonobstant l'article 5, un jugement portant sur des droits réels immobiliers n'est reconnu ou exécuté que si l'immeuble est situé dans l'État d'origine.

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

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

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

(l) the judgment ruled on a counterclaim –

(i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim;

(ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;

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

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

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

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

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

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

Article 6
*Exclusive basis for recognition and enforcement*

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

Article 7
*Refus de reconnaissance ou d'exécution*

1 La reconnaissance ou l'exécution peut être refusée si :

(a) l'acte introductif d'instance ou un acte équivalent contenant les éléments essentiels de la demande :

(i) n'a pas été notifié au défendeur en temps utile et de telle manière qu'il puisse organiser sa défense, à moins que le défendeur ait comparu et présenté sa défense sans contester la notification devant le tribunal d'origine, à condition que le droit de l'État d'origine permette de contester la notification ; ou

(ii) a été notifié au défendeur dans l'État requis de manière incompatible avec les principes fondamentaux de l'État requis relatifs à la notification de documents ;

(b) le jugement résulte d'une fraude ;

(c) la reconnaissance ou l'exécution est manifestement incompatible avec l'ordre public de l'État requis, notamment dans le cas où la procédure appliquée en l'espèce pour obtenir le jugement était incompatible avec les principes fondamentaux d'équité procédurale de cet État et en cas d'atteinte à la sécurité ou à la souveraineté de cet État ;

(d) la procédure devant le tribunal d'origine était contraire à un accord, ou à une clause figurant dans l'acte constitutif d'un trust, en vertu duquel le litige en question devait être tranché par un tribunal d'un État autre que l'État d'origine ;

(e) le jugement est incompatible avec un jugement rendu par un tribunal de l'État requis dans un litige entre les mêmes parties ; ou

(f) le jugement est incompatible avec un jugement rendu antérieurement par un tribunal d'un autre État entre les mêmes parties dans un litige ayant le même objet, lorsque le jugement rendu antérieurement réunit les conditions nécessaires à sa reconnaissance dans l'État requis.

2 La reconnaissance ou l'exécution peut être différée ou refusée si une procédure ayant le même objet est pendante entre les mêmes parties devant un tribunal de l'État requis lorsque :

(a) ce dernier a été saisi avant le tribunal de l'État d'origine ; et

(b) il existe un lien étroit entre le litige et l'État requis.

Le refus visé au présent paragraphe n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.

Article 8
*Questions préalables*

1 Une décision rendue à titre préalable sur une matière à laquelle la présente Convention ne s'applique pas, ou sur une matière visée à l'article 6 par un tribunal d'un État

Article 7
*Refusal of recognition or enforcement*

1 Recognition or enforcement may be refused if –

(a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim –

(i) was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence, unless the defendant entered an appearance and presented their case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

(ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

(b) the judgment was obtained by fraud;

(c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State;

(d) the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court of a State other than the State of origin;

(e) the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties; or

(f) the judgment is inconsistent with an earlier judgment given by a court of another State between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

2 Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –

(a) the court of the requested State was seised before the court of origin; and

(b) there is a close connection between the dispute and the requested State.

A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 8
*Preliminary questions*

1 A ruling on a preliminary question shall not be recognised or enforced under this Convention if the ruling is on a matter to which this Convention does not apply or on a mat-

autre que celui désigné dans cette disposition, n'est pas reconnue ou exécutée en vertu de la présente Convention.

2 La reconnaissance ou l'exécution d'un jugement peut être refusée si, et dans la mesure où, le jugement est fondé sur une décision relative à une matière à laquelle la présente Convention ne s'applique pas, ou sur une décision relative à une matière visée à l'article 6 qui a été rendue par un tribunal d'un État autre que celui désigné dans cette disposition.

Article 9
*Divisibilité*

La reconnaissance ou l'exécution d'une partie dissociable d'un jugement est accordée si la reconnaissance ou l'exécution de cette partie est demandée ou si seule une partie du jugement peut être reconnue ou exécutée en vertu de la présente Convention.

Article 10
*Dommages et intérêts*

1 La reconnaissance ou l'exécution d'un jugement peut être refusée si, et dans la mesure où, le jugement accorde des dommages et intérêts, y compris des dommages et intérêts exemplaires ou punitifs, qui ne compensent pas une partie pour la perte ou le préjudice réels subis.

2 Le tribunal requis prend en considération si, et dans quelle mesure, le montant accordé à titre de dommages et intérêts par le tribunal d'origine est destiné à couvrir les frais et dépens du procès.

Article 11
*Transactions judiciaires*

Les transactions judiciaires homologuées par un tribunal d'un État contractant, ou qui ont été conclues au cours d'une instance devant un tribunal d'un État contractant, et qui sont exécutoires au même titre qu'un jugement dans l'État d'origine, sont exécutées en vertu de la présente Convention aux mêmes conditions qu'un jugement.

Article 12
*Pièces à produire*

1 La partie qui requiert la reconnaissance ou qui demande l'exécution produit :

(a) une copie complète et certifiée conforme du jugement ;

(b) si le jugement a été rendu par défaut, l'original ou une copie certifiée conforme du document attestant que l'acte introductif d'instance ou un acte équivalent a été notifié à la partie défaillante ;

(c) tout document nécessaire pour établir que le jugement produit ses effets dans l'État d'origine ou, le cas échéant, qu'il est exécutoire dans cet État ;

(d) dans le cas prévu à l'article 11, un certificat délivré par un tribunal (y compris par une personne autorisée du tribunal) de l'État d'origine attestant que la transaction judiciaire est exécutoire, en tout ou en partie, aux mêmes conditions qu'un jugement dans l'État d'origine.

ter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.

2 Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply, or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.

Article 9
*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 10
*Damages*

1 Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.

2 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
*Judicial settlements (*transactions judiciaires*)*

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, 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.

Article 12
*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 given 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) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;

(d) in the case referred to in Article 11, a certificate of a court (including an officer of the court) of the State of origin stating that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.

2 Si le contenu du jugement ne permet pas au tribunal requis de vérifier que les conditions du présent chapitre sont remplies, ce tribunal peut exiger tout document nécessaire.

3 Une demande de reconnaissance ou d'exécution peut être accompagnée d'un document relatif au jugement, délivré par un tribunal (y compris par une personne autorisée du tribunal) de l'État d'origine, sous la forme recommandée et publiée par la Conférence de La Haye de droit international privé.

4 Si les documents mentionnés dans le présent article ne sont pas rédigés dans une langue officielle de l'État requis, ils doivent être accompagnés d'une traduction certifiée dans une langue officielle, sauf si le droit de l'État requis en dispose autrement.

Article 13
*Procédure*

1 La procédure tendant à obtenir la reconnaissance, l'exequatur ou l'enregistrement aux fins d'exécution, et l'exécution du jugement sont régies par le droit de l'État requis sauf si la présente Convention en dispose autrement. Le tribunal requis agit avec célérité.

2 Le tribunal de l'État requis ne peut refuser de reconnaître ou d'exécuter un jugement en vertu de la présente Convention au motif que la reconnaissance ou l'exécution devrait être requise dans un autre État.

Article 14
*Frais de procédure*

1 Aucune sûreté, caution ou dépôt, sous quelque dénomination que ce soit, ne peut être imposée en raison, soit de sa seule qualité d'étranger, soit du seul défaut de domicile ou de résidence dans l'État requis, à la partie qui demande l'exécution dans un État contractant d'une décision rendue par un tribunal d'un autre État contractant.

2 Toute condamnation aux frais et dépens, rendue dans un État contractant contre toute personne dispensée du versement d'une sûreté, d'une caution ou d'un dépôt en vertu du paragraphe premier ou du droit de l'État dans lequel l'instance a été introduite est, à la demande du créancier, déclarée exécutoire dans tout autre État contractant.

3 Un État peut déclarer qu'il n'appliquera pas le paragraphe premier ou désigner dans une déclaration lesquels de ses tribunaux ne l'appliqueront pas.

Article 15
*Reconnaissance et exécution en application du droit national*

Sous réserve de l'article 6, la présente Convention ne fait pas obstacle à la reconnaissance ou à l'exécution d'un jugement en application du droit national.

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 any necessary documents.

3 An application for recognition or enforcement may be accompanied by a document relating to the judgment, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.

4 If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 13
*Procedure*

1 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.

2 The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

Article 14
*Costs of proceedings*

1 No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given by a court of another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.

2 An order for payment of costs or expenses of proceedings, made in a Contracting State against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 or of the law of the State where proceedings have been instituted, shall, on the application of the person entitled to the benefit of the order, be rendered enforceable in any other Contracting State.

3 A State may declare that it shall not apply paragraph 1 or designate by a declaration which of its courts shall not apply paragraph 1.

Article 15
*Recognition and enforcement under national law*

Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.

Article 16
*Disposition transitoire*

La présente Convention s'applique à la reconnaissance et à l'exécution de jugements si, au moment de l'introduction de l'instance dans l'État d'origine, la Convention produisait des effets entre cet État et l'État requis.

Article 17
*Déclarations limitant la reconnaissance et l'exécution*

Un État peut déclarer que ses tribunaux peuvent refuser de reconnaître ou d'exécuter un jugement rendu par un tribunal d'un autre État contractant, lorsque les parties avaient leur résidence dans l'État requis et que les relations entre les parties, ainsi que tous les autres éléments pertinents du litige, autres que le lieu du tribunal d'origine, étaient liés uniquement à l'État requis.

Article 18
*Déclarations relatives à des matières particulières*

1 Lorsqu'un État a un intérêt important à ne pas appliquer la présente Convention à une matière particulière, il peut déclarer qu'il ne l'appliquera pas à cette matière. L'État qui fait une telle déclaration s'assure que la portée de celle-ci n'est pas plus étendue que nécessaire et que la matière particulière exclue est définie de façon claire et précise.

2 À l'égard d'une telle matière, la Convention ne s'applique pas :

(a) dans l'État contractant ayant fait la déclaration ;

(b) dans les autres États contractants, lorsque la reconnaissance ou l'exécution d'un jugement rendu par un tribunal d'un État contractant ayant fait la déclaration est demandée.

Article 19
*Déclarations relatives aux jugements concernant des gouvernements*

1 Un État peut déclarer qu'il n'appliquera pas la présente Convention aux jugements issus de procédures auxquelles est partie :

(a) cet État ou une personne physique agissant pour celui-ci ; ou

(b) une agence gouvernementale de cet État ou toute personne physique agissant pour celle-ci.

L'État qui fait une telle déclaration s'assure que la portée de celle-ci n'est pas plus étendue que nécessaire et que l'exclusion du champ d'application y est définie de façon claire et précise. La déclaration ne peut pas faire de distinction selon que l'État, une agence gouvernementale de cet État ou une personne physique agissant pour l'un ou l'autre est le défendeur ou le demandeur à la procédure devant le tribunal d'origine.

2 La reconnaissance ou l'exécution d'un jugement rendu par un tribunal d'un État qui a fait une déclaration en vertu du paragraphe premier peut être refusée si le jugement est issu d'une procédure à laquelle est partie l'État qui a fait la déclaration ou l'État requis, l'une de leurs agences gouver-





Article 16
*Transitional provision*

This Convention shall apply to the recognition and enforcement of judgments if, at the time the proceedings were instituted in the State of origin, the Convention had effect between that State and the requested State.

Article 17
*Declarations limiting recognition and enforcement*

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the court of origin, were connected only with the requested State.

Article 18
*Declarations with respect to specific matters*

1 Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

2 With regard to that matter, the Convention shall not apply –

(a) in the Contracting State that made the declaration;

(b) in other Contracting States, where recognition or enforcement of a judgment given by a court of a Contracting State that made the declaration is sought.

Article 19
*Declarations with respect to judgments pertaining to governments*

1 A State may declare that it shall not apply this Convention to judgments arising from proceedings to which any of the following is a party –

(a) that State, or a natural person acting for that State, or

(b) a government agency of that State, or a natural person acting for such a government agency.

The State making such a declaration shall ensure that the declaration is no broader than necessary and that the exclusion from scope is clearly and precisely defined. The declaration shall not distinguish between judgments where the State, a government agency of that State or a natural person acting for either of them is a defendant or claimant in the proceedings before the court of origin.

2 Recognition or enforcement of a judgment given by a court of a State that made a declaration pursuant to paragraph 1 may be refused if the judgment arose from proceedings to which either the State that made the declaration or the requested State, one of their government agencies or a

nementales ou une personne physique agissant pour l'un d'entre eux, dans les limites prévues par cette déclaration.

Article 20
*Interprétation uniforme*

Aux fins de l'interprétation de la présente Convention, il sera tenu compte de son caractère international et de la nécessité de promouvoir l'uniformité de son application.

Article 21
*Examen du fonctionnement de la Convention*

Le Secrétaire général de la Conférence de La Haye de droit international privé prend périodiquement des dispositions en vue de l'examen du fonctionnement de la présente Convention, y compris de toute déclaration, et en fait rapport au Conseil sur les affaires générales et la politique.

Article 22
*Systèmes juridiques non unifiés*

1 Au regard d'un État contractant dans lequel deux ou plusieurs systèmes de droit ayant trait aux questions régies par la présente Convention s'appliquent dans des unités territoriales différentes :

(a) toute référence à la loi, au droit ou à la procédure d'un État vise, le cas échéant, la loi, le droit ou la procédure en vigueur dans l'unité territoriale considérée ;

(b) toute référence au tribunal ou aux tribunaux d'un État vise, le cas échéant, le tribunal ou les tribunaux de l'unité territoriale considérée ;

(c) toute référence au lien avec un État vise, le cas échéant, le lien avec l'unité territoriale considérée ;

(d) toute référence à un facteur de rattachement à l'égard d'un État vise, le cas échéant, ce facteur de rattachement à l'égard de l'unité territoriale considérée.

2 Nonobstant le paragraphe premier, un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu d'appliquer la présente Convention aux situations qui impliquent uniquement ces différentes unités territoriales.

3 Un tribunal d'une unité territoriale d'un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu de reconnaître ou d'exécuter un jugement d'un autre État contractant au seul motif que le jugement a été reconnu ou exécuté dans une autre unité territoriale du même État contractant selon la présente Convention.

4 Le présent article ne s'applique pas à une Organisation régionale d'intégration économique.

Article 23
*Rapport avec d'autres instruments internationaux*

1 La présente Convention doit être interprétée de façon qu'elle soit, autant que possible, compatible avec d'autres traités en vigueur pour les États contractants, conclus avant ou après cette Convention.

natural person acting for either of them is a party, to the same extent as specified in the declaration.

Article 20
*Uniform interpretation*

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

Article 21
*Review of operation of the Convention*

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for review of the operation of this Convention, including any declarations, and shall report to the Council on General Affairs and Policy.

Article 22
*Non-unified legal systems*

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, where appropriate, to the law or procedure in force in the relevant territorial unit;

(b) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;

(c) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit;

(d) any reference to a connecting factor in relation to a State shall be construed as referring, where appropriate, to that connecting factor in relation to the relevant territorial unit.

2 Notwithstanding paragraph 1, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

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

4 This Article shall not apply to a Regional Economic Integration Organisation.

Article 23
*Relationship with other international instruments*

1 This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2 La présente Convention n'affecte pas l'application par un État contractant d'un traité conclu avant cette Convention.

3 La présente Convention n'affecte pas l'application par un État contractant d'un traité conclu après cette Convention en ce qui a trait à la reconnaissance ou à l'exécution d'un jugement rendu par un tribunal d'un État contractant qui est également Partie à ce traité. Aucune disposition de l'autre traité n'affecte les obligations prévues à l'article 6 à l'égard des États contractants qui ne sont pas Parties à ce traité.

4 La présente Convention n'affecte pas l'application des règles d'une Organisation régionale d'intégration économique Partie à cette Convention en ce qui a trait à la reconnaissance ou à l'exécution d'un jugement rendu par un tribunal d'un État contractant qui est également un État membre de l'Organisation régionale d'intégration économique lorsque :

(a) ces règles ont été adoptées avant la conclusion de la présente Convention ; ou

(b) ces règles ont été adoptées après la conclusion de la présente Convention, dans la mesure où elles n'affectent pas les obligations découlant de l'article 6 à l'égard des États contractants qui ne sont pas des États membres de l'Organisation régionale d'intégration économique.

CHAPITRE IV – CLAUSES FINALES

Article 24
*Signature, ratification, acceptation, approbation ou adhésion*

1 La présente Convention est ouverte à la signature de tous les États.

2 La présente Convention est sujette à la ratification, à l'acceptation ou à l'approbation par les États signataires.

3 Tout État peut adhérer à la présente Convention.

4 Les instruments de ratification, d'acceptation, d'approbation ou d'adhésion sont déposés auprès du Ministère des Affaires étrangères du Royaume des Pays-Bas, dépositaire de la Convention.

Article 25
*Déclarations relatives aux systèmes juridiques non unifiés*

1 Un État qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par la présente Convention peut déclarer que la Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles. La déclaration indique expressément les unités territoriales auxquelles la Convention s'applique.

2 Si un État ne fait pas de déclaration en vertu du présent article, la Convention s'applique à l'ensemble du territoire de cet État.

3 Le présent article ne s'applique pas à une Organisation régionale d'intégration économique.

2 This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention.

3 This Convention shall not affect the application by a Contracting State of a treaty concluded after this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. Nothing in the other treaty shall affect the obligations under Article 6 towards Contracting States that are not Parties to that treaty.

4 This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Member State of the Regional Economic Integration Organisation where –

(a) the rules were adopted before this Convention was concluded; or

(b) the rules were adopted after this Convention was concluded, to the extent that they do not affect the obligations under Article 6 towards Contracting States that are not Member States of the Regional Economic Integration Organisation.

CHAPTER IV – FINAL CLAUSES

Article 24
*Signature, ratification, acceptance, approval or accession*

1 This Convention shall be open for signature by all States.

2 This Convention is subject to ratification, acceptance or approval by the signatory States.

3 This Convention shall be open for accession by all States.

4 Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 25
*Declarations with respect to non-unified legal systems*

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 declare that the Convention shall extend to all its territorial units or only to one or more of them. Such a declaration shall state expressly the territorial units to which the Convention applies.

2 If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.

3 This Article shall not apply to a Regional Economic Integration Organisation.

Article 26
*Organisations régionales d'intégration économique*

1 Une Organisation régionale d'intégration économique constituée seulement par des États souverains et ayant compétence sur certaines ou toutes les matières régies par la présente Convention peut signer, accepter, approuver cette Convention ou y adhérer. En pareil cas, l'Organisation régionale d'intégration économique aura les mêmes droits et obligations qu'un État contractant, dans la mesure où cette Organisation a compétence sur des matières régies par la présente Convention.

2 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, l'Organisation régionale d'intégration économique notifie au dépositaire, par écrit, les matières régies par la présente Convention pour lesquelles ses États membres lui ont transféré leur compétence. L'Organisation notifie aussitôt au dépositaire, par écrit, toute modification intervenue dans la délégation de compétence précisée dans la notification la plus récente faite en vertu du présent paragraphe.

3 Aux fins de l'entrée en vigueur de la présente Convention, tout instrument déposé par une Organisation régionale d'intégration économique n'est pas compté, à moins que l'Organisation régionale d'intégration économique déclare, en vertu de l'article 27(1), que ses États membres ne seront pas Parties à cette Convention.

4 Toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, à une Organisation régionale d'intégration économique.

Article 27
*Organisation régionale d'intégration économique en tant que Partie contractante sans ses États membres*

1 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, une Organisation régionale d'intégration économique peut déclarer qu'elle a compétence pour toutes les matières régies par la présente Convention et que ses États membres ne seront pas Parties à cette Convention mais seront liés par celle-ci en raison de la signature, de l'acceptation, de l'approbation ou de l'adhésion de l'Organisation.

2 Lorsqu'une déclaration est faite par une Organisation régionale d'intégration économique en conformité avec le paragraphe premier, toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, aux États membres de l'Organisation.

Article 28
*Entrée en vigueur*

1 La présente Convention entre en vigueur le premier jour du mois suivant l'expiration d'une période de trois mois après le dépôt du deuxième instrument de ratification, d'acceptation, d'approbation ou d'adhésion visé à l'article 24.

2 Par la suite, la présente Convention entre en vigueur :

(a) pour chaque État ou Organisation régionale d'intégration économique la ratifiant, l'acceptant, l'approuvant ou y adhérant postérieurement, le premier jour du mois suivant l'expiration de la période pendant laquelle des notifications peuvent être faites en vertu de l'article 29(2) ;

Article 26
*Regional Economic Integration Organisations*

1 A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

2 The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3 For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 27(1), that its Member States will not be Parties to this Convention.

4 Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation.

Article 27
*Regional Economic Integration Organisation as a Contracting Party without its Member States*

1 At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

2 In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 28
*Entry into force*

1 This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 24.

2 Thereafter this Convention shall enter into force –

(a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of the period during which notifications may be made in accordance with Article 29(2);

(b) pour les unités territoriales auxquelles la présente Convention a été étendue conformément à l'article 25, le premier jour du mois suivant l'expiration d'une période de trois mois après la notification de la déclaration visée par ledit article.

Article 29
*Établissement de relations en vertu de la Convention*

1 La Convention ne produit des effets entre deux États contractants que si aucun d'entre eux n'a transmis de notification au dépositaire à l'égard de l'autre conformément aux paragraphes 2 ou 3.

2 Un État contractant peut notifier au dépositaire, dans les 12 mois suivant la notification par le dépositaire visée à l'article 32(a), que la ratification, l'acceptation, l'approbation ou l'adhésion d'un autre État n'aura pas pour effet d'établir des relations entre ces deux États en vertu de la Convention.

3 Un État peut notifier au dépositaire, lors du dépôt de son instrument en vertu de l'article 24(4), que sa ratification, son acceptation, son approbation ou son adhésion n'aura pas pour effet d'établir des relations avec un État contractant en vertu de la Convention.

4 Un État contractant peut à tout moment retirer une notification qu'il a faite en vertu des paragraphes 2 ou 3. Ce retrait prendra effet le premier jour du mois suivant l'expiration d'une période de trois mois à compter de la date de notification.

Article 30
*Déclarations*

1 Les déclarations visées aux articles 14, 17, 18, 19 et 25 peuvent être faites lors de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion ou à tout moment ultérieur et être modifiées ou retirées à tout moment.

2 Les déclarations, modifications et retraits sont notifiés au dépositaire.

3 Une déclaration faite au moment de la signature, de la ratification, de l'acceptation, de l'approbation de la présente Convention ou de l'adhésion à celle-ci prend effet au moment de l'entrée en vigueur de la Convention pour l'État concerné.

4 Une déclaration faite ultérieurement, ainsi que toute modification ou tout retrait d'une déclaration, prend effet le premier jour du mois suivant l'expiration d'une période de trois mois après la date de réception de la notification par le dépositaire.

5 Une déclaration faite ultérieurement, ainsi que toute modification ou tout retrait d'une déclaration, ne produit pas d'effet à l'égard des jugements rendus à l'issue d'instances déjà introduites devant le tribunal d'origine au moment où la déclaration prend effet.

Article 31
*Dénonciation*

1 La présente Convention peut être dénoncée par une notification écrite au dépositaire. La dénonciation peut se limiter à certaines unités territoriales d'un système juridique non unifié auxquelles s'applique la présente Convention.

(b) for a territorial unit to which this Convention has been extended in accordance with Article 25, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 29
*Establishment of relations pursuant to the Convention*

1 The Convention shall have effect between two Contracting States only if neither of them has notified the depositary regarding the other in accordance with paragraph 2 or 3.

2 A Contracting State may notify the depositary, within 12 months after the notification by the depositary referred to in Article 32(a), that the ratification, acceptance, approval or accession of another State shall not have the effect of establishing relations between the two States pursuant to the Convention.

3 A State may notify the depositary, upon the deposit of its instrument pursuant to Article 24(4), that its ratification, acceptance, approval or accession shall not have the effect of establishing relations with a Contracting State pursuant to the Convention.

4 A Contracting State may at any time withdraw a notification that it has made under paragraph 2 or 3. Such a withdrawal shall take effect on the first day of the month following the expiration of three months following the date of notification.

Article 30
*Declarations*

1 Declarations referred to in Articles 14, 17, 18, 19 and 25 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2 Declarations, modifications and withdrawals shall be notified to the depositary.

3 A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months following the date on which the notification is received by the depositary.

5 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall not apply to judgments resulting from proceedings that have already been instituted before the court of origin when the declaration takes effect.

Article 31
*Denunciation*

1 This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2 La dénonciation prend effet le premier jour du mois suivant l'expiration d'une période de 12 mois après la date de réception de la notification par le dépositaire. Lorsqu'une période plus longue pour la prise d'effet de la dénonciation est précisée dans la notification, la dénonciation prend effet à l'expiration de la période en question après la date de réception de la notification par le dépositaire.

Article 32
*Notifications par le dépositaire*

Le dépositaire notifie aux Membres de la Conférence de La Haye de droit international privé, ainsi qu'aux autres États et aux Organisations régionales d'intégration économique qui ont signé, ratifié, accepté, approuvé la présente Convention ou y ont adhéré conformément aux articles 24, 26 et 27 les renseignements suivants :

(a) les signatures, ratifications, acceptations, approbations et adhésions prévues aux articles 24, 26 et 27 ;

(b) la date d'entrée en vigueur de la présente Convention conformément à l'article 28 ;

(c) les notifications, déclarations, modifications et retraits prévus aux articles 26, 27, 29 et 30 ; et

(d) les dénonciations prévues à l'article 31.

En foi de quoi, les soussignés, dûment autorisés, ont signé la présente Convention.

Fait à La Haye, le 2 juillet 2019, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement du Royaume des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Membres de la Conférence de La Haye de droit international privé lors de sa Vingt-deuxième session ainsi qu'à chacun des autres États ayant participé à cette Session.

2 The denunciation shall take effect on the first day of the month following the expiration of 12 months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 32
*Notifications by the depositary*

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded to this Convention in accordance with Articles 24, 26 and 27 of the following –

(a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 24, 26 and 27;

(b) the date on which this Convention enters into force in accordance with Article 28;

(c) the notifications, declarations, modifications and withdrawals referred to in Articles 26, 27, 29 and 30; and

(d) the denunciations referred to in Article 31.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 2nd day of July 2019, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Members of the Hague Conference on Private International Law at the time of its Twenty-Second Session and to each of the other States which have participated in that Session.

Documents de travail Nos 93 et 94

Working Documents Nos 93 and 94

*Distribués le samedi 29 juin 2019*

*Distributed on Saturday 29 June 2019*

**No 93 REV – Proposition du Bureau Permanent – Proposal of the Permanent Bureau**

**Projet de formulaire recommandé conformément à la Convention sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale**

**FORMULAIRE RECOMMANDÉ**
**CONFORMÉMENT À LA CONVENTION SUR**
**LA RECONNAISSANCE ET L'EXÉCUTION DES JUGEMENTS ÉTRANGERS**
**EN MATIÈRE CIVILE OU COMMERCIALE**
**(« LA CONVENTION »)**

(Exemple de formulaire confirmant la délivrance et le contenu d'un jugement rendu par le tribunal d'origine dans le but de sa reconnaissance et de son exécution en vertu de la Convention)

**1. COORDONNÉES DU TRIBUNAL D'ORIGINE**

Nom du tribunal .....

Ville (et état, le cas échéant) .....

Pays .....

**2. RÉFÉRENCE DE L'AFFAIRE ~~DU~~ DEVANT LE TRIBUNAL D'ORIGINE / NUMÉRO DE DOSSIER**.....

**3. PARTIES**

..... (DEMANDEUR(S))

c.

.....(DÉFENDEUR(S))

**4. DATE DE L'INTRODUCTION DE L'INSTANCE ET DU JUGEMENT**

4.1 L'instance a été introduite (article 16) le ..... *(jj/mm/aaaa)*

4.2 Le jugement a été rendu le ..... *(jj/mm/aaaa)*

**5. DISPOSITIF DU JUGEMENT**

5.1 Ce tribunal a accordé le paiement du montant suivant *(le cas échéant, veuillez indiquer toute catégorie de dommages et intérêts, la ~~monnaie~~ devise dans laquelle le paiement a été accordé, ainsi que toute modalité de paiement prescrite telle que la date et le montant des versements)* :

5.2 Ce tribunal a accordé les intérêts comme suit *(veuillez indiquer le (ou les) taux d'intérêt, la (ou les) partie(s) des ~~indemnités~~ montants accordés auxquell~~e~~s s'appliquent les intérêts, la date à partir de laquelle les intérêts sont décomptés, ainsi que toute information supplémentaire relative aux intérêts qui pourrait aider le tribunal requis)* :

5.3 Ce tribunal a inclus dans le jugement les frais et dépens de la procédure comme suit *(veuillez préciser les montants spécifiques accordés et, le cas échéant, la part du montant global accordé destinée à couvrir les frais et dépens de la procédure)* :

5.4 Ce tribunal a accordé le dédommagement non pécuniaire comme suit *(veuillez décrire la nature du dédommagement)* :

## 6. EFFET DU JUGEMENT

6.1 Ce jugement est exécutoire dans l'État d'origine :

☐ OUI (article 4(3)) ☐ NON
☐ Impossible à confirmer

6.2 Ce jugement, en tout ou en partie, fait actuellement l'objet d'un recours dans l'État d'origine :

☐ OUI *(veuillez préciser la nature et le statut de ce recours)* (article 4(4))
☐ NON ☐ Impossible à confirmer

## 7. TOUTE AUTRE INFORMATION PERTINENTE

## 8. PIÈCES JOINTES

*Les pièces jointes doivent être ~~fournies~~ produites dans la langue officielle ou accompagnées d'une traduction certifiée conforme dans une langue officielle de l'État requis, sauf disposition contraire ~~de la loi~~ du droit de l'État requis (article 12(3) et (4)).*

Sont annexées au présent formulaire les pièces énoncées dans la liste suivante (si disponibles) :

☐ une copie complète et certifiée conforme du jugement (article 12(1)(a)) ;

☐ si le jugement a été rendu par défaut, l'original ou une copie certifiée conforme du document attestant que l'acte introductif d'instance ou un acte équivalent a été notifié à la partie défaillante (article 12(1)(b)) ;

☐ tout document nécessaire pour établir que le jugement produit ses effets dans l'État d'origine ou, le cas échéant, qu'il est exécutoire dans cet État (article 12(1)(c)) ;

☐ dans le cas prévu à l'article 11 de la Convention, un certificat délivré par un tribunal (y compris par une personne autorisée du tribunal) de l'État d'origine attestant que la transaction judiciaire est exécutoire, en tout ou en partie, aux mêmes conditions qu'un jugement dans l'État d'origine (article 12(1)(d)).

**9.** Fait à ……, le ……, 20 ……

**10.** Signature et cachet (le cas échéant) du tribunal ou d'une personne autorisée du tribunal :

## 11. COORDONNÉES

PERSONNE ~~DE~~ À CONTACTER DANS LE TRIBUNAL D'ORIGINE : .....

TÉL. : .....

TÉLÉCOPIE : .....

COURRIEL : .....

LANGUE(S) DE COMMUNICATION DE LA PERSONNE ~~DE~~ À CONTACTER : .....

* * *

**Draft recommended form under the Convention on the recognition and enforcement of foreign judgments in civil or commercial matters**

**RECOMMENDED FORM**
**UNDER THE CONVENTION ON THE**
**RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS**
**IN CIVIL OR COMMERCIAL MATTERS**
**("THE CONVENTION")**

(Sample form confirming the issuance and content of a judgment given by the court of origin for the purposes of recognition and enforcement under the Convention)

**1. DETAILS OF THE COURT OF ORIGIN**

Name of court .....

City (and state, if applicable) .....

Country .....

**2. COURT OF ORIGIN CASE REFERENCE / DOCKET NUMBER** .....

**3. PARTIES**

..... (PLAINTIFF(S))

v.

.....(DEFENDANT(S))

**4. DATE OF THE INSTITUTION OF THE PROCEEDINGS AND OF THE JUDGMENT**

4.1 The proceedings were instituted (Article 16) on ..... *(dd/mm/yyyy)*

4.2 The judgment was ~~rendered~~ given on .....*(dd/mm/yyyy)*

**5. AWARD DELIVERED IN THE JUDGMENT**

5.1 This court awarded the following payment of money *(please indicate the amount and, where applicable, any relevant categories of damages, the currency of the award~~;~~, and any prescribed terms of payment of the monetary award such as the date and amount of any instalments)*:

5.2 This court awarded interest as follows *(please specify the rate(s) of interest, the portion(s) of the award to which interest applies, the date from which interest is computed, and any further information regarding interest that would assist the court addressed)*:

5.3 This court included within the judgment the following costs and expenses relating to the proceedings *(please specify the amounts of any ~~such~~ explicit awards of costs and expenses and, ~~including,~~ where applicable, any amount(s) within a monetary award intended to cover costs and expenses relating to the proceedings)*:

5.4 This court awarded the following non-monetary relief *(please describe the nature of such relief)*:

## 6. THE EFFECT OF THE JUDGMENT

6.1 This judgment is enforceable in the State of origin:

☐ YES (Article 4(3)) ☐ NO
☐ Unable to confirm

6.2 This judgment (or a part thereof) is currently the subject of review in the State of origin:

☐ YES *(please specify the nature and status of such review)* (Article 4(4))
☐ NO ☐ Unable to confirm

## 7. ANY OTHER RELEVANT INFORMATION

## 8. ATTACHMENTS

*The attached documents should be ~~provided~~ produced in the official language or accompanied by a certified translation into an official language of the requested State, unless otherwise provided for by the law of the requested State (Article 12(3) and (4)).*

Attached to this form are the documents marked in the following list (if available):

☐ a complete and certified copy of the judgment (Article 12(1)(a));

☐ if the judgment was given 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 (Article 12(1)(b));

☐ any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin (Article 12(1)(c));

☐ in the case referred to in Article 11 of the Convention, a certificate of a court (including an officer of the court) of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin (Article 12(1)(d)).

**9.** Dated this …… day of ……, 20 …… at ……

**10.** Signature and/or stamp by the court or officer of the court:

## 11. CONTACT DETAILS

CONTACT PERSON IN THE COURT OF ORIGIN: .....

TEL.: .....

FAX: .....

E-MAIL: .....

CONTACT PERSON COMMUNICATION LANGUAGE(S): .....

**No 94 – Proposal of the delegations of Brazil and Israel**

Article 5
*Bases for recognition and enforcement*

1 Subject to Article 6, a ~~A~~ judgment is eligible for recognition and enforcement if one of the following requirements is met –

[…]

Article 6
*Exclusive basis for recognition and enforcement*

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

# Document de travail No 95

# Working Document No 95

*Distribué le dimanche 30 juin 2019*

*Distributed on Sunday 30 June 2019*

**No 95 – Proposal of the delegations of Switzerland, Australia, Israel, Japan and Uruguay**

Article 28
*Entry into force*

1 This Convention shall enter into force on the first day of the month following the expiration of the period during which notifications may be made in accordance with Article 29 for the first two States that have deposited their ~~three months after the deposit of the second~~ instruments of ratification, acceptance, approval or accession referred to in Article 24.

2 Thereafter this Convention shall enter into force –

(a) for each State ~~or Regional Economic Integration Organisation~~ subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of the period during which notifications may be made in accordance with Article 29~~(2)~~ with respect to that State;

(b) for a territorial unit to which this Convention has been extended in accordance with Article 25 after the Convention has entered into force for the State making the declaration, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 29
*Establishment of relations pursuant to the Convention*

1 The Convention shall have effect between two Contracting States only if neither of them has notified the depositary regarding the other in accordance with paragraph 2 or 3. In the absence of such a notification, the Convention has effect between two Contracting States from the first day of the month following the expiration of the period during which notifications may be made.

**No 95 REV – Proposition des délégations de la Suisse, de l'Australie, du Canada, d'Israël, du Japon et de l'Uruguay – Proposal of the delegations of Switzerland, Australia, Canada, Israel, Japan and Uruguay**[*]

Article 28
*Entrée en vigueur*

1 La présente Convention entre en vigueur le premier jour du mois suivant l'expiration ~~d'une~~ de la période pendant laquelle une notification peut être faite en vertu de l'article 29(2) à l'égard du deuxième État qui a déposé son ~~de trois mois après le dépôt du deuxième~~ instrument de ratification, d'acceptation, d'approbation ou d'adhésion visé à l'article 24.

2 Par la suite, la présente Convention entre en vigueur :

(a) pour chaque État ~~ou Organisation régionale d'intégration économique~~ la ratifiant, l'acceptant, l'approuvant ou y adhérant postérieurement, le premier jour du mois suivant l'expiration de la période pendant laquelle des notifications peuvent être faites en vertu de l'article 29(2) à l'égard de cet État ;

(b) pour ~~les~~ une unité~~s~~ territoriale~~s auxquelles~~ à laquelle la présente Convention a été étendue conformément à l'article 25 après l'entrée en vigueur de la Convention pour l'État qui fait la déclaration, le premier jour du mois suivant l'expiration d'une période de trois mois après la notification de la déclaration visée par ledit article.

Article 29
*Établissement de relations en vertu de la Convention*

1 La présente Convention ne produit des effets entre deux États contractants que si aucun d'entre eux n'a transmis de notification au dépositaire à l'égard de l'autre conformément aux paragraphes 2 ou 3. En l'absence d'une telle notification, la Convention produit des effets entre deux États contractants dès le premier jour du mois suivant l'expiration de la période pendant laquelle les notifications peuvent être faites.

2 Un État contractant peut notifier au dépositaire, dans les 12 mois suivant la date de la notification par le dépositaire visée à l'article 32(a), que la ratification, l'acceptation, l'approbation ou l'adhésion d'un autre État n'aura pas pour effet d'établir des relations entre ces deux États en vertu de la présente Convention.

* * *

Article 28
*Entry into force*

1 This Convention shall enter into force on the first day of the month following the expiration of the period during

[*] Work. Doc. No 95 REV was distributed on 1 July 2019.

which a notification may be made in accordance with Article 29(2) with respect to the second State that has deposited its ~~three months after the deposit of the second~~ instrument of ratification, acceptance, approval or accession referred to in Article 24.

2 Thereafter this Convention shall enter into force –

(a) for each State ~~or Regional Economic Integration Organisation~~ subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of the period during which notifications may be made in accordance with Article 29(2) with respect to that State;

(b) for a territorial unit to which this Convention has been extended in accordance with Article 25 after the Convention has entered into force for the State making the declaration, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 29
*Establishment of relations pursuant to the Convention*

1 This~~e~~ Convention shall have effect between two Contracting States only if neither of them has notified the depositary regarding the other in accordance with paragraph 2 or 3. In the absence of such a notification, the Convention has effect between two Contracting States from the first day of the month following the expiration of the period during which notifications may be made.

2 A Contracting State may notify the depositary, within 12 months after the date of the notification by the depositary referred to in Article 32(a), that the ratification, acceptance, approval or accession of another State shall not have the effect of establishing relations between the two States pursuant to this~~e~~ Convention.

*Distribué le dimanche 30 juin 2019*

**No 96 – Proposition du Bureau Permanent en consultation avec le Président du Comité de rédaction**

## PROJET DE CONVENTION SUR LA RECONNAISSANCE ET L'EXÉCUTION DES JUGEMENTS ÉTRANGERS EN MATIÈRE CIVILE OU COMMERCIALE

Les Parties contractantes à la présente Convention,

Désireuses de promouvoir un accès effectif de tous à la justice et de faciliter, à l'échelon multilatéral, le commerce et l'investissement ~~multilatéral~~ fondés sur des règles, ainsi que la mobilité, par le biais de la coopération judiciaire,

Estimant que cette coopération peut être renforcée par la mise en place d'un ensemble uniforme de règles ~~fondamentales~~ essentielles sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale, afin de faciliter la reconnaissance et l'exécution effectives de ces jugements,

Convaincues que cette coopération judiciaire renforcée nécessite notamment un régime juridique international offrant une plus grande prévisibilité et sécurité en matière de circulation des jugements étrangers à l'échelle mondiale, qui soit complémentaire de la *Convention du 30 juin 2005 sur les accords d'élection de for*,

Ont résolu de conclure la présente Convention à cet effet et sont convenues des dispositions suivantes :

### CHAPITRE I – CHAMP D'APPLICATION ET DÉFINITIONS

#### Article premier
*Champ d'application*

1 La présente Convention s'applique à la reconnaissance et à l'exécution des jugements en matière civile ou commerciale. Elle ne recouvre notamment pas les matières fiscales, douanières ou administratives.

2 La présente Convention s'applique à la reconnaissance et à l'exécution, dans un État contractant, d'un jugement rendu par un tribunal d'un autre État contractant.





*Distributed on Sunday 30 June 2019*

**No 96 – Proposal of the Permanent Bureau, in consultation with the Chair of the Drafting Committee**

## DRAFT CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS

The Contracting Parties to the present Convention,

Desiring to promote effective access to justice for all and to facilitate rule-based multilateral trade and investment, and mobility, through judicial co-operation,

Believing that such co-operation can be enhanced through the creation of a uniform set of core rules on recognition and enforcement of foreign judgments in civil or commercial matters, to facilitate the effective recognition and enforcement of such judgments,

Convinced that such enhanced judicial co-operation requires, in particular, an international legal regime that provides greater predictability and certainty in relation to the global circulation of foreign judgments, and that is complementary to the *Convention of 30 June 2005 on Choice of Court Agreements*,

Have resolved to conclude this Convention to this effect and have agreed upon the following provisions –

### CHAPTER I – SCOPE AND DEFINITIONS

#### Article 1
*Scope*

1 This Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters. It shall not extend in particular to revenue, customs or administrative matters.

2 This Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State.

Article 2
*Exclusions du champ d'application*

1 La présente Convention ne s'applique pas aux matières suivantes :

(a) l'état et la capacité des personnes physiques ;

(b) les obligations alimentaires ;

(c) les autres matières du droit de la famille, y compris les régimes matrimoniaux et les autres droits ou obligations découlant du mariage ou de relations similaires ;

(d) les testaments et les successions ;

(e) l'insolvabilité, les concordats, la résolution d'établissements financiers, ainsi que les matières analogues ;

(f) le transport de passagers et de marchandises ;

(g) la pollution marine transfrontière, la pollution marine dans les zones ne relevant pas de la juridiction nationale, la pollution marine ~~causée~~ par les navires, la limitation de responsabilité pour des demandes en matière maritime, ainsi que les avaries communes ;

(h) la responsabilité pour les dommages nucléaires ;

(i) la validité, la nullité ou la dissolution des personnes morales ou des associations entre personnes physiques ou personnes morales, ainsi que la validité des décisions de leurs organes ;

(j) la validité des inscriptions sur les registres publics ;

(k) la diffamation ;

(l) le droit à la vie privée ;

(m) la propriété intellectuelle ;

(n) les activités des forces armées, y compris celles de leur personnel dans l'exercice de ses fonctions officielles ;

(o) les activités relatives au maintien de l'ordre, y compris celles du personnel chargé du maintien de l'ordre dans l'exercice de ses fonctions officielles ;

(p) les entraves à la concurrence, sauf lorsque le jugement porte sur un comportement qui constitue un accord anticoncurrentiel ou une pratique concertée entre concurrents réels ou potentiels visant à fixer les prix, procéder à des soumissions concertées, établir des restrictions ou des quotas à la production, ou diviser des marchés par répartition de la clientèle, de fournisseurs, de territoires ou de lignes d'activité, et lorsque ce comportement et ses effets se sont tous deux produits dans l'État d'origine ;

(q) la restructuration de la dette souveraine par des mesures étatiques unilatérales.

2 Un jugement n'est pas exclu du champ d'application de la présente Convention lorsqu'une question relevant d'une matière à laquelle elle ne s'applique pas est soulevée seulement à titre préalable et non comme objet du litige. En particulier, le seul fait qu'une telle matière ait été invoquée dans le cadre d'un moyen de défense n'exclut pas le juge-

Article 2
*Exclusions from scope*

1 This Convention shall not apply to 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, resolution of financial institutions, and analogous matters;

(f) the carriage of passengers and goods;

(g) transboundary marine pollution, marine pollution in areas beyond national jurisdiction, ship-source marine pollution, limitation of liability for maritime claims, and general average;

(h) liability for nuclear damage;

(i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs;

(j) the validity of entries in public registers;

(k) defamation;

(l) privacy;

(m) intellectual property;

(n) activities of armed forces, including the activities of their personnel in the exercise of their official duties;

(o) law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties;

(p) anti-trust (competition) matters, except where the judgment is based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the State of origin;

(q) sovereign debt restructuring through unilateral State measures.

2 A judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings. In particular, the mere fact that such a matter arose by way of defence does not exclude

ment du champ d'application de la Convention, si cette question n'était pas un objet du litige.

3 La présente Convention ne s'applique pas à l'arbitrage et aux procédures y afférentes.

4 Un jugement n'est pas exclu du champ d'application de la présente Convention du seul fait qu'un État, y compris un gouvernement, une agence gouvernementale ou toute personne agissant pour ~~le compte d'~~un État, était partie au litige.

5 La présente Convention n'affecte ~~pas~~ en rien les privilèges et immunités dont jouissent les États ou les organisations internationales, pour eux-mêmes et pour leurs biens.

Article 3
*Définitions*

1 Au sens de la présente Convention :

(a) le terme « défendeur » signifie la personne contre laquelle la demande ou la demande reconventionnelle a été introduite dans l'État d'origine ;

(b) le terme « jugement » signifie toute décision sur le fond rendue par un tribunal, quelle que soit la dénomination donnée à cette décision, telle qu'un arrêt ou une ordonnance, de même que la fixation des frais et dépens de la procédure ~~du procès~~ par le tribunal (y compris le greffier du tribunal), à condition que cette dernière ~~elle~~ ait trait à une décision sur le fond susceptible d'être reconnue ou exécutée en vertu de la présente Convention. Les mesures provisoires et conservatoires ne sont pas des jugements.

2 Une entité ou une personne autre qu'une personne physique est réputée avoir sa résidence habituelle dans l'État :

(a) de son siège statutaire ;

(b) selon le droit duquel elle a été constituée ;

(c) de son administration centrale ; ou

(d) de son principal établissement.

CHAPITRE II – RECONNAISSANCE ET EXÉCUTION

Article 4
*Dispositions générales*

1 Un jugement rendu par un tribunal d'un État contractant (État d'origine) est reconnu et exécuté dans un autre État contractant (État requis) conformément aux dispositions du présent chapitre. La reconnaissance ou l'exécution ne peut être refusée qu'aux motifs énoncés dans la présente Convention.

2 Le jugement ne peut pas faire l'objet d'une révision au fond dans l'État requis. Il ne peut y avoir d'appréciation qu'au regard de ce qui est nécessaire pour l'application de la présente Convention.

3 Un jugement n'est reconnu que s'il produit ses effets dans l'État d'origine et n'est exécuté que s'il est exécutoire dans l'État d'origine.

a judgment from the scope of the Convention, if that matter was not an object of the proceedings.

3 This Convention shall not apply to arbitration and related proceedings.

4 A judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings.

5 Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3
*Definitions*

1 In this Convention –

(a) "defendant" means a person against whom the claim or counterclaim was brought in the State of origin;

(b) "judgment" means any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses of the proceedings by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

2 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 the law of which it was incorporated or formed;

(c) where it has its central administration; or

(d) where it has its principal place of business.

CHAPTER II – RECOGNITION AND ENFORCEMENT

Article 4
*General provisions*

1 A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

2 There shall be no review of the merits of the judgment in the requested State. There may only be such consideration as is necessary for the application of this Convention.

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 La reconnaissance ou l'exécution peut être différée ou refusée si le jugement visé au paragraphe 3 fait l'objet d'un recours dans l'État d'origine ou si le délai pour exercer un recours ordinaire n'a pas expiré. Un tel refus n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.

Article 5
*Fondements de la reconnaissance et de l'exécution*

1 Un jugement est susceptible d'être reconnu et exécuté si l'une des exigences suivantes est satisfaite :

(a) la personne contre laquelle la reconnaissance ou l'exécution est demandée avait sa résidence habituelle dans l'État d'origine lorsqu'elle est devenue partie à la procédure devant le tribunal d'origine ;

(b) la personne physique contre laquelle la reconnaissance ou l'exécution est demandée avait son établissement professionnel principal dans l'État d'origine lorsqu'elle est devenue partie à la procédure devant le tribunal d'origine et la demande ~~à l'origine du~~ sur laquelle se fonde le jugement ~~portait sur~~ résultait de ~~son~~ l'activité de cet établissement ~~professionnelle~~ ;

(c) la personne contre laquelle la reconnaissance ou l'exécution est demandée est celle qui a saisi le tribunal de la demande, autre que reconventionnelle, ~~à l'origine du~~ sur laquelle se fonde le jugement ;

(d) le défendeur avait une succursale, une agence ou tout autre établissement sans personnalité juridique propre dans l'État d'origine, au moment où il est devenu une partie à la procédure devant le tribunal d'origine, et la demande ~~à l'origine du~~ sur laquelle se fonde le jugement résultait des activités de cette succursale, de cette agence ou de cet établissement ;

(e) le défendeur a expressément consenti à la compétence du tribunal d'origine au cours de la procédure dans laquelle le jugement a été rendu ;

(f) le défendeur a fait valoir ses arguments sur le fond devant le tribunal d'origine sans en contester la compétence dans les délais prescrits par le droit de l'État d'origine, à moins qu'il ne soit évident qu'une contestation de la compétence ou de son exercice aurait échoué en vertu de ce droit ;

(g) le jugement porte sur une obligation contractuelle et a été rendu par un tribunal de l'État dans lequel l'obligation a été ou aurait dû être exécutée, conformément ~~:~~

(i) à l'accord des parties, ou~~,~~

(ii) à la loi applicable au contrat, à défaut d'un accord sur le lieu d'exécution,

sauf si les activités du défendeur en relation avec la transaction ne présentaient manifestement pas de lien intentionnel et substantiel avec cet État ;

(h) le jugement porte sur un bail immobilier et a été rendu par un tribunal de l'État où est situé l'immeuble ;

(i) le jugement rendu contre le défendeur porte sur une obligation contractuelle garantie par un droit réel rela-

4 Recognition or enforcement may be postponed or refused if ~~a~~ the judgment referred to under paragraph 3 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 5
*Bases for recognition and enforcement*

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

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

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

(c) the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;

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

(e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;

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

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

(i) the agreement of the parties, or

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

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

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

(i) the judgment ruled against the defendant on a contractual obligation secured by a right *in rem* in immovable

tif à un immeuble situé dans l'État d'origine, à condition que la ~~une~~ demande contractuelle ait été accompagnée d'une demande portant sur ce droit réel ~~concernant ce droit réel ait également été~~ dirigée contre ce défendeur ;

(j) le jugement porte sur une obligation non contractuelle résultant d'un décès, d'un dommage corporel, d'un dommage subi par un bien corporel ou de la perte d'un bien corporel et l'acte ou l'omission directement à l'origine du dommage a été commis dans l'État d'origine, quel que soit le lieu où le dommage est survenu ;

(k) le jugement porte sur la validité, l'interprétation, les effets, l'administration ou la modification d'un trust constitué volontairement et documenté par écrit, et :

(i) au moment de l'introduction de l'instance, l'État d'origine était ~~celui~~ désigné dans l'acte constitutif du trust comme étant un État dont les tribunaux sont appelés à trancher les litiges relatifs à ces questions ; ou

(ii) au moment de l'introduction de l'instance, l'État d'origine était ~~celui~~ désigné, de façon expresse ou implicite, dans l'acte constitutif du trust comme étant l'État dans lequel est situé le lieu principal d'administration du trust.

Le présent alinéa ne s'applique qu'aux jugements portant sur des aspects internes d'un trust~~,~~ entre personnes étant ou ayant été au sein de la relation établie par le trust ;

(l) le jugement porte sur une demande reconventionnelle :

(i) dans la mesure où il ~~est~~ a été rendu en faveur du demandeur reconventionnel, à condition que cette demande ~~porte sur~~ résulte de la même transaction ou d~~l~~es mêmes faits que la demande principale ; ou

(ii) dans la mesure où il ~~est~~ a été rendu contre le demandeur reconventionnel, sauf si le droit de l'État d'origine exigeait une demande reconventionnelle à peine de forclusion ;

(m) le jugement a été rendu par un tribunal désigné dans un accord conclu ou documenté par écrit ou par tout autre moyen de communication qui rende l'information accessible pour être consultée ultérieurement, autre qu'un accord exclusif d'élection de for.

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

2 Si la reconnaissance ou l'exécution est ~~requise~~ demandée contre une personne physique agissant principalement dans un but personnel, familial ou domestique (un consommateur) en matière de contrat de consommation, ou contre un employé relativement à son contrat de travail :

property located in the State of origin, if the contractual claim was brought together with a claim against the same defendant relating to that right *in rem*;

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

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

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

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

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

(l) the judgment ruled on a counterclaim –

(i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim; or

(ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;

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

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

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

(a) l'alinéa (e) du paragraphe premier ne s'applique que si le consentement a été donné devant le tribunal, que ce soit oralement ou par écrit ;

(b) les alinéas (f), (g) et (m) du paragraphe premier ne s'appliquent pas.

3 Le paragraphe premier ne s'applique pas à un jugement portant sur un bail immobilier résidentiel (bail d'habitation) ou sur l'enregistrement d'un immeuble. Un tel jugement est susceptible d'être reconnu et exécuté uniquement s'il a été rendu par un tribunal de l'État où est situé l'immeuble.

Article 6
*Fondement exclusif de la reconnaissance et de l'exécution*

Nonobstant l'article 5, un jugement portant sur des droits réels immobiliers n'est reconnu ou exécuté que si l'immeuble est situé dans l'État d'origine.

Article 7
*Refus de reconnaissance ~~ou~~ et d'exécution*

1 La reconnaissance ou l'exécution peut être refusée si :

(a) l'acte introductif d'instance ou un acte équivalent contenant les éléments essentiels de la demande :

(i) n'a pas été notifié au défendeur en temps utile et de telle manière qu'il puisse organiser sa défense, à moins que le défendeur ait comparu et présenté sa défense sans contester la notification devant le tribunal d'origine, à condition que le droit de l'État d'origine permette de contester la notification ; ou

(ii) a été notifié au défendeur dans l'État requis de manière incompatible avec les principes fondamentaux de l'État requis relatifs à la notification de documents ;

(b) le jugement résulte d'une fraude ;

(c) la reconnaissance ou l'exécution est manifestement incompatible avec l'ordre public de l'État requis, notamment dans le cas où la procédure appliquée en l'espèce pour obtenir le jugement était incompatible avec les principes fondamentaux d'équité procédurale de cet État et en cas d'atteinte à la sécurité ou à la souveraineté de cet État ;

(d) la procédure devant le tribunal d'origine était contraire à un accord, ou à une clause figurant dans l'acte constitutif d'un trust, en vertu duquel le litige en question devait être tranché par un tribunal d'un État autre que l'État d'origine ;

(e) le jugement est incompatible avec un jugement rendu par un tribunal de l'État requis dans un litige entre les mêmes parties ; ou

(f) le jugement est incompatible avec un jugement rendu antérieurement par un tribunal d'un autre État entre les mêmes parties dans un litige ayant le même objet, lorsque le jugement rendu antérieurement réunit les conditions nécessaires à sa reconnaissance dans l'État requis.

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

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

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

Article 6
*Exclusive basis for recognition and enforcement*

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

Article 7
*Refusal of recognition ~~or~~ and enforcement*

1 Recognition or enforcement may be refused if –

(a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim –

(i) was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence, unless the defendant entered an appearance and presented their case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

(ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

(b) the judgment was obtained by fraud;

(c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State;

(d) the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court of a State other than the State of origin;

(e) the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties; or

(f) the judgment is inconsistent with an earlier judgment given by a court of another State between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

2 La reconnaissance ou l'exécution peut être différée ou refusée si une procédure ayant le même objet est pendante entre les mêmes parties devant un tribunal de l'État requis lorsque :

(a) ce dernier a été saisi avant le tribunal de l'État d'origine ; et

(b) il existe un lien étroit entre le litige et l'État requis.

Le refus visé au présent paragraphe n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.

Article 8
*Questions préalables*

1 Une décision rendue à titre préalable sur une matière à laquelle la présente Convention ne s'applique pas, ou sur une matière visée à l'article 6 par un tribunal d'un État autre que celui désigné dans cette disposition, n'est pas reconnue ou exécutée en vertu de la présente Convention.

2 La reconnaissance ou l'exécution d'un jugement peut être refusée si, et dans la mesure où, le jugement est fondé sur une décision relative à une matière à laquelle la présente Convention ne s'applique pas, ou sur une décision relative à une matière visée à l'article 6 qui a été rendue par un tribunal d'un État autre que celui désigné dans cette disposition.

Article 9
*Divisibilité*

La reconnaissance ou l'exécution d'une partie dissociable d'un jugement est accordée si la reconnaissance ou l'exécution de cette partie est demandée ou si seule une partie du jugement peut être reconnue ou exécutée en vertu de la présente Convention.

Article 10
*Dommages et intérêts*

1 La reconnaissance ou l'exécution d'un jugement peut être refusée si, et dans la mesure où, le jugement accorde des dommages et intérêts, y compris des dommages et intérêts exemplaires ou punitifs, qui ne compensent pas une partie pour la perte ou le préjudice réels subis.

2 Le tribunal requis prend en considération si, et dans quelle mesure, le montant accordé à titre de dommages et intérêts par le tribunal d'origine est destiné à couvrir les frais et dépens de la procédure ~~du procès~~.

Article 11
*Transactions judiciaires*

Les transactions judiciaires homologuées par un tribunal d'un État contractant, ou qui ont été conclues au cours d'une instance devant un tribunal d'un État contractant, et qui sont exécutoires au même titre qu'un jugement dans l'État d'origine, sont exécutées en vertu de la présente Convention aux mêmes conditions qu'un jugement.

2 Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –

(a) the court of the requested State was seised before the court of origin; and

(b) there is a close connection between the dispute and the requested State.

A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 8
*Preliminary questions*

1 A ruling on a preliminary question shall not be recognised or enforced under this Convention if the ruling is on a matter to which this Convention does not apply or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.

2 Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply, or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.

Article 9
*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 10
*Damages*

1 Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.

2 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
*Judicial settlements (*transactions judiciaires*)*

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, 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.

Article 12
*Pièces à produire*

1 La partie qui requiert la reconnaissance ou qui demande l'exécution doit produire~~t~~ :

(a) une copie complète et certifiée conforme du jugement ;

(b) si le jugement a été rendu par défaut, l'original ou une copie certifiée conforme du document attestant que l'acte introductif d'instance ou un acte équivalent a été notifié à la partie défaillante ;

(c) tout document nécessaire pour établir que le jugement produit ses effets dans l'État d'origine ou, le cas échéant, qu'il est exécutoire dans cet État ;

(d) dans le cas prévu à l'article 11, un certificat délivré par un tribunal (y compris par une personne autorisée du tribunal) de l'État d'origine attestant que la transaction judiciaire est exécutoire, en tout ou en partie, aux mêmes conditions qu'un jugement dans l'État d'origine.

2 Si le contenu du jugement ne permet pas au tribunal requis de vérifier que les conditions du présent chapitre sont remplies, ce tribunal peut exiger tout document nécessaire.

3 Une demande de reconnaissance ou d'exécution peut être accompagnée d'un document relatif au jugement, délivré par un tribunal (y compris par une personne autorisée du tribunal) de l'État d'origine, sous la forme recommandée et publiée par la Conférence de La Haye de droit international privé.

4 Si les documents mentionnés dans le présent article ne sont pas rédigés dans une langue officielle de l'État requis, ils doivent être accompagnés d'une traduction certifiée dans une langue officielle, sauf si le droit de l'État requis en dispose autrement.

Article 13
*Procédure*

1 La procédure tendant à obtenir la reconnaissance, l'exequatur ou l'enregistrement aux fins d'exécution, et l'exécution du jugement sont régies par le droit de l'État requis sauf si la présente Convention en dispose autrement. Le tribunal de l'État requis agit avec célérité.

2 Le tribunal de l'État requis ne peut refuser de reconnaître ou d'exécuter un jugement en vertu de la présente Convention au motif que la reconnaissance ou l'exécution devrait être requise dans un autre État.

Article 14
*Frais de procédure*

1 Aucune sûreté, caution ou dépôt, sous quelque dénomination que ce soit, ne peut être imposée en raison, soit de sa seule qualité d'étranger, soit du seul défaut de domicile ou de résidence dans l'État requis, à la partie qui demande l'exécution dans un État contractant d'une décision rendue par un tribunal d'un autre État contractant.

2 Toute condamnation aux frais et dépens de la procédure, rendue dans un État contractant contre toute personne dispensée du versement d'une sûreté, d'une caution ou d'un dépôt en vertu du paragraphe premier ou du droit de l'État

Article 12
*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 given 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) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;

(d) in the case referred to in Article 11, a certificate of a court (including an officer of the court) of the State of origin stating that the judicial settlement or a part of it is enforceable in the same manner as a judgment 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 any necessary documents.

3 An application for recognition or enforcement may be accompanied by a document relating to the judgment, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.

4 If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 13
*Procedure*

1 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 of the requested State shall act expeditiously.

2 The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

Article 14
*Costs of proceedings*

1 No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given by a court of another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.

2 An order for payment of costs or expenses of proceedings, made in a Contracting State against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 or of the law of the State where pro-

dans lequel l'instance a été introduite est, à la demande du créancier, déclarée exécutoire dans tout autre État contractant.

3 Un État peut déclarer qu'il n'appliquera pas le paragraphe premier ou désigner dans une déclaration lesquels de ses tribunaux ne l'appliqueront pas.

Article 15
*Reconnaissance et exécution en application du droit national*

Sous réserve de l'article 6, la présente Convention ne fait pas obstacle à la reconnaissance ou à l'exécution d'un jugement en application du droit national.

CHAPITRE III – CLAUSES GÉNÉRALES

Article 16
*Disposition transitoire*

La présente Convention s'applique à la reconnaissance et à l'exécution de jugements si, au moment de l'introduction de l'instance dans l'État d'origine, la Convention produisait des effets entre cet État et l'État requis.

Article 17
*Déclarations limitant la reconnaissance et l'exécution*

Un État peut déclarer que ses tribunaux peuvent refuser de reconnaître ou d'exécuter un jugement rendu par un tribunal d'un autre État contractant, lorsque les parties avaient leur résidence dans l'État requis et que les relations entre les parties, ainsi que tous les autres éléments pertinents du litige, autres que le lieu du tribunal d'origine, étaient liés uniquement à l'État requis.

Article 18
*Déclarations relatives à des matières particulières*

1 Lorsqu'un État a un intérêt important à ne pas appliquer la présente Convention à une matière particulière, il peut déclarer qu'il ne l'appliquera pas à cette matière. L'État qui fait une telle déclaration s'assure que la portée de celle-ci n'est pas plus étendue que nécessaire et que la matière particulière exclue est définie de façon claire et précise.

2 À l'égard d'une telle matière, la Convention ne s'applique pas :

(a) dans l'État contractant ayant fait la déclaration ;

(b) dans les autres États contractants, lorsque la reconnaissance ou l'exécution d'un jugement rendu par un tribunal d'un État contractant ayant fait la déclaration est demandée.

Article 19
*Déclarations relatives aux jugements concernant un État ~~des gouvernements~~*

1 Un État peut déclarer qu'il n'appliquera pas la présente Convention aux jugements issus de procédures auxquelles est partie :

(a) cet État ou une personne physique agissant pour celui-ci ; ou

ceedings have been instituted, shall, on the application of the person entitled to the benefit of the order, be rendered enforceable in any other Contracting State.

3 A State may declare that it shall not apply paragraph 1 or designate by a declaration which of its courts shall not apply paragraph 1.

Article 15
*Recognition and enforcement under national law*

Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.

CHAPTER III – GENERAL CLAUSES

Article 16
*Transitional provision*

This Convention shall apply to the recognition and enforcement of judgments if, at the time the proceedings were instituted in the State of origin, the Convention had effect between that State and the requested State.

Article 17
*Declarations limiting recognition and enforcement*

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the court of origin, were connected only with the requested State.

Article 18
*Declarations with respect to specific matters*

1 Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

2 With regard to that matter, the Convention shall not apply –

(a) in the Contracting State that made the declaration;

(b) in other Contracting States, where recognition or enforcement of a judgment given by a court of a Contracting State that made the declaration is sought.

Article 19
*Declarations with respect to judgments pertaining to a State ~~governments~~*

1 A State may declare that it shall not apply this Convention to judgments arising from proceedings to which any of the following is a party –

(a) that State, or a natural person acting for that State~~;~~, or

(b) une agence gouvernementale de cet État ou toute personne physique agissant pour celle-ci.

L'État qui fait une telle déclaration s'assure que la portée de celle-ci n'est pas plus étendue que nécessaire et que l'exclusion du champ d'application y est définie de façon claire et précise. La déclaration ne peut pas faire de distinction selon que l'État, une agence gouvernementale de cet État ou une personne physique agissant pour l'un ou l'autre est le défendeur ou le demandeur à la procédure devant le tribunal d'origine.

2 La reconnaissance ou l'exécution d'un jugement rendu par un tribunal d'un État qui a fait une déclaration en vertu du paragraphe premier peut être refusée si le jugement est issu d'une procédure à laquelle est partie l'État qui a fait la déclaration ou l'État requis, l'une de leurs agences gouvernementales ou une personne physique agissant pour l'un d'entre eux, dans les limites prévues par cette déclaration.

Article 20
*Interprétation uniforme*

Aux fins de l'interprétation de la présente Convention, il sera tenu compte de son caractère international et de la nécessité de promouvoir l'uniformité de son application.

Article 21
*Examen du fonctionnement de la Convention*

Le Secrétaire général de la Conférence de La Haye de droit international privé prend périodiquement des dispositions en vue de l'examen du fonctionnement de la présente Convention, y compris de toute déclaration, et en fait rapport au Conseil sur les affaires générales et la politique.

Article 22
*Systèmes juridiques non unifiés*

1 Au regard d'un État contractant dans lequel deux ou plusieurs systèmes de droit ayant trait aux questions régies par la présente Convention s'appliquent dans des unités territoriales différentes :

(a) toute référence à la loi, au droit ou à la procédure d'un État vise, le cas échéant, la loi, le droit ou la procédure en vigueur dans l'unité territoriale considérée ;

(b) toute référence au tribunal ou aux tribunaux d'un État vise, le cas échéant, le tribunal ou les tribunaux de l'unité territoriale considérée ;

(c) toute référence au lien avec un État vise, le cas échéant, le lien avec l'unité territoriale considérée ;

(d) toute référence à un facteur de rattachement à l'égard d'un État vise, le cas échéant, ce facteur de rattachement à l'égard de l'unité territoriale considérée.

2 Nonobstant le paragraphe premier, un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu d'appliquer la présente Convention aux situations qui impliquent uniquement ces différentes unités territoriales.

(b) a government agency of that State, or a natural person acting for such a government agency.

The State making such a declaration shall ensure that the declaration is no broader than necessary and that the exclusion from scope is clearly and precisely defined. The declaration shall not distinguish between judgments where the State, a government agency of that State or a natural person acting for either of them is a defendant or claimant in the proceedings before the court of origin.

2 Recognition or enforcement of a judgment given by a court of a State that made a declaration pursuant to paragraph 1 may be refused if the judgment arose from proceedings to which either the State that made the declaration or the requested State, one of their government agencies or a natural person acting for either of them is a party, to the same extent as specified in the declaration.

Article 20
*Uniform interpretation*

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

Article 21
*Review of operation of the Convention*

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for review of the operation of this Convention, including any declarations, and shall report to the Council on General Affairs and Policy.

Article 22
*Non-unified legal systems*

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, where appropriate, to the law or procedure in force in the relevant territorial unit;

(b) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;

(c) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit;

(d) any reference to a connecting factor in relation to a State shall be construed as referring, where appropriate, to that connecting factor in relation to the relevant territorial unit.

2 Notwithstanding paragraph 1, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

3 Un tribunal d'une unité territoriale d'un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu de reconnaître ou d'exécuter un jugement d'un autre État contractant au seul motif que le jugement a été reconnu ou exécuté dans une autre unité territoriale du même État contractant selon la présente Convention.

4 Le présent article ne s'applique pas ~~à une~~ aux Organisations régionales d'intégration économique.

Article 23
*Rapport avec d'autres instruments internationaux*

1 La présente Convention doit être interprétée de façon qu'elle soit, autant que possible, compatible avec d'autres traités en vigueur pour les États contractants, conclus avant ou après cette Convention.

2 La présente Convention n'affecte pas l'application par un État contractant d'un traité conclu avant cette Convention.

3 La présente Convention n'affecte pas l'application par un État contractant d'un traité conclu après cette Convention en ce qui a trait à la reconnaissance ou à l'exécution d'un jugement rendu par un tribunal d'un État contractant qui est également Partie à ce traité. Aucune disposition de l'autre traité n'affecte les obligations prévues à l'article 6 à l'égard des États contractants qui ne sont pas Parties à ce traité.

4 La présente Convention n'affecte pas l'application des règles d'une Organisation régionale d'intégration économique Partie à cette Convention en ce qui a trait à la reconnaissance ou à l'exécution d'un jugement rendu par un tribunal d'un État contractant qui est également un État membre de l'Organisation régionale d'intégration économique lorsque :

(a) ces règles ont été adoptées avant la conclusion de la présente Convention ; ou

(b) ces règles ont été adoptées après la conclusion de la présente Convention, dans la mesure où elles n'affectent pas les obligations ~~découlant de~~ prévues à l'article 6 à l'égard des États contractants qui ne sont pas des États membres de l'Organisation régionale d'intégration économique.

CHAPITRE IV – CLAUSES FINALES

Article 24
*Signature, ratification, acceptation, approbation ou adhésion*

1 La présente Convention est ouverte à la signature de tous les États.

2 La présente Convention est sujette à la ratification, à l'acceptation ou à l'approbation par les États signataires.

3 Tout État peut adhérer à la présente Convention.

4 Les instruments de ratification, d'acceptation, d'approbation ou d'adhésion sont déposés auprès du Ministère des Affaires étrangères du Royaume des Pays-Bas, dépositaire de la Convention.

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

4 This Article shall not apply to ~~a~~ Regional Economic Integration Organisations.

Article 23
*Relationship with other international instruments*

1 This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2 This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention.

3 This Convention shall not affect the application by a Contracting State of a treaty concluded after this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. Nothing in the other treaty shall affect the obligations under Article 6 towards Contracting States that are not Parties to that treaty.

4 This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Member State of the Regional Economic Integration Organisation where –

(a) the rules were adopted before this Convention was concluded; or

(b) the rules were adopted after this Convention was concluded, to the extent that they do not affect the obligations under Article 6 towards Contracting States that are not Member States of the Regional Economic Integration Organisation.

CHAPTER IV – FINAL CLAUSES

Article 24
*Signature, ratification, acceptance, approval or accession*

1 This Convention shall be open for signature by all States.

2 This Convention is subject to ratification, acceptance or approval by the signatory States.

3 This Convention shall be open for accession by all States.

4 Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 25
*Déclarations relatives aux systèmes juridiques non unifiés*

1 Un État qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par la présente Convention peut déclarer que la Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles. La déclaration indique expressément les unités territoriales auxquelles la Convention s'applique.

2 Si un État ne fait pas de déclaration en vertu du présent article, la Convention s'applique à l'ensemble du territoire de cet État.

3 Le présent article ne s'applique pas ~~à une~~ aux Organisations régionales d'intégration économique.

Article 26
*Organisations régionales d'intégration économique*

1 Une Organisation régionale d'intégration économique constituée seulement par des États souverains et ayant compétence sur certaines ou toutes les matières régies par la présente Convention peut signer, accepter, approuver cette Convention ou y adhérer. En pareil cas, l'Organisation régionale d'intégration économique aura les mêmes droits et obligations qu'un État contractant, dans la mesure où cette Organisation a compétence sur des matières régies par la présente Convention.

2 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, l'Organisation régionale d'intégration économique notifie au dépositaire, par écrit, les matières régies par la présente Convention pour lesquelles ses États membres lui ont transféré leur compétence. L'Organisation notifie aussitôt au dépositaire, par écrit, toute modification intervenue dans la délégation de compétence précisée dans la notification la plus récente faite en vertu du présent paragraphe.

3 Aux fins de l'entrée en vigueur de la présente Convention, tout instrument déposé par une Organisation régionale d'intégration économique n'est pas compté, à moins que l'Organisation régionale d'intégration économique déclare, en vertu de l'article 27(1), que ses États membres ne seront pas Parties à cette Convention.

4 Toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, à une Organisation régionale d'intégration économique.

Article 27
*Organisation régionale d'intégration économique en tant que Partie contractante sans ses États membres*

1 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, une Organisation régionale d'intégration économique peut déclarer qu'elle a compétence pour toutes les matières régies par la présente Convention et que ses États membres ne seront pas Parties à cette Convention mais seront liés par celle-ci en raison de la signature, de l'acceptation, de l'approbation ou de l'adhésion de l'Organisation.

2 Lorsqu'une déclaration est faite par une Organisation régionale d'intégration économique en conformité avec le paragraphe premier, toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, aux États membres de l'Organisation.

Article 25
*Declarations with respect to non-unified legal systems*

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 declare that the Convention shall extend to all its territorial units or only to one or more of them. Such a declaration shall state expressly the territorial units to which the Convention applies.

2 If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.

3 This Article shall not apply to ~~a~~ Regional Economic Integration Organisations.

Article 26
*Regional Economic Integration Organisations*

1 A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

2 The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3 For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 27(1) that its Member States will not be Parties to this Convention.

4 Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation.

Article 27
*Regional Economic Integration Organisation as a Contracting Party without its Member States*

1 At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

2 In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 28
*Entrée en vigueur*

1 La présente Convention entre en vigueur le premier jour du mois suivant l'expiration d'une période de trois mois après le dépôt du deuxième instrument de ratification, d'acceptation, d'approbation ou d'adhésion visé à l'article 24.

2 Par la suite, la présente Convention entre en vigueur :

(a) pour chaque État ou Organisation régionale d'intégration économique la ratifiant, l'acceptant, l'approuvant ou y adhérant postérieurement, le premier jour du mois suivant l'expiration de la période pendant laquelle des notifications peuvent être faites en vertu de l'article 29(2) ;

(b) pour les unités territoriales auxquelles la présente Convention a été étendue conformément à l'article 25, le premier jour du mois suivant l'expiration d'une période de trois mois après la notification de la déclaration visée par ledit article.

Article 29
*Établissement de relations en vertu de la Convention*

1 La présente Convention ne produit des effets entre deux États contractants que si aucun d'entre eux n'a transmis de notification au dépositaire à l'égard de l'autre conformément aux paragraphes 2 ou 3.

2 Un État contractant peut notifier au dépositaire, dans les 12 mois suivant la notification par le dépositaire visée à l'article 32(a), que la ratification, l'acceptation, l'approbation ou l'adhésion d'un autre État n'aura pas pour effet d'établir des relations entre ces deux États en vertu de la présente Convention.

3 Un État peut notifier au dépositaire, lors du dépôt de son instrument en vertu de l'article 24(4), que sa ratification, son acceptation, son approbation ou son adhésion n'aura pas pour effet d'établir des relations avec un État contractant en vertu de la présente Convention.

4 Un État contractant peut à tout moment retirer une notification qu'il a faite en vertu des paragraphes 2 ou 3. Ce retrait prendra effet le premier jour du mois suivant l'expiration d'une période de trois mois à compter de la date de notification.

Article 30
*Déclarations*

1 Les déclarations visées aux articles 14, 17, 18, 19 et 25 peuvent être faites lors de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion ou à tout moment ultérieur et être modifiées ou retirées à tout moment.

2 Les déclarations, modifications et retraits sont notifiés au dépositaire.

3 Une déclaration faite au moment de la signature, de la ratification, de l'acceptation, de l'approbation ~~de la présente Convention~~ ou de l'adhésion ~~à celle-ci~~ prend effet au moment de l'entrée en vigueur de la présente Convention pour l'État concerné.

4 Une déclaration faite ultérieurement, ainsi que toute modification ou tout retrait d'une déclaration, prend effet le premier jour du mois suivant l'expiration d'une période de trois mois après la date de réception de la notification par le dépositaire.

Article 28
*Entry into force*

1 This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 24.

2 Thereafter this Convention shall enter into force –

(a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of the period during which notifications may be made in accordance with Article 29(2);

(b) for a territorial unit to which this Convention has been extended in accordance with Article 25, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 29
*Establishment of relations pursuant to the Convention*

1 This~~e~~ Convention shall have effect between two Contracting States only if neither of them has notified the depositary regarding the other in accordance with paragraph 2 or 3.

2 A Contracting State may notify the depositary, within 12 months after the notification by the depositary referred to in Article 32(a), that this~~e~~ ratification, acceptance, approval or accession of another State shall not have the effect of establishing relations between the two States pursuant to the Convention.

3 A State may notify the depositary, upon the deposit of its instrument pursuant to Article 24(4), that its ratification, acceptance, approval or accession shall not have the effect of establishing relations with a Contracting State pursuant to this~~e~~ Convention.

4 A Contracting State may at any time withdraw a notification that it has made under paragraph 2 or 3. Such a withdrawal shall take effect on the first day of the month following the expiration of three months following the date of notification.

Article 30
*Declarations*

1 Declarations referred to in Articles 14, 17, 18, 19 and 25 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2 Declarations, modifications and withdrawals shall be notified to the depositary.

3 A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months following the date on which the notification is received by the depositary.

5 Une déclaration faite ultérieurement, ainsi que toute modification ou tout retrait d'une déclaration, ne produit pas d'effet à l'égard des jugements rendus à l'issue d'instances déjà introduites devant le tribunal d'origine au moment où la déclaration prend effet.

Article 31
*Dénonciation*

1 Tout État contractant peut dénoncer la présente Convention par une notification écrite au dépositaire. La dénonciation peut se limiter à certaines unités territoriales d'un État à plusieurs unités auxquelles s'applique la Convention. ~~La présente Convention peut être dénoncée par une notification écrite au dépositaire. La dénonciation peut se limiter à certaines unités territoriales d'un système juridique non unifié auxquelles s'applique la présente Convention.~~

2 La dénonciation prend effet le premier jour du mois suivant l'expiration d'une période de 12 mois après la date de réception de la notification par le dépositaire. Lorsqu'une période plus longue pour la prise d'effet de la dénonciation est précisée dans la notification, la dénonciation prend effet à l'expiration de la période en question après la date de réception de la notification par le dépositaire.

Article 32
*Notifications par le dépositaire*

Le dépositaire notifie aux Membres de la Conférence de La Haye de droit international privé, ainsi qu'aux autres États et aux Organisations régionales d'intégration économique qui ont signé, ratifié, accepté, approuvé la présente Convention ou y ont adhéré conformément aux articles 24, 26 et 27 les renseignements suivants :

(a) les signatures, ratifications, acceptations, approbations et adhésions prévues aux articles 24, 26 et 27 ;

(b) la date d'entrée en vigueur de la présente Convention conformément à l'article 28 ;

(c) les notifications, déclarations, modifications et retraits prévus aux articles 26, 27, 29 et 30 ; et

(d) les dénonciations prévues à l'article 31.

En foi de quoi, les soussignés, dûment autorisés, ont signé la présente Convention.

Fait à La Haye, le 2 juillet 2019, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement du Royaume des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Membres de la Conférence de La Haye de droit international privé lors de sa Vingt-deuxième session ainsi qu'à chacun des autres États ayant participé à cette Session.

5 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall not apply to judgments resulting from proceedings that have already been instituted before the court of origin when the declaration takes effect.

Article 31
*Denunciation*

1 A Contracting State to this Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a multi-unit State to which the Convention applies. ~~This Convention may be denounced by notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.~~

2 The denunciation shall take effect on the first day of the month following the expiration of 12 months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 32
*Notifications by the depositary*

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded to this Convention in accordance with Articles 24, 26 and 27 of the following –

(a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 24, 26 and 27;

(b) the date on which this Convention enters into force in accordance with Article 28;

(c) the notifications, declarations, modifications and withdrawals referred to in Articles 26, 27, 29 and 30; and

(d) the denunciations referred to in Article 31.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 2nd day of July 2019, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Members of the Hague Conference on Private International Law at the time of its Twenty-Second Session and to each of the other States which have participated in that Session.

*Distribué le lundi premier juillet 2019*

**No 97 – Texte du projet de Convention**

PROJET DE CONVENTION SUR LA RECONNAISSANCE ET L'EXÉCUTION DES JUGEMENTS ÉTRANGERS EN MATIÈRE CIVILE OU COMMERCIALE

Les Parties contractantes à la présente Convention,

Désireuses de promouvoir un accès effectif de tous à la justice et de faciliter, à l'échelon multilatéral, le commerce et l'investissement fondés sur des règles, ainsi que la mobilité, par le biais de la coopération judiciaire,

Estimant que cette coopération peut être renforcée par la mise en place d'un ensemble uniforme de règles essentielles sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale, afin de faciliter la reconnaissance et l'exécution effectives de ces jugements,

Convaincues que cette coopération judiciaire renforcée nécessite notamment un régime juridique international offrant une plus grande prévisibilité et sécurité en matière de circulation des jugements étrangers à l'échelle mondiale, qui soit complémentaire de la *Convention du 30 juin 2005 sur les accords d'élection de for*,

Ont résolu de conclure la présente Convention à cet effet et sont convenues des dispositions suivantes :

CHAPITRE I – CHAMP D'APPLICATION ET DÉFINITIONS

Article premier
*Champ d'application*

1 La présente Convention s'applique à la reconnaissance et à l'exécution des jugements en matière civile ou commerciale. Elle ne recouvre notamment pas les matières fiscales, douanières ou administratives.

2 La présente Convention s'applique à la reconnaissance et à l'exécution, dans un État contractant, d'un jugement rendu par un tribunal d'un autre État contractant.

Article 2
*Exclusions du champ d'application*

1 La présente Convention ne s'applique pas aux matières suivantes :





*Distributed on Monday 1 July 2019*

**No 97 – Text of the draft Convention**

DRAFT CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS

The Contracting Parties to the present Convention,

Desiring to promote effective access to justice for all and to facilitate rule-based multilateral trade and investment, and mobility, through judicial co-operation,

Believing that such co-operation can be enhanced through the creation of a uniform set of core rules on recognition and enforcement of foreign judgments in civil or commercial matters, to facilitate the effective recognition and enforcement of such judgments,

Convinced that such enhanced judicial co-operation requires, in particular, an international legal regime that provides greater predictability and certainty in relation to the global circulation of foreign judgments, and that is complementary to the *Convention of 30 June 2005 on Choice of Court Agreements*,

Have resolved to conclude this Convention to this effect and have agreed upon the following provisions –

CHAPTER I – SCOPE AND DEFINITIONS

Article 1
*Scope*

1 This Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters. It shall not extend in particular to revenue, customs or administrative matters.

2 This Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State.

Article 2
*Exclusions from scope*

1 This Convention shall not apply to the following matters –

(a) l'état et la capacité des personnes physiques ;

(b) les obligations alimentaires ;

(c) les autres matières du droit de la famille, y compris les régimes matrimoniaux et les autres droits ou obligations découlant du mariage ou de relations similaires ;

(d) les testaments et les successions ;

(e) l'insolvabilité, les concordats, la résolution d'établissements financiers, ainsi que les matières analogues ;

(f) le transport de passagers et de marchandises ;

(g) la pollution marine transfrontière, la pollution marine dans les zones ne relevant pas de la juridiction nationale, la pollution marine par les navires, la limitation de responsabilité pour des demandes en matière maritime, ainsi que les avaries communes ;

(h) la responsabilité pour les dommages nucléaires ;

(i) la validité, la nullité ou la dissolution des personnes morales ou des associations entre personnes physiques ou personnes morales, ainsi que la validité des décisions de leurs organes ;

(j) la validité des inscriptions sur les registres publics ;

(k) la diffamation ;

(l) le droit à la vie privée ;

(m) la propriété intellectuelle ;

(n) les activités des forces armées, y compris celles de leur personnel dans l'exercice de ses fonctions officielles ;

(o) les activités relatives au maintien de l'ordre, y compris celles du personnel chargé du maintien de l'ordre dans l'exercice de ses fonctions officielles ;

(p) les entraves à la concurrence, sauf lorsque le jugement porte sur un comportement qui constitue un accord anticoncurrentiel ou une pratique concertée entre concurrents réels ou potentiels visant à fixer les prix, procéder à des soumissions concertées, établir des restrictions ou des quotas à la production, ou diviser des marchés par répartition de la clientèle, de fournisseurs, de territoires ou de lignes d'activité, et lorsque ce comportement et ses effets se sont tous deux produits dans l'État d'origine ;

(q) la restructuration de la dette souveraine par des mesures étatiques unilatérales.

2 Un jugement n'est pas exclu du champ d'application de la présente Convention lorsqu'une question relevant d'une matière à laquelle elle ne s'applique pas est soulevée seulement à titre préalable et non comme objet du litige. En particulier, le seul fait qu'une telle matière ait été invoquée dans le cadre d'un moyen de défense n'exclut pas le jugement du champ d'application de la Convention, si cette question n'était pas un objet du litige.

3 La présente Convention ne s'applique pas à l'arbitrage et aux procédures y afférentes.

(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, resolution of financial institutions, and analogous matters;

(f) the carriage of passengers and goods;

(g) transboundary marine pollution, marine pollution in areas beyond national jurisdiction, ship-source marine pollution, limitation of liability for maritime claims, and general average;

(h) liability for nuclear damage;

(i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs;

(j) the validity of entries in public registers;

(k) defamation;

(l) privacy;

(m) intellectual property;

(n) activities of armed forces, including the activities of their personnel in the exercise of their official duties;

(o) law enforcement activities, including the activities of law enforcement personnel in the exercise of their official duties;

(p) anti-trust (competition) matters, except where the judgment is based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the State of origin;

(q) sovereign debt restructuring through unilateral State measures.

2 A judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings. In particular, the mere fact that such a matter arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.

3 This Convention shall not apply to arbitration and related proceedings.

4 Un jugement n'est pas exclu du champ d'application de la présente Convention du seul fait qu'un État, y compris un gouvernement, une agence gouvernementale ou toute personne agissant pour un État, était partie au litige.

5 La présente Convention n'affecte en rien les privilèges et immunités dont jouissent les États ou les organisations internationales, pour eux-mêmes et pour leurs biens.

Article 3
*Définitions*

1 Au sens de la présente Convention :

(a) le terme « défendeur » signifie la personne contre laquelle la demande ou la demande reconventionnelle a été introduite dans l'État d'origine ;

(b) le terme « jugement » signifie toute décision sur le fond rendue par un tribunal, quelle que soit la dénomination donnée à cette décision, telle qu'un arrêt ou une ordonnance, de même que la fixation des frais et dépens de la procédure par le tribunal (y compris par une personne autorisée du tribunal), à condition que cette fixation ait trait à une décision sur le fond susceptible d'être reconnue ou exécutée en vertu de la présente Convention. Les mesures provisoires et conservatoires ne sont pas des jugements.

2 Une entité ou une personne autre qu'une personne physique est réputée avoir sa résidence habituelle dans l'État :

(a) de son siège statutaire ;

(b) selon le droit duquel elle a été constituée ;

(c) de son administration centrale ; ou

(d) de son principal établissement.

CHAPITRE II – RECONNAISSANCE ET EXÉCUTION

Article 4
*Dispositions générales*

1 Un jugement rendu par un tribunal d'un État contractant (État d'origine) est reconnu et exécuté dans un autre État contractant (État requis) conformément aux dispositions du présent chapitre. La reconnaissance ou l'exécution ne peut être refusée qu'aux motifs énoncés dans la présente Convention.

2 Le jugement ne peut pas faire l'objet d'une révision au fond dans l'État requis. Il ne peut y avoir d'appréciation qu'au regard de ce qui est nécessaire pour l'application de la présente Convention.

3 Un jugement n'est reconnu que s'il produit ses effets dans l'État d'origine et n'est exécuté que s'il est exécutoire dans l'État d'origine.

4 La reconnaissance ou l'exécution peut être différée ou refusée si le jugement visé au paragraphe 3 fait l'objet d'un recours dans l'État d'origine ou si le délai pour exercer un recours ordinaire n'a pas expiré. Un tel refus n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.

4 A judgment is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings.

5 Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3
*Definitions*

1 In this Convention –

(a) "defendant" means a person against whom the claim or counterclaim was brought in the State of origin;

(b) "judgment" means any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses of the proceedings by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

2 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 the law of which it was incorporated or formed;

(c) where it has its central administration; or

(d) where it has its principal place of business.

CHAPTER II – RECOGNITION AND ENFORCEMENT

Article 4
*General provisions*

1 A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.

2 There shall be no review of the merits of the judgment in the requested State. There may only be such consideration as is necessary for the application of this Convention.

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 referred to under paragraph 3 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 5
*Fondements de la reconnaissance et de l'exécution*

1 Un jugement est susceptible d'être reconnu et exécuté si l'une des exigences suivantes est satisfaite :

(a) la personne contre laquelle la reconnaissance ou l'exécution est demandée avait sa résidence habituelle dans l'État d'origine lorsqu'elle est devenue partie à la procédure devant le tribunal d'origine ;

(b) la personne physique contre laquelle la reconnaissance ou l'exécution est demandée avait son établissement professionnel principal dans l'État d'origine lorsqu'elle est devenue partie à la procédure devant le tribunal d'origine et la demande sur laquelle se fonde le jugement résultait de son activité professionnelle ;

(c) la personne contre laquelle la reconnaissance ou l'exécution est demandée est celle qui a saisi le tribunal de la demande, autre que reconventionnelle, sur laquelle se fonde le jugement ;

(d) le défendeur avait une succursale, une agence ou tout autre établissement sans personnalité juridique propre dans l'État d'origine, au moment où il est devenu une partie à la procédure devant le tribunal d'origine, et la demande sur laquelle se fonde le jugement résultait des activités de cette succursale, de cette agence ou de cet établissement ;

(e) le défendeur a expressément consenti à la compétence du tribunal d'origine au cours de la procédure dans laquelle le jugement a été rendu ;

(f) le défendeur a fait valoir ses arguments sur le fond devant le tribunal d'origine sans en contester la compétence dans les délais prescrits par le droit de l'État d'origine, à moins qu'il ne soit évident qu'une contestation de la compétence ou de son exercice aurait échoué en vertu de ce droit ;

(g) le jugement porte sur une obligation contractuelle et a été rendu par un tribunal de l'État dans lequel l'obligation a été ou aurait dû être exécutée, conformément

(i) à l'accord des parties, ou

(ii) à la loi applicable au contrat, à défaut d'un accord sur le lieu d'exécution,

sauf si les activités du défendeur en relation avec la transaction ne présentaient manifestement pas de lien intentionnel et substantiel avec cet État ;

(h) le jugement porte sur un bail immobilier et a été rendu par un tribunal de l'État où est situé l'immeuble ;

(i) le jugement rendu contre le défendeur porte sur une obligation contractuelle garantie par un droit réel relatif à un immeuble situé dans l'État d'origine, à condition que la demande contractuelle ait été accompagnée d'une demande portant sur ce droit réel dirigée contre ce défendeur ;

(j) le jugement porte sur une obligation non contractuelle résultant d'un décès, d'un dommage corporel, d'un dommage subi par un bien corporel ou de la perte d'un bien corporel et l'acte ou l'omission directement à l'origine du dommage a été commis dans l'État d'origine, quel que soit le lieu où le dommage est survenu ;

Article 5
*Bases for recognition and enforcement*

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

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

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

(c) the person against whom recognition or enforcement is sought is the person that brought the claim, other than a counterclaim, on which the judgment is based;

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

(e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;

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

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

(i) the agreement of the parties, or

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

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

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

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

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

(k) le jugement porte sur la validité, l'interprétation, les effets, l'administration ou la modification d'un trust constitué volontairement et documenté par écrit, et :

(i) au moment de l'introduction de l'instance, l'État d'origine était désigné dans l'acte constitutif du trust comme étant un État dont les tribunaux sont appelés à trancher les litiges relatifs à ces questions ; ou

(ii) au moment de l'introduction de l'instance, l'État d'origine était désigné, de façon expresse ou implicite, dans l'acte constitutif du trust comme étant l'État dans lequel est situé le lieu principal d'administration du trust.

Le présent alinéa ne s'applique qu'aux jugements portant sur des aspects internes d'un trust entre personnes étant ou ayant été au sein de la relation établie par le trust ;

(l) le jugement porte sur une demande reconventionnelle :

(i) dans la mesure où il a été rendu en faveur du demandeur reconventionnel, à condition que cette demande résulte de la même transaction ou des mêmes faits que la demande principale ; ou

(ii) dans la mesure où il a été rendu contre le demandeur reconventionnel, sauf si le droit de l'État d'origine exigeait une demande reconventionnelle à peine de forclusion ;

(m) le jugement a été rendu par un tribunal désigné dans un accord conclu ou documenté par écrit ou par tout autre moyen de communication qui rende l'information accessible pour être consultée ultérieurement, autre qu'un accord exclusif d'élection de for.

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

2 Si la reconnaissance ou l'exécution est demandée contre une personne physique agissant principalement dans un but personnel, familial ou domestique (un consommateur) en matière de contrat de consommation, ou contre un employé relativement à son contrat de travail :

(a) l'alinéa (e) du paragraphe premier ne s'applique que si le consentement a été donné devant le tribunal, que ce soit oralement ou par écrit ;

(b) les alinéas (f), (g) et (m) du paragraphe premier ne s'appliquent pas.

3 Le paragraphe premier ne s'applique pas à un jugement portant sur un bail immobilier résidentiel (bail d'habitation) ou sur l'enregistrement d'un immeuble. Un tel jugement est susceptible d'être reconnu et exécuté uniquement s'il a été rendu par un tribunal de l'État où est situé l'immeuble.

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

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

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

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

(l) the judgment ruled on a counterclaim –

(i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim; or

(ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion;

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

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

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

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

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

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

Article 6
*Fondement exclusif de la reconnaissance et de l'exécution*

Nonobstant l'article 5, un jugement portant sur des droits réels immobiliers n'est reconnu ou exécuté que si l'immeuble est situé dans l'État d'origine.

Article 7
*Refus de reconnaissance et d'exécution*

1 La reconnaissance ou l'exécution peut être refusée si :

(a) l'acte introductif d'instance ou un acte équivalent contenant les éléments essentiels de la demande :

(i) n'a pas été notifié au défendeur en temps utile et de telle manière qu'il puisse organiser sa défense, à moins que le défendeur ait comparu et présenté sa défense sans contester la notification devant le tribunal d'origine, à condition que le droit de l'État d'origine permette de contester la notification ; ou

(ii) a été notifié au défendeur dans l'État requis de manière incompatible avec les principes fondamentaux de l'État requis relatifs à la notification de documents ;

(b) le jugement résulte d'une fraude ;

(c) la reconnaissance ou l'exécution est manifestement incompatible avec l'ordre public de l'État requis, notamment dans le cas où la procédure appliquée en l'espèce pour obtenir le jugement était incompatible avec les principes fondamentaux d'équité procédurale de cet État et en cas d'atteinte à la sécurité ou à la souveraineté de cet État ;

(d) la procédure devant le tribunal d'origine était contraire à un accord, ou à une clause figurant dans l'acte constitutif d'un trust, en vertu duquel le litige en question devait être tranché par un tribunal d'un État autre que l'État d'origine ;

(e) le jugement est incompatible avec un jugement rendu par un tribunal de l'État requis dans un litige entre les mêmes parties ; ou

(f) le jugement est incompatible avec un jugement rendu antérieurement par un tribunal d'un autre État entre les mêmes parties dans un litige ayant le même objet, lorsque le jugement rendu antérieurement réunit les conditions nécessaires à sa reconnaissance dans l'État requis.

2 La reconnaissance ou l'exécution peut être différée ou refusée si une procédure ayant le même objet est pendante entre les mêmes parties devant un tribunal de l'État requis lorsque :

(a) ce dernier a été saisi avant le tribunal de l'État d'origine ; et

(b) il existe un lien étroit entre le litige et l'État requis.

Le refus visé au présent paragraphe n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.

Article 6
*Exclusive basis for recognition and enforcement*

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

Article 7
*Refusal of recognition and enforcement*

1 Recognition or enforcement may be refused if –

(a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim –

(i) was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence, unless the defendant entered an appearance and presented their case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

(ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

(b) the judgment was obtained by fraud;

(c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State;

(d) the proceedings in the court of origin were contrary to an agreement, or a designation in a trust instrument, under which the dispute in question was to be determined in a court of a State other than the State of origin;

(e) the judgment is inconsistent with a judgment given by a court of the requested State in a dispute between the same parties; or

(f) the judgment is inconsistent with an earlier judgment given by a court of another State between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

2 Recognition or enforcement may be postponed or refused if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –

(a) the court of the requested State was seised before the court of origin; and

(b) there is a close connection between the dispute and the requested State.

A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 8
*Questions préalables*

1 Une décision rendue à titre préalable sur une matière à laquelle la présente Convention ne s'applique pas, ou sur une matière visée à l'article 6 par un tribunal d'un État autre que l'État désigné dans cette disposition, n'est pas reconnue ou exécutée en vertu de la présente Convention.

2 La reconnaissance ou l'exécution d'un jugement peut être refusée si, et dans la mesure où, le jugement est fondé sur une décision relative à une matière à laquelle la présente Convention ne s'applique pas, ou sur une décision relative à une matière visée à l'article 6 qui a été rendue par un tribunal d'un État autre que l'État désigné dans cette disposition.

Article 9
*Divisibilité*

La reconnaissance ou l'exécution d'une partie dissociable d'un jugement est accordée si la reconnaissance ou l'exécution de cette partie est demandée ou si seule une partie du jugement peut être reconnue ou exécutée en vertu de la présente Convention.

Article 10
*Dommages et intérêts*

1 La reconnaissance ou l'exécution d'un jugement peut être refusée si, et dans la mesure où, le jugement accorde des dommages et intérêts, y compris des dommages et intérêts exemplaires ou punitifs, qui ne compensent pas une partie pour la perte ou le préjudice réels subis.

2 Le tribunal requis prend en considération si, et dans quelle mesure, le montant accordé à titre de dommages et intérêts par le tribunal d'origine est destiné à couvrir les frais et dépens de la procédure.

Article 11
*Transactions judiciaires*

Les transactions judiciaires homologuées par un tribunal d'un État contractant, ou qui ont été conclues au cours d'une instance devant un tribunal d'un État contractant, et qui sont exécutoires au même titre qu'un jugement dans l'État d'origine, sont exécutées en vertu de la présente Convention aux mêmes conditions qu'un jugement.

Article 12
*Pièces à produire*

1 La partie qui requiert la reconnaissance ou qui demande l'exécution doit produire :

(a) une copie complète et certifiée conforme du jugement ;

(b) si le jugement a été rendu par défaut, l'original ou une copie certifiée conforme du document attestant que l'acte introductif d'instance ou un acte équivalent a été notifié à la partie défaillante ;

(c) tout document nécessaire pour établir que le jugement produit ses effets dans l'État d'origine ou, le cas échéant, qu'il est exécutoire dans cet État ;

Article 8
*Preliminary questions*

1 A ruling on a preliminary question shall not be recognised or enforced under this Convention if the ruling is on a matter to which this Convention does not apply or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.

2 Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply, or on a matter referred to in Article 6 on which a court of a State other than the State referred to in that Article ruled.

Article 9
*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 10
*Damages*

1 Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.

2 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
*Judicial settlements (*transactions judiciaires*)*

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State has approved, or which have been concluded in the course of proceedings before a court of a Contracting State, 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.

Article 12
*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 given 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) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;

(d) dans le cas prévu à l'article 11, un certificat délivré par un tribunal (y compris par une personne autorisée du tribunal) de l'État d'origine attestant que la transaction judiciaire est exécutoire, en tout ou en partie, aux mêmes conditions qu'un jugement dans l'État d'origine.

2 Si le contenu du jugement ne permet pas au tribunal requis de vérifier que les conditions du présent chapitre sont remplies, ce tribunal peut exiger tout document nécessaire.

3 Une demande de reconnaissance ou d'exécution peut être accompagnée d'un document relatif au jugement, délivré par un tribunal (y compris par une personne autorisée du tribunal) de l'État d'origine, sous la forme recommandée et publiée par la Conférence de La Haye de droit international privé.

4 Si les documents mentionnés dans le présent article ne sont pas rédigés dans une langue officielle de l'État requis, ils doivent être accompagnés d'une traduction certifiée dans une langue officielle, sauf si le droit de l'État requis en dispose autrement.

Article 13
*Procédure*

1 La procédure tendant à obtenir la reconnaissance, l'exequatur ou l'enregistrement aux fins d'exécution, et l'exécution du jugement sont régies par le droit de l'État requis sauf si la présente Convention en dispose autrement. Le tribunal de l'État requis agit avec célérité.

2 Le tribunal de l'État requis ne peut refuser de reconnaître ou d'exécuter un jugement en vertu de la présente Convention au motif que la reconnaissance ou l'exécution devrait être requise dans un autre État.

Article 14
*Frais de procédure*

1 Aucune sûreté ou caution ni aucun dépôt, sous quelque dénomination que ce soit, ne peut être imposé en raison, soit de sa seule qualité d'étranger, soit du seul défaut de domicile ou de résidence dans l'État requis, à la partie qui demande l'exécution dans un État contractant d'une décision rendue par un tribunal d'un autre État contractant.

2 Toute condamnation aux frais et dépens de la procédure, rendue dans un État contractant contre toute personne dispensée du versement d'une sûreté, d'une caution ou d'un dépôt en vertu du paragraphe premier ou du droit de l'État dans lequel l'instance a été introduite est, à la demande du créancier, déclarée exécutoire dans tout autre État contractant.

3 Un État peut déclarer qu'il n'appliquera pas le paragraphe premier ou désigner dans une déclaration lesquels de ses tribunaux ne l'appliqueront pas.

Article 15
*Reconnaissance et exécution en application du droit national*

Sous réserve de l'article 6, la présente Convention ne fait pas obstacle à la reconnaissance ou à l'exécution d'un jugement en application du droit national.

(d) in the case referred to in Article 11, a certificate of a court (including an officer of the court) of the State of origin stating that the judicial settlement or a part of it is enforceable in the same manner as a judgment 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 any necessary documents.

3 An application for recognition or enforcement may be accompanied by a document relating to the judgment, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.

4 If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 13
*Procedure*

1 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 of the requested State shall act expeditiously.

2 The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

Article 14
*Costs of proceedings*

1 No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given by a court of another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.

2 An order for payment of costs or expenses of proceedings, made in a Contracting State against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 or of the law of the State where proceedings have been instituted, shall, on the application of the person entitled to the benefit of the order, be rendered enforceable in any other Contracting State.

3 A State may declare that it shall not apply paragraph 1 or designate by a declaration which of its courts shall not apply paragraph 1.

Article 15
*Recognition and enforcement under national law*

Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.

Article 16
*Disposition transitoire*

La présente Convention s'applique à la reconnaissance et à l'exécution de jugements si, au moment de l'introduction de l'instance dans l'État d'origine, la Convention produisait des effets entre cet État et l'État requis.

Article 17
*Déclarations limitant la reconnaissance et l'exécution*

Un État peut déclarer que ses tribunaux peuvent refuser de reconnaître ou d'exécuter un jugement rendu par un tribunal d'un autre État contractant, lorsque les parties avaient leur résidence dans l'État requis et que les relations entre les parties, ainsi que tous les autres éléments pertinents du litige, autres que le lieu du tribunal d'origine, étaient liés uniquement à l'État requis.

Article 18
*Déclarations relatives à des matières particulières*

1 Lorsqu'un État a un intérêt important à ne pas appliquer la présente Convention à une matière particulière, il peut déclarer qu'il ne l'appliquera pas à cette matière. L'État qui fait une telle déclaration s'assure que la portée de celle-ci n'est pas plus étendue que nécessaire et que la matière particulière exclue est définie de façon claire et précise.

2 À l'égard d'une telle matière, la Convention ne s'applique pas :

(a) dans l'État contractant ayant fait la déclaration ;

(b) dans les autres États contractants, lorsque la reconnaissance ou l'exécution d'un jugement rendu par un tribunal d'un État contractant ayant fait la déclaration est demandée.

Article 19
*Déclarations relatives aux jugements concernant un État*

1 Un État peut déclarer qu'il n'appliquera pas la présente Convention aux jugements issus de procédures auxquelles est partie :

(a) cet État ou une personne physique agissant pour celui-ci ; ou

(b) une agence gouvernementale de cet État ou toute personne physique agissant pour celle-ci.

L'État qui fait une telle déclaration s'assure que la portée de celle-ci n'est pas plus étendue que nécessaire et que l'exclusion du champ d'application y est définie de façon claire et précise. La déclaration ne peut pas faire de distinction selon que l'État, une agence gouvernementale de cet État ou une personne physique agissant pour l'un ou l'autre est le défendeur ou le demandeur à la procédure devant le tribunal d'origine.



Article 16
*Transitional provision*

This Convention shall apply to the recognition and enforcement of judgments if, at the time the proceedings were instituted in the State of origin, the Convention had effect between that State and the requested State.

Article 17
*Declarations limiting recognition and enforcement*

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the court of origin, were connected only with the requested State.

Article 18
*Declarations with respect to specific matters*

1 Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

2 With regard to that matter, the Convention shall not apply –

(a) in the Contracting State that made the declaration;

(b) in other Contracting States, where recognition or enforcement of a judgment given by a court of a Contracting State that made the declaration is sought.

Article 19
*Declarations with respect to judgments pertaining to a State*

1 A State may declare that it shall not apply this Convention to judgments arising from proceedings to which any of the following is a party –

(a) that State, or a natural person acting for that State; or

(b) a government agency of that State, or a natural person acting for such a government agency.

The State making such a declaration shall ensure that the declaration is no broader than necessary and that the exclusion from scope is clearly and precisely defined. The declaration shall not distinguish between judgments where the State, a government agency of that State or a natural person acting for either of them is a defendant or claimant in the proceedings before the court of origin.

2 La reconnaissance ou l'exécution d'un jugement rendu par un tribunal d'un État qui a fait une déclaration en vertu du paragraphe premier peut être refusée si le jugement est issu d'une procédure à laquelle est partie l'État qui a fait la déclaration ou l'État requis, l'une de leurs agences gouvernementales ou une personne physique agissant pour l'un d'entre eux, dans les limites prévues par cette déclaration.

Article 20
*Interprétation uniforme*

Aux fins de l'interprétation de la présente Convention, il sera tenu compte de son caractère international et de la nécessité de promouvoir l'uniformité de son application.

Article 21
*Examen du fonctionnement de la Convention*

Le Secrétaire général de la Conférence de La Haye de droit international privé prend périodiquement des dispositions en vue de l'examen du fonctionnement de la présente Convention, y compris de toute déclaration, et en fait rapport au Conseil sur les affaires générales et la politique.

Article 22
*Systèmes juridiques non unifiés*

1 Au regard d'un État contractant dans lequel deux ou plusieurs systèmes de droit ayant trait aux questions régies par la présente Convention s'appliquent dans des unités territoriales différentes :

(a) toute référence à la loi, au droit ou à la procédure d'un État vise, le cas échéant, la loi, le droit ou la procédure en vigueur dans l'unité territoriale considérée ;

(b) toute référence au tribunal ou aux tribunaux d'un État vise, le cas échéant, le tribunal ou les tribunaux de l'unité territoriale considérée ;

(c) toute référence au lien avec un État vise, le cas échéant, le lien avec l'unité territoriale considérée ;

(d) toute référence à un facteur de rattachement à l'égard d'un État vise, le cas échéant, ce facteur de rattachement à l'égard de l'unité territoriale considérée.

2 Nonobstant le paragraphe premier, un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu d'appliquer la présente Convention aux situations qui impliquent uniquement ces différentes unités territoriales.

3 Un tribunal d'une unité territoriale d'un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu de reconnaître ou d'exécuter un jugement d'un autre État contractant au seul motif que le jugement a été reconnu ou exécuté dans une autre unité territoriale du même État contractant selon la présente Convention.

4 Le présent article ne s'applique pas aux Organisations régionales d'intégration économique.

2 Recognition or enforcement of a judgment given by a court of a State that made a declaration pursuant to paragraph 1 may be refused if the judgment arose from proceedings to which either the State that made the declaration or the requested State, one of their government agencies or a natural person acting for either of them is a party, to the same extent as specified in the declaration.

Article 20
*Uniform interpretation*

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

Article 21
*Review of operation of the Convention*

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for review of the operation of this Convention, including any declarations, and shall report to the Council on General Affairs and Policy.

Article 22
*Non-unified legal systems*

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, where appropriate, to the law or procedure in force in the relevant territorial unit;

(b) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;

(c) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit;

(d) any reference to a connecting factor in relation to a State shall be construed as referring, where appropriate, to that connecting factor in relation to the relevant territorial unit.

2 Notwithstanding paragraph 1, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

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

4 This Article shall not apply to Regional Economic Integration Organisations.

Article 23
*Rapport avec d'autres instruments internationaux*

1 La présente Convention doit être interprétée de façon qu'elle soit, autant que possible, compatible avec d'autres traités en vigueur pour les États contractants, conclus avant ou après cette Convention.

2 La présente Convention n'affecte pas l'application par un État contractant d'un traité conclu avant cette Convention.

3 La présente Convention n'affecte pas l'application par un État contractant d'un traité conclu après cette Convention en ce qui a trait à la reconnaissance ou à l'exécution d'un jugement rendu par un tribunal d'un État contractant qui est également Partie à ce traité. Aucune disposition de l'autre traité n'affecte les obligations prévues à l'article 6 à l'égard des États contractants qui ne sont pas Parties à ce traité.

4 La présente Convention n'affecte pas l'application des règles d'une Organisation régionale d'intégration économique Partie à cette Convention en ce qui a trait à la reconnaissance ou à l'exécution d'un jugement rendu par un tribunal d'un État contractant qui est également un État membre de l'Organisation régionale d'intégration économique lorsque :

(a) ces règles ont été adoptées avant la conclusion de la présente Convention ; ou

(b) ces règles ont été adoptées après la conclusion de la présente Convention, dans la mesure où elles n'affectent pas les obligations prévues à l'article 6 à l'égard des États contractants qui ne sont pas des États membres de l'Organisation régionale d'intégration économique.

CHAPITRE IV – CLAUSES FINALES

Article 24
*Signature, ratification, acceptation, approbation ou adhésion*

1 La présente Convention est ouverte à la signature de tous les États.

2 La présente Convention est sujette à la ratification, à l'acceptation ou à l'approbation par les États signataires.

3 Tout État peut adhérer à la présente Convention.

4 Les instruments de ratification, d'acceptation, d'approbation ou d'adhésion sont déposés auprès du Ministère des Affaires étrangères du Royaume des Pays-Bas, dépositaire de la Convention.

Article 25
*Déclarations relatives aux systèmes juridiques non unifiés*

1 Un État qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par la présente Convention peut déclarer que la Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles. La déclaration indique expressément les unités territoriales auxquelles la Convention s'applique.

Article 23
*Relationship with other international instruments*

1 This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2 This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention.

3 This Convention shall not affect the application by a Contracting State of a treaty concluded after this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. Nothing in the other treaty shall affect the obligations under Article 6 towards Contracting States that are not Parties to that treaty.

4 This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Member State of the Regional Economic Integration Organisation where –

(a) the rules were adopted before this Convention was concluded; or

(b) the rules were adopted after this Convention was concluded, to the extent that they do not affect the obligations under Article 6 towards Contracting States that are not Member States of the Regional Economic Integration Organisation.

CHAPTER IV – FINAL CLAUSES

Article 24
*Signature, ratification, acceptance, approval or accession*

1 This Convention shall be open for signature by all States.

2 This Convention is subject to ratification, acceptance or approval by the signatory States.

3 This Convention shall be open for accession by all States.

4 Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 25
*Declarations with respect to non-unified legal systems*

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 declare that the Convention shall extend to all its territorial units or only to one or more of them. Such a declaration shall state expressly the territorial units to which the Convention applies.

2 Si un État ne fait pas de déclaration en vertu du présent article, la Convention s'applique à l'ensemble du territoire de cet État.

3 Le présent article ne s'applique pas aux Organisations régionales d'intégration économique.

Article 26
*Organisations régionales d'intégration économique*

1 Une Organisation régionale d'intégration économique constituée seulement par des États souverains et ayant compétence sur certaines ou toutes les matières régies par la présente Convention peut signer, accepter ou approuver cette Convention ou y adhérer. En pareil cas, l'Organisation régionale d'intégration économique aura les mêmes droits et obligations qu'un État contractant, dans la mesure où cette Organisation a compétence sur des matières régies par la présente Convention.

2 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, l'Organisation régionale d'intégration économique notifie au dépositaire, par écrit, les matières régies par la présente Convention pour lesquelles ses États membres lui ont transféré leur compétence. L'Organisation notifie aussitôt au dépositaire, par écrit, toute modification intervenue dans la délégation de compétence précisée dans la notification la plus récente faite en vertu du présent paragraphe.

3 Aux fins de l'entrée en vigueur de la présente Convention, tout instrument déposé par une Organisation régionale d'intégration économique n'est pas compté, à moins que l'Organisation régionale d'intégration économique déclare, en vertu de l'article 27(1), que ses États membres ne seront pas Parties à cette Convention.

4 Toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, à une Organisation régionale d'intégration économique.

Article 27
*Organisation régionale d'intégration économique en tant que Partie contractante sans ses États membres*

1 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, une Organisation régionale d'intégration économique peut déclarer qu'elle a compétence pour toutes les matières régies par la présente Convention et que ses États membres ne seront pas Parties à cette Convention mais seront liés par celle-ci en raison de la signature, de l'acceptation, de l'approbation ou de l'adhésion de l'Organisation.

2 Lorsqu'une déclaration est faite par une Organisation régionale d'intégration économique en conformité avec le paragraphe premier, toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, aux États membres de l'Organisation.

Article 28
*Entrée en vigueur*

1 La présente Convention entre en vigueur le premier jour du mois suivant l'expiration de la période pendant laquelle une notification peut être faite en vertu de l'article 29(2) à l'égard du deuxième État qui a déposé son instrument de ratification, d'acceptation, d'approbation ou d'adhésion visé à l'article 24.

2 If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.

3 This Article shall not apply to Regional Economic Integration Organisations.

Article 26
*Regional Economic Integration Organisations*

1 A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

2 The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3 For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 27(1) that its Member States will not be Parties to this Convention.

4 Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation.

Article 27
*Regional Economic Integration Organisation as a Contracting Party without its Member States*

1 At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

2 In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 28
*Entry into force*

1 This Convention shall enter into force on the first day of the month following the expiration of the period during which a notification may be made in accordance with Article 29(2) with respect to the second State that has deposited its instrument of ratification, acceptance, approval or accession referred to in Article 24.

2 Par la suite, la présente Convention entre en vigueur :

(a) pour chaque État la ratifiant, l'acceptant, l'approuvant ou y adhérant postérieurement, le premier jour du mois suivant l'expiration de la période pendant laquelle des notifications peuvent être faites en vertu de l'article 29(2) à l'égard de cet État ;

(b) pour une unité territoriale à laquelle la présente Convention a été étendue conformément à l'article 25 après l'entrée en vigueur de la Convention pour l'État qui fait la déclaration, le premier jour du mois suivant l'expiration d'une période de trois mois après la notification de la déclaration visée par ledit article.

Article 29
*Établissement de relations en vertu de la Convention*

1 La présente Convention ne produit des effets entre deux États contractants que si aucun d'entre eux n'a transmis de notification au dépositaire à l'égard de l'autre conformément aux paragraphes 2 ou 3. En l'absence d'une telle notification, la Convention produit des effets entre deux États contractants dès le premier jour du mois suivant l'expiration de la période pendant laquelle les notifications peuvent être faites.

2 Un État contractant peut notifier au dépositaire, dans les 12 mois suivant la date de la notification par le dépositaire visée à l'article 32(a), que la ratification, l'acceptation, l'approbation ou l'adhésion d'un autre État n'aura pas pour effet d'établir des relations entre ces deux États en vertu de la présente Convention.

3 Un État peut notifier au dépositaire, lors du dépôt de son instrument en vertu de l'article 24(4), que sa ratification, son acceptation, son approbation ou son adhésion n'aura pas pour effet d'établir des relations avec un État contractant en vertu de la présente Convention.

4 Un État contractant peut à tout moment retirer une notification qu'il a faite en vertu des paragraphes 2 ou 3. Ce retrait prendra effet le premier jour du mois suivant l'expiration d'une période de trois mois à compter de la date de notification.

Article 30
*Déclarations*

1 Les déclarations visées aux articles 14, 17, 18, 19 et 25 peuvent être faites lors de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion ou à tout moment ultérieur et être modifiées ou retirées à tout moment.

2 Les déclarations, modifications et retraits sont notifiés au dépositaire.

3 Une déclaration faite au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion prend effet au moment de l'entrée en vigueur de la présente Convention pour l'État concerné.

4 Une déclaration faite ultérieurement, ainsi que toute modification ou tout retrait d'une déclaration, prend effet le premier jour du mois suivant l'expiration d'une période de trois mois après la date de réception de la notification par le dépositaire.

2 Thereafter this Convention shall enter into force –

(a) for each State subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of the period during which notifications may be made in accordance with Article 29(2) with respect to that State;

(b) for a territorial unit to which this Convention has been extended in accordance with Article 25 after the Convention has entered into force for the State making the declaration, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 29
*Establishment of relations pursuant to the Convention*

1 This Convention shall have effect between two Contracting States only if neither of them has notified the depositary regarding the other in accordance with paragraph 2 or 3. In the absence of such a notification, the Convention has effect between two Contracting States from the first day of the month following the expiration of the period during which notifications may be made.

2 A Contracting State may notify the depositary, within 12 months after the date of the notification by the depositary referred to in Article 32(a), that the ratification, acceptance, approval or accession of another State shall not have the effect of establishing relations between the two States pursuant to this Convention.

3 A State may notify the depositary, upon the deposit of its instrument pursuant to Article 24(4), that its ratification, acceptance, approval or accession shall not have the effect of establishing relations with a Contracting State pursuant to this Convention.

4 A Contracting State may at any time withdraw a notification that it has made under paragraph 2 or 3. Such a withdrawal shall take effect on the first day of the month following the expiration of three months following the date of notification.

Article 30
*Declarations*

1 Declarations referred to in Articles 14, 17, 18, 19 and 25 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2 Declarations, modifications and withdrawals shall be notified to the depositary.

3 A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months following the date on which the notification is received by the depositary.

5 Une déclaration faite ultérieurement, ainsi que toute modification ou tout retrait d'une déclaration, ne produit pas d'effet à l'égard des jugements rendus à l'issue d'instances déjà introduites devant le tribunal d'origine au moment où la déclaration prend effet.

Article 31
*Dénonciation*

1 Tout État contractant peut dénoncer la présente Convention par une notification écrite au dépositaire. La dénonciation peut se limiter à certaines unités territoriales d'un système juridique non unifié auxquelles s'applique la présente Convention.

2 La dénonciation prend effet le premier jour du mois suivant l'expiration d'une période de 12 mois après la date de réception de la notification par le dépositaire. Lorsqu'une période plus longue pour la prise d'effet de la dénonciation est précisée dans la notification, la dénonciation prend effet à l'expiration de la période en question après la date de réception de la notification par le dépositaire.

Article 32
*Notifications par le dépositaire*

Le dépositaire notifie aux Membres de la Conférence de La Haye de droit international privé, ainsi qu'aux autres États et aux Organisations régionales d'intégration économique qui ont signé, ratifié, accepté ou approuvé la présente Convention ou qui y ont adhéré conformément aux articles 24, 26 et 27 les renseignements suivants :

(a) les signatures, ratifications, acceptations, approbations et adhésions prévues aux articles 24, 26 et 27 ;

(b) la date d'entrée en vigueur de la présente Convention conformément à l'article 28 ;

(c) les notifications, déclarations, modifications et retraits prévus aux articles 26, 27, 29 et 30 ; et

(d) les dénonciations prévues à l'article 31.

En foi de quoi, les soussignés, dûment autorisés, ont signé la présente Convention.

Fait à La Haye, le 2 juillet 2019, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement du Royaume des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Membres de la Conférence de La Haye de droit international privé lors de sa Vingt-deuxième session ainsi qu'à chacun des autres États ayant participé à cette Session.

5 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall not apply to judgments resulting from proceedings that have already been instituted before the court of origin when the declaration takes effect.

Article 31
*Denunciation*

1 A Contracting State to this Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2 The denunciation shall take effect on the first day of the month following the expiration of 12 months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 32
*Notifications by the depositary*

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded to this Convention in accordance with Articles 24, 26 and 27 of the following –

(a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 24, 26 and 27;

(b) the date on which this Convention enters into force in accordance with Article 28;

(c) the notifications, declarations, modifications and withdrawals referred to in Articles 26, 27, 29 and 30; and

(d) the denunciations referred to in Article 31.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 2nd day of July 2019, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Members of the Hague Conference on Private International Law at the time of its Twenty-Second Session and to each of the other States which have participated in that Session.

# Procès-verbaux
# de la Première commission

# Minutes
# of the First Commission

# Procès-verbal No 1

# Minutes No 1

*Séance du mardi 18 juin 2019 (matin)*

*Meeting of Tuesday 18 June 2019 (morning)*

1. La séance est ouverte à 11 h 13 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

2. **Le Président** s'adresse à l'assemblée et fait part de son extrême plaisir de pouvoir apporter sa voix après celles qui se sont déjà faites entendre plus tôt à l'occasion de la Séance d'ouverture. Il profite donc de cet instant pour souhaiter la bienvenue aux délégués réunis ici à La Haye où le soleil brille pour continuer et achever les travaux relatifs au projet de Convention sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale dont les préparatifs ont débuté il y a sept ans. Si plusieurs d'entre les délégués ont pris part à ce projet depuis ses débuts, d'autres l'ont rejoint en cours de route, depuis plusieurs années déjà. Si le Président est heureux d'ouvrir les travaux de la Commission, il précise que l'expérience acquise au cours de ces dernières années sera essentielle et comptera pour beaucoup dans le déroulement des négociations à venir. Certains délégués participent aux travaux relatifs au projet Jugements pour la première fois. Là encore, le Président précise que l'expertise apportée par ces délégués dans ce domaine est essentielle. Elle apportera un nouveau regard sur le projet de Convention, aidera très certainement à améliorer le texte pour enfin toucher au but final, cette destination tant attendue, le 2 juillet. Avant d'aller plus avant dans la discussion, le Président passe la parole à la Responsable de l'administration qui va entretenir l'assemblée de certaines questions administratives et sociales.

3. **The Head of Administration** explained that she wanted to touch on a few administrative and social matters. Starting with the seating, she explained that it was Hague Conference tradition to organise the seating in French alphabetical order. The number of seats were assigned proportionally, based on the size of the delegation. As a result, each Member delegation had from one to four seats, and each observer State and organisation had one seat at the table. The Permanent Bureau had assigned the chairs on the periphery of the room proportionally. In this regard she thanked everyone for their flexibility. As the participants may have noticed, things were loosening up a little bit, as the room was very full this morning. She thanked everyone for their cooperation which helped to get everyone seated. Given the high number of participants in this meeting, the Permanent Bureau arranged for an overflow space, which some were already using on the first floor of the Academy Building (in the Seminar Room). There was a video and audio connection in that room, but there was no interpretation available. She encouraged participants to make use of that room if they wished, while keeping in mind that interpretation facilities were not available upstairs. Everyone had received a badge when they registered, and the Permanent Bureau asked that everyone should wear their badge at all times during the meeting. There were different colours for the badges. The Permanent Bureau badges were blue, the observer badges were yellow, and the delegate badges were white. Participants who had been identified as a head of delegation had a blue ribbon on their badge. Requests for changes could be made throughout the meeting, and delegates could request an additional ribbon from the Information Desk in the foyer.

4. Equally, if delegates should need any assistance from the administrative staff, they could ask at the Information Desk, and there was a Secretariat table here in the room. Also, the Secretariat was located immediately behind the Plenary space.

5. She stressed that if there was anything one could do to assist the delegates during the next two weeks, they should not hesitate to ask. The provisional list of participants had been posted to the Secure Portal and would be available for everyone to consult. Moreover, the Permanent Bureau would not be making paper copies of this list which was over 50 pages long. She asked everyone to check their personal information for correctness, so that the Permanent Bureau could ensure that participants received all the documents sent during the course of the Session. If changes needed to be made, participants could send an email to the following email address: "workdoc@hcch.net". She kindly requested delegations wishing to submit Working Documents to do so by email to a separate email address for Working Documents: "workdoc@hcch.net". The Head of Administration stressed that the Working Documents must be submitted in either English or French, or preferably in both languages. The Working Documents would be circulated in the language(s) as submitted by Members, as no translation facilities for Working Documents were available. Paper copies of the Working Documents would be distributed in the room, as had been done already during the coffee break.

6. She noted that the Permanent Bureau would keep the Secure Portal up to date, including the provision of a "download-all" link, on a daily basis, with all documents related to the Diplomatic Session. The audio files of each day's meeting would also be posted to the Secure Portal on a daily basis as soon as possible after the meeting ends. She also highlighted that the credentials to access the Secure Portal had changed as of 9.00 a.m. this day. Delegates could find the new password on page 16 of the information brochure that they received with their badge. She asked all participants to reset their settings if need be, as the password from May 2018 would need to be updated. Moreover, Minutes of this meeting would be taken, which meant that the interventions would be recorded in the language in which they were given, *i.e.*, in English or French. The Permanent Bureau would be producing those Minutes with the help of their Recording Secretaries. She stressed that the Permanent Bureau was aiming to post the Minutes as soon as possible after the completion of each half-day session, *i.e.*, a morning and afternoon session. Once the Minutes were posted on the Secure Portal, delegates and observers were welcome to make changes to their own interventions, but not to the interventions of someone else. The Permanent Bureau would prefer to receive those via email as well under "workdoc@hcch.net". There were more details about the Minutes and also the Working Documents in the information brochure. She then asked the participants to contact



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a member of the administrative staff for outstanding questions on the matters raised. She stressed that all proposals for changes on the Minutes must be submitted to the Permanent Bureau by 19 July 2019, a couple of weeks after the close of the Diplomatic Session. Based on the changes that the Permanent Bureau would receive, final versions of the Minutes would be produced and posted to the Secure Portal during the course of July/August. These Minutes would then be included in the *Proceedings* of the Twenty-Second Session.

7. Some might have noticed that there was a photographer present this morning. The photographer would be on hand again on 29 June and for the closing ceremony on the 2nd of July. The Permanent Bureau would be posting pictures that were taken to the Secure Portal. The Head of Administration invited the participants to use those pictures on their respective social media platforms. However, she reminded the participants that the content of the meetings was not to be shared. Additionally, a film crew was present today which would join the Session again on 22 June and on 2 July, so they would become familiar faces. As always, the refectorium at the Peace Palace was open for lunch on weekdays. The Permanent Bureau also worked with the refectorium to set up a small coffee corner for coffee and pastries and other drinks. They would operate a limited breakfast and lunch service from the kitchen corner for at least the first few days of the Session and possibly longer. There were other options for lunch in the neighbourhood, which were mentioned on page 21 of the information brochure. Regarding the coffee breaks, a separate table for sugar and milk had been set up. The Head of Administration kindly asked the participants that after getting their coffee, they should try to keep moving so that as many people as possible could be served during the limited time available for breaks during this Session. She thanked everyone for their attention and wished the meeting good luck for the coming weeks.

8. **The Chair** turned back to the question of the destination of the meeting. What was this destination at which the meeting planned to arrive, and at which it would arrive? Putting aside the Secretary General's ever more expansive metaphors regarding mountains, seas and now space, the Chair noted that his comments would be a little more prosaic. The goal was to reach consensus on the text of a Convention on the recognition and enforcement of foreign judgments in civil or commercial matters, a Convention which would be a companion Convention to the HCCH *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 HCCH Choice of Court Convention") which had entered into force in 2015. The objectives of the work had already been referred to by the Secretary General and by a number of other speakers: First, to enhance access to justice, and second to facilitate cross-border trade and investment by reducing costs and risks associated with cross-border dealings. A successful Judgments Convention would advance these goals in a number of ways, of which the Explanatory Report provided a helpful summary. The Chair then paused to explain what he meant by "successful Convention". He thought that "success" had two limbs. First, a Convention that commanded broad acceptance, and that was widely ratified. As the Secretary General had said, "We are not here to create a document of extraordinary elegance, but of no practical importance." And secondly, a Convention that had the maximum reach consistent with that goal. In what ways would the instrument advance those broad objectives? First, and most importantly, it would ensure that the judgments to which it applied would be recognised and enforced in all Contracting States, which would significantly enhance the practical effectiveness of those judgments, and provide the successful party with better prospects of obtaining meaningful relief, *i.e.*, justice in practice. Secondly, it would avoid the need for duplicative proceedings in two or more Contracting States, *i.e.*, the merits of the claim would not need to be litigated in order to obtain effective relief. Thirdly, it would reduce the costs and timeframes associated with obtaining recognition and enforcement of judgments. Fourthly, and very importantly, the Convention would improve the accessibility of the law, and make it possible for parties, their advisors, and also, of course, the judges who need to decide these cases, to look to one place for a framework that guides the recognition and enforcement of a significant number of foreign judgments (not all, but he would come back to that question). And lastly, a clear, certain and predictable framework for the recognition/enforcement of judgments would enable a party deciding where to bring a claim initially to make more informed choices about where they should commence their proceedings, taking into account their ability to enforce a judgment under the Convention. The participants had been working on this for a long time. And over the more than 20 years that the HCCH had been working on these issues, the links between States had become both broader and deeper. The frequency with which individuals moved across borders, including as workers, and the extent of cross-border consumer dealings, also through the Internet, had increased dramatically. And also, of course, the frequency and scale of commercial transactions across borders had all been increasing rapidly. The need, the practical need, to which the Judgments Project was responding was even greater now than at the time when the work began. So the goal then was a treaty that would contribute to a more just and more prosperous world. Being in this room, and working towards that goal, would be a huge opportunity.

9. It was one that the meeting could welcome, and should welcome. It was exciting, and the Chair noted that he was excited as well. People might say that he sometimes was too excited, but he promised to work on that. As well as being exciting, it was also a very significant responsibility, one to which one must rise. It was one that he was confident the meeting could rise to. Given that responsibility, it was fortunate that the meeting would not begin its work with a blank slate. A huge amount of hard work had already been done. As well as the Experts' Group, and the Working Group, which the Secretary General had referred to, there were the Special Commission meetings which had met in this room four times from 2016 to 2018, and which had produced a draft Convention, the 2018 draft Convention, that it considered would form an appropriate basis for a discussion at a Diplomatic Session.

10. Now this stage had been reached. The *co-Rapporteurs* who had worked so hard and to whom the Chair was so grateful had prepared a revised draft Explanatory Report to accompany the 2018 draft Convention. It was these documents, the draft text and the draft Explanatory Report, that provided the point of departure for the work. The Chair then explained that he would take a few minutes to outline the architecture of the draft Convention to ensure everyone was on the same page. Many of the participants would be familiar with it already. Some had already heard him talk about this topic, perhaps even more than once, for which he apologised. But it seemed to him that it would be helpful for all to just pause for a couple of minutes and to orient themselves. Before diving into the detailed and specific provisions, one needed to make sure one could see the forest before one focused on the trees. He jokingly remarked that there was a bit of a metaphor disease on the table, and it was catching.

11. He then went on to explain that the draft Convention had at its core a single practical issue, namely: In what circumstances would the courts of a Contracting State be required to recognise and enforce a judgment given by a court of another Contracting State? It was important to bear in mind the very tightly circumscribed focus of what the meeting was working on. The Convention was important, but it was not trying to cover everything. In particular, the Convention was not concerned with which court would hear and determine the original dispute, not concerned with the jurisdiction of the court of origin, or with regulating parallel proceedings, or with the so-called exorbitant grounds of jurisdiction. Those were all matters for a different project to be considered by an Experts' Group at a later date. Secondly, it was not concerned with judgments from non-Contracting States. It was about the circulation of judgments between Contracting States. And thirdly, and the meeting really needed to bear this in mind, it was not designed to be an exclusive or comprehensive statement of the circumstances in which judgments from one Contracting State would be recognised and enforced in another Contracting State. The instrument stated minimum requirements for recognition and enforcement. It was a floor, not a ceiling. If the prescribed criteria were met, then the judgment must be recognised and enforced. But if the criteria of the instrument were not met it remained open to the State addressed to recognise and enforce the judgment under national law or under other intergovernmental arrangements. There were a couple of exceptions to this approach to which he would return later. The provisions of the text performed two main functions: They identified the judgments that were eligible for recognition or enforcement under the Convention, and they made provision for the process, *i.e.*, the machinery for recognition or enforcement of those judgments. Articles 1, 2 and 3 identified the classes of judgments to which the Convention would apply. Article 1 identified the broad scope of the application of the Convention to judgments in civil or commercial matters, Article 2 set out certain exclusions from scope, and Article 3 set out some definitions, most importantly, the definition of the term "judgment". Article 4 was the cornerstone of the instrument. It sets out the central obligation imposed on Contracting States. It provides that a judgment given by a court of a Contracting State, the State of origin, must be recognised and enforced in another Contracting State, the requested State, in accordance with the provisions of Chapter II.

12. Importantly, recognition or enforcement could be refused only on the grounds specified in the Convention; if a judgment was eligible for enforcement under Articles 1, 2 and 3, and if the criteria found in the following provisions of Chapter II were met, it was not open to a Contracting State under this draft text to decline recognition or enforcement on other grounds under national law, and in particular, the court addressed could not decline to recognise or enforce a judgment based on its own view of the merits of the substantive claim.

13. He explained that the text then moved to the next level of detail, clarifying in what circumstances a particular judgment would be recognised and enforced if it came from another Contracting State. If it was a civil or commercial judgment and it was within scope, should this particular judgment then be recognised or enforced? What the draft text sought to do, and what one had consistently aimed to do throughout this exercise from the early days and the Experts' Group, is to identify cases where recognition and enforcement of a judgment would command broad acceptance, cases where if one were to ask, "Is it reasonable for this judgment to be recognised and enforced?", one would expect a generally positive answer across the full diversity of legal systems and approaches of Member States.

14. The draft tried to walk the somewhat delicate line between maximising the reach of the Convention and not impairing the objective of commanding widespread acceptance. The meeting would continue to walk that line in the coming weeks. Articles 5 and 6 addressed the complaint by a party opposing recognition/enforcement that the court of origin was not an appropriate court to hear and decide the dispute, so its judgment should not be binding on the unsuccessful party. Article 7 addressed all other objections, including objections relating to the process before the court of origin.

15. Article 5 set out the bases for recognition and enforcement, which have also been referred to as jurisdictional filters, or in more traditional terminology as indirect grounds of jurisdiction. What was the connection between the court of origin and the person objecting to recognition or enforcement, and/or the subject matter of the proceedings?

16. Article 6 served two functions. It identified some connections which were sufficient for recognition or enforcement of certain categories of judgments, and it also prohibited recognition or enforcement of judgments in those specific categories if the prescribed connections were absent, and that prohibition extended to recognition or enforcement under national law.

17. That Article, as it currently stood, was the exception to the idea of the instrument being a floor, not a ceiling. Article 7 provided that recognition/enforcement may – not must – may be refused in certain circumstances, which also included matters relating to the process followed in the court of origin. Article 7 was not mandatory, because it was open to Contracting States to prescribe less restrictive criteria for recognising and enforcing foreign judgments – whether generally, or with regard to particular States, or in particular fields.

18. Articles 8 to 10 and 12 dealt with a number of specific issues, namely rulings on preliminary questions, severability, non-compensatory damages and *transactions judiciaires* (judicial settlements).

19. Articles 13 to 15 dealt with that second limb, the process for recognition and enforcement of judgments in the State addressed.

20. Article 16 made explicit the very important feature of the instrument that had been mentioned already, namely the floor and ceiling metaphor. Subject to the narrow exceptions in Article 6, the instrument would not preclude recognition or enforcement of a foreign judgment under national law.

21. Chapter III set out general clauses relating to the operation of the Convention. And Chapter IV set out final clauses which would not be addressed in detail at this point, but they would be addressed at a later stage.

22. It was worth pausing to notice the important safety valve in Article 19. The safety-valve provision was intended to enable a State to accede to the Judgments Convention, even if it had specific concerns about, for example, a particular category of judgment, or a particular basis for recognition and enforcement. Article 19, as it was currently drafted, provided that where a State had a strong interest in not applying the Convention to a specific matter, that State


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was allowed to declare that it will not apply the Convention to that matter. The State making the declaration was obliged to ensure that the declaration was no broader than necessary, and that the specific matter excluded was clearly and precisely defined.

23. The Chair explained that Article 20, which appears in square brackets, would provide an additional specific declaration regime for judgments pertaining to Governments.

24. Having provided this brief overview of the draft Convention – which the Chair joked could be called a helicopter view, but that would be so much less exciting than the Secretary General's analogy to space – the Chair noted that the draft text provided the starting point for discussions, and drafting work. He noted that the Plenary would discuss particular provisions in more detail as they were reached in the agenda.

25. With respect to the agenda, the Chair reminded delegates that they should have a copy of the draft schedule in front of them. He opined that it was intended to enable the Commission on Judgments to make deliberate progress through the issues at hand, beginning with some basic structural provisions then moving on to more detailed aspects of the draft text. The Chair explained that, as had been signalled, the agenda would be followed with a degree of flexibility and would be modified in light of progress made throughout the Session.

26. The Chair noted that this was an issue to be decided by consensus, and proposed that the draft agenda be adopted. This was accepted by the Plenary.

The Chair observed that the "crib sheet" was another useful document, prepared by the Permanent Bureau, which listed relevant Working Documents and Preliminary Documents received to date by topic, in the order contemplated by the agenda.

27. The Chair expressed his gratitude to the staff of the Permanent Bureau for their work in preparing the Diplomatic Session. He also wished to note his support for the words of those who had expressed gratitude to the Chairs and participants in the informal working groups that he observed had worked hard over the last year to lay the foundations for this meeting. He emphasised the significant difference that the Preliminary Documents that they prepared, and informal conversations they had, would make to the focus and efficiency of discussions over the coming weeks in The Hague.

28. The Chair then recognised the many delegations who had submitted Working Documents well in advance of the meeting, as had been requested, as this had ensured that all participants had had time to prepare properly for these discussions. As had been signalled before the meeting, the Chair confirmed that priority would be given to Working Documents submitted in advance. Nonetheless, he recorded his expectation that there would be sufficient time to reach the proposals that had been received since the 17 May 2019 deadline. The Chair also anticipated that there would be some additional Working Documents arising directly out of discussions of the Plenary.

29. The Chair noted his particular thanks also to the many delegations that had worked with others, outside the formal Working Groups, to prepare joint proposals. He observed that this collaborative work tends to improve the quality of Working Documents significantly; as they have been tested with others, and had other eyes cast over them, they would be more likely to work from a substantive, technical perspective. He suggested this was also a good test of whether a proposal would be likely to command broad support, and be worth bringing to the floor of the Plenary.

30. This, he said, was especially important if any delegations were contemplating making new proposals during the week, noting that some have already done so. He reminded delegates that the expectation that proposals would be provided well in advance, to enable proper consideration by all delegations, had been identified many months ago, and it was noted then that timely proposals would be given priority. In the interest of fairness to everyone, the Chair proposed that that was how the Commission should work. However, he reiterated his expectation that it should be able to give full attention to all proposals.

31. The Chair expressed his intention to begin by working through the proposals distributed before the meeting began and complete discussions on those proposals, before turning to later proposals. Those Working Documents would be considered in the order of subject contemplated by the agenda. To ensure that the discussions maintained some logical order, the Chair suggested that certain matters should be dealt with in conjunction with any relevant proposals regardless of when they were received, being: any new proposals to retain or delete text in square brackets in the 2018 draft Convention. These points had already been flagged for discussion by the inclusion of square brackets, and represented issues that needed to be addressed in order to produce a text without square brackets. The Chair observed that as recently as a couple of days ago there were words in square brackets for which no proposals had been received for alternative text or the removal of the square brackets. In jest, the Chair reminded delegates that the Commission would not be adopting a Convention with square brackets in the text, and welcomed any new proposals resulting from discussions on existing Working Documents, for example possible compromise approaches, or revised language for an existing Working Document, in light of helpful contributions made in the room.

32. Upon completion of those discussions, the Chair stated that attention could then be given to any remaining new proposals. He observed that there would be two benefits to taking those proposals a little later: First, that it would provide some time for delegations to consider those proposals and, secondly, that it would provide time for proponents to discuss their ideas and seek support from other delegations. He further noted that it would be helpful for delegates introducing papers to have an idea of the level of support. The Chair opined that if one could not identify, in advance, a number of other delegations that would support a proposal, the odds of commanding broad support in the room would likely not be so great. He therefore strongly encouraged all delegations to explore proposals informally with others, in order to test likely levels of support, as well as the technical, substantive quality of proposals before bringing new Working Documents to the Plenary.

33. Finally, the Chair made comments about how decisions would be made in the coming weeks. As had been stated by the Secretary General and others, the Chair reiterated that the Commission works by consensus. To achieve the goals of the Commission, he noted that consensus would need to be reached on the text of the Convention as a whole; that is, the ultimate consensus required would be on a complete text. He emphasised that this would be achieved by striving for consensus on each provision along the way.

34. The Chair reported that he had been asked many questions about the meaning of "consensus". However, he explained that it would be impossible and unhelpful for him to attempt a comprehensive explanation of that at that time; those issues would arise as the meeting progressed. However, he considered it helpful to emphasise that there would need to be a consensus to include an obligation in the text of the Convention. If, for example, the question were whether topic X should be included in scope, there would need to be a consensus to include it in scope – if there were not, it could not go in because there would not be a consensus to adopt treaty obligations in respect of that topic. The Chair noted that there were some nuances, which may need further exploration at a later stage.

35. The Chair reminded Members that the requirement to work by consensus, and the process of working by consensus, meant that the views of every Member count in these discussions; he described it as a very empowering process. He reminded Members that this also means every Member has a responsibility to work towards achieving a consensus. He explained that the members of the Commission needed to be curious, to be open to different points of view, and to be ready to shift their positions in light of convincing arguments put forward by others. He encouraged the Members to be creative, flexible, and pragmatic. Further, the Chair emphasised the need to be prepared to find middle ground that would meet the interests and concerns of all. While the goal would be to work hard towards achieving unanimity in the room on each provision, he reminded Members that unanimity is not always achievable. On some points, he said, one or two Members may find themselves the lone voices in the room pressing for a particular approach. The Chair committed to ensuring that in such instances those Members have plenty of time and opportunity to seek to persuade others, both in the room and outside it. He assured Members that decisions where there were differences of views would not be rushed; time would be taken to talk such issues through, and to understand the underlying concerns and objectives before moving to resolve points on which people had different, legitimate perspectives.

36. But ultimately, the Chair recalled that the Commission needed to produce a single text. He reminded Members that if they were unable to build broad support for their preferred approach, they would need to give careful thought to whether they should block consensus on that particular point. In doing so, he suggested they consider whether their concerns might be met in other ways, for example, by clarifications in the Explanatory Report, or by making a declaration under Article 19 (although he noted that such a declaration should only be made if an issue is of great importance to that Member and they cannot conceive of an alternative having heard the discussions of the room). He reminded Members that careful thought should be given to whether a concern is really so great as to justify the serious step of preventing progress on issues that command broad acceptance.

37. The Chair then expressed optimism that if all participants approached discussions constructively, positively, pragmatically, and with a clear focus on the ultimate objective, consensus would be achieved on a final text that would serve the goals of the Commission and of which delegates could be proud.

38. In all of this, the Chair explained that he saw himself as a servant of the Commission. He acknowledged the honour and the responsibility of the role, noting particularly that it had been daunting enough to chair Special Commissions where it was not necessary to reach a final conclusion on everything; it was possible to place text in square brackets and to postpone that final decision. The Chair reminded the Commission that those deferred decisions now needed to be finalised. He reiterated his commitment to facilitating this, and noted the importance of the help and support of all Members. The Chair welcomed suggestions for how the Commission should proceed in the Plenary, informally and during breaks. He encouraged Members to speak up if there were things the Chair could improve, rather than being silent and frustrated.

39. Following that overview of the process, and before turning to the specific provisions of the agenda, the Chair invited delegations to make any contributions they may have regarding the objectives of the Convention, or about the working methods.

40. **A delegate from the United States of America** thanked the Chair, noting that he wished to make some observations in his personal capacity given his long-standing association with the Project. The delegate recalled that the Project began as a result of a proposal by the United States of America in May 1990, and that his association with the Project had been continuous since 1991. He remarked that this may make him the oldest surviving "victim" of this process. His observations comprised two general topics, context and consequences.

41. Since 1992, when the Project began, and even since 2005 when the HCCH Choice of Court Convention was completed, the delegate observed that there had been an unprecedented increase in the ease of movement of people, goods, and ideas across borders; the conduct of the average citizens in many countries now, at least periodically, becomes enmeshed in connections with numerous other countries. The delegate opined that this had been made possible, in part, by a sharp decrease in the transaction costs of operating across borders, meaning that there had been a great increase in the number of transactions which were modest and generally conducted without advice of counsel. While the transaction costs of conduct diminished, the delegate explained, the transaction costs of dispute resolution had not. In that sense, he suggested, the greatest beneficiaries of this Project may be fellow average citizens, engaged episodically in modest activities that cross borders. He observed that many such actors would be unaware of the existence of the HCCH, and that even if they were they would be unfamiliar with the field and reminded Members of the obligation to assist such people, particularly where their disputes may be handled by those without much sophistication in the area. In order to achieve this, the delegate suggested that the ultimate Convention would need to be relatively clear, simple and easy to apply.

42. If a successful Convention can be created, the delegate recognised that this would be a major contribution to access to justice. Addressing the question of what would constitute a successful Convention, the delegate agreed with the Chair, that this would be a Convention that is both widely ratified and can be applied in ways that get proper results in a large number of contexts. Simply reporting out a text would not be a success. The delegate highlighted the serious consequences of such a failure, as it would be the third time in a generation or so that the HCCH had embarked on a Project of this kind, at great expense to the Member States. He expressed concern that failure would quash any appetite for further work in this area, no matter how badly it might be needed.


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43. On the other hand, he recognised that even a modest success – something less than any given delegate in the room might want – would still be a success, as that would still provide a platform for further improvements in the future. In concluding, the delegate urged all delegates to keep in mind the context of the Project, and the consequences of failure. Departing from earlier remarks of other participants, the delegate considered that, unfortunately, failure was an option, but one that should be avoided.

44. **A delegate from Canada** congratulated the Chair on his election and assured him of the support of its delegation. Canada confirmed that they shared the objectives set out by the Chair and looked forward to a constructive and fruitful two weeks, that would produce a potentially very successful Convention. The delegate also expressed Canada's thanks to the Permanent Bureau for the impeccable organisation of and preparation for the meeting; particularly the documents posted to the Secure Portal and the new "download-all" function. The delegate observed that the agenda is full, and expressed a hope that the Chair and other delegates would be willing to work in small groups outside the Plenary as that may be more productive for the progression of certain issues. Canada also expressed gratitude to the chairs of the informal working groups for their active participation and facilitation of productivity on those issues.

45. **The Chair** thanked the delegate from Canada for her contribution, and noting no other requests, turned to the substantive work.

46. The Chair noted with cautious optimism that based on the number of Working Documents currently on the table, it might be possible to make more progress in the coming days than the draft agenda contemplated. In particular, it might be possible to move on to Article 2 on day 1, to deal with the limbs of Article 2(1) that are not the subject of any proposals, and to introduce the discussion of the proposals on Article 2(1), being: (l) privacy, (p) anti-trust/competition, and (g) maritime matters. The Chair assured participants that such issues would not need to be resolved at that stage, they could be revisited on day 2, but that should it become possible, an early conclusion would not be unwelcome.

47. The Chair suggested that there may be some spare time on the Thursday (day 3), and that a productive use of that time would be to have an initial discussion about final clauses (Chapter IV), as he foresaw that this may be a matter that could usefully be the subject of the small working group mentioned by the distinguished delegate from Canada. He therefore encouraged delegates to be prepared for a preliminary discussion of the Working Documents in relation to final clauses on Thursday.

48. The Chair then invited the Secretary General to comment on the process for adopting the Explanatory Report following the conclusion of the Diplomatic Session, as the question of how to work on proposals regarding the Explanatory Report had been raised in the Working Documents.

49. **The Secretary General** acknowledged the importance of this topic as the Explanatory Report would be crucial in the understanding and indeed the promotion of the future instrument. He reported that the process had been discussed at the Council on General Affairs and Policy in March 2019, with the result that the Permanent Bureau was requested to add a section on the process of adopting the Explanatory Report to what was then Preliminary Document No 26, now contained in section 3 of Information Document No 2 for this Session, distributed in April 2019. The Secretary General acknowledged the work of the *co-Rapporteurs* for completing this work quickly for the Diplomatic Session. The second important concept, the Secretary General explained, would be consensus, that is, that the adoption of the Explanatory Report should and would reflect consensus amongst all Members. He noted that this process is based on the model followed for the adoption of the Explanatory Report of the 2005 HCCH Choice of Court Convention. The basic process, he explained, would be for the *co-Rapporteurs* to prepare a revised version of the Explanatory Report as soon as possible following the close of the Diplomatic Session, reflecting the outcome of the discussions during the Session. This would then be sent to all delegations, who will be invited to comment and to suggest amendments to that revised Explanatory Report by a certain date. All Member States are to be provided with all comments, in order to provide a full picture as to what changes have been requested and by whom. Following this, the Secretary General explained that a further revised Explanatory Report would be provided to all delegations, who would be invited to comment on the changes only by a certain date. The Secretary General recognised that the final step for the formal adoption of the Explanatory Report was not addressed in section 3 of Information Document No 2. He suggested that there was a general interest in the Explanatory Report being adopted as quickly as possible, and not waiting until the next Council on General Affairs and Policy in March 2020. He expressed the hope that it would be possible to submit the final version of the Explanatory Report for approval as part of a silent procedure.

50. The Secretary General then took the opportunity to make some other remarks regarding the procedures of the Diplomatic Session. First, with regard to letters of credentials, he expressed his thanks to all the Members for their diligent submissions. He noted that there were some letters still outstanding, but that they were imminent. The Secretary General confirmed that if in the course of proceedings there is a need to assess whether or not there is actual consensus, the views of those Members that have not submitted their letters of credentials will not be considered for the assessment of consensus. Finally, the Secretary General reported that the HCCH was in the process of developing a new policy on observers, and that this was an important topic considered at the Council on General Affairs and Policy. He confirmed that, until a new policy was approved, the HCCH would continue to apply usages. He reminded the floor that, while contributions from observers were very welcome, it remained the prerogative of the Chair to limit such interventions if required by time considerations or as a means to progress as effectively as possible. The Secretary General wished to record that the Permanent Bureau had responded to the request of Council to present Members with a list of observers that had been invited, and of those that had accepted the invitation. This list was available on the Secure Portal and was updated on a number of occasions.

51. **The Chair** thanked the Secretary General for his helpful reminder of process. He explained that the approach he intended to adopt, as each provision was discussed, would be to begin with consideration of any proposals about the text of the provision itself. Once the text was settled, he proposed moving to discussion of suggestions for the drafting of the Explanatory Report. The Chair reminded the Plenary that it was not the job of the Commission to make formal decisions about that language as the Secretary General had explained. Rather, the *co-Rapporteurs* would prepare the next draft of the Explanatory Report in light of the

discussions of the room, and then Members would all have the opportunity to make further comments.

52. Having completed the preliminary matters, the Chair proposed turning to substance. He suggested starting at the very beginning with Article 1 of the 2018 draft Convention, Working Document No 1.

53. The Chair reminded the room that Article 1 was concerned with scope. Paragraph 1 provided that the Convention would apply to the recognition and enforcement of judgments relating to civil or commercial matters. It would not extend, in particular, to revenue, customs or administrative matters. In paragraph 2, it was explained that the Convention would apply to the recognition and enforcement in one Contracting State of a judgment given by a court of another Contracting State. The Chair reported that no Working Documents had been produced in relation to the text of these provisions, and expressed hope that this meant the provisions could be adopted by consensus immediately.

54. The Chair asked if the meeting was happy to proceed, and received assent. On that basis, he proposed that the Commission adopt Article 1(1). The Members agreed by consensus, and the Chair congratulated the room for the adoption of the first paragraph of the Convention. He then proposed the adoption of Article 1(2), which was also accepted by consensus. The Chair expressed his excitement at the conclusion of the first Article.

55. The Chair then turned to Working Document No 26, proposed by Brazil, which made suggestions with regard to certain aspects of the Explanatory Report concerning Article 1. He noted that the document also addressed Article 2 but requested that Brazil reserve introducing that part of Working Document No 26 until discussions moved to Article 2.

56. **A delegate from Brazil** greeted the meeting and acknowledged the remarkable period in the history of the HCCH. The delegate explained that Brazil was the proponent of Working Document No 26, which related to Article 1, and Article 2(4). First of all, the delegate noted Brazil's intention to simplify the mixing of concepts of sovereign, public, and government powers to explain what was a public law and how it related to civil and commercial matters. He explained that the proposal aimed to limit the reference to sovereign powers, and stated that Brazil believed it was sufficient to explain that public law is outside the scope of the expression "civil and commercial". Therefore, Brazil proposed to delete similar expressions, which could lead to unintended misunderstanding and misinterpretation.

57. Secondly, the delegate highlighted the proposal to add text to the language of paragraph 29 of the Report, for the sake of clarification. He opined that the language did not do anything new, but encouraged other Member States to comment if there were any significant concerns. Turning to the proposals regarding paragraph 31, the delegate from Brazil explained that they had suggested a number of new examples to be included after the first sentence, which explained that if neither of the parties exercise sovereign powers, the Convention would apply. The examples already included were the example of private claims for harm caused by anti-competitive conduct – which was still in brackets. The proposed examples would add illustrations of corruption and other illicit activities, which the delegate explained would be situations that would entail applications for private claims for compensation that would be covered by the private law understanding, which is included in civil commercial matters, and not public law, which is outside of the expression. The delegate from Brazil explained that these examples of private claims would fall within the understanding of civil and commercial matters.

58. The delegate then set out the proposal to refer to collective action in the last part of paragraph 31. He expressed Brazil's understanding that there was at that time no reference to "collective action" in the draft Explanatory Report. He then noted that the Commission had learned through the drafting process that there were a lot of ways to enforce private claims, and to seek private rights to civil and commercial matters. He highlighted that collective action was a well-used and well-known process, which Brazil thought should be expressly noted as a possibility.

59. The Chair invited the room to make any comments on the proposal, or suggestions to the *co-Rapporteurs*. The floor was given to Argentina.

60. **A delegate from Argentina** greeted the meeting. She expressed regret that, despite the ordinary tendency of Argentina to coordinate with Brazil, Argentina could not support the proposals contained in Working Document No 26. The delegate flagged that Argentina had tabled a proposal regarding Article 2 on the scope of the Convention, as well as Argentina's concerns regarding the extension of scope to the State in Article 20. As such, she said that the explanation in the Explanatory Report was crucial for Argentina, not just the text of the Convention. At that time she reserved Argentina's position, and suggested it could be returned to as discussion progressed on those other Articles.

61. **The Chair** sought further contributions from the floor regarding the Explanatory Report as it related to Article 1.

62. **A delegate from the United States of America** flagged his interest in clarifying his understanding of the Chair's rules of procedure, and noted the United States of America had significant issues regarding paragraph 71. He requested confirmation that this would be considered at a later time.

63. **The Chair** confirmed this understanding.

64. **A delegate from Israel** thanked the delegation of Brazil for their proposal, but requested clarification of whether Brazil was proposing to modify the substantive aspects of the text. He assumed this was not the intention but expressed that there were possible concerns that parts of the proposal could have this effect. He recorded that Israel was happy with the drafting in the draft Explanatory Report. He suggested that negotiating the text now would not be productive as it was very long. He expressed interest in clarification from Brazil as to whether they were suggesting something substantive, and whether they feel strongly about the proposal. That failing, he suggested that Brazil make these comments through the process earlier described by the Secretary General.

65. **The Chair** reiterated that it was not the task of the Commission to negotiate the text of the Explanatory Report in that forum. Rather, Members could offer helpful suggestions to the *co-Rapporteurs*. It would then be a task for them to reflect those suggestions, while bearing in mind that the canonical decision, the authoritative decision, would be the decision on the text of the instrument. The *co-Rapporteurs* would decide how best to explain that in light primarily of the text, but also secondarily of the discussion in the room. That said, the Chair repeated his earlier sentiment that Members should make constructive suggestions


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while matters were fresh in their minds. The Chair invited the European Union to take the floor.

66. **A delegate from the European Union** expressed that the delegation had no concerns regarding the proposals for paragraphs 29 and 31 of the draft Explanatory Report. He observed that there was potential merit in streamlining the terminology used for sovereign powers. He noted that the European Union was not particularly concerned with which term was used. Regarding paragraph 31, the delegate explained the European Union was of the understanding that collective action would already be included, because the text as it stood already talked about government agencies acting on behalf of private parties, such as consumers. However, he acknowledged that clarification to that extent, and the inclusion of additional illustrations, did not raise any objections from the delegation, and could in fact be helpful.

67. **A *co-Rapporteur*** offered some points of clarification regarding the draft Explanatory Report. He drew the meeting's attention to paragraph 82 where the Report refers to collective action in the definition of judgments. He explained that the Report sets out that a judgment is a decision on the merits and implies some kind of contentious judicial proceedings in which a court disposes of the claim insofar as it involves a disposition of a claim. It includes monetary and non-monetary judgments, judgments given by default, and judgments in collective action.

68. The *co-Rapporteurs*, while noting they did not have a strong preference, also wished to highlight that with respect to the concept of governmental powers issues, at paragraph 85 of the Hartley/Dogauchi Report it refers to the exercise of governmental powers; the concept in the draft Explanatory Report was taken from that.

69. **A delegate from Switzerland** explained that while the delegation did not have a clear position on this issue, she did, however, wish to raise the question of whether the term "collective action" in this context might be related in any way to issues of State insolvency. If it were, the delegate reminded the room that this, like any other insolvency issue, was not covered by the scope of this Convention.

70. **The Chair** thanked the delegate from Switzerland, but noted that he had not understood collective action in that sense in this context, because as she had indicated, insolvency was essentially already excluded.

71. **A delegate from the People's Republic of China** explained that his delegation would need a clearer picture of this proposal, because there were several different concepts being considered. He highlighted that these issues were not even on the same level: sovereign powers, to some extent, always come from the angle of international law, while governmental powers would more likely stem from internal aspects, and public powers could be from international or domestic law. The delegate suggested that perhaps the *co-Rapporteurs* could offer some further clarification. He also noted that there was new wording in the proposed paragraph 31 regarding "public bodies", which perhaps the Brazilian delegate could explain further.

72. **The Chair** reiterated the undesirability of a detailed negotiation of the text of the Explanatory Report, but encouraged Members to offer suggestions for the *co-Rapporteurs*.

73. **A delegate from Sri Lanka** enquired whether there could be some explanation as to what would fall within the ambit of administrative matters, as it was a very general term. From the Sri Lankan perspective, she observed that there are various degrees of administrative tribunals.

74. **A delegate from Brazil** offered some responses. He acknowledged that his delegation had objections to the proposal, but asked whether there were any points that could be agreed upon, or whether the objection would be for the whole package of proposals. In response to the concerns of the delegation of Israel, the delegate from Brazil confirmed that Brazil was not proposing any substantive change to the meaning of the text, and would be happy to progress through the process explained by the Secretary General. He thanked the delegation of the European Union for their support and the *co-Rapporteurs* for explaining that collective action is already included in the Report.

75. Regarding government powers and the concerns of the delegation of China, the delegate from Brazil noted that sometimes government agencies may bring private claims in civil and commercial matters, but that did not mean that they are exercising sovereign power in the sense of public law. The Explanatory Report already included the possibility of government agencies bringing private claims in civil and commercial matters. He reiterated that an exercise of government powers is not sovereign power, and that was the reason for the proposal to delete the reference to government powers, as it might lead to unintended consequences. He confirmed that it was not his delegation's intention to change anything regarding sovereignty, and that the proposal did not touch on administrative matters.

76. **The Chair** thanked the Members for their contributions to the discussion. He acknowledged that Brazil did not wish to affect the substance of Article 1, which he reminded the Plenary, is in any event not possible by altering the Explanatory Report. He considered there were a number of helpful reflections for the *co-Rapporteurs* to take into account, and he noted that they were conscious of the distinction that has repeatedly been drawn in the room between regulators bringing effectively private claims on behalf of private parties (which can be civil or commercial matters and within scope), and regulators exercising their regulatory powers, and perhaps seeking an injunction to restrain breaches of securities laws, for example, which is not a civil or commercial matter within the scope of the instrument. He proposed that the Commission trust the *co-Rapporteurs* to find the language to best capture this distinction.

77. The Chair then moved the discussion on to consideration of Article 4, which he described as the cornerstone of this instrument. He recognised that the meeting was scheduled to discuss paragraphs 1 through 4, but not paragraphs 5 and 6 in relation to common courts.

78. Noting there were no proposals for Article 4(1), the Chair proposed that the provision be adopted. The provision was adopted by consensus.

79. In relation to paragraph 2, the Chair noted that there was language in square brackets that needed to be dealt with. There were two Working Documents in relation to that provision: Working Documents Nos 32 REV and 36. The Chair noted that while the Working Documents were received late it was logical to consider them at this time. Before opening the discussion, the Chair stated that the origin of Article 4(2) was Article 8(2) of the 2005 HCCH Choice of Court Convention, which states "[w]ithout prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin".

This text had been used in an earlier draft of the Convention, but had been amended in the May 2018 meeting of the Special Commission in order for the principle to be stated before the qualification.

80. **A delegate from Israel** introduced the proposal in Working Document No 32 to remove the square brackets, which he said reflected the discussions of the Special Commission. He explained that he thought the current drafting was good and that there was merit in retaining the second sentence. He expressed concern that litigants or judges may not always consult the Explanatory Report, which could lead to misinterpretation of the circumstances in which there may be limited review of the merits to determine whether the Convention would apply or not.

81. As co-proponents **a delegate from the United States of America** expressed concern about deleting the second sentence. He was concerned because a bare statement could create huge asymmetric applications of the Convention or mean that it may be inoperable. This applies to the phrase "of the merits" as well. It is problematic that there is no public international law definition of what a review is, nor a Convention definition. This would mean those applying the Convention would be directed back to national law to determine what "of the merits" means. This could vary greatly between legal systems. The result of non-uniformity would be that countries with broad notions of "of the merits" will be far more constrained. Furthermore, he expressed concern that this asymmetry would operate in every case under the Convention because as the Chair had said this Article is the cornerstone.

82. Furthermore, he opined that for those countries with broad notions of "of the merits", there would be serious questions as to whether they can operate certain parts of the Convention. There could be numerous situations under Articles 5, 6 and 7 in which application of the filter or the ground for refusal would involve an inquiry, which under some law or other is on the merits. The delegate from the United States of America noted, for example, that in many legal systems whether a foreign judgment was obtained by fraud in Article 7 would be an on the merits inquiry; not having the second sentence there to clarify that such enquiries or examinations are necessary to apply the Convention would lead to a large uncertainty in the ultimate results. This, he said, could create a serious impediment to ratification. He reiterated the United States of America's position that the brackets should be deleted and the text retained.

83. **The Chair** invited the delegation of Uruguay to introduce Working Document No 36.

84. **A delegate from Uruguay** proposed deleting the text in square brackets, as it could lead to confusion. He observed that it was settled policy that there would be no review of the merits, and that the second sentence was self-evident as each provision requiring review had its own grounds of application. He further noted that while there was no definition of review there was also no definition of examination.

85. **The Chair** observed that there was no disagreement about policy or substance; all Members understood that a requested State could not decline recognition or enforcement because it thinks the foreign judgment is wrong in some respect. Conversely, he acknowledged that if a question arose about whether a judgment was within scope, or whether an Article 5 filter was satisfied, or whether an Article 7 defence applied, then the facts and law relevant to that issue could be considered by the requested court. The Chair explained that the goal was to find the formulation most helpful to the various audiences to whom this document would speak.

86. **A delegate from the Russian Federation** expressed support for the proposal of Uruguay. He drew a comparison with the 1958 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, and the importance of clarity that arbitral awards cannot be reviewed on the merits. He opined that including the second sentence would mean losing the opportunity to have that advantage in this Convention. Just the first sentence would be much clearer.

87. **A delegate from the European Union** lent strong support to the proposal of the delegations of Israel and the United States of America to delete the square brackets and retain the text. He reiterated the Chair's characterisation of Article 4 as the cornerstone of the Convention. He queried how the second sentence could obscure the agreed intention that review would be possible where it was specifically provided for in the Convention. Rather, he thought that it precisely captured the system of the Convention. The delegate recalled discussions at the Special Commission where Uruguay had proposed the change to list the principle before the qualification. He recognised that that was a worthy point that had been adopted. Further, the delegate posited that it would be suboptimal to completely depart from the 2005 HCCH Choice of Court Convention. He suggested that since there was agreement on policy and the arguments in favour of keeping the second sentence were better, the Commission should not spend too much time on what was ultimately a matter of taste.

88. **A delegate from Brazil** expressed support for the proposal of Uruguay, but noted they were flexible.

89. **A delegate from Japan** confirmed there was no substantive difference, but for the sake of clarity and consistency with the 2005 HCCH Choice of Court Convention his delegation supported the proposal of the delegations of Israel and the United States of America.

90. **A delegate from Australia** noted that his delegation had not previously taken a definitive position on this issue, and that the fact that it is included in the 2005 HCCH Choice of Court Convention should not be determinative. He accepted that changes had been made to make the language more precise, and that ultimately Australia would support removing the square brackets and retaining the text. Given the ultimate audience, clarity would be beneficial.

91. **The Chair** confirmed again that there was absolutely no policy difference on this provision. He encouraged delegates to consider this question of difference in taste over the lunch break.

92. **A delegate from the European Union** made a final suggestion that Members could consider including wording like "as specifically provided by this Convention", which would restrain the broad term "examination".

93. **The Chair** thanked the delegate for this additional food for thought. He encouraged Members not to draw out discussions on this subject, and to maintain a sense of proportion on an issue where there was no policy difference. He suggested that Members test any drafting proposals with others before bringing them to the Commission.

94. The meeting was closed at 1.00 p.m.


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# Procès-verbal No 2

# Minutes No 2

*Séance du mardi 18 juin 2019 (après-midi)*

*Meeting of Tuesday 18 June 2019 (afternoon)*

1. La séance est ouverte à 14 h 30 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

*Article 4*

2. **The Chair** noted the enthusiasm in the room and invited further interventions on the square-bracketed text of Article 4(2). The Chair noted that the square brackets reflected unresolved issues requiring discussion and resolution by States through interventions, particularly from those States which had proposed Working Documents on the issue. The Chair encouraged resolution of this matter within the afternoon.

3. **A delegate from the Philippines** suggested that it may be better to identify the specific Articles to which the second sentence of Article 4(2) referred. The delegate noted that, from reading the Explanatory Report, it would appear that the second sentence applied subject to the application of Articles 5, 6 and 7 of the draft Convention.

4. **The Chair** thanked the delegate for his constructive intervention and noted that Article 2 is also important for Article 4(2). Nonetheless, the Chair reminded the Plenary that it is not the role of the Chair to resolve issues, and that the questions raised by States must be resolved by States. Noting that a solution to the text of Article 4(2) will need to be found in the course of the afternoon, the Chair moved the discussion to Article 4(3). Observing that there were no Working Documents relating to Article 4(3), and that there were no interventions to the contrary, the Chair considered Article 4(3) to be adopted. For Article 4(4), the Chair indicated a proposal was being developed by a delegation. In anticipation that the delegation would conduct informal consultations over the afternoon to determine whether there was sufficiently broad support to bring the proposal to the floor, the Chair postponed discussion on that Article. The Chair then directed the discussions to Article 2(1)(a) through (l) and (p), then to Article 2(2) and (3).

*Article 2(1)(a) to (e)*

5. **The Chair** noted there were no Working Documents on the *chapeau* to Article 2(1) and proceeded on the basis that it was adopted. Turning to each of the Articles in turn (Art. 2(1)(a), the status and legal capacity of natural persons; Art. 2(1)(b), maintenance obligations; Art. 2(1)(c), other family law matters including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; Art. 2(1)(d), wills and succession; Art. 2(1)(e), insolvency, composition, resolution of financial institutions and analogous matters), the Chair noted that there were no Working Documents and, in the absence of interventions, proceeded on the basis that each of the Articles was adopted by consensus.

6. **A delegate from Israel** sought clarification as to whether it could make suggestions for the Explanatory Report during the Second Reading, given that it was still engaged in consultations concerning the Explanatory Report on Article 2(1) issues.

7. **The Chair** responded that suggestions for the *co-Rapporteurs* would be most usefully made during the First Reading. However, given that discussion on Article 2(1) will continue tomorrow, the Chair indicated that further suggestions may be made at that time concerning paragraphs discussed today.

8. **A delegate from Canada** wished to comment upon the Explanatory Report relating to Article 2(1)(e), specifically, the phrase "to prevent the failure of financial institutions". First, as a matter of tone for the Explanatory Report, the delegate wished to avoid any suggestions of being "too big to fail". Secondly, the delegate suggested adjustments should be made to the references to the Financial Stability Board (FSB) in footnote 33. In particular, the suggestion that the FSB maintain the framework should be avoided (as the application of the framework is a matter for individual jurisdictions). Rather, the FSB should be seen as a source of guidance for jurisdictions.

9. **The Chair** commended the delegate's intervention as the model of helpful, brief suggestions.

*Article 2(1)(f) and (h) to (j)*

10. **A delegate from Switzerland** queried the merit of the exclusion under Article 2(1)(f) and the explanation given for it. The delegate noted that only very few of the Conventions dealing with the carriage of people and goods contain provisions for recognition and enforcement of judgments, for example, the *Convention on the Contract for the International Carriage of Goods by Road (CMR)*. Further, the delegate indicated that rules relating to conflicts with other instruments operate to give effect to all other existing instruments and enable States to make rules departing from the draft Convention. In light of this, the delegate queried whether the exclusion was sufficiently justified. The delegate emphasised that her intervention was not a proposal but a flag for consideration.

11. **A delegate from Canada** responded that Canada would object to removing this exception. She stressed that Canada has specific reasons for maintaining this exclusion, for reasons to do with exclusive jurisdiction.

12. **The Chair** noted that there was no Working Document to exclude Article 2(1)(f). Although the adoption of a provision during the First Reading should not preclude reconsideration of the issue during the Second Reading, the Chair encouraged delegates to develop support for proposals before bringing them to the Plenary. The Chair indicated he would proceed on that basis unless delegates expressed a contrary view. After seeking further interventions, the Chair noted that Article 2(1)(f) was adopted by consensus. The Chair noted that Article 2(1)(g) was subject to a proposal to be considered later. Considering Article 2(1)(h), concerning liability for nuclear damage, Article 2(1)(i), concerning the validity, nullity, or dissolution of legal per-

sons or associations of natural or legal persons, and the validity of decisions of their organs, the Chair noted that there were no Working Documents nor interventions, and took each to be adopted by consensus. The Chair directed the discussion to Article 2(1)(j) concerning the validity of entries in public registers.

13. **An observer for the International Institute for the Unification of Private Law (UNIDROIT)** requested clarification in relation to the Explanatory Report concerning Article 2(1)(j) after taking the opportunity to thank the Permanent Bureau and the HCCH for inviting UNIDROIT, and congratulating the Permanent Bureau, the drafters of the Explanatory Report and the delegates for having reached the Diplomatic Session. The question related to whether references to entries in public registers were taken to refer to international registers, given the footnote in the Explanatory Report referring to regional instruments. The observer considered that this may include registries under the Cape Town Convention (*Convention on International Interests in Mobile Equipment*) and Aircraft Protocol (*Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*) even if they are not State registries, because they are available to the public. The Convention and the Protocol have their own rules relating to jurisdiction and issues of validity.

14. **The Chair** invited the *co-Rapporteurs* to comment.

15. **A *co-Rapporteur*** confirmed his understanding from the Plenary was that international registers, such as those maintained under the Cape Town Convention, are within the exclusion. He indicated that this could be clarified in the Explanatory Report.

16. **The Chair** noted that Article 2(1)(j) was adopted. Turning to Article 2(1)(k), the Chair noted there were no Working Documents concerning defamation.

*Article 2(1)(k); Article 2(1)(l)*

17. **A delegate from Israel** sought clarification and consideration from the *co-Rapporteurs* concerning paragraph 55 of the Explanatory Report on Article 2(1)(l), where it is implied that defamation could only apply to disclosure of "*true* information". The delegate noted that in Israeli law and perhaps other laws, defamation may also apply to false information if there is no public interest. The delegate indicated that, if defamation only applied to "true" information, this may present a problem with respect to Israeli law.

18. **The Chair** noted that the intervention of the delegate from Israel was not a proposal on the text, but a question on the light that is shed upon the scope of Article 2(1)(k) by paragraph 55 of the Explanatory Report and Article 2(1)(l). The Chair noted that, in most systems with which he was familiar, defamation related to false statements with truth available as a defence.

19. **A *co-Rapporteur*** explained that the paragraph resulted from discussions at the May 2018 meeting of the Special Commission concerning the difference between defamation and privacy. During those discussions, the difference between false information and true information arose. As far as he was aware, defamation does not concern the disclosure of true information. He noted that the paragraph was an attempt to reflect this understanding of the group, however it could be amended if the understanding was not correct.

20. **The Chair** suggested that this may be better addressed "offline" if the position were unique to Israel. Noting that the delegate from Israel was nodding, the Chair suggested that information concerning Israeli law could be provided to the *co-Rapporteurs* for adjustment as necessary in the Explanatory Report. The Chair sought consensus as to Article 2(1)(k), and noted that it was adopted. Article 2(1)(l) to (o) was subject to special agenda items, and not considered. The Chair directed the discussion to each of the Article 2(1) sub-paragraphs for which there were proposals, starting with Article 2(1)(g) for which the United States of America had proposed Working Document No 28.

*Article 2(1)(g)*

21. **A delegate from the United States of America** thanked the Chair and the Permanent Bureau for the helpful and informal survey of international instruments in these areas contained in Preliminary Document No 12. The delegate proposed to strike marine pollution and emergency towage and salvage from the exclusions from scope. The original text of Article 2(1)(g) had been carried from the HCCH *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 HCCH Choice of Court Convention"), and had a history prior to that. Because the 2005 HCCH Choice of Court Convention includes rules on direct jurisdiction, there may have been specific concerns with respect to choice of court agreements in marine pollution claims and emergency towage and salvage claims, however the delegate did not see how that justification applied to the recognition and enforcement of judgments. Further, the delegate noted that the discouragement of marine pollution, and the encouragement of emergency towage and salvage of vessels in distress, are each an internationally accepted good. He indicated the United States saw no compelling reason for not including such judgments within the scope of the Convention. There are no existent international Conventions for recognition and enforcement of emergency towage and salvage judgments, and only very few Conventions which provide for recognition and enforcement concerning marine pollution (for example, the *International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Convention)*). Even then, those Conventions address ship-sourced pollution, which accounts for 12% of all marine pollution, are extremely narrow, some have not entered into force, and some lack major maritime nations as signatories. The United States considered that any interaction with other marine pollution Conventions could be addressed by the "relationship with other international instruments" provision. As a matter of policy, the delegate saw good reasons for recognition and enforcement of judgments of marine pollution, especially concerning liability, because it would discourage pollution. Likewise, the recognition and enforcement of emergency towage and salvage would permit providers of these services to be more easily fully compensated, especially when they deal with ships which by nature are mobile and sometimes one-ship corporations.

22. **A delegate from Norway** thanked the Chair and supported the proposal from the United States of America. The delegate agreed that the issues are not properly governed in other international Conventions. Given that marine pollution is usually an international case, the delegate considered it highly recommendable to include it within the scope of the Convention.

23. **A delegate from Switzerland** considered that the proposal of the United States of America had great merit and, like Norway, found the proposal convincing.


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24. **A delegate from Brazil** also considered that the proposal of the United States of America had merit, particularly in the pursuit of a broader Convention. The delegate thanked the Permanent Bureau for the excellent paper on marine pollution, including the annex with examples of treaty regimes of marine pollution liability. However, Brazil considered that the issue is connected to jurisdiction. The delegate referred to the Annex to Preliminary Document No 12 and noted the preponderance of references to the place of damage as the jurisdictional basis for pursuing marine pollution liability. The delegate said the forum in which the damage occurred would be the proper jurisdiction to determine marine pollution liability under those Conventions. The delegate noted the first Convention in the Annex to Preliminary Document No 12 establishes the forum of the damage as an exclusive basis of jurisdiction. Noting that the discussion had not yet turned to Article 5, the delegate suggested the issue was nonetheless closely connected to jurisdictional filters. The delegate flagged that Brazil proposed to deal with a new jurisdictional filter in Article 5(1) to cover environmental damages.

25. **The Chair** sought to clarify whether Brazil supported the modifications proposed by the United States of America.

26. **A delegate from Brazil** supported the proposal, provided it did not close discussion of jurisdictional issues concerning marine pollution.

27. **The Chair** responded that nothing foreclosed future discussions upon Article 5.

28. **A delegate from the European Union** sought to present a nuanced approach. With regard to emergency towage and salvage, the European Union saw no structural substantive issues militating against inclusion within the scope of the Convention. With respect to marine pollution, the picture was more complex. Although the European Union coordination process was ongoing, the delegate foreshadowed considerable hesitation in removing the exclusion in the areas where there exist Conventions which deal with recognition and enforcement and which have a varying degree of ratification from States. The delegate appreciated the technical argument of the United States of America that the relationship with other instruments should prevent matters from being included in the Convention, which are governed by other treaties. However, as a matter of policy, the inclusion may have consequences for the attractiveness of ratifying other Conventions. For example, the Bunker Convention does not deal with recognition and enforcement, but has an otherwise broader scope. The delegate queried whether the recognition and enforcement of judgments in marine pollution matters may be better addressed under those Conventions explored in Preliminary Document No 12. The delegate acknowledged that those Conventions primarily address ship-sourced pollution. Therefore, there may be merit in distinguishing between ship-sourced pollution, which indeed represents only a limited proportion of total marine pollution cases, and the other sources of marine pollution. The delegate reassured that the European Union intended to revert swiftly, but at this stage could not lend support to inclusion of the marine pollution issues.

29. **A delegate from Singapore** supported the proposal of the United States of America concerning marine pollution. The delegate suggested that a position of compromise might be to treat marine pollution as a tort, limited by the jurisdictional filter in Article 5(1)(j).

30. **A delegate from the People's Republic of China** expressed flexibility with respect to emergency towage and salvage. However, for marine pollution, the delegate aligned his concerns with those of the European Union. The delegate highlighted the existence of special rules and international legal systems concerning marine pollution and considered them to be the best place to address marine pollution liability concerns. The delegate indicated that he would need to consult further with maritime authorities if marine pollution were to be deleted.

31. **A delegate from Uruguay**, consistently with the understanding that the Convention should be as broad as possible, supported the deletion of these exclusions from Article 2(1)(g) and the proposal of the distinguished delegation of the United States of America.

32. **A delegate from Israel** needed to consider this proposal further. Concerning marine pollution emanating from ships, the delegate highlighted there was at least one international regulation in force and, in Israel, enacting legislation. The delegate highlighted his concern that the enacting legislation, and the enacting legislation to be required by this Convention, would present an issue under Article 24 and domestic law. The delegate said Israel could be flexible with respect to salvage. He suggested that a possible way forward for marine pollution could be to limit the exclusion to ship-sourced pollution to minimise conflicts with other international instruments. His understanding was that other types of pollution may not be covered by international instruments, in which case they could be covered by the Convention. The delegate emphasised that this was not a firm position as there had been less time to consider this issue, which had been scheduled for the following day.

33. **The Chair** acknowledged that the discussion was scheduled for tomorrow and therefore he would not push for a final solution unless it were self-evident. He summarised that it seemed that there was appetite for an exclusion for limitation of liability upon maritime claims, an exclusion for general average, but probably not an exclusion for emergency salvage and towage and that it would be premature to assess the position concerning marine pollution. In the absence of other interventions, the Chair postponed further discussion to enable the delegates to consult and revert tomorrow.

34. **A delegate from the United States of America** emphasised the primary interest is in reaching a constructive result and indicated the willingness of the United States to collaborate further with delegations who raised further questions or suggested modifications.

*Article 2(1)(l)*

35. **The Chair** directed the discussion to Article 2(1)(l) and Working Document No 16 of the European Union and Working Document No 34 of the United States of America.

36. **A delegate from the European Union** reminded the Plenary of the European Union's consistent position that privacy should be excluded from the scope of the Convention. Without rehashing the arguments at length, the delegate considered that the privacy matters would routinely conflict with constitutional issues concerning the freedom of expression and thereby imply a significant danger for undesirably frequent use of the public policy exception. The delegate observed there had been substantial support for the exclusion in principle, and that discussions had evolved to consideration of the precision with which States want the exclusion to be stated. The delegate recalled efforts to make the wording more precise but, after having considered various textual possibilities, it seemed it would

be difficult to narrow the exclusion in the text of the Convention. The delegate said the best solution from the May 2018 meeting of the Special Commission was the draft text in the square brackets, and therefore asked for the removal of the square brackets. The solution represented the best combination in terms of covering all the cases sought to be covered, whilst being as precise as possible so as not to burden the text. The European Union's intention from the beginning was focused on non-contractual issues, which the delegate considered to be captured in the current text. The delegate stressed that the Article should be read in close connection with the Explanatory Report which contained clarifications that had been discussed consistently and which the European Union sought as 'part of the package'. He noted that some adjustments to the Explanatory Report may of course still be made. As a side remark on the Explanatory Report, the delegate suggested it may be worthwhile to consider the parallelism between defamation and privacy and that it may be worthwhile to align the texts as closely as possible within the Convention. The delegate highlighted that individual terms currently point in different directions, which may or may not be justified. For example, an issue previously discussed was whether privacy applies to natural and legal persons alike: the current Explanatory Report describes the application of defamation to legal and natural persons, whereas for privacy the concept is narrowed only to natural persons.

37. **A delegate from the United States of America** expressed satisfaction with the first wording of the current exclusion. However, the proposed inclusion of proceedings brought for a breach of contract between the parties presented a matter of great concern and caution. The delegate highlighted that the law in this area is subject to rapid flux, development and uncertainty. The delegate echoed the observations of the delegation of the European Union that privacy has constitutional implications, and said this raised concerns as to what States might be called upon to recognise and enforce. Although restricting the inclusion to proceedings "brought for breach of contract" may sound limited, the delegate suggested this may not have clear application in terms of the internet. For example, is a privacy policy posited on a website in one country a binding contract or the source of contractual terms? In one country it may be, in another it may not be. What would happen where a court has authority to imply terms into a contract that might not have been understood by the parties? Finally, questions arise concerning the incorporation of mandatory aspects of contract law into contract claims, including constitutional law doctrines which block recognition and enforcement of judgments that might otherwise fall within the Convention. The delegation preferred caution as a sound policy and therefore proposed a blanket exclusion of privacy, at least until the law in this area becomes more settled and developed so that it may be revisited. The delegate stressed that the square-bracketed text would otherwise represent a grave invitation for the use and abuse of the public policy exception.

38. **The Chair** summarised that there were no proposals to delete the privacy exclusion completely and that there appeared to be consensus to remove most privacy matters from scope. The question remained as to whether and which privacy matters to bring back into scope, and whether the square-bracketed text should be retained.

39. **A delegate from Australia** largely agreed with the United States of America but had one concern relating to commercial arrangements for the protection of personal information that were better addressed by the proposal of the delegation of the European Union. The delegate gave the example of a company or government department receiving the services of an IT or HR company to manage personal information on its behalf. The parties may have a contractual term requiring personal information to be safeguarded and treated appropriately; however, a data breach occurs to reveal that personal information and cause embarrassment or harm to the employees of the original party. The delegate considered that such basic commercial arrangements concerning protection of personal information probably should be covered by the Convention. If the European Union's proposal or similar were not adopted, the delegate was concerned the Convention may not cover this situation, which is a typical contractual requirement. The delegate then briefly addressed the relationship between defamation and privacy in the Explanatory Report. In Australia, the definition of personal information for the purposes of privacy regulation includes an opinion about a person, whether true or not. For example, an opinion on an employee file that the person is "a poor worker and lazy", whether true or not, would be considered to be personal information. Therefore, paragraph 55 of the Explanatory Report does not work from an Australian privacy definition perspective. Lastly, the delegate cautioned against eliding the terms defamation and privacy. The delegate emphasised they are not the same concept and should be treated differently, particularly as privacy regimes are developing rapidly.

40. **A delegate from Argentina** did not agree with the exclusion of privacy at all.

41. **The Chair** noted there were no Working Documents to that effect to structure the discussion.

42. **A delegate from Argentina** understood the text was in square brackets for discussion.

43. **The Chair** considered the tacit assumption to be fair and allowed discussion.

44. **A delegate from Argentina** considered privacy to be a human right. While understanding that many States have constitutional concerns, the delegate did not see why the Convention should provide for such a choice. The delegate gave the example of an individual who, having obtained a remedy for damage to a fundamental human right to privacy, was denied recognition in another State. The delegate suggested there may be different ways of striking the balance, but that it should be drawn by every State with the application of the public policy exception. The delegate expressed concern that removing the possibility for enforcement of any decision detracted too much from the individual.

45. **The Chair** encouraged delegates to structure future discussions by providing Working Documents with as much notice as possible.

46. **A delegate from the Republic of Korea** wished to briefly question what was meant by "privacy". As discussed in an informal working group and also appears in the bracketed text, there appeared to be a parallel to Article 2(2)(o) of the 2005 HCCH Choice of Court Convention, which provides for "infringement of intellectual property rights […], except where […] proceedings are brought for breach of a contract". Here, the text only refers to privacy, not privacy or its infringement. The delegate queried whether privacy infringement was included in "privacy", and whether other delegations were of a mind to modify the language.


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47. **The Chair** summarised that a consistent assumption reflected in the Explanatory Report is that references to the exclusion of privacy refer to an exclusion of proceedings in relation to infringements of someone's privacy. On that central assumption, additional language is not needed in respect of that paragraph.

48. **A delegate from the People's Republic of China** advocated that privacy be excluded from the scope of the Convention because of vested differences, such as the definition of scope and protection, which are better addressed by different countries.

49. **A delegate from Israel** thanked the European Union for their proposal and expressed his delegation's reservations about a total exclusion of privacy, despite the problems raised by the United States of America. Aligning his comments with the delegate from Australia, he highlighted that the major problem with a blanket exclusion is the unauthorised selling of databases. The delegate raised that there may be cases where a breach of personal information does not fall within a contractual claim. The delegate recalled that efforts to further confine the privacy exclusion, prompted by the European Union's proposal, had proven difficult. The European Union's proposal reflected an imperfect but good compromise between the rationale for excluding privacy matters, on the one hand, and constitutional issues of freedom of expression, on the other, and therefore received Israel's support. The delegate suggested to the *co-Rapporteurs* to refer to the unauthorised selling of databases within the Explanatory Report as a case to be included within scope.

50. **A delegate from Singapore** aligned with the position of Israel and Australia to support the European Union's proposal. The delegate also sought to clarify whether data protection issues that relate only to privacy are covered by the exclusion (as data protection can encompass issues unrelated to privacy).

51. **A delegate from Uruguay**, consistently with the understanding that the Convention should be as broad as possible, agreed with the delegate from Argentina that privacy should not be excluded. However, given that this position may not achieve consensus, the delegate supported the proposal of the European Union.

52. **A delegate from Brazil** also supported the position brought by Argentina, which had always been the view of Brazil. However, the delegate recalled that it had been difficult to reach consensus on this issue in previous meetings, noting the strong position stated by the European Union against including privacy matters within scope. The current text reflected a compromise between the two positions. The delegate supported the proposal of the European Union but expressed difficulties in moving beyond that towards a total exclusion of privacy matters.

53. **A delegate from Australia** responded to the delegate from Singapore concerning data protection. The delegate explained that the final two sentences of paragraph 55 of the Explanatory Report covered these issues, reflecting Australia's understanding that "[d]ata protection, intrusion or breach of confidence are only included in sub-paragraph (l) insofar as they relate to the private life of natural persons". The delegate expressed sympathy in response to the concerns raised by Argentina but noted that the disparate state of privacy protection across the world posed challenges in this area. The delegate noted that Australia, like many States, has a privacy regulator that works closely with international counterparts concerning cross-border matters.

54. **A delegate from the European Union** sought to make three short remarks. First, the delegate agreed with the position of Australia concerning paragraph 55 of the Explanatory Report. The inclusion of data protection is limited to cases where it relates to private life. Secondly, in response to the concerns of Argentina, the delegate recalled that privacy rights have a clear fundamental human rights dimension but that the other side also has a fundamental rights dimension concerning the freedom of expression. The delegate expressed reluctance to rely upon the public policy exception given that the conflict of these rights is resolved differently in different jurisdictions and stressed the need for a balance to be struck somewhere.

55. **A delegate from Norway** understood data protection to be covered by the privacy exclusion as it relates to natural persons. The delegate supported the European Union's proposal on the view that privacy should be excluded, but not totally.

56. **A delegate from the European Union** recalled that, thirdly, it is difficult to draw a line between what is contractual and non-contractual, particularly in the online world. This delimitation issue does not only apply to privacy matters, and can arise in a number of respects. In these borderline cases, the requested State is in a position to consider whether or not something is covered by the exclusion in Article 2.

57. **The Chair** summarised that the distinguished delegates from Uruguay and Brazil had accurately read the position in relation to including all privacy matters in scope: there was simply no consensus to do so, when consensus is required to assume international obligations in relation to a topic. Therefore, the issue became whether contractual privacy disputes should be within scope, squarely raising the difference between the proposals of the European Union and the United States of America. The Chair proposed to allow the issue to mature overnight and revert to the well-defined question: Is there a consensus that the instrument should extend to privacy matters brought for breach of contract between the parties? Then, before proceeding with anti-trust, the Chair gave the floor to the Secretary General.

58. **Le Secrétaire général** rappelle qu'à chaque Session diplomatique de la HCCH, il est coutume d'avoir un programme social. L'événement principale de la 22e Session diplomatique est un dîner formel, qui aura lieu le 29 juin. En raison du nombre élevé de participants, il rappelle que les invitations ont été limitées, si bien qu'il est demandé aux délégués en ayant reçu une mais qui ne comptent pas y assister, d'en informer le Secrétariat afin que d'autres puissent en bénéficier. Il indique également que le nombre final de participants doit être communiqué ce samedi.

*Article 2(1)(p)*

59. **The Chair** indicated that it might be helpful to begin with a short summary of the position reached by the informal working group on anti-trust (competition) matters. He mentioned the five Working Documents on this issue, namely, Working Documents Nos 4, 7, 25, 29 and 38, the latter of which, although received only today, is intertwined with the others so they will all be taken at the same time. Before turning to them, the Chair gave the floor to the chair of informal working group V.

60. **The chair of informal working group V** thanked all the participants in the working group who were very willing to discuss in a spirit of compromise the matters of anti-trust. She also extended greetings to a consultant to the

HCCH for having drawn up an excellent note, and to the Permanent Bureau for its assistance. She recalled that the group discussed these issues the day before, to see whether there could be some middle ground potentially found. However, she was unable to report a consensus on such a compromise. She further observed that there was a full range of views between total inclusion and total exclusion of these matters. She briefly reviewed the issues discussed, namely, that if anti-trust were included, it would only be private enforcement of anti-trust matters; public law aspects would not be included. She further noted a general feeling that if anti-trust were included, this would probably promote the enforcement of anti-trust overall but there was no unanimity as to whether the effects would be altogether desirable. She then perused the views expressed. The first one was whether there was an interest in having consistency or not with the 2005 HCCH Choice of Court Convention. There were also divergent views as to whether the involvement of the public interest in anti-trust matters completely justify the exclusion, or whether this could be sufficiently dealt with by the public policy exception. She pointed out that the group explored several possible ways of potentially narrowing down the exclusion. She further presented two potential approaches on the table, namely, to narrow down the scope of the exclusion to some parts of anti-trust or to deal with it by excluding certain types of remedies. In her view, it seemed there was more sympathy for the approach of narrowing down the exclusion.

61. **A delegate from the European Union** emphasised the constructive debates in the informal working group. His delegation was in favour of having competition matters in the scope of application of the draft Convention because it constitutes civil and commercial matters. He further highlighted that all litigation in civil and commercial matters is included in the scope of application. In his delegation's view, it facilitated trade and investment and contributed to economic growth. Concerning the inclusion of anti-trust, he thanked the Permanent Bureau for its very helpful note, which highlighted that, if included, it does not concern a wide range of judgments. In this particular area, only a small number of jurisdictional filters will apply, as for example, habitual residence or branch but to the exclusion of torts. In his view, if these types of action are not included in the scope of application, an unsuccessful plaintiff might be tempted to relitigate and seek remedy in another State, which is not in the interest of procedural economy and legal certainty. A departure from the 2005 HCCH Choice of Court Convention is justified because the latter includes both direct rules of jurisdiction and rules of recognition and enforcement, unlike the draft Convention, which contained only rules of indirect jurisdiction. He also acknowledged interests of delegations in not including competition matters. In his view, Article 19 addressed these concerns. He further suggested the possibility for States to withdraw their declaration made in accordance with the latter Article.

62. **A delegate from Israel** indicated its main justification for the inclusion of the provision: he saw private enforcement of anti-trust as a very important means for promoting anti-competition value, provided that it is limited to civil and commercial matters. He further pointed out that he did not see the risk of any involvement of regulatory affairs or public law.

63. **A delegate from Japan** mentioned that anti-trust matters should be included in the scope of the draft Convention in order to promote free and fair competition that must be the main objective of anti-trust law shared all over the world. He further noted that the 2005 HCCH Choice of Court Convention excludes them. In his view, it was because exclusive choice of court agreements should not always be allowed in those matters, which is not the case for the draft Convention that deals with recognition and enforcement.

64. **A delegate from Brazil** echoed the comments of the European Union, Japan, and Israel. He stressed that the proposal is in accordance with the general approach of Brazil to Article 2, which is to have the broadest operation possible of the draft Convention, including anti-trust judgments, *i.e.*, the private enforcement judgments on anti-trust. He further explained that, in the case of exclusion of anti-trust, Article 5(1) of the draft Convention will not apply, which will lead parties to opportunities for forum shopping and litigation strategy. He then suggested the Plenary approve his proposal at the outset of the discussion.

65. With respect to Working Document No 29, **a delegate from the United States of America** indicated that, in formulating his proposal, he tried to focus on commonalities in anti-trust law around the world, namely, anti-competitive agreements among competitors to do certain various specific things. In his view, if the draft Convention tries to go beyond that, it will be very difficult to get a consensus and serious issues of public interest and public policy will arise. He stated that he tried to find a middle ground but if the inclusion of anti-trust cannot be restricted to specific heads of anti-trust violation, he proposed a complete exclusion.

66. **A delegate from the Republic of Korea** introduced Working Document No 38 REV and reiterated his delegation's basic position of preferring the complete exclusion. He further outlined that anti-trust contracts and torts are different from traditional contracts and torts because of the underlying economic policy consideration. In his view, going further than the level of development of national rules regarding anti-trust in the draft Convention will prompt Article 19 declarations, and once the declaring State identifies its "strong interest" in not applying the Convention to anti-trust matters, it might effectively dissuade the declaring State's courts and legislators from interpreting or formulating its national rules to recognise and enforce foreign judgments in these matters. Therefore, the delegation of the Republic of Korea had come up with two possible alternatives of compromise regarding the scope:

– Option A, which proposed to extend Article 5(1)(m) to exclusive choice of court agreements;

– Option B, which proposed the intervention of anti-trust law to define illegality of a contractual obligation even without a choice of court agreement.

67. He further proposed to expand Article 11 to cover anti-trust matters and to aim Article 10 to avoid issues that may arise in determining reference price or calculating pure economic loss, as stated in Working Document No 7.

68. **The Chair** suggested that delegates indicate whether they want anti-trust completely in, completely out, or whether they are open to a middle approach, and if so which one they prefer in order to gauge the progress of the discussion. He wanted an understanding of the reactions to all these possibilities.

69. **A delegate from Brazil** highlighted the fruitful meeting of the informal working group, which took place one day earlier, even if they were not part of it. He stressed that the proposal of the delegation of the United States of America could be the basis for some compromise solution. For the time being, he agreed to live with something along

those lines, but explained that he needed further clarification from his capital.

70. **A delegate from Ukraine** expressed support for the current text of the draft Convention, namely, to exclude anti-trust matters from the scope of the Convention at this stage, as was the case with the 2005 HCCH Choice of Court Convention. She further brought a brief explanation on her point of view. In her country, anti-trust matters would be administrative matters. Therefore, allowing anti-trust matters to be within the scope of the Convention might allow the circulation of judgments that were administrative in their matters and not civil and commercial.

71. **The Chair** recalled that the scope restriction to civil or commercial matters applies in any event. He reiterated the point made earlier that the focus was on private enforcement actions and whether they should be in or out, or in certain identified circumstances in or out.

72. **A delegate from Singapore** was supportive of the complete exclusion of competition matters. He considered that competition matters reflected the economic policy of the State and were therefore not an area which involves purely private rights. He highlighted that this is exacerbated by the fact that many countries have laws which have extra-territorial effects, further making it worse – he questioned why, for instance, one State should acknowledge the judgment from another if the latter renders a judgment on a company from the former. He further thought that the Republic of Korea proposal (Work. Doc. No 38 REV, option B) could be a good starting point as a compromise since it limits the recognition of competition law-related judgments to cases when there is an issue of illegality of contract.

73. In order to have a Convention as broad as possible, **a delegate from Uruguay** was in favour of the proposals made by the European Union, Israel, Japan and Brazil.

74. **A delegate from the People's Republic of China** was in favour of excluding completely anti-trust. He stressed that anti-trust is a very important, but sensitive issue not only related to the interest of the competitors and consumers, but also related to the country's economic policy, and to public interest. He added that countries may have substantive differences on anti-trust legal frameworks and different standards in the implementation level. With regard to Article 19, the delegation of the People's Republic of China was of the view that this Article will be overused and will not address every issue because of its limitations.

75. **A delegate from Norway** supported the inclusion of anti-trust matters in the scope of the draft Convention for the reasons that have been already mentioned. She further gave one additional argument, namely, the parallel between the enforcement and recognition of court decisions and the recognition and enforcement of arbitral awards. Indeed, in Norway, the civil law consequences of competition are arbitrable. If it is the case, the arbitral award will be recognised and enforced under the 1958 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. Therefore, it would be a paradoxical situation when the recourse to court under the draft Convention would be less favourable to the effectiveness of mandatory law, such as competition law, than choosing arbitration. She further mentioned that it is not a question of competition law directly but rather the civil law consequences of competition. She further added that, for the time being, the proposals on the table are not completely satisfactory.

76. **A delegate from Sri Lanka** expressed her view as coming from a developing country because competition law is nascent in her country where even judges are not familiar with competition provisions and the economic analysis that it would require. She considered then as unfair to foist upon judges the task of having to enforce a judgment, along with a law with which they are not familiar. Therefore, she agreed with the exclusion of anti-trust, as worded in the draft Convention.

77. **A delegate from the European Union** suggested to determine the direction to follow in terms of looking for a compromise solution. He further agreed with the delegation of Brazil and was in favour of building a compromise based on the proposal of the United States of America rather than following the other alternative approaches. He outlined his will to discuss and further mentioned that the current situation was the most favourable to seek a compromise. For the rest, he was in line with the arguments raised by the delegation of Norway.

78. **A delegate from Israel** echoed the comments made by the European Union and further suggested continuing developing the proposal without discounting any other possibilities.

79. **A delegate from Australia** agreed with the comments made by the European Union and supported by Israel. He thought that the proposal of the United States of America is the one to work with, in terms of finding a compromise. Further, he shared the same concerns as those raised by Norway and considered that it was important to tackle this issue.

80. **The Chair** summarised the status of the debates: namely, he pointed out that it was very unlikely to reach a consensus that all anti-trust should be in. He further noted that there were numerous voices expressing reservations about that approach. There were also some voices expressing a preference for all anti-trust to be out but many of those voices have indicated a willingness to look at something modelled on the American approach. Those who were favouring the inclusion of all anti-trust matters considered also the approach proposed by the United States of America a useful one. The Chair suggested that the informal working group continue its work and do some serious work on language that takes the U.S. approach as its point of departure. He further encouraged the informal working group to look at whether there are some categories of anti-trust on which consensus for inclusion within the scope could be reached. The Chair checked whether there was a consensus to proceed on that basis.

81. **A delegate from Brazil** asked whether his delegation could join the informal working group.

82. **The Chair** indicated further that anyone else who has an interest in joining the informal working group should reach out to the First Secretary or the Secretary General.

*Article 2(2) and (3)*

83. **The Chair** suggested continuing with Article 2(2) and (3) on which no Working Documents had been received. He noted that Article 2(2) and (3) were adopted by consensus.

84. **A delegate from the European Union** came back to Article 2(2) read with paragraph 65 of the Explanatory Report stating that a judgment on private damages that was based on a prior decision of an administrative authority,

which would otherwise be excluded under Article 1(1), is not excluded from the scope of the draft Convention, although its recognition and enforcement may be refused under Article 8. He did not want to start an in-depth discussion but thought it had merits for further consideration because it is related to the anti-trust discussion.

85. **The chair of informal working group V** pointed out that this is a general issue of Article 8 and not just an anti-trust issue. Furthermore, she was not sure whether this could be resolved in any reasonably satisfactory manner.

86. **The Chair** expressed his reluctance to add these issues to the anti-trust informal working group.

87. **A delegate from the United States of America** came back to Article 2(3) with respect to the effects this Article would have on, for example, a judgment that would recognise or enforce an arbitral award.

88. **A delegate from the European Union** was inclined to accept that paragraph 65 of the draft Explanatory Report is not confined to competition law issues. However, he asserted that his delegation does not accept the text of the *co-Rapporteurs* in paragraph 65 of the draft Explanatory Report because his delegation has a different understanding of what constitutes a preliminary question.

89. **The Chair** indicated that this issue will be dealt with during the debates regarding Article 8.

90. **A delegate from Israel** echoed the comments made by the United States of America and sought clarification on that matter. He queried whether a judgment that recognises an arbitral award falls under Article 2(3) or not.

91. **The Chair** observed that this issue is dealt with in paragraph 66 of the draft Explanatory Report which indicated that decisions on recognition and enforcement of foreign judgments or arbitral awards given by the court of a State cannot be recognised or enforced in another State under the draft Convention. He indicated that those who are not in line with the view expressed by the Explanatory Report may think about what substantive textual changes to the draft Convention would be needed when Article 3 will be discussed. He then came back to Article 4(2) and questioned whether there had been any evolution of thinking in this respect.

*Article 4(2)*

92. **A delegate from Uruguay** mentioned that he had approached the delegations of Israel and the United States of America. He further indicated that it was moving forward: there was one agreement and one pending answer.

93. **The Chair** was grateful for those active discussions. He further suggested to close the meeting earlier given the progress done and given that there were issues that would benefit from some conversation.

*Article 3*

94. **A delegate from the European Union** proposed the adoption of Article 3, on which no Working Document had been submitted, before closing the meeting.

95. **A delegate from Canada** raised a terminological issue between the French and English versions of Article 3 itself, namely, the English version referred to "officer of the court" which could be translated into French as *greffier*, *registraire* or *pronotaire*. She queried whether the Drafting Committee could resolve that question.

96. **The Chair** suggested that the Drafting Committee should consider the issue. If it appeared to be an issue of substance, rather than an issue of drafting expression, the Chair of the Drafting Committee would bring it back to the Plenary.

97. **The Chair of the Drafting Committee** agreed to peruse these discrepancies in the Drafting Committee, and as the case may be, to go back to the Plenary.

98. **Le Président** indique qu'il en est très reconnaissant.

99. **A delegate from Israel** indicated that, in paragraph 89 of the draft Explanatory Report, as an example of non-State authorities is given religious courts. However, in Israel, religious courts can be part of the official judicial system with competence in civil and commercial matters. He therefore queried whether this could be reflected in the Explanatory Report.

100. **The Chair** pointed out that Article 3 was adopted by consensus. He was grateful for the productive as well as enjoyable day. He further encouraged everybody to continue to make the same sort of progress and to come up with solutions.

101. The meeting was closed at 5.47 p.m.

# Procès-verbal No 3

# Minutes No 3

*Séance du mercredi 19 juin 2019 (matin)*

*Meeting of Wednesday 19 June 2019 (morning)*

1. La séance est ouverte à 9 h 34 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

2. **Le Président** souhaite la bienvenue à tout le monde et indique qu'il s'agit de la deuxième journée de travail. Il souhaite débuter la réunion en évoquant quelques points d'ordre administratif. D'abord, le Président tient à remercier la municipalité de La Haye pour la réception qu'elle a offerte la veille au soir, qui était très agréable. The Chair also thanked the municipality of The Hague for the food, the nibbles and the sunshine. The Deputy Mayor had assured the Chair that she personally had organised the sun-

shine. The Chair understood that the Secretary General would be writing on behalf of the meeting to thank the municipality for the reception. The Chair jokingly encouraged the Secretary General to also thank the municipality for the sunshine, especially as one now understood that it could not be guaranteed.

3. Secondly, the Chair clarified that by referring something to the Drafting Committee, he had gone slightly ahead of himself as there was as yet no Drafting Committee. The meeting still needed to establish one. The Chair then nominated as Chair of the Drafting Committee Professor Fausto Pocar who had done such an excellent job in that role throughout the Special Commission meetings.

4. *The Commission adopted this proposal by acclamation.*

5. **The Chair** then asked the Chair of the Drafting Committee to carry out consultations in relation to the composition of the Committee and report back to the Commission.

6. **The Chair of the Drafting Committee** thanked the Chair for the nomination, and the Commission for the acceptance of the nomination. He noted that he would make some consultations and during the day, he would return for the composition of the Drafting Committee to have it approved.

7. **The Chair** thanked the Chair of the Drafting Committee for this excellent proposal. He then confirmed that the informal working group on anti-trust/competition would meet at lunchtime on this day. The Chair asked the First Secretary (Mr Ribeiro-Bidaoui) to explain the logistics of the meeting.

8. **The First Secretary (Mr Ribeiro-Bidaoui)** thanked the Chair and informed the Commission that the meeting would take place in the Seminar Room on the first floor of the Academy Building, *i.e.*, the current overflow room, which would be rearranged for the meeting. Also, a light lunch would be provided. Since there was limited capacity in the room, he noted that the interest of Brazil, the People's Republic of China, the European Union, Israel, Japan, Norway, the Republic of Korea, Switzerland, Singapore, the United Kingdom and the United States of America in the meeting had been registered. He asked the delegates to inform the Secretariat if any other delegation would wish to attend the meeting.

9. **The Chair** then proposed to review the matters which had been left over from the previous day's meeting. His understanding was that on Article 4(2) there would be a Working Document circulated, which could be revisited later today. He then thanked the proponents of the Working Document and noted that he appreciated the hard work that had gone into that document overnight by those with an interest in the issue.

10. He then referred to Article 2(1)(g) ("maritime matters") and asked for updates on the progress on this provision from the Plenary.

11. **A delegate from the European Union** thanked the Chair and wished a good morning to everyone. He then asked for a little more time on this matter. Possibly, the matter could be discussed this afternoon, but he could not make any promises at this stage because participants were checking with their capitals back home. He could not give an update at the moment, therefore.

12. **The Chair** thanked the delegate from the European Union and noted that it was helpful to know roughly what the likely timing was. He was delighted that it was – hopefully – a matter of hours rather than days. The Chair then asked for updates on Article 2(1)(l) ("privacy"). Were people thinking about it, were they doing something about it?

13. **A delegate from the United States of America** explained that his delegation had made some enquiries about a possible, further permutation back in Washington. His delegation was waiting for responses because of the time differences and so on. Hopefully they would be in a better position by this afternoon.

14. **The Chair** thanked the delegate from the United States of America for his helpful intervention. He then noted that Article 2(1)(p) was considered by an informal working group, so this matter would be progressing at lunchtime on this day. In the afternoon, the meeting would therefore revisit Article 2. Moreover, he would like to invite any delegations who wanted to make suggestions about the Explanatory Report in connection with Article 2 to do that. The Chair noted that he was aware that the delegation of Israel might have some comments. Also, one or two other delegates had mentioned that they would like to proffer some suggestions on Article 2. These comments would be dealt with together with the substance, rather than merely forecasting where we would end up on Article 2, hopefully later today.

15. The other open issue from the previous day was Article 4(4), on which a Working Document had now been distributed overnight, namely Working Document No 40 from the delegation of Peru. The Chair noted that it might be premature to discuss it, given the short period available to consider it. Since the meeting was doing so well on time, he then proposed that the proponents should be allowed to introduce the Working Document. This could be done with all new Working Documents. This would give the delegates the benefit of having heard the explanations on the Working Documents. The meeting would then revisit the proposals later for a substantive discussion, after some opportunity for reflection. He then asked the delegation of Peru to introduce Working Document No 40.

16. **A delegate from Peru** wished a good morning to everyone and apologised for presenting the Working Document at a rather late stage. He believed, however, that it dealt with an issue that one might face when applying the Convention. When reading Article 4(4), it seemed to concern the ability of the court addressed to choose all the three options that were included in the Article regarding judgments that are the subject of review in the State of origin. This provision might be interpreted as being not only a permissive clause, but an authoritative clause. In that case, for example, from the point of view of his delegation, which might be shared by other delegations, one could only refuse recognition when the presented judgment was still the subject of review. In that sense, his delegation wanted to clarify with this proposal that this clause in particular was not authorising the judge to do something that was not possible under their national law. It would not be opening new options. The proposal also referred to Article 14, which said that procedures were governed by the law of the requested State. This was not changing anything in substance, it just made the text more precise, and to make it clear for the judges applying the Convention. However, the delegation of Peru was also open to other suggestions on how to modify the text, if they still complied with this objective. He hoped that this proposal would be positively received.

17. **The Chair** thanked the delegate from Peru and repeated that this proposal would not be discussed straight away. All participants should get a chance to read it and think about it. The meeting would deal with it at a later stage; the precise time would depend on the progress made with other papers. He then noted that no more matters stemming from the previous discussions remained, which meant that the meeting could now turn to the next substantial topic, namely, Article 5. The following Working Documents were concerned with Article 5: Working Documents Nos 5, 6, 22, 27, 35 and 37. The Chair confirmed with the floor that these were the only proposals relating to Article 5. The Chair then proposed to discuss Article 5 limb by limb. When the discussion reached a limb that was the subject of proposals, the meeting then would deal with those.

18. The Chair then turned to the discussion of Article 5(1), which reads that "[a] judgment is eligible for recognition and enforcement if one of the following requirements is met". The Chair noted that there were no proposals relating to that *chapeau*. He then confirmed with the Plenary that this paragraph was adopted by consensus.

19. The Chair then turned to discussing Article 5(1)(a) and noted that there were no proposals in relation to subparagraph (a). He noted that Article 5(1)(a) was the subject of some reflection and discussions that were happening in the room. He was convinced that if those discussions matured, they would be brought to the Plenary. The Chair then suggested to adopt Article 5(1)(a), subject to any new proposals, which was confirmed by the Plenary.

20. The Chair then turned to Article 5(1)(b), on which there were no proposals. He sought confirmation from the floor that this paragraph could be adopted by consensus.

21. **A delegate from Canada** noted that her proposal might be a point for the Drafting Committee, but there were some inconsistencies in the way Article 5(1)(b), and some other provisions, Article 5(3)(a) and (b), and Article 7(1)(a)(i), used pronouns in order to refer to a defendant. Article 5(1)(b) used "his or her", Article 5(3)(a) used "their", and Article 7(1)(a) used "him" and "his". These issues needed to be cleaned up, without changing the substance of the Articles.

22. **The Chair** thanked the delegate from Canada for picking that up and asked the Drafting Committee, on behalf of the Plenary, to ensure that the language was both gender neutral and consistent. The Chair confirmed with the Plenary that these issues could be left to the Drafting Committee.

23. The Chair then turned to Article 5(1)(c) and confirmed with the Plenary that there were no proposals in relation to the provision, and that it was adopted by consensus.

24. The Chair then turned to Article 5(1)(d) and confirmed with the Plenary that there were no proposals in relation to the provision, and that it was adopted by consensus.

25. The Chair explained that this procedure might seem both formal and fast, but the meeting should pause to notice that this was the product of the huge amount of work that had been done over many years, thinking about both the conceptual foundations of each of these limbs and their drafting. It was a truly significant thing that the meeting was making such swift progress, and not a trivial thing. The Chair expressed his delight that the meeting was making great progress on these very important issues. He encouraged the meeting to continue to do so, and then turned towards Article 5(1)(e). The Chair confirmed with the Plenary that there were no proposals in relation to the provision, and that it was adopted by consensus.

26. The Chair then turned to Article 5(1)(f) and noted that this provision had been the subject of a lot of discussion in the past, but that there were currently no proposals in relation to it. The Chair confirmed with the Plenary that it was adopted by consensus in its current form. The Chair repeated that this was the tribute to an extraordinary amount of work that had gone into these provisions in the past.

27. The Chair then turned to Article 5(1)(g). He noted that this was another very carefully crafted melding of different traditions in relation to contractual obligations. Again, the Chair confirmed with the Plenary that there were no proposals in relation to the provision, and that it was adopted by consensus.

28. The Chair then turned to Article 5(1)(h) and a relevant proposal in Working Document No 27 by the delegations of Brazil and Israel. Since the proposal also dealt with Article 6(b) and (c), it was logical to deal with all of these proposals together. He therefore suggested to revisit these proposals at a later stage in a package, after having worked through the other limbs of Article 5, which was accepted by the proponents.

29. The Chair then moved to Article 5(1)(i), confirming with the Plenary that there were no proposals in relation to the provision, and that it was adopted by consensus.

30. The Chair then moved to Article 5(1)(j) and two relevant proposals in Working Document No 5 from the delegation of the Republic of Korea, and in Working Document No 37 from the delegation of Uruguay. He noted that although Working Document No 37 had been submitted late, the practicalities of discussing the paragraph entailed that all these proposals should be discussed together. Despite the limited time for the delegates to digest the proposal, he asked the delegation of Uruguay to introduce Working Document No 37.

31. **A delegate from the Republic of Korea** wished all participants a good morning and noted that this proposal had already been made at the stage of the Special Commission, as reprinted in the current Working Document. In order to receive some broader consideration, the delegation of the Republic of Korea had made some kind of self-compromise on its earlier proposal. The proposal had two points. The first point concerned omission, and the second point concerned joint and concurrent torts. Both points came from the idea that the jurisdictional filters employed by Article 5 were intended to cover very common, shared and predictable bases. Article 5(1)(j) already realised this idea by limiting the types of torts to physical torts and also the connecting factor to the place of the wrongful act, not of the harm.

32. The first proposal therefore was to omit 'place of omission', since determining the place where omission took place might entail uncertainty, and legal analysis might be needed to identify the places where a preventive measure should have been made. In determining the place of omission, Article 5(1)(j) might function differently from Contracting State to Contracting State, and this would not be what the meeting was intending to do. Moreover, even if the place of omission was deleted as a filter in the Convention, national rules might still grant indirect jurisdiction at the place of omission. Moreover, if in the specific case the defendant had already acted positively in the State of origin, the court of origin might make this clear in its judg-


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ment, and then controversy would not occur in determining the place of tort.

33. The second point of the proposal concerned joint torts and concurrent torts. The delegate noted that he only had a very vague idea about the different ways of categorising joint and concurrent torts in different jurisdictions. Under Korean law, for example, joint torts and concurrent torts would be treated together under a broad concept of joint torts. Under Korean law, the uncertainty may be more visible.

34. By way of example, he suggested that if a harmful medicine was inflicted upon a person in one State, and this person then goes to another State for medical treatment, and a negligent medical treatment occurred there, then the second tortfeasor was a concurrent tortfeasor, not a joint tortfeasor in the narrow sense. From the second person's point of view, the first place might not be a forum that would be properly covered by Article 5(1)(j). The problem with predictability would be even more valid for the first defendant. From the point of view of the first tortfeasor, the place where the medical treatment may occur might be totally unforeseeable.

35. A solution could be to require foreseeability of the place of tort of the other tortfeasors for each defendant. As a possible compromise, the delegation of the Republic of Korea would like to suggest that the place of harm should be predictable in any case, as in the October 1999 preliminary draft Convention. As a compromise solution, the delegation of the Republic of Korea would like to propose that the place of tortious behaviour of other tortfeasors would have to be foreseeable.

36. **The Chair** thanked the delegate from the Republic of Korea and then asked Uruguay to introduce Working Document No 37, so that each of these suggested changes could be addressed later.

37. **A delegate from Uruguay** wished a good morning to the Plenary and explained that the proposal aimed at reviewing the narrow basis for indirect jurisdiction for non-contractual obligations, and to include the recognition of the jurisdiction exercised by the court of the States where the harm occurred, a principle that was widely accepted by national legal systems. The exclusion of such a filter could lead to unfair and inconsistent situations and might revive the traditional discussion on the relevance and meaning of the act or omission versus the harm for non-contractual obligations in private international law. This could enrich the Convention and the delegation of Uruguay would like to have this discussion in the Plenary.

38. **The Chair** thanked the delegate from Uruguay and noted that there were actually three reasonably distinct proposals for change in relation to Article 5(1)(j): one, the first suggestion from the delegation of the Republic of Korea, a narrowing, to exclude omissions; the second proposal from the delegation of the Republic of Korea, a narrowing of the circumstances in which it will apply to joint and concurrent tortfeasors; and then the proposal from the delegation of Uruguay for a substantial expansion, so that the place of harm was also a basis for recognition and enforcement. The Chair suggested to address each of those proposals separately, and to discuss them in a focused way. He then suggested that the proposal to omit the reference to omission should be discussed first, and sought interventions from the floor.

39. **A delegate from Israel** thanked the delegation of the Republic of Korea for their proposal but noted that if it was followed one would lose something very significant. The place of omission seemed to be a basis for torts-related litigation in almost all of the legal systems. A significant amount of judgments which could circulate under the Convention could be lost, therefore he suggested to stick with the inclusion of "omission."

40. **A delegate from Norway** noted that the delegation of Norway would also absolutely prefer to keep "omission".

41. **A delegate from the People's Republic of China** shared the view of the delegation of Israel that the original text should be retained.

42. **A delegate from Australia** aligned his delegation with the delegation of Israel and others and preferred to keep "omission".

43. **A delegate from the European Union** noted that the delegation of the European Union associated itself with all the other delegations that had spoken on this proposal so far, and wished to retain "omission". Difficulties in locating the place of an omission might occur, but they should not be overstated. In many cases, the place of the omission being the place where the action should have taken place that was omitted was not so difficult to identify. If the meeting were to make this change, one would further limit an already very narrow filter. The delegation of the European Union would like not to omit "omissions."

44. **The delegation of Singapore** was also not in favour of deleting "omission". "Omissions" were a big part of tort law. While the main difficulties lay in deciding where the omission took place, this was primarily a factual issue which could be dealt with by looking at where the duty of care arose.

45. **The delegation of Uruguay** also wished to retain "omission".

46. **The delegation of Brazil** also wished to retain "omission".

47. **The Chair** summarised that there had been a number of voices in favour of retaining "omission". No one, apart from the proponent, had been enthusiastic about its deletion. He sought comments from the delegation of the Republic of Korea.

48. **A delegate from the Republic of Korea** noted that they respected the decision of the other delegations, and expressed the hope that this issue could be further contemplated in the Explanatory Report.

49. **The Chair** thanked the delegation of the Republic of Korea for their enormously constructive and collaborative approach to that issue. He noted that the deletion of "omission" would not be made. The Chair then turned to the second proposal from the delegation of the Republic of Korea which was effectively adding a limit to this ground in the case of joint or concurrent torts where recognition or enforcement was sought against a joint or concurrent tortfeasor who was not the person who had acted or omitted to act in the relevant State.

50. **A delegate from Switzerland** thanked the delegation of the Republic of Korea for the proposal. She noted that it was difficult to tell whether this proposal was a limitation, or, indeed actually an enlargement of this filter, because it

was not entirely clear whether the filter actually applied in cases of joint and concurrent torts to those tortfeasors that did not themselves act in the respective place. She thought it was very wise that this was open to further development. One knew of other instruments on the recognition and enforcement of judgments that also did not specifically and explicitly address this issue, and legal development showed that things could develop in that field. She would certainly prefer to leave the filter as it was, and to not add that part.

51. **The Chair** thanked the delegate from Switzerland for that important reminder, making a point which he had overlooked, that actually when one read the language of the existing provision, and the reference to the act or omission directly causing such harm, it was by no means obvious that the filter would apply to joint or concurrent tortfeasors who did not themselves directly act or omit to act in that State.

52. The proposed amendment might impliedly assume a broader scope than appropriate, and then limit that assumption. The Chair apologised if he had caused unnecessary confusion. He then thanked the delegates for being alert and resolving the confusion. Bearing in mind that clarification, he suggested to discuss both how the provision currently worked, and whether the additional language should be added.

53. **A delegate from the European Union** explained that when they had considered the proposal from the delegation of the Republic of Korea – for which they also expressed their gratitude – they had stumbled across the same question. The delegation of the European Union had two reflections on this. The first was that the initial reading of the text was that the tort filter should be applied to each defendant separately. His delegation was not proposing to set this reading in stone in the Explanatory Report. But that was their reading, and that would deflate or eliminate the problem that the proposal was trying to deal with. The other reflection was that whilst concurrent responsibility and joint liability might be an issue of specific importance in tort issues, it might not only be relevant there; it could be a horizontal issue that had not been addressed anywhere else in the draft Convention, and then maybe one should not do so only specifically in this place. Against that background, his delegation would also prefer to stick with the current text.

54. **A delegate from Australia** thanked the delegation of the Republic of Korea for their proposal. For the reasons just articulated by the delegate from the European Union, the delegation of Australia had exactly the same thoughts and opined that each tortfeasor should be considered separately. His delegation would also be concerned about opening up all the other grounds, potentially, to the same questions. The text should be retained as is, therefore.

55. **A delegate from Israel** thanked the delegation of the Republic of Korea for their proposal, but expressed a strong preference to keep the text as is.

56. **A delegate from the United States of America** thanked the delegation of the Republic of Korea for their proposal. As the delegate from the European Union stated, the delegation of the United States of America would look to this provision as initially drafted to look to the acts of each individual potential tortfeasor or defendant. For that reason, his delegation would like to leave the language as it stood.

57. **A delegate from Japan** thanked the distinguished delegate from the Republic of Korea. However, his delegation would also like to keep the text as it is. He opined that this might be an issue of interpretation. Obviously, a uniform interpretation was necessary, but, for example, if the delegation of the Republic of Korea interpreted "the act" in the text as it was explained in this Working Document, then the interpretation might not be so far-fetched. He therefore suggested to keep the text as it is and leave the text to the interpretation.

58. **The Chair** summarised the interventions made by suggesting that the proposal might make worse the very problem that it was trying to fix, because it might lock in a particular interpretation in relation to joint and concurrent tortfeasors which was by no means axiomatic. There was a fairly broad view that it would be more prudent not to make this change, and to allow the interpretation of this limb to evolve over time.

59. **A delegate from the Republic of Korea** noted his delegation was happy to hear that there seemed to be a broad consensus that Article 5(1)(j) would apply to each tortfeasor. He hoped that this consensus could also be reflected in the Explanatory Report.

60. **The Chair** suggested to proceed on the basis that that change would not be made to Article 5(1)(j). He then turned to discuss the proposal from the delegation of Uruguay to amend Article 5(1)(j). Although the Working Document had come in very recently, this was not a new issue. One had been around this loop more than once over the years, and so the meeting was probably in a position to discuss it. He reminded the delegates that if they felt that more time was needed they could make interventions to that effect. He then opened the discussion on Working Document No 37 with the proposal to have the place of harm as a filter.

61. **A delegate from the European Union** noted that this was obviously not a new question as it had been discussed extensively before. Nevertheless, it had not been looked at for a while. His delegation might have to ask for some time to consider the proposal, but his delegation was willing to discuss the proposal now and to listen to the views of the other participants. On a procedural note, he opined that it might be worthwhile to also consider the proposal of the delegation of Brazil which created another filter, a specific tort filter for environmental damage, including the act where the damage occurred. Although technically a different notion, it went in the same direction as the Working Document from the delegation of Uruguay.

62. **The Chair** thought that it might be helpful to have it introduced as a backdrop for the discussions. He then asked the delegation of Brazil to introduce Working Document No 35. A discussion on Working Document No 37 would then follow.

63. **A delegate from Brazil** thanked the delegate from the European Union for remembering that proposal. He agreed that these proposals should be discussed together. Since the Special Commission meeting in May 2018, the delegation of Brazil had consulted the stakeholders back home on the draft Convention. A feeling resulted that a piece of this important cake was missing in the Convention, namely the jurisdictional basis for the liability for environmental damages. Many of the most important international instruments on environmental damages included the place in which the harm occurred as a proper basis for exercising jurisdiction. Some of these Conventions included a provision stating "that the jurisdiction in which the harm occurred should rule on civil damages on environmental damage liability", and they also contained an obligation that judgments should

be enforced by the other Contracting States of that specific instrument. It might therefore be useful to discuss this issue here. Although the proposal added a new jurisdictional filter, one would not be adding a new issue to the Convention.

64. He continued that there were two exceptions to environmental damages in the Convention, namely marine pollution and nuclear damages. Although now there was only once exception, it led his delegation to think that a lot of situations of environmental damage liability were already covered by the scope of the Convention. Obviously, the proposal would only concern private claims. For these reasons, the filter had merit. Secondly, several multilateral treaties dealing with this issue existed. And thirdly, if not most importantly, this Convention would probably not affect the application of the older instruments dealing with that issue, based on the current draft of Article 24, subject to further discussions.

65. **The Chair** thanked the delegate from Brazil for providing this background information, and then sought interventions from the Plenary on Working Document No 37.

66. **A delegate from the United States of America** reminded the meeting that this issue had been discussed in great detail over a lengthy period. His delegation was opposed to the additions proposed in Working Documents Nos 35 and 37 for the same reason. These revisions would seem to overcome the need for some degree of purposeful and substantial activity that is linked to the relevant jurisdiction. For that reason, his delegation thought one needed to focus on the act itself, as was the case in the current version of Article 5(1)(j). His delegation thought, therefore, that the text needed to be retained as such.

67. **A delegate from Israel** opined that the proposal would expand the indirect jurisdictional basis for enforcement by including cases where the harm occurred in the State of origin, even if the act or omission causing the harm did not. He understood that States had different approaches to this, but these grounds for jurisdiction were not universally accepted. For example, in some States, there was a high threshold for having jurisdiction on the basis of harm alone, where some connection needed to be shown between the activities of the person causing the harm in that State. In light of this, his delegation would caution against expanding this jurisdictional filter beyond the current wording in Article 5(1)(j).

68. **A delegate from the People's Republic of China** explained his delegation could unfortunately not agree with this proposal. His delegation was concerned that if one enlarged the jurisdictional filter, this might have unpredictable consequences. Moreover, different countries had different kinds of legal systems, and may employ different jurisdictional criteria or filters.

69. **A delegate from Japan** thanked the delegation of Uruguay for their proposal. Unfortunately, this issue had been the subject of a lot of discussion, and Japan could not agree with providing indirect jurisdiction of the State where the harm occurred with no safeguards. At least some safeguards were needed. Moreover, in the opinion of his delegation, it would be better to discuss the proposal from the delegation of Brazil, and if necessary, one could enlarge the scope gradually. He concluded by noting that his delegation preferred to keep the text as is.

70. **A delegate from Brazil** clarified that his delegation was able to support the proposal from the delegation of Uruguay. His delegation saw also merits in having the connection with the place in which the harm occurred for non-contractual obligations, as it appeared in the proposal from Uruguay.

71. **A delegate from Serbia** thanked the delegation of Uruguay for their proposal, noting that his delegation understood its underlying reasons. However, his delegation was afraid of potential adverse effects that might occur in practice, should this solution be accepted. His delegation would prefer to keep the text of Article 5(1)(j) as it currently was.

72. **A delegate from the Russian Federation** also supported the current version because her delegation agreed that the jurisdictional filters needed to be connected with acts or omissions.

73. **A delegate from Argentina** stated that her delegation was not yet able to give their final support on the proposal. However, she noted that her delegation saw value in expanding this basis of jurisdiction, considering that each time damages, particularly in the environmental field, were taking place in more than one jurisdiction. At least the proposal should be retained for more consultations later.

74. **The Chair** noted that this constituted a material expansion of the indirect grounds of jurisdiction, and therefore of the sphere of operation of the Convention. As a result, there needed to be a consensus in order to make this change. Currently, the meeting was far from such a consensus. A number of voices had expressed a lack of enthusiasm for this change. On the other hand, a couple of voices had asked for more time. Also, the distinguished colleagues from the People's Republic of China had referred to "for the time" in their response. The Chair therefore proposed to put the proposal on hold until later in the day, and to give the proponents a chance to talk to the other delegations. Unless some of the delegations that expressed a desire to keep the language as it is changed their positions, the meeting would be well short of a consensus. The matter would then be revisited later in the day.

75. **The Chair** then turned the discussion to Working Document No 35 from the delegation of Brazil on Article 5(1)(j *bis*), and sought interventions from the floor. The Chair summarised that from the earlier discussions there had been some proponents for it. The meeting had also heard that the delegation of the United States of America rejected the proposal for the same reasons as were stated in relation to Working Document No 37. The Chair clarified that he needed more than two interventions in order to enable him to gauge the mood of the room.

76. **A delegate from Israel** agreed with the delegation of the United States of America that the proposal was problematic. There were certain international agreements and international treaties on this matter, which provided for specific arrangements. And it was correct as Brazil had stated that sometimes in certain contexts, this was an agreed rule. But as it currently reads, the text referred to any environmental damage, for example, not only to marine pollution or specific areas. His delegation was concerned therefore that this proposal might widen the scope of the Convention, and the delegation of Israel would not be able to support it at this stage.

77. **A delegate from the People's Republic of China** noted that the concept of environmental damage was a very big idea, and also fell within the scope of the other international instruments. His delegation thought, therefore, that from a practical point of view, this proposal might not be

so clear, even with regard to the concept of environmental damage. For the same reasons, they could not support to add the filter of the harm that occurred in the State of origin.

78. **The Chair** thanked the delegation of the People's Republic of China for their very clear intervention.

79. **A delegate from the European Union** repeated that these were recent proposals, and the European Union might want to take a fresh look at them together with its Member States. However, he wanted to recall the position that his delegation had taken on this in the past. The place where the damage occurred, in general, not only with regard to a specific type of damage, was not a shocking concept, since this concept was applied within the European Union. But this would not necessarily mean that his delegation subscribed to the same concept at a global level, because there would be greater uncertainty as to the predictability of where proceedings could take place. In the past, this approach had not been supported. He noted that regarding this specific concept of environmental damage, although they had not yet discussed this in detail, this could incur problems of qualification regarding the definition of environmental damage, as the distinguished delegation of the People's Republic of China had said. He also asked whether with the narrow tort filter as currently employed, which only applied to physical damage in principle, there would be a sufficient justification to make a distinction between one specific type of physical damage and all other types of physical damage. These were just intermediate reflections. Later on, he would be able to offer a coordinated specific position of the delegation of the European Union on this point.

80. **A delegate from Japan** noted that his delegation was not enthusiastic to have this limb. However, he would like to consider it further, and especially the concept of environmental damage. The delegate wondered whether his image was correct. For example, if a plaintiff was a victim of the so-called PM 2.5 in the State of origin, would a judgment that ruled on the compensation of damages to the plaintiff's health be circulated under the Convention, irrespective of the place where the defendant's company, which emits the pollutants, had its place of business? He was not sure whether the delegation of Brazil had considered such a situation or not, but he would like to confirm this specific example. Currently, the delegation of Japan was not enthusiastic to have this limb, but even if it were to be included, certain safeguards would be necessary, like the safeguard in Article 10(1)(b) of the October 1999 preliminary draft Convention. The position of his delegation was flexible, but the delegate repeated that at the moment, they were not enthusiastic about it.

81. **A delegate from Uruguay** supported the proposal of the distinguished delegation of Brazil.

82. **The Chair** suggested to revisit the proposal at the same time at which the meeting would come back to Article 5(1)(j). He noted that the proposal concerned an extension of the scope of obligations undertaken, because an extension of the category of judgments that would circulate would require a consensus. At this moment, no consensus was present, but the Chair noted that he would be happy to leave some time for discussions. He announced that the meeting would revisit the matters probably later today, in order to provide room for consultation over the morning coffee and lunch breaks. The Chair then turned towards the discussion of Article 5(1)(k), and the relevant Working Document No 6 from the delegation of the Republic of Korea.

83. **A delegate from the Republic of Korea** explained that the proposal dealt with two points. The first point concerned Article 5(1)(k)(i) of the proposal; it might be a technical matter, but if the parties agreed to settle peacefully or by means of conciliation or arbitration, the current text technically left open the possibility to include them to be covered. It intended to make clear that only when the court or courts of the jurisdiction are chosen, Article 5(1)(k)(i) applies. The second point concerned Article 5(1)(k)(ii). If "expressly or impliedly" would be maintained within the text, then some courts might be tempted to attribute a presumed intent, their own ideas about what the parties would have agreed, and then would interpret it as an implied intent of the parties. This might be one additional source of unclarity. His delegation had also thought about limiting the proposal to "express designation", but was proposing a compromise solution. He also clarified that his delegation never intended to require that some kind of pro-forma standard language should be used. His delegation could either accept an express designation or a designation that appeared clearly from the provision of the trust instrument.

84. **The Chair** proposed to deal with each proposal separately and turned first to the discussion of Article 5(1)(k)(i) with its addition of the phrase "the court or courts of". The idea was to make it clear that it was not sufficient that the trust instrument provided for dispute resolution by some non-judicial, non-curial, mechanism in that State.

85. **A delegate from Switzerland** remarked that the delegation of Switzerland did not have any objection to this. In fact, this was how she would have understood the provision. She noted that other participants might correct her, as the entire trust provision had been discussed quite extensively in an informal working group, which might also be something to keep in mind when dealing with the rest of the provision.

86. **The Chair** confirmed that this had also been his reading of the provision.

87. **A delegate from the European Union** thanked the delegation of the Republic of Korea for Working Document No 6 and confirmed that this had also been the reading of his delegation. The proposal could be a helpful clarification, and his delegation definitely did not object to this textual change.

88. **A delegate from Israel** thanked the delegation of the Republic of Korea for its proposal, and noted that there were no objections to this proposal. The proposal reflected the reading of his delegation of the provision. He also noted that if it was wished to extend the enforcement under national law in a more favourable way, then Article 16 could be used.

89. **A delegate from Australia** agreed with the other interventions and noted that there was no harm in including that proposal.

90. **A delegate from Canada** thanked the delegation of the Republic of Korea for their proposal and noted that her delegation had no objection to the substance of the proposal. The drafting might need some work, but this could be done by the Drafting Committee.

91. **A delegate from the People's Republic of China** also supported the proposal from the delegation of the Republic of Korea and thanked the delegation for their proposal.


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92. **The Chair** thanked delegates for the very helpful confirmation that he was headed broadly in the right direction. Clearly there was no policy issue involved, and there was broad support for this proposal as a useful clarification of what had always been the intention of the provision. The delegation of Canada had flagged that the precise language might need some beautification, which was a task for the Drafting Committee. He confirmed with the Plenary that the proposed change of Article 5(1)(k)(i) was adopted.

93. The Chair then turned to the discussion of the second part of this proposal, the deletion of "expressly or impliedly" in Article 5(1)(k)(ii), and the inclusion of some additional language at the end of the paragraph about the designation being expressed or appearing clearly from the provisions of the trust instrument.

94. **A delegate from Switzerland** noted that she would be extremely glad to hear the views of those who had been actively engaged in the informal working group on trusts, as she was a bit at a loss as to what to make of the proposal, or even to see what change exactly it would introduce. Therefore, she would not feel qualified to give an opinion.

95. **The Chair** thanked the delegate from Switzerland for her remarkable honesty.

96. **A delegate from the European Union** stated that his delegation was not particularly enthusiastic about this proposal. The underlying reasons were related to the nature of trusts. One should first consider that trusts are established unilaterally. A trust is not a contractual arrangement where one would have to insist on the parties agreeing on this being referred to a specific jurisdiction. One also needed to consider that trusts could exist for a very long period of time. One was still dealing with trusts today, and one would deal in the future with trusts that had been established a long time ago. If an unduly narrow filter would be established through this Convention, this might have an undesirable impact on a jurisdiction in the future in relation to those trusts. Finally, the delegate pointed out that the vast majority of litigation in this area was uncontentious, consisting to a large extent of trustees simply asking for instructions from a court on matters concerning the internal administration of the trust. For the combination of these reasons there was no necessity to be unduly narrow in relation to this filter. His delegation preferred to stay with the wording as it currently stood.

97. **A delegate from Singapore** supported the proposal from the delegation of the Republic of Korea to remove the reference to implied designations, and to make the addition.

98. **A delegate from the United Kingdom** explained that the inclusion of the implied designation was quite important from a policy perspective. As the delegate from the European Union had pointed out, this was actually a very practical, important matter. The vast bulk of litigation, as she understood it from practitioners in this area, was actually on uncontentious matters; it was exactly the sort of thing that her colleague from the European Union had just described, namely trustees seeking directions from courts, in order to carry out trust business, essentially protecting themselves against later complaints. That was a very important practical matter. She thought it would make little sense to limit the filter so that 90% of the uncontentious practical daily work of these trustees, and the practitioners advising them, would not be able to circulate under the Convention. Moreover, she added that the proposal could imply that trusts were a little bit like contracts. Therefore, in the light of what was now included in the draft Convention, if the express designation would be required, then these trust instruments could certainly be redrawn to include an expressive designation. However, as the delegate from the European Union had tactfully pointed out, these trust instruments could be very old. She would be a little bit less tactful and quite blunt by saying that a trust was a unilateral act, and that the person who might have originally undertaken that act might very well be dead. Probably there were several thousands or millions of trusts in that situation. It was important therefore not to restrict this filter.

99. **A delegate from Israel** noted that after consulting on this with their experts on trusts, his delegation did not see any difficulties with the proposal. It was regarded mainly as a clarification.

100. **A delegate from Australia** aligned himself with the eloquent comments made by the distinguished delegate from the United Kingdom, and noted that the delegation of Australia associated themselves with the interventions made by the delegates from the United Kingdom and the European Union.

101. **A delegate from Canada** noted that her delegation would add their voice to those who preferred retaining the text as it is, for the reasons articulated by the delegate from the United Kingdom.

102. **The Chair** confirmed with the room that there were no other interventions. The Chair encouraged participants with an interest in the matter to discuss it over the coffee break.

103. The meeting was closed at 10.58 a.m.

104. The meeting resumed at 11.25 a.m.

105. The Chair recognised the constructive work of some Members in continuing informal discussions on Article 5(1)(k) during the coffee break. He reopened discussion on that provision for final comments before he proposed deferring discussions until later in the day.

106. **A delegate from the United States of America**, following consultation over the break, noted his delegation's preference to retain the text as is. He recorded that the delegation of the United States of America would not support the change proposed in Working Document No 6.

107. **A delegate from Singapore** reported that his delegation would be open to retaining the implicit designation reference if there were more explanations in the Explanatory Report on what "implied" means, which would be useful to everyone in providing more clarity.

108. **A delegate from the United Kingdom** confirmed that his delegation was considering a suggestion for a change to the Explanatory Report and would bring that proposal to the floor later.

109. **The Chair** noted that the delegate from the Republic of Korea who would be speaking on that later had not been in the room to hear this exchange, but he was sure that someone would ensure that he would be thoroughly informed about it.

110. **A delegate from Australia** recorded its delegation's preference to retain the text and supported the approach of introducing further clarity in the Explanatory Report.

111. **The Chair** proposed that these discussions continue outside the Plenary, and that it be reconsidered later in the day.

112. The Chair noted that there were no Working Documents regarding Article 5(1)(l), the counterclaim filter, and asked whether this meant that it could be adopted by consensus. Consensus was achieved.

113. The Chair moved the discussion to Article 5(1)(m), which was addressed in Working Document No 22.

114. Avant d'aborder le Document de travail No 22, **un délégué de la Suisse** souhaite apporter un commentaire d'ordre linguistique concernant la version française de cet article 5(1)(m) car il appert que le deuxième alinéa n'est pas aligné sur la version anglaise et que plusieurs mots sont en outre manquants. Il serait judicieux que le Comité de rédaction se penche sur cette disposition. Outre donc ce problème linguistique, cet article pose également un problème de fond, lequel est traité dans le Document de travail No 22.

115. Comme tout le monde le sait, les accords d'élection de for sont couverts par le présent projet de Convention, mais seuls les accords non exclusifs sont repris, la raison avancée étant d'éviter de mettre en péril la *Convention du 30 juin 2005 sur les accords d'élection de for* (ci-après, la « Convention Élection de for de 2005 »), qui traite des accords exclusifs d'élection de for.

116. Or, la Suisse n'est pas convaincue par cette argumentation, ce pour deux raisons. Tout d'abord, la Convention Élection de for de 2005 n'a pas besoin de cette protection car il s'agit d'une excellente Convention, élaborée d'ailleurs pour l'anecdote sous la présidence d'un délégué suisse. En effet, elle offre suffisamment d'avantages comme par exemple une règlementation sur la compétence directe, ce que le présent projet de Convention ne prévoit pas. Ensuite, si on regarde les filtres prévus dans le projet de Convention, plusieurs d'entre eux sont fondés sur une acceptation de la compétence (les compétences indirectes). Le délégué renvoie à cet égard aux alinéas (c), (e) ou (f) de l'article 5(1), qui concernent la désignation indirecte d'un juge. Dès lors, selon l'avis de la Suisse, il n'y a aucune raison d'exclure la désignation directe d'un juge. Pour ces raisons, le délégué indique que la délégation de la Suisse est convaincue du bien-fondé d'élargir le champ de l'alinéa (m) afin qu'il comprenne également les accords exclusifs d'élection de for.

117. **A delegate from the European Union** expressed his delegation's understanding of the technical argument raised by the delegate from Switzerland, but noted that they were nonetheless unenthusiastic about the initiative. The reason for this, he said, lay to some extent in the history of the approach to the Judgments Convention. Further, he suggested that his delegation was not convinced that it would not influence the attractiveness of the HCCH *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 HCCH Choice of Court Convention"). He observed that the 2005 HCCH Choice of Court Convention was an excellent Convention, and invited all Members who had not yet ratified it to do so – in jest, he pointed out that indeed Switzerland was one such Member.

118. He explained that from early on in the Project, the approach had been to deal with a specific subset first (*i.e.*, judgments arising from choice of court agreements), and then tackling the more general picture without creating overlaps. He expressed a preference to adhere to that approach and not create any overlap. The delegation of the European Union was concerned that if it was possible to obtain the circulation of judgments rendered under exclusive choice of court agreements under this Convention, the selling point of the 2005 HCCH Choice of Court Convention would be obviously decreased. He recognised that there were still unique features of the 2005 Convention, but that nonetheless his delegation was concerned that an overlap would lead to issues regarding the success of that Convention. He expressed the preference of the delegation of the European Union to retain the text as it stood and not implement the proposal of the delegation of Switzerland.

119. **A delegate from Israel** thanked the delegate from Switzerland, and expressed his delegation's support for the proposal. He emphasised the careful consideration that had led to this position, and noted that Article 24 would resolve any concerns about the interaction with the 2005 HCCH Choice of Court Convention. The delegation of Israel did not believe that this would deter States from becoming a Party to the 2005 Convention, which he observed contained a valuable framework for obligating courts in one State to uphold the choice of court clauses. He also reported that Israel was presently actively considering signing the 2005 Convention independently of the new Convention for that reason.

120. **A delegate from Brazil** expressed support for the proposal of the delegation of Switzerland and recognised the clever reasoning expounded by the delegate from Switzerland.

121. **A delegate from Singapore** expressed support for the proposal of the delegation of Switzerland. He agreed that it was hard to justify excluding exclusive choice of court agreements because Article 5(1)(m) was really about party autonomy. It would be illogical to include non-exclusive agreements but exclude exclusive agreements. The delegate observed that the only real concern in the room was to preserve the 2005 HCCH Choice of Court Convention, but he maintained that it still held its own advantages, like a different membership of parties.

122. **A delegate from the Republic of Korea** noted that his delegation was still engaged in some internal consultation, but that his delegation found the proposal of the delegation of Switzerland quite convincing. He suggested that some States might perceive a difficulty in joining the 2005 HCCH Choice of Court Convention as the requested court could not reassess whether the agreement was validly agreed in the recognition stage. He saw value in this double Convention, and expressed interest in continuing review of the proposal of the delegation of Switzerland.

123. **A delegate from the People's Republic of China** also thanked the delegation of Switzerland for their proposal, but stated that his delegation could not agree. He explained that there was a saying in Chinese traditional culture that "you can like the new ones, but you cannot easily just be tired of old ones". He used this to emphasise concerns that implementing the proposal could impact the existing Convention. He reminded the Commission that the People's Republic of China had signed the 2005 HCCH Choice of Court Convention in 2017, and still believed in its importance. He pointed out that this new Convention was intended to be a complement to the 2005 Convention and that this was the agreed starting point.

124. **The delegation of Uruguay** supported the proposal of the delegation of Switzerland.


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125. **A delegate from Norway** expressed that it did not support the proposal of the delegation of Switzerland. The delegate echoed the remarks of the delegate from the People's Republic of China that the starting point was that the Conventions should be complementary and not overlap – they would be taken as a package. She highlighted that the risk in creating this overlap was that the attractiveness of the 2005 HCCH Choice of Court Convention would be reduced. As a result, those Parties only interested in the 2005 Convention would likely then be Party to a Convention with fewer Contracting Parties.

126. **A delegate from the United States of America** expressed that his delegation was intrigued by the proposal of the delegation of Switzerland. He acknowledged that some States, including his own, often found difficulties in implementing Conventions. However, he suggested that it might be unfortunate not to allow for the possibility of a more expansive application of this Convention, recognising that it would be for States or other parties to determine whether, and how, any number of Conventions would apply domestically. He accepted that the proposal of the delegation of Switzerland was a good start. He then proposed the possibility of a declaration which might allow those wishing to do so to apply the Convention to exclusive choice of court agreements. He noted this would provide States with a greater number of options to tailor the Convention to their domestic circumstances. He reiterated earlier comments that, presuming good drafting, Article 24 would deal with any conflict.

127. **A delegate from Sri Lanka** posited that it can be difficult for some smaller parties to identify the various instruments and understand their operation in tandem. Rather, she preferred a 'one-stop-shop', where all of the aspects for recognition and enforcement were completely contained within one instrument. She suggested that, looking at the ultimate use of these instruments by a general public, it would be better to have one comprehensive instrument. She supported the reasons raised by other delegations that this would not undermine the 2005 HCCH Choice of Court Convention.

128. **The Chair** noted that there were persuasive arguments in both directions, and this was therefore a tricky issue to resolve. He illustrated the concept by suggesting that delegates consider the perspective of a judge in a country that is Party to the Judgments Convention, but not the 2005 HCCH Choice of Court Convention, or a judge that is confronted with a judgment coming from a country that is Party to the Judgments Convention but not the 2005 Convention; that judge would be bewildered to see someone opposing recognition or enforcement sought on the basis of an agreement to the jurisdiction of the court of origin, simply because that agreement was exclusive. This would be intuitively unattractive.

129. On the other hand, he recognised the broader arguments about the relationship between the two treaties, and the fact that this instrument has always been seen as a complement to the 2005 HCCH Choice of Court Convention which is designed to deal not just with recognition or enforcement, but also to go further and deal with the jurisdictional aspects. He noted that it had always been envisioned that parties would join both Conventions, so that they would not ever find themselves in the illogical position of having to refuse a judgment on those grounds. The Chair noted that these issues had been well covered by the room, but as they operated on different planes they were not easily reconciled.

130. This change would involve an extension of the sphere of operation of this instrument – to exclusive agreements, as well as non-exclusive – which would require consensus. Although there was considerable support for the proposal in the room, the Chair observed that at this stage he would not be able to say with confidence that there was a consensus because there were also some voices raised strongly against the proposal. He acknowledged the proposal made by the delegation of the United States of America for a possible middle path. This topic would benefit from further informal discussion, in pursuit of a consensus. The Chair invited delegates to continue those conversations and for the delegation of Switzerland to see what progress could be made.

131. **A delegate from the European Union** signalled that his delegation did have some comments regarding the treatment of this Article in the Explanatory Report, but that these would be reserved until after a decision had been made on the text of the Convention.

132. **The Chair** agreed that later discussion would not be precluded by this, and that a conclusion on the Convention text was a necessary precursor to discussions on the Explanatory Report.

133. The Chair then turned to Working Document No 27 which comprised proposals in relation to Articles 5(1)(h) and 6(b) and (c), submitted by the delegations of Brazil and Israel.

134. **A delegate from Brazil** introduced the document which, he explained, aimed to replace the term "tenancy", which in some jurisdictions is not used as a standalone criterion for differentiating applicable law regimes on property rights, with the phrase "*in personam*". He explained that this reflected a concept with which most, if not all, jurisdictions were familiar and would therefore likely be more clearly understood by requested courts. He acknowledged that the notion of tenancy was important to some Members, and that the proposal suggested that this be expounded in the Explanatory Report. The proposal aimed for a balanced approach to extend protection beyond rights *in rem* only for rights in immovable property for a period of more than six months, and for rights for a shorter period only if the State where the property was situated has exclusive jurisdiction on the law; if not, Article 5(1)(h) would apply.

135. **A delegate from Israel** further explained that the proposal aimed to avoid situations of possible confusion in implementation between rights *in rem* and rights *in personam*. It had become apparent in the Explanatory Report that these concepts differ in different jurisdictions. The delegate advanced that it would be desirable to avoid a situation where judgments originating from a State where the property was not located could circulate, despite the intention that the Commission was trying to capture. He hoped that the proposal addressed this by including rights *in personam* and *in rem* over six months; the possibility for mistaken application and a breach of the obligation to provide protection would be limited. He was concerned that simply referring to "*in rem*" in the text would not be sufficient. He further highlighted that in Israeli law tenancy had no relevance, and that his delegation was not sure it was an appropriate term to use in the text if it was only relevant to some States. This could cause a problem for implementation.

136. **The Chair** admitted that he did not completely understand this proposal and that he would use the prerogative of the Chair to expand on this before opening the floor. He enquired as to which particular *in personam* rights the pro-

ponents had in mind, noting that the basic concept of tenancy as was reflected in the draft Explanatory Report was a right of exclusive occupation of the land. Referring instead to rights *in personam* in respect of immovable property could raise a vast range of rights – for instance, a right to operate a crane boom across the property, a right to graze sheep on the property but not to occupy it exclusively, a right to cross it with vehicles for a limited period in the context of a construction project, a right to display a sign, and many more possible rights. The Chair assumed that the proponents did not intend to refer to all of these rights, as they did not engage with the issue, but requested specificity as to what was intended.

137. **A delegate from Brazil** thanked the Chair for his revelatory questions, as they were useful for discussion. Regarding tenancy, the delegate asked to be directed to where this was set out in the draft Explanatory Report, as perhaps he had missed this definition of tenancy. The perceived lack of a definition was in part what had prompted the proposal. Regarding which *in personam* rights were being considered, the delegate explained the example of possession, which in Brazil is a right *in personam* but in some jurisdictions it is a right *in rem*. This could cause a problem where people may litigate on possessing immovable property in Brazil, not by means of a contract, but by means of effect. Under Brazilian law, there are situations in which a person has the right to occupy or possess that property without taking the ownership due to consent of the owner; these rights can be granted before the courts. If a dispute of that nature originated in a foreign jurisdiction and then Brazil was requested to enforce that judgment, this would be difficult as the judgment would not be covered by the protection of rights *in rem*. It would be difficult for Brazil to accept such judgments.

138. **The Chair** sought clarification that what Brazil conceived was only rights of possession of immovable property, which was treated differently in different jurisdictions. He noted the difficulty in that while possession may sometimes be considered a right *in personam*, it did not follow that all rights *in personam* were rights of possession of the kind that engage these concerns. The Chair raised the example of the right to occasionally graze sheep on someone's land, which they use also as part of their back garden – an arrangement that the Chair himself had at one time entered into.

139. **A delegate from Israel** confirmed that possession was one right that they had in mind, However, he noted that as a common law system he was not sure it was accurate to refer to it as a right of possession in their law. What the proposal was intended to achieve was to have something broader than rights *in rem*, but his delegation was open to discussing other terms to address this. He believed that referring to only rights *in rem* and tenancy was not sufficient, and reiterated that tenancy was not a meaningful concept in Israel. He noted that his delegation had made proposals at previous Special Commission meetings that were not accepted, but that there were still concerns which the delegation thought needed to be addressed.

140. Recognising that his confusion may not be shared by the room, **the Chair** opened the floor for discussion.

141. **A delegate from the European Union** observed that his delegation did not understand how a tenancy could be a meaningless concept, as from his delegation's perspective it is a clearly defined concept. He recalled that there had been long-standing discussion of the extent to which tenancy should be protected by a rule of exclusive jurisdiction, because this was seen differently in jurisdictions around the world. He noted that that was the reason for the somewhat laborious and complex provision that was currently in the draft text. He expressed concern that the proposal from the delegations of Brazil and Israel would expand the concept to other legal relationships beyond tenancy. In that way, something already complicated was at risk of being broadened, without any precise conception of what was being included, because the delegation of the European Union had thought about all types of *in personam* rights in that context. The delegate opined that this would not meet with the approval of those delegations already having difficulties accepting tenancy. The delegate further illustrated the uncertainty of the proposed provision, explaining that while States held exclusive jurisdiction over tenancy, this was not the case for all *in personam* rights.

142. This, he suggested, was perhaps the core of Article 6: to protect exclusive jurisdiction where it is universally recognised. Another solution would be to find a balance, but the delegate did not think that this would be easy for *in personam* rights. The delegate acknowledged that he had engaged in discussions with the delegation of Brazil, and so he too had turned his mind to the concept of possession. He explained that the German concept was complicated and joked that this was perhaps to be expected. In Germany this was not considered a right at all, rather a factual circumstance, and the rights derived from it were *erga omnes*. This was, he thought, a distinctive feature of what is usually dealt with as rights *in rem*. In that way, if the concern was with regard to possession, the delegate suggested there may be another way to deal with that. It was not, he thought, appropriate to broaden everything to *in personam* rights and include an unknown vague number of legal rules and relationships; it might be a better approach to consider the interim provision itself, and then include something in the Explanatory Report. The delegate observed that a number of interim rights are currently quoted in the Explanatory Report, and one could possibly deal with possession in that context.

143. **A delegate from Australia** noted that he remained confused as to whether the concern was essentially a problem with the word tenancy, and whether a different description or addition such as "however so described" might be useful. He added that the delegation of Australia shared the hesitation to expand into all *in personam* rights, and whether opening up in this way was really what the Plenary intended. He noted that his delegation would remain open to amendments to the text to the extent that they continue to capture that core concept of possession in a tenancy-type situation, but would be hesitant to go beyond that.

144. **A delegate from Switzerland** expressed that she shared the confusion of what would be encompassed by *in personam* rights. But more concerning to her was the expansion of scope in sub-paragraph (b) that this proposal would cause. She recalled the various proposals that had arisen during the meetings of the Special Commission and noted that many of the proposals lean in exact opposite directions; not all delegations were on the same page regarding the obligation created by Article 6. She emphasised that this was not to say that her delegation wished to retain the text as it stood, because it did not particularly like it, but they certainly did not want to expand it.

145. **A delegate from Uruguay** thanked the proponents for their proposal, which he said addressed important issues and comprised more neutral and holistic wording for dealing with immovable property. Ultimately, he opined that this would be an issue of qualification by the requested


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State, whether it was a right *in personam* or *in rem*. For those for which the term "tenancy" had meaning, his delegation was able to proceed as per their conception. The delegation of Uruguay supported the proposal.

146. **A delegate from Argentina**, in line with the comments of the delegate from Uruguay, explained that coming from a Roman law country *in personam* covers everything contractable. In general, *in personam* rights encompass everything that is contractual, which is what her delegation wanted. For her delegation, rights *in rem* were an exhaustive list, and possession would already be included in the existing draft text. There was merit in shedding light concerning contractual rights relating to property, but not more than that. In that case, she expressed her delegation's support for the proposal.

147. **A delegate from the People's Republic of China** expressed that he shared the confusion of other delegations about what was included in *in personam*, and further noted concern about enlarging the scope from tenancy. He recorded a preference to concentrate on tenancy, and not to expand to other legal concepts.

148. **A delegate from Japan** echoed the comments of the delegate from Switzerland, as his delegation objected to the expansion of Article 6(b) because it created an additional international obligation of denial of the recognition and enforcement of judgments, which his delegation saw as being against the objective of the Convention. Regarding possession, he suggested that such concerns could be addressed through the expansion of limb (c).

149. **A delegate from Sri Lanka** noted her understanding of the reluctance to expand the provision to a very broad concept. From a Sri Lankan law perspective, she explained that confining the provision to the word tenancy might create uncertainty with regard to leases; the relationship between the lessor and lessee would be considered a leasehold agreement as opposed to a tenancy agreement. She suggested there could be confusion at the stage of implementation where judges or lawyers may want to distinguish terms. While she understood the reluctance to consider the broader concept, it would still be appropriate to alter the word tenancy and perhaps explain it in the context of rights in contract, as another delegate had mentioned.

150. **Un délégué de la Suisse** remercie toutes les délégations qui se sont exprimées sur cette question, qui s'avère très importante car elle rappelle quelque chose de très fondamental. L'assemblée ici présente est occupée à négocier une Convention internationale, supposant que l'assemblée devrait en toute logique trouver un accord sur les termes à utiliser. Il convient d'être attentif au fait que les termes employés ici ne sont pas nécessairement identiques à ceux utilisés dans les systèmes de droit national. L'article 21 est d'ailleurs prévu pour rappeler à chacun qu'il convient de garder à l'esprit qu'un principe axiomatique utilisé dans un système juridique pourrait être inconnu ou rejeté dans un autre système juridique. En outre, il convient de noter que la Convention devrait être interprétée de manière ouverte, avec un esprit d'ouverture afin de transposer ces clauses obtenues par consensus linguistique dans les systèmes nationaux. À défaut, le texte risque d'être illisible.

151. **The Chair** observed that there were no further interventions. He summarised that there were various views in the room regarding the concept of tenancy in different States, but also a willingness to find a way to reduce any confusion or practical problems that reference to that concept without explanation might cause. The Chair did not see consensus or anything near to it at this stage. He tentatively suggested that the proposal to broaden the Article 5 filters and the exclusive jurisdiction recognised by Article 6 had not achieved consensus, but that given the openness to consider some other approach to address the concerns about tenancy the meeting could proceed without adopting anything at that stage and Members could try to resolve the issue by other means. He asked for suggestions as to how to proceed.

152. **A delegate from Brazil** accepted that the Chair had captured the issue well. However, in any discussions outside the Plenary, his delegation hoped that work could be done on the issue of possession as well as tenancy. He suggested that the Chair leave room for new proposals on defining tenancy and including something on possession.

153. **The Chair** agreed that there was sympathy in giving room for exploring whether the language around tenancy in particular failed to capture the idea of possession. He noted, however, that this would likely look different from the language in Working Document No 27. He directed the meeting to proceed on the basis that the proposal was not adopted but would welcome other proposals over the next day or two. This decision would not preclude further discussion. The Chair then drew discussions on Article 5(1) to a close, noting deferrals on Article 5(1)(j), (j *bis*) and (k), as well as (m).

*Article 5(2)*

154. The Chair recorded that there were no Working Documents in relation to Article 5(2), and proposed its adoption. The provision was adopted by consensus. The Chair then paused to recognise that this complicated issue had now been practically and successfully resolved after many years of discussion. He then noted that Article 5(3) related to intellectual property and a few days had been reserved for this topic later in the agenda.

*Article 6 and Article 7(1)(h)*

155. The Chair proposed that the meeting then turn to Article 6, flagging that Working Document No 27 had already been discussed. Now before the meeting was Working Document No 43 from the delegation of Singapore, proposing the deletion of Article 6(c) and the insertion of Article 7(1)(h) – a consequential change. The Chair proposed deferring discussion on that proposal as it had just been received and required consideration, but nonetheless invited the delegation of Singapore to introduce the proposal.

156. **A delegate from Singapore** explained the starting point that, as others had pointed out, Article 6 was perhaps an exception to the idea that the Convention would serve as a floor and not a ceiling. As such, Article 6 should only apply to rules that are universally recognised. He noted that the delegation of Singapore had no objections to Article 6(a) and (b), as there was general recognition that intellectual property and immovable property are territorial in nature. However, with regard to Article 6(c), the rule applies to tenancies of more than six months. He suggested that this was perhaps because in some countries such tenancies are treated as a special class of property rights, but highlighted that this treatment was not present in other countries. For example, Singapore (and other common law countries) treated this just as a species of contract. Given this concern regarding discrepancies between countries on this point it would be more appropriate for there to be discretion to different countries to refuse recognition to judgments relating to such tenancies, if their national law requires them to do so.

157. **The Chair** acknowledged that also received that day was a proposal from the delegation of Saudi Arabia. In order for delegations to have a complete picture of the suite of proposals, the Chair invited the delegation of Saudi Arabia to introduce Working Document No 45.

158. **A delegate from Saudi Arabia** expressed support for the proposal to remove Article 6(c) regarding immovable property as a matter of exclusive jurisdiction.

159. **The Chair** confirmed that he would not ask for decisions but did invite any initial contributions on the proposals.

160. **A delegate from Canada** reported preliminary reactions that the delegation of Canada would support the deetion of Article 6(c). With respect to reflecting this as a ground for refusal in Article 7, she understood from Working Document No 45 from the delegation of Saudi Arabia that it does not include the six-month element. Her delegation had read Working Document No 45 as not having the six-month formulation which appeared in Working Document No 43. The delegation of Canada favoured not including the six-month element, rather just tenancies of immovable property, generally, where the property was not situated in the State of origin.

161. **A delegate from Australia** enquired of the delegation of Saudi Arabia, regarding the removal of Article 6(c), whether its proposal for Article 7 was intended to also cover Article 6(b).

162. **The Chair** rephrased, asking the delegation of Saudi Arabia, given the apparent breadth of the suggested Article 7, what would be the relationship between that proposal and Article 6(b).

163. **A delegate from Saudi Arabia** explained that the proposal was focused on immovable property not located in a State. His delegation proposed to keep Article 6(b) which stated clearly that the property be located in the State of origin.

164. **The Chair** clarified that the point made by the delegation of Australia was that Article 6 does two things: it provides for recognition and enforcement of judgments that rule on rights *in rem* in immovable property where the property is situated in the State of origin, and it requires refusal if the property is not situated in that State, whereas the proposal made by the delegation of Saudi Arabia for Article 7(1)(h) has a discretion for refusal which would overlap with the mandatory one in Article 6(b). This was what was causing confusion, so he asked whether the delegation of Saudi Arabia intended to maintain the mandatory rule in Article 6(b) and add a discretion in other cases, or whether it was intended to be discretionary in all cases.

165. **A delegate from Saudi Arabia** explained that the concern his delegation hoped to address was about the situation where property was not situated in the State of origin; adding the proposed paragraph to Article 7 was important. He did not see the link with Article 6(b), which he considered was about enforcing and recognising judgments where the property *was* situated in the State of origin.

166. **A delegate from Japan** thanked the delegate from Saudi Arabia. He raised a query regarding Working Document No 45. As he understood, Article 6(b) dealt with judgments on rights *in rem* in immovable property, so he enquired whether perhaps the purpose of the proposal was to allow for refusal of recognition of a judgment that ruled on rights relating to immovable property other than the rights *in rem* on immovable property, when the immovable property is not situated in the State of origin.

167. **A delegate from Saudi Arabia** responded that the proposal insisted that if immovable property was not situated in the State of origin, that would be grounds for refusing recognition and enforcement of a judgment. Otherwise, if the property was situated in the State of origin, as others had raised, this would depend on the domestic law of each State.

168. **A delegate from Switzerland** thanked the delegations of Singapore and Saudi Arabia for their proposals. She expressed that she was not sure she understood the aim of the proposal. She noted that her current understanding of Article 6 was that it not only permits but rather demands refusal of recognition and enforcement of any judgment ruling on issues covered by that Article. She was then unsure if the delegation of Saudi Arabia intended to capture issues in any way connected with immovable property. If there was an intention to go beyond what was already addressed in Article 6, the delegate expressed a wish to better understand that.

169. **A delegate from the Russian Federation** explained that for Russian courts the issue of exclusive jurisdiction on immovable property was very sensitive. Currently, procedural codes provided that Russian courts had explicit jurisdiction on all rights in respect of immovable property. She expressed on behalf of her delegation a preference for maintaining the text of Article 6, despite understanding the position of other delegations.

170. **The Chair** asked for any further interventions at the present stage, bearing in mind that the meeting would return to that discussion once delegations had had a chance to further consider and coordinate.

171. **A delegate from the European Union** noted that there was not yet a coordinated European Union position, but he sought to provide an initial comment, based on previous considerations of the topic. He acknowledged that tenancy was a sensitive issue, and that no one was entirely happy with Article 6(c). This had led to constant proposals pulling in either direction. He noted that there was no easy way out of this, but it was the position of the delegation of the European Union that it would be difficult to move away from the current text. He noted that while being a complex construction, the current formulation did justice to the different views on this issue. Any attempt to move in one direction would produce a knee-jerk proposal in the opposite direction.

172. **The Chair** thanked the delegate from the European Union for this reminder of the history of the issues driving the discussion.

173. **A delegate from Switzerland** suggested that if the operation of the protection were changed there might be more flexibility. She suggested that what was currently in the draft text of Article 6(c) was a very complex compromise, precisely because this provision was so rigid, and because it imposed not only a possibility for the State affected to refuse recognition and enforcement, but because it also created an international obligation. She thought that the approach of the delegation of Singapore, that this be in some way discretionary, may make those with concerns more comfortable. As it stood, many delegations would object to going further, but perhaps a change in approach would prompt greater flexibility.


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174. **The Chair** reviewed the positions expressed, that States had concerns about being required to enforce judgments from other States in relation to tenancies of property in the requested State; there could be the possibility of a broader discretionary ground of refusal, and Article 7, maybe without the six-month limit, or perhaps without the exclusive jurisdiction tag, but in particular, without the six-month limit, is being held out as a possible approach. It would be important when it came to making a decision on this Article to understand whether the consequence of relaxing the criteria was not to impose an obligation not to recognise, but merely to create the possibility of non-recognition of a judgment in Article 7. With respect to Article 6, the Chair noted that there were separate elements of the obligation: the positive obligation to recognise and enforce certain judgments, and the obligation not to enforce certain judgments. It was possible that there would not be consensus on both elements. He suggested that there be a conversation about an approach that might command broad consensus, and cautioned rushing to a conclusion that displeased all.

175. The Chair queried whether there needed to be an informal working group or whether it could be even more informally left to discussions during breaks.

176. **A delegate from Brazil** noted that the delegation of Brazil had no appetite for discussion of the exclusion of Article 6(c), but accepted that some delegations saw merit in that. He reminded the room that in the proposal submitted by the delegation of Brazil, that Article was seen as the basis for something bigger. He preferred to see the various proponents return with developed proposals, but insisted that it would be unbalanced if some issues had the benefit of a working group and some not.

177. **The Chair** agreed that the issues raised by the delegation of Brazil would indeed have to be drawn into a working group.

178. In such case, **the delegate from Brazil** agreed and thanked the Chair.

179. **A delegate from Australia** observed that this discussion has been carried on over considerable time and noted that his delegation did not like the present drafting but that various delegations may not like any alternative. He expressed sympathy for the proposal of the delegate from Singapore, but thought that ultimately the Commission would end up with the current text as a result of any further work. His delegation was, as such, reluctant to invest more time on the issue at that stage.

180. **A delegate from Canada** expressed her delegation's continuing hope of a more satisfactory outcome, noting that the Diplomatic Session comprised different delegates with new perspectives compared to the Special Commission meetings. She favoured the establishment of a working group to address the issues of tenancy and rights *in personam* as they will need to be dealt with in any event.

181. **A delegate from Singapore** highlighted that in the draft Convention it was not clear that an Article 19 declaration could be made in respect of matters under Article 6. He suggested that if it could be applied to that subject matter, that could be a way out.

182. **A delegate from the United States of America** recognised that this was an important issue, and the current text was imperfect though it reflected a lot of the discussions that had taken place. The delegation of the United States of America maintained that all effort should be made to resolve these issues, so it would support a working group being established. He acknowledged that the assessment of the delegate from Australia may prove true, but he nonetheless remained hopeful.

183. **A delegate from Israel** echoed the position of the delegate from Brazil that further discussion would be beneficial and should include the issue of possession as well as tenancy. In response to the suggestion of the delegate from Singapore, the delegate from Israel expressed his understanding that it was not possible to "declare out" of this obligation through Article 19. If that were the case, there would be no point to Article 6. He accepted that a better conclusion may not be reached but thought that discussion was worthwhile regardless.

184. **The Chair** recognised that there were enough issues of importance on which there were differing views and that it would be inefficient to have separate parallel discussions in the corridor. It would be more appropriate to convene a working group so that all those interested could work together, with an appropriate chair. He noted that this group would not be convened at this lunchtime so he would consider that timing. He also invited the delegate from Australia, despite his gloomy outlook, to take up his position as chair of that working group.

185. **A delegate from Australia** suggested that it would be helpful before the working group met that those participating come with proposals, and that the delegations of Israel and Brazil come with examples regarding the issue of rights of possession, in order to facilitate an informed conversation in the room.

186. **The Chair** agreed that it would need to be a focused discussion, and would need to add something new to the seven years already spent discussing the matter.

187. The meeting was closed at 12.56 p.m.

## Procès-verbal No 4

## Minutes No 4

*Séance du mercredi 19 juin 2019 (après-midi)*

*Meeting of Wednesday 19 June 2019 (afternoon)*

1. La séance est ouverte à 14 h 30 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

2. **The Chair** redirected the Plenary to the bracketed text of Article 4(2), noting that the delegations of Israel, the United States of America and Uruguay had prepared Working Document No 42.

3. **A delegate from Uruguay** reported the good news that, in the spirit of reaching consensus, the co-sponsors had reached a compromise upon the two proposals discussed yesterday. The new proposal reflected the underlying agreement as to policy objectives, by keeping the text in square brackets but with two minor changes: changing the word "examination" to the word "consideration", and adding the word "solely" after "necessary".

4. **A delegate from Israel** indicated that the language may benefit from the review of the Drafting Committee, and agreed with the delegate from Uruguay that the language itself does not change the substance of the provision.

5. **A delegate from the United States of America** explained that the new proposal satisfied the preference of the delegation of the United States of America for understandable, plain language. The delegate also agreed there may be better drafting possible, but that the current proposal reflected efforts of compromise.

6. **The Chair** commended the collaboration as an outstanding example of practical, constructive and efficient work towards consensus. The Chair indicated that the Drafting Committee may beautify some of the language.

7. **A delegate from the Russian Federation**, although initially opposing the inclusion of the second sentence, was content with the wording of the new second sentence. However, the delegate considered that the Explanatory Report should stress that "no review of the merits" remains the key principle. The delegate wished to emphasise that the second sentence should not be constructed as an invitation to review the merits again.

8. **The Chair** expressed that he was confident the *co-Rapporteurs* would reflect the basic principle that the court addressed may only satisfy itself of questions of fact or law to the extent it needs to determine the application of the Convention, and in doing so it is not bound by the judgment.

9. **A delegate from the European Union** welcomed the proposal as it retained the second sentence which the delegation of the European Union had wanted to keep. He thanked the delegations who co-sponsored the proposal. The delegate offered no strong observations or criticism, but suggested that the Drafting Committee may examine the particular drafting. As an observation upon drafting, the delegate explained that the delegation of the European Union had also turned its mind to alternative drafting, and had thought that the word "assessment", as opposed to "consideration", could be possibly used. For the word "solely", the delegation of the European Union had considered that "necessary" is already a sufficiently strict standard: something cannot be more "necessary" than "necessary", let alone "strictly" necessary.

10. **The Chair** highlighted that other matters the Drafting Committee may consider were whether a verb such as "as is" necessary, or "as may be" necessary, should be included; and also whether the words "solely" and/or "necessary" are necessary.

11. **A *co-Rapporteur*** referred to paragraphs 99 to 101 of the Explanatory Report, which elucidate the language in the earlier version of Article 4(2). The *co-Rapporteurs* had used the word "examination" in paragraph 100 and the word "consideration" in paragraph 101. The *co-Rapporteur* sought clarification as to the sense in which the delegates thought "consideration" was distinct from "examination", and what the change sought to achieve. She noted that the *co-Rapporteurs* had understood "examination" as a word permitting the requested court to look at the judgment, to see what it said, for application of the filter. On the other hand, "consideration" may be seen to involve a stronger sense of assessment than "examination".

12. **The Chair** summarised the seemingly favourable view that connotations of "examination" of a judgment caused some problems for delegations. However, where "consideration" of a particular provision of the Convention was required, then this was acceptable to States. The point is that you consider the application of the Convention, afresh, and independently of what is in the judgment. The Chair noted that delegates were nodding in agreement, but that this could be the subject of conversation in the coming weeks.

13. **A *co-Rapporteur*** reiterated that, upon their joint reading, the *co-Rapporteurs* thought "consideration" referred back to consideration of the judgment, and not consideration of the Convention. She suggested that the word "judgment" might need to be added to the second sentence, to reflect what the Plenary intended.

14. Concerning the text of the Explanatory Report, **the Chair** clarified that it does not prevent such consideration of issues relevant to the application that may also be dealt with in the judgment, as is necessary for the application of the Convention. He noted that the further conversations will be assisted by seeing the outcome of the Drafting Committee's work. Concerning the text of Article 4(2), the Chair concluded it was adopted by consensus.

*Article 2(1)(p)*

15. **The chair of the informal working group on anti-trust matters** provided an update on the discussions occurring over the lunch break. Should anti-trust matters be reflected as an exception with a carve-out, she noted a general preference for the carve-out to focus upon matters, not claims or remedies, and that it should not refer to jurisdictional filters. The group had also identified anti-trust issues that should not fall within the scope of the Convention, including merger control issues, prohibitions of mergers and so on. She noted that States which were in favour of a total exclusion had been open to considering a partial inclusion. However, there were ongoing consultations as to whether only anti-competitive agreements between parties, or whether unilateral behaviours, could be the subject of such inclusion. Another issue was whether the carve-out should be generic or whether it should be enumerative, listing the types of behaviours falling within the scope of the Convention. If there were a carve-out, it seemed that delegations sceptical of the inclusion of anti-trust would prefer a specific and enumerated carve-out from the exception. Moving forward, the delegates proposed to work upon enumerating those specific issues to fall within the Convention, as this seemed to be a more promising approach (noting, however, that States wishing to include all anti-trust matters favoured a different approach). It remained to be seen whether a consensus on this limited exclusion can be established. The chair noted that she is in everybody's hands as to whether there was sufficient appetite for further meetings of the informal working group following further discussions.


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*Article 2(1)(g)*

16. **A delegate from the European Union** provided an update that the delegation of the European Union could agree to excluding emergency towage and salvage from the exclusion. However, concerning marine pollution, the delegation wished to retain the exclusion concerning ship-sourced pollution for the reasons given earlier. The delegation was still considering its position with respect to other sources of marine pollution, but the delegate expressed willingness to consider it constructively.

17. **A delegate from Japan** noted the flexibility of the delegation of Japan with regard to the treatment of emergency towage and salvage, and that it could accept either exclusion or inclusion. However, he was hesitant to include certain marine pollution matters where they are also regulated under other existing Conventions. The delegate referred to paragraph 58 of Preliminary Document No 12, and the fact that some Conventions establish regimes with exclusive jurisdiction, for example under the *International Convention on Civil Liability for Bunker Oil Pollution Damage* (hereinafter, "Bunker Convention") and the *International Convention on Civil Liability for Oil Pollution Damage* (hereinafter, "CLC"). The delegation of Japan wished to preserve the existing regimes by denying recognition and enforcement where the judgments are rendered by a court which does not have exclusive jurisdiction so defined. The delegate considered it necessary therefore to exclude at least the marine pollution regulated by the existing Conventions. The delegate also explained that Article 24 would not be sufficient to deal with any conflict between Conventions, as it only deals with a "true" conflict with other international instruments. For example, under the CLC and the Bunker Convention, recognition and enforcement may only be sought for a judgment of the court of the Contracting State that has exclusive jurisdiction. There is no explicit obligation to deny recognition and enforcement of judgments of courts that do not have exclusive jurisdiction, nor is there an obligation to deny recognition and enforcement of judgments from a court of a non-Contracting State. Given that there is no obligation to deny, it appeared to the delegate that there was no true conflict with the draft Convention. Yet in circumstances where a requested State was required to recognise and enforce a judgment under the draft Convention, but the court of origin does not have exclusive jurisdiction, the delegate considered that the requested court should deny recognition and enforcement, to preserve the existing regimes for marine pollution.

18. **A delegate from the People's Republic of China** explained that its delegation required further time to seek a reply from its capital concerning marine pollution.

19. **A delegate from the European Union** clarified that the delegation of the European Union was largely in agreement with the reasons given by the delegation of Japan, given that the existing Conventions are in the field of ship-sourced pollution.

20. **The Chair** noted the need to return to Article 2(1)(g) but commended the progress that had been made. Given that there was no reported progress on Article 2(1)(l), the Chair directed the discussion to the remaining loose end with respect to Article 4(4) and Working Document No 40.

*Article 4(4)*

21. **A delegate from Peru** explained that the idea of the proposal in Working Document No 40 was to be more precise so that courts would not interpret Article 4 as granting them extra powers that the law in the requested State does not have. The delegate explained that, in many cases, a court can only recognise a judgment that is no longer the subject of review. The idea was to provide clarity for operators, and the delegate awaited comments of his fellow delegates, noting he could be flexible with the language if the objective remains.

22. **A delegate from the European Union** thanked the delegation of Peru for raising this issue by way of the Working Document, and shared that the delegation of the European Union had examined the evolution of the Article since its departure from its functional equivalent in Article 8(4) of the HCCH *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 HCCH Choice of Court Convention"). The delegate explained how Article 8(4) of the 2005 HCCH Choice of Court Convention uses a different formulation: there was no reference to a "court", it only permitted recognition or enforcement to be postponed or refused, and so on. The delegate highlighted that this was interpreted in the Explanatory Report on the 2005 HCCH Choice of Court Convention (hereinafter, "Hartley/Dogauchi Report") as giving a discretion to the national legislator to decide on which of these options could be available in the Contracting State that is requested. However, the delegate emphasised that the formulation has changed since then which, from what the European Union could tell, was primarily to make the presentation simpler and clearer. In that context, the Article has changed from the passive mode "may be postponed or refused" to an active mode by referring to the court that can take certain action. Drawing attention to the draft Explanatory Report and footnote 96, the delegate explained that this in fact introduces a policy change from the 2005 Convention. While a discretion may be exercised by the legislator under the 2005 Convention, here the discretion is directly given to the court addressed. The delegate from the European Union observed that this underpins the concern expressed by the delegate from Peru. However, the delegate from the European Union did not think such a policy change should occur: it should be possible for the national legislator to decide whether one or more of the alternatives should be available to the courts. The delegate from the European Union suggested the proposed text in Working Document No 40, and the reference to Article 14(1), was suboptimal to achieve its purposes. He explained that a reference to "within the limits of the law of the requested State" is not made elsewhere in the Convention. This could raise questions as to whether further references to national law are required, or whether that should be avoided. Although the delegation of the European Union disagreed with the text of the proposal, the delegate agreed that the point should be addressed. The delegate suggested that one approach may be to return to the policy of the 2005 Convention, revert to the passive mode, and include the same explanation from the Hartley/Dogauchi Report. This may be complicated by the fact that the draft Convention contains an additional third alternative, the enforcement against provision of security, that was not present before; however, this could be considered by the Drafting Committee.

23. **The Chair** echoed that the possible policy implications of moving from the passive to active voice were not discussed at the time of the change and that it has produced unintended consequences. The Chair invited interventions as to how this should be fixed and whether this or another mechanism should be preferred.

24. **A delegate from the Republic of Korea** thanked the delegate from Peru for the proposal. The delegate had indicated this morning that its delegation could adopt a positive position regarding the proposal, but discussions with a ju-

dicial colleague had raised a point of doubt. In the Republic of Korea, a treaty or Convention shall have full effect in internal law if and only if it is ratified with the approval of the Congress. If the Convention is ratified, then the possibilities for judicial action are broadened. The delegate added that this is not necessarily an undesirable implication, because it is also the decision of the Congress.

25. **A delegate from Norway** aligned her position with the delegate from the European Union and observed the unintended change of policy that had occurred. The delegate preferred for the national legislation to be given the choice between the three alternatives, and not the court itself. She proposed for delegates to convene to find the proper drafting.

26. **A delegate from Switzerland** thanked the delegation of Peru for highlighting the issue and adopted a similar position to the delegations speaking earlier. She agreed that a policy deviation from the 2005 HCCH Choice of Court Convention was probably not intended and that it should be fixed in an appropriate manner.

27. **A delegate from Brazil** thanked the Chair, and aligned his delegation's policy position with that of the delegation of the European Union, agreeing that proper language is required.

28. **A delegate from Ukraine** suggested it may be useful to clarify in the Explanatory Report that the court addressed may apply any one of Article 4(4)(a), (b) or (c) measures in accordance with its national law. This would not make any additional implication in the text. In such a case, it would be clear for implementing parties that they would not be required to implement point (a), for example, if it were not required under national law.

29. **The Chair** observed the clear view that there had been an unintentional policy change under Article 4, as the Working Document from Peru had highlighted. The Chair summarised the view that a different solution was desirable to achieve the same outcome: namely, that domestic implementing legislation should have control over which options are available. This would not only require amendments to the Explanatory Report but also a change in the text. The Chair suggested that delegates convene to produce a proposed text, perhaps eliminating the reference to the court or adopting a passive formulation, and revert to the Plenary.

30. **A delegate from Peru** thanked the Chair and reiterated his delegation's willingness to engage in discussions to modify the language in order to return to the original policy.

31. **The Chair** concluded that Article 4(4) will not be adopted until delegates had seized the opportunity for further drafting to reinstate the former policy. The Chair then turned to the agenda, noting that various issues with respect to Article 5(1)(j *bis*), (k) and (m) were ongoing. The Chair indicated that work concerning Articles 5(1)(h) and 6(b) and (c) would be considered by an informal working group convened by Mr Walter from Australia. The Chair also noted that discussions as to tenancies would occur tomorrow, and that the *co-Rapporteurs* had offered to prepare a draft text of the revised Explanatory Report to assist the discussion.

*Article 7(1)(a), (b) and (c)*

32. **The Chair** then directed the discussion to Article 7, grounds for refusal of recognition or enforcement, despite it being scheduled for discussion tomorrow (with particular intellectual property matters reserved for discussion on Friday). Observing that no Working Documents had been received upon the *chapeau* to Article 7, the Chair concluded it was adopted by consensus. Turning to Article 7(1)(a), (b) and (c) in turn, the Chair noted that there were no Working Documents nor proposals, and confirmed that they were adopted by consensus. Turning to Article 7(1)(d), the Chair highlighted the helpful explanation in the Explanatory Report that the effect of Article 2(3) is that a reference to arbitration gives the court addressed the ability to decline recognition or enforcement depending upon national arbitration law. The Chair invited the delegation of Singapore to speak to its Working Document No 39.

*Article 7(1)(d)*

33. **A delegate from Singapore** explained that Article 7(1)(d) is a manifestation of the principle of party autonomy. The delegate described that the purpose of the proposal in Working Document No 39 is to ensure that any judgment, obtained in breach of an agreement, will not be entitled to recognition under the Convention. For the delegation of Singapore, there were three situations in which judgments might be obtained in breach of agreement. The first situation arises where there is an arbitration clause, which is addressed by Article 2(3) by excluding arbitration from the scope of the Convention. The second situation arises where there is a choice of court agreement which validly excludes the jurisdiction of the court of origin. The delegate explained that this is currently addressed under the current version of Article 7(1)(d). The delegate considered that the third situation was not adequately dealt with under the Convention: namely, where parties have settled their dispute in an agreement containing a non-suit clause. The delegate was of the view that the principle of party autonomy should be applied and upheld in this situation, equally with arbitration clauses and choice of court clauses. The delegate explained that a party who sues in breach of a non-suit clause should not expect to circulate that judgment under the Convention.

34. **The Chair** remarked that, upon first reading, he had thought it directed to compulsory obligations to mediate before litigation, rather than settlement agreements. The Chair expressed uncertainty as to how the proposal should be understood and enquired whether it is intended to deal with mediation agreements.

35. **A delegate from Singapore** explained that it was intended to deal with settlement agreements, whether done through mediation or otherwise. That was why the words "resolved in a manner other than through litigation in the court of origin" had been used.

36. **The Chair** sought further clarification. The existing text of Article 7(1)(d) contains the words "under which the dispute in question was *to be determined*" (emphasis added), which the Chair read as including "to be resolved". It would arise where there is a commitment to mediate or engage in some other process *ex ante* that was then not complied with. The Chair enquired whether the delegate from Singapore disagreed with this outcome.

37. **A delegate from Singapore** clarified that this was not his intention. Rather, the intention was to deal with disputes that had already been resolved, and where there was a non-suit clause in the settlement agreement.

38. **The Chair** thanked the delegate from Singapore for his helpful explanation and invited interventions.

39. **A delegate from the Republic of Korea** deeply sympathised with the proposal and thanked the delegate from


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Singapore for raising it. The delegate from the Republic of Korea offered the preliminary thought that, if the additional language were to be included, it may introduce a small element belonging to the area of substantive law and thereby the opportunity for review of substance of extrajudicial settlements. The delegate emphasised this was preliminary thinking and that its delegation would further consider the issue.

40. **A delegate from the European Union** stated it would be beneficial to have more time to consider the proposal. The delegate noted that this has been the subject of different proposals in the past, and that the European Union's principal point of departure was that these questions should be resolved by other means, not by a ground for refusal, under the Convention.

41. **The Chair** observed there were no further interventions, but that more time would be helpful to consider the proposal further before its scheduled discussion tomorrow. The Chair directed the discussion to Article 7(1)(e) and Working Document No 44 from the delegation of Uruguay.

*Article 7(1)(e) and (f)*

42. **A delegate from Uruguay** explained that the aim of the proposed addition of the word "earlier" was to align the *res judicata* effects of judgments in Article 7(1)(f) with the concepts of *litis pendentia* of Article 7(2). The delegate explained that, were the text left as it is, an opportunistic party against whom recognition or enforcement was sought could present the same (or similar) case before a court of the requested State to enjoy a "re-hearing" and avoid recognition or enforcement. This would go against the core ideas of recognition and enforcement of foreign judgments. The delegate shared that this is called "*chicana*" in Uruguayan Spanish, whereby lawyers exploit procedural tools to win time, in the knowledge that there would be no result on the merits and generally without good faith. The delegate continued that, were it otherwise, refusal would be permitted not only in the case of *litis pendentia* but also when a case is seized in the requested State *after* the judgment is rendered in the State of origin, but *before* its presentation for recognition and enforcement. The delegate expressed concern that this reflected an opportunity for manipulation by the losing party. The delegate highlighted the discrepancy between Article 7(2)(a) and (1)(e): on the one hand, the Convention regulates *lis pendentia* where the court of the requested State was seized before the court of origin (Art. 7(2)(a)). On the other hand, Article 7(1)(e) permits recognition or enforcement to be refused for inconsistency with a judgment, without saying when that judgment needs to have been given (a possible interpretation being that it could be a judgment given at any time, even when it is commenced after a presentation for recognition and enforcement). The delegate summarised that these problems could be simply resolved by the addition of the word "earlier" as proposed. The delegate also highlighted that paragraphs 301 and 302 of the current Explanatory Report describe the difference between Article 7(1)(e) and (f), but without explaining the underlying rationale.

43. **The Chair** provided context for the discussion and explained that Article 7(1)(e) is replicated word-for-word from Article 9(f) of the 2005 HCCH Choice of Court Convention. Therefore, the proposal from the delegate from Uruguay represented a narrower ground for declining recognition and enforcement than that in the 2005 Convention.

44. **A delegate from the European Union** offered a preliminary reaction, noting that a coordinated position needed to be developed. The delegate highlighted that a distinction between judgments from the State where recognition or enforcement is sought, and judgments of other countries, is not uncommon in the context of grounds for refusal. The delegate recognised that this was the system in the European Union under the Brussels Ia 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). The delegation of the European Union was therefore hesitant to move away from this point of departure. The delegate observed that the risk of manipulation or undue behaviour highlighted by the delegate from Uruguay seemed to be limited, because in order to have the refusal ground there must be a judgment in existence. When considered in conjunction with Article 7(2), a postponement or refusal is possible only if proceedings were already pending at the time of application for recognition and enforcement. It is not possible if proceedings were commenced only after an application for recognition and enforcement.

45. **A delegate from Switzerland** thanked the delegation of Uruguay and agreed that there was merit to the thinking behind the proposal. However, the delegate explained that the issue is resolved in many national laws in the manner it is presently dealt with under the Convention. She expressed uncertainty as to whether there would be consensus for the proposed approach.

46. **A delegate from Singapore** aligned with the delegations of the European Union and Switzerland and expressed reluctance to depart from the current approach. The delegate explained that given how broad the draft Convention is and the number of topics included, it had always been understood that a judgment from the requested State would have priority over a judgment from a requesting State. The delegate cautioned that to adopt a principle that "the first in time would always prevail" would be to require a radical rethinking of the obligations in Article 7(2).

47. **A delegate from Brazil** agreed there was merit in the proposal brought by the delegate from Uruguay. However, the delegate from Brazil was not as concerned by the extreme prospects (of a party merely raising a new case in the requested State) because, as the delegate from the European Union had pointed out, the provision required a judgment to have been delivered in the requested State. Nonetheless, the delegate from Brazil observed "middle ground" circumstances in which a party, who anticipates a judgment being delivered against his interests, properly brings a case and obtains a judgment in the future State in which recognition and enforcement would be sought. The delegate considered that in that situation, there would be merit in having a provision in line with the proposal from the delegate from Uruguay.

48. **A delegate from Australia**, although reflecting that the discussions represented excellent future projects for the HCCH to consider, joined with the delegations of the European Union and Switzerland. He indicated that in most scenarios the risk raised by the delegate from Uruguay would be fairly slight. The delegate also acknowledged the "elephant in the room" that States would prefer judgments from their own jurisdictions.

49. **A delegate from Israel** explained that the current position in Article 7(1)(e) reflects the position in Israeli law, albeit without the temporal addition. Given the inconsistency with that policy, the delegation of Israel was hesitant to accept the proposal. However, he expressed the willingness of his delegation to consider the issue in the future.

50. **A delegate from the Republic of Korea** thanked the Chair and the delegate from Uruguay and offered preliminary observations. The delegate from the Republic of Korea suggested that one approach to the proposal could be to read it in line with Article 14(1), which addresses procedure for recognition alone. The delegate explained that the existence of Article 14(1) made it possible for the requested court to delay recognition by requiring certain procedures, so that recognition may not be automatic depending on the law of the requested State. If that were not the outcome under Article 14(1), then the delegate suggested there would be less need to follow the proposal of the delegation of Uruguay: recognition would be automatic, and the later judgment of the requested State would be in violation of the *res judicata* already created. The delegate considered that Article 14 allowed for not accepting automatic recognition, and so the delegate has a little more concern for the proposal of the delegation of Uruguay. However, the delegate stressed he would like to further consider the proposal.

51. **A delegate from Argentina** also offered the preliminary view that there was room for strategic behaviour by litigants; however, her delegation preferred to consider the matter further.

52. **A delegate from Sri Lanka** sought clarification from the delegate from Uruguay as to what the word "earlier" adds to the word "given".

53. **The Chair** offered that the point of the proposal was that the judgment in the requested State must have been given earlier than the foreign application for recognition and enforcement before the requested court. At present, Article 7(1)(e) allowed recognition and enforcement to be refused if there were an inconsistent judgment of the courts of the requested State, whatever the date of that judgment (including judgments rendered after the foreign judgment, but before an application for recognition and enforcement). The point of the change was that it applies only if the judgment were given earlier than the foreign judgment.

54. **A delegate from Sri Lanka** considered that the word "given" seemed to carry the same meaning as "earlier" under the proposed draft.

55. **The Chair** indicated that the proposal represented a material difference.

56. **A delegate from Canada** stated that its delegation was not in a position to support the proposal.

57. **A delegate from Japan** also stated that his delegation could not accept the proposal. He indicated that a change to the text may present difficulties for prospective Contracting States.

58. **The Chair** summarised that it seemed, subject to correction, that this would impose additional obligations on Contracting States because it would require them to recognise and enforce a wider range of foreign judgments. In other words, the circumstances in which they could decline recognition would be reduced. Given that consensus would be required to adopt this more stringent formula and that there was no consensus, the proposal was not adopted. The Chair then directed the discussion to Article 7(1)(f). Observing there were no Working Documents, the Chair concluded the Article was adopted by consensus. The Chair reminded the meeting that Article 7(1)(g) would be discussed on Friday, as a matter of intellectual property.

59. **A delegate from Canada** sought clarification as to whether Article 7(1)(e) had been adopted.

60. **The Chair** clarified that Article 7(1)(e) was adopted, in its form from the 2018 draft Convention.

61. **A delegate from Uruguay** requested that the Explanatory Report briefly mention the proposal contained in Working Document No 44, and the reasons why the original text was retained.

62. **The Chair** observed that the structure of the Explanatory Report was not a record of debate but an explanation of the agreed text. He observed the *co-Rapporteurs* commenting that they would have to think about its inclusion.

*Article 7(2)*

63. **The Chair** read the Article 7(2) provision, noted that there were no proposals, and concluded that it was adopted by consensus. Approaching the coffee break, the Chair foreshadowed there would be two options. First, the Commission could consider Articles 8 to 10 and 12. The Chair suggested these could be considered efficiently, given the apparent paucity of proposals. Alternatively, the Chair suggested that delegates may wish to take a longer coffee break in the expectation of resolving residual Article 5 issues over coffee.

64. **A delegate from Israel** suggested that the topics for Saturday could be addressed ahead of time.

65. **A delegate from the European Union** wished to discuss intellectual property issues before embarking upon discussions of Article 8, given that the proposals were closely connected. For example, Working Document No 17 proposed a restructure of Article 8, the position of the delegation of the European Union on which would change depending upon whether intellectual property matters were "in" or "out".

66. **The Chair** concluded that the afternoon would proceed with consideration of Articles 9, 10 and 12.

67. **Le Président** propose de passer à l'examen de l'article 9, qui porte sur la divisibilité et qui est identique à l'article 15 de la *Convention de La Haye du 30 juin 2005 sur les accords d'élection de for* (ci-après, la « Convention Élection de for de 2005 »). Il indique par ailleurs qu'il n'y a pas de Document de travail à ce sujet.

*Article 9*

68. **A delegate from Canada** indicated that she has no issue on the substance but raised an ambiguity regarding the French version of the text. She queried whether the Drafting Committee could take it into account.

69. **The Chair** noted that the Drafting Committee will consider the issue. He confirmed that Article 9 was adopted by consensus.

*Article 10*

70. **Le Président** propose ensuite de passer à l'article 10 au sujet des dommages et intérêts. Il souligne qu'il n'y a pas de Document de travail et que le texte de l'article est identique à l'article 11 de la Convention Élection de for de 2005.


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71. Le Président indique que l'article 10 est adopté par acclamation.

72. **A delegate from the European Union** observed that the last sentence of paragraph 333 of the Explanatory Report, concerning Article 10, states that "[t]he compensatory portion of the judgment remains enforceable if it is severable". He further expressed concerns in the case it might not be severable. Regarding monetary judgments, he stated that it should be possible to decide what the compensation element would be. In his view, this was more consistent with the statement from paragraph 335(g) of the Explanatory Report, which derives from the Hartley/Dogauchi Report, and which states that recognition and enforcement may only be refused to the extent that the judgment goes beyond the actual loss or harm suffered. Since there was almost a duty to sever, he was concerned with this sentence in the Explanatory Report.

73. **The Chair** agreed that it was consistent with his recollection of the policy underpinning this provision, namely, that there was a positive duty to identify and enforce the compensatory element that did not depend on the judgment from the court of origin, being in a form which is on its face severable.

74. **A *co-Rapporteur*** questioned the consequence of this sentence in the Explanatory Report.

75. **The Chair** recalled that the question is whether the last four words ("if it is severable") would be better omitted because it suggests that an inquiry must be conducted into whether the judgment is separable, which was not the intention.

76. **The *co-Rapporteurs*** nodded in agreement.

77. **The Chair** directed the debates to Article 12, judicial settlements.

*Article 12*

78. **The Chair** noted that there were no Working Documents on that Article, which mirrors Article 12 of the 2005 HCCH Choice of Court Convention.

79. **A delegate from Canada** outlined that there are square brackets in her version of the Article.

80. **The Chair** indicated that the delegation of Canada is not reading the most up-to-date version of the draft Convention. He further confirmed that Article 12 is adopted by consensus.

81. **A delegate from the European Union** referred to paragraph 344 of the Explanatory Report and stated that judicial settlements may not be invoked, for example, as a procedural defence to a new claim and do not have the force of *res judicata*. He further added that it may be, in some case, a contractual defence. His delegation has no issue on substance but he stated that it could have been said in a more comprehensible fashion. He further stated that this issue will be raised with the *co-Rapporteurs*, along with a proposal.

82. **The Chair** was about to say that concrete suggestions should be provided to the *co-Rapporteurs* for their consideration, but he then realised it was the intention of the delegation of the European Union.

83. **A delegate from the European Union** indicated that he had a text, but he had not brought it today because this topic was on the agenda for a later day. He pointed out that it will be shared with the *co-Rapporteurs*.

84. **The Chair** noted that Articles 9, 10 and 12 have been dealt with and further suggested to start the debates on final clauses, along with the two related proposals, but without trying to decide anything today. The two relevant Working Documents are Working Document No 12 from the delegation of the European Union on reservations and Working Document No 24 from the delegations of Japan, Switzerland and the United States of America on treaty relationship mechanisms. The Chair indicated that the sooner those documents will be perused, the better it will be. He then proposed to begin with Working Document No 12.

*Final clauses*

85. **A delegate from the European Union** explained the rationale of her delegation's proposal in Working Document No 12 by saying that the Convention specifies which declarations shall be permitted, what shall be their content and at which time they shall be made. Consequently, her delegation simply suggested adding the reverse side of the coin with this proposal prohibiting reservations, which is a standard clause in various HCCH Conventions.

86. **The Chair** asked whether any delegations wished to make an early contribution on that point, knowing that the subject will be brought back tomorrow.

87. **A delegate from the United States of America** indicated that his delegation did not contemplate any reservation his Government might take regarding the draft Convention. However, he shared concerns about the inclusion of this Article for two reasons. First, it constituted a departure from the 2005 HCCH Choice of Court Convention. Secondly, and more importantly, the U.S. Senate has already, in the context of other Conventions, expressed great concerns with respect to no-reservation clauses. Then, he observed that a no-reservation provision for his delegation could tilt the scale in favour of opposition to the approval of the draft Convention. He repeated that his delegation does not anticipate relying on the possibility of taking reservations. Then, he pointed out that it would be quite problematic to have a no-reservation provision within the draft Convention.

88. **A delegate from Israel** stated that his delegation was not in line with the proposal. In his delegation's view, it was important to retain flexibility. He pointed out that his delegation did not envisage adding reservations beyond the declaration that were explicitly provided. He further added that, according to the *Vienna Convention on the Law of Treaties*, a reservation not compatible with the object and purpose of the Convention would not be allowed.

89. **A delegate from Singapore** expressed a preference to debate this issue at a later stage of the proceedings. He added that his view on the proposal will depend on what will be agreed in the text of the draft Convention, specifically how Article 19 is settled. He added that reservations may need to be done with respect to subjects where agreement may not be found. His delegation considered that it will be in a better position to discuss the proposal at a later stage.

90. **A delegate from Australia** stated that his delegation was not in favour of the proposal. He recalled the comments made by the delegate from Israel and preferred to rely on the Vienna Convention. He added that the delegation of Australia has no intention of making any reserva-

tion. He further echoed the point of view of the delegation of Singapore and considered it too early to reach a definitive conclusion.

91. **A delegate from Brazil** stated that his delegation was in a position to support, in principle, the proposal. He outlined the seven years required to bring the draft Convention to the Plenary, along with the sensitive issues the delegations have been through and important consensus reached. However, he indicated that a strong compromise may be difficult on a couple of issues. He further pointed out that when the lack of strong consensus has been anticipated, the Plenary already allowed declarations, which were planned in the draft Convention. He further stated that the draft Convention is currently being negotiated with the understanding that States could take advantage of the declaration system. He relied on the comments of the delegate from Israel saying that any reservations would be incompatible with the draft Convention. He further said that the language could be addressed in a different way, namely, that any reservations would be incompatible and that the Vienna Convention did not allow reservations. However, he was of the view that it would not help because the result will be the same in the end. He observed that, if it is not said that any reservations will be incompatible, States would be allowed to make reservation, which was against the spirit of negotiation delivered throughout these years. He was of the view that if a delegation had already anticipated concerns regarding the draft Convention, it would be important to know it by the end of the Plenary, allowing to anticipate other declarations. He further expressed concerns about the idea of permitting reservations.

92. **The Chair** indicated that the delegate from Israel did not say that any reservation would necessarily be inconsistent with the Vienna Convention. Rather, the point was that the Vienna Convention does not permit any reservations that would go so far that they were inconsistent with the object of the draft Convention. Then, the Chair noted that there are some outer limits on what would be appropriate. He further expressed that this discussion was helpful to the delegation of the European Union, namely, to know that there were some reservations about expressly prohibiting reservations and that achieving a consensus on that point might require some debates. Next, the Chair directed discussions towards Working Document No 24 from the delegations of Japan, Switzerland and the United States of America on treaty relationship mechanisms.

93. **Un délégué de la Suisse** indique que cette proposition a un historique très long. Il rappelle que des propositions similaires ont déjà été présentées dans le cadre de groupes préparatoires, d'experts et de travail. L'importance de cette thématique a toujours été soulignée, c'est donc sans surprise que l'introduction d'un mécanisme d'adhésion est ici proposée. Il estime que la raison d'être de cette proposition est d'assurer le succès du projet de Convention. Le jour où les différents législateurs nationaux se poseront la question de la ratification de la Convention, la possibilité d'avoir son mot à dire sur les États parties facilitera grandement la tâche, en raison de la grande diversité de systèmes juridiques. Il insiste sur le fait que la Suisse n'a jamais émis aucune objection contre aucun autre État dans le cadre de la Conférence de La Haye. Le délégué ne pense donc pas que ce mécanisme sera utilisé de nombreuses fois par la Suisse ; il s'agit simplement de soulager les esprits des parlementaires lorsqu'ils se poseront la question de la ratification de la Convention, et donc d'en assurer son succès. Deux options sont présentées, les deux étant acceptables. Premièrement, le mécanisme de l'*opt-out* : lorsqu'un État devient Partie à la Convention, il pourrait émettre une objection envers un autre État, et la Convention n'entrerait alors pas en vigueur entre eux. Le même raisonnement s'applique lorsqu'un État fait objection à l'arrivée d'un nouvel État : la Convention n'entrerait pas en vigueur entre eux. Deuxièmement, le mécanisme de l'*opt-in* : la Convention n'entrerait en vigueur que lorsque le nouvel État est accepté par les autres États parties. Il indique que les deux mécanismes proposés s'appliquent tant aux États qui sont déjà Parties à la Convention qu'à ceux qui entament les démarches pour le devenir. Il souligne d'ailleurs qu'une telle objection pourrait être faite et retirée en tout temps.

94. **A delegate from the United States of America** was grateful to the delegate from Switzerland for his initial presentation. He observed that a treaty relationship mechanism is an essential condition for the United States of America to become Party to the draft Convention. He further indicated that his delegation has already used such an objection mechanism contained in other Hague Conventions in the past, when a State has not provided the required information or has not established an office that is necessary for the implementation of a Convention. He mentioned that an objection has been withdrawn in one instance. Namely, the United States of America recently accepted treaty relations with several States pursuant to the HCCH *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*. He then turned to Working Document No 24, which allows for two options. He added that they have been flexible as to which option could be adopted. He mentioned that, in the past, an assertion had been made that a provision such as this would have a limiting or stifling effect on the recognition and enforcement of judgments. He was not in line with that assertion since that provision will enable States to become Party to the draft Convention that might not otherwise be in a position to become Party. Then, more judgments would be recognised and enforced with additional States Parties. In his view, it would facilitate the purpose of recognition and enforcement of the draft Convention. He said that his delegation was grateful to the delegate from Switzerland for his intervention and expressed his availability to answer any questions on what constitutes one of the most important provisions for the United States of America.

95. **A delegate from Japan** was of the view that a certain level of compatibility is required between judicial systems for the recognition and enforcement of foreign judgments. Although he thought that, in general, there was compatibility among judicial systems in the world, a treaty relationship mechanism would be necessary in the case of fundamental incompatibility between two judicial systems. He added that his delegation has no preference for either option but outlined the necessity to have such a mechanism.

96. **The Chair** indicated that this subject will be brought back to the Plenary tomorrow since it was an ongoing work, which he had anticipated. He further questioned whether another delegation would like to make initial statements to improve prospective reflections.

97. **A delegate from Israel** had listened very carefully to the presentations made by other delegations and recalled that his delegation was, in the past, not in line with the inclusion of a treaty relationship mechanism, as proposed in Working Document No 24. In light of promoting a broad accession to the draft Convention, the delegation of Israel did not object to the inclusion of an opt-out-mechanism, as suggested in the first alternative to the proposal in the Working Document, and further expressed preference for this option, even if he hoped that it will not be used. Further, he


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pointed out that he was grateful that he had the occasion of the Diplomatic Session to change his position on this.

98. **A delegate from Australia** shared concerns expressed with these proposals. He thought that the Plenary needs to go through a few more policy considerations if it is going down this path. He referred to the comment according to which a declaration could be made and withdrawn at any time. He sought clarification on that point, namely, as to whether any time period may apply in this regard. In particular, he was concerned to avoid situations of strategic declarations to avoid the recognition or enforcement of specific judgments. In his view, those policy questions have to be answered. He sought further clarification on judgments that were ready to be recognised, namely, whether a time period might have an impact on that. He observed that those clarifications on how the mechanisms might work might be of great assistance for delegations in determining whether they could go along with this proposal or not.

99. **A delegate from Uruguay** expressed appreciation to the delegations of Japan, the United States of America and Switzerland for Working Document No 24. He indicated that his delegation understood the importance of the matter. He thought that the Plenary should be as broad as possible on the issue regarding treaty relationships among countries. The delegation of Uruguay preferred the current mechanism, namely the no-entry control mechanism but could go along with the opt-out mechanism, in order to look for consensus. He added that his delegation could not accept the opt-in mechanism, which could be impractical and against the universal spirit of the draft Convention. He stated that the rules should be the establishment of treaty relationships among the State Parties to the Convention and the exception is when it does not happen, in the case of an express will of a given State. He further echoed the comments made by the delegation of Australia.

100. **A delegate from Norway** indicated that her delegation can support both the opt-in and opt-out mechanisms because it might attract more States to the Convention. In her delegation's view, it was important that such a declaration should not allow to circumvent the Convention and to avoid the enforcement of a judgment. She observed that this can be done by giving such a declaration effect from a later stage and not a retroactive one.

101. **A delegate from Brazil** thanked the delegations of Japan, the United States of America and Switzerland for their proposal. Based on previous Special Commission meetings, he indicated that his delegation would disfavour any of the two options. However, he took notice of concerns expressed by delegations to have such a sort of mechanism. He echoed comments made by the delegate from Australia. He indicated that he tried to figure out the circumstances that would allow Contracting States to make such a declaration, whether it is opt-in or opt-out. On that point, he recalled that the Plenary already tried to tackle the issue during Special Commission meetings and failed. Namely, the circumstances that have been found were the ones already described by Article 7 of the draft Convention. On the contrary, when the Special Commission tried to figure out something that was out of the situation of Article 7, it failed to deliver a text on that. He then implied that it is the reason why there is not a text of that issue in the draft Convention. He did not say that the delegation of Brazil will be inflexible on that. Rather, he explained that, before choosing an option mechanism, he would like to have more detailed information on the circumstances which would allow a State to make those kinds of declarations. He further echoed comments made by other delegations.

102. **A delegate from the European Union** expressed gratitude towards the three delegations for their proposal. He further noted that the delegation of the European Union favoured an open approach, as it is currently in the draft Convention. He acknowledged that the debated issue is a sensitive one. In that respect, his delegation expressed a clear preference against the opt-in option because it could act as an impediment to widespread ratification of the draft Convention irrespective of the efforts made towards the opt-in option. He was in favour of discussing the opt-out clause. He then referred to the distinction that was made between States that did participate in the Special Commission or Diplomatic Sessions leading to the adoption of a Convention and those that acceded to the Convention at a later stage (see Work. Doc. No 24). He further added that he was willing to broaden that scope and consider it as a general approach irrespective of whether or not a State attended the Diplomatic Session. However, he echoed comments made by the delegate from Australia. He further questioned the possibility of lodging an objection at a later stage, when there was already a treaty relationship, knowing that the proposal refers to an objection to the establishment of a treaty relationship. Like the delegate from Australia, he questioned how such a declaration would function. He pointed out that in the HCCH *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* there is a time limit to raise those objections. Therefore, he said that his delegation reserved its position for the time being.

103. **A delegate from Singapore** agreed with most of the delegations that having this kind of mechanism, whether opt-in or out, would allow more States to accede to the draft Convention. He went along with the proposal.

104. **A delegate from Canada** mentioned that her delegation was consistently unfavourable towards this kind of approach when the issue was raised in the past. She indicated that she has questions and some of those were raised by the delegate from the European Union. In terms of wording, namely the reference to establishment, she thought it meant that an objection could be made and withdrawn at any time. She questioned the impact this could have on legal certainty and predictability.

105. **A delegate from the Russian Federation** stressed that her delegation has a close position to that announced by the delegation of the European Union and that her delegation favoured the universal and open character of the draft Convention. She further thought that the draft Convention has a mechanism which helps judges to not enforce a judgment contrary to fundamental requirements of due process among others. At this stage, she said that her delegation was against opt-in and opt-out mechanisms, which were, in her view, political and not legal mechanisms.

106. **A delegate from Argentina** noted that, without prejudice to her last intervention on the subject, those kinds of clause should be discussed at a later stage. In general, her delegation was not in favour of those types of mechanisms. Then, she observed that there were no reasons in previous HCCH Conventions that could justify the introduction of this type of clause. She added that her delegation could possibly consider an opt-out mechanism, depending on the final result of the draft Convention. She further echoed comments made by the delegate from the Russian Federation, namely, that those kinds of mechanisms led to political consideration more than legal ones. Further, she outlined that the Plenary is trying to make a legal document, which might be defeated for political reasons. Finally, she echoed observations made by the delegates from Canada and Australia.

107. **The Chair** observed that it was a very helpful first conversation.

108. **Un délégué de la Suisse** remercie les délégations qui se sont exprimées sur le sujet. Il indique que le mécanisme de l'*opt-out* semble avoir été préféré et mérite de plus amples travaux, notamment en lien avec les problèmes soulevés par l'Australie. Il assure que ces problèmes vont être traités afin de trouver une solution. À ce sujet, il demande au Bureau Permanent s'il est envisagé d'établir un groupe de travail sur les clauses finales. En cas de réponse positive, la matière discutée pourrait-elle y être intégrée ? Pour répondre au Brésil, au sujet des circonstances sous lesquelles une déclaration peut être faite, le délégué indique qu'en préparant le Document de travail No 24, de nombreuses recherches ont été faites. Il ressort que les Conventions qui contiennent ce genre de mécanisme ne définissent aucunes circonstances, car délicates et politiquement sensibles. De son avis, il n'est donc pas une bonne idée de définir les circonstances. Il indique que la mention de la diversité des ordres juridiques semble suffisante.

109. **The Chair** confirmed that there was an intention to set up a working group on final clauses. He added that treaty relationship mechanisms ought to be included in the group. He further noted that the delegate from Switzerland was right in outlining the lack of enthusiasm with respect to the opt-in mechanism. He indicated that the willingness of some delegations to explore the opt-out mechanism may be the base to find a consensus on that issue, taking into account practical issues raised by the delegation of Australia and other delegations. He further added that the working group on final clauses was about to be created.

110. **A delegate from Canada** indicated that in the general clauses section of the draft Convention, there were a number of clauses that in other organisation or drafting styles might be considered in the final clauses section. She asked whether it would be useful to put the consideration of some of those into the remit of the final clauses working group.

111. **The Chair** suggested waiting to see how the discussions of those clauses go in the Plenary and then see whether they need the attention of an informal working group. He suggested to close the meeting early in order to allow delegations to continue informal discussions about Article 2(1)(g) and (l) and Article 5(1)(j), (j *bis*), (k) and (m).

112. **A delegate from Israel** asked what other provisions will be reviewed tomorrow, in order to prepare.

113. **The Chair** indicated that IP topics will be jumped over and that the Plenary will turn to other matters that were contemplated for Saturday morning, namely, Article 2(1)(n) and (o), and (4) and (5), and Article 20.

114. **The Chair** expressed congratulations for the progress made. He was looking forward to continuing the discussions.

115. The meeting was closed at 5.40 p.m.



# Procès-verbal No 5

# Minutes No 5

*Séance du jeudi 20 juin 2019 (matin)*

*Meeting of Thursday 20 June 2019 (morning)*

1. La séance est ouverte à 9 h 45 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

2. **The Chair** welcomed the delegates to the third day of the meeting of the Commission, which was poised to make more progress. He suggested to begin by running through a list of all the issues that had been parked so far, and to check whether they had been resolved, or whether some process was under way to ensure that they would be.

*Article 2(1)(g)*

3. **The Chair** then returned to Article 2(1)(g) and Working Document No 28. He explained that he would attempt to determine the points of discussion, and to narrow them down slightly, in order to establish how they could be resolved. Regarding Article 2(1)(g), the Chair noted that it seemed to be common ground that the exclusions in relation to the limitation of liability for maritime claims and general average should remain as they were, and confirmed this with the Plenary.

4. He then moved towards "emergency towage and salvage". He noted that he had not heard any voices pressing for the retention of this exception, and sought interventions on whether any delegation would be concerned about that deletion.

5. **A delegate from the People's Republic of China** sought to make a request before deciding on this item. He noted that the document prepared by the Permanent Bureau (Prel. Doc. No 12 of June 2019) would state clearly that removing "emergency towage and salvage" could lead to some problems. He kindly asked the esteemed colleagues from the Permanent Bureau to briefly state the consequences of deleting this item.

6. **The Chair** clarified that the delegate from the People's Republic of China referred to paragraph 76 of Preliminary Document No 12, and noted that his reading of the paragraph was that it was not suggesting that there would be problems with deleting it. The document merely pointed out that some emergency towage and salvage operations involved the exercise of public or governmental powers or regulatory powers, which as a result would not fall under the Convention in any respect.

7. If anything, the document was suggesting that the impact of deleting this might be narrower than one might

have expected. It would be precisely in that situation of additional complexity, namely where there was a significant regulatory element, that the concern that it would not fall under the Convention would not arise. The Chair confirmed with the First Secretary (Mr Ribeiro-Bidaoui) that his reading of the paragraph was correct.

8. **A delegate from the People's Republic of China** noted that if one added emergency towage and salvage to the scope, this would actually add complexity to this Convention. Under Chinese maritime laws, in many situations, the emergency towage was mandatory, and for that situation, the judgment would not be of a civil or commercial nature. For these kinds of situations and judgments, it was difficult for this Convention to apply.

9. **A delegate from the European Union** thanked the Chair as well as the delegate from the People's Republic of China. As usual, the delegate was extremely perceptive, and studied carefully the Preliminary Documents. The delegate expressed understanding for the position of the delegation of the People's Republic of China, but noted that he also thought that the response of the Chair had been correct, namely that while some emergency towage and salvage might be done by the State, or on behalf of the State and therefore clearly be outside the scope of the Convention, the Explanatory Report and the Preliminary Document would not suggest that all the emergency towage and salvage was done by the State. In countries at least where it was not done by the State, it was reasonable that a private party that had conducted that emergency towage and salvage should be able to get proper compensation for doing so, and that the judgment awarding that proper compensation should circulate where it needed to circulate under this Convention.

10. He did not think that this created any unnecessary complexity. There would be a dividing line between civil and commercial matters and public law matters in many areas of the Convention. That in itself was not a good enough reason to exclude something from scope. There would be clear-cut cases where it was not *acta iure imperii*, but clearly an act *iure gestionis*, or something done by a private actor. His delegation had certainly been persuaded by the document, and had changed their position in this regard, and now favoured keeping emergency towage and salvage in the scope of the Convention. His delegation had not found any international Conventions dealing with this, and therefore, if one would not cover it in this Convention, there was no international mechanism for the recognition and enforcement of any judgment that compensated appropriately the actors who engaged in emergency towage and salvage.

11. **The Chair** noted that he would not press the room to make a decision on Article 2(1)(g) until all elements had been resolved: he had merely intended to take the temperature of the room on this element, as his sense had been that there had been shifts of positions. He encouraged any delegations with remaining concerns, and particularly the delegation of the People's Republic of China, to talk to other delegations to see if those concerns could be allayed when the clause would be finally addressed.

12. Regarding marine pollution, the Chair noted that his sense of the mood in the room was that there was no consensus to bring all forms of marine pollution back into scope, and that there were significant concerns, in particular about ship-source marine pollution being within the scope. He then asked for an update on whether progress was being made on this issue. He also wanted to clarify whether the only ongoing debate was about whether ship-source marine pollution, or some wider category of marine pollution, should be excluded.

13. **A delegate from the European Union** confirmed the Chair's understanding that the delegation of the European Union would firmly insist upon keeping ship-source marine pollution outside the scope of the Convention. He could not give any final reply on other marine pollution issues at this stage, because his delegation was still checking whether there were arguments that would militate against including the other forms of marine pollution. But he would like to send a mildly positive signal towards the inclusion and hoped he could provide a further update as quickly as possible. Consultations were under way but had not been concluded yet.

14. **A delegate from the People's Republic of China** wished to make two remarks. First, he noted that his delegation did not have any concerns about the deletion of the exclusion of emergency towage and salvage. He had merely raised the issue with regard to the points raised by the very important Preliminary Document of the Permanent Bureau. If delegations wanted emergency towage and salvage to be removed from the exclusions from scope, then his delegation could agree to that. This would save everybody's time for further consultation.

15. The delegate continued that the second point concerning marine pollution, however, was more important, at least for him in his current role as the Special Representative for Climate Change Negotiations. For him personally, climate change and environmental issues were therefore more important than private international law *per se*.

16. **The Chair** remarked jokingly that this was a shocking admission, but that the delegate was nevertheless still welcome to the meeting.

17. **A delegate from the People's Republic of China** noted that his delegation strongly preferred to retain the exclusion of the whole issue concerning marine pollution. He referred to the document presented by the esteemed colleagues from the Permanent Bureau and confessed that it was a very good document on environmental law, not on private international law, because most of the points were very correct concerning environmental law, concerning the protection of environmental law and concerning accountability for environmental damage. There were many Conventions in this area, in particular UNCLOS (the *United Nations Convention on the Law of the Sea*). However, the protection of the environment was very different from private international law. In the area we are not pretty sure every State had the same policies, and had the same regard concerning which kinds of activities constituted the so-called damage to the environment, and which kind of precaution, or prevention, or damage, or which other elements should be taken into consideration. His delegation was of the view that the area of pollution was a very specialised area and addressing only the aspect of the recognition and enforcement of foreign judgments in this area did not seem to be sufficient. According to his knowledge, the international environmental law experts had debated many issues touched upon by the Preliminary Document without consensus, like the principles of environmental law, or the protection of the environment in different areas of the ocean.

18. He also opined that if the delegations had experts in the environmental area, or from the Law of the Sea area, look at the document, then some of the policy aspects might be recognised by some of the delegations. In order to avoid prolonging the debate, and cause uncertainty for the future

discussion, it was very important to make clear what could and what could not be achieved. His delegation was of the view that it would be better to leave the whole area of marine pollution to the other branches of international law, also from the perspective of private international law. His delegation therefore strongly supported the retention of the old language in the text regarding this point.

19. **The Chair** noted that he was glad that the delegate from the People's Republic of China could have been spared to come and join this meeting instead of saving the environment. Even private international law lawyers had to acknowledge grudgingly that the environment might be a more pressing concern most of the time. The Chair was delighted to have the delegate back, who was known for his characteristic sense of humour and pragmatism.

20. The Chair then checked whether there was broader concern in the room about narrowing the discussion down from marine pollution to ship-source marine pollution, and whether other delegations would share the concerns expressed by the delegation of the People's Republic of China. He recalled that there was as yet no coordinated position of the delegation of the European Union on this issue. If other delegations wanted to flag that, this would enable other delegates arguing for a narrowing to know who they needed to talk to, and what the issues were that they needed to engage with from a substantive perspective.

21. He confirmed with the Plenary that there were no other interventions in this regard and noted that now one had a very clear picture of where the remaining debate lay in relation to Article 2(1)(g). It seemed clear that emergency towage and salvage could be deleted in the working notes. Future discussions would then focus on marine pollution, and in particular on whether it was or was not acceptable to add the words "ship-source" in front of "marine pollution". The Chair encouraged those with an interest in the issue to keep discussing it, and the issue would be revisited sooner rather than later. The Chair then thanked the delegations for what he thought had been an extremely productive conversation in terms of gauging the status of the discussions.

*Article 2(1)(l)*

22. **The Chair** then turned to Article 2(1)(l). He noted that the discussions on Tuesday had shown that there would certainly be an exclusion from scope in relation to privacy matters, so that the external square brackets around the provision would be removed. However, a serious conversation was needed about whether an exception to that exclusion was appropriate in order to bring some privacy matters back into scope. He asked for an update on the status of those discussions from the room, and whether any sort of forecast about the time of resolution could be made.

23. **A delegate from the United States of America** informed the Chair that his delegation had been busy during the night hours, and that they were hoping to be able to present a Working Document which would provide an attractive intermediate position between the current text with the brackets and a complete exclusion, but more time was needed.

24. **The Chair** thanked the delegate for the very helpful intervention and noted that he was delighted to hear this. He then asked whether other delegations were able to provide precise forecasts about when they would be able to come back to the room. He then sought interventions on Article 2(1)(l) from the floor.

25. **A delegate from Japan** noted that he could not provide a precise forecast, but that he wanted to raise one question concerning the proposal made by the distinguished delegation of the European Union and their Working Document No 16: If the proceedings which were brought for breach of contract between the parties were included in the scope of the Convention, how would the jurisdictional ground of Article 5(1)(g) work for those proceedings? In particular, he would like to know where the place of performance would be if a party to a contract, for example, an IT company, had a contractual obligation not to infringe the privacy of the other party. This could mean that the IT company should not infringe the privacy of the other party all over the world. If this was the correct interpretation, then courts of all Contracting States might have jurisdiction over the proceedings based on Article 5(1)(g), although there was the safeguard of the "unless" clause. He might be wrong, but he would like to know how Article 5(1)(g) worked for those proceedings. This would help to consider further the proposal from the delegation of the European Union.

26. **A delegate from Switzerland** explained that there were potentially two possibilities of resolving these questions. Both possibilities had been explored in previous case law elsewhere. One possibility in such a case where there was a very widespread place of performance, or even multiple places of performance, was to not apply those filters in these cases. If it was impossible to determine one single place of performance, then a place of performance would simply not exist. This would be one possibility to address it. The other potential possibility was to see whether there was in fact one place that could be determined. Obviously, there was also the theoretical possibility to simply allow universal jurisdiction, even if in the long term this would not be a very sensible road to go down. It was a matter of interpretation, but surely sensible solutions to this problem could be found.

27. **A delegate from the European Union** thanked the delegate from Japan for the question. Although the delegate had pointed to an issue that specifically arose in relation to privacy issues, it was not unique to privacy issues alone. Rather, it was an issue that might horizontally arise in the contractual filter, which meant that one had to resolve it for privacy issues in just the same way as it had to be resolved horizontally.

28. **Another delegate from the European Union** agreed with the comments of his colleague and noted that this question could be considered by the *co-Rapporteurs* when revising the Explanatory Report, whatever the outcome on this issue, when discussing Article 5(1)(g). In Europe, where one had to deal with this issue in the context of the Brussels Convention (*Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*), and then of the Brussels I Regulation (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), different views even within the Court of Justice of the European Union had emerged in relation to this type of provision. He stressed that Article 7(1)(a) of the Brussels I Regulation was not identical to this provision, but it mirrored it in some respects. The Court of Justice had taken the view that there was no place of performance if there were multiple places of performance.

29. Therefore, if one were to follow that precedent, one would clearly state that where there were multiple places of performance, this filter should be disregarded. That was one solution. Indeed, as the delegate from Switzerland had


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stated, one could also look for the solution which the court had adopted in relation to the place of delivery of goods, and the place for the provision of services, namely that one chose the main place of delivery, *i.e.*, the principal place of delivery, or the principal place of provision of services. He apologised for being so technical, but it was a technical question, and deserved a technical answer.

30. There was as yet no position within the delegation of the European Union, and certainly not a coordinated position, on what the correct answer should be because there had not been any warning of this question. He was therefore only able to lay out the possibilities. His delegation was at this point not willing in any way to suggest what the answer should be. If a collective discussion were deemed necessary, then this would have to be done at a later stage. On the other hand, it might be something best left to practice, and best left to development. The Explanatory Report might not adopt a definitive position, but merely point out that there were different possibilities. He concluded by noting that the meeting was entirely in the hands of the Chair.

31. **The Chair** thanked the delegates from Switzerland and the European Union for those two helpful answers to how issues of this kind had been tackled. The Chair noted that there had been approval from the *co-Rapporteurs* regarding the possibility of identifying possible approaches in the Explanatory Report, without making a decision for one or the other.

32. If some delegates wanted to take this further and encourage the *co-Rapporteurs* to suggest how issues of this kind would be dealt with under Article 5(1)(g), and not just in relation to privacy, but effectively in relation to any negative obligation, because they failed to be performed anywhere, then someone should bring that back to the floor. Otherwise, it would be left to the *co-Rapporteurs* to identify the different ways in which this might be dealt with in the context of Article 5(1)(g).

33. **A delegate from Mexico** noted that the purpose of his comment was not to predict a particular outcome of the current discussion on whether privacy will be included or excluded. Rather, he wanted to ask the Drafting Committee to make the English, French and Spanish versions of the provision more consistent. The term used in the English version was "privacy". In the French version, the term used was "*le droit à la vie privée*". In the Spanish version, however, instead of "*derecho a la intimidad*", which was the current term, "*derecho a la vida privada*" should be used. This would make the Spanish version consistent with other international instruments.

34. **The Chair** clarified that the Drafting Committee would not be working on a Spanish version of the instrument, so it was unlikely to engage with that issue. However, preparing a version in Spanish would be very important for the broad understanding of the instrument, and suggestions for how this question could be best addressed were very welcome, and it would probably be best left to the Permanent Bureau to coordinate those.

35. **A delegate from the Republic of Korea** addressed a question to the distinguished delegation of the European Union. He noted that his delegation might be confused, but when looking at the current English, the current language seemed to be borrowed from Article 2(2)(o) of the HCCH *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 HCCH Choice of Court Convention"), which dealt with intellectual property rights infringement. His understanding of Article 2(2)(o) of the 2005 HCCH Choice of Court Convention was that an infringement of intellectual property, which was one kind of tort, would be covered if the same situation also constituted a breach of contract. An infringement of intellectual property occurring together with a breach of contract dealing with intellectual property was therefore covered by the 2005 Convention. He sought clarification as to whether he understood Working Document No 16 correctly to mean that the "except" language used in this proposal intended to make clear that infringement of privacy, which was one special type of tort, would be covered, but only in this context.

36. **A delegate from the European Union** thanked the distinguished delegate from the Republic of Korea for the question, but he noted that it would not concern the same situation. It was not intentional, but the language happened to reflect the language of Article 2 of the 2005 HCCH Choice of Court Convention. He noted that he was not convinced that it was trying to do the same thing. He thought that in the context of this Project, contract actions concerning privacy were outside the scope without this language in Article 2 of this Convention. If this language were inserted, this would only bring contract actions concerning privacy into scope. It was not indirectly bringing tort actions concerning privacy into scope. This was the intention of Working Document No 16, and he apologised for any confusion caused. Under Working Document No 16, all tort actions in relation to privacy were still excluded from the scope of the Convention.

37. **A delegate from Australia** noted in response to the question raised earlier by the delegate from Japan that in terms of protection of data there were increasingly sophisticated players who were including clauses into their contracts relating to where data is held, and where particular aspects of the contracts were to be performed. In practice, particularly in the bigger kinds of cases, this problem was less likely to arise.

38. **The Chair** agreed that one should not overlook the fact that in many cases, the circumstances would be quite simple; there would be purely domestic arrangements in relation to someone whose privacy mattered only in the country in which they lived, and who was of no interest to the rest of the world. Their privacy was unlikely to be infringed elsewhere, therefore. Very few people were international celebrities about whom interesting information was likely to be disclosed in the global media. He then gave the floor to the *co-Rapporteurs*.

39. **A *co-Rapporteur*** noted that she intervened in order to ask the parties preparing proposals to look at the Explanatory Report which contained one short paragraph on privacy, which was based on previous discussions. It seemed to her that the definition in the Explanatory Report was much narrower than what the discussions here were showing, *e.g.*, regarding the inclusion of the public disclosure requirement. The Explanatory Report was based on what had been discussed in previous Special Commission meetings. Obviously, the Explanatory Report would have to reflect whatever decision was taken in this venue. In preparing their proposals, delegates should ensure that if the proposal is based on a different definition of privacy than the one contained in paragraph 55, then that should be made clear.

40. **The Chair** did not think that different understandings of the basic concept of privacy from what was spelled out in paragraph 55 existed, but delegations could raise possible issues in connection with the Explanatory Report.

41. **A delegate from the European Union** recalled his earlier intervention that, in principle, his delegation was very happy with the understanding in paragraph 55 of the Explanatory Report. Nothing in the current discussions would suggest a broadening of that understanding. When the distinguished delegate from Australia made a reference to data protection clauses in contracts that might be breached, one was still only talking about situations where in breach of those contractual clauses there had been a data leakage, and therefore a public disclosure of data relating to privacy.

42. **Another delegate from the European Union** noted that that was the reason for specifically referring to paragraph 55 in their proposal. Two possible changes would be necessary, however. One, one would need to say in the last sentence, "the exclusions cover non-contractual privacy-based claims", if the exception is approved. And there was another issue which needed to be identified, namely: Did this cover only natural persons, or also legal persons? These issues needed to be revisited in the Explanatory Report. He concluded by noting that his delegation would not want to re-open discussions on most of this paragraph.

43. **The Chair** noted that he did not see any change in the shared understanding of the concept of privacy, which was helpfully captured in the Explanatory Report. And the delegate from the European Union was right to say that it was premature to discuss how paragraph 55 might be modified to reflect language that had not yet been adopted. Until there was any exclusion to the privacy exclusion that was adopted by consensus, nothing useful could be achieved in relation to the Explanatory Report discussion of that exclusion.

44. **A delegate from the European Union** noted that the Explanatory Report currently drew a very rigid distinction between defamation as only relating to untrue information, and privacy only relating to true information. This would have to be modified in order to move away from that very rigid distinction because there were some legal systems, including within the European Union, where these definitions were not adhered to with that level of rigidity. This could be resolved in the Explanatory Report.

45. **Another delegate from the European Union** suggested that this could be done quite easily by deleting "[u]nlike defamation" in the third sentence of paragraph 55, and by changes in paragraph 54 on "defamation".

46. **The Chair** noted that the *co-Rapporteurs* had taken the suggestions on board and would not make presumptions about bright lines that did not exist in all jurisdictions as between these two topics. The Chair then summarised the discussions on privacy and noted that there would be a privacy exclusion. The only question was whether one could adopt by consensus a carve-out from that exclusion in relation to some subset of proceedings that raised privacy issues. The focus there was contractual disputes, on which continuing conversations were held. The Chair then foreshadowed the distribution of a Working Document on that matter in the not too distant future. He confirmed with the floor that this was the current state of discussion and thanked the delegates for an extremely useful conversation in terms of clarifying the status of the discussion, and how the discussion was to be concluded.

47. **A delegate from Australia** reiterated with regard to the comments in the Explanatory Report on privacy that "truth" was not a useful concept in privacy. The proposal from the delegation of the European Union to remove the words "[u]nlike defamation" might not help this delegation, since the Australian definition of privacy specifically referred to the fact that opinions could be included, whether true or not.

48. **The Chair** noted that he should have referred to the comments made by the delegates from Israel and Australia that that distinction was not a sharp one. However, the comments had been taken on board by the *co-Rapporteurs* that it was not illuminating in this context to refer to truth. That concept could be put to one side, in the context of distinguishing between privacy and defamation.

*Article 2(1)(p)*

49. **The Chair** then moved to Article 2(1)(p) and noted that it seemed that there would be an exclusion from scope in relation to anti-trust/competition matters. The live question was whether one could reach consensus on an exception to that, *i.e.*, on some subset of claims which were raising anti-trust issues that would be brought back into scope.

50. **A delegate from Switzerland** noted in her capacity as chair of the informal working group that they were still waiting for feedback from some delegations, so it would not be possible at this stage to give any further updates to yesterday's status quo.

51. **A delegate from the Republic of Korea** felt a need to clarify the position of his delegation on this issue. His delegation had submitted a compromise proposal on Tuesday, but he stressed that they were still proposing a full exclusion on this matter. As much as they appreciated the delegation of the United States of America for their compromising proposal, compromising proposals were not an option for his delegation. After having listened closely to the interventions made by the delegations of Singapore, Sri Lanka, and others, it did not seem as if the meeting was forming a consensus towards its inclusion. Other views were expressed as well. He believed new attention needed to be given to those other views. As stated in the explanation of their proposal, the position of the delegation of the Republic of Korea on the full exclusion had not changed, and they were not departing from it for the following reasons: one, the Convention was supposed to be dealing with court decisions that are private and civil in nature, but anti-trust law matters were by nature public issues. Moreover, since this was an issue of public policy of each State, countries differed in their perspective in dealing with the various issues of anti-trust matters.

52. **The Chair** noted that this was not the time for discussing substantive positions on it, as the matter would be revisited later. He was absolutely conscious that there were some delegations that would like to see anti-trust excluded completely, and this conversation would take place. However, now he was trying to identify whether the matter should be excluded completely, or whether there was a consensus to have some small part of it come back in. He absolutely understood the position of the delegation of the Republic of Korea, but substantive discussion would only be had when there were concrete proposals on the table for a middle ground, which have some support for adoption. If there was no consensus on that then it would not be adopted.

53. **A delegate from the Republic of Korea** confirmed that his delegation was comfortable with that approach, and noted that he had merely wanted to clarify that his delegation was proposing a full exclusion, because they had made a compromise solution earlier on, and that he had wanted to avoid confusion.


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54. **The Chair** thanked the delegate for that very helpful intervention. He then noted that the question of anti-trust would be revisited once more refined proposals for a possible exclusion from the exclusion were available. At this stage then he would test whether there was a consensus to bring those matters back into scope, against the backdrop of a common view that there would be some level of anti-trust exclusion. He confirmed that every delegation was comfortable with that summary.

55. The Chair then provided an opportunity for delegations to make comments and suggestions about the Explanatory Report in relation to Article 2(1), (2) and (3).

56. **A delegate from the United States of America** referred to the discussion the other day with respect to Article 2(3), where it had been clarified on the floor that the Convention would not apply to a judgment addressing the recognition or enforcement of an arbitral award. That seemed to make sense. It had been indicated that the Explanatory Report did address this, although not necessarily in the discussion of Article 2(3) itself. His delegation wanted to use this opportunity to help to create the *travaux* for the discussions by indicating that there was agreement that this Convention would not apply to judgments that were recognising and enforcing arbitral awards, but also to allow for those who will in the future seek to obtain guidance from the Explanatory Report. He opined that it would be helpful to have discussion of the non-application of the Convention to such judgments in the discussion of Article 2(3) itself. His delegation did not have a proposal in text form, but he did not think that this was a contentious point at all.

57. **The Chair** agreed that the discussions that were held the other day referring to language elsewhere in the text could usefully be reflected in the discussion of Article 2(3), so that people who were trying to understand the implications of that paragraph could find it easily.

58. **A delegate from Switzerland** noted that she had a question concerning paragraph 52 of the Explanatory Report. Paragraph 52 stated the following about the validity of entries in public registers: "This litigation usually takes place between the applicant and the Registrar." In her opinion, that was a somewhat risky statement, and she proposed that it be taken out. The same applied to the sentence in paragraph 51: "Judgments on these matters were excluded from the scope of the draft Convention because they are not usually recognised and enforced in other States." She noted that she was unsure about the wording, and whether it added much clarity. She suggested to delete that sentence as well.

59. **The Chair** agreed that the latter might not be an accurate statement. It was often the case that a judgment about the validity of an internal decision taken by the State of incorporation was recognised elsewhere. He then sought comments from the *co-Rapporteurs* on these two suggestions.

60. **A *co-Rapporteur*** confirmed that he agreed with the second suggestion, but sought some clarification about the first one. The *co-Rapporteurs* had been asked many times to explain the differences between this exclusion and other disputes in the context of intellectual property rights when the validity of the entry was also an issue. Their understanding was that this exclusion covered the common situation of a dispute between the private party and the authority, or the registrar, or any other kind of authority, denying the registration. The *co-Rapporteurs* thought that it would be helpful to include the sentence.

61. **The Chair** asked the delegate from Switzerland for further comments on paragraph 52 of the Explanatory Report.

62. **A delegate from Switzerland** explained that she would expect that this paragraph would not only apply to intellectual property matters, but also to all sorts of public registers. Although not being a specialist in this type of litigation, she thought that the litigation could indeed take place between the person in whose favour something was entered in the public register, and the person disputing the validity of the entry. In fact, she wondered that if the proceedings were just with the registrar, it might not even be a civil or commercial matter. Possibly, litigation could concern the validity of an inscription in the public register, concerning the ownership of for example an immovable property. This would still concern the validity of the entry in the public register. Deleting the sentence would not do any harm, but keeping it in could create potential for confusion.

63. **The Chair** suggested to refer this conversation to an informal meeting between a small number of delegations with an interest in the question, and confirmed this approach with the Plenary. He then confirmed that there were no further comments on or suggestions for the Explanatory Report on Article 2(1), (2) or (3).

*Article 4(4)*

64. **The Chair** then turned to the next unresolved issue, Article 4(4), and Working Document No 40. As heard yesterday there was indeed an issue with the provision, but there might be a preference to deal with it in ways that would differ from the precise approach adopted in Working Document No 40.

65. **A delegate from Peru** informed the Chair that his delegation was currently still engaging with some other delegations with an interest in the proposal and asked for more time to produce a proposal.

66. **The Chair** agreed. He also noted that he wanted to keep all of these issues moving and reminded the delegates that although good progress had been made this week, still time was scarce, and he noted that he tried to create some sort of intermediate sense of modest pressure at this stage. Delegates could relax a little, but only a little bit. The meeting should continue to work against that backdrop.

*Article 5(5)*

67. **The Chair** then turned to Article 5(5) and an open issue arising out of Working Document No 35 from the delegation of Brazil regarding Article 5(1)(j *bis*), and asked for an update on the progress of the informal discussions.

68. **A delegate from Brazil** informed the Chair that his delegation was still in the process of discussions with other delegations, and that they would return to the Chair later.

69. **The Chair** thanked the delegate from Brazil for the helpful intervention.

*Article 5(1)(k)*

70. **The Chair** then turned to Article 5(1)(k), and Working Document No 6.

71. **A delegate from the United Kingdom** explained that she had been undertaking some discussions with the distinguished delegation of the Republic of Korea, and the dis-

tinguished delegation of Singapore, relating to some suitable Explanatory Report language for the *co-Rapporteurs* to consider. The delegation of Singapore was also asking whether one could find some examples of the kinds of factors that might be relevant to implication of the place of administration. She had contacted a practitioner expert in the United Kingdom to see if he could assist with that. The expert would try to have a look at this at the weekend. In the meantime, one was working on the Explanatory Report language.

*Article 5(1)(m)*

72. **The Chair** confirmed that there were no other interventions in that regard, and turned to Article 5(1)(m) and Working Document No 22 from the delegation of Switzerland to expand the scope beyond non-exclusive choice of court agreements to exclusive ones.

73. **Un délégué de la Suisse** rappelle que la proposition a reçu le soutien des délégations de l'Israël, du Brésil, de Singapore, de la République de Corée, de l'Uruguay et de Sri Lanka. Il rappelle aussi que les délégations de l'Union européenne, de la République populaire de Chine et de la Norvège ont rejeté cette proposition. Il admet qu'obtenir le consensus pour cet élargissement des obligations va s'avérer difficile, parce que ça exigerait le consensus de l'Union européenne, de la République populaire de Chine et de la Norvège. Déjà, à l'exception de l'Union européenne, la présence de flexibilité est minime. Dans un esprit de compromis et au vu de la situation, le délégué pense, à contre cœur, qu'il serait souhaitable de retirer cette proposition.

74. De plus, la délégation de la Suisse souhaiterait souligner qu'il existe une proposition concernant le préambule de la Convention qui vient souligner la connexion entre la présente Convention et la *Convention de La Haye du 30 juin 2005 sur les accords d'élection de for*. Aux fins de promotion de la Convention qui nous occupe en ce moment, il serait crucial de souligner son caractère binaire, ainsi que l'importance de ratifier les deux Conventions pour éviter toute lacune concernant les accords exclusifs d'élection de for. Il conviendrait que le Bureau Permanent insiste sur cette connexion.

75. **Le Président** remercie le délégué de la Suisse pour cette approche réaliste et pragmatique.

76. **A delegate from the European Union** thanked the delegation of Switzerland for its flexibility in that respect. Against the background of the discussions held the previous day, his delegation had taken a fresh look at the matter and had searched their souls as to whether the proposal could be accommodated in any way. Eventually, the reflections which had been set out today on the complementary nature of the Convention, and indeed, on the binary package, had prevailed. There had been no flexibility in that respect. He was grateful to the delegation of Switzerland for helping to achieve progress by not insisting on that proposal. On the other hand, because the link between the two Conventions was so important to his delegation, his delegation would like to strongly support what the delegation of Switzerland had just suggested, in terms of emphasising that link in the Preamble to the Convention.

77. **The Chair** agreed that the importance of that link had been referred to by almost everyone who spoke in the introductory stage of this meeting, and it would be important to ensure that it was underlined in multiple ways in the outcomes of the work of this meeting. Since there were no outstanding proposals in relation to Article 5(1)(m), the meeting might be able to make a decision on that limb of Article 5(1). He confirmed with the Plenary that Article 5(1)(m) was adopted by consensus. He thanked the Plenary and expressed gratitude for the pragmatism and flexibility of the delegation of Switzerland.

*Article 5(1)(j)*

78. **The Chair** turned to Article 5(1)(j).

79. **A delegate from Uruguay** reported that there was no support from other delegations to open the discussion regarding their proposal, even though the recognition of the jurisdiction of the place of the harm was widely accepted in legal systems for non-contractual obligations. By being realistic and pragmatic rather than idealistic, his delegation had accepted that there was no consensus to adopt their proposal in Working Document No 37. He appreciated that the Plenary had considered the proposal, and hoped that the Plenary was furthermore open and willing to adopt the proposal of the distinguished delegation of Brazil.

80. **The Chair** thanked the delegate for that great display of flexibility and pragmatism. The intervention had underlined the value of raising an issue and having an opportunity to explore it in light of the Plenary discussion, and then to respond realistically and practically to it. He was most grateful to the delegations for facilitating the discussion in that way.

*Article 5(1)(j* bis*) and (k)*

81. **The Chair** then turned to Article 5(1)(j *bis*) and (k) and foreshadowed that after the coffee break substantive discussion about Working Document No 39 would be held. The meeting would then move on to Article 2(1)(n) and (o), and (4) and (5); one would at least introduce those conversations, although one might not be able to bring them to a conclusion.

82. In response to a question from the delegation of Canada, **the Chair** confirmed with the room that Article 5(1)(j) was adopted by consensus.

83. He thanked the delegations and the delegate from Canada, and postponed the meeting until 11.20 a.m.

84. The meeting resumed at 11.36 a.m.

85. **The Chair** expressed the hope that delegates had enjoyed a productive coffee break, and gave the floor to the Secretary General.

86. **The Secretary General** reported that he had received statements from Viet Nam and from Paraguay. Their delegations had not been able to make opening statements, but those written statements had been made available as Information Documents on the Secure Portal.

87. **The Chair** reminded the relevant delegates that there would be an informal working group during the lunch break to consider Article 5(1)(h) and Article 6(b) and (c).

*Article 7(1)(d)*

88. **The Chair** moved on to Article 7(1)(d). He invited the delegation of Singapore to introduce revised Working Document No 39.

89. **A delegate from Singapore** explained that the proposal dealt with the situation where parties had reached


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final resolution of their dispute and agreed on a non-suit clause, but one of the parties subsequently brought a suit in breach of that settlement agreement. The revision was intended to address the Chair's request for clarity, which was reflected in the underlined words of the proposal. He said that this proposal should uphold the principle of party autonomy, similar to choice of court agreements or arbitration clauses. The hope was to extend this to cases where parties had breached a non-suit clause in a settlement agreement.

90. **A delegate from the European Union** thanked the delegation of Singapore for the revised proposal. He admitted that he had been initially confused by this proposal, particularly as he thought it was not clear that the proposed language did not refer to arbitration or judicial settlements. He suggested that this could imply that mediated settlement agreements have *res judicata* effect. As the Explanatory Report on Article 12 and the Hartley/Dogauchi Report showed, he thought it was clear that the approach to this in different countries was far from uniform, even within the European Union. This proposal, in Working Document No 39 REV, was at risk of implying that there was uniformity. If the proposal was intended to preserve the *Singapore Convention on Mediation* then there was no need to include specific text, as Article 24 would deal with this. He particularly noted the proposal of the delegation of the European Union in Working Document No 46 for the text of Article 24, which he said would clarify the text. As a result, there would not be a conflict between these two instruments. He reiterated that the delegation of the European Union was not keen to adopt the proposal.

91. **A delegate from Norway** associated her delegation with the remarks of the delegate from the European Union, particularly regarding the effect of Article 24. She did not believe that settlement agreements should be indirectly given *res judicata* effect through this Convention. Even in the Singapore Convention the possibility for settlement agreements to preclude court proceedings is limited; even in that Convention, there are possibilities to exercise defences against the enforcement of settlement agreements. The non-preclusions in the Singapore Convention would accord with a total preclusion of a possibility to enforce court decisions in this Convention. She suggested that this proposal would create a vacuum. The delegation of Norway also agreed with the delegation of the European Union that any problems of coordination with the Singapore Convention would be taken care of by Article 24.

92. **A delegate from Switzerland** thanked the delegate from Singapore for the clarification that this was not intended to be about agreements to mediate but mediated agreements. She suggested that perhaps this concern would be dealt with better under sub-paragraph (e) rather than (d) of the Article. On the substance, she recorded that the delegation of Switzerland could not support the proposal, particularly as in most jurisdictions such agreements would not have *res judicata* effect. She expressed concern that this would introduce a review of the merits of a judgment that would not be desirable.

93. **A delegate from Israel** expressed understanding for the proposal of the delegation of Singapore, and shared in those concerns. He appreciated that the delegation of Singapore had facilitated a discussion on a point that the delegation of Israel had not particularly considered before. Nonetheless, the delegation of Israel was reluctant to support the proposal if the situation of mediated settlements were transposed to the domestic sphere; it would be possible to imagine a case where two parties reach a settlement, and then one party who is dissatisfied with a settlement turns to the court to litigate the dispute. In this case under Israeli law there was no special mechanism to address the situation; it would ordinarily be left to judges to solve the conundrum. There was no reason in the international arena to treat internationally mediated settlements differently from domestic settlement agreements. The issue could still be left to the discretion of judges, using the range of tools available to them under domestic law. Israel could see that there was some uncertainty with regard to the treatment of this issue under the draft Convention, but it was not the goal of the Convention to prescribe specific rules to address every possible situation, and preferred to leave this to domestic law, and the discretion of judges. It was preferable to leave the provision as it was in the draft Convention and to live with that uncertainty.

94. **The Chair** observed that there was no support for the proposal in the room. He enquired whether Singapore could accept that this was not the way to address this concern.

95. **A delegate from Singapore** thanked all delegations for expressing their views on the proposal. He accepted that countries would treat settlement agreements differently, and acknowledged the point made by the delegation of Israel that this matter could be left to judicial discretion in the requested State. He suggested that this may fall under the public policy limitations in a particular country, for instance if it were against the public policy of a State to enforce a foreign judgment obtained in breach of a settlement agreement that was stated to be finally binding.

96. **The Chair** sought confirmation as to whether the delegation of Singapore intended to proceed with the proposal, or could recognise that it was not widely supported.

97. **A delegate from Singapore** accepted that the proposal was not widely supported.

98. **The Chair** then invited the Plenary to adopt Article 7(1)(d) as it appeared in the May 2018 draft Convention, as there were no further proposals. The provision was adopted by consensus. The Chair thanked the delegation of Singapore for their constructive approach.

*Article 2(n) and (o)*

99. **The Chair** opened discussion on Article 2(n) and (o), which raised Working Document No 19 proposed by the delegations of Israel, the Republic of Korea and the United States of America, and Working Document No 33 from Brazil. He asked the proponents to introduce those documents.

100. In light of the sovereign character of military or law enforcement activities, **a delegate from Israel** wished to clarify that judgments relating to the official activities of armed forces or law enforcement personnel will not circulate under the Convention, which was in any event not intended to promote enforcement in respect of those matters. Exclusion from scope of these sensitive matters would address concerns of some States and therefore promote broader accession to the Convention. He also noted the support of the delegation of Israel for the proposal of the delegation of Brazil to clarify the Explanatory Report.

101. **A delegate from the United States of America**, as co-proponents, explained that this was a narrowly tailored set of measures to address possible problems that may arise. There were four underlying reasons for the proposal. First, he reminded the Plenary that they were dealing with a Convention of unprecedented powers, which would allow a judgment to circulate to possibly (hopefully) 80 countries

or so; secondly, the application of State immunity law was not uniform; thirdly, some activities of military forces and law enforcement activities in some respects and in some legal systems could be classified as civil and commercial. Finally, he stressed that these matters were subject to a number of carefully negotiated multi- and bilateral agreements, which represented very delicate balances as well as often comprising exclusive and exhaustive dispute resolution and cost-sharing mechanisms. He stated that the major concern in this area was that an improvident judgment in one country – which he accepted was a risk, and one that they would deal with – might not be able to be contained to that individual country; there would not be sufficient bases to prevent its circulation. That could in turn induce litigants to attempt to circumvent the delicate web of treaties and agreements that played a significant role in the maintenance of peace and law enforcement cooperation. He suggested that the proposal represented a minimum way to avoid these potentially significant problems.

102. **A delegate from the Republic of Korea** added that including these matters may invite a systematic invocation of public policy grounds.

103. **A delegate from Brazil** supported the proposal of the delegations of Israel, the United States of America and the Republic of Korea and noted that the proposals sought to address the same concerns. He introduced Working Document No 33, explaining that the material difference was a proposal of language for the Explanatory Report to clarify the meaning of "personnel" under both limbs of the provision. His delegation had tried to achieve this through a definition of personnel, located in the two final paragraphs of the proposal. The delegation of Brazil proposed drawing a clear link between those people and the relationship of employment or maintenance by the armed forces of each State of duty. In relation to law enforcement, he noted that the core issue was the concept of the exclusivity of activity, *i.e.*, if someone was exclusively committed to the law enforcement activity, that person would be considered personnel of that law enforcement team. He noted that the delegation of Brazil was open to suggestions for improvement but observed that all supported the exclusion from scope of those issues.

104. **A delegate from Canada** expressed her delegation's strong support for this discussion. Canada supported deleting the square brackets and retaining the text of sub-paragraphs (n) and (o), particularly as this would remove a significant barrier to ratification for many States. She also expressed support for the proposal of the delegation of Brazil regarding the Explanatory Report.

105. **A delegate from Australia** expressed the support of its delegation.

106. **A delegate from the European Union** noted that his delegation had not initially seen this exclusion as necessary as it should be dealt with by the limited scope of civil and commercial matters. He nonetheless accepted this was a matter of concern for some delegations. The delegate accepted that sub-paragraphs (n) and (o) were sufficiently narrow and the delegation of the European Union could accept that. The delegation also accepted the proposal of the delegation of Brazil for the Explanatory Report. The delegation illustrated their position by picking up one of the examples that was in the draft Explanatory Report of someone driving a car and having an accident, while carrying out responsibilities in the context of an official function. The delegation of the European Union thought that in that context the employment status of the person driving the car did not play a decisive role; for that reason, clarification could be made. The delegate from the European Union clarified that the only reason that this statement was only in principle was that these provisions had always been discussed in conjunction with Article 2(4) and Article 20; if sub-paragraphs (n) and (o) were included then the other clauses were unnecessary. The final position of the delegation of the European Union would depend on whether the package was an outcome that the delegation could accept.

107. **A delegate from Switzerland** noted that the delegation of Switzerland was still unenthusiastic; the general rules on scope should be sufficient to exclude these issues. The delegate understood that some delegations preferred to explicitly exclude these matters, and that including the text would not be a deal-breaker for the delegation of Switzerland. Further, she acknowledged the Explanatory Report was not being discussed at that time but wished to note that this Convention was not making any rules about immunity; rather, these were rules about application. The delegate had reservations about anything that might suggest this were a statement about immunity

108. **A delegate from Japan** expressed understanding for concerns of all proponents and supported their proposals.

109. **A delegate from Serbia** accepted that these were provisions about application and not immunity. He agreed with the proposals.

110. **A delegate from Argentina** joined the delegation of Switzerland in their wish not to make any rule concerning immunities in this kind of Convention. However, she expressed uncertainty as to whether perhaps this was being done, either knowingly or unknowingly; she noted that this would become more relevant when attention turned to the proposal in Working Document No 31. For that reason, the delegation thought there needed to be more clarification as to what judgments would be covered. She agreed with the proposals of the delegations of Brazil, the Republic of Korea, Israel and the United States of America, because this goes to the issue that there is no uniform criteria for sovereign acts and commercial acts. This would provide clarity and, as the delegate from Canada had mentioned, remove obstacles to ratification. She also concurred with the European Union that any ultimate position would depend on the package of provisions, being Article 2(1)(n) and (o), and (4), and Article 20.

111. **A delegate from Singapore** supported the inclusion of sub-paragraphs (n) and (o), but noted that he would be slow to link Article 20 to this outcome, as it was potentially much broader than this paragraph; it could include, for example, international humanitarian activities conducted by government agencies that are not part of the armed forces or part of any law enforcement agencies. It was therefore important to have Article 20 for those activities.

112. **A delegate from Israel** thanked the delegations for their support for his delegation's joint proposal. He agreed with the delegation of Switzerland that this did not represent an intention to make a statement about immunity or to affect public international law. Regarding the relationship with Article 20, the delegation of Israel saw this as a completely distinct provision.

113. **A delegate from Uruguay** thanked all the proponents. Like the delegate from Switzerland, he wished to record a preference not to include sub-paragraphs (n) and (o) as they were already outside the scope of the Convention. Nonetheless, he noted that the delegation of Uruguay would not

oppose a consensus on this matter if it facilitated other delegations being able to join the Convention.

114. **A delegate from Canada** highlighted that while these matters were outside the Convention scope, the national law would still apply. This, she thought, reinforced the idea that no rules were being made with respect to immunity. The delegate also called attention to discrepancies in the language of the proposal of the delegation of Brazil and the text of the draft Convention in sub-paragraph (o). She noted an errant "their", which she believed should indeed be included, but had not been marked as a change. She simply wished to flag that matter for the consideration of the Drafting Committee.

115. **The Chair** clarified that the 2018 draft Convention said "including the activities of law enforcement personnel in the exercise of official duties", and sought confirmation from the delegation of Brazil as to whether the change "including the activities of law enforcement personnel in the exercise of *their* official duties" was intentional. **A delegate from Brazil** stated this was not an intended change. **The Chair** thanked the delegates and noted that the Drafting Committee could reflect based on the wording in Working Document No 19 and the draft Convention.

116. **The Chair** underlined the agreement in the room that nothing in these paragraphs should be seen as an attempt to affect immunities under public international law or the national law of any State. He recognised the discussions regarding whether these proposals should be considered as a package with Article 2(4) and Article 20. He accepted that Article 2(1)(n) and (o) might form a backdrop to those later provisions, but that it would not be necessary to defer decisions on these exclusions. He explained the reasoning for this, that the *inclusion* of these matters within the scope of the Convention would require consensus. Far from consensus to include there was an emerging consensus to exclude these matters, and from some a recognition that it was important to other delegations, which would mean removing the square brackets and retaining the text.

117. The Chair suggested that the Commission was in a position to make a decision on those provisions. He proposed adopting Article 2(1)(n) and (o) as set out in Working Document No 19. These provisions were adopted by consensus.

118. Conversation then turned to the Explanatory Report in relation to Article 2(1)(n) and (o).

119. **A delegate from the People's Republic of China**, still with respect to Working Document No 19, queried the difference in language used regarding activities of armed forces as opposed to activities of law enforcement.

120. **A delegate from the United States of America** explained that it was somewhat easier to delineate armed forces. The same demarcation was not possible for law enforcement activities as for armed forces.

121. **The Chair** recalled that this distinction had been explored at previous meetings, and hoped that the explanation had been helpful to the delegation of the People's Republic of China. He reiterated that this was a deliberate distinction in the language, and recorded that there were no proposals on the table to change it.

122. **A *co-Rapporteur*** requested confirmation from the Plenary that there was a final decision to include the two clarifications in the proposal of the delegation of Brazil in Working Document No 33. If so, he highlighted that the *co-Rapporteurs* were having some difficulty understanding the last part of the proposal. He observed that the proposal stated that there should be some clarification in this case that personnel should relate to law enforcement members that are exclusively committed to law enforcement activities. He was not sure whether "exclusively" has a particular meaning in this context, or if the *co-Rapporteurs* are asked to clarify that civil servants and all employees are also included. He sought guidance from the proponents.

123. **The Chair** observed, based on the interventions so far, that there had been broad sympathy for the suggestions in the Working Document that the provision should be read as extending to civilian employees if they fell within the language of those paragraphs. However, the sense was that the language in the proposal was not the correct method. The intention appeared to be to focus not on employment status and clothing worn but rather whether the activities fell within the meaning of the provision. He then sought confirmation from the Plenary.

124. **A delegate from the European Union** (chair of the informal working group on declarations with respect to judgments pertaining to governments) agreed with the Chair. He then drew the attention of the Plenary to Preliminary Document No 5 of April 2019, which had already made suggestions regarding paragraphs 59 and 60 of the Explanatory Report. As chair of the informal working group, he asked the *co-Rapporteurs* to take account of this report, as it comprised recommendations made by consensus of the members of the working group.

125. **A delegate from the United States of America** also noted some concern regarding the language of "exclusively committed", because working part-time did not make those people less linked to law enforcement.

126. **The Chair** asked the delegate from Brazil if there was a need for that language.

127. **A delegate from Brazil** confirmed that this terminology did have meaning for the delegation of Brazil. It was deliberate language to capture that there should be an exclusive relationship between the person and the activities carried out on behalf of the law enforcement function. He acknowledged that they had not considered those who might work part-time as protected by the exclusion. He suggested that the problem being considered was out of the exclusion as the personal activities of such people were not linked to the activity. He noted, however, that the delegation of Brazil was open to a suggestion from the delegation of the United States of America for other terminology for the links between the person and the activity, but wished to see consideration continue. For the delegation of Brazil the idea of exclusivity was important.

128. **The Chair** noted concern that the proposed language did not reflect the text that had been adopted. It was, he thought, quite clear that a part-time law enforcement officer engaged in the exercise of those official duties fell within the provision, regardless of what they did the rest of the time. He observed that what the delegation of Brazil was emphasising was the importance of the activities being in the exercise of official duties of a law enforcement person. Again, the Chair felt this was clear from the language of the Convention. The Chair again stated that the Plenary could only make "polite suggestions" to the *co-Rapporteurs* as they strove to make clear the importance of confining this exception to activities of law enforcement personnel when engaged in the exercise of their official duties, and

not when they might be off playing rock music in the evening, or even, he joked, undertaking policy work of the kind in which the Commission was presently engaged.

129. **A delegate from Brazil** agreed that for the time being this may be the extent of discussion. He requested that the delegation of Brazil be given leeway to prepare other suggestions through discussion outside the Plenary.

*Article 2(4)*

130. Attention then turned to Article 2(4), and Working Document No 31 from the delegation of Argentina, and Working Document No 26 from the delegation of Brazil regarding the Explanatory Report.

131. **The Chair** invited the delegation of Argentina to introduce the document.

132. **A delegate from Argentina** noted her concern regarding the current drafting of the Convention. She again raised the concern that this work should not be trying to change the rules of public international law concerning immunities. According to the scheme of the Convention there was an assumption of the restrictive theory of immunity in the sense that the definition or the distinction between a sovereign act and a commercial act is a distinction pertinent to the immunity of execution of States, and this was not the case. She stated that distinction was useful in discussions about immunity from jurisdiction (when a State can be taken before another court), but not enforcement measures. She explained that the rule under international law concerning enforcement was the rule of absolute immunity. She acknowledged that there were some national legislations that might have exceptions. She referred to work of the International Law Commission and the resulting 2004 United Nations *Convention on Jurisdictional Immunities of States and Their Property*. When dealing with measures of execution, which were dealt with in Article 19 of the Convention on Jurisdictional Immunities, three very narrow exceptions had been crafted: first, express consent of the State; secondly, which was related, when States allocated property to the satisfaction of a judgment; third, a specific aspect, assets related to the activity that led to the litigation, and that were in the State of the forum. The delegate highlighted that even the exceptions did not attract consensus, and the Convention has not entered into force even 15 years later. The only rule that stands is that of absolute immunity. In the 2005 HCCH Choice of Court Convention – from which Article 2(4) and (5) were derived – this distinction was relevant as there were jurisdictional issues, whereas in the draft Convention there was not the same rationale. The delegation was concerned that requested States would be unable to review whether an act was commercial due to the general prohibition of review of the merits in Article 2(4); the court of origin would already have decided whether a matter was commercial or not. The delegate reflected that under Article 2(4) review was not allowed, so the only available choice for Members would be to enforce or refuse on grounds of public policy. The problem, she highlighted, was that there was no uniform criteria for determining whether an act was commercial or not; further, litigants might seek to pursue their claim in a forum that recognised the commercial element and then seek enforcement elsewhere.

133. The delegate explained that for Argentina this was not just a theoretical point. Argentina had faced this first in the jurisdictional phase and then with the ensuing enforcement process. Argentina had faced enforcement for issuance of sovereign debt, and restructuring processes – which were clear sovereign administration – and management of pension funds of State agencies, measures taken by the Central Bank and monetary authorities. She recalled recent cases faced by other Members; Germany had filed suit against Italy in the International Court of Justice for not respecting the jurisdictional immunities of a State. In that case, Italy was trying to enforce a local court's decision and also decisions from Greece. Two years ago, the European Court of Justice had ruled on a preliminary issue due to a consultation request submitted by Greece. The delegate emphasised that this affected different States, not just Argentina.

134. She stated that in the interest of compromise, the delegation of Argentina had produced the proposal in Working Document No 31. The delegate acknowledged that this proposal was not Argentina's preference, but that her delegation had taken on the concerns of other delegations. She explained that this inclusion was intended to be consistent with the filters in Article 5. She emphasised that the scope of the Convention is private relationships, that it was not designed to tackle States; they had been included to avoid gaps in the Convention, but this should be done cautiously.

135. This would not affect access to jurisdiction. She explained that this would not rule out the possibility of judgments against States being enforced, as this could occur under national rules, but this Convention was not the appropriate place. Caution should be exercised to avoid creating unintended effects. The delegate flagged that this was a critical concern for Argentina, and that the delegation of Argentina had been accommodating of other delegations' concerns, and hoped they might receive the same flexibility.

136. **The Chair** reminded the room that the delegation of Argentina had expressed concern that the court addressed would not itself consider whether a judgment related to civil or commercial matters, but he reminded the Plenary that the adopted language in Article 4(2) critically includes consideration whether the judgment is or is not in scope. He recalled another important background assumption, that there was a similar provision in the 2005 HCCH Choice of Court Convention. That Convention dealt with jurisdiction, but also deals with recognition and enforcement. The Chair felt that it was reasonably clear that recognition and enforcement were not excluded by the mere fact that a State was a Party in the context of the 2005 Convention as well. He encouraged the room to bear in mind that there were no proposals at that stage to modify Article 2(5), which makes clear that nothing in this Convention affected privileges and immunities of States or organisations in respect of themselves, and of their property. As such, immunities from execution were not affected by anything in this instrument. He encouraged the room to bear these facts in mind as they embarked on this conversation.

137. **A delegate from Mexico** thanked the delegation of Argentina for raising the concern, and expressed broad support for the proposal. However, he clarified that the delegation of Mexico could not support the second part of the proposal of the delegation of Argentina that: "This exclusion does not apply to proceedings to which an enterprise owned by a State is a party." The delegation saw it as materially impossible to determine when an enterprise owned by a State was a party or not.

138. **A delegate from Peru** expressed support for the proposal of the delegation of Argentina.

139. **A delegate from the Russian Federation** supported the proposal of the delegation of Argentina. The delegate suggested that it might be better to exclude this paragraph, leaving only paragraph 5. Her concern was that paragraph 4


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looked like an invitation for judges to hear the cases with participants of governments and governmental agencies. She noted that this was merely a point for consideration

140. **A delegate from Israel** fully supported the proposal of the delegation of Argentina, but thought it was important to emphasise this was not an alternative to their proposal for Article 20 in Working Document No 18 as well as the proposal regarding sub-paragraphs (n) and (o).

141. **A delegate from the United States of America** expressed that his delegation could not support the proposal as it stood, while the points raised were extremely salient. He added that the current text had been developed since the 1990s, and was the result of a lot of very extensive and delicate consideration both on direct jurisdiction and the indirect jurisdiction side. He thought that the text had become generally accepted and hopefully would work well. He also noted that the delegation of the United States of America perhaps did not share the understanding of public international law on immunities from enforcement, as was stated by the delegate from Argentina. However, as had been noted there was a very explicit preservation of immunities in this text, so that would be applied by national courts. Nevertheless, the delegate expressed sympathy for the importance of this issue to the delegation of Argentina and perhaps others, and stated that his delegation wished to consider whether there were alternative mechanisms that might be available to provide further assurance to the delegation of Argentina without necessarily altering the current text of Article 2(4).

142. **A delegate from South Africa** expressed their support for the proposal of the delegation of Argentina.

143. **A delegate from Uruguay** suggested pragmatism should be encouraged here. He thought the current wording was sufficient, but understood the concerns and the need to seek the best language. He noted that the delegation of Uruguay would not oppose a consensus if one could be found, or would be open to alternative measures.

144. **A delegate from the European Union** recalled that the delegations of Argentina and the European Union saw this provision as part of a package linked to Article 2(1)(n) and (o); however, their position beyond that differed greatly. The European Union would not support Working Document No 31. He noted that his delegation had accepted Article 2(1)(n) and (o) as they were very narrow exclusions from scope, but that this did not sit well with Article 2(4) making a blanket exclusion, in principle, for all activities where States have been parties to litigation. Throughout consideration of this topic, the delegate pointed out that there had been discussions regarding whether there should be narrow or broad exclusions or whether there should be a declaration mechanism. The delegate echoed the Chair's comments that Article 2(4) and (5) had to be read together so that would comprise a full concept of protection, State privileges and immunities. As the delegation of the United States of America had observed, the delegation of the European Union did not subscribe to the view that the delegation of Argentina had expressed on how the concept of immunity should be interpreted, against the background that there is no uniform view on how this should be seen.

145. The delegate encouraged delegations to bear in mind that whenever someone submits a judgment for recognition and enforcement under this Convention, it would be for the requested State to see in which fashion it applied Article 2(5). While the delegate saw uniformity in that respect he preferred a restrictive view. The delegate observed that the combination of paragraphs 4 and 5 in the draft Convention was not so different from the proposal as national law would still decide whether recognition would take place. He also expressed hesitance in departing from the 2005 HCCH Choice of Court Convention. He acknowledged the importance of the issue for the delegation of Argentina and noted that indeed European countries had been confronted with these problems and it would be preferable to deal with those specific problems rather than creating a blanket statement through the Convention. He provided an example from the European Court of Justice in a situation similar, if not identical, to what the delegation of Argentina had raised, being the replacement of sovereign bonds in a financial crisis situation by other bonds of a much lower nominal value. In that respect, the European Court of Justice had decided that the intervention to replace those bonds was clearly outside the scope of civil and commercial activities. He suggested that it would be possible to provide explanations and clarifications on specific problems.

146. In light of the time needed for the informal working group on immovable property and tenancy, and it being past 1.00 p.m., the Chair called the meeting to a close, to resume at 2.30 p.m.

147. The meeting was closed at 1.15 p.m.

## Procès-verbal No 6

## Minutes No 6

*Séance du jeudi 20 juin 2019 (après-midi)*

*Meeting of Thursday 20 June 2019 (afternoon)*

1. La séance est ouverte à 14 h 40 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

*Article 2*

2. **The Chair** asked delegations wishing to speak on this issue (Art. 2) to raise their signs.

3. **A delegate from Switzerland** thanked the delegation of Argentina for its proposal contained in Working Document No 31. The delegate from Switzerland understood the concerns behind the proposal and agreed they should be suitably addressed. However, for the reasons laid out by the Chair, the delegate from Switzerland was quite concerned by the way in which the proposal dealt with the matter because it potentially created a serious imbalance in the structure of the Convention.

4. **A delegate from Korea** aligned with the delegations of the European Union and Switzerland and raised a practical point: it could be arbitrary and unpredictable to leave this to the consent of the State. While understanding the concerns, the delegate suggested that this could be resolved through other provisions. Therefore, the delegate hesitated from expressing a positive position with respect to the proposal.

5. **A delegate from Japan** thanked the delegation of Argentina and expressed sympathy with the delegation's concerns. The delegate raised two points. First, the delegate understood that the Convention does not affect the immunities of States, especially with respect to enforcement. A requested State may choose not to enforce a judgment which, from its point of view, infringes privileges and immunities, to the extent it concerns enforcement. In that light, the delegate did not understand there to be a problem for the delegation of Argentina even if its proposal were not adopted. The delegate's second point related to the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (hereinafter, "2004 Immunities Convention") to which Japan is a Contracting State. The delegate highlighted that there are quite a lot of matters for which State immunity is not allowed. To better understand the delegation of Argentina's concerns, the delegate from Japan suggested discussing individual matters for which immunity posed a problem, and perhaps reflecting these specific concerns in a new ground of refusal (*e.g.*, a specific matter relating to proceedings to which a State is a party), or an exclusion of specific matters (for example, Art. 2(1)(n) or (o)). The delegate expressed sympathy with the concerns of the delegation of Argentina and his desire to consult further on the issue.

6. **A delegate from Singapore** aligned with the views of the delegations of the European Union and Switzerland. The delegate considered there to be no consensus on how to treat a government party when it acts in its role as government or in a commercial manner. The delegate emphasised that that is why the complex question is dealt with under Article 20. The delegate considered that the proposed approach had the effect of excluding all judgments against governments, thereby creating an imbalance in the text of the Convention. The delegate considered the issue to be better dealt with by individual States via Article 20.

7. **A delegate from the People's Republic of China** thanked the delegate from Argentina and expressed sympathy for their concerns. However, the delegate from the People's Republic of China concurred with the delegations of the European Union and the United States of America. The delegate highlighted two concerns. First, the delegate stressed that a private international Convention should not purport to affect public international rules or principles. The delegate referred to the 2004 Immunities Convention, which also reflected a kind of international law concerning immunity. The delegate considered that Article 2(4) as modified by Working Document No 31 clearly bears customary international law implications that are agreed by some States and not by others, like the European Union, and they would not agree that this absolute immunity applies everywhere. First, the delegate observed that everyone in the room agreed that the present Convention is a private international law Convention, for which delegates did not try to make rules of public international law. The delegate recalled that the issue of immunity had been delicately debated and agreed upon during the negotiations of the *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 HCCH Choice of Court Convention"). The delegate stated that paragraphs 4 and 5 should be read together: paragraph 5 clearly shows that the international law concerning immunity will not be affected. The delegate highlighted that this best accommodated both the States who insist upon absolute immunity, and States who insist upon a limited or restrictive immunity. It simply mentions the rules, without specifying which of the rules apply. The text of paragraph 4 in the draft Convention also accommodates those States which want absolute immunity and those which prefer restrictive immunity. Reading the current draft of paragraph 4, it is only mentioned that the judgment is not excluded from the scope of the Convention by the "mere fact" that a State is a party to a judgment. This could be decided by the respective States themselves. The delegate highlighted that this enables respective States to conclude for themselves whether they would apply the Convention or not: again, accommodating the will of both sides. Yet, the proposed text of paragraph 4 in Working Document No 31 reflected only the rules of absolute immunity. The delegate highlighted that the People's Republic of China is also a signatory to the 2004 Immunities Convention and, for that reason, it was difficult to accept the first paragraph, and more difficult to accept the second. It was not clear to the delegate why a State-owned enterprise needed to be mentioned, given that the first paragraph only mentioned the government. If a State-owned enterprise were acting as the State, then it would be captured by the word "government", thus it is not logical and reasonable to include the second paragraph. For those two reasons, it was difficult for the delegation of the People's Republic of China to agree with Working Document No 31.

8. **A delegate from Sri Lanka**, whilst not specifically identifying with the wording of the proposal, identified with the problem raised by the delegation of Argentina. The delegate recalled that the Chair had considered the immunity provision in Article 2(5) to be adequate. However, the delegate emphasised that a State actor is not a commercial actor, and that State property is held in trust for the entirety of the country and it therefore bears a different complexion. Given there is no uniformity in application nor understanding as to the legal import of an immunity defence, it would be dangerous to allow State property to be subject to the vagaries of interpretation before a local court. As to the suggested adequacy of Article 20, the delegate only understood that the Article would apply if the affected State court were engaged in the matter. But if the State were subject to proceedings in a third State, Article 20 would not have any application and therefore its protections, if any, are inadequate. The delegate repeated her sympathy for the legitimate concerns of the delegation of Argentina and indicated her willingness to address a solution, even if the particular wording were not acceptable.

9. **A delegate from Ukraine** stated her delegation's support to the proposal of the delegation of Argentina, and noted that Article 20 should be drafted consistently with Article 2, if adopted. The delegate suggested that discussing them in conjunction may assist in resolving the issue.

10. **A delegate from Norway** expressed reluctance for the proposal in Working Document No 31. The delegate was concerned that permitting such a significant carve-out from the Convention would make it less attractive for States to ratify. The delegate considered this to be the limit of carve-outs and, while expressing sympathy for the concerns of the delegation of Argentina, expressed the desire for it to be resolved in a narrower fashion. The delegate hoped there could be agreement upon language to that effect.

11. **A delegate from Israel** emphasised that the application of the Convention to proceedings to which States are a


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party was important for the delegation of Israel. The delegate appreciated that there were strong feelings on either side of the debate but that, in the spirit of compromise and in an attempt to find a pragmatic solution, where strong feelings are expressed for the exclusion of a matter from scope, the balance should tip towards a more restrictive approach. A sweeping rule would present a major obstacle to Israel joining the Convention. It was worth repeating that an overly rigid approach could deter States from joining the Convention at all, undermining the effect the Convention seeks to achieve. The delegate emphasised that flexibility is required for the Convention to have a truly global reach, and considered that at the bottom line there needed to be some kind of mechanism to exclude the application of the Convention to proceedings to which a State is a party. The delegation of Israel preferred the approach under Article 20, which enabled the exclusion to be tailored. However, failing that, the delegate preferred a broader exclusion than that reflected by the proposal by the delegation of Argentina.

12. **A delegate from Chile** considered it reasonable to exclude judgments from scope where States, governments or other State agencies were party to the proceedings. As currently drafted, the delegate believed the clause could jeopardise the success of the Convention and for the same reason supported its exclusion.

13. **A delegate from Argentina** sought to respond to the various observations offered by States, summarise the issues, and explain why the delegation of Argentina maintained its position. First, as to the position that Article 4(2) would enable review if it were a civil or commercial matter, the delegate assumed on good faith that this was permitted on a reading of the current text. The delegate emphasised that, if there were disagreement as to that assumption at this stage of negotiation, imagine the problems a judge would face in applying the Convention having not participated in the Session. She suggested clarification on this point was needed. Secondly, the delegate highlighted that the 2005 HCCH Choice of Court Convention concerns recognition and enforcement. However, she distinguished the application of the 2005 Convention as deriving from a position of consent by a State, given that it looks to where a choice of court agreement has been concluded. On the other hand, the current draft Convention concerns enforcement in situations where there has been no consent; thus, the rationale is different because the scope of the draft Convention is broader. The delegate offered an intellectual point of clarification, in that her main concern was with "enforcement" and not recognition as such. She highlighted that rules are different in this respect. Nonetheless, the Convention applies to both recognition and enforcement and perhaps the application of the Convention required fine-tuning in that respect. Thirdly, the delegate emphatically agreed that Article 2(4) must be read in conjunction with Article 2(5). However, she maintained that the conjunction does not sufficiently address her delegation's concerns. She emphasised the need for Article 2(5) to remain in the text, as it is, especially because it was necessary to respect all the special categories of property that are recognised under State immunity. The current text of Article 2(5) was consistent and coherent with the proposal of the delegation of Argentina. Fourthly, the delegate agreed that the Convention concerned private international law. However, the nature of the instrument to be created is of a public international law character, governed by public international law rules and susceptible to the operation of the *Vienna Convention on the Law of Treaties*. The delegate explained that the rule in customary international law is for absolute State immunity regarding enforcement (although she acknowledged that some States depart from this rule). However, to the extent that States agree to a Convention containing rules concerning enforcement (*i.e.*, where States consent to enforcement in civil or commercial matters), then that Convention, concluded later in time, would be interpreted as supplanting the customary international law rules amongst the Contracting States. The delegate emphasised that it was never foreseen nor intended to change the rules of States' immunity, and yet the Convention would have that impact. And then further, Article 2(5) would have the effect of preserving immunities. Fifthly, the delegate addressed the disparate national positions concerning States' immunity. The delegate considered that Article 16 already foresees the application of national law, and that a State with its own laws on immunity should apply them. She stressed that her delegation's proposal does not purport to take this ability away from States. Finally, the delegate expressed her thanks to the delegations for hearing her delegation's concerns and for their willingness to continue the debate, even if they could not accept the drafting.

14. **A delegate from Japan** said that, he may be wrong, but a choice of court agreement referred to an agreement on jurisdiction to adjudicate. This meant that a choice of court agreement does not entail an agreement for enforcement in the requested State.

15. **The Chair** shared this understanding. The Chair highlighted that there are three distinct concepts in play: recognition, enforcement, and execution against the property of a State. These are completely different topics and the Chair stressed the need for caution and precision in this conversation.

16. **A delegate from Switzerland** agreed with the Chair and emphasised that the Convention is not about immunity from execution. Nothing could be clearer than Article 2(5) in this regard: nothing in the Convention should affect privileges and immunities of States in respect of themselves and their property, including their immunity from execution.

17. **The Chair** emphasised that the Convention is asymmetric in this respect, because a State has immunity from execution in respect of its property, but if a State succeeds in a judgment against another party and seeks to enforce it elsewhere, the question of enforcement raises no concerns at all. The Chair noted that the conversation needs to be taken forward outside the Plenary.

18. **A delegate from the People's Republic of China** aligned his position with the delegate from Switzerland. From the perspective of the delegation of the People's Republic of China, Article 2(5) is exactly what the delegate from Argentina had requested. Indeed, it could be overly protected by paragraph 5 and not paragraph 4. The delegate agreed with the delegate from Argentina: according to public international law, the enforcement against State assets is difficult. However, Article 19 of the 2004 Immunities Convention clearly states it is not impossible. The delegate remarked that it was not the intention of paragraph 4 to interfere with the absolute immunity under the 2004 Immunities Convention. The delegate reiterated that this Convention, on private international law, should not purport to alter another immunity Convention's rules: the 2004 Immunities Convention clearly enacts rules to deal with recognition and enforcement relating to States and their property. If the new paragraph in Working Document No 31 were introduced, it would displace the traditional absolute immunity rule. The delegate emphasised that the international community had defined its position on the issue of immunities in 2004, and that the States which participated in that proc-

ess, including the People's Republic of China, had adopted that approach. For such States, the proposed version of paragraph 4 was not acceptable. At the same time, the delegate emphasised that paragraph 5 was more than enough and could guarantee rights: under it, nothing affects the privileges and immunities of States, and so a State could insist upon its own rules of immunity. The delegate reiterated that nothing in the Convention affects States' immunities, including government agencies in the sense that they are States.

19. **The Chair** highlighted a few threads emerging from the discussion. First, almost every delegation had expressed sympathy for the concerns raised by the delegation of Argentina and the importance of meaningfully addressing those concerns: the question was whether this had been already done. Secondly, the Chair thanked the delegate from Argentina for her helpful summary and explained that excluding all aspects of recognition and enforcement probably overshoots the mark. If there were to be a change to the text to accommodate concerns, it would need to be more tailored. Rather than making a decision as to how to do this, the Chair suggested continuing the discussion of Article 2(4) and (5) in conjunction with Article 20, given their interlinking operation as highlighted by some of the delegates. Directing the Plenary to Article 2(5), the Chair noted he had no proposals as to the text of Article 2(5). In the absence of suggestions to the contrary, and in the presence of nodding from the delegates, the Chair concluded Article 2(5) was adopted by consensus. He noted this provided a helpful platform for the continuation of the conversations.

20. **A delegate from Israel** addressed paragraph 73 of the Explanatory Report concerning Article 2(5). The delegate pointed out for the record that, if it were a substantive issue, the delegate would not insist upon its inclusion but that the position of the delegation of Israel was that the wording of the third sentence in paragraph 73 of "State officials" should also extend to the privileges and immunities of "current and former" State officials. The delegation did not consider this position to be clear from the text.

21. **A delegate from Switzerland** referred to paragraph 74 of the Explanatory Report. There, and at other points, the language used was that the draft Convention will not apply in certain cases where State immunity kicks in. However, the delegate did not consider this to be a case of "non-application" or "non-applicability", but that immunity operates on a different level.

22. **The Chair** noted nodding from the *co-Rapporteurs*, before directing the discussion to Article 20.

*Article 20*

23. **The Chair** expressed his excitement to discuss Article 20. The relevant documents were Preliminary Document No 5, the Report from informal working group IV on declarations with respect to judgments pertaining to governments, and Working Document No 18 co-sponsored by the delegations of Israel and the People's Republic of China. The Chair invited the chair of informal working group IV to address the Plenary.

24. **The chair of informal working group IV** thanked the hosts in Hong Kong and the People's Republic of China for welcoming the working group to discuss Articles 2 and 20 earlier in the year. The chair of informal working group IV noted that Preliminary Document No 5 sets out various options for revision to Article 20. The States attending the informal working group were not in a position to agree upon a text. However, as is apparent from the Preliminary Document, the text with strongest support was option 1. Option 1 had a simple statement in paragraph 2 that "[a] declaration pursuant to paragraph 1 shall not extend to civil or commercial activities of an enterprise owned by a State". While the approach did not meet with consensus, it was the proposal that most attending States favoured. Nonetheless, the chair of informal working group IV noted other interesting ideas contained in options two and three, which he suggested States may wish to discuss. The chair of informal working group IV also noted the good progress with respect to paragraph 3: there had been agreement amongst the attending States as to suggested text replacing current paragraph 3. The proposed new text was seen to usefully clarify the effects of making a declaration.

25. **A delegate from Israel** introduced the proposal contained in Working Document No 18. The delegate thanked again the chair of informal working group IV and joined in thanking the gracious hosts from the People's Republic of China and Hong Kong. The most important thing emerging from the meeting, as the delegate understood, was that there was preliminary agreement as to the policy of Article 20. The only issue the delegate considered to be not agreed upon was the phrasing of Article 2. First, the delegate considered Article 20 should adopt a middle ground, compromised approach (especially in light of the proposal from the delegation of Argentina). The delegate acknowledged that, on the one hand, Article 2 does not provide full protection. Joining agreement with the delegate from Sri Lanka, the delegate from Israel considered it did not resolve issues of enforcement outside of jurisdiction by a State against a State. The delegate emphasised that this was an important issue for the delegation of Israel, but understood that it would be difficult to garner consensus on this point. On the other hand, the delegate considered Article 2 addressed other concerns. For example, most of the property of a State is usually situated within the State, not outside it (at least for States like Israel). Further, if the property in question is consular or diplomatic property, it will be protected from execution, thereby dealing with concerns of other States. Secondly, the delegate highlighted how his delegation had demonstrated flexibility on this important issue. The delegation of Israel had examined its various positions, throughout the Special Commission meetings, and had adapted its position in a spirit of compromise. The delegate recalled that compromise would lead to a successful Convention with broad accession. The delegate appealed to other States to demonstrate flexibility and reiterated the willingness of the delegation of Israel to work with everyone to submit a proposal to reflect everyone's concerns on such an important issue. Looking to the proposal, there appeared to be two options. The first option, preferred by the delegations of Israel and the People's Republic of China, would be no reference to State-owned enterprises. The delegate was not convinced as to how this presented a risk. The delegate did not believe States would seek to abuse the declaration in order to also include State-owned enterprises. From the experience of Israel, in many cases State-owned enterprises do not share the interests of a State. Indeed, the delegate remarked that Israel is in litigation with several Israeli State-owned enterprises. However, if this view did not garner popular support, the delegations of Israel and the People's Republic of China proposed a second option to make clear that a declaration could be made regarding State-owned enterprise where the State-owned enterprise acts "in the name of" the State. The phrase "in the name of" was chosen because, during informal meetings, there emerged an issue with the wide phrasing of "on behalf of". This was a proposal of the *co-Rapporteurs* on the understanding that the phrase worked in French. The delegate from Israel extended his great appre-


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ciation to the People's Republic of China as co-sponsor, in acknowledgment of its strong position against including State-owned enterprises. The delegate from Israel truly appreciated their flexibility and support upon such a sensitive issue. The delegate from Israel saw this as a great advancement from prior discussions of Article 20. The delegate expressed hope for consensus upon the principle, noting that some States may have an issue with the phrasing "in the name of". For the delegation of Israel, the language did not represent an important obstacle. Rather, the key point was the inclusion of something like Article 20 in the Convention. If it were not, Israel would not join the Convention. The delegate reiterated his call to other delegations to respect the importance of the issue.

26. **A delegate from the People's Republic of China** thanked the delegate from Israel. If Article 20 were kept, the delegate emphasised the need to address conflict between paragraphs 1 and 2. According to Article 20, a person acting on behalf of the State includes a natural or a legal person. The delegate explained that legal persons include State-owned enterprises and yet, paragraph 2 substantially excludes State-owned enterprises from legal persons. The delegate considered that the report of the informal working group in Preliminary Document No 5 did not address this conflict. Like other legal persons, a State-owned enterprise is an independent legal person. The delegate queried: If other legal persons could act on behalf of a State, why could a State-owned enterprise not do so? There appeared to be no reason to exclude State-owned enterprises from paragraph 1 and therefore the delegate proposed to delete paragraph 2 from option 1. On the other hand, and in the spirit of compromise, the delegate could accept option 2 which it considered to refer clearly and precisely to when an enterprise is not acting "in the name of" the State, or "in the name of" a government. As for the wording "on behalf of" or "in the name of", the delegation of the People's Republic of China could be flexible as to whatever achieved consistency in English and French. The delegate expressed his willingness to continue discussion with delegations.

27. **The Chair** sought clarification from the co-sponsors. First, informal working group IV had a suggested text replacing the current paragraph 3, for which the chair of informal working group IV had indicated broad agreement. However, this is not the text used in the co-sponsored Working Document No 18. The Chair queried whether this was a deliberate choice: Were the co-sponsors satisfied with paragraph 3 proposed by informal working group IV, or was its omission from Working Document No 18 a conscious indication to a preference for the old text?

28. **A delegate from Israel** indicated no conscious desire on the part of the delegation of Israel, noting that the text was prepared on its initiative.

29. **A delegate from the People's Republic of China** agreed that the wording proposed by informal working group IV for paragraph 3 was fine. The delegate also repeated that option 1 in Preliminary Document No 5 did not address the concerns of the delegation of the People's Republic of China.

30. **The Chair** concluded that the proposed paragraph 3 in Preliminary Document No 5 should be the focus of discussion. The Chair then addressed the phrases "on behalf of" and "in the name of". The Chair was reminded by reading Article 2(4) that both the Special Commission and the proposal of the delegation of Argentina had referred to a person "acting for" a State. The Chair sought further clarification from the co-sponsors: Was this a deliberate choice, or did it reflect again an agnostic approach towards language?

31. **A delegate from Israel** clarified that "in the name of" resulted from discussions in the working group concerning compatibility with the French language. The delegate suggested the *co-Rapporteurs* may be able to elaborate. His understanding was that "on behalf of" translated into French is "in the name of", and that there was broad initial agreement that "in the name of" would satisfy most delegations, hence why it was chosen. The delegate indicated that, if the Chair's questions were directed to the acceptability of "acting for", then the Israeli delegation is fine with that, too.

32. **The chair of informal working group IV** sought to clarify that the language was not discussed in Hong Kong, and that the position arose in a different meeting not of the working group.

33. **A *co-Rapporteur*** emphasised that, in European law, there is an important difference between "in the name of" and "on account of". When someone acts "in the name of" another party, for example A acts "in the name of" B and enters into a relationship with a third party, the relationship is between B (the principal) and the third party. If A acts in the name of B, there is a direct legal relationship between the third party and the principal B. Whereas if someone acts "on behalf of" a party (*i.e.*, the intermediary acts in its own name, but in the interests of the principal), then a legal relationship is established directly between the agent A and the third party. In private law in many European countries, this difference is relevant. The *co-Rapporteur* emphasised that it is important to clarify in the Explanatory Report whether delegates intend "in the name of" and "on behalf of" to have the same meaning, or whether they actually and technically have different meanings.

34. **The Chair** thanked the *co-Rapporteur* for his helpful explanation and sought clarification as to whether "acting for" a principal also has a particular meaning.

35. **A *co-Rapporteur*** explained that "acting for" implies the intermediary is "acting on behalf of" the principal; that is, it acts in its own name but in the interests of the principal. Technically, the difference is between "in the name of" and "on behalf of". The *co-Rapporteur* explained that a clear difference exists in Spanish law and foreshadowed that there might be a difference in the French language between the words "*au nom de*" and "*pour le compte de*".

36. **The Chair** turned to a discussion of the proposal in Working Document No 18.

37. **A delegate from the European Union** thanked the delegations of the People's Republic of China and Israel for the Working Document. The delegate noted that the delegation of the European Union had participated in the efforts to find an acceptable solution. The delegate emphasised this is a matter of grave concern, which the delegation of the European Union considers to be one of the thorniest issues in the Convention. The starting point is that the European Union has never been a friend of, indeed it has been opposed to, any solution proposed in Article 20. This is the starting position and conviction of the delegation of the European Union. The delegate elaborated that, in principle, whenever a State is party to a relationship, either there is an exercise of public authority (outside the scope of the Convention) or the State behaves like any other party in a civil or commercial relationship, in which case it should fall within the scope of the Convention subject to the rules of State immunity discussed earlier. In that respect, it was

difficult to approach the topic as permitting a State, within a purely commercial and civil relationship, to apply the Convention to everyone else in a civil or commercial relationship but exempt itself from such application. The delegate acknowledged this was a difficult starting point, and that the delegation of the European Union had not changed its opinion in that respect.

38. However, when efforts towards compromise were made in acknowledgment of the concern of other delegations, the delegate had stressed that any consideration of anything along the lines of Article 20 would have to be predicated on the firm principle that any declaration mechanism should not be available for State-owned enterprises. The delegate explained that that was the understanding upon which paragraph 2 was drafted. The reason for this – and here the delegate disagreed with the delegate from Israel's view that there was not a problem – was that the European Union saw a serious risk that this could lead to an economically unbalanced situation in the relationship between different Contracting States. If there were uncertainty, or a possible loophole, to declare the activities of State-owned enterprises "out" of the Convention, then the relationship between two Contracting Parties may be severely affected.

39. The delegate explained that the imbalance arises where a large part of the economic activities and GDP of one of the Contracting States is comprised by the activities of State-owned enterprises, whereas for other States (including the European Union Member States) the percentage of commercial activities deriving from State-owned enterprises is marginal. The delegate stressed that this was why the delegation of the European Union insisted upon a fool-proof safeguard that State-owned enterprises would not benefit from any such declaration mechanism. This brought the delegate to the difficulty. The delegate recalled the disagreements in formulating a fool-proof mechanism that clearly and simply states that the declaration is not available to State-owned enterprises. A formulation stating that the declaration was not available to State-owned enterprises in civil or commercial activities was not accepted in the discussions. However, the delegate explained that as the discussions moved away from this formulation and introduced qualifications, everything depended upon what those qualifications actually meant. What did "acting for", "on behalf of", "in the name of", "on account of", actually mean? The delegate recalled that the original wording "on behalf of" could be read in many different ways. It could be narrow, but on the other hand it could be broadly read to include every instance in which a State-owned enterprise is engaged in civil or commercial matters somehow related to a public interest. The delegate gave the example of the construction of infrastructure, for example roads and airports, which is clearly in the public interest. If a State-owned enterprise engaged in the construction of highways or airports, with no exercise of sovereign authority anywhere in sight, could that enterprise nonetheless be seen as acting "on behalf of" a State because the activity is related to a public interest? The delegate observed that the exchange amongst the delegates, *co-Rapporteurs* and the Chair this afternoon had elucidated the difficulties concerning the language: "in the name of" was not universally understood, and it did not provide the guarantee that the delegation of the European Union required to even approach an Article 20 solution. Reading paragraphs 1 and 2 together from Working Document No 18, the language appeared to be circular to the delegate: it permitted an entity (including a State-owned enterprise) that acted "in the name of" a State to make a declaration, unless that entity was a State-owned enterprise. This did not provide a limitation because it was already apparent from paragraph 1.

40. The delegate then turned to the concerns, expressed by the delegate from the People's Republic of China, that a contradiction may be created in paragraph 1(a) if paragraph 2 simply stated that the mechanism was "not available" to State-owned enterprises in civil or commercial matters: that is, that under paragraph 1(a) a person acting "on behalf of", "in the name of" a State could be the subject of a declaration, and a person could also be a legal person. The delegate from the European Union understood this in a technical sense and suggested the policy might have been to permit some persons to make a declaration whilst not permitting this to State-owned enterprises. However, the delegate emphasised that this would still entail different treatment for State-owned enterprises. In that sense, the delegate from the European Union suggested that the concerns of the delegation of the People's Republic of China could be easily resolved: by not allowing any legal persons, who are not the State itself or a government agency, to benefit from a declaration. The delegate said this would produce completely equal treatment between State-owned enterprises and other completely private enterprises. Finally, the delegate welcomed the flexibility of the other delegations concerning the contribution of the delegation of the European Union to the reciprocity mechanism in paragraph 3 of Article 20.

41. **A delegate from the United States of America** thanked the proponents of Working Document No 18 for the proposal and expressed support for a declaration mechanism by which each State Party could declare it will not apply the Convention to judgments to which its agencies, or any person acting as an agent of the State or its agencies, is a party. The delegate reflected that this was a targeted approach, of limited application, where a broader approach could have been taken by addressing the issues in Article 2. The delegate was reminded by the delegate from the European Union that it would be a sovereign decision to exclude the application of the Convention to judgments against the State. So it may not be inappropriate at the State level that States are able to decide the Convention will not apply to them. The delegate agreed with the delegation of the European Union in that it creates asymmetry. However, the delegate also noted other concerns and the need to accommodate them to achieve the broadest possible accession. Turning to the draft Convention and Working Document No 18, the delegate considered there to be definitional issues, including the phrase "in the name of" which the delegation of the United States of America had difficulty in understanding. The phrase seemed to the delegate to be addressed to an agency relationship. The delegate considered that there needed to be a degree of limitation. He thanked the Chair for highlighting nuances of language, concerning the phrase "acting for" in respect of Article 2(4), and observed that this formulation was also utilised in Article 2(5) of the 2005 HCCH Choice of Court Convention. If the terminology were considered to be the same, then there should be consistency with that instrument. If there were a particular meaning to be given to that term, the delegate hoped for wider jurisprudence to understand what it entailed. The delegate reiterated that it hoped the phrase referred to a relationship of agency. The delegate expressed willingness to discuss paragraph 2, whether there was a paragraph 2 or not. Were it included, the delegate anticipated a degree of complexity in determining what is a State-owned enterprise, which would present issues for implementation and application. On the other hand, the absence of a reference could present political or diplomatic issues. The delegate from the United States of America indicated his willingness to discuss further. The delegate summarised that the delegation of the United States of America supported Working


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Document No 18 as a basis for discussion and resolution of the issues in a targeted manner.

42. **A delegate from the People's Republic of China** thanked the delegation of the European Union. As it has reiterated again, the delegation of the People's Republic of China does not see anything meaningful in Article 20 as a whole, whereas other States do. What is important to the delegation of the People's Republic of China is the understanding that a logical, legal consistency needs to apply to legal persons. The delegate considered that the State-owned enterprise, if it is to have separate legal status, if it can sue and be sued, then it is a purely commercial entity and should be thought of as a commercial entity equally with other legal persons. The delegate highlighted that this is the only reason the delegation of the People's Republic of China did not agree with the original paragraph which excluded State-owned enterprises from making this kind of declaration. However, this does not mean that the delegation of the People's Republic of China insisted upon a State-owned enterprise having the ability to make a declaration on the condition that all other legal persons are not able to make that kind of declaration. As to leaving all legal persons out of making a declaration, if that is the proposal of the delegation of the European Union, then it was acceptable to the delegation of the People's Republic of China. For the delegate, "person" meant any other person, enterprise or entity other than government agencies or the government itself. The delegate acknowledged that a great portion of China's GDP is produced by State-owned enterprises but stressed that it does not want State-owned enterprises to enjoy the immunities of a State, because they are private legal persons. The delegate indicated this could be an avenue for possible solutions between the delegations of the European Union and the People's Republic of China.

43. **The Chair** thanked the delegations and adjourned for a coffee break, noting that discussions should conclude at 5.00 p.m. to enable the informal working group on final clauses to convene.

44. **Le Président** rappelle qu'il ne reste qu'une demi-heure à la Plénière. Il donne ensuite la parole à la Suisse.

45. **A delegate from Switzerland** thanked the delegation of the People's Republic of China for Working Document No 18 and further shared the concerns expressed by the delegation of the European Union in this regard. Without repeating them, she noted that the area of immunity and the exclusion of law enforcement activities according to Article 2(1)(o), among others, should be sufficient. She observed that it should not be possible to declare out of the scope of the draft Convention for purely commercial activity, regardless of whether that activity was carried out by enterprises with a separate legal personality, which was not the only potential way in which purely commercial activity can be carried out. She further recalled that her delegation had very grave concerns about this.

46. **A delegate from Canada** stressed the importance of focusing on the main purposes of the draft Convention, namely, to increase the circulation of judgments in civil and commercial matters. She recalled that most judgments in civil and commercial matters do not involve States as parties. In Canada's view, there was no objection to Article 20 that would allow a State to opt out for civil and commercial judgments. She understood that the absence of such a provision could be an obstacle to ratification by some States. Canada could go along with this in the interest of having more State Parties and thereby allowing greater circulation of civil and commercial judgments, even if State judgments did not circulate. In that context, there were not that many discrepancies between the text of the draft Convention and the proposal, such that the Diplomatic Session simply needed to make clear what the discussion was about and to make sure that the language used properly expressed what the Plenary was trying to capture. She further pointed out that it was essential to have a provision preventing governments from taking their enterprises completely out of the scope of the draft Convention. Apart from this point, she was willing to discuss possible variations.

47. **A delegate from Norway** thanked the delegation of the People's Republic of China for its proposal. As was the case with Article 2(4), the delegation of Norway was concerned about the possibility that all State agencies and enterprises could be excluded from the scope of the draft Convention. However, she thought that it was clear with Article 2(4) and States' immunity that only civil and commercial matters are covered. However, she noted that she was willing to render this more clear since there were serious concerns from other delegations. She agreed with the delegations of the European Union and Switzerland. To that effect, the delegation of Norway was not willing to have a possibility to exclude enterprises that are competing on the market with private-owned companies from other States. She asserted that it would create imbalance in the draft Convention itself and would not attract ratifications, but rather the opposite situation. She expressed a preference to tackle this issue within Article 20, rather than with Article 2(4). She further thanked the delegation of the People's Republic of China because its proposal made sure that State-owned enterprises were also covered, as long as they were not exactly identified as State-owned enterprises. She expressed the willingness of the delegation of Norway to work with the delegation of the People's Republic of China to figure this out.

48. **A delegate from the United Kingdom** observed that she went along with the declaration made by the delegation of the European Union and that she was not going to repeat what has been said. She then shared her concerns on Article 20 in the draft Convention. She stated that several delegations explained the importance of having a mechanism along the lines of Article 20 because the absence of such a mechanism could have deterred them from joining the draft Convention. She further endorsed the comments made by the delegate from Norway and repeated that States could refuse to join the draft Convention because there was serious economic imbalance that could eventually result in a kind of economic threat. She outlined that it was important to tackle this issue and thanked the delegations of the People's Republic of China and the European Union for their very fruitful exchange.

49. **A delegate from the European Union** came back to the intervention by the delegation of the People's Republic of China before the break and confirmed that the delegation of the People's Republic of China correctly understood his queries and drew the right conclusion that it could be an important development for him to eliminate the possibility for a declaration under Article 20 for any legal persons, whether they were State-owned enterprises or any other entities. In his view, it was a very helpful clarification and his delegation will come back to that in the future.

50. **A delegate from Israel** was grateful to the delegations that showed flexibility despite their concerns. He was fully supportive of the preliminary idea between the delegations of People's Republic of China and the European Union.

51. **A delegate from Australia** was not in favour of Article 20 but understood the concerns. He then echoed comments made by the delegates from Norway and the United Kingdom. The delegation of Australia was not in line with the proposal made by the delegations of the People's Republic of China and Israel. He further asked for clarification from the Chair: Article 20 was in square brackets and the only proposals were the proposals made by the delegations of the People's Republic of China and Israel; therefore, if the Plenary did not agree, there was no proposal to keep the Article in at all.

52. **The Chair** indicated that he has been proceeding in the case of square-bracketed text, in Working Document No 1, on the basis that something must be done, either to remove the square brackets or to remove the text, and that had to be in a Working Document from a delegation. As a matter of example, if the Plenary does not accept Working Document No 18, which was, in his view, not a sensible way to proceed, the Plenary would be left with text in square brackets. Then, the Chair would be insisting that someone come with a new proposal to remedy that unresolved issue. However, he added that the Plenary would not do that because there were proposals. He further suggested the process taking this forward, namely, he proposed to reconvene informal working group IV under the same convenorship to deal with the conceptually related issues of Article 2(4) and Article 20, as well as with the proposal there was on the table.

53. **A delegate from Argentina** agreed that these were conceptually related matters. She clarified that the proposal of the delegation of Argentina was still on the table. She added she would expand her work from Article 20 to Article 2(4) because the informal working group has only dealt with Article 20.

54. **The Chair** confirmed that the informal working group remit was broader and included relevant aspects of Article 2.

55. **The chair of informal working group IV** pointed out that Preliminary Document No 5 made suggestions in relation to the Explanatory Report and to Article 2 even if he had not any desire to change its text. He further added that a member of the delegation of Argentina would be welcome at the informal working group meeting.

56. **The Chair** envisaged that the working group would discuss both text and suggestions for the Explanatory Report in relation to Article 2(4) and Article 20. He added that he was aware that there was an outstanding Working Document from the delegation of Brazil on the language in the Explanatory Report in connection with Article 2(4), which fed into the process. He proposed the working group convene a meeting at lunchtime, the next day. He recalled that those willing to be a part of the conversation, such as the delegation of Argentina, should communicate with the chair of informal working group IV and with the Permanent Bureau. The Chair concluded the discussion on Article 2(4). He then queried whether the chair of informal working group III could explain where their group had got to. He asked the Plenary to refer to Preliminary Document No 9 REV REV.

57. **The chair of informal working group III** pointed out that Preliminary Document No 9 was also helpful for the Plenary to understand. He stated that, after the last meeting of the Special Commission, Article 24 had been discussed intensively. First, informal working group III analysed the relationship with other individual multilateral instruments, namely, the 2005 HCCH Choice of Court Convention, the 1958 *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention), the 2018 *United Nations Convention on International Settlement Agreements Resulting from Mediation* (the Singapore Convention on Mediation), Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), the 2007 Lugano *Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, and the 1993 Convention on legal assistance and legal relations in civil, family and criminal matters (the Minsk Convention) in order to gain precise information on which the discussion should be based. He stressed that the analysis was difficult because the working group had to base its analysis on certain interpretations of those instruments. He outlined the contributions of all the members of informal working group III that allowed to acknowledge clearly the precise relationship with other international instruments. He turned to the three main issues that were discussed with respect to Article 24. The first issue was to add "or other international instrument" in paragraphs 2 and 3. In his view, many delegations were flexible on that point, and it had been decided to leave this issue by those who are interested. He explained that the informal working group added the words "or other international instrument" between square brackets in Article 24(1), as their omission was indicated in footnote 270 of the Explanatory Report. The chair of the informal working group noted that the deletion of paragraph 5 had been agreed by consensus. The second issue was whether the bracketed words "as between Parties to that instrument" in paragraph 2 should be retained. On this issue, it was agreed by consensus on the deletion of these words, which meant that all Conventions concluded before the draft Convention prevailed over the latter. He further stressed that the draft Convention should give way to other international instruments to favour the ratification of the draft Convention. The third issue was whether the second sentence of Article 24(3) should be kept. Since no consensus had been reached before submitting Preliminary Document No 9 REV REV, the sentence was still bracketed. He outlined that a consensus had been reached then and the second sentence of paragraph 3 had been retained to protect the legitimate interests of a Contracting State, which was not Party to other international instruments. He pointed out that it was the main issue that had been tackled. Still in paragraph 3, the words "for the purposes of obtaining" were replaced by "as concerns the". The reason was to allow Contracting States to apply another international instrument for the purpose of refusing recognition and enforcement of judgments given by a court of the Contracting State that was also Party to that instrument. He indicated that a consensus had been reached with respect to paragraph 4, in line with paragraph 3. In addition, he mentioned the issue regarding the point of time to distinguish earlier instruments (para. 2 will be applied) from the later ones (para. 3 will be applied). In the draft Convention and the 2005 HCCH Convention, the relevant point of time was the entry into force for each Contracting State. However, it could allay discrepancies in the treatment of the same instrument as can be seen in the Working Document. In the example used, State A could treat the bilateral instrument as the later one, whereas State B could treat it as the earlier one. He observed that some participants suggested to use the conclusion of the draft Convention as the point of time to avoid such discrepancies even though this constituted a departure from the 2005 HCCH Convention. However, he mentioned that a consensus had not been reached on that point, and further discussion was required. Therefore, he asked the Chair whether he could introduce, as a delegate from Japan, Working Document No 41.


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58. **The Chair** agreed.

59. **A delegate from Japan** introduced Working Document No 41. It was based on the discussion of informal working group III. He proposed to delete the words "or other international instrument" in paragraphs 2 and 3 and to delete paragraph 5. With respect to paragraph 3, the words "for the purposes of obtaining" should be replaced by "as concerns the". The square brackets of the second sentence of paragraph 3 should be deleted as well. He added that paragraph 4 should be revised to realise parallelism between paragraphs 3 and 4.

60. **The Chair** thanked the chair of informal working group III for his explanation. Before closing the Plenary to allow the informal working group on final clauses to convene, he proposed to the Chair of the Drafting Committee to confirm its composition.

61. **The Chair of the Drafting Committee** indicated that, after some consultations, he was ready to propose to the Plenary for endorsement the composition of the Drafting Committee, which he had been given the honour to chair. He had tried, with the assistance of the Secretary General, to keep a certain geographical and some gender balance, as well as to ensure language skills in the official languages of the HCCH. He recalled that, unlike Special Commission meetings, a text needs to be adopted as final and not subject to amendment in the future, except by revision of the Convention. For this reason, it was important that the French and English texts had exactly the same meaning. He then proposed the composition of the Drafting Committee: Mr Boni de M. Soares from Brazil, Ms Kathryn Sabo from Canada, Mr Xiaofei Sun from the People's Republic of China, Mr Andreas Stein and Mr Paul R. Beaumont from the European Union and as alternate Ms Andrea Schulz, Ms Christelle Hilpert from France, Mr Keisuke Takeshita from Japan, Mr Pieter André Stemmet from South Africa with Mr Sabonga Mpongosha as alternate, Prof. Dr Tanja Domej from Switzerland, and as an alternate Mr Niklaus Meier, and Mr Ronald A. Brand from the United States of America. He recalled that the *co-Rapporteurs*, Ms Geneviève Saumier and Dr Francisco J. Garcimartín Alférez, were completing the group, were benefiting from the assistance of the Permanent Bureau, and those members who attended were not mentioned. He recalled that alternates were invited not to attend the meeting when the principal was already attending. He warmly thanked those who have accepted to serve in the Drafting Committee, which meant to work over night and during the weekend. He noted that he would try to keep the meetings as short as possible.

62. **The Chair** reported that the composition of the Drafting Committee had been approved and thanked those members for their willingness to work during the weekend. He further recalled that it had been an excellent day with good progress. He thanked the Plenary and looked forward to having another excellent day of work. He indicated that the informal working group on final clauses would convene in the Seminar Room.

63. The meeting was closed at 5.10 p.m.

# Procès-verbal No 7

# Minutes No 7

*Séance du vendredi 21 juin 2019 (matin)*

*Meeting of Friday 21 June 2019 (morning)*

1. La séance est ouverte à 9 h 40 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

*Article 2(1)(m)*

2. **The Chair** welcomed everybody back to the room and noted that Article 2(1)(m) was the first item on the agenda. A lot of work had been done on the subject already over the last years. He asked the chair of the informal working group on intellectual property matters to provide an update. He thanked the delegate for chairing this working group, and for preparing a questionnaire with the assistance of the Permanent Bureau. He had brought together the diverse reflections of the group.

3. **The chair of the informal working group on intellectual property matters** thanked the Chair and the members of the informal working group for all their contributions despite their own work commitments. The work had been carried out via email only during the intersessional period.

4. The informal working group had been tasked with two questions: one concerned the competent authorities, and the other concerned intellectual property generally. He noted that he could summarise the discussion of the working group in one brief sentence, namely that there had been no consensus on any issue.

5. Regarding the issue of competent authorities, the members had remained troubled by the dilemma noted in the last Special Commission meeting, namely that on the one hand, the draft Convention had been negotiated from the start on the basis of judicial decisions in civil or commercial matters, to the exclusion of administrative decisions. But on the other hand, in some jurisdictions, competent authorities had exclusive jurisdiction over some intellectual property matters which were normally decided by courts of law in other countries.

6. Work in the group had begun with that dilemma, and it had ended with that dilemma. The group had then undertaken a survey of the countries involved in the working group and a few other countries. The Permanent Bureau had been very helpful in compiling the data and summarising the results of the survey. The informal working group discussed the survey, but ultimately there had been limited support for allowing the circulation of decisions of competent authorities under the draft Convention, although many had expressed their openness to further discussions.

7. Concerning the possible inclusion of competent authorities, some delegates considered there ought to be safeguards. For example, some safeguards included confining the definition of "competent authorities" to intellectual property offices; decisions should concern "registered intellectual property rights" or "rights which are required to be registered"; and intellectual property rights should be within the territorial competence of the authority. Also, the decision of the competent authority should result from judicial, or quasi-judicial, adversarial proceedings. These were the limitations that had been suggested for the case that the meeting should decide to include decisions of competent authorities. The working group had then moved on to discuss the issues regarding intellectual property more generally, and some proposals had been put forward, but he would not like to discuss them in more detail because there had been no real consensus. As a result, there was no proposal from the working group, or a proposal endorsed by the working group as such.

8. **The Chair** expressed his deep gratitude to the chair of the informal working group, and thanked the members of this group for their hard work. He also noted that the Plenary should extend its gratitude to the Permanent Bureau for supporting this group with the questionnaire, and to the government departments around the world which had responded to that questionnaire. He noted that an enormous amount of work and thought had gone into understanding the position better. Even if ultimately no consensus had been reached, at least the Plenary was now better informed.

9. He then turned to the Working Documents on intellectual property issues. Each proposal comprised a number of interlinking proposals, and so the Chair suggested that the proponents should introduce the Working Documents as packages. The Working Documents would be discussed in the following order: Working Document No 9 from the delegation of Singapore, Working Document No 13 from the delegation of the European Union, Working Document No 17 from the delegations of Israel and Brazil, and Working Document No 21 from the delegations of the United States of America and Canada.

10. **A delegate from Singapore** explained that Working Document No 9 was drafted on the basis that intellectual property was included in the Convention. The basic premise was that, where the infringement of intellectual property rights fell within the scope of a choice of court agreement between the parties, that resulting judgment should circulate under the terms of the Convention. This was the primary proposal of the delegation of Singapore. The other proposals were consequential to this proposal, namely to expand the defence to situations where the court of origin had failed to apply the law of the place where the intellectual property right is protected. This was a safeguard to accommodate concerns about the territoriality of intellectual property rights. To sum up, the Working Document proposed an expansion of the grounds of jurisdiction for a choice of court by the parties, and additional safeguards to protect the territorial competence of the countries where the intellectual property right was created.

11. **A delegate from the European Union** sought to make a few general introductory remarks first, and then discuss the individual provisions and proposed changes. In general, the delegates observed the progress of intellectual property issues. Initially, the European Union and some other delegations had argued in favour of the full inclusion of intellectual property rights, but it quickly become clear that other delegations had problems with that approach.

12. His delegation had engaged with other delegations in a labour-intensive process of understanding each other, both in the informal working group and in the Special Commission. This process had been supported by the help of the chair of the informal working group and the Permanent Bureau. In addition, intense intersessional work had occurred. He thanked everyone who had actively participated in that process. He believed that quite some progress had been made in that work to accommodate the concerns of some delegations, by identifying middle ground, most notably including the basis of a very strict adherence to the principle of territoriality in the approach to intellectual property matters.

13. The relevant text was currently reflected in the draft Convention. However, there was still firm opposition to this type of compromise solution from a number of delegations, particularly in relation to patents, or to patents and other intellectual property rights for which the registration is required.

14. For example, some argued that there was not sufficient harmonisation of patent rights at the global level to enable the circulation of decisions in that particular area.

15. Moreover, as set out by the chair of the informal working group, there was the thorny question of the treatment of decisions by competent authorities. This would be important to some delegations, but it would move away from the principle of only allowing court decisions to circulate under the Convention. This was an issue also arising in relation to other registered intellectual property rights, but not to copyrights and related rights.

16. In addition, although not directly related to the current topic, this question was somewhat inextricably linked to the question of common courts. At least from the perspective of the delegation of the European Union, common courts were relevant exclusively in the area of intellectual property rights. The delegate observed the discussion on common courts was complex, with no consensus yet within reach. The delegate did not want this to risk the failure of the Convention. On that basis, the delegate from the European Union introduced a limited proposal to include only copyright and related rights within the scope of the Convention.

17. The delegate explained the aspects of the proposal. Firstly, it was not a radically new proposal, because the same approach had been taken in the HCCH *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 HCCH Choice of Court Convention"). Secondly, regarding the concerns for a lack of harmonisation within intellectual property, the delegate explained that copyright and related rights were approximated to a much greater extent than patents by virtue of the 1886 *Berne Convention for the Protection of Literary and Artistic Works*, as amended (the Berne Convention) and the treaties of the World Intellectual Property Organization (WIPO). Thirdly, one could avoid the thorny issues, for example the issue of competent authorities, because they were irrelevant in the context of copyright and related rights. And finally, at least from the perspective of the delegation of the European Union, the proposal did not require the Plenary to address common courts under the Convention, because common courts were only relevant in the context of patents and trademarks from a European Union perspective.

18. The delegate highlighted that it would be useful to circulate decisions in this area. It was often the case that copyright infringers were not present in the States where a right was protected, in the sense that infringers did not have a

"brick and mortar" presence nor assets in the State. Therefore, the inclusion of copyright judgments would create tangible benefits, whilst avoiding a huge proportion of the problems that had made the discussion on intellectual property rights so difficult so far.

19. **Another delegate from the European Union** explained that the key and the heart of their proposal was Article 2(1)(m) on the exclusions from scope. The proposal was to exclude intellectual property, except for copyright and related rights. The proposal did not yet take a position on whether the words "and analogous matters" should be added or not, so the square brackets had remained in the proposal on Article 2(1)(m). The delegate considered it wiser to focus on the big policy decision at this stage, and leave the details for later.

20. Articles 5 and 6 contained consequential changes based on the new policy direction taken in Article 2. The *chapeau* remained untouched concerning the principle that general filters in Article 5(1) should not apply to what is left of intellectual property within the scope, namely copyright and related rights. Consequently, paragraph 3 remained in Article 5, which was the only filter available for intellectual property (except for the current Art. 6, which would be discussed later). However the words in the *chapeau* "does not apply to a judgment that ruled on an intellectual property right or an analogous right" were changed to "does not apply to a judgment that ruled on a copyright or related right". With the deletion of patents, trademarks and other rights required to be registered from the scope of the Convention, Article 5(3)(a) had become redundant, and its deletion was proposed.

21. Article 5(3)(a) and (b) of Working Document No 13 (previously Art. 5(3)(b) and (c)) were concerned with the infringement of copyright and related rights, and the subsistence or ownership of copyright and related rights. The reference to "an unregistered trademark or unregistered industrial design" had been deleted. This constituted only a technical, follow-up change.

22. In Article 6, likewise paragraph (a) would then be deleted, because this paragraph concerned rights required to be registered.

23. The next proposed change, namely the deletion of subparagraph (g) in Article 7(1), was not related to the policy change. After the creation of Article 5(3) and the strict territoriality-based filter, the delegation of the European Union had always advocated that Article 7(1)(g) was no longer necessary. If only judgments from the country of protection were allowed to circulate, that country would naturally apply its own intellectual property rights regime. It would not be harmful to keep it, but it was an unnecessary burden.

24. Regarding Article 8, the European Union was also open to other changes; for example, there seemed to be a proposal by the delegations of Brazil and Israel to divide Article 8 into two Articles. For the moment, the delegation of the European Union had limited its proposal to what was necessary to implement the policy change. The change in the *chapeau* of Article 8(3) was only a follow-up change, therefore, moving to intellectual property rights other than copyrights or related rights. The delegate recalled that the whole of Article 8 had been copied from Article 10 of the 2005 HCCH Choice of Court Convention. Under the 2005 Convention, intellectual property was also excluded (except for copyright and related rights, which were included). Because of this exclusion, it could always be the case that in a judgment which falls within the scope of either of the two Conventions, a money judgment for instance, there was a preliminary question relating to a matter excluded from the scope of the Convention. The larger the exclusion was, the more likely it was that this question would arise.

25. If intellectual property rights were excluded (except for copyright and related rights), then there might well be, for example, money judgments and license litigation which would be outside the Convention because they are based on a ruling on an intellectual property right. Article 8 would therefore still have room for application. The wording needed to be adapted to the fact that the exclusion from scope was now larger than it used to be.

26. The change proposed to Article 11 was also unrelated to the policy change and constituted a new approach. The delegation of the European Union would be very happy if Article 11 were removed altogether, since they would not object to including injunctions in the scope of this Convention. She noted that her delegation was aware that this was a problem for some delegations in relation to intellectual property infringement, but also these delegations had come a long way to try to find some middle ground. For these reasons, her delegation had tried to find areas for compromise.

27. One concern regarded the case where a behaviour originated in country A, but the intellectual property right was protected in country B. The behaviour (*e.g.*, online infringement) may also take place in a certain way in country B, where the right was protected (because if it did not take place there, then there would be no infringement). That was the difficulty with the concept of territoriality and intellectual property in the world of online infringement. There were many delegations which were not ready to enforce foreign injunctions relating to a foreign intellectual property right which was infringed in a foreign State (State B) if the behaviour originated in their own State (State A) and was perfectly lawful there. As this was a legitimate view, her delegation proposed to try to tailor this limitation of Article 11 to make it as narrow as necessary to meet those concerns. Therefore, the proposal stated that the injunctive relief granted in a judgment ruling on an infringement of copyright or related rights should be enforced only to the extent that it related to conduct in the State of origin. The delegate clarified that there had to be some conduct in the State where the right was protected, and where the judgment originated.

28. The second part of the proposal regarding Article 11 was intended to clarify that it would not create an obligation for States which currently do not enforce injunctions. If the law of the requested State provided for a certain kind of remedy (*e.g.*, a monetary remedy, which would apply in cases of non-compliance with a local injunction) then this Convention created the obligation that it should also be used to implement foreign injunctions. The proposal would not create any new obligations; it would merely state that countries should use those remedies which were already available under their national law, and that the foreign judgment should be treated like a local judgment, provided, of course, that Article 11(a) was met, and that the judgment related to conduct in the State of origin. She concluded by declaring that her delegation was available to answer any questions concerning Working Document No 13.

29. **A delegate from Israel** thanked all the delegations that had participated in the negotiations on intellectual property. She also thanked the chair of the informal working group on intellectual property matters for his good work, and thanked the other delegations for their papers.

She observed there was a will to find middle ground. Her delegation still supported Working Document No 17, which created an international coherent standard that kept that territoriality principle and other basic principles of intellectual property rights intact. In her delegation's view, it would be very advantageous to have the recognition and enforcement of foreign judgments on intellectual property set forth in the draft Convention, while maintaining these principles. She explained that Working Document No 17 was very much based on the 2018 draft Convention. First, the proposal suggested to divide Article 5 into four subparagraphs. Some textual changes had been made as well, and a comma had been added after "State of origin" in the first line of Article 5(3)(b) to clarify that the infringement took place in the State of origin, and to clarify that it was obviously not the intellectual property right that originated in the State of origin.

30. The proposal also added "is eligible for recognition and enforcement if", which was the reason for the deletion in Article 5(3)(a), since validity and subsistence can only be recognised, and not enforced. Structural changes had been made, therefore: Article 5(3)(b) and (c), which dealt with infringement, stated that the judgment was eligible for recognition *and* enforcement; Article 5(3)(d) dealt *only* with recognition. Moreover, some purely textual, clarifying changes had been made to the last sentence of Article 5(3)(b). However, the delegate indicated that the necessity of this addition should be discussed, as it could be a substantive standard. The same structural change had been made in Article 5(3)(c), for the same reasons.

31. Regarding Article 5(3)(d), the proposal was to delete "ownership", and the delegate noted that her delegation had never been fond of the concept of including judgments on ownership under the draft Convention. Moreover, the proposed changes clarified that these judgments would only be eligible for recognition. There seemed to be a wide agreement that there was nothing to be enforced *de facto* with regard to such judgments. With regard to "validity or subsistence" in Article 5(3)(d), the Working Document proposed to delete the square brackets around "subsistence", since each of these terms referred to different intellectual property rights, as stated in the draft Explanatory Report.

32. Moreover, the Working Document proposed two changes to Article 6. First, "registration" should be deleted, as it was a vague term, and no consensus seemed to exist on what this term really encompassed in relation to Article 6. The second change was to add the words "has been applied for", and "been applied for or to have", because it was intended that Article 6 would apply also to intellectual property rights for which an application for registration had been submitted. For example, if a patent application was submitted to the patent office, and the patent office decided that it was not eligible for registration, and a court in the same State approved this decision, then Article 6 should apply to that decision. In this case, there was no grant or registration, and under the previous language, these cases would not have been covered by Article 6.

33. The Working Document also proposed some changes with regard to Article 8. First, Article 8 was divided into Article 8 and Article 8a for the sake of clarity, as the current Article 8 was very long and complex.

34. Working Document No 17 then proposed to delete "courts" in order to bring Article 8 in line with Article 6, which referred to "States" and not to "courts". She noted that – also with regard to footnote 215 of the Explanatory Report – "State" in Article 6 could refer to any State, and not only to a Contracting State, and she invited other delegations to express their view on the matter.

35. Regarding Article 8a, the Working Document proposed some textual changes in Article 8a(1). The word "court" had been replaced with "State" for the same reasons. Article 8a(2) was also just a textual change to make it clearer.

36. The delegate invited other delegations to express their views on the proposals. She noted that one of the square brackets which was included around Article 8(3) of the May 2018 draft Convention was missing in Article 8a(2) of Working Document No 17. She also added that the square brackets were still needed around Article 8(3), as her delegation was not sure whether it was necessary at all.

37. The delegate explained that Article 11 of Working Document No 17 was an attempt to find some middle ground. She expressed the view that everyone had made much progress in this regard. In order to find some middle ground, being one of the States that were concerned with the enforcement of injunctions for a lawful activity in its State, the last sentence of Article 11 had been changed in order to include monetary remedies deriving from an injunction that orders or prohibits behaviour in the State of origin. This was a compromise solution which still kept the territoriality principle intact but might also accommodate the concerns of other delegations.

38. **A delegate from Brazil** thanked the Chair and wished a good morning to everybody. He thanked the delegation of Israel for presenting the joint proposal, and for the extensive collaboration since 2017. He explained that the idea behind the proposal was to mirror the territoriality principle of the substantive law on intellectual property in the provisions for jurisdiction. This was the idea which should be transported into this Convention. His colleague from the delegation of Israel had just perfectly described the technical issues and the political implications, so he aligned himself with the observations made by his colleague.

39. **The Chair** invited the delegations of the United States of America and Canada to introduce Working Document No 21.

40. **A delegate from the United States of America** wished a good morning to everyone and noted that his delegation wished to echo all the thanks to those that had been diligently involved in the intellectual property discussions. It had been a huge effort from all sides.

41. Working Document No 21 proposed to exclude all intellectual property and analogous matters from the Convention. The reason for doing so was to encourage wide adoption of the treaty, including by the United States of America. Therefore, it was important to ensure that the Convention text was easily understood and readily applied by litigants, practitioners and judges. The proposal sought to avoid the creation of problematic or otherwise unacceptable obligations for parties. With a lone exception, intellectual property stakeholders across the world had overwhelmingly objected to the inclusion of intellectual property, because intellectual property was not like other traditional civil and commercial law matters. Instead, it was largely entwined with administrative law, and other administrative determinations. For example, some jurisdictions vested exclusive jurisdiction, as explained by the chair of the informal working group on intellectual property matters, so that only those tribunals could actually resolve any particular intellectual property matter. A move to include intellectual

property within scope was antithetical to Article 1 of the Convention which clearly placed these administrative matters outside the scope of the Convention. Further, this ill fit was confirmed by Chapter II, which included five references to specific intellectual property rules among its 12 provisions, which meant that over 40% of Chapter II required a specific rule on intellectual property. This was indicative that this might not be a good fit for this Convention.

42. Against this backdrop, Working Document No 21 proposed to remove the brackets on Article 2(1)(m), resulting in the phrase "intellectual property and analogous matters". The idea was to do three things at least: first, it would capture all forms of intellectual property memorialised in international treaties, including the 1883 *Paris Convention for the Protection of Industrial Property* (Paris Convention), the 1967 *Convention Establishing the World Intellectual Property Organization* (WIPO), and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement) that entered into force in 1995. While these three agreements had a substantial overlap in their respective understandings of intellectual property rights, those treaties were also unexclusive of some rights existing in jurisdictions today. That explained the proposal's second objective, namely to be robust against the test of time, and to make the draft Convention future-proof. The phrase was broad enough to be forward-looking. Thirdly, the proposal would delete all subsequent references to intellectual property, thereby removing any concern of unintended consequences that had been shared with the delegation of the United States of America by intellectual property stakeholders.

43. As a result, the Working Document suggested the deletion of Articles 5(3), 6(a), 7(1)(g), 8(3), and 11. As the delegation of the United States of America had mentioned in its opening remarks, while the instrument might not be the most ambitious with respect to the matters covered, or the manner in which it applied to those matters, one could not lose sight of the contribution that such a Convention would provide. In the opinion of the delegation of the United States of America, the complete exclusion of intellectual property would allow for a greater number of States to become Party to the Convention, and therefore increase the number of judgments that would circulate globally.

44. He concluded by deferring all further comments to his colleagues from the delegation of Canada, and expressed gratitude for that delegation's collaboration on this proposal.

45. **A delegate from Canada** wished to extend a warm and sincere thank you to all delegates that had contributed to the protracted and detailed discussions. He believed that while the intellectual property experts had particularly enjoyed the discussions, this might not have been the case for the private international law lawyers. He also thanked the intellectual property stakeholder groups that had taken the discussions into serious consideration, and understood the practical impacts of this project on their particularly valuable assets. His delegation truly appreciated the input of intellectual property stakeholder groups in the meetings for this project.

46. In addition to the remarks from the delegate from the United States of America, the delegate from Canada explained that the proposal was motivated by research which demonstrated there was currently a real lack of full appreciation as to what the practical impediments intellectual property stakeholders were facing, and that there was no identified problem.

47. This led to the second point, namely that it was the stakeholders who should be the primary beneficiaries from the inclusion of intellectual property, or who should be seeking its exclusion. This mere fact had made them consider whether it was the right time to address intellectual property judgments with this instrument. It was because of the questions of whether it was the right time, and the right approach, for addressing the recognition of decisions, that Working Document No 21 had been proposed. This issue should not act as an impediment to the Session.

48. **The Chair** thanked the delegate from Canada and noted that a range of viable approaches were helpful for consideration. He explained that the fundamental choice this room needed to make was whether to include certain intellectual property matters within scope. As discussed on the first day, a consensus was needed to bring a sphere of activity into the scope of the Convention and to assume obligations in relation to those matters. It seemed that the logical way to structure this discussion was to begin with Article 2(1)(m) and to focus on the scope issue, recognising that approaches of delegations as to whether particular matters should be excluded from scope or included in scope will be informed by their understanding of the way in which those matters would be addressed were they to be included. This fundamental question that needed to be addressed, and the three possible broad approaches that had been proposed, were either to include all intellectual property rights, or to narrow the scope and include only copyright, or to exclude all intellectual property rights.

49. He then reminded the floor of the proposal by the delegation of the European Union and which acknowledged the unlikelihood of a consensus to include all intellectual property matters within scope. The Chair noted this was reflected in the sense he had gained from the discussions to date, and of the soundings he had taken informally over the last days. The Chair encouraged the delegations therefore not to embark on detailed discussions of the implications of including rights other than copyright in the instrument. He also asked the delegations to correct this view in case he had misjudged the mood of the room.

50. He proposed that interventions should not address the fine details of how the instrument might affect cross-border patent litigation, or cross-border registered trademark litigation, when in fact there was no consensus to have those subjects within scope. It rather seemed to him that the Plenary should focus on the scope issue, and in particular, on whether the instrument should address copyright. He invited interventions in agreement or disagreement as to the proposed approach.

51. **A delegate from Israel** suggested commencing the discussions with registered intellectual property rights, as some of the issues applied similarly to unregistered rights and registered rights. For the delegation of Israel there was no reason to differentiate between a monetary judgment on the infringement of a patent, and a monetary judgment on the infringement of copyright.

52. **A delegate from Brazil** stated that with all due respect to the intervention made by the delegate from the United States of America that intellectual property rights would be considered as administrative law, everyone knew that it was more likely international law. Several years ago, everyone had agreed upon different treaties and Conventions, for example the TRIPS Agreement. There, 140 countries had agreed on the minimum standards on patents, trademarks, copyright, infringement, border measures, and litigation, with the aim of providing for, *e.g.*, minimum cer-

tainty, minimum cross-border trade conditions for all countries to enable trade and the transfer of technologies, and the commercialisation of intellectual property rights. That considered, she repeated that intellectual property law was mostly considered as international law, and it was one of the most international fields of law amongst all the other areas of law. Intellectual property was mostly governed by treaties to which everyone had agreed, with the resulting duty to internalise these treaties as done in Brazil. On the other hand, her delegation recognised that countries adopted their internal intellectual property laws by different means. Her delegation was aware that the United States of America, for instance, may have a different take on the non-obviousness requirement than other countries, and in general all countries had their own national policy concerns and limits. However, the delegate urged that the Plenary should not lose sight of the goals of the Convention, namely to provide more clarity, more certainty, to enable the transfer of technologies, cross-border transactions, international contracts, and fair play for everyone and for all matters, including in the intellectual property area.

53. Since intellectual property was such an international field of law, her delegation was of the view that this treaty should be the place to also cover intellectual property judgments and intellectual property matters. With all due respect for the views of other delegations, her delegation strongly wanted to pursue the discussions and perhaps develop a compromise position.

54. **The Chair** noted that there was obviously an appetite in the room to discuss the possibility of including intellectual property rights generally within scope, as well as just copyright, or no intellectual property rights. He also noted that it seemed useful to address this issue on a level of principle, rather than getting into the fine details. He then clarified with the delegation of Brazil that they proposed to delete Article 2(1)(m), and to include all intellectual property matters in the Convention.

55. **A delegate from Norway** thanked the Chair and wished everyone a good morning. She noted that the delegation of Norway would like to include intellectual property in the Convention in the way that was stated in the 2018 draft Convention. Discussion on the details on the drafting were possible. If there was no possibility to reach consensus to have intellectual property included in the text of the Convention, then her delegation supported the proposal by the delegation of the European Union.

56. **A delegate from the Republic of Korea** noted that his delegation would not take a firm position on the question whether intellectual property issues should be included at this point. Rather, he sought to highlight some of the possible concerns regarding the inclusion of intellectual property rights. He repeated that the delegation of the Republic of Korea would reserve its position on the matter.

57. He explained that the focus of the intervention would be on copyright issues. At the outset, he noted that intellectual property rights issues were very much intertwined with anti-trust issue matters, since intellectual property rights holders often held a position of market dominance. Their action or inaction could often come under scrutiny by anti-trust authorities in the different countries. For that reason, in a lot of cases, these two areas merged and formed legal doctrines and concepts. It would therefore be logical to synchronise the position on the issue of intellectual property rights and anti-trust matters.

58. However, his delegation did not wish to jump to conclusions at this point. To the delegate's understanding, the very premise of the Convention was that there would be a reasonable court decision, no matter where the case was adjudicated, with a similar outcome to a local judgment. In that connection, there might be some concern regarding intellectual property rights since, as the distinguished delegate from the United States of America had said, they concerned policies of States with different perspectives on the various issues of intellectual property rights.

59. For example, the United States of America and the European Union had different views with respect to certain intellectual property rights. This difference could cause different outcomes in lawsuits. He invited the delegations of the United States of America and the European Union to correct his intervention if necessary. Copyright was an example of these different views, and it involved both intellectual property and anti-trust issues which could fall under the Convention. In the United States of America, the refusal of licensing copyright was considered completely legal. This principle had been established hundreds of years ago by the Supreme Court of the United States of America, and was therefore unlikely to change in the near future. But conversely, the refusal of licensing could be illegal in the European Union in certain circumstances. For example, Microsoft and some other firms incorporated in the United States of America had run into problems with this. Authorities and courts in the European Union viewed this rather as a matter of public interest than an issue of free will of intellectual property right holders.

60. In this regard, the delegate addressed the facts of one of the leading cases of the Court of Justice of the European Union. This case concerned three TV stations which were operating within the European Union that published a TV guide, and each covered exclusively their own programmes, which were protected under copyright. A business operator named Magill attempted to publish a comprehensive weekly TV guide in competition with the separate TV guides published by each station. He was prevented from doing so by the three copyright owners, the TV stations. Magill argued that the refusal was an abuse of a dominant position. He sought an order of compulsory licensing and monetary compensation. The Court of Justice ruled in favour of the claimant and granted the remedy. If this case had been adjudicated in the United States of America, the outcome might have been very different since copyright holders have the freedom to decide whether to license it at all. This illustrated the discrepancies that could lead to different outcomes in lawsuits, which could cause concern to some delegations. He reiterated that the Republic of Korea did not have a firm position on the matter. At present, his delegation sought to listen closely to the discussion that had developed in the Plenary, and to establish a position later. He then gave the floor to his colleague.

61. **Another delegate from the Republic of Korea** noted that his delegation proposed to exclude "analogous matters" from the Convention since this issue was unfamiliar to some nations, and there were varieties of application in each country. His delegation considered that this issue was not ripe for inclusion in the Convention.

62. **The Chair** noted that he would welcome any contributions anyone might have on the question of analogous matters. While the focus of discussions was primarily on scope and whether intellectual property rights should be included or excluded, it might be efficient to express a view on analogous matters at the same time.


*Procès-verbal/Minutes No 7*

63. **A delegate from Argentina** asked for the Chair's permission to read out a statement from the delegation of Mexico, which could not be here today. She also noted that her own delegation did not have strong views on intellectual property.

64. **The Chair** noted that he was comfortable with that request but asked the delegate from Argentina to focus only on Article 2(1)(m), and the parts relating to scope issues.

65. **A delegate from Argentina** thanked the Chair and noted at the outset that the reading of the statement from the delegation of Mexico did not mean the endorsement of her delegation regarding its content. She then read out the following statement:

> "The Mexican delegation considers that the inclusion of topics related to intellectual property in the Convention is not adequate. The purpose of the Convention is the recognition and enforcement of judgments in civil and commercial matters, issued by a court of another Contracting State. Intellectual property is a matter of a different legal nature, falling in the realms of administrative or criminal law. The Mexican delegation recognises the importance of intellectual property rights for economic development. However, we consider that this Convention is not the adequate instrument to regulate this matter. And finally, as expressed before, inclusion of this topic would be, in our opinion, contrary to Article 1(1) of the Convention, which already excludes from its application revenue, customs and administrative matters."

66. **A delegate from Singapore** recalled that it had always been a proponent of the inclusion of intellectual property. However, his delegation recognised that there was a divergence of views. In that respect, his delegation supported the proposal by the delegation of the European Union to include only copyright if that approach was the one most likely to obtain consensus.

67. **A delegate from Japan** thanked the delegations for their enormous effort to reach consensus. His delegation was of the view that intellectual property rights other than copyright and related rights should be excluded for the reasons explained in the proposal from the distinguished delegation of the European Union, and in the proposal from the distinguished delegations of the United States of America and Canada. Concerning copyright and related rights, issues on online infringement of copyright were very important for the delegation of Japan because of the Japanese industry of manga comics, such as Doraemon, Dragon Ball, Naruto, or One Piece. The delegate noted as an aside that the British Museum currently hosted an exhibition on manga comics. The content of this industry was very important in Japan. The infringement of copyrights in manga comics occurred frequently on the Internet. The delegate impressed that Japan would like to ensure the appropriate global protection of the copyright in manga comics. The current text relating to copyright could be useful, but it could also be dangerous because of the uncertainty of the content of the current rules. Japanese stakeholders considered that there were few merits of the draft Convention to online infringement. For example, even during internal discussions, one had had difficulties in agreeing on a uniform understanding of the concept of "the State for which protection was claimed". Some thought it related only to the forum State, others had a different view. In addition, his delegation could not understand why the requirement that a judgment be given by a court in the State for which protection was sought was provided in Article 5(3)(b), in addition to the requirement of a connecting factor provided in the words "infringement in the State of origin". From the point of view of his delegation, private international law instruments on the protection of copyright should not only have rules on the recognition and enforcement of foreign judgments, but also rules on the applicable law and direct jurisdiction.

68. For these reasons, Japan sought to exclude copyrights and related rights. The delegate expressed his strong support for the proposal by the delegations of the United States of America and Canada.

69. **The Chair** thanked the delegate from Japan and jokingly remarked that anyone who could combine high principle and manga, in a contribution to a multilateral discussion on private international law, deserved a prize the precise nature of which would be the subject of discussion at a later meeting.

70. **A delegate from the Russian Federation** thanked the members of all delegations who had contributed immensely to the creation of a new regime of intellectual property rights in this Convention. In order not to destroy the work that had been done on the matter, her delegation proposed the creation of a separate protocol to the draft Convention, which would allow the countries which were ready to enforce judgments on intellectual property matters to do so. If this proposal received no consensus, then her delegation supported the proposal of the distinguished delegations of the United States of America and Canada to exclude all intellectual property matters from the scope of the Convention.

71. **A delegate from Serbia** noted that he could not compete with the charm and the sense of humour of the distinguished delegate from Japan, but he would try to be just as concise. His delegation recognised the efforts made by the informal working group. His delegation particularly appreciated the proposals of those delegations that had tried to find some middle ground. However, having regard to the specificities of intellectual property disputes, his delegation would prefer to exclude intellectual property and analogous matters from the scope of the Convention.

72. **The Chair** thanked the delegate from Serbia for the beautifully clear and concise intervention, even if it had not been quite as funny as the intervention by the delegation of Japan.

73. **A delegate from Peru** noted that intellectual property matters were treated by an Administrative Tribunal in Peru, and therefore Peruvian judgments on intellectual property would not be recognised in other States. The delegate considered this to be the problem with the inclusion of intellectual property for his delegation. Peru considered intellectual property matters to be administrative and not judicial. For this reason, he supported the exclusion of intellectual property rights from the Convention.

74. **Un délégué de la Suisse** souhaite la bienvenue aux membres de la Commission. La délégation de la Suisse souhaiterait que tous les droits de propriété intellectuelle soient inclus, y compris tous les recours. Il signale que sa délégation insiste sur ce point car il s'agit d'un paquet qui forme un tout, l'idée étant de ne pas uniquement inclure certains droits comme proposé par certaines délégations, par exemple les droits d'auteur. Certains États ont manifesté un intérêt au regard des droits d'auteur tandis que d'autres au regard des brevets ou des marques.

75. La délégation du Japon a mentionné les mangas, la délégation de la Suisse souhaiterait citer pour sa part les fromages. Les Suisses aiment leurs fromages et sont demandeurs d'une protection d'origine géographique. Chaque État marque son propre intérêt en cette matière. Si les droits de propriété intellectuelle devaient être inclus, tous les droits devraient être compris. Il en est de même concernant les recours, qui devraient être insérés. La délégation de la Suisse a pris note des difficultés qui sous-tendent l'inclusion de tous les droits de propriété intellectuelle, ce qui amène le délégué à mentionner la deuxième préférence de sa délégation qui consiste à une exclusion totale. Un compromis en cette matière n'est pas une solution.

76. Le délégué recourt à la métaphore employée par le Secrétaire général de la HCCH, qui consiste à dire que si on ne peut pas voler jusqu'à la lune, on y vole jusqu'à mi-chemin, et ce n'est pas une solution envisageable. C'est pourquoi la délégation de la Suisse souhaiterait supporter la proposition des délégations des États-Unis d'Amérique et du Canada. Enfin, l'option d'un protocole comme proposé par la délégation de la Fédération de Russie est aussi une option intéressante à prendre en considération.

77. **Le Président** remercie la délégation de la Suisse et demande à la délégation de l'Uruguay de se concentrer sur des principes et illustrations pratiques.

78. **Un délégué de l'Uruguay** souhaite la bienvenue aux membres de la Commission. He thanked the members of the informal working group, and the distinguished delegations that had presented their proposals. At this point of the discussion, and being consistent with the position of having as broad a scope as possible, his delegation was of the view that some issues of intellectual property had to be included in order to respect exclusive jurisdiction when applicable. His delegation could not support the complete exclusion of intellectual property from the scope of the Convention. The delegation of Uruguay had sympathy for looking for a middle-ground solution between the proposals of the distinguished delegations of Brazil and Israel, and of the European Union, and they were flexible in how this was translated into Article 2(1)(m).

79. **A delegate from Australia** thanked the Chair and everyone who had contributed to this discussion both this morning and over the last few years. He noted that he took the floor with a slightly heavy heart. The discussions this morning echoed the discussions that had occurred over a long period of time. Sadly, there was at times a lack of common understanding about how this meeting should deal with intellectual property. The delegation of Australia had reluctantly reached the conclusion that at this time, it was perhaps best not to include intellectual property in the scope of this Convention. This was despite Australia having been one of the initial proponents for including intellectual property in this Convention, and had held that position for quite some time. It had been a big decision for the delegation of Australia to shift from that position. For his delegation, a couple of very important points had to be noted. The first was that the discussion on intellectual property should not stop. The delegate recalled the proposal from the delegation of the Russian Federation to conclude a protocol, which received some tentative support from the delegation of Switzerland. The delegation of Australia did not mind the idea of a protocol. If that proposal was going too far, then his delegation would like to see ongoing work through the HCCH, perhaps in conjunction with WIPO, perhaps through an expert's group, in order to continue this discussion on how intellectual property should be treated within private international law. In public policy terms, the term "ripe" was often used to describe an issue that is ready for action, and this stage had unfortunately not yet been reached.

80. Furthermore, his delegation wondered whether it would be possible to have some further discussions on the question of "preliminary questions", and of how the Convention might apply to intellectual property in the context of preliminary questions around Article 8. Possibly there was scope for some work to be done in that area, which would be very important. He concluded by expressing his deep appreciation to those delegations which had made huge efforts to compromise and to reach a consensus, even while sacrificing their own interest.

81. **A delegate from Turkey** thanked the Chair and the delegates for their proposals. With regard to anti-trust and competition issues, the delegate from Norway had explained the arbitrability issues of anti-trust regarding Article 8. The delegate from Turkey considered the same issues were raised by intellectual property, because some issues could not be arbitrated, such as validity and ownership of intellectual property. For this reason, the delegate from Turkey, like the delegate from the Republic of Korea, supported the exclusion of intellectual property rights from the scope of the Convention. If anti-trust matters were excluded, then intellectual property matters should also be excluded, as proposed by the delegations of the United States of America and Canada.

82. **The Chair** noted with the same heavy heart as the delegate from Australia that it seemed that the discussion so far had shown that the meeting was struggling to reach a consensus to include either all intellectual property matters, or even a subset of intellectual property, in the scope of this particular instrument. However, there was more than a glimmer of hope for the future: there was widespread desire for a continuing conversation regarding the two different but intersecting cultures of private international law and intellectual property, to build on all the work that had been done to date. He encouraged delegates to talk about these questions over the coffee break.

83. The meeting was closed at 11.01 a.m. The meeting reopened at 11.41 a.m.

84. **The Chair** recalled his tentative view that there was no consensus for the inclusion of intellectual property matters in general, or for the inclusion of a narrower subset. There was, however, an appetite for pursuing the topic outside this meeting and in future. If this was correct, then the meeting should proceed through each provision in light of the decision to exclude intellectual property. He would then like to consider how to proceed beyond this meeting, so as not to lose all the intellectual effort expended on the topic so far.

85. **A delegate from Singapore** agreed with that characterisation, and supported the idea of building on the proposal of the delegation of the Russian Federation to develop a separate protocol. This would allow interested countries to pursue that interest.

86. **The Chair** observed that there were no other interventions regarding the proposed approach. He invited the Secretary General to explain procedural options for future work.

87. **The Secretary General** explained that the procedural framework of the HCCH provided for and indeed envisaged that the Council on General Affairs and Policy may sit during a Diplomatic Session as a Commission on General Af-

fairs and Policy. This was the path that he recommended at that stage. He acknowledged the desire to preserve the extensive work done on the intersection between private international law and intellectual property. At this stage it would be appropriate for Professor Vlas to convene the Commission on General Affairs and Policy; the Chair of the Council, Mr Andrew Walter, who was in attendance, would chair that Commission. The Commission would then have the power to determine the next step and to add a matter to the Work Programme. He accepted that it might be going too far to add to the Work Programme, noting that some Members may not be prepared to take that decision today. The Permanent Bureau was unsure how it would respond to additional work, particularly as it was not budgeted for. He suggested the most appropriate step might be for the Commission to recommend to the Council on General Affairs and Policy, at its meeting in March 2020, that it consider instigating an Experts' Group – this could include colleagues and friends from WIPO and other experts.

88. Any decision or recommendation of a Commission on General Affairs and Policy would be reflected in the Final Act of the Diplomatic Session; the Council on General Affairs and Policy could then take this up in March 2020.

89. The Chair of Commission I noted for those who were possibly less familiar with the structure of the HCCH that the Council on General Affairs and Policy is the organ that meets, in principle, once a year and determines the Work Programme of the Organisation.

90. The Secretary General observed that from his position this would be an appropriate way forward, giving all Members time to prepare positions and for the Permanent Bureau to prepare for work.

91. **The Chair of the Diplomatic Session** recognised that Article III(A)(7)(a) of the Rules of Procedure indeed allowed for the Council on General Affairs and Policy to sit during the Diplomatic Session. As the Chair of the Council on General Affairs and Policy was present, the Chair of the Diplomatic Session proposed that the Commission on General Affairs and Policy sit and deal with the question of future work on intellectual property. The Chair of the Commission on General Affairs and Policy and the Chair of the Commission on Judgments could decide when to consider this issue in the agenda; the Chair of the Diplomatic Session remarked he was happy to support their decision.

92. **The Chair of the Commission on Judgments** supported the discussion of Council being held at that time as it would assist the Plenary to conclude work on the Convention.

93. **The Chair of the Diplomatic Session** invited the Chair of the Commission on General Affairs and Policy to convene a meeting of the Council on General Affairs and Policy. Following the meeting of the Council on General Affairs and Policy, the meeting of the Commission on Judgments resumed at 12.33 p.m.

94. **The Chair** proposed that the Plenary work through practical consequences for the text flowing from the lack of consensus to include intellectual property matters within scope.

*Article 2(1)(m)*

95. The Plenary turned to Article 2(1)(m) and Working Document No 21 proposed by the United States of America and Canada. The suggestion was that Article 2(1)(m) should read "intellectual property and analogous matters". He noted that in Working Document No 13 from the European Union, the phrase "and analogous matters" had been in square brackets, but that that delegation had been agnostic as to its inclusion. **The Chair** opened the floor for discussion.

96. **A delegate from the People's Republic of China** expressed concern regarding the term "analogous matters". In the interest of certainty and uniformity of the Convention into the future, he suggested that those words be excluded from the text.

97. **The Chair** drew attention to paragraph 56 of the Explanatory Report. He recalled that the reason this was introduced was debate among Members about forms of protection, *e.g.*, the protection for traditional knowledge, genetic resources, or traditional cultural expressions which are treated as intellectual property in some States, but not others. The concern was that if only intellectual property matters were excluded then judgments in respect of widely recognised forms of intellectual property would not circulate, but those related to more controversial forms of ideas and protections would. This was perhaps a peculiar result. This was how the text of the draft Convention had been reached, but he acknowledged that there was no settled meaning of "analogous matters". This would mean a degree of imprecision, which could have an effect over time.

98. **A delegate from the European Union** remarked that, when it came to issues such as traditional knowledge (as set out in the draft Explanatory Report), the European Union considered it appropriate to exclude all things that are dealt with as intellectual property rights in various jurisdictions. His delegation would not support excluding intellectual property matters based only on a narrow notion. The European union preferred the inclusion of the words "analogous rights". Further, the delegate flagged that the meeting should perhaps consider whether they should include language like that of the 2005 HCCH Choice of Court Convention that makes an exception for contractual issues, like licensing contracts for intellectual property issues. The delegate recalled that there had not been a policy disagreement that these issues be included. The delegate observed that if intellectual property rights were excluded here, the same clarification that was considered necessary for the 2005 Convention might be needed.

99. **A delegate from Israel** reiterated the concerns reflected by the Chair regarding analogous matters. Her delegation joined with the European Union that the concept of "analogous matters" absolutely needed to be included in Article 2(1)(m) (*i.e.*, excluded from the draft Convention), but the delegation was open to discussion of different wording.

100. **A delegate from the United States of America** agreed with the European Union and Israel. He observed that the language served an important purpose, as had been explained in his delegation's proposal. The term accommodated intellectual property rights that may arise in future and become universal. He thought it was an astute addition to the text of the exclusion.

101. **A delegate from Brazil** supported the deletion of "and analogous matters", following the unfortunate exclusion of intellectual property matters generally. The Contracting Parties would then be able to discuss on the basis of the law of the requested State the qualification of these kinds of disputes on a substantive view on a case-by-case basis; this would widen the scope of the Convention.

102. **A delegate from Japan** accepted that "analogous matters" was quite an ambiguous concept, but commented that intellectual property itself was also quite ambiguous. He supported the inclusion of the term in Article 2(1)(m).

103. **A delegate from Australia** supported the inclusion of the words "and analogous matters".

104. **Un délégué de la Suisse**, suite à l'intervention de la délégation de l'Union européenne, revient sur la proposition de sa délégation qui consistait à inclure « *and analogous matters* » et propose à la place de réfléchir aux contrats portant sur la propriété intellectuelle.

105. **A delegate from Uruguay** joined the People's Republic of China and Brazil in their remarks; his delegation preferred not to include the wording "and analogous matters".

106. **A delegate from Singapore** supported the inclusion of the words "and analogous matters".

107. **A delegate from the Philippines** supported the inclusion of the words "and analogous matters", having heard the rationale behind the inclusion.

108. **A delegate from Canada** noted support for inclusion of analogous matters as co-proponents, and encouraged those delegations with concerns to refer to Working Document No 21, which provided conceptual guidance as to the matters included within "intellectual property" and "analogous matters".

109. **A delegate from the People's Republic of China** reiterated that it was important not to make public international law rules at this meeting. This was not the correct forum for developing intellectual property laws. The delegate remarked that these words were not used in any other intellectual property Conventions, and that this Commission should avoid introducing any new terms. He agreed with the delegate from Japan that "intellectual property" was an ambiguous term. The delegate recalled that the 2005 HCCH Choice of Court Convention only used these terms: this had not posed a problem and the People's Republic of China had ratified that Convention. He thought the same should apply also to the draft Convention. He reminded the Plenary that this Convention was about recognition and enforcement; the prerogative ultimately lay with the court addressed to decide whether a matter was intellectual property or not. Therefore, it was not necessary to include these words in the text. He suggested that it could be appropriate to note in the Explanatory Report that intellectual property rights under the Convention could be interpreted in a broad way, for some rights that were not the same from State to State. The delegation did not support introducing the term "and analogous matters".

110. **A delegate from Norway** expressed that her delegation did not have an exclusive position on including "and analogous matters" in the text, however, she supported the oral proposal of the European Union and supported by Switzerland, to carve out from the exclusion situations corresponding to what was already in the 2005 HCCH Choice of Court Convention, where proceedings were in the course of a claim for breach of contract.

111. **The Chair** recognised that there would be a need to return to aspects of the intellectual property discussion, for example Article 8(3), in light of the exclusion of intellectual property matters. He was inclined to suggest that paragraph 2(1)(m) might also be best left to be settled on Monday. He observed that there were two moving parts being "analogous matters", and the possibility of an exclusion of the kind seen in Article 2(2)(o) of the 2005 HCCH Choice of Court Convention (breach of contract proceedings). He noted that it would be more constructive to have a Working Document in order to make progress. He suggested that this matter should be concluded on Monday and not deferred further. At that stage he confirmed that sub-paragraph (m) would state "intellectual property" but was hesitant to record any decision while the decision on the square brackets remained to be settled.

112. **A delegate from the European Union** indicated it would prepare a Working Document for the Plenary. He raised a point for reflection with respect to "analogous matters", having listened carefully to the delegation of the People's Republic of China and the argument that it should be left to the requested State to decide the issue. He highlighted the concern that a requested State would be forced to recognise something that was dealt with as an intellectual property right in the State of origin, that it did not consider an intellectual property right. This was a result that he saw as somewhat paradoxical.

113. **The Chair** observed that delegations should reflect over the weekend upon the suggestion by the People's Republic of China that intellectual property must have autonomous meaning in this Convention, and it would be expected that would be extended to those matters treated as intellectual property in the State of origin. He noted that an explanation would be included in the Explanatory Report.

114. **A delegate from Brazil** raised a question: he wondered whether the Plenary had actually formally made the decision to exclude intellectual property from the Convention. He commented that before the change in nature of the meeting (to the Council on General Affairs and Policy) the Commission on Judgments had begun discussion of the proposal from the Russian Federation, and had considered the possibilities and the technicalities of inclusion or exclusion.

115. **The Chair** clarified that before the changeover, it had been his assessment that there was no consensus nor any real prospect of reaching a consensus to include intellectual property. He recalled he had then proposed that work should continue upon that basis and that, after inviting views to the contrary, there had not been any objection. The meeting had then proceeded on that basis. He explained that the reason no formal decision was taken was that the text in sub-paragraph (m) would operate to exclude intellectual property matters, but the form of that provision was yet to be decided. He clarified that the Commission makes decisions on text, not on concepts. What the Commission was now addressing were the formal decisions on the text flowing from the decision not to include intellectual property. The Plenary returned to discussing the precise formulation of the provision, and the Chair scheduled a decision regarding the language of sub-paragraph (m) for Monday.

116. **A delegate from Brazil** wished to clarify that the decision being taken was on the removal of the external brackets around Article 2(1)(m).

117. **The Chair** disagreed, and confirmed that no formal decision was to be taken at that time. He clarified that the status of Article 2(1)(m) was still pending, and that that decision would be made on Monday after the lunch break. He then suggested that the Plenary consider the practical consequences of the decision on intellectual property. He suggested that after the lunch break the Plenary could discuss Article 5, Article 6 and Article 7 – Article 8 would be considered at a later stage – and deal with Article 11. He


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would then turn their attention to Articles 13 to 16. Depending on the progress of discussions, he suggested that the Plenary would then be in a position to make a final decision on whether to meet on Saturday.

118. **A delegate from Israel** requested preliminary discussions on Article 8 to inform Members' reflections over the weekend.

119. **The Chair** acknowledged the request and suggested he check what material was presently available to facilitate those discussions

120. The meeting closed at 1.05 p.m.

## Procès-verbal No 8

## Minutes No 8

*Séance du vendredi 21 juin 2019 (après-midi)*

*Meeting of Friday 21 June 2019 (afternoon)*

1. La séance est ouverte à 14 h 43 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

2. **Le Président** indique à la Plénière qu'il est temps de reprendre. He suggested to resume the work on the provisions that make specific reference to intellectual property on the basis that there will be an exception in Article 2(1)(m). He indicated that no consensus has been reached yet on whether Article 2(1)(m) should refer to "analogous matters" and on whether Article 2(1)(m) should mirror Article 2(2)(o) of the HCCH *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 HCCH Choice of Court Convention"). The Chair noted that there is no Working Document. He suggested to work through the more detailed provisions and to have a brief discussion of them. He added that a decision could be made in some cases.

*Article 5(3)*

3. **The Chair** turned to Article 5(3). He mentioned that if paragraph 3 is excluded then judgments having as their main object the validity of an intellectual property right or the infringement of such right will be excluded from the scope of the draft Convention. However, he noted that judgments ruling on those issues as a preliminary matter will not be excluded. He further pointed out that the debates regarding preliminary questions will arise with respect to Article 8, later in the meeting. The Chair stated that the debate regarding Article 8 will be a preliminary one and no final decision will be made on that day. With respect to Article 5(3), which concerned judgments having their main object as ruling on infringement, validity, subsistence, or ownership of an intellectual property right, the Chair noted that if those judgments will not circulate under the draft Convention then the proposal in Working Document No 21 was to delete Article 5(3). He sought confirmation from the meeting that Article 5(3) is to be deleted.

*Article 7(1)(g)*

4. Noting that confirmation, **the Chair** turned to Article 7(1)(g), which was a ground for refusal. It concerned the case where a judgment ruled on an infringement of an intellectual property right, applying to that right/infringement a law other than the internal law of the State of origin. It was agreed to delete Article 7(1)(g) because it was no longer relevant. The Chair then suggested to leave Article 8 aside for the moment and turn to Article 11.

5. **A delegate from the European Union** sought clarification because the Chair indicated that Articles 5(3) and 7(1)(g) were deleted; however, nothing had been said with respect to Article 6(a).

6. **The Chair** recognised that he had overlooked Article 6(a) and directed the discussion towards this Article.

*Article 6(a)*

7. **The Chair** explained that Article 6(a) was about judgments that ruled on the registration or validity of an intellectual property right. He stated that this was now obviously outside the scope of the draft Convention. The Chair confirmed that Article 6(a) was deleted.

*Article 11*

8. **The Chair** directed the debate towards Article 11 concerning non-monetary remedies in intellectual property matters. He recalled that judgments having as their main object ruling on an infringement in intellectual property matters were now outside the scope of the draft Convention. The Chair then indicated that it follows that Article 11 should be deleted. The Chair confirmed that this was the position.

*Article 8(3)*

9. **The Chair** turned again to Article 8(3) because judgments relating to intellectual property may still arise under the draft Convention, but as a preliminary matter. He added that Article 10(3) of the 2005 HCCH Choice of Court Convention expressly provides for the effect of a preliminary ruling on the validity of an intellectual property right, other than copyright or a related right, and its implications for recognition and enforcement of a downstream judgment. He indicated that it seems logical to delete Article 8(3) since intellectual property rights are out. He suggested then to have a preliminary discussion on the issue. He proposed to start the debates with Working Document No 21 of the delegation of the United States of America and Canada and further asked what were the reasons for departing from the 2005 Convention on that point.

10. **A delegate from the United States of America** introduced Working Document No 21. This proposal aimed to exclude intellectual property and to delete Article 8(3), which brings the matter back in the draft Convention. He explained that Article 8(1) states that preliminary questions

shall not be recognised or enforced, and that Article 8(2) provides a discretionary ground for refusal. Concerning Article 8(3), he recalled that its delegation sought its deletion. He added that among all of the excluded matters of Article 2(1), only intellectual property would enjoy a special treatment. In his delegation's view, there was no reason to allow such discrepancies between excluded matters. He further asked what the reasons would be to keep Article 8(3). He added that now that intellectual property was excluded, Article 8(3) may have a broader scope than licensing agreements. He further questioned what types of civil and commercial law matters would have, as their preliminary questions, intellectual property. He welcomed the discussion on this point and thought of at least two matters, namely: i) contracts and ii) tort for malpractice, which would have intellectual property as a preliminary question. He pointed out that for a malpractice tort against a patent prosecution attorney, a valid right is required to resolve the issue and therefore the court would have to look at the underlying intellectual property question of validity, which is the preliminary question. He outlined that his delegation was concerned with what other as-yet uncontemplated intellectual property issues would trigger Article 13(b). He recalled that, to be consistent with his delegation's position to exclude intellectual property, he favoured the deletion of Article 8(3).

11. **The Chair** asked the delegation of the United States of America whether there was a reason to have a different approach than the 2005 HCCH Choice of Court Convention.

12. **A delegate from the United States of America** explained that there was a fundamental difference because non-exclusive jurisdiction was at stake. He further understood that if changes were made it would raise the question of why those changes have been made.

13. **The Chair** agreed and outlined that it could raise the issue of why this point had been addressed here and why the opposite conclusion had been reached.

14. **A delegate from Singapore** replied saying that it differs from the 2005 HCCH Choice of Court Convention because the latter Convention includes a certain subset of intellectual property, namely, copyright. In his view, that was why there was a need for the equivalent of Article 8(3) whereas the point here was the exclusion of all intellectual property.

15. **The Chair** pointed out that this distinction was not helpful here because in the 2005 HCCH Choice of Court Convention, it is the intellectual property rights that are excluded that are the subject of the equivalent of Article 8(3). In that Convention, the corresponding provision did not apply to copyright, which is in scope, but rather to the excluded rights. He added that the Plenary was looking for a coherent and principled framework to deal with this issue.

16. **A delegate from the European Union** thought that the Plenary wanted to exclude intellectual property, provided that contractual litigation should be inside the scope of the draft Convention.

17. **The Chair** remarked that it was yet to be decided. Therefore, the delegation of the European Union should feel free to address this question on the assumption that it was a possible outcome.

18. **A delegate from the European Union** asserted that contractual litigation should be included within the scope of the draft Convention. She added that her delegation will make a proposal on this. As stated by the Chair, she recalled that Article 8 in its entirety applies only when a matter excluded from the draft Convention arises as a preliminary question, and on its way to the final judgment on the object of the proceeding, which was within the scope of the draft Convention, the court makes a finding on this preliminary question. Further, she indicated that Article 8(1) allows the requested State to not give effect to this finding on the preliminary question. She added that this may be regulated by national law, but not by the draft Convention. She explained that paragraph 2 indicated that recognition may be refused if the judgment was based on a ruling on a matter to which this Convention does not apply. She emphasised that, as explained by both the Hartley/Dogauchi Report and the Explanatory Report, that situation arose only when the court of the requested State came to a different conclusion on the preliminary question. Otherwise, there were no reasons to refuse the recognition and enforcement of the judgment because of the ruling on the preliminary question. She further noted that, under the 2005 HCCH Choice of Court Convention, the threshold for refusing recognition in intellectual property was higher, so this should also be the case under the draft Convention. She considered that, in intellectual property, it was only the proper forum that should have a say on the essentials, namely, the validity. She then explained that the protection of the proper forum and its findings were the underlying philosophy of paragraph 3. Namely, if a judgment that has been issued in that forum came to a different result than the court dealing with the preliminary question, the recognition or enforcement should be postponed, or refused. She added that if proceedings were still pending before that forum, recognition or enforcement may be postponed, or refused. She underscored that if a defendant who has raised the invalidity defence once in the proceeding in the court of origin, and has failed, and did not bother to take this question to the proper forum, then the philosophy of paragraph 3 was that the same defendant should fail in the enforcement forum as he failed in the original forum. In her view, this logic applied in the 2005 Convention and should also apply under the draft Convention provided that contractual litigation is included within the scope. She was of the view that no reason could justify the exclusion of these money judgments from circulation if there was a way to refuse recognition and enforcement in certain appropriate cases.

19. **A delegate from Israel** observed that her delegation always had an issue with this Article. In her view, any matter outside the scope of the Convention may be refused under Article 8(2), so this should be the case for intellectual property. Since Article 6(a) has been deleted, she wondered whether Article 8(3) is still relevant. With regard to Article 8(3), she said that, as it stands, the scope of Article 8(3) was actually wider than before, because before it would only apply with regard to the validity of registered intellectual property rights. She stated that, in her view, the intention was to give incentive to a defendant that wants to challenge a registered intellectual property right to go to the proper forum and ask to declare that right invalid. However, she said it was not as relevant since Article 6(a) has been deleted. She then turned to her next concerns and gave an example, namely, if she has a patent that has been registered in Israel and someone got a judgment in a different State stating, as a preliminary question, that the patent was invalid. In the event she did not want this judgment to be recognised and enforced then, in theory, under Article 8(3) she has to go to before a court in Israel and ask for a declarative judgment stating that the patent is valid even though it is registered in Israel. She expressed concerns about this situation. She added that it will create more litigation for intellectual property rights that the competent authority already declared to be eligible.

20. **A delegate from Japan** indicated why, in his view, Article 8(c) should be deleted, which constitutes a departure from the 2005 HCCH Choice of Court Convention. He quoted Article 2(2)(o) of the 2005 Convention that states that infringement of intellectual property rights other than copyright and related rights is outside the scope of the Convention, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract. He added that the 2005 Convention applies to a certain extent to contractual matters related to registered intellectual property rights, and therefore the 2005 Convention had Article 10(3) which was similar to Article 8(3) of the draft Convention. He further recalled that Article 8(3) should be deleted because currently there was no provision which provides the inclusion of contractual matters relating to registered intellectual property rights.

21. **A delegate from Canada** indicated why a distinct approach should be taken in the context of the draft Convention. Namely, in the context of the 2005 HCCH Choice of Court Convention, there were two parties agreeing on a particular court to have their dispute settled. Then, he added that it was more reflective of ensuring that the consent cannot be easily frustrated in the intellectual property contractual context by raising validity, which has been excluded. He indicated that, currently, any disputes that have an exclusive choice of court agreement can be addressed under the 2005 Convention. The question remains: to which judgments would Article 8(3) of the draft Convention apply.

22. **A delegate from Australia** noted that, based on the assumption and conclusion of the delegation of the European Union, his delegation could support the proposal. In his delegation's view, contractual matters should be within the scope, and on that point, Article 8(3) had important work to do. However, if contractual matters were not included then Article 8(3) should be omitted.

23. **A delegate from Brazil** considered that, at this stage of the discussion, a decision on the exclusion of intellectual property had not yet been made. He further indicated that he was trying to deal with the idea of adopting the proposal from the delegation of the United States of America and Canada. He further pointed out that he felt that the Plenary was losing some control of the effects of intellectual property within the draft Convention. He added that, as said by the delegate from Australia, if contractual matters were retained, less control will be possible on what the outcome should be. Under these conditions, he was of the view that an extra protection was necessary, as provided by Article 8(3). He further outlined that some adjustments may be required since Article 6(a) has been removed. Therefore, the idea was to substitute that for intellectual property, and in this case, this expression would be sufficient for the delegation of Brazil.

24. **The Chair** outlined that those adjustments will be required to make drafting sense since Article 6(a) has been deleted.

25. **A delegate from the European Union** noted that in the 2005 HCCH Choice of Court Convention, intellectual property was excluded to a large extent. She added that Article 10 refers to the situation where a matter excluded under Article 2 or Article 21 arose as a preliminary question. She stated that this was the starting point of Article 8 of the draft Convention and that a reference to the indirect jurisdiction rule in Article 6(a) has been added. Her delegation was of the view that the basic version of the rule on preliminary questions was that the court of origin dealt with matters excluded from the scope of the draft Convention. She further suggested to go in that direction. In her delegation's view, the deletion of Article 6(a) did not change anything in that philosophy. She then gave the following example with respect to license litigation where a licensee did not pay the licence fee and is sued for payment. If he refused to pay because he said that the intellectual property right was not valid and the court found it to be valid, then why would this money judgment not circulate? If the defendant was sure that this right was not valid, then why should he not be required to go to the proper forum to have it declared invalid?

26. **Another delegate from the European Union** replied to the intervention of the delegate from Canada regarding the departure from the 2005 HCCH Choice of Court Convention. On that point, he did not agree with the delegate from Canada saying that the departure is justified because the parties have chosen the forum where the decision has been taken. In his delegation's view, it was not legitimate because the rationale was protecting the proper forum. It therefore did not matter whether that forum resulted from an exclusive choice of court agreement between the parties or from a jurisdiction filter for contractual litigation under the draft Convention.

27. **The Chair** noted that there were also consent-based filters in the draft Convention. He was therefore of the view that a better explanation than choice of forum is required. The Chair noted that it was a useful survey with respect to Article 8, allowing the delegates to have their thoughts percolating in their mind during the weekend on this subject.

28. The Chair directed the debate toward Articles 13 to 16.

*Article 13*

29. **The Chair** indicated that there were no Working Documents and proposed to adopt the text by consensus.

30. **A delegate from the European Union** had no contribution to make but wanted to indicate that footnote 247 of the Explanatory Report states that a discrepancy should be brought to the attention of the Diplomatic Session: Article 13(1)(d) did not refer to an officer of the court, unlike Article 13(3).

31. **The Chair** queried whether the delegation of the European Union had any suggestions on this.

32. **A delegate from the European Union** proposed that the *co-Rapporteurs* introduce the issue because they were the ones to raise it. He added that his delegation did not have a firm position on that.

33. **A delegate from the People's Republic of China** emphasised that if the Plenary decided to keep Article 8(3), the judgment may still be related to some judgment from common courts.

34. **The Chair** thanked the delegate from the People's Republic of China and indicated that the discussion of common courts will be reached on Monday. He further added that the delegates should think about this point during the weekend. He queried whether the *co-Rapporteurs* had something to say about both Article 13(1)(d), which refers to a court, and Article 13(3), which refers to an officer of the court.

35. **A *co-Rapporteur*** stated that it was an issue they had just raised, and they did not see any reason for allowing this discrepancy.

36. **The Chair** mentioned that this inconsistency was also present in Article 13 of the 2005 HCCH Choice of Court Convention. He further echoed the comments made by the *co-Rapporteur* regarding whether the difference between Article 13(1)(d) and Article 13(4) had really been intended. For good measure, the Chair indicated that the Plenary should look at Article 3(1)(b), which refers to an officer of the court. The Chair further questioned whether it was a deliberate policy choice or an accident of history.

37. **A delegate from Canada** thought that it was not a deliberate choice. She was in favour of clarifying this situation. She added that the French version should be perused as well. She further echoed the comments she made when discussing Article 3: when the English text refers to an officer of the court, the French text could use different terms.

38. **The Chair** asked whether there was a policy reason to differentiate between these two limbs. If there was no policy reason, the language should be aligned. The Chair suggested that this issue could be dealt with by the Drafting Committee. The Chair asked further if there were other drafting questions or any issues regarding the Explanatory Report.

39. **A delegate from Uruguay** referred to Article 13(1)(c) in the Explanatory Report, in particular to paragraph 347, which states that paragraph 1(c) requires the production of any document necessary to prove that the judgment has effect or, where applicable, is enforceable in the State of origin. He further suggested to include in the Explanatory Report concrete examples, which should be as broad as possible, to facilitate the consideration of the courts of the requested State.

40. **The Chair** observed that the *co-Rapporteurs* will take that into account.

41. **A delegate form Israel** stated that he understood Article 13(1)(c) as saying that any document would be necessary. He acknowledged that examples may be of help but wanted to avoid the implication of a closed list in the Explanatory Report.

42. **The Chair** agreed. He understood the intervention of the delegation of Uruguay as a request for illustrations of the sort of thing that might be required.

43. **A *co-Rapporteur*** emphasised that they were reluctant to provide this kind of list. He added that the Permanent Bureau should come up with a recommended form including a reference to whether the judgment is enforceable or not in the State of origin. He questioned whether this could be sufficient to satisfy this requirement. Otherwise, it may vary from State to State.

44. **The Chair** noted that no document may be needed for this purpose and added that in most cases the recommended form will be seen as sufficient. He outlined that it would depend from context to context and the most that can be done to give examples based on hypothetical cases.

45. **A delegate from Sri Lanka** queried whether it would be sensible to follow the example given in the HCCH *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* since the debates here were about authenticity and finality.

46. **The Chair** indicated that the issue of a recommended form will be discussed next week. He therefore directed the debates toward Article 14.

*Article 14*

47. **The Chair** pointed out that there was a Working Document, namely Working Document No 23 of the delegation of Switzerland.

48. **Le délégué de la Suisse** rappelle que l'article 14 prévoit que c'est le droit de l'État requis qui régit la procédure tendant à obtenir la reconnaissance, l'exequatur ou l'enregistrement aux fins d'exécution, et l'exécution du jugement. C'est donc cette loi qui détermine le délai applicable à ces procédures. De son avis, le délai applicable pour demander l'exécution d'un jugement étranger devrait être le même pour un jugement national dans la mesure où aucune distinction en devrait être faite et c'est là qu'intervient la proposition suisse. Il indique qu'une différence de traitement, telle qu'opérée par certains États, pourrait mettre en échec le fonctionnement du projet de Convention.

*Article 14(1)*

49. **The Chair** suggested to proceed paragraph by paragraph. He indicated that, according to Article 14(1), 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. He observed that this paragraph has been subject to many discussions but there was no proposal for changing its wording. He confirmed that this paragraph was adopted by consensus.

*Article 14(2)*

50. **The Chair** directed the discussion to Article 14(2): the court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State. He remarked that this paragraph has been subjected to many discussions as well. He observed that there is no Working Document. He noted that this paragraph was adopted by consensus. He suggested to turn to the proposal of the delegation of Switzerland.

51. **A delegate from Australia** stated that its delegation supported the proposal.

52. **Une déléguée du Canada** indique qu'elle pourrait appuyer la proposition suisse. Toutefois, il serait judicieux à son avis de revoir le titre de l'article 14 dans la mesure où le délai de prescription peut relever, dépendant des États, du droit matériel ou du droit procédural.

53. **The Chair** indicated that he had had a discussion on that issue with the *co-Rapporteurs* during lunch break. He added that he now has a contrary view to the one he had before. Namely, when applying one's national law to the issue of limitation in the context of enforcement, rather than looking to the substantive law that governs the judgment, this should be treated as a matter of procedure.

54. **A delegate from the People's Republic of China** outlined that this issue was of importance but further stated that it was difficult for his delegation to accept the proposal on the ground that Article 14 stated that the procedure is fully subjected to the law of the requested Stated. In his view, this proposal imposed requirements for domestic


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legislation, which should uphold a principle of non-discrimination. He thought that the People's Republic of China did not have this kind of rule. He therefore further queried whether States in the room have this kind of rule. If that was the case, he would be willing to consider the proposal.

55. **The Chair** observed that this issue had been discussed in Preliminary Document No 11, prepared by the Permanent Bureau. The Chair believed that some States indeed had a different treatment of foreign and domestic judgments regarding the limitation period but did not remember the relevant paragraph in the Preliminary Document.

56. **A delegate from Israel** indicated that his national law contains such types of provisions. He thought that if States have such mechanisms, it will require a change of policy for them to join the Convention. He recalled that this proposal came up during the Special Commission. It was decided that the requested State should apply its own procedural law regarding the statute of limitations. He added that a consensus had been reached with respect to the language of the Explanatory Report: foreign judgments, if they are recognised and enforced, should be treated in the same manner as domestic judgments. Initially, he was not in favour of that language but then could go along with that compromise. He mentioned that Preliminary Document No 11, paragraphs 67 and 68, indicated that there are also no regional or international instruments expressly addressing limitation periods. He did not understand why the draft Convention should be different on that point. He explained that, under his national law, that difference has been considered because, in his view, it was more difficult to prove grounds for refusal. He noted that Israel was currently considering shortening the statute of limitations for domestic judgments, which was a matter of domestic law. He pointed out that he understood concerns from delegations but wanted to go along with the consensus that had been reached in the wording of the Explanatory Report, in paragraphs 355 and 356. He further pointed out that when Israel joins the Convention, an effort will be made not to discriminate against foreign judgments. He echoed the comments made by the delegate from the People's Republic of China and outlined that imposing additional obligations for States would be difficult.

57. **A delegate from the Republic of Korea** expressed full support for the proposal.

58. **A delegate from the European Union** observed that this issue had been debated in the past, which led to the current situation: the Explanatory Report dealt with the principle of non-discrimination. His delegation was happy with that solution and agreed on substance with the proposal of the delegation of Switzerland. His delegation had always placed a high degree of importance on the principle of non-discrimination, in general as well as in the specific case of a statute of limitations. He remarked that the last sentence of paragraph 355 in the Explanatory Report seems to be a general statement, but it is under the heading "Statute of limitations". Therefore, in his view, the Explanatory Report was quite clear on the issue. He further noted that it is how the draft Convention should operate; then, he supported the proposal of the delegation of Switzerland in substance and recalled that having the principle of non-discrimination in the Explanatory Report or in the draft Convention itself was not a matter of pivotal importance.

59. **A delegate from Norway** outlined that the principle of non-discrimination was a matter of importance. She considered that several delegations may think that this did not apply; therefore, she expressed support for the proposal of the delegation of Switzerland because her delegation was of the view that it was necessary to have this principle in the text of the draft Convention itself.

60. **Un délégué de l'Uruguay** exprime son soutien à la proposition de la délégation de la Suisse.

61. **A delegate from Turkey** stated that his delegation was in favour of the proposal. Having seen the interpretation that may be made by other delegations, his delegation considered it necessary to have the principle in the text of the draft Convention.

62. **The Chair** remarked that this proposal received a great deal of support, and that a comment from the delegation of the People's Republic of China flagging this might be difficult to accept if it is only a theoretical issue, and an opposition of one delegation. He noted that it would be helpful if it were possible to proceed on the basis that there is a consensus, without making controversial rulings about what qualifies as consensus. He proposed to leave this issue until after the break, allowing delegations expressing concerns to engage with delegations supporting the proposal.

63. **A *co-Rapporteur*** expressed concerns about parts of the proposal and the way it was drafted. First, he did not find any jurisdiction where there is a limitation period to request the recognition of a foreign judgment. In his view, it would be strange to impose a limitation period for the recognition of the *res judicata* effect of a foreign judgment. Nevertheless, the proposal refers to both recognition and enforcement. Secondly, the proposal compared the recognition and enforcement of a foreign judgment with the limitation period for domestic judgments. He stated that there are not *exequatur* proceedings for domestic judgments; therefore, the proposal compared things that cannot be compared in his view. He emphasised that some parts of the proposal needed to be clarified.

64. **The Chair** thanked the *co-Rapporteur* for having identified those technical issues that require to be considered.

65. **A delegate from the Republic of Korea** observed that his delegation had read an article written by a professor from the People's Republic of China on Chinese law on the recognition and enforcement of foreign judgments. He stated that he would reach out to the delegation of the People's Republic of China for further clarification.

66. **The Chair** was hopeful those delegations would have the time to have this conversation over the break. In his view, it was the best way to take this issue forward.

67. **A delegate from Japan** asked whether the law of the requested State, in the proposal, includes its private international law rules.

68. **Un délégué de la Suisse** indique qu'il s'agit de toutes les règles déterminantes pour demander l'exécution d'un jugement. Il souligne que ce point sera clarifié s'il pose problème.

69. **The Chair** asked whether it is not a theoretical issue because if national law would have been reviewed, including private international law rules, it is hard to see what law it would look to, except the law of the State of origin, in which case there is no problem. He further stated that the idea of looking to some third State, with a limitation period that might be shorter, seems inherently unlikely. The Chair recalled that this conversation would be more appropriate

during the break between the proponents and those who have concerns. The Chair then adjourned for a coffee break.

70. The Chair then proposed that further time was needed to deal with the proposal concerning Article 14(3), given the technical drafting questions that had been raised by the *co-Rapporteurs*. However, the Chair reflected that there was a lot of support for the proposal and only limited reservations about it. The Chair encouraged those holding reservations to reflect upon whether they wished to maintain them, noting that in any event there were technical issues that needed to be dealt with before a final decision was made.

71. **A delegate from Israel** stated that its delegation had no issue with reserving the issue until Monday. The delegate indicated that its delegation was contemplating a proposal along the lines of an Article 15 declaration and asked whether proposals on an Article 15 declaration mechanism should be submitted on the assumption that something would be included in the text, or whether such a proposal should wait until the discussion had occurred on Monday. In other words, should a Working Document be submitted on the premise that something would be in the text?

72. **The Chair** directed that delegations should submit proposals against the possibility that something will be included, rather than on particular assumptions. The Chair emphasised the need for efficiency moving forward and warned the delegates against feeling complacent about the amount of time reserved for discussion next week. The Chair reminded the Plenary that there remained quite a list of issues yet to be resolved, some of them small, and yet some of them had remained unresolved for a number of days. He encouraged delegates to maintain focus to resolve these issues. Leaving Article 14 for Monday, the Chair directed the discussion to Article 15 for which he noted two Working Documents: Working Document No 10 from the delegation of the European Union and Working Document No 30 from the delegation of Israel.

*Article 15*

73. **A delegate from the European Union** explained that the proposal of the delegation of the European Union was triggered by an invitation from the *co-Rapporteurs* in footnote 257 of the draft Explanatory Report to consider a particular point. The delegate read Article 15(2) as it is worded in the draft Convention and highlighted that its benefit is provided in terms of the circulation of a costs order given in *exequatur* proceedings. However, he explained that one may only benefit by virtue of Article 15(1) when "no security, bond or deposit" had been required. The delegate considered that this presented a problem for a number of States, including European Union Member States, which had legislation in place, from the beginning, that prevented someone from being required to provide a security, bond or deposit solely on the grounds of not being domiciled or resident in that State. Therefore, parties in the jurisdiction of those States were not exempted by virtue of Article 15(1), but by virtue of the national law already in place. Nonetheless, the delegate considered that parties from those States should benefit from Article 15(2). Therefore, his delegation proposed simply to add "or of the law of the State where proceedings have been commenced" after the words "by virtue of paragraph 1" in the existing text, to cater for that category of State. The delegate said this was not a new nor invented position but referred back to the HCCH *Convention of 25 October 1980 on International Access to Justice* (hereinafter, "1980 HCCH Access to Justice Convention") which addressed the issue with the same formulation.

74. **A delegate from Israel** stated that its delegation had no problem with the proposal of the delegation of the European Union. The proposal concerned situations where a State had made a declaration (to the effect that it would not apply para. 1) but where, in a case before a court of that State, there was no imposition of a security, bond or deposit in such a State. The delegate noted that, where the court had nonetheless refrained from imposing a "security, bond or deposit" and had then made a costs order, the subsequent costs order would not circulate. The delegate felt from a policy perspective that this would amount to a punishment upon litigants for a choice made by States making a paragraph 1 declaration. The delegate did not see any policy reason as to why litigants should be punished in this respect.

75. **The Chair** enquired of the delegate from the European Union as to his appreciation of Working Document No 30, and whether the delegate understood it to reflect a broader approach, or whether he had reservations.

76. **A delegate from the European Union** responded that he did not regard the substance of the proposal of the delegation of Israel to differ from the European Union's proposal. He emphasised that the delegation of the European Union understood the "law of the State where proceedings have been commenced" to include the law of a State that did not absolutely require the imposition of such a security or bond, and where the court has made use of such a discretion by not requiring a security or bond. The delegate suggested that these overlapping concepts could be explained in the Explanatory Report. If that could be agreed upon, the delegate said that the wording proposed by its delegation would not have to be changed substantially and could be kept in line with the formulation established under the 1980 HCCH Access to Justice Convention. The delegate suggested that the Explanatory Report could explain that the situation outlined by the delegate from Israel would be covered by that formulation.

77. **The Chair** said that, on the basis that the proposal of the delegation of the European Union achieves the same outcome as that in Working Document No 30, the Plenary should now refrain from discussing the preferable formulation and turn to consider two things: i) whether Article 15 should be included in the Convention and ii) whether Article 15 should be included with the proposed extension.

78. **A delegate from Canada** reminded the Plenary that this Article was not a favourite of her delegation, saying that her delegation was substantially less than enthusiastic about it. Nonetheless, accepting that Article 15 was there, the delegate considered paragraph 3 to be imperative. The delegate expressed concern that the proposals did not fully address the problem raised. She explained there are many cases in which security for costs are ordered, yet the security is insufficient to cover the actual costs. She recalled the concerns of the delegate from Israel that litigants, rather than States, suffered punishment for the choices of States. Yet the delegate from Canada was not satisfied that either proposal sufficiently addressed the problem, and she was interested to hear whether other delegations shared her concern.

79. **The Chair** agreed that neither proposal addressed the additional issue raised by the delegate from Canada. However, he sought an indication from the delegate from Canada as to whether the delegation of Canada was comfortable with the proposals nonetheless, which go beyond the current position in the draft text to offer successful respondents a little more protection, even though there may be further scope for protection.


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80. **A delegate from Canada** expressed uncertainty that the reference to the "law of the State where proceedings have been commenced" referred to the place where the proceedings for recognition and enforcement had been commenced. She indicated that her delegation is less familiar with the wording as Canada is not a Party to the 1980 HCCH Access to Justice Convention. The delegate refrained from expressing a view on the preferable reference.

81. **A delegate from the Republic of Korea** thanked the delegations from the European Union and Israel for each of their proposals. The delegate expressed total agreement with the delegation of the European Union: the proposed paragraph 2 adequately addressed the situation for States which already have a "no security" rule and which therefore do not need to make a paragraph 1 declaration. For that reason, the delegate supported the proposal of the delegation of the European Union. However, the delegate from the Republic of Korea held some concerns for the wording of the proposal contained in Working Document No 30. The delegate observed the fundamental basis of Article 15 was that States should not impose security on the sole basis of nationality, domicile or residence and, as a corollary, that an order for costs should be circulated. However, the delegate considered that the proposed words in Working Document No 30 suggested that States which do not adopt a "no security" rule would be afforded a discretion as to whether they do or do not impose a costs order, and that a costs order would be circulated regardless. The delegate considered that the proposed words could tear down the fundamental relationship regarding a "no security" rule as the paragraph about circulation (para. 2 in the current draft text, para. 3 in Work. Doc. No 30) departed away from paragraph 1. The delegate considered that States could easily make a paragraph 1 declaration to gain the benefits (of circulating security for costs) without incurring any additional burden under paragraph 1. The delegate therefore hesitated to agree with the proposal of the delegation of Israel.

82. **The Chair** indicated that the delegation of Israel had not proposed the text in its proposed paragraph 3, but simply moved its location. The Chair repeated that the proposed words were also present in the draft Convention and in the proposal of the delegation of the European Union and that its location should be a matter for the Drafting Committee and not discussed by the Plenary today. He directed discussions to paragraph 2 (which he noted the delegate from Israel would prefer to have contained in para. 3).

83. **A delegate from Brazil** supported the proposal of the delegation of the European Union. The delegate noted that Brazil is also a Party to the 1980 HCCH Access to Justice Convention. He reminded the Plenary that the wording of Article 15 was part of a compromise achieved in an informal working group during the fourth Special Commission and, in that regard, the delegate was very happy with the current text as it stood.

84. **A delegate from Israel** clarified a misunderstanding. The delegate did not propose to permit a judgment for costs to circulate where a State had made a paragraph 1 declaration and a court of that State had previously imposed a security, bond or cost. What the delegate proposed was that litigants should not be penalised only in the situation where a State had made a paragraph 1 declaration, but a court had not subsequently imposed a security, bond or cost.

85. **A delegate from Australia** expressed his gratitude to the *co-Rapporteurs* for identifying the issue and thanked the delegates from Israel and the European Union for correcting past errors. The delegate preferred Article 15 to be expressed in fewer words, and for that reason said the proposal of the delegation of the European Union most correctly addressed the issue at hand.

86. **The Chair** observed there were no further interventions and that there was broad support for the substance of the proposal of the delegation of the European Union. He summarised that the policy objectives of the delegation of Israel could be achieved under the proposal of the delegation of the European Union, and that the Explanatory Report could emphasise the point that references to being exempt by virtue of "the law of the State where proceedings have been commenced" extend to where that law allows a discretion and no subsequent bond is required. The Chair said this should be able to be adopted by consensus.

87. **A delegate from Israel** remarked that the Explanatory Report could make clear that this would also apply when a State has exercised the right to declare. If the delegation of the European Union shared this understanding with his delegation, the delegate had no issue with the wording. The delegate reiterated his delegation's policy concern for the situation where a State made a paragraph 1 declaration, yet no security or bond was imposed by a court of that State, and therefore the litigant would be prevented from circulating a subsequent costs order. To the extent the delegation of the European Union agreed with this concept, the delegate from Israel did not have an issue with the wording of Article 15 and wished for such an explanation to be included in the Explanatory Report.

88. **The Chair** enquired whether any State had a problem with the proposed clarification. The Chair proposed to proceed on the basis of adopting Article 15 as set out in Working Document No 10, with the clarifications in the Explanatory Report about the effect of the reference to the "law of the State where proceedings have been commenced" and the practical immateriality of a declaration being made if in such a case no security is required.

89. **A delegate from the European Union** stated that its delegation had no problem with the substance of the proposed course but also suggested that it could be helpful, in any case, for States to make limited paragraph 1 declarations, perhaps specifying that one does not exclude oneself from all cases but only "from those in which the discretion of the court […]" and so on and so forth.

90. **The Chair** concluded that there was consensus as to the text of Article 15. The Chair turned to Article 16.

*Article 16*

91. **The Chair** observed that there were no Working Documents concerning Article 16. He described the important function that Article 16 performs: that the Convention sets a "floor", not a "ceiling" (subject to Art. 6). The Chair concluded that Article 16 was adopted by consensus. The Chair reflected that this was a fundamental provision, and that with consensus upon its inclusion the basic building blocks of the Convention were aligning neatly. The Chair then remarked that the Plenary had discussed all matters scheduled for today, and he thus proposed to take stock of the unresolved issues from the last four days. If none were ready for resolution, the Chair proposed to make concrete plans for their resolution (*e.g.*, by establishing informal working group meetings tomorrow instead of the Plenary, or during Monday lunchtime).

*Article 2(1)(g)*

92. **The Chair** highlighted that Article 2(1)(g) was one such 'loose end'. The question was whether the Plenary wished to exclude all marine pollution from the scope of the Convention, or only ship-sourced marine pollution. The Chair emphasised that this needed to be brought to a conclusion, despite States' indications that they were consulting with maritime experts. The Chair encouraged the delegations to place pressure upon such experts for a reply. The Chair then enquired whether there existed consensus to exclude only ship-sourced pollution.

93. **A delegate from the People's Republic of China** stated that its delegation held a strong position to exclude all marine pollution issues.

94. **A delegate from the European Union** assured that his delegation had placed further pressure on its experts, and indicated that the delegation of the European Union may be inclined towards the position of not excluding all marine pollution, and that perhaps an exclusion pertaining to ship-sourced pollution only would be enough. However, he emphasised this position was not final and expressed gratitude for a Monday morning deadline.

95. **The Chair** emphasised that the issue would be resolved on Monday morning. The Chair requested the delegation of the People's Republic of China to consult its experts again, and to reflect upon whether it might demonstrate flexibility in its position given that the delegation's concerns were not widely held. The Chair highlighted the availability of other 'safety valves' under the Convention, such as Article 19.

96. **A delegate from the People's Republic of China** stressed that the issue was of fundamental importance, and that he had no flexibility on the issue. The delegate reflected upon the approach taken by the Plenary: that if obligations were to be introduced into the Convention, consensus was required.

97. **The Chair** recalled that in the opening remarks, he expressed the strong hope not to test the question of what is required for consensus. He emphasised that consensus is not the same as unanimity, and that there may be situations where just one or two delegations with reservations would be strongly encouraged to look to other solutions (such as an Art. 19 declaration) in the interests of avoiding difficult line calls. The Chair highlighted that, where an exclusion from scope was of fundamental importance to only one or two States, it could limit the scope of the Convention just for itself and thereby permit every other State the opportunity to deal with the issue under the Convention. The Chair sympathised with the delegation's position, but encouraged the delegation of the People's Republic of China to reflect upon whether it were possible to avoid testing the approach of reaching consensus. He welcomed and encouraged the delegation to take the floor.

98. **A delegate from the People's Republic of China** recalled that States were all on the same footing, and that all States had the same understanding as to what consensus entailed. He remarked that "consensus" meant that there were no major concerns upon important issues. The delegate considered that his delegation had demonstrated flexibility in order to achieve consensus on each and every issue discussed so far. He recalled that every country would have its own fundamental issues. The delegate did not wish to test the process of consensus: such a question would not only affect discussions on the provision currently under consideration. The delegate suggested there could be some procedural rules to test what consensus is, but reiterated that testing consensus was not what he was intending to do, nor had he tried to. The delegate reiterated his desire for a successful Diplomatic Session to resolve issues important to all delegations, including issues that were of major concern. The delegate highlighted that his delegation's position emerged from a country that would seek to circulate many of its own judgments in the future under the draft Convention, and in turn would want to receive many judgments for circulation. The delegate expressed that he would value the attention of other delegations upon the very important concerns of a very important country in this process.

99. **The Chair** sought to underline the point that he did not wish to test the boundaries of the concept of consensus, and that this required the Plenary to find elegant and mutually agreeable solutions. The Chair acknowledged the fair point raised by the delegation of the People's Republic of China, however he called upon them to reflect upon whether the issue were sufficiently important to be pressed. At the same time, he encouraged all delegations to reflect upon the fact that the issue was very important for the delegation of the People's Republic of China, and that everyone needed to reflect upon how this could be resolved in a way that was mutually satisfactory.

100. **A delegate from Japan** clarified his delegation's position that if ship-sourced marine pollution were excluded from the draft Convention, other matters could still be "in" the scope of the Convention.

101. **The Chair** encouraged delegations to reflect over the weekend upon the most collaborative and constructive way to move the issue forward, which could involve movement in either direction. He noted that there would either be consensus to make the change, or there would be acceptance that it was a bridge too far, at this time, under this instrument.

*Article 2(1)(l)*

102. **The Chair** directed the discussion to privacy matters and Working Document No 47 from the delegations of Australia and the United States of America.

103. **A delegate from the United States of America** stressed his delegation's strong preference for a blanket exclusion with respect to privacy from the scope of the Convention. In a spirit of collaboration, and in the knowledge that other States felt that this position was too restrictive, the delegate reported he had consulted with privacy experts. The experts were willing to accept that their concerns for the place of "privacy" in the Convention may not operate strongly in the context of an obligation in a commercial contract to protect personal information. The delegate clarified that this referred to companies operating in a market place obtaining personal information pursuant to very specific contractual obligations, promising to protect them, and then failing to do so. How that goal was achieved (either in the text or in the Explanatory Report) was somewhat less important to the delegation of the United States of America. The delegate repeated his delegation's preference for a blanket exclusion, but in the interests of moving the discussion forward the delegate referred to the co-sponsor to provide insight as to the proposal.

104. **A delegate from Australia** was concerned that a blanket exception on privacy matters could invite an interpretation that extended the exception to the protection of personal data in certain contractual circumstances. The dele-


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gate explained this could result in an absurd situation: judgments relating to data that contained no personal information would circulate, and yet if the data contained personal information then the judgment may not circulate. The delegate said that, like the delegate from the United States of America, Australia was not wedded to a particular solution so long as there was a common understanding. The delegate stressed that the strong preference of the delegation of Australia was for the Explanatory Report to explain that it is clear a judgment would circulate in these circumstances.

105. **A delegate from the Republic of Korea** enquired of the co-sponsors whether the phrase "breach of an obligation" was meant to include enforcing an obligation, for example under a contract to administer personal data.

106. **The Chair** sought to clarify whether the delegate's question referred to, for example, orders for the performance of such an obligation where it had not been breached already. The Chair framed the question thus: Why distinguish between proceedings for breach of an obligation and a proceeding to enforce an obligation *ex ante*?

107. **A delegate from the United States of America** explained that his delegation's driving concern was that there was uncertainty as to the types of litigation that may arise in the future. The delegate was reasonably confident that one could specify the circumstances in which the action involved a breach of a contractual obligation. However, circumstances which might involve an attempt to prevent a breach for some other future occurrence, and the kind of litigation that would arise from that, were a good deal less clear to his delegation. Given the general strong preference of his delegation for a complete exclusion, the delegate stated that adding this understanding back in would not be desirable (particularly because the delegation of the United States of America found it difficult to predict the contours of such a situation).

108. **A delegate from Brazil** reserved her delegation's position on this matter as she was consulting and the proposal had just been received.

109. **A delegate from Israel** thanked the delegates from the United States of America and Australia and agreed it was a helpful direction, however the delegate wished for more time. The delegate wanted to understand the position of the delegation of the European Union, who he observed had a keen interest in privacy regulations, noting that the delegation of Israel would be in a position to decide on Monday.

110. **A delegate from the European Union** stated that the delegation of the European Union needed to coordinate its position. However, he signalled "intellectual and other" openness upon the issue. The delegate sought to clarify whether the "obligations" in a commercial contract had to be express or whether they could include implied obligations to protect personal information.

111. **The Chair** said he assumed that "obligations" referred to any obligations, express or implied. He noted that the proponents were nodding, and the discussion proceeded on that basis.

112. **A delegate from the People's Republic of China** enquired as to the new proposal concerning "in a commercial contract" in Working Document No 47. He enquired as to the difference and intention between "commercial contract" and the older wording.

113. **A delegate from the United States of America** used the term "commercial" as a shorthand, but acknowledged the point was not fleshed-out. He explained it was intended to reflect a contract that had generally been made available, through a generally accessible market open to any buyer, as opposed to what might be a private arrangement between friends to have one keep information in exchange for consideration. The aim was to reflect the notion of market activity underlying the contract: whether "commercial" was the best word for this or not he would leave to others, but it seemed to the delegate to be a good proxy. The delegate's concern was that a general breach of "contract" was too wide and may not be clear, whereas "commercial contract" was more precise. The delegate explained that it seemed uncertain whether a breach of "contract" definitely excluded claims other than breach of contract, so long as breach of contract was also alleged in the case.

114. Noting no further interventions, **the Chair** acknowledged that delegates required more time. The Chair asked the proponents to reflect upon whether the exception did anything at all. The answer to this, the Chair stressed, depended broadly upon how the exclusion of privacy was understood. The Chair provided the following example: suppose Mr Paul Herrup were to notice that there were companies selling cheerful greetings to be hung on the wall, but noticed a gap in the market for gloomy greetings, and therefore set up a company, Paul Herrup's Gloomy Greetings Limited. Suppose the company were a massive success and that millions of customers signed up, online, to have depressing greetings hung on the wall when they arrive in their office. Suppose the business grew to the point where Mr Paul Herrup's computers could no longer hold data, and he therefore contracted with a provider to store information about his customers and other transactional information. Looking to Article 2(1)(l), the Chair considered the provision would deal with disputes between Paul Herrup's Gloomy Greetings Limited and the technology service provider where there was a breach of contract. However, the Chair questioned whether this would involve a "privacy" claim at all. Where there had been a disclosure of data by the IT services company, it seemed to the Chair that individual customers may have privacy claims against Paul Herrup's Gloomy Greetings Limited, and privacy claims against the IT services provider. However, the dispute between Paul Herrup's Gloomy Greetings Limited and the IT services provider would be a commercial dispute about the performance of a commercial contract, which only indirectly concerned privacy. The Chair explained the same situation may arise even if the data were to be kept secure for other reasons (*e.g.*, it was commercially sensitive or valuable): the key circumstance was where there had been a contractual obligation to keep information secure, and there had been a disclosure or deliberate selling of the information. The Chair wondered how and whether the exception operated.

115. **A delegate from the United States of America** repeated his original intervention that this area of law was rapidly changing, and that pleadings and theories of recovery were in a great deal of flux and dynamism. The delegate emphasised it was also an extremely sensitive area of the law. The delegate said he did not want to be surprised by courts which may not characterise matters purely as a breach of contract. The delegate's proposal reflected an abundance of caution against the future. The delegate drew attention to his opening remarks that it may well be appropriate to revisit the position in 10 or 15 years' time but that, for the moment, the delegate did not want to rely upon legal classifications or categorisations as to what was involved in particular actions.


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116. **The Chair** clarified that his question ran the other way. The Chair queried: Why not simply mention "privacy" as the exclusion, and invite the *co-Rapporteurs* to explain that the exclusion of privacy matters did not extend to purely commercial disputes between, for example, a data holder and its service provider?

117. **A delegate from the United States of America** acknowledged that his earlier answer did not address the Chair's question which he had misunderstood. The delegate considered the Chair's solution to be acceptable, so long as the general exclusion on privacy remained. He reflected there were a number of ways of resolving the problem, but that a note to that effect in the Explanatory Report would be acceptable.

118. **A delegate from Australia** highlighted his delegation's flexibility on the position. The delegate explained that earlier discussions of this Article had made his delegation wonder whether that was the common understanding. However, if it was the common understanding, and if the position were reflected in the Explanatory Report, then the delegate would be satisfied with that outcome.

119. **The Chair** indicated that the Plenary should reflect on all the possibilities over the weekend.

*Article 2(1)(p)*

120. **The Chair** reminded the Plenary of the continuing discussions of the informal working group. He encouraged the group to meet as soon as possible and suggested tomorrow morning in the absence of the Plenary meeting tomorrow.

*Article 2(4) and Article 20*

121. **The Chair** noted the ongoing work and enquired when it should next meet.

122. **The chair of the informal working group** indicated this was in the Chair's hands, depending on whether the Plenary would convene tomorrow. The chair of the informal working group indicated that, although it would be useful to continue the discussion, no resolution could be expected by tomorrow morning and that a further meeting on Monday or Tuesday next week would be required. The chair of the informal working group cautioned against the Chair's expectations of a resolution: the working group was widely attended, with new suggestions being floated for the first time in terms of new exclusions from scope under Article 2. On the other hand, the chair of the informal working group reported good progress with respect to Article 20.

123. **The Chair** indicated this would be a useful meeting, but not a final meeting, for tomorrow morning.

*Article 4(4)*

124. **The Chair** indicated there had been two proposals concerning Article 4(4): Working Document No 48 from the delegations of the European Union, Norway and Switzerland; and Working Document No 49 from the delegation of Peru.

125. **A delegate from the European Union** recalled the background to the proposal was that the current text referred specifically to the courts, which, as the delegate from Peru had rightly indicated, created an imbalance with Article 7 and other provisions (where it is left to the State, through its means, to determine which provisions operate). The delegate explained the proposal reflected a change in the *chapeau* so that it reads "recognition or enforcement may be" – as is the case in Article 7. The delegate explained the Article then set out options (a), (b) and (c). The delegate explained that another proposed change was a drafting change to sub-paragraph (a) to the former words "which enforcement". It did not appear to the delegate to work very well, and the delegate preferred the word "however". The delegate clarified the effect of the provision: the judgment may be granted recognition or enforcement, "however" where the judgment is sought to be enforced, this "may be made subject to the provision of security". The delegate recalled that there had been discussions with the delegate from Peru in an attempt to reach a common proposal which had sadly not been possible. However, this did not mean a future agreement was not possible.

126. **A delegate from Norway** clarified that the effect of the proposal was to enable a State to do this by legislative means or by the courts.

127. **A delegate from Peru** would have preferred to conduct the discussion once the Plenary had had time to analyse the proposals, acknowledging that Working Document No 49 was a little lengthy. The delegate explained that the concrete problem of the delegation of Peru was that by providing three options this effectively expanded the powers of a judge by virtue of the Convention. The delegate explained that, in some countries including Peru, it is not possible to recognise judgments that are subject to review. Although the delegate appreciated the proposal of the delegation of the European Union, which avoids stating directly that the decision is up to the judge, the delegate believed it was not sufficiently clear that the decision should be directed to the legislature. The delegate explained that he had researched the background to the Article which was Article 8(4) of the 2005 HCCH Choice of Court Convention. Article 8(4) of the 2005 Convention provided only for "postponement" or "refusal" of a judgment subject to review. The current draft text added to this the possibility of recognition or enforcement "which enforcement may be made subject to the provision of such security as it shall determine". The delegate highlighted that the 2005 Convention provided for that option but not expressly: rather, through the Explanatory Report, which stated that the possibility might be open to some courts if their legislature permitted it. However, the delegate remarked that his delegation's difficulty with the addition (granting recognition or enforcement subject to security) was that it might be interpreted as a call for the legislature to adopt this approach. The delegate wished to make it clear that this was a choice limited by national law, and not an opportunity for judges to exercise their discretion. The delegate introduced two possibilities. The first option would accommodate State legislators who wished to retain the text "subject to the provision of such security", but limits this with the phrase "to the extent allowed by national law". The delegate summarised that this was almost exactly the same text of the agreed language of the 2005 Convention, with additional text that this can only be done to the extent permitted by national law. Alternatively, the delegate introduced option 2 which reproduced the same language as the 2005 Convention and included new language in the Explanatory Report. The delegate reiterated the main concern was for clarity that Contracting States do not have to modify the specific issue if it is a contested one, and that it is an option that has a limit in national law (and is not simply an authorisation for judges to use their discretion). The delegate expressed his delegation's preference for discussions to continue on Monday given that delegates had just received lengthy proposals.


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128. **The Chair** invited interventions but, noting that there were none, added it to the list of issues to be considered on Monday.

*Article 5(1)(h), Article 6(a) and (b)*

129. **The Chair** inquired about progress in relation to the three issues arising out of Article 5, namely issues in Articles 5(1)(h) and 6(a) and (b) related to immovables and tenancies. The chair of the informal working group indicated discussions were ongoing and that another meeting of the group was envisaged for Monday lunchtime.

*Article 5(1)(j* bis*)*

130. **A delegate from Brazil** acknowledged the difficulties in pushing forward with the original proposal and noted that the delegation of Brazil was now exploring possibilities for a narrower jurisdictional filter linking to the place in which the damage occurred: if not for all environmental damages, at least for some sort of it. The delegate reiterated that the delegation of Brazil was still considering possibilities but was not ready to offer to share a clear position.

131. **The Chair** commended this as a helpful way to move forward and encouraged the delegation to test the possibility for consensus before bringing the proposals to the Plenary.

*Article 5(1)(k)*

132. **A delegate from the United Kingdom** reported that she had been exchanging ideas with the delegate from the Republic of Korea concerning a reference in the Explanatory Report in the hope that the text could remain as it is. The delegate from the United Kingdom had sent suggested drafting off to an expert, who had also agreed to look at a suggestion from the delegation of Singapore to introduce simple examples of what a court might look for in identifying "an implied designation of place of administration of a trust".

*Final clauses – Review of progress*

133. **The Chair** indicated that the informal working group on final clauses had continued its meetings. The Chair then sought to take stock of the progress of the Plenary after the first week of the Diplomatic Session. The Chair observed there had been excellent progress in terms of taking a first look at issues, and that the Plenary was somewhat ahead of its agenda. However, he remarked that a number of issues were put aside for further discussion and subsequent resolution. Given the progress by Plenary and the need for more focused discussion in smaller groups, the Chair was inclined to think that it would not be necessary for the Plenary to meet tomorrow morning provided that people with responsibility for carrying specific issues forward understood this as an opportunity to develop the issues during that time. The Chair indicated the availability of rooms within the Hague Academy, and asked the informal working groups on anti-trust matters and final clauses to each meet tomorrow morning at 9.30 a.m. in place of the Plenary. The Chair enquired whether delegations wished to adopt a different approach.

134. **A delegate from Israel** sought clarification as to whether groups would meet in parallel, as it presented an issue for smaller delegations.

135. **The Chair** had thought they would meet in parallel but indicated that if it posed practical difficulties then it may be possible to accommodate sequential meetings. The Chair proposed for the informal working group on final clauses to meet from 9.30 until 11.30 a.m. and then the informal working group on anti-trust matters to meet from 11.30 a.m. until 1.00 p.m., noting that the Drafting Committee was also scheduled to meet tomorrow. The Chair enquired whether the Drafting Committee could also meet in the morning, or whether there were delegates who wished to attend an informal working group in addition to their role in the Drafting Committee.

136. **The Chair of the Drafting Committee** expressed a preference for the Drafting Committee to meet in the morning but enquired whether this caused a difficulty.

137. **The Chair** indicated that it had been expected that the Drafting Committee would meet in the afternoon following the Plenary, and that plan could be kept to avoid difficulty.

138. **A delegate from Canada** indicated her wish to attend the final clauses meeting in the morning, but that if the meeting concluded at 11.30 a.m. (provided there were no Drafting Committee members wishing to attend the anti-trust meeting), then the Drafting Committee could meet soon thereafter at the Permanent Bureau.

139. **The Chair** noted he was not pressed to convene a Plenary meeting tomorrow. On that assumption, the Chair proposed for the two groups to meet successively in the morning in the Seminar Room. Given that it seemed that the Drafting Committee would meet in the afternoon, the question became whether it wished to start earlier.

140. **A delegate from the European Union** requested to meet at 12.00 p.m.

141. **The Chair of the Drafting Committee** stated that he had no problem meeting at that time.

142. **The Chair** summarised that the Drafting Committee would convene at the Permanent Bureau at midday – 'high noon at the Permanent Bureau'. The Chair requested the Permanent Bureau to arrange lunch. The Chair thanked the delegates for the fantastic week, which had progressed and built upon the substantial work that had gone before. He expressed confidence that negotiations could continue in a low-key and productive manner and urged all States to undertake the necessary 'homework' and reflection over the weekend.

143. The meeting was closed at 6.15 p.m.

# Procès-verbal No 9

# Minutes No 9

*Séance du lundi 24 juin 2019 (matin)*

*Meeting of Monday 24 June 2019 (morning)*

1. La séance est ouverte à 9 h 40 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

2. **The Secretary General** reminded the delegates of administrative matters concerning the formal dinner on Saturday evening.

3. **The Chair** proposed that the morning session begin with a report from Ms Sabo on behalf of the Chair of the Drafting Committee, followed by a discussion of any issues which arose from the report followed by the outstanding intellectual property matters, in particular the language of Article 2(1)(m) and whether to retain Article 8(3). Thereafter, the related question of common courts would be addressed: whether a provision on common courts was still required and, if so, its content. The Plenary would then proceed through the list of outstanding items and confirm the progress of the informal working groups. Time permitting, a discussion on general clauses other than Article 20, which was being addressed in an informal working group, would also take place.

*Report of the Drafting Committee*

4. **Ms Sabo**, on behalf of the Chair of the Drafting Committee, thanked the Chair and discussed the changes to the text of the Convention contained in Working Document No 50. Based on a proposal by the Chair of the Drafting Committee, the English and French versions of Article 1(1) were better aligned, which also made the provision more aligned with the language in the HCCH *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 HCCH Choice of Court Convention"). No change was made to the French version, however the first line in the English version was amended to "judgments in" rather than "judgments relating to". In Article 2(1)(g), in accordance with a decision of the Plenary, "emergency towage and salvage" was deleted, and "marine pollution" was retained since the matter had not been resolved. As a result, amendments to conjunctions and punctuation for Article 2(1)(g) were also made. In Article 2(1)(m), the square brackets around the whole sub-paragraph were deleted, but the reference to "analogous matters" was retained in square brackets, since that decision was still pending. Further, the square brackets around Article 2(1)(n) and (o) were also deleted, and the word "their" was included before "official duties", which aligned the English version with the French version, which used a possessive pronoun rather than a possessive adjective. In Article 3(1)(b), the Drafting Committee had considered the English and French versions, and it was concluded that whilst the term "officers of the court" was a slightly broader term than "*greffier*" in the French version, in the context of the Convention the terms were deemed functionally equivalent and consequently no change was made.

5. For Article 4(2), the proposal in Working Document No 42 was implemented, which in English read: "This does not preclude such consideration as may be necessary for the application of this Convention." The Committee considered inclusion of the word "solely" but concluded that it was redundant because of the word "necessary". A corresponding change was made in the French version using the word "*appréciation*".

6. In Articles 5(1)(b) and 7(1)(a)(i), there was a lack of consistency in the use of pronouns in the English version, and so in Article 5(1)(b) "his or her" was changed to "their", and in Article 7(1)(a)(i) "him" and "his" were changed to "them" and "their". In the French version, no change was made because it was concluded that the term "*défendeur*" was neutral enough. In Article 5(1)(k)(i), the text of both languages was modified slightly without changing the substance, for the purposes of clarity. In the second limb of Article 5(1)(m), the French version was modified to be better aligned with the English version. Further, Article 5(3) was deleted in accordance with the proposal in Working Document No 21, as was Article 6(a). It was noted for the re-draft contained in Working Document No 50 that the Articles and paragraphs had not been re-numbered. Article 7(1)(g) was also deleted in accordance with Working Document No 21.

7. In relation to Article 9, a question was raised by Canada whether the provision was sufficiently clear. The Drafting Committee concluded that it was clear, where the provision was to be read together with the other relevant provisions, and so no change was necessary. Article 11 was also deleted in accordance with Working Document No 21. A proposal was made from the European Union with respect to Article 13(1)(d), which concerned consistency in relation to the issuance of certificates, and consequently a reference to "an officer of the court" was added. In Article 15(2), the Drafting Committee included a reference in accordance with Working Document No 10, inserting "or of the law of the State where proceedings have been instituted" for the English version, employing "instituted" rather than "commenced", and in the French version inserting "*ou du droit de l'État dans lequel l'instance a été introduite*". Finally, the delegate noted that following the last meeting of the Drafting Committee there were additional suggestions exchanged, which would be considered by the Committee at its next session.

8. **A delegate from Uruguay** thanked the Drafting Committee and queried in relation to Article 4(2) whether "necessary solely" was wrong from a grammatical point of view or whether it did not sound good or was redundant as, it was remarked, the wording was part of the formula that was adopted by consensus by the Plenary.

9. **Ms Sabo**, on behalf of the Chair of the Drafting Committee, explained that the Drafting Committee had discussed the issue at some length and concluded that the inclusion of "solely" was redundant, because "necessary" was sufficient.

10. **A delegate from the European Union**, as a member of the Drafting Committee, further clarified that the Drafting Committee had included "may be" to soften the second



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sentence and to balance the removal of the word "solely" to establish that it may not be necessary at all to consider other provisions that might affect the merits in some cases. The change by the Drafting Committee was to make clear that a requested court only considered matters which might differ from the view of the court of origin on the merits. If one of the provisions in the Convention entitled a requested court to look at issues on which they may reach a different conclusion than the court of origin, then it was only a discretionary choice and not mandatory, reflected in the wording "may be". The discussions in the Drafting Committee focused on the fact that the change properly reflected the Plenary's decision.

*Article 13*

11. **The Chair** acknowledged that the Drafting Committee included in Article 13(1)(d) "including an officer of the court" in square brackets, and it was necessary to confirm with the Plenary that there was no policy content included in the addition. The Chair sought to confirm that the language was acceptable and that the square brackets could be removed.

12. **A delegate from Canada** indicated that the change better reflected the policy of the 2005 HCCH Choice of Court Convention.

13. **A delegate from the European Union** suggested that in the Explanatory Report a clarification be included to the effect that the phrase "officer of the court" was not included in the 2005 HCCH Choice of Court Convention, but should have been. There was not to be a contrasting interpretation between the draft Convention and the 2005 Convention and, rather, the words "officer of the court" in a sense would be implied into the relevant provision in the 2005 Convention. Strictly speaking, that could not occur, but it was expressed that that was the desire. The absence of "officer of the court" was a problem to which the *co-Rapporteurs* had drawn the Drafting Committee's attention, because with regard to the law in some States it could be problematic not to include an "officer of the court", because such certificates were normally issued by an officer of the court rather than by the judge.

14. **The Chair** concluded there was consensus and that the square brackets could be deleted.

*Intellectual property matters*

15. **The Chair** noted that new Working Documents were expected to be circulated during the Session, and proposed to begin with Article 2(1)(m) and identified there were two outstanding issues: "analogous matters" and an exception relating to contract, modelled on Article 2(1)(o) of the 2005 HCCH Choice of Court Convention. Delegates from the European Union and the People's Republic of China confirmed that new proposals from their delegations were to be circulated shortly. The Chair proposed to delay the discussions on Article 2(1)(m) to the afternoon meeting.

*Common courts*

16. **A delegate from Brazil**, chair of informal working group II, thanked the Secretariat for his appointment as chair and noted it had been very difficult to resolve differences on a political level regarding common courts. It was recalled that at the May 2018 Special Commission meeting two alternative provisions were included, and he acknowledged that no consensus had been reached by the working group during e-mail discussions and an informal gathering in Hong Kong in February. Preliminary Document No 8 contained an alternative opt-in or opt-out system, but the proposal did not direct, affect or deal with the Working Documents presented by the delegations throughout the current Session. It was expressed that a way through could be agreed, but a final text could not be submitted to the Plenary.

17. **A delegate from the Republic of Korea** proposed Working Document No 8 in order to facilitate the discussion, which was based on the assumption that an opt-out declaration would be adopted. It was expressed that before an Article 4(5) declaration would take effect, the other States should have more time to consider the declaration. If the same waiting period were applied to declarations under Article 4(5) and (6), the other States would have to make the opt-out declaration within the same month. In order to avoid this time-pressure and the risk of encouraging unnecessary opt-out declarations, it was proposed that a longer waiting period for an Article 4(6) declaration be applied. In the delegate's opinion, it was necessary to have some provision on common courts, even if intellectual property was excluded from the Convention, as more common courts may appear in the future. He also noted the indication of the *co-Rapporteurs* in their draft Explanatory Report that existing courts currently characterised as transnational courts could later be identified as common courts, as demonstrating the necessity to include a common court provision in the Convention.

18. **A delegate from the European Union** introduced Working Documents Nos 11 and 14 and noted that, from the perspective of the European Union, the matter of common courts was closely related to intellectual property. It was explained that Working Document No 11 was prepared at the Second Meeting of the Special Commission and encompassed common courts relevant from the perspective of the European Union. The delegate stated that at the May 2018 Special Commission meeting significant work had occurred in relation to Article 4(5) and the European Union had prepared an explanatory paper on how common courts would work since the last Special Commission.

19. Working Document No 14 concerned Article 4(6), and was strictly related to the inclusion or exclusion of intellectual property matters, for it related to two courts, the Unified Patent Court and the Benelux Court which had jurisdiction on certain trademark matters. The proposal in Working Document No 14 would no longer be relevant if the Plenary arrived at a decision to exclude intellectual property matters from the Convention.

20. The delegate explained that Working Document No 11 was a clarification which sought to expand on the Explanatory Report in conformity with the Explanatory Report on the 2005 HCCH Choice of Court Convention. The view was expressed that it was more appropriate to address the Court of Justice of the European Union in the paragraph dealing with Regional Economic Integration Organisations (REIOs), rather than the paragraph on common courts. The European Union, as an REIO, possibly in the future a signature Party to the Convention and already now a Member of the HCCH, should have the judgments issued by its judicial arm circulate in the framework of the Convention like any other judgments given by a national court of a Contracting State. Clarification on this matter in the Explanatory Report was therefore sought.

21. **A delegate from Israel** thanked the European Union for withdrawing its proposal on Working Document No 14 and introduced Working Document No 20. The delegate

stated that there was great complexity if a provision on common courts was included in the Convention, as identified in Preliminary Document No 7. In addition, although courts established under bilateral investment treaties that dealt with investor-State disputes did not qualify as common courts, as the revised Explanatory Report identified, it could not be entirely ruled out in the future that there might be cases in which these courts function as common courts. There was also a risk of new common courts being established in the future, which are unforeseen to the Plenary, such as the idea of a universal business and human rights court. It was the view of the delegate that there was no need for including a provision on current common courts, but certain courts, such as the Committee of the Privy Council, could be explicitly stated in the Explanatory Report as falling within the definition of a "court" for the purposes of the Convention. There was a great risk attached to including a long provision on common courts, when it was not entirely established if they were relevant, what their nature would be, and how the declaration system or reciprocity system would work. The delegate commented that in the future, it may be desirable to amend the Convention to include reference to common courts, but at the present stage it was proposed that the provisions be removed.

22. **The Chair** drew attention to paragraph 124 of the revised Explanatory Report, which included examples of common courts which exercised jurisdiction on behalf of rather than over the State, footnote 103, which raised the question of the intersection with Article 5(1)(k), footnote 104, which invited consideration of the treatment of courts exercising purely an appellate function, and footnote 107, which concerned how a declaration would apply in relation to such courts. The *co-Rapporteurs* expressed the view that the footnotes were self-explanatory. The Chair noted that there was no common court provision in the 2005 HCCH Choice of Court Convention, and reminded the Plenary of the principle of only introducing differences from the 2005 Convention where there was a good reason to do so, and the main reason advanced for the provision all those meetings ago was because of intellectual property, which may no longer fall within the scope of the Convention. It was also highlighted, by way of context, that the basic obligation of recognition and enforcement was found in Article 4(1), which refers to a judgment of a court of a Contracting State. If the text was silent on common courts in the Convention, the position would be that where there was a judgment from an appellate court, it will be for the requested State to decide whether that court should be considered a court of a Contracting State, having regard to the nature and function it is performing. In the context of appellate courts, for example, the Chair expressed that there was a high measure of comfort that if a decision went before the Judicial Committee of the Privy Council, after having been considered by a national court of a Contracting State, then it would be treated as an appellate decision by a court of the Contracting State for that purpose. In contrast, other courts which exercise judicial functions for Contracting States might well be regarded by the requested court as not fulfilling the basic threshold for recognition and enforcement. The same analysis would also have to take place under the 2005 Convention. The determination that was necessary was if the Plenary wanted to change that analysis in the Judgments instrument, especially in light of the developments in relation to intellectual property.

23. **A delegate from the People's Republic of China** agreed with the Chair's explanation and remarked that, concerning Working Document No 11, some of the examples provided in the Explanatory Report may not be particularly relevant for the Convention and that what could be categorised as a common court may require further consideration. Furthermore, whilst the meaning of a "State" was addressed in the Explanatory Report of the 2005 HCCH Choice of Court Convention, it may not be possible to take for granted that it also applied to the complex and important draft Convention. The delegate concurred that it was for the court addressed to make the correct consideration of the nature and of the functions of the common court judgment requested to be recognised and enforced, and it would be preferable to have the analysis as the solution rather than include additional provisions which may create further problems.

24. **A delegate from Switzerland** indicated strong support for the proposal by Israel and expressed general agreement with the statements by the delegate from the People's Republic of China that it was a matter better left to those who would apply the Convention and to the future development of the Convention. A small drafting point was noted in the context of the formulation of the filters in Article 5, namely that it would be wiser to state the court *of* the Contracting(?) State rather than *in* the Contracting(?) State. It was agreed with the delegates from Israel and the People's Republic of China to remove the provision on common courts.

25. **A delegate from the Russian Federation** agreed that for the moment the question of common courts was very difficult and complex, and posed several problems that could not be resolved at once because the Plenary lacked a clear understanding of what future common courts could emerge. Also, there were several unresolved questions regarding how the existing common courts would work in the context of this Convention. For these reasons, the delegate agreed with the delegates from Israel and the People's Republic of China that the Convention should not mention common courts. The future operation of the Convention would hopefully show how the Convention could apply to common courts, but for the time being it was expressed that the Convention should not touch upon the problem of common courts.

26. **A delegate from the European Union**, with regard to Working Document No 11 and the language of the Explanatory Report on the Court of Justice of the European Union, addressed the comments made by the People's Republic of China to clarify that the proposal only concerned the deleted text and the underlined text. The text in paragraph 124 had been included to be able to delete the text at the end, but the European Union did not propose the text of paragraph 124. With regard to the Court of Justice of the European Union, it was expressed that it would be considered a court of a Contracting Party, and so civil and commercial judgments of the Court of Justice of the European Union would circulate like a judgment of a Contracting State. With regard to Working Document No 20 and the proposal to delete the whole provision on common courts, the European Union had an interest in the provision if intellectual property were included in the scope of application. In light of the developments in the Plenary with respect to intellectual property, the European Union was in a position at this stage not to object to the proposal, and agreed that the alternative had always been that if the matter is not addressed in the Convention, it would be left to the requested court to assess whether the particular judgment falls within the scope of the Convention.

27. **A delegate from Japan** stated that from its point of view, fair or equal treatment of the common courts to national domestic courts was appropriate and important. The current mechanism provided in Article 4(5) and (6) could

cause issues, and the current mechanism may not treat common courts and national courts equally. From that point of view, it would be preferable that the issue should be left to interpretation, and the delegation strongly supported Working Document No 20 and the inclusion of the words in the Explanatory Report in Working Document No 11.

28. **A delegate from Sri Lanka** shared the reservations expressed concerning common courts, because of the complexities involved in distinguishing international law disputes as opposed to civil and commercial matters, and supported removing the provision. The delegate emphasised the importance of retaining the integrity of the appellate procedure, which could be managed by way of explanation in the Explanatory Report.

29. **A delegate from the People's Republic of China** noted the helpful remarks from the European Union and drew attention to Article 29 of the 2005 HCCH Choice of Court Convention, which made clear that the REIO shall in that case have the rights and obligations of a Contracting State, and it was understood for the 2005 Convention that it only applied in the situation of where the parties chose a certain court. The delegate commented that he did not think there would be many cases in that combination concerning some particular courts from the European Union system. In relation to the draft Convention, there may be a reciprocity issue if it is explicitly stated that all Contracting States already have the obligation to recognise and enforce judgments from the European Union system. However, at the same time, the same obligation could not be applied directly to the court making these kinds of judgments. It was preferable to leave the issue open and leave room for these kinds of situations. The deletion of the paragraphs from Working Document No 11 would not cause greater difficulties or dangers for the European Union side but would make it easier for other parties to accept the whole idea of this situation. Since the Plenary was avoiding the problem of common courts in the text of the Convention, the Convention need not mention other issues that may not be in the minds of the parties at all.

30. **The Chair** confirmed there was opposition to the additional language suggested to paragraph 444, but no opposition to paragraph 124 concerning the Court of Justice of the European Union.

31. The Chair concluded that there was no opposition to the European Union's proposal for deletion of the wording in paragraph 124, and suggested that the language concerning REIOs and the explanation of what it means for such an organisation to become a Party be addressed later when discussing the provision on REIOs.

32. **A delegate from the European Union** concurred with the Chair's proposal and clarified that it was not the European Union's intention to claim special treatment in relation to the Court of Justice of the European Union, that it would give the European Union rights but no obligations. The relevant consideration in the context of the Court of Justice of the European Union was that it had a role, albeit limited, in handing down judgments in the civil and commercial field. If the European Union were a Contracting Party, there was no reason why these judgments should not circulate. The delegate from the People's Republic of China's concerns for a fair reciprocity system were acknowledged, but it was expressed that in this context one should not only look at a specific court. The Court of Justice of the European Union has only a limited role in recognising foreign judgments, but the European Union had always stated that as a Party it was obligated to fulfil all the obligations under the Convention. Whether that obligation in relation to incoming judgments was fulfilled by the Court of Justice of the European Union or through national courts of the European Union Member States was a matter of internal organisation of the judicial system of the European Union. The European Union was happy to clarify that matter to the extent necessary or possible in the Explanatory Report.

33. **A delegate from Israel** expressed appreciation for the European Union's flexibility and noted that the discussion had been postponed, despite Israel's serious concern with mentioning the Court of Justice of the European Union in the way that the European Union had proposed. However, the delegate from Israel supported the European Union's proposal combined with its proposal of deleting Article 4(5) and (6).

34. **The Chair** concluded that there was consensus to delete all paragraphs relating to common courts, Article 4(5) and (6).

35. **A *co-Rapporteur*** sought clear instructions from the Plenary on how the Explanatory Report should deal with common courts, in light of the removal of those provisions from the Convention.

36. **The Chair** noted that there may be support for the position put forward by the People's Republic of China, to the effect that the less said the better. In this regard, the Explanatory Report could simply refer the matter to Article 4(1), and leave the question of validity of a judgment emanating from a common court to the court of the requested State. The Chair requested interventions on this proposal. The Chair concluded that as there was no appetite for a larger discussion on common courts within the Explanatory Report, the Explanatory Report should be kept brief on these matters. The Chair referred the matter back to the *co-Rapporteurs*.

*Intellectual property matters – Article 2(1)(m)*

37. At the request of the Chair, **a delegate from the European Union** presented its joint proposal with the delegation of Norway under Working Document No 53, proposing to replace the text of Article 2(1)(m) with "intellectual property, except insofar as the judgment ruled on a contractual matter". The delegate explained that the European Union had understood that this proposal reflected a common understanding that although intellectual property was intended to be excluded from the scope of the draft Convention, contractual litigation relating to intellectual property would be explicitly included within the scope of the draft Convention, by creating an exception from Article 2(1)(m). This would not leave it ambiguous as to whether contractual intellectual property litigation would be within scope, as this joint proposal would clarify the position. The delegate noted that the proponents had attempted to find language modelled on other examples. She explained having difficulty in connecting the word "matter" in the *chapeau* text with the proposed wording in sub-paragraph (m), as intellectual property is itself a "matter". The delegate stated that they had attempted to borrow Article 2(2)(o) of the 2005 HCCH Choice of Court Convention, but there were difficulties with this including that where a judge in a requested State is faced with a judgment, he/she will see what the judgment is based on, but he/she will not necessarily see what the initial claim was based on (contract, or otherwise). The delegate remarked that the European Union would be open to drafting suggestions, but that the fundamental policy position should be that if a judgment ruled on a contractual matter, it should be within the scope of the draft Convention, even

if other intellectual property-related issues are excluded from the scope. The delegate further highlighted that this question would be relevant to the discussion of Article 8. The delegate also noted that the text "and analogous matters" could be deleted. In this regard, it was the European Union's position that intellectual property should be understood as an autonomous concept, and as such there is no need to refer to "analogous matters".

38. **A delegate from Norway** reaffirmed that the purpose of the joint proposal was to ensure that contractual intellectual property matters were not excluded from the scope of the draft Convention. The delegate explained that the proposal followed similar drafting to the 2005 HCCH Choice of Court Convention, as the proponents had understood that this would be most widely acceptable to other delegations.

39. **A delegate from Switzerland** introduced Working Document No 55, explaining that the proposal would be advanced as an alternative drafting position to the European Union and Norway's proposal. She expressed support for the fundamental policy objective to include all manner of intellectual property-related contract litigation within scope, and noted that her delegation had an agnostic position on the inclusion of the phrase "analogous matters", as it appeared in the draft text.

40. **The Chair** recalled that under the 2005 HCCH Choice of Court Convention, Article 2(2)(n) and (o) excluded both validity and infringement matters from the scope of that Convention. He suggested that given that the Swiss proposal referred to both validity and infringement, that drafting may mirror that Convention more closely than the European Union and Norway's joint proposal.

41. At the request of the Chair, **a delegate from the United States of America** took the floor to re-introduce Working Document No 21, its joint proposal with Canada. The delegate affirmed that the United States of America's policy position was that no reference to intellectual property should be retained in the Convention. The delegate observed that the proposals of Switzerland, and the European Union and Norway, sought to include those contractual matters, despite the substantial shift in drafting policy taken by the Plenary in the removal of Article 5(3). He queried which contractual intellectual property matters would then find their way to a recognising State and suggested that this question was still under consideration by his delegation. The delegate otherwise highlighted an increasing interest globally around standard essential patents (SEPs) and voluntary consensus-based organisations around the world setting standards for technologies, including the Institute of Electrical and Electronics Engineers (IEEE) in the United States of America, and the International Telecommunication Union (ITU) in Europe. As an example, he explained that these bodies would find a voluntary standard basis for which mobile telephones would be interoperable. He noted that where patents were essential to the practice of any standard, global patent portfolios would often be litigated in a single jurisdiction. The inclusion of contractual matters here in relation to intellectual property may touch on SEP and fair, reasonable, and non-discriminatory determinations (FRANDs). The delegate expressed concern that the inclusion of contract-based intellectual property in the draft Convention could incentivise litigation gamesmanship by allowing parties to sue in the most desirable court to render a judgment that could be enforced globally. The delegate further raised the issue that the new proposals may have the effect of facilitating a party's malpractice claim against their intellectual property attorney, because attorneys are typically retained via contract.

42. **A delegate from Canada** explained that his delegation had also been working through the potential impact of the new proposals of the European Union and Norway, and Switzerland. He observed that the proposals may unintentionally cover judgments that would have been excluded under the May 2018 draft text. He expressed caution to ensure that these proposals would not be revived. The delegate concluded by reinforcing his delegation's commitment to its joint proposal under Working Document No 21.

43. **An observer for the International Federation of the Phonographic Industry (IFPI)** explained that, as a peak body for the music industry, her organisation was largely comfortable with the circulation of judgments rendered in relation to contracts including intellectual property choice of court clauses, but was much less comfortable on the circulation of such judgments generated without such clauses. In that regard, the observer registered support for the European Union's proposal, provided that the contracts brought back into the scope of the draft Convention included specific reference to the filter for choice of forum, to make sure that the parties' expectations as to where contracts are to be litigated are always expressly obeyed. Where parties did not think about that matter, her organisation's position would be that such contracts should not be included within the scope of the draft Convention.

44. **A delegate from Singapore** generally expressed support for the position that the draft Convention should include contract matters dealing with intellectual property. However, the delegate noted that the Plenary may need to consider issues of ownership as well as enforcement, on the basis that these are often treated by national legal systems as separate from validity issues.

45. **A delegate from Japan** requested clarification from other delegates as to the key differences between the proposals of Switzerland and of the European Union and Norway. He explained that on his reading, the key difference would relate to the treatment of judgments resulting from infringement proceedings brought for breach of intellectual property rights. The delegate suggested that on the face of the proposal from the European Union, such a judgment on this would be in scope, but out of scope under the proposal from the delegation of Switzerland.

46. **A delegate from the European Union** responded that in designing its joint proposal with Norway, the delegations had examined the language in the 2005 HCCH Choice of Court Convention, which excludes intellectual property infringement from the scope of the Convention except where the proceedings were brought for breach of contract, or could have been brought for breach of contract. The delegate noted that using such wording here would bring infringement judgments into scope, in circumstances where a number of delegations had opposed that. The delegate further opined that within such infringement proceedings, invalidity is a standard defence, and that delegations had also opposed the inclusion of (in)validity issues. In that regard, the delegate concluded that the design of the proposal was to keep the clause narrow and not include infringement judgments, and that the text should not consider on which basis the claim was brought, but only on which basis the judgment was given. The delegate summarised that if the judgment was based on contract, it should circulate, whereas if it was based on tort, it should not. The delegate added that this exclusion should not provide a backdoor way to reopen intellectual property issues which were previously agreed to be excluded from scope.


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47. **A delegate from Norway** agreed with the comments of the delegate from the European Union, noting that the most important element to the joint proposal was that the claim upon which the judgment was decided should be contractual. The proposed carve-out within Article 2(1)(m) made clear that if there is a preliminary ruling on intellectual property, as long as the ruling is based in contract, it should circulate under the draft Convention.

48. **An observer for the International Association for the Protection of Intellectual Property (AIPPI)** supported the comments advanced by the observer for the IFPI, and added that it would be important to ensure that it was fully understood what was proposed to be excluded or included under each intellectual property exclusion or inclusion. The observer gave the example of compulsory licences, and whether it was intended that these be excluded or included, as such licences are issued based on an agreement or contract (*i.e.*, based on licence fees paid). The observer also joined in the comments raised by the delegate from the United States of America regarding SEPs and FRANDs.

49. **A delegate from Brazil** expressed support for the joint proposal of the European Union and Norway noting that, if intellectual property were to be excluded from the scope of the Convention, it should retain minimal scope to consider contractual intellectual property matters.

50. **A delegate from Israel** explained that her delegation was under the impression that all intellectual property matters had been excluded from the scope of the draft Convention, and that the accepted starting point should be the joint proposal of the United States of America and Canada under Working Document No 21. The delegate noted, however, that the revised proposals appeared to limit the scope of the exclusion. The delegate added that in lengthy discussions in working groups and in the Plenary, it had understood that concepts of validity and infringement may not include registration, ownership or subsistence, but that no consensus was reached on these matters. She explained that should the Plenary continue with the proposal from the delegation of Switzerland that excludes only part of the judgments on intellectual property (namely, only infringement and validity judgments), and not all intellectual property judgments are excluded, the delegation of Israel intended to introduce a further joint Working Document No 56 with Brazil, to exclude infringement of intellectual property rights from the exclusion of the scope of the Convention (to allow the circulation of judgments on infringement of intellectual property rights under the draft Convention). The delegate noted that her delegation otherwise supported the joint proposal of the United States of America and Canada. She further added that inclusion of the term "analogous matters" was crucial in circumstances where the Plenary could not reach an autonomous interpretation of the term "intellectual property", and that there was also no definition arrived at by the World Intellectual Property Organization. She concluded by noting that the text of the draft Convention, as it stands, now excludes analogous matters, and that consensus would be required to bring such matters into scope. As such, she explained that if "analogous matters" cannot be kept in by consensus, it should be excluded from scope.

51. **An observer for the International Trademark Association (INTA)** noted that it was one of the very few stakeholder organisations that had supported the inclusion of intellectual property matters in the scope of the draft Convention, and that the 2018 version of the draft text was well designed in terms of the protection of territoriality and other issues. The observer expressed support for the proposal of the European Union and Norway on the inclusion of contractual intellectual property matters, adding that there was a clear distinction between contractual litigation and the questions arising with intellectual property in the trademark context. The observer added that she was agnostic on the inclusion of the phrase "analogous matters".

52. **A delegate from Japan** advised that the proposals raised new issues in relation to SEPs and FRANDs. He explained that from a national law perspective, it may be difficult to distinguish contractual and tort matters for the purposes of this exclusion. He explained that in FRAND matters, in the Japanese context, contract and tort matters were essentially mixed. He continued that it may be difficult for judges to understand the precise scope of the draft Convention if the Plenary decided to include contractual matters. In that regard, the delegate expressed strong support for the joint proposal of the United States of America and Canada. He added that his delegation could be flexible on the inclusion of "analogous matters", but that on balance they would prefer to retain the phrase.

53. **A delegate from Mexico** stated that his delegation understood that all matters on intellectual property would be excluded, and on this basis he expressed strong support for the joint proposal of the United States of America and Canada.

54. **A delegate from the European Union** noted that compulsory licensing disputes should be considered non-contractual matters which would not be included within the scope, and that this position could be clarified in the Explanatory Report. The delegate added that the draft Convention should be drafted for the future, and if all intellectual property-related contractual litigation were to be excluded, a large number of judgments concerning typically commercial matters would not circulate under the draft Convention.

55. **Another delegate from the European Union** then considered the concerns expressed by the delegations of the United States of America and Canada with regard to SEPs. The delegate advised that, when there is a plain and simple refusal to obtain a license, a SEP owner would typically sue for infringement, which would be an excluded matter. However, if a licensing contract were in place, then the dispute could also involve typically contractual issues that would be the subject of a judgment. In those circumstances the delegate invited the delegation of the United States of America to expand upon why including contractual intellectual property matters in the Convention would likely increase abusive behaviours such as forum shopping. More generally, the delegate reiterated that delegations should make an effort to see intellectual property-related contracts as a typically commercial matter, not as an attempt to bring infringement and validity issues back into the Convention through the back door. He stated that the inclusion of intellectual property assets within international commercial contracts was increasingly important for businesses and the economy of the Contracting States and stood to become even more important in the future, considering the development of technologically advanced manufacturing and the knowledge-based economy. He concluded that there would be a significant impact on the Convention's scope of application in leaving aside an important portion of commercial contracts which are key to international business strategies by failing to include these within scope.

56. At the invitation of the Chair, **a delegate from the People's Republic of China** introduced Working Document No 58. The delegate advised that the proposal was

advanced to simplify matters. The delegate explained that the primary policy was to exclude intellectual property itself, and not to enter into different classifications of rights from each country under domestic law. This would not tie either domestic courts or international organisations to any definition or restriction on intellectual property, in the hope that this would make the exclusion easier to understand.

57. **A delegate from the United States of America** provided further analysis on the issue of FRANDs. He noted that in voluntary consensus bodies, FRANDs were treated differently by jurisdictions around the world. In the European Union, for example, FRANDs were treated as competition law concerns primarily, whereas in the United States of America, there was a credible position that these are matters of contract law, and are not classified under competition theory. He cited the example of a third-party beneficiary of an agreement between a patented technology holder and the particular standard-setting body, and that the third-party beneficiaries of those agreements might then be entitled to some FRAND license. He concluded that there is no consensus globally on how this particular issue might be treated. The delegate also supported the comments of the delegate from Japan, and suggested that it would be desirable to conduct any further discussions with either a full inclusion or exclusion of matters. Further, the delegate welcomed the proposal of the People's Republic of China, and noted that his delegation would consider its drafting and approach to the issue of exclusions from scope.

58. **The Chair** recapitulated discussions of the potential inclusion of "analogous matters" in Article 2(1)(m). The Chair noted support for inclusion of this wording in the joint proposal of the United States of America and Canada, and then other proposals against inclusion, including the proposal from the People's Republic of China. The Chair noted there may be some commonality on the policy position, but noted that there was no consensus on drafting within the text. The Chair concluded that it might be desirable to reconvene the informal working group on intellectual property rights. Noting support for that course, the Chair re-convened the informal working group on intellectual property rights and referred the potential inclusion of "analogous matters" to them. The Chair requested further interventions from delegations as to the inclusion of judgments ruling on contractual intellectual property matters.

59. **A delegate from the European Union** wished to reiterate that, like all concepts in the draft Convention, the inclusion of contract-based intellectual property matters should be an autonomous concept to be explained in the Explanatory Report. The delegate opined that although FRANDs may be approached differently in different legal systems, this should not be an obstacle for the inclusion of contractual litigation on intellectual property matters in the scope of the draft Convention, if the Explanatory Report would clarify what is and what is not meant by that inclusion.

60. **The Chair** highlighted certain difficulties with that approach. He considered that if a national legal system were to consider the FRAND issue as a contractual issue, it would be difficult for the Explanatory Report to create an exclusion from scope that would be observed if it conflicted with that national law. Noting the technical and conceptual difficulties in the discussion, the Chair referred the matter to the informal working group on intellectual property rights, for further consideration.

61. **A delegate from Brazil** expressed his wish to join the informal intellectual property working group.

62. At the invitation of the Chair, **a delegate from Israel** introduced Working Document No 56, a joint proposal with Brazil. The delegate explained that if intellectual property matters were to return to the scope of the Convention under the proposal from the delegation of Switzerland, then this proposal would be responsive to that text. All intellectual property matters would be excluded, except from infringement cases on registered and unregistered intellectual property rights. The delegate added that the proposal would only retain infringement cases within the scope of the Convention, if the safeguards which had been previously discussed were maintained – including that the court that gives the judgment is the court in the State where the intellectual property infringement occurred. The delegate explained that the proposal would then also delete Article 5(3)(a), as well as Article 5(3)(d) concerning validity, subsistence, and ownership of unregistered rights, and Article 6(a) which deals with validity and registration of intellectual property rights. Finally, the proposal would reinstate Article 11, which means that only monetary remedies deriving from infringement cases would circulate.

63. **A delegate from Brazil** added that the joint proposal with Israel under Working Document No 56 would allow for a minimum scope for intellectual property matters, *i.e.*, infringement cases, and damages recovered on those cases. The delegate stated that in a scenario where almost everything related to intellectual property rights was to be excluded, this joint proposal would provide for minimum protection of intellectual property rights holders in their pursuit of international justice, in terms of being, at minimum, capable of recovering their monetary damages.

64. **The Chair** referred all proposals relating to the exclusion of intellectual property matters under Article 2(1)(m) to the informal working group on intellectual property rights, to be convened during the lunch break.

65. The Chair closed the meeting at 12.55 p.m.

# Procès-verbal No 10

# Minutes No 10

*Séance du lundi 24 juin 2019 (après-midi)*

*Meeting of Monday 24 June 2019 (afternoon)*

1. La séance est ouverte à 14 h 46 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

2. **The Chair** welcomed the Plenary back after the lunch break. He asked the chair of the informal working group on intellectual property matters to provide an update on the meeting that occurred over the lunch break.

*Intellectual property*

3. **The chair of the informal working group on intellectual property matters** thanked the members of the informal working group, who made serious efforts to find common ground despite the ten minutes' notice by which they had to convene. The chair summarised that there had been limited consensus (which he observed meant, in fact, no consensus) and that two matters had been discussed: "analogous" matters, and "contractual" matters. Firstly on "analogous" matters, there was consensus on the policy sought to be achieved. The chair explained that the policy was to prevent a situation where intellectual property matters are excluded, but then non-intellectual property and near-intellectual property matters 'creep in through the back door'. However, the chair highlighted that disagreement arose in two respects: the structure for the way in which the policy should be expressed (in particular, whether it should be contained in the text of the Convention or in the Explanatory Report), and the definition of analogous matters. With regard to the former, the chair noted that strong views had been expressed for both sides, and that some States had indicated that their position was contingent upon the position taken with respect to contracts. For the latter, the chair noted there had been some progress (albeit no consensus) as to the meaning of the phrase "analogous matters" and the extent to which the delegations wished to define "analogous matters" in the text of the Convention. The chair noted there was a division of views: some supported a conservative approach that gave as few examples as possible, whereas others wished to include as many examples as possible to elucidate the types of matters to be excluded. Secondly, turning to the issue of "contractual" matters, the chair observed that the informal working group had approached consensus. There had been a general preference among several members to identify the kinds of contractual actions sought to be excluded. The chair noted that the simple proposition that "contractual matters are within scope" had not been acceptable to a number of delegations. On the other hand, no delegation wished to totally exclude contractual matters simply where there had been some connection, at some point, with intellectual property. The question thus became how and where the delegations would draw the line between contracts the Plenary wanted to be 'in' and contracts the Plenary wanted to be 'out'. One aspect that emerged (again, albeit without consensus) was that the Plenary could consider the situation in which the parties had chosen the court of a particular jurisdiction to decide the dispute. Such a choice could be a means to allow contractual disputes into the scope of the Convention. The chair summarised that further discussion was necessary.

4. **The Chair** thanked the chair of the informal working group on intellectual property matters for convening the meeting and thanked the delegates for participating; the discussions of the working group appeared to have been productive. The Chair sensed that the Plenary should not rush to make its decision on this point, and that the conversations should continue over the next day and half to be resolved late tomorrow or on Wednesday at the latest. The Chair asked whether the Plenary were willing to keep working on that basis and, with no interventions to the contrary, concluded that the Plenary would proceed on that basis. Another informal working group might be helpful tomorrow. The Chair then sought to take stock of outstanding issues for discussion.

*Article 2(1)(g)*

5. **The Chair** sensed that conversations were continuing upon this issue and that they should run further. Observing some nodding, the Chair encouraged the participants to continue talking with a view to resolving the issue.

*Article 2(1)(l)*

6. **The Chair** noted that a number of delegations had expressed a desire for more time to consider Working Document No 47, co-sponsored by the delegations of Australia and the United States of America. The desire for more time appeared to be the only area of consensus. The Chair, noting that more time had passed, checked whether the co-sponsors had modified their proposals.

7. **A delegate from Australia** maintained his position but expressed willingness to withdraw the proposal if there was agreement as to the understanding.

8. **A delegate from the United States of America** remarked he stood side by side with his colleagues from Australia.

9. **The Chair** described the delegates as two kangaroos, bounding together across a plain in perfect synchronisation. The Chair explained the metaphor was intended to wake up the delegates. The Chair enquired whether the Plenary would proceed on the basis of an exclusion on privacy, coupled with a clear explanation in the Explanatory Report that the exclusion did not extend to contractual litigation between a data holder and a provider of services (*e.g.*, in relation to the performance or breach of such contracts).

10. **A delegate from Brazil** had discussed the proposal and was happy to support the new language. The delegate sought to clarify whether his understanding of the consensus position was correct: he asked whether the exclusion would not only cover contracts between companies, but also contracts between companies and private persons (on the understanding that the latter are commercial contracts, and not contracts the Chair had previously indicated would be outside the provision). The delegate observed that there existed contracts that involved a provider holding information, even if the contract was not concluded with a service provider. This included commercial contracts with a relationship between a company and a private person. The delegate suggested this should be included within the scope of the Convention (brought in via the exclusion). The delegate summarised his delegation would be happy with the proposal, but suggested commercial contracts should be understood to include contracts between companies and private persons.

11. **The Chair** asked the delegate to respond to his question as to whether it was acceptable for additional language not to be added, but an explanation included in the Explanatory Report that the 'privacy' exclusion did not reflect an exclusion of the type of contracts just described. The Chair reiterated this was what the delegations of Australia and the United States of America had said they could live with, and the Chair wanted to clarify this was the basis upon which the Plenary agreed to proceed.

12. **A delegate from Brazil** remarked that he did not capture the outcome of the discussion in this way. The delegate understood that the last part of the language would be kept. He remarked that if the Chair were encouraging the Plenary to adopt the course the Chair had just described, Brazil did

not have a strong position against it and instead wished to observe the reactions of other delegations.

13. **A delegate from the European Union** signalled flexibility from his delegation as to whether the understanding were included in the text, or only explained in the Explanatory Report. The delegate sought to clarify the policy. He sympathised with the delegate from Brazil in the sense that the European Union had also asked itself, "What does commercial contract precisely mean?" The delegate recalled that the delegate from the United States of America had provided an example of a narrow definition of a non-commercial contract, which was a purely private arrangement. From that example, it appeared to the delegate from the European Union that "B2B" contracts would definitely be 'in' the Convention but "C2C" contracts would be definitely 'out' (as they are purely private arrangements), and that it was unclear whether "B2C" contracts would be 'in' or 'out'. The delegate provided an example scenario: say a person stored personal photographs on the cloud, and there was an express or implied contractual clause about protection of personal data, and a data breach or leakage occurred, and the person sued the provider for the breach. The delegate asked, would a judgment upon that contractual dispute be 'in' or 'out' of the Convention? The delegate stated the preference of the European Union that it be 'in' the scope of the Convention, but flagged that the European Union was not completely inflexible on this position.

14. **The Chair** understood that a judgment in such a situation would be 'out', because it was squarely a privacy claim by the individual against the person holding the data. The Chair characterised the example scenario as a privacy claim, notwithstanding that in some States it would be characterised as statutory, and in other States it would be characterised as contractual, and in further States it would be characterised as both – as a mix of rights. However, the Chair reiterated that it was not claims by the data subject against anyone mishandling their data that was sought to be brought back 'in' to the Convention. Rather it was claims concerning commercial transactions, between someone who holds data and any array of service providers, that should not be denied circulation under the Convention. It appeared to the Chair that it was exceptionally unlikely that claims by a privacy subject would be included in the Convention by consensus, whatever the cause of action. Certainly, the Chair did not understand that to be proposed for the text nor the Explanatory Report. The Chair acknowledged that some States sought a different outcome, but that he sought to identify what could realistically be achieved upon consensus.

15. **A delegate from the United States of America** confirmed that the Chair had captured the intention of the United States of America, and that they marched side by side with the Chair in that respect.

16. **A delegate from Switzerland** did not have a strong policy position in the field. She queried whether the word "commercial" was an extremely good choice in this context, given that the title and scope of the Convention related to "civil or commercial" matters. The delegate suggested it would be better to be specific as to which contracts fell within the scope of the Convention and those that did not, without using the word "commercial".

17. **The Chair** thanked the delegate, but said that the proposed use of the word "commercial" was not for the text of the Convention but for an explanatory note in the Explanatory Report. The Chair noted that the *co-Rapporteurs* would need to consider best language for it. The Chair observed the Plenary was approaching resolution, but encouraged the delegations to consider whether they could make alternative suggestions that would command consensus.

18. **A delegate from Israel** expressed willingness to hear the position of other delegations, especially the position of the delegation of the European Union. The delegate recalled that Israel had supported an early proposal from the European Union, and that he would be grateful to hear whether it remained on the table. The delegate also indicated he could support the proposal co-sponsored by the delegations of Australia and the United States of America, although he understood that proposal was now being withdrawn. The delegate recalled that the only opposition to the joint proposal from the United States of America and Australia regarded the use of the word "commercial". He enquired of the co-sponsoring delegations whether it would be a problem if the Plenary used their proposal as a basis, but omitted the word "commercial" from the text and instead elaborated upon the intended operation in the Explanatory Report. The delegate agreed with the delegate from the European Union that "B2C" contracts should be within scope, but noted his concern that using only the word "privacy" may be misinterpreted by litigants and judges who did not consult the Explanatory Report. The delegate noted that, if the end result were simply the use of the word "privacy", Israel would not stand in the way of consensus. However, he suggested, given no strong views had been expressed in opposition to the proposal from the United States of America and Australia, the proposal could be reinstated.

19. **A delegate from Canada** shared the same views expressed by the delegate from Switzerland concerning the word "commercial". The delegate from Canada suggested using a different word, because even with subsequent interventions it was not clear to the delegate whether other States considered "B2B" contracts only, or "B2B" and "B2C" contracts, to be "commercial" and therefore within scope. The delegate did not consider that there was anything close to agreement upon the policy being discussed.

20. **A delegate from the European Union** submitted that the Plenary was approaching consensus. The delegate recalled that the European Union had made a number of proposals, one which included a reference to breach of contract, and another which sought an all-out exclusion for privacy. In that respect, the European Union had signalled its flexibility on this issue. The delegate remarked that the European Union could live with text in the Convention that excluded privacy, coupled with some form of explanation in the Explanatory Report to illustrate those scenarios that were intended to be excluded. He explained that this was not an ideal solution for the European Union, but that his delegation could live with it and would not block consensus along those lines.

21. **The Chair** agreed the Plenary was edging towards a consensus, but did not want to "stampede" delegations into a decision as to what would be 'in' or 'out' on this approach. The Chair asked whether the Plenary wished for more time to consider proceeding on the basis of a one-word exclusion of "privacy" coupled with an explanation in the Explanatory Report to the effect that the exclusion would extend to all types of claims involving data subjects (contractual or otherwise) but would not extend to "B2B" contracts (for example, a B2B contract between service providers).

22. **A delegate from the European Union** suggested that the approach described by the Chair could solve the problem of the awkward use of the word "commercial". The


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approach removed the need for a short but adequate text in the body of the main Convention, and instead permitted the Explanatory Report to explain the policy position that B2B contracts were included within scope.

23. **The Chair** clarified that, for Brazil, a business could also include a private person and therefore the proposal from the European Union dealt with the problem that had been raised by the delegate from Brazil.

24. **A delegate from Norway** did not think that dealing with the issue in the Explanatory Report would suffice, because unless the words were in the text there would be no rights or obligations binding upon the States. The delegate preferred to deal with the issue with text in the Convention. However, if there were no consensus on this point, she was happy to go along with the approach of the Plenary and would not block consensus.

25. **The Chair** clarified that the approach involved using the Explanatory Report to elucidate the term "privacy". The Chair reiterated that the illustration should explain that the exclusion would not extend to contractual disputes 'once-removed', *i.e.*, between the data holder and the data subject (*e.g.*, the exclusion would not extend to "B2B" contracts between a data holder and a service provider). After receiving no indication from the delegates that they wished for further time, and with no interventions to the contrary, the Chair concluded that there was consensus on this point. He commended the delegations for being pragmatic and achieving timely progress.

*Article 2(1)(p) – Anti-trust matters*

26. **The chair of the informal working group on anti-trust matters** noted that she had not yet had an opportunity to ask the participants whether they wished to convene another meeting or whether they preferred to pursue the issue on a bilateral basis. Noting the strong stances taken by the European Union and the United States of America on this issue, she asked whether they would indicate their current position.

27. **A delegate from the European Union** reported that he had engaged in constructive bilateral discussions and expressed the hope they would bear fruit. Given the discussions were ongoing, the delegate indicated it was not useful to meet again in an informal working group setting. Instead, the delegate proposed to keep the Plenary informed and hoped a further informal working group meeting would not be necessary.

28. **The Chair** remarked that unless there were widespread clamour for another meeting, or even a small clamour, discussions would proceed on that basis. The Chair encouraged the delegates to resolve their discussions sooner rather than later, and gladly noted that the delegate from the European Union had undertaken to inform the Plenary as to the progress of discussions. The Chair observed these were the outstanding issues on Article 2, and directed the discussion to Article 4(2).

*Article 4(2)*

29. **The Chair** indicated that the Drafting Committee had adjusted the language of this provision in response to a decision in the Plenary last week. The wording took the form proposed in Working Document No 50. The Chair recalled a brief discussion concerning the deletion of the word "solely". The Chair identified the new Working Document No 57 proposed by the delegate from Uruguay, which responded to the Drafting Committee's text.

30. **A delegate from Uruguay** introduced the proposal in Working Document No 57, which sought to reflect the political consensus agreed by the Plenary in the text of the Article. The delegate explained that the proposal adopted a "transactional formula". This was proposed in the spirit of compromise, given that the delegate's original proposal was to delete the whole of the second sentence. The delegate proposed to keep the words "may be", delete the word "solely", and add the word "only" after the word "consideration", to reflect the understanding that consideration of the merits was a narrow concept and could only occur within the framework of the Convention (where such review was required for its application). Finally, the delegate suggested the French version would benefit from including the additional word *en français*.

31. **Le Président** remercie le délégué de l'Uruguay et demande quels seraient les mots à utiliser dans la version française du texte.

32. **A delegate from Uruguay** was not in a position to suggest French language. However, he suggested that adding "only" in the English version, with a parallel amendment in French, would produce a better solution.

33. **The Chair** clarified that the reason he had asked was that the proposal in English was an unusual stylistic formulation. The Chair wanted to see how the French version appeared, to see whether it were a more elegant formulation (noting that the English proposal was no Jane Austen work, either).

34. **A delegate from the Republic of Korea** expressed sympathy for the concerns of Uruguay and thought there was no harm in emphasising the exceptional nature of the second sentence. For that reason he supported the proposal.

35. **A delegate from the United States of America** was reminded that the text, which had been considered by the Drafting Committee, was the result of a great deal of compromise. The delegate recalled there had been a great deal of discussion to determine whether and how the Convention would apply. The delegate understood that the position had not changed. He therefore preferred the word "solely", and could also support the language produced by the Drafting Committee. However, he also supported the addition of the word "only" proposed by the delegate from Uruguay on the understanding that the issue was important to Uruguay, and the proposal did not entail a change in substance.

36. **Delegates from Mexico, Peru, Brazil and Israel** supported the proposal of Uruguay to include the word "only".

37. **A delegate from the European Union** noted that, although the European Union had not coordinated specifically on the word "only", he could support the proposal given that it did not make a difference on the substance of the provision.

38. **A delegate from Argentina** supported the proposal from Uruguay. She remarked that the word "only" was read as an emphasis and that, although it may not sound like Shakespeare for a native speaker, it made perfect sense for a Spanish-speaking country.

39. **A delegate from Turkey** supported the proposal from Uruguay.

40. **The Chair** observed a groundswell of support and broad enthusiasm for the clarification. Observing no voices against the proposal, the Chair concluded it could be adopted by consensus. The Chair suggested the Drafting Committee might consider the placement of the word, and noted that the delegate from Uruguay nodded in acknowledgement.

41. **A delegate from the United States of America** appreciated and supported what the Chair had suggested and requested that the Drafting Committee seek to consult with the delegate from Uruguay before reverting to the Plenary so the exercise would not be repeated.

42. **The Chair** agreed this was a sensible rider.

*Drafting Committee changes*

43. **The Chair** enquired of the Plenary whether the changes made by the Drafting Committee were satisfactory and could be adopted (so that the tracked changes could be removed from Working Document No 50, permitting the Drafting Committee to track afresh any further changes). Observing no interventions to the contrary, the Chair concluded that the changes of the Drafting Committee were adopted and would no longer be marked in tracked changes.

*Article 4(4)*

44. **The Chair** noted that there were two Working Documents with respect to Article 4(4): Working Document No 48 co-sponsored by the delegations of the European Union, Norway and Switzerland, and Working Document No 49 from the delegation of Peru (which, the Chair noted, contained two alternative proposals). The Chair enquired whether the Plenary simply needed to make a decision, or whether there were further interventions on any of the three proposals.

45. **A delegate from Australia**, with great thanks to the delegate from Peru, supported the approach in Working Document No 48 from the delegations of the European Union, Norway and Switzerland.

46. **A delegate from Israel** thanked the delegation of Peru. However having considered the structure of the Convention, the appearance of the provision to judges and litigants, the need to avoid difficult questions as to international law, and the fact that the language was simpler than that in the *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 HCCH Choice of Court Convention"), the delegate supported the proposal in Working Document No 48 from the delegations of the European Union, Norway and Switzerland.

47. **A delegate from Mexico** considered that the issue raised by the delegate from Peru was important. He supported option 1 in Working Document No 49 but could be flexible regarding option 2.

48. **A delegate from Japan** supported the proposal in Working Document No 48, noting that clarity was important because the Convention would be considered not only by private international law specialists but also junior judges.

49. **A delegate from Brazil** considered there to be a clear policy difference between the two proposals. The delegate considered that the proposal from the European Union, Switzerland and Norway left it to the court of the requested State to determine which of the possible outcomes would apply to a judgment that was subject to an appeal. On the other hand, the delegate understood that the proposal from Peru left the choice to national law. He considered this second approach produced a clearer understanding as to whether a decision should be enforced. The delegate therefore supported option 1 in the proposal from Peru. However, he noted that, if the European Union, Norway and Switzerland could be flexible regarding their proposal (in particular, adding a caveat for the possibility of not applying Art. 4(a)), then Brazil could equally support Working Document No 48.

50. **The Chair** expressed concern that there may be a misconception and asked the delegate from the European Union to clarify the position.

51. **A delegate from the European Union** clarified that, when his delegation had introduced Working Document No 48, the European Union had taken into consideration the concerns of Peru that it would be inappropriate to refer to a "court" in the *chapeau* of Article 4(4). The delegate remarked that the reference to "court" had therefore been removed, and the Article now bore a neutral reference. The delegate highlighted that the effect of this would be to permit the national legislator to adopt whatever means it chose (be it via primary or secondary legislation, or even via rules of procedure that empowered a court to make the choice) to identify which of the Article 4(4) options ((a), (b) or (c)) would be applied. The delegate stressed that the discretion remained completely open under the proposed text. The delegate considered that the real problem lay with the fact that some countries, which used implementing legislation to give effect to treaties, found it difficult under their own law to limit the wording of a treaty.

52. **Another delegate from the European Union** added that there was no policy difference between the two proposals. However, the delegate noted two drafting issues relating to each of the options proposed by the delegate from Peru. The concerns arose from the proposed reference to "national law" that did not appear elsewhere in the Convention. This created an internal inconsistency in the text of the Convention. Firstly, in option 1, the reference to "national law" was only made available for the third, new option (which was not present in the 2005 HCCH Choice of Court Convention) which suggested that recourse to national law was not available for the other two sub-options. The delegate considered this to be an awkward result. Secondly, although option 2 appeared to have "neat" language that reflected the wording of the 2005 Convention, the formulation disguised the fact that a third option was introduced in the Explanatory Report. The delegate explained that having two options in the main text, and one option hidden in the Explanatory Report, did not convince the European Union to move from its position. The delegate therefore maintained his position under the proposal of the European Union.

53. **The Chair** underscored that there was no policy difference between the proposals. He highlighted that the goal was to enable national law to prescribe which of the various options would be available to the courts of a requested State. He considered this position to be clear from the Explanatory Report to the 2005 HCCH Choice of Court Convention, which emphasised that the language "*may* be postponed or refused" permitted a requested court to in fact *grant* enforcement (where permitted to do so by its national law). The Chair recalled the delegates had spoken on many occasions about the need for "the greater to include the lesser" and for the need to grant enforcement subject to security. The Chair explained that the only reason for re-


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formulating the provision was to make it more accessible: the Plenary had wanted to make it easier for a judge to identify the three options available. The Chair reiterated that it was, of course, still possible for local implementing legislation to give effect to the options through primary, secondary or procedural rules. He clarified that the issue for determination was which of the proposed forms best expressed the policy.

54. **A delegate from Chile** supported the proposal of Peru in Working Document No 49. The delegate preferred option 2 but could be flexible with either option.

55. **A delegate from Peru** clarified the intention underlying his delegation's proposal. First, the delegate considered that the possibility of subjecting recognition and enforcement to a security presented a departure from the 2005 HCCH Choice of Court Convention. The delegate did not consider that the 2005 Convention permitted expressly that possibility, however the Explanatory Report seemed to permit that interpretation. Secondly, the delegate expressed concern that the additional option given to judges would be inconsistent with Article 14 (which dictated that procedure would be governed by the laws of a requested State unless the Convention provided otherwise). The delegate explained this was why the first proposal included a reference to "national law" *in accordance with* Article 14. In that respect, the delegate expressed flexibility as to the two options he had presented. The delegate preferred to retain the text of the 2005 Convention (which contained three options, including sub-para. (a) in square brackets) if the delegations agreed upon the interpretation. He highlighted that this avoided the need to add text to afford judges a new possibility inconsistent with the 2005 Convention. The delegate stressed that his main concern was for clarity. He described his understanding that it was not the intention that the Convention oblige States to include the possibility in their implementing legislation. In that sense, the delegate highlighted the merits of referring to "national law", or returning to the language of the 2005 Convention, to accommodate the concerns of States implementing the Convention under their national law.

56. **The Chair** clarified that none of the options *required* national law to make available the option of granting recognition or enforcement, with or without security. The Chair emphasised it would be open, under all of the proposals, for national law to limit the possibility. The Chair explained the discretion was conferred upon the law maker.

57. **A delegate from Peru** clarified this was not the way Peru saw the matter. The delegate considered that the legislator was required by the language to include the possibility. Upon ratification, the delegate considered that States could not go against the text of the Convention.

58. **The Chair** responded that it was important to emphasise, not only here but elsewhere, that the word "may" should not be read as "must". The word "may" reflected a discretion, conferred upon the States, which permitted a State to decide whether or not it would proceed in that way. The Chair stressed that this understanding was fundamental to the Convention. By way of example, the Chair referred to the *chapeau* of Article 7 as containing the most fundamental "may" of the Convention (by it, "recognition and enforcement *may* be refused if […]"). The Chair emphasised that this left it open to national law to either mandate that refusal occur in those circumstances, or to permit recognition and enforcement notwithstanding that some defences could be made out. The Chair reiterated this was a choice for national legislators, and that it was fundamental to the architecture of the Convention that the choice be open in this way. The Chair highlighted that the open choice was an aspect of preserving national law enforcement, emphasised by Article 16. The Chair drew attention to the fact that Article 16 merely emphasised the choice, and that the position was the same under the 2005 HCCH Choice of Court Convention even though it did not contain an analogue of Article 16. He reiterated that recognition and enforcement was not constrained by the Convention, because the grounds for refusal under Article 7 were subject to the word "may", such that national law could provide otherwise. To understand the issue differently would be to cut across the basic structural features of the Convention that had prevailed after years upon years of discussion.

59. **A delegate from Argentina** supported option 1 in Working Document No 49.

60. **A delegate from Canada** supported the proposal in Working Document No 48.

61. **A delegate from Uruguay** preferred to follow the language of the 2005 HCCH Choice of Court Convention and supported option 1 of Working Document No 49. However, he agreed that there was no policy difference between the proposals, and indicated that further discussion could lead to a consensus on the text.

62. **A delegate from Switzerland** preferred her delegation's co-sponsored proposal. She underscored the remarks of the delegate from the European Union and cautioned against enabling provisions in favour of "national law". She highlighted that there are many ways in which the Convention left decisions to national legislators (including through the use of the word "may", and also by other means). The delegate was concerned that an explicit reference to a choice conferred upon the national legislator would be confusing in this provision. Although she agreed with the policy underlying option 1 of the proposal from Peru, the delegate considered it to be problematic from a drafting perspective.

63. **A delegate from the United States of America** observed this was an interesting issue indeed. From his delegation's perspective, Working Document No 48 was agreeable to the United States of America. However, he read the text differently from others, including from the Chair. He explained that, notwithstanding the 2005 HCCH Choice of Court Convention, the language in Article 4(4) read like an absolute possibility. That was to say, that the word "may" in the *chapeau* of Article 4(4) indicated that any of options (a), (b) or (c) were possible, at least on the international plane. The delegate agreed with the Chair that "may" did not mean "must", and that Article 7 entailed permissive language which authorised judges to refuse recognition or enforcement on any of the enumerated grounds therein. The delegate remarked that implementing legislation should give effect to the provisions of the Convention. The delegate considered that, where judges relied upon implementing legislation and not the Convention itself, the implementing legislation should provide each of the discretionary options to the judge. However, he contrasted this with the view of other delegations that "may" is understood as permissive authorisation, regardless of what might be included on the domestic plane in legislation. By way of example, the delegate considered that if implementing legislation did *not* reflect all three options under Article 4(4), it could be asserted that the legislation was inconsistent with the Convention. The delegate remarked that the use of the word "may" in Article 4(4) was not to provide guidance to the legislature, but rather it reflected an international com-

mitment by States to the existence of the availability of (a), (b) or (c). This meaning seemed clear to the delegate. In the absence of ambiguity, the delegate remarked that the necessity of referring to the Explanatory Report (for additional language and understanding in the interpretation of the Convention) would not be clear. However, the delegate acknowledged that this interpretation may not be available to some delegations. Turning to the Working Documents, the delegate did not agree that there was rough similarity between Working Document No 48 and Working Document No 49. He indicated a preference for Working Document No 48, however he could support option 1 in Working Document No 49 if there were support for that option.

64. **The Chair** presumed that the United States of America could also support option 2, given that it carried the same effect as the 2005 HCCH Choice of Court Convention.

65. **A delegate from the United States of America** indicated that he was flexible and would not block consensus on option 2.

66. **The Chair** clarified that the word "may" identified options that are available to the State. However, the State may also choose not to apply some of them. If there were implementing legislation in a State, the State was not required to make any or all of the Article 7 defences available. The Chair indicated there was a real prospect that some States would choose not to make some defences available. In that case, the discretion of the court would be constrained by the implementing legislation, in a manner wholly consistent with the State's obligations. The Chair reiterated this had been discussed on many occasions.

67. **A delegate from the European Union** gave strong support to the explanation by the Chair: it reflected precisely the understanding held by his delegation. The delegate highlighted that the proposal from Peru could create problems if it were based on a different understanding. Indeed, if it were based on a different understanding, the solution proposed by the delegation of Peru would not solve the very issue it had raised. According to the delegate's informal bilateral discussions, he observed that the only possibility under Peruvian law was to refuse recognition (*i.e.*, even postponement was not available). The delegate explained that if one adopted (what the European Union considered to be) the fundamentally wrong view – namely, that all options were required to be available – then a State would be obliged to make all possibilities available, notwithstanding that some options were not available under that State's national law. The delegate emphasised he did not agree with this interpretation: under the Convention, there was no obligation to make the possibilities available. The delegate therefore considered option 1 in Working Document No 49 to be particularly problematic, indeed the most problematic option. The delegate reiterated his strong attachment to Working Document No 48.

68. **The Chair** confirmed that his earlier explanation derived directly from the work of the *co-Rapporteurs* in paragraph 275 of the Explanatory Report.

69. **A delegate from the People's Republic of China** agreed with Chair's comments and interpretation, which he considered to be beautiful and concise. The delegate sought to draw attention to option 1 of Working Document No 49. The delegate commended the explanation of the fundamental rules of treaty interpretation provided by the delegate from Switzerland, concerning the situation where there are words in some provisions but not in others. The delegate supposed that, where national law or principles limited recognition, the Article would only apply to that provision. However, the delegate foreshadowed this result would create problems for the interpretation of the whole treaty. The delegate remarked that the result required States to add words when they did not have them under their own national rules, otherwise the international community would consider there to be a policy differentiation. Therefore, the delegate regarded option 1 to be dangerous. This was not the only provision for which a State would need to apply the limitations of its domestic law. The delegate politely invited the delegation of the Republic of Korea to rethink and consult its treaty law experts on this important issue. Secondly, the delegate commended the useful remarks by the United States of America concerning the meaning of the word "may". The delegate was concerned that "may" conferred a choice upon national legislators who may not necessarily have international legal or treaty law expertise, and therefore may fail to understand the intention of the provision. The delegate expressed concern for States with treaty rules of adoption, as they would be required to adopt the whole Convention as part of their master legal system (as opposed to States with treaty rules of transformation, which the delegate considered had an easier process of creating new laws). The delegate suggested that States with an adoption approach may require guidance as to how the word "may" should be read. The delegate proposed reverting to the language of the 2005 HCCH Choice of Court Convention.

70. **The Chair** noted a long list of delegations wishing to speak. The Chair emphasised there was no policy difference, and that the Plenary had spent an hour considering the different ways in which it might express the same result. The Chair observed strong concerns about the formulation in Working Document No 48, and strong concerns about including a reference to "national law" in option 1 in Working Document No 49. The concerns, even if overstated, deserved to be respected. It seemed to the Chair that the most realistic path would be to revert to the language in the 2005 HCCH Choice of Court Convention, which appeared as option 2 in Working Document No 49, coupled with an appropriate discussion in the Explanatory Report modelled extremely closely on the 2005 Convention. The Chair let delegations consider this approach and indicated that, upon returning from the coffee break, he would ask the delegates whether they wished to proceed on that basis or continue discussions.

71. **The Chair** welcomed back the delegations and asked whether the approach he suggested could be adopted by consensus. With no interventions to the contrary, the Chair concluded that option 2 of Working Document No 49 concerning Article 4(4) was adopted by consensus. He added that the Explanatory Report would essentially repeat the explanation in the Explanatory Report for the 2005 HCCH Choice of Court Convention.

72. **A *co-Rapporteur*** asked whether he was right in understanding that, even in such a case, national law could still present a third alternative: to grant recognition with security for costs. He noted that this was possible in Spain. If that were the case, he queried whether it should be mentioned in the Explanatory Report.

73. **The Chair** indicated that the Explanatory Report for the 2005 HCCH Choice of Court Convention records this as an option under that Convention. He suggested that the Explanatory Report for the draft Convention should similarly explain that national law can provide for recognition with security for costs. The Chair elaborated that the Explanatory Report should also explain that national law may,


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for example, determine *not* to provide the postponement option or *not* to provide the grant option.

74. **A delegate from Israel** pointed out that, currently, courts in Israel are not allowed to recognise or enforce judgments which are subject to appeal. He indicated this position may be changed subject to the draft Convention. However currently, the delegate was concerned that the language in the Explanatory Report was not strong enough (especially, the language to the effect that "the judgment creditor may be required to provide security to ensure the judgment debtor is not prejudiced"). Rather, the delegate favoured positive language (*e.g.*, that "the court can require"), similarly to the draft text of the Convention. Also, the delegate explained that Israel was uncertain as to whether and how a court addressed must "rescind" the enforcement of a judgment that is subsequently set aside in the court of origin. As Israel recalled the discussions, the delegates had not decided to create an obligation to rescind enforcement in those circumstances. Indeed, under Israeli law, the delegate was uncertain as to how such an obligation could work in practice. The delegate requested that the *co-Rapporteurs* examine the Minutes from previous Special Commission meetings, and consider using stronger language to clarify the implementation of this Article.

75. **The Chair** thanked the delegate from Israel for his polite suggestions and then turned to Article 5(1)(g *bis*) and Working Document No 35.

*Article 5(1)(g* bis*)*

76. **A delegate from Brazil**, after discussing the proposal with other delegations, realised that there was no possibility for the proposal to go further. He withdrew the proposal.

77. **The Chair** thanked the delegate from Brazil. The Chair then directed the discussions toward Article 5(1)(k).

*Article 5(1)(k)*

78. **The chair of the informal working group on trusts** remarked that substantial progress had been made. She extended her thanks to the delegations of Korea and Singapore. Currently, there was an agreement not to amend the text of the draft Convention itself, however she foreshadowed the production of a Working Document that would furnish some suggestions for the Explanatory Report to address three concerns, namely: i) the implication should not be seen as being governed by any kind of presumptions in the area; ii) an indication that when the requested court is examining the text of a trust instrument, it is trying to determine the meaning of *that* trust instrument, such that evidence of other circumstances is relevant only to the meaning of *that* trust instrument; and finally, iii) as suggested by Singapore, it would be helpful to have a non-exhaustive list of examples to assist a requested court where it is searching for evidence of an implied designation. She added that if there were to be a Working Document, it should come from the European Union and other co-sponsoring delegations.

79. **The Chair** asked whether the delegation of the Republic of Korea was in agreement not to make the suggested textual changes to Article 5(1)(k) but instead insert the appropriate suggestions in the Explanatory Report.

80. **A delegate from the Republic of Korea** agreed.

81. **The Chair** concluded that Article 5(1)(k) as it was in Working Document No 50 was adopted by consensus.

*Tenancies and immovable properties*

82. **The Chair** recalled that the continuing informal working group on tenancies and immovable properties was discussing issues with respect to Article 5(1) and Article 6. The informal working group would meet tomorrow, during the lunch break.

83. **The chair of the informal working group on tenancies and immovable property** observed that there had been an email exchange on that topic amongst the working group, with a full set of documents. He noted that any State interested in the discussions should contact the Secretariat to have the full set of documents.

*Article 14(3) and (4)*

84. **The Chair** directed discussions towards Article 14. He recalled that paragraphs 1 and 2 had been adopted. He further indicated that there was a revised proposal from Switzerland, regarding paragraph 3 contained in Working Document No 54, and a proposal from Israel on a new consequential paragraph 4 in Working Document No 52. The Chair directed the discussion first to Article 14(3), and the proposal from the delegation of Switzerland.

85. **A delegate from Switzerland** highlighted that an explanation had been added to Working Document No 54. The proposal sought to prevent a specific form of discrimination, namely: the imposition of a specific deadline for registration (or an application for enforcement) of a foreign judgment where it did not follow the operation of the general rules of the requested State. The proposal was not intended to interfere with general rules of limitation, including conflict-of-laws issues. To make this completely clear, the word "national" had been replaced by the word "internal" law. The delegate explained that the proposal only referred to a specific deadline provided for in the *internal* law of the requested State. The delegate emphasised that the issue of recognition was not removed from the proposal, because there may be a specific deadline for the recognition of a foreign judgment. Indeed, the delegate indicated that imposing such a specific deadline for recognition might be a potential loophole to achieve the same effect that the proposal sought to prevent. Instead, the proposal added the word "effectiveness" to the text to make it clear that, if a deadline were not necessary to maintain the "effectiveness" of a domestic judgment, nor should a deadline be imposed upon a foreign judgment.

86. **A delegate from Israel** recalled that he had strongly objected to the proposal from Switzerland in earlier discussions. He considered that it raised complicated issues, and echoed the comments made by one *co-Rapporteur* on that point. Although Working Document No 54 referred to a five-year limitation period (which was the case in Israel), the delegate was confident this was just a coincidence and was not intended to refer to Israeli legislation. He proposed that, if the innovative proposal from Switzerland were accepted, it would only be reasonable to also permit States to declare that they would not apply Article 14(3) due to the whole host of issues that could arise. For example, in Israel, a domestic judgment did not require any declaration of enforceability (the domestic judgment is enforceable from the moment it is received) whereas a foreign judgment did require a process of declaring enforceability. In this respect, the delegate considered it difficult to compare the processes. However, if there were consensus to impose the

obligation according to the proposal from Switzerland, the delegate reiterated that he considered it appropriate to allow Contracting States a declaration not to apply it. The delegate was concerned that such an obligation could deter other States from signing the Convention.

87. **A delegate from Canada** explained that, among the 14 jurisdictions in Canada, some had rules with respect to specific time limits for recognition and enforcement, some had rules for the enforcement of local judgments, and some had rules for the time for execution of local judgments. From a principled perspective, her delegation thought the Convention should include a rule that makes it clear that one should not discriminate against a foreign judgment. The expression of that rule, and the accommodation of all the different situations, was a different matter. She stressed the need for the language to encompass both domestic and foreign judgments. The delegate was inclined to support the proposal from Switzerland, however she reserved the opportunity to have further discussions on the language. Concerning the proposal from the delegation of Israel, the delegate from Canada did not consider an opt-out declaration mechanism to be appropriate in the circumstances.

88. **A delegate from the European Union** recalled that he was strongly attached to the idea of non-discrimination. He was in favour of the text as it had stood before, with the clarification provided by paragraph 355 of the Explanatory Report (that judgments given in other Contracting States, if they are to be recognised and enforced, are to be treated in the same manner as domestic judgments). The European Union was 'relatively agnostic' as to whether this clarification should be incorporated into the text of the draft Convention; and it certainly had no objection to including it in the text as proposed by the delegation of Switzerland. However, he was strongly opposed to creating an opt-out declaration in paragraph 4. He underlined that his delegation had not coordinated since the Working Document was new, but the position of the European Union should not have been changed.

89. **A delegate from Australia** highlighted that the principle of non-discrimination underpinned the work of the Plenary. He supported the proposal of Switzerland, even if its drafting might require changes. He further remarked that he definitely could not support the proposal from Israel.

90. **A delegate from Uruguay** recalled that he was strongly in favour of the proposal made by Switzerland. With respect to Working Document No 52, even if his delegation preferred not to have declarations of this kind, the delegate understood the concerns of Israel and therefore neither supported nor objected to the proposal from Israel if it were necessary for the retention of Article 14(3) and attracting signatures to join the Convention.

91. **A delegate from Israel** clarified that he could go along with what had been said by the European Union regarding the Explanatory Report. The delegate reiterated that he had no problem with explanation of the principle of non-discrimination in the Explanatory Report. Rather, the delegate was concerned to add such language to the text of the Convention.

92. **The Chair** sought clarification on how the delegation of Israel's commitment to the principle of non-discrimination fitted with the opt-out declaration which would permit Israel to discriminate.

93. **A delegate from Israel** indicated that the question related to how States viewed the issue. The delegate explained that in Israel, upon a foreign judgment being declared enforceable, it is automatically prescribed a time period for its enforcement (one that is potentially longer than the period for domestic judgments) that is calculated from the date of the declaration of enforceability. For example, a domestic judgment in Israel may be executed within 25 years. Once a foreign judgment is declared enforceable, the same statute of limitation would apply as a domestic judgment. The delegate explained that he did not view this as discrimination.

94. **A delegate from Switzerland** remarked that the delegate from Israel had neatly illuminated the issue for which she was concerned should Article 14(3) not be included. If the non-discrimination principle applied only once a judgment has been declared enforceable (or recognised), then a shorter time limit could be imposed effectively.

95. **The Chair** observed that his understanding from the Explanatory Report was that the principle of non-discrimination was not confined to the period after recognition or enforcement had been granted, but was intended to emphasise the importance of not discriminating between judgments from the requested State and judgments in respect of which recognition or enforcement was sought.

96. **A delegate from Argentina** was sympathetic to the proposal of Switzerland because it corresponded to her approach. However, she was aware of the concerns raised by Israel and could go along with Article 14(4) and could be flexible as to the approach.

97. **A delegate from the People's Republic of China** indicated that, from a policy point of view, he agreed with the proposal from Switzerland. However, he pointed out that it was important to accommodate States and to avoid fundamental difficulties for them to join the Convention. He further recalled that when Article 15(1) was discussed, the very same question of non-discrimination was raised. In his view, if States required a declaration mechanism in Article 14(4) to join the Convention, then China would support such a declaration.

98. **A delegate from Singapore** expressed support for the non-discrimination principle and sought clarification from the delegation of Israel with respect to its proposal. He queried whether a declaration under Article 14(4) would have a reciprocity mechanism and, if so, he queried how it would work. The delegate observed that as far as we know, any declaration in the draft Convention has a reciprocity element and there would be issues if the proposed Article 14(4) declaration carried no reciprocal effect.

99. **A delegate from Sri Lanka** expressed support for the principle of non-discrimination but shared concerns with respect to the wording of the proposal from Switzerland: it seemed to invite a requested court to disregard its national law, which might raise constitutional issues. While agreeing for the need to include the non-discrimination principle, she asked whether another formulation might be drafted.

100. **The Chair** agreed, saying it would require domestic legislation making it effective; therefore, it would impose an obligation on the State, which would then need to remove any inconsistency in its implementing legislation. The Chair noted that the delegate from Switzerland nodded in agreement.

101. **A delegate from Israel** responded to the delegate from Singapore by saying that he had no objection to the proposed Article 14(4) declaration mechanism carrying re-


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ciprocal effects. And, if there were no Article 14(3), there would be no need for an Article 14(4) declaration.

102. **The Chair** considered that the delegations should reflect overnight upon Working Documents Nos 52 and 54. He observed that it was unlikely for consensus to be reached upon Article 14(3), without also adopting Article 14(4). In that regard, those who supported Article 14(3) should consider whether they preferred to address non-discrimination in the Explanatory Report, rather than include Article 14(3) in the text only to also have a declaration in Article 14(4) that ran counter to it.

103. **A delegate from Switzerland** emphasised that having a declaration mechanism would turn the non-discrimination principle around. She considered the declaration mechanism to be unacceptable. She preferred to withdraw her proposal than have an Article 14(4) declaration. She was sure that everyone who supports the principle of non-discrimination would go along the same line.

104. **The Chair** asked whether Switzerland would reflect on that overnight or would withdraw the proposal now.

105. **Un délégué de la Suisse** indique qu'il préfère retirer la proposition que de permettre un mécanisme de déclaration. Il poursuit en questionnant la manière de procéder du Président dans la mesure où la dernière fois que cet article avait été discuté, ce dernier avait reconnu « *a great level of support* ». Par ailleurs, il souligne que d'autres délégations s'étaient prononcées en faveur d'un paragraphe 3. Il conclut son intervention en indiquant que cette question, pour être définitivement réglée, nécessite davantage de temps et de réflexion.

106. **The Chair** recalled that a great deal of support did not mean consensus. He added that, when listening to the contributions that delegations made this afternoon, he was also considering the support expressed during previous discussions on that question. Although he considered there to be a great level of support for Article 14(3), the Chair did not consider that support sufficient to amount to consensus; so, he expressly left that question to percolate overnight. For this reason, he did not seize on the suggestion of Switzerland to withdraw its proposal, and proposed to return to the issue again tomorrow.

107. Then, the Chair turned to the informal working groups. He indicated that the informal working group on general and final clauses would meet immediately after the Plenary; the informal working group on tenancies and immovable property would meet on Wednesday at lunchtime; the informal working group on intellectual property matters would meet tomorrow at 9.00 a.m., and the Plenary would reconvene tomorrow at 10.30 a.m.; and the informal working group on governments would meet on Wednesday during lunchtime, provided that a final conclusion might be reached. The Chair encouraged delegations with a strong interest in that work to actively consult with each other.

108. **A delegate from Argentina** stressed the interest of her delegation with respect to the informal working group on governments. She was in line to convene a meeting Wednesday during lunchtime and allowing delegations to consult internally in the meantime. However, she raised concerns about timing: she did not want proposals to not be considered due to lack of time. She wanted to flag that and then said that her delegation made a proposal on exclusions from scope because Article 2(4) was highly sensitive. She added that another proposal had been submitted by her delegation regarding Article 2(1). She further stressed that her delegation was also working on language to accommodate everyone's interests.

109. **The Chair** stressed the importance of concluding the work of the informal working groups. He emphasised that the informal working group on intellectual property matters should resolve pending issues during the meeting of tomorrow morning.

110. **A delegate from the European Union** pointed out that the European Union coordination meeting for tomorrow would be announced later.

111. **The Chair** concluded the meeting at 5.18 p.m.

# Procès-verbal No 11

# Minutes No 11

*Séance du mardi 25 juin 2019 (matin)*

*Meeting of Tuesday 25 June 2019 (morning)*

1. La séance est ouverte à 10 h 45 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

2. **The Chair** proposed the following agenda: to begin, a report from the informal working group on general and final clauses, followed by a report from the informal working group on intellectual property and discussion in the Plenary on Article 2(1)(m) and Article 8, and a discussion on outstanding issues in Article 2(1), in particular anti-trust, Article 14(3) and (4). Thereafter, a discussion on general clauses, except Articles 20 and 24, and final clauses, and matters relating to tenancy and immovable property, including a report from the informal working group after its lunchtime meeting.

*Working group on general and final clauses*

3. **The chair of the informal working group on general and final clauses** introduced Working Document No 61[1] and noted that great technical progress had been made during the group's meetings. It was apparent from the meetings that the most difficult provision was the provision on objections, and no political agreement had been reached concerning the issue of bilateralisation and objections. Working Document No 61 (Info. Doc. No 7) encompassed a broad objection clause, but it was noted that a narrow ob-

[1] As noted in para. 13 below, Work. Doc. No 61 was replaced by Info. Doc. No 7.

jection clause was also possible. The chair outlined the approaches to openness and objections contained in the previous HCCH Conventions. Of the 39 Conventions under the auspices of the HCCH, four Conventions were entirely open, including the HCCH *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 HCCH Choice of Court Convention"), the HCCH *Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* and the HCCH *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*. Twelve Conventions were restricted, in terms of access, to Members of the HCCH. An alternative mechanism to restrict access was to stipulate that the Convention was only open to States present at the Diplomatic Session, which had been applied in 18 Conventions. In relation to bilateralisation and objection clauses, it was noted that they were not a new phenomenon in HCCH Conventions. A number of Conventions contained an unrestricted approach to accession, approximately 12, whereas seven older Conventions had a number of restrictions on accession. A tacit acceptance of accession procedure, existing in various forms, was incorporated in seven to ten HCCH Conventions. The purpose of tacit acceptance to accession was to emphasise that only an existing Contracting State could object to accession of a new State, such as in the HCCH *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* and the HCCH *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*. With the Conventions which contained a tacit acceptance procedure, acceding States did not have a right of veto, but had to accept all existing 'members of the club'. Further, seven Conventions applied the principle of explicit acceptance, including the HCCH *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the HCCH *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*.

4. Regarding Article 29 *bis* in Working Document No 61 (Info. Doc. No 7), the chair explained that it contained a broad objection clause, providing that Contracting States could make an objection at any time: when becoming a Contracting State, when another State became an objecting State, and at any time thereafter. Existing States and incoming States both had a right of veto, and could both exercise the right after becoming a Contracting State.

5. Paragraph 1 stated the policy, "The Convention shall have effect only as regards relations between States neither of which have raised an objection with respect to the other State in accordance with paragraph 2, 3 or 4." The policy was clear; objections could be made and an objection affected the objecting State and the State to which the objection was directed. The principle was based on full reciprocity, with the consequence that if an objection was made, the Convention would not have effect between the two States. It was important to note that an objection could only be made in accordance with paragraph 2, 3 or 4. For practical reasons, Article 29 would need to distinguish between three situations: i) firstly, where an objection was made by an existing Contracting State vis-à-vis a new State becoming a Contracting State, ii) where an objection was made by a new Contracting State vis-à-vis an existing Contracting State, and iii) where an objection was made after the entry into force of the Convention.

6. Paragraph 2 addressed the situation where an existing Contracting State sought to object to an incoming State, and conferred a veto right to the existing Contracting States. According to the provision, "A Contracting State may notify the depositary of its objection to the establishment of treaty relations with a ratifying, accepting, approving or acceding State within 12 months after the receipt of the notification by the depositary referred to in Article 32(a)." A 12-month period was necessary because this type of decision was a complicated matter which required significant consideration. Also, for international organisations such as the European Union, coordination on a matter of this kind was needed, a matter of great complexity.

7. Paragraph 3 stated that "[a] ratifying, accepting, approving or acceding State may, upon deposit of its instrument under Article 25(4), notify the depositary of its objection to the establishment of treaty relations with any Contracting State", and was the other side of the coin to paragraph 2. New Contracting States could exercise veto against existing Contracting States, which achieved a balance between the two States. The objection could only be taken when accepting, approving or acceding to the Convention, and the objection would take effect when the Convention enters into force for the new Contracting State, with the consequence that the Convention would not enter into force between the new Contracting State and the existing Contracting State to which the objection was directed. It was unnecessary to include a time limit in paragraph 3, because an incoming State had sufficient time to consider whether it would become a Party to the Convention and whether it would make an objection.

8. Paragraph 4 allowed any Contracting State at any time to make an objection: "A Contracting State may at any time notify the depositary of its objection to the continuation of treaty relations with another Contracting State […]." The paragraph also contained a rule on transitional problems or issues in relation to ongoing proceedings. However, it was emphasised that paragraph 4 was a veto right for any Contracting State vis-à-vis another Contracting State, which could be taken at any time. It was explained that the informal working group discussed the possibility of including some qualifying language in the Explanatory Report or in the provision itself, but consensus on this matter could not be reached. Paragraph 4 provided that an objection would take effect three months after the date the objecting State notified the depositary of its objection. The subsequent matter that needed to be addressed was how the objection would apply with respect to ongoing proceedings in the objecting State vis-à-vis the State to which the objection was directed. A rule which was clear and targeted tactical objections by an objecting State was required. The rule provided in paragraph 4 was that: "An objection made under this paragraph shall not apply to judgments resulting from proceedings that have already been instituted in the State of origin when the objection takes effect."

9. Paragraph 5 concerned withdrawal of objections, which could be made at any time and would take effect three months after notification to the depositary of the withdrawal of the objection. Again, withdrawal would also raise transitional issues in relation to ongoing proceedings, and so the rule in paragraph 4 was also included in paragraph 5. Paragraph 6 contained a provision stating: "Objections and withdrawals of objections shall be notified to the depositary."

10. The chair explained that Working Document No 61 (Info. Doc. No 7) was a skeleton of a broad objection clause; one that would be applicable when a State became a Contracting State, one that existing Contracting States could apply vis-à-vis new Contracting States, and one that any Contracting State could apply at any time. The chair pointed out that there was also the possibility of drafting a nar-


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row objection clause, which would allow a Contracting State to make an objection only once, a 'one-shot mechanism' which could be fired when a State became a Contracting State. An incoming Contracting State could only object to an existing Contracting State when it became a Party to the Convention, and an existing Contracting State could only object to a new Contracting State when the latter became a Party to the Convention. However, it would not be possible to make an objection after that point in time. The delegate explained that the narrow objection clause could be achieved by deleting paragraph 4 from the broad objection clause. The narrow objection clause limited the scope for objection, but in policy terms it may be deemed a compromise if a broad objection clause was not acceptable to the Plenary.

11. **The Chair** indicated that a general discussion of Working Document No 61 (Info. Doc. No 7) would take place in the afternoon session, and sought comments regarding the process or other matters relating to the informal working group on general and final clauses.

12. **A delegate from the People's Republic of China** expressed concerns in relation to the process and the appropriate status of "non-paper" of Working Document No 61 (Info. Doc. No 7). A colleague of the delegate had attended the working group discussions, and it was clear that the informal working group focused on all the final clauses of the draft Convention, and the most important discussions of the informal working group concerned the difficult issue of bilateralisation; no specific proposals on the text were produced by the working group. The delegate considered it misleading that the "non-paper" contained a detailed provision and language upon which no members had agreed. Further, the delegate was hesitant to embrace the suggestion by the chair of the informal working group that paragraph 4 would need to be deleted in order to formulate a narrow objection clause, before even knowing the approach or seeing it in the text. The delegate considered the text reflected a personal preference from the chair of the informal working group. Considering the joint proposal from the delegates of Japan, Switzerland and the United States of America in Working Document No 24, this proposal did not contain the language or policy contained in Working Document No 61 (Info. Doc. No 7). The delegate requested the Chair to withdraw the non-paper, because it was procedurally incorrect. He conveyed his strong objection to the text being presented as a Working Document that required consideration by all the delegations. Only the discussion status or discussion situations in the working group could be presented, something like a report, but a Working Document could not be presented.

13. **The Chair** clarified that if he had referred to Working Document No 61 (Info. Doc. No 7) as a report from the informal working group on general and final clauses, he had misspoken, and that it was a report from the chair of the working group, his reflections on the discussions in the group. The Chair confirmed that it was not a proposal, in the sense of a Working Document, and it was more appropriate to consider it as an Information Document, a background document to prompt reflection. The Chair noted the agreement of the delegate from the People's Republic of China that the document could be noted as an Information Document. The Chair highlighted that Information Documents were received from observers or other States in order to facilitate reflection by the Plenary (noting that delegations do not always have a monopoly on insights into these hard issues). The Chair stressed that Working Document No 61 (Info. Doc. No 7) was not a report from the informal working group, nor did it bear any sort of endorsement from the members of the group. It was not a formal Working Document, but an Information Document.

14. At the invitation of the Chair, **the chair of the informal working group on general and final clauses** concurred with the Chair's statements and noted that at the outset of his presentation he expressed that there was no agreement in the informal working group whether or not to include an objection. The delegate explained that in the informal working group the provision was drafted from a technical perspective, but that there was no substance to it. The document was purely to facilitate the Plenary's discussion on the subject matter, and there had been no intention to table the document as a proposal.

15. **A delegate from the United States of America** recognised the concerns expressed by the delegate from the People's Republic of China and agreed with the tenor of the delegate's assessment. The delegate was pleased that the document would be treated more like an Information Document. The delegate asked the Chair whether the content of Working Document No 61 (Info. Doc. No 7) would be discussed in the afternoon session. In the alternative, the delegate expressed his willingness, in consultation with the other proponents of Working Document No 24, to consider presenting a new Working Document similar to Working Document No 61 (Info. Doc. No 7), although the parenthetical Article or the comment in paragraph 4 would be characterised a little differently in the revised tripartite paper.

16. **The Chair** clarified that, if the Plenary were to discuss the text in the document in detail, it was preferable from a procedural perspective that a delegate propose a new Working Document. It would also be helpful for the Plenary to know whether Working Document No 24 had been superseded and whether the Plenary should solely focus on the new text contained in Working Document No 61 (Info. Doc. No 7).

17. **Un délégué de la Suisse** remercie la délégation de la République populaire de Chine pour son intervention et son analyse de la procédure quant au Document de travail No 61. Le délégué souligne que, même s'il paraît nécessaire de reformuler le Document de travail sous la forme d'un Document d'information, la substance du document sera réintroduite sous la forme d'une proposition formelle tripartite ou bipartite des délégations intéressées. Il demande ensuite, dans un souci d'efficacité, que les autres délégations soient prêtes à discuter la substance du Document de travail No 61 (Doc. info. No 7).

18. **The Secretary General** explained that the nature of the non-paper had been formulated precisely to convey that it did not reflect any views of the informal working group. Rather, it was a document from the chair of the informal working group. He explained that the Secretariat should have submitted the document as an Information Document as opposed to a Working Document. The Secretary General expressed apology and emphasised that the oversight should not backfire on the chair of the informal working group.

19. **A delegate from Japan** thanked the chair of the informal working group for his efforts in preparing the document.

*Intellectual property*

20. **The chair of the informal working group on intellectual property matters** provided a report on the status of the working group's discussions. He noted that discussions

within the group had been useful and constructive, but that so far no consensus had been reached on any issue discussed. He advised, however, that the respective counter positions were now much better understood, and that the informal working group would benefit from further time to continue discussions.

21. Noting no objection to that approach, **the Chair** granted the working group further time to continue their discussions after the lunch break, so that the afternoon Plenary might reconvene at 4.00 p.m.

*Article 14(3)*

22. **The Chair** reintroduced discussions of current proposals relating to Article 14(3). He recalled that live proposals included Working Document No 52 proposed by Israel, and Working Document No 54 from Switzerland.

23. **A delegate from Switzerland** advised that the delegation wished to withdraw its proposal, having reflected further on Working Document No 54. The delegate explained that her delegation had been given comfort by the revisions made to Working Document No 60 (the *co-Rapporteurs*' Explanatory Report revisions). The delegate noted that this had allowed her delegation to soften their position on this issue, and that on reflection having a specific deadline was not necessarily completely unacceptable in all types of situations if that deadline was reasonably long (for example, ten years). This could account for certain factual and legal issues which might have to be considered in the context of recognition and enforcement, but which do not have to be considered only with respect to enforcement. The delegate affirmed her delegation's strongly held view that there should be no discrimination and no encroachment on the principle of effectiveness in this context. In that regard, the delegate suggested that some further text on the principle of effectiveness might be added to the Explanatory Report. The delegate considered that yet another approach may be to include an Article on effectiveness within the Convention's text, such as appears in the HCCH *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (hereinafter, "2007 HCCH Maintenance Convention"). Her delegation considered that there should not be unreasonably short deadlines for application and granting of recognition and enforcement, as this would be against the spirit of the Convention.

24. At the invitation of the Chair, **a delegate from Israel** confirmed that in light of the withdrawal of Working Document No 54, their proposal under Working Document No 52 was withdrawn. However, the delegate noted that it may have further comments on Working Document No 60.

25. **A delegate from the European Union** explained that in light of its review of the proposals of Switzerland and Israel, it had reached similar conclusions to those put forward by those delegations. He noted that the internal discussions of the European Union had to date largely concentrated on one particular issue, the statute of limitations for the enforcement of judgments, whereas the effectiveness argument was a horizontal one, and certainly applied to limitation periods, but not only to that issue. In that regard, the delegate advised that his delegation was considering the production of a Working Document on effectiveness. He also noted that his delegation's departure point was also the 2007 HCCH Maintenance Convention, but concluded that his delegation's proposal would not reinvigorate the matters now withdrawn under the proposals of Switzerland and Israel.

26. **The Chair** encouraged any foreshadowed proposals to be completed and submitted promptly.

27. At the Chair's invitation, **a *co-Rapporteur*** provided a short introduction to Working Document No 60 (Explanatory Report revisions) and drew attention to its salient amendments. He stated that the amendments related to the paragraph dealing with limitation periods (paras 355 *et seq.*) and the general principles under the law of treaties (para. 358). He added that paragraph 354 was expanded to elaborate on the difference between the term "declaration of enforceability" (*i.e.*, *exequatur* process) and "enforcement" within the context of Article 14, which refers to the concept of execution. With regard to the enforcement limitation period under paragraph 355, he explained that his main intention was to describe the different comparative law approaches to this problem. He identified three possible approaches. The starting point of Article 14 would be that the law of the requested State would determine the limitation period for both the declaration of enforceability, and execution of such. The *co-Rapporteur* elaborated on the three alternative possible comparative law approaches that a State may take with regard to these problems: i) first, the application of the domestic law (*i.e.*, the national law) of the requested State; ii) secondly, the law of the requested State referring back to the limitation period of the law of the State of origin; and iii) thirdly, the law of the requested State referring back to the law governing the substantive claim on which the judgment ruled to determine the limitation period for the enforcement of the judgment.

28. The *co-Rapporteur* then further addressed the principles of non-discrimination and effectiveness, in paragraph 358. He noted the inclusion of a final sentence in this paragraph, which stated that under international law, "a national law that provides for shorter limitation periods for enforcement of foreign judgments than it does for domestic judgment would not be compatible with this principle". The *co-Rapporteur* also indicated that he could reflect upon the comment by the delegation of Switzerland, saying that in particular with regard to a specific limitation period, not for execution but for the declaration of enforceability, an unreasonably shorter period of time for such a declaration would be incompatible with a principle of effectiveness within the Convention.

29. **A delegate from Israel** thanked the *co-Rapporteurs* for their valuable amendments. The delegate supported the amendments to paragraph 358 of the Explanatory Report, and agreed with the comments of the delegation of Switzerland that the paragraph might include a statement that an unreasonably short period for giving a declaration of enforceability would also be incompatible with a principle of effectiveness of the Convention. The delegate did not consider that the Plenary should determine what that period of time could be. Finally, the delegate suggested that paragraph 358's final sentence could refer to "execution", not "enforcement", as this would better reflect the intention that after the judgment had been declared enforceable, there should be no discrimination against that judgment.

30. **Le co-Rapporteur** indique qu'elle a bien compris la suggestion des délégués de rendre le Rapport explicatif plus précis quant aux termes « demande de reconnaissance » et « exécution ». Elle remarque qu'il existe un problème de langage, car les termes ne sont pas toujours précis. Elle assure aux délégations qu'elle fera en sorte de préciser le langage dans le paragraphe 358 et les paragraphes précédents, en observant que le plus grand défi dans l'article 14 est qu'il y a différentes phases ou notions d'exécution et qu'il est essentiel d'avoir la même compréhension.

31. **A delegate from Uruguay** advised that his delegation considered the principle of non-discrimination to be a very important principle captured under the 1969 *Vienna Convention on the Law of Treaties*. However, he highlighted that the concept of interpretation in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object on purpose, was in fact an overarching principle which applied to the whole draft Convention, and not just Article 14. The delegate suggested that perhaps the correct place for such reference would be under Article 21, with specific references to previous Articles such as this Article 14.

32. **The Chair** noted that these further points could be taken up within the proposal foreshadowed by the European Union. The Chair noted that this completed discussion of Article 14 for the time being, noting that paragraphs 1 and 2 to Article 14 had been adopted.

*Discussion of general clauses*

*Article 17*

33. Noting no extant proposals or Working Documents in relation to Article 17, **the Chair** concluded that Article 17 was adopted by consensus.

*Article 18*

34. At the invitation of the Chair, **a delegate from the European Union** introduced Working Document No 15. The delegate advised that the purpose of the proposal was to better clarify the intended operation of Article 18. In his delegation's estimation, the Article was not indispensable to the structure of the Convention and it appeared to have been carried over from the 2005 HCCH Choice of Court Convention where it featured in Article 19. The delegate added that if this provision were to stay in the draft Convention, it may require clarifying language to ensure its operation would be expressly confined to situations with no geographical connecting factors to the court of origin. The delegate explained that his delegation's proposal would tie the use of the declaration mechanism to filters relating to the jurisdiction of the court of origin, based on submission or express consent. The delegate explained that the proposal may usefully prevent the possible abuse of this declaration mechanism, and ensure predictability and increased legal certainty for parties involved in international litigation.

35. **The Chair** queried whether the proposal could be effective, insofar as its suggested text referred to jurisdiction in the court of origin being based on certain subparagraphs. The Chair recalled that the draft Convention did not address the basis on which the court of origin exercised jurisdiction, noting that the draft Convention is agnostic on that point. He explained that the court of origin may exercise jurisdiction on any basis known to its national law, and that Article 5 would then allow an inquiry at the time of recognition or enforcement into whether there were certain connections between the parties, the dispute, and the court of origin. He concluded by noting that the proposal could therefore not ask on what basis the court of origin had based its jurisdiction.

36. Responding to the Chair's remarks, **a delegate from the European Union** accepted that its proposal under Working Document No 15 may need to be reformulated. He expressed his delegation's openness to find more suitable wording, but emphasised the importance of having reference to these filters.

37. **A delegate from Switzerland** suggested that the proposal of the European Union may not be necessary, but that equally her delegation did not have any concerns with its approach. The delegate highlighted a further issue for consideration by the European Union relating to sub-paragraph (c) of its the proposal. The delegate noted that it may not be appropriate to allow non-recognition in the case contemplated by sub-paragraph (c). The delegate gave the example of a claimant suing a defendant (who is also habitually resident in the same State as the claimant) in a court abroad, for nuisance reasons. Should that defendant successfully defend the claim, perhaps on the basis that there was no jurisdiction in the court abroad, then on the basis of such a declaration, the requested State could refuse recognition and enforcement of the costs order. The delegate queried whether this would be an intended outcome of the proposal of the European Union.

38. **A delegate from Israel** recorded that his delegation had no strong views, but that it was yet to be convinced of the need to delineate this declaration. He suggested that it may be best to retain the text of the draft Convention, to provide flexibility for States. The delegate concluded however that, if the proposal was extremely important to the European Union, Israel would not object to the proposal.

39. **A delegate from Japan** queried whether a Contracting State could declare the exclusion if the judgment was eligible for recognition and enforcement, not only based on sub-paragraph (c) or (f), but also based on a sub-paragraph other than those mentioned in the Working Document, such as (a) or (i). The delegate noted that it was his belief that the intention of the Working Document would be to deny the possibility of the declaration for such cases by adding the requirement of the jurisdictional filters, but that the current text did not say so, and he requested other delegations to provide clarity on this point.

40. **A delegate from Canada** suggested that the European Union may formulate examples of possible abuse of the Article 23 declaration mechanism, to highlight the case for inclusion.

41. Noting that the proposal required certain amendments to its current form, **the Chair** requested that the European Union refine Working Document No 15, and resubmit the proposal for further review.

*Article 19*

42. Noting no extant proposals or Working Documents in relation to Article 19, **the Chair** concluded that Article 19 was adopted by consensus.

*Article 20*

43. **The Chair** reserved Article 20 for further discussion in light of the anticipated report of the informal working group on Article 20 and other government-related issues.

*Article 21*

44. Noting no extant proposals or Working Documents in relation to Article 21, **the Chair** concluded that Article 21 was adopted by consensus.

*Article 22*

45. At the request of the Chair, **the Secretary General** introduced Working Document No 62, a proposal of the Permanent Bureau. The Secretary General explained that the


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proposal would update the intended method of review of operation of the Convention. He noted that this Article was a traditional provision, but that it required amendment to reflect the new reality of the HCCH and better reflect its good governance framework, in particular, under the supervision and guidance of the Council on General Affairs and Policy. The Secretary General added that there was no intention with this proposal to undermine the importance of the provision. He highlighted that servicing existing Conventions is a core function of the work of the HCCH, and that it is a fundamental aim to ensure that Conventions actually operate well in practice. Under this revised Article, the Secretary General would be responsible to make all necessary arrangements for gathering information and reviewing the operation of this Convention, including any declarations and how they operated, and would report on these matters to the Council on General Affairs and Policy, who would in turn take decisions, including whether or not to convene, or whether or not there was a need to convene, a Special Commission to discuss the practical operation of the Convention. The Secretary General added that, technically, the Secretary General would continue to convene Special Commissions, but that he did not consider that there was a need to reflect that matter expressly in the proposal.

46. **A delegate from the European Union** considered that this proposal linked to and addressed matters discussed in the informal working group on general and final clauses, insofar as had been suggested in the context of that group that sub-paragraph (b) in the existing draft text was not necessary. The delegate expressed his delegation's support for the proposal.

47. **Un délégué du Canada** rejoint la position de la délégation de l'Union européenne en remerciant le Bureau Permanent, et exprime son soutien pour la proposition du Bureau Permanent.

48. **A delegate from the People's Republic of China** joined in thanking the Permanent Bureau for its proposal and noted that it had no *per se* objection to its adoption. However, the delegate mentioned that the Plenary may wish to consider whether the language in the proposal be broadened beyond reference simply to declarations, as there may be other similar kinds of objection to emerge in the Convention within the final text, and that it may be desirable to allow these matters to be dealt with by the Permanent Bureau and Secretary General.

49. **The Chair** thanked the delegate from the People's Republic of China and agreed that although no current text in the Convention had been adopted providing any other action except for declarations, there may be different actions in the future that would be desirable to include within the scope of this provision. The Chair suggested that this Article could be revisited to make consequential amends in that scenario.

50. **Delegates from Israel and Uruguay** each thanked the Secretary General and expressed support for the Permanent Bureau's proposal.

51. **A delegate from the United States of America** also expressed his delegation's support for the proposal, and clarified his delegation's understanding that, should the Statute of the HCCH change, which may in turn alter the HCCH's bodies and the allocation of responsibilities, this provision would be interpreted in that circumstance to ensure that the relevant internal procedure would still be followed.

52. **The Secretary General** confirmed the understanding of the delegate from the United States of America.

53. Noting no further interventions on the Permanent Bureau's proposal, **the Chair** concluded that Working Document No 62 on Article 22 had been adopted by consensus.

*Article 23*

54. Noting that there were no extant proposals or Working Documents received in relation to Article 23, **the Chair** suggested that the *co-Rapporteurs* could produce a modified explanation of the Article in the Explanatory Report.

55. **A delegate from Australia** intervened to advise that discussions in the working group had in fact foreshadowed a potential Working Document yet to be produced in relation to Article 23.

56. **A delegate from Canada** also intervened to underscore that the informal working group was currently working on Article 23, and that it was discussed in that context yesterday. The delegate confirmed that, as a result of that discussion, there would likely be a proposal from the working group, or from interested delegations from within that working group. The delegate also advised that Canada could not accept Article 23 as currently drafted.

57. **The Chair** suggested that the discussion be postponed, but that any Working Document should be received quickly, for discussion as a first item during the course of the morning meeting tomorrow.

58. **Un délégué de la Suisse** indique que sa délégation avait également pensé, comme la délégation du Canada, qu'une proposition devait être faite dans le cadre du Groupe de travail informel, mais il ajoute que cela pourrait être clarifié avec le président dudit groupe. Le délégué indique qu'il est d'accord pour dire qu'une proposition peut être soumise ; par ailleurs il ne pense pas qu'il y ait eu de discussion politique sur l'article 23. Il remarque qu'il reste quelques précisions linguistiques à apporter dans le texte mais, de son avis, il n'y avait pas de vrai désaccord au sein du groupe. Il estime qu'il serait peut-être judicieux, par conséquent, de voir une proposition présentée par le président du Groupe de travail, ou si le président estime qu'une délégation ou un État devrait soumettre une proposition, la Suisse serait ravie de le faire, selon le cas.

59. **The Chair** replied that he had been unaware of these developments within the informal working group.

60. **The chair of the informal working group on general and final clauses** confirmed the interventions of Switzerland and Australia. He requested the Chair's further direction.

61. **A delegate from the European Union** suggested that it may be possible for interested delegations to produce a further Working Document on this Article without the need for a further meeting of the informal working group.

62. **A delegate from Canada** observed that it would not have been possible for proposals relating to Article 23 to have been submitted before the May 2019 deadline, and pointed out that, in the case of this kind of technical provision, which was dependent on the text of the rest of the instrument, such provisions are impossible to draft in advance, and must be dealt with towards the end of the Session. The delegate noted that her delegation would be


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pleased to assist in the preparation of the text, based on the discussions in the informal working group.

63. **A delegate from Israel** noted the importance of the issue to several delegations, but also noted that the working group on general and final clauses should be permitted to focus on other issues and that the present proposal should be coordinated bilaterally by an informal meeting between interested delegations. The delegate indicated that the delegation of Israel would likely support any form of wording arrived at under such a proposal.

64. **Un délégué de la Suisse** propose la tenue d'une réunion informelle avec des délégations qui sont intéressées à collaborer à l'élaboration d'une proposition formelle concernant l'article 23.

65. **The Chair** endorsed the approach suggested by the Plenary and suggested that such informal meeting may be aided by the attendance of either or both *co-Rapporteurs*.

*Article 24*

66. **The Chair** noted that the Plenary would have some difficulty in dealing with Article 24 before hearing the report of the working group on tenancy and immovable properties, given that Article 24 was closely linked to Article 6. In that way, discussion of the Article was reserved.

*General and final clauses – other business*

67. **The chair of the informal working group on general and final clauses** advised that further discussion of many of the final clauses would remain dependent on the decisions by the working group in relation to objections. He added that the working group had otherwise discovered some minor corrections that could be made to the text. The delegate undertook to bring these matters back to Plenary for discussion in due course.

68. Noting the need to allow further progress of informal working groups and coordination meetings, **the Chair** closed the meeting at 12.50 p.m.

# Procès-verbal No 12

# Minutes No 12

*Séance du mardi 25 juin 2019 (après-midi)*

*Meeting of Tuesday 25 June 2019 (afternoon)*

1. La séance est ouverte à 16 h 15 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

2. **The Chair** opened the meeting and thanked the informal working groups for their reports on progress. He proposed that the Plenary resume by hearing from the informal working group on tenancies and immovable property.

*Tenancies and immovable property*

3. **The chair of the informal working group on tenancies and immovable property** thanked the participants and stated that an agreement has been reached within the group to amend Articles 5(1)(h) and 6(c). On his behalf, the chair of the informal working group foreshadowed that he would submit a Working Document for consideration by the Plenary. The chair observed that Article 6(c) of the Working Document included the proposal of Singapore and also the new proposal of Canada and Switzerland. He outlined that additional discussion may be required. He also noted the proposal by Israel and Brazil to revise and clarify Article 6(b). For all these reasons, another meeting might be necessary, after which a Working Document on Articles 5(1)(h) and 6(c) might be brought before the Plenary.

4. **The Chair** thanked the chair of the informal working group, and noted that the group should be given sufficient time to convene. Then, he directed the discussion to intellectual property.

*Intellectual property*

5. **The chair of the informal working group on intellectual property matters** thanked the delegates who had participated in the group. He indicated that there was consensus in terms of policy, namely, that intellectual property rights should be excluded. However, there was no consensus as to the appropriate expression of the exclusion in Article 2(1)(m). On that point, two options were available: Article 2(1)(m) might only refer to "intellectual property" or to "intellectual property and analogous matters". He remarked that strong views were expressed for both options. Those who wanted to retain the term "analogous matters" considered that the term was important to signal the necessity of looking beyond national intellectual property law. It further signalled that the intellectual property matters sought to be excluded reflected an autonomous conception of intellectual property rights. Another concern was that there may be unintended effects upon the development

of intellectual property if the Convention referred only to "intellectual property", and that the development of intellectual property law was not the function of the HCCH. Turning to those who wanted to delete "analogous matters", the chair explained the view that it might be difficult to define "analogous matters" within certain jurisdictions, and that the term may cause confusion to judges. The second issue discussed with the informal working group was about contracts and the exclusion of intellectual property (irrespective of the way it was expressed). The chair confirmed there was consensus to exclude several types of contract matters. The informal working group considered that the best way to express the exclusion was within the Explanatory Report. It was suggested that the Explanatory Report should state that some types of contract will be excluded, along with a list of examples. He observed that Article 8(3) had been discussed, however no consensus was reached. He was of the view that issues pertaining to Article 8 would be better resolved in the Plenary.

6. **The Chair** stressed that issues regarding Article 2(1)(m) should be resolved today, so that the discussion of Article 8(3) could commence.

*Article 2(1)(m)*

7. **The Chair** turned to Article 2(1)(m) and stressed that language had to be resolved in the Plenary, given that there was a consensus in terms of policy. He recalled that there were two options: Working Document No 21 from the delegations of the United States of America and Canada, and Working Document No 58 from the delegation of the People's Republic of China. He reiterated that the issue was whether to refer only to "intellectual property", or to also include the phrase "and analogous matters". The Chair asked whether the Plenary could proceed on the basis that there was no consensus on the terms to be used. He further queried whether there was a consensus with respect to contractual matters, which could be reflected in the Explanatory Report rather than in the text of the draft Convention itself. He suggested that the Plenary hear from those who supported the phrase "and analogous matters" and those who preferred to retain only "intellectual property". He noted that afterwards, a decision would be taken.

8. **A delegate from the United States of America** thanked the chair of the informal working group for the fruitful discussions. He indicated that one of the reasons for the proposal of the United States of America and Canada was to 'future-proof' the instrument. He mentioned that there were currently discussions in the United States of America regarding how the fourth industrial revolution (*e.g.*, changes brought on by artificial intelligence) may spur the need for new intellectual property rights. He acknowledged the comments made by several delegations, namely, that "analogous matters" did not mean anything in the international intellectual property community and was potentially confusing. He elaborated that the breadth of the term was precisely the point of the language because the definition of intellectual property might change from one jurisdiction to another. The delegate considered that "analogous matters" adequately served as a signal to capture intellectual property rights broadly. He observed that the rationale behind the proposal of the United States and Canada was to capture and to provide direction for judges. He addressed the concerns raised by some delegations that the phrase "analogous matters" was tantamount to creating new international intellectual property law. On that point, he explained that the proposal concerned an exclusion from the scope, which did not impose any obligations and could not correctly be characterised as creating new international intellectual property law.

9. **A delegate from Israel** was grateful to the chair of the informal working group. While her delegation was in favour of finding a compromise to have intellectual property within the scope of the Convention, they would support including the term "analogous matters". In her view, it would send a signal to practitioners to check in the Explanatory Report the meaning of "analogous matters" when applying the Convention. Further, she indicated that her delegation could be flexible.

10. **The Chair** invited interventions from those delegations supporting the deletion of the words "analogous matters". He then proposed to have a discussion on the merits of both approaches, before making a final choice.

11. **A delegate from the People's Republic of China** stated that he could have agreed with almost all of the details of the intervention from the United States of America, recalling however that he expressed support for the deletion of "analogous matters". Firstly, he was of the view that keeping those words constitutes a departure from the *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 HCCH Choice of Court Convention"). He added that he saw no reason to allow such departure concerning intellectual property rights. Secondly, he observed that the introduction of new terminology, such as "analogous matters", should not be done by the HCCH, which was not specialised in intellectual property. He observed that courts and judges were not familiar with intellectual property; therefore he did not want to put in the text of the Convention a term that could not be clearly defined. However, he noted that Working Document No 21 enclosed a list of intellectual property rights and analogous matters, as it should be understood under the draft Convention. He did not object to such a list, and suggested it might be included in the Explanatory Report.

12. **A delegate from Brazil** echoed the comments made by the delegate from the People's Republic of China; namely, she expressed support for the deletion of the terms "analogous matters". In her view, the HCCH was not the appropriate forum to introduce new terminology with respect to intellectual property. She added that she was happy to find consensus, and reiterated her position that "analogous matters" should be removed in order to guaranty legal certainty and clarity.

13. **The Chair** sought further interventions. He recalled that there was no significant policy gap between the delegations, but rather a shared interest in expressing that common policy in the most effective way. He encouraged the delegations to focus on the merits of the different expressions.

14. **A delegate from Japan** thanked the chair of the working group for his excellent work. He supported the inclusion of "analogous matters" in the draft Convention. He echoed the comments made by the United States of America. The delegate considered that inclusion of the words "analogous matters" would encourage national judges to consult the Explanatory Report when confronted with intellectual property rights; otherwise, they might misunderstand the term of intellectual property. He added that a consensus had been reached in terms of policy. Further, he stated that the words "analogous matters" could be used even though the HCCH was not specialised in that field.


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15. **A delegate from Canada** supported the inclusion of "analogous matters" along the same lines as Japan. He briefly addressed the interrelationship with bodies that are designed or focused upon intellectual property, and explained that the phrasing of the exclusion would impact those other bodies. He considered that without the words "analogous matters", the words "intellectual property" would need to cover those matters which some States considered to be "intellectual property" but which other bodies did not. He noted that the exact nature of some individual rights (*e.g.*, relating to databases, or traditional knowledge) was the subject of ongoing debate. If the words "analogous matters" were included, the bodies could continue their discussions without trying to clearly and definitively define their joint understanding of intellectual property.

16. **A delegate from Norway** noted that her intervention reflected the debates of the informal working group. She responded to the proponents who considered "analogous matters" to cover intellectual property rights that are not covered under one court's system. The delegate reminded the Plenary that the draft Convention must be interpreted autonomously, according to Article 21. She recalled that the definition of intellectual property in other specialised international instruments was "evolving" and "living". The delegate therefore considered that referring to an autonomous and living definition of intellectual property, based upon specialised international instruments, would be sufficient to interpret "intellectual property" under the draft Convention. The delegate then turned to the words "analogous matters", and the two opinions as to their effect which she observed within the delegations. Some delegations thought that keeping "analogous matters" in the draft text invited an autonomous interpretation. However, others thought that the term invited courts to apply their own interpretation. Her delegation considered that autonomous interpretation should be preferred, however she considered this could be achieved without the words "analogous matters". She therefore sought the removal of the wording.

17. **A delegate from Uruguay** thanked the chair of the informal working group on intellectual property matters. He echoed the comments made by the delegate from the People's Republic of China and indicated that "analogous matters" was an ambiguous term that may reduce the scope of the draft Convention and invite uncertainty. He further referred to comments made by Brazil, saying that "analogous matters" did not come from the intellectual property world.

18. **A delegate from the European Union** indicated that her delegation's proposal in Working Document No 13 did not take a position on the words "analogous matters". However, she indicated that, after a first round of discussion, her delegation was in favour of deleting "and analogous matters". She further recalled that this did not constitute a change of policy because the Explanatory Report outlined that the term intellectual property must receive an autonomous interpretation. She noted that judges in a requested State will have to interpret the Convention in situations where the judgment (sought to be recognised or enforced) concerned matters considered to be intellectual property in the State of origin but not intellectual property in the requested State. Provided that the Explanatory Report stressed that the Convention should be interpreted autonomously, the delegate did not consider the outcome to be different. She added that the intellectual property concepts would develop in the appropriate forum, namely the World Intellectual Property Organization (WIPO). Therefore, she had a slight preference for deleting those words, without the position being a 'red line'.

19. **The Chair** noted that the intervention from the European Union confirmed that the issue was not a matter of policy, but rather of how best to express that policy.

20. **A delegate from the Russian Federation** supported the deletion of "analogous matters" but for different reasons. She was of the view that it would not be sensible to introduce new terminology, within this forum, which was not focused on intellectual property. She therefore supported the removal of the terms "analogous matters" in the text of the Convention. However, she added that her delegation did not oppose the exclusion of what was understood to be analogous matters from the scope of the draft Convention. Further, she thought that the best option would be to give in the Explanatory Report a broad range of examples covering all the matters falling under "analogous matters".

21. **A delegate from the United States of America** recalled that the Chair had stated there was no policy difference – however, the delegation considered there to be a fundamental policy difference, albeit not on this immediate issue. The delegate, recalling the intervention by the delegate from Israel, considered that a mere reference to "intellectual property" did not present sufficient ambiguity such that users of the Convention (*i.e.*, judges and parties) would think to resort to the Explanatory Report. The delegate did not consider that every user, in every instance, would look to the Explanatory Report to give meaning to every term in the Convention, particularly if those terms seemed to make sense on their face. The delegate expressed concern that simply referring to "intellectual property" would precipitate its application as to what was *understood* to be intellectual property by the user, rather than raising questions as to what is and is not intellectual property. The delegate considered that the addition of "and analogous matters" introduced just the right amount of ambiguity to encourage the user to seek guidance from the *travaux préparatoires* and the Explanatory Report. The delegate thought it important to recognise that not everything could be put in the Explanatory Report, especially if it were expected that users would not look to it to answer questions they did not think needed to be asked.

22. **The Chair** posed a particular question to the delegate from the United States of America: Why should the Convention use different language from that of its sister instrument, the 2005 HCCH Choice of Court Convention? Why, if the intellectual property exclusions were thought to be co-extensive (except with respect to copyright, which was treated differently under the 2005 Convention), would they be expressed differently? The Chair asked if the delegation of the United States of America could provide a compelling reason.

23. **Another delegate from the United States of America** offered three reasons. Firstly, the delegate considered consent to jurisdiction to be a major point of departure. He explained that exclusive choice of court agreements and non-exclusive choice of court agreements are fundamentally different. Secondly, the treatment of intellectual property under the 2005 HCCH Choice of Court Convention was fundamentally different. The delegate posed a question in response: What reason was there for blind adherence to a former instrument? Thirdly, the delegate remarked he was not present at the negotiations for the 2005 instrument, and did not know of his colleagues who were, so to the extent that intellectual property experts had now 'infiltrated' the HCCH they were able to raise interesting intellectual property issues. The delegate endorsed the comments of his colleague and summarised that there were three good reasons not to adopt the same approach as under the 2005 Convention.

24. **The Chair** assured the Plenary that the presence of intellectual property experts was most welcome, and joked he would never describe them as having 'infiltrated' the HCCH: they should be seen as overt, and not covert, intellectual property lawyers.

25. **A delegate from Israel** responded to issues concerning the terminology. She agreed that "analogous matters" was not a term used in intellectual property instruments; however, it was language used in private international law instruments such as the draft Convention. She highlighted that the draft Convention used this term in Article 5(1)(e), as did Article 2(1)(e) of the 2005 HCCH Choice of Court Convention. On a personal note, the delegate joked that, given consensus on core intellectual property matters occurred so infrequently, it would be sad not to have something in the text of the Convention.

26. **A delegate from Canada** responded to the Chair's query as to why a different approach might be taken from that in the 2005 HCCH Choice of Court Convention. The delegate emphasised that the range of risk and the types of judgments under the draft Convention was significantly broader than under the 2005 Convention. The delegate considered it superficial to justify an acceptable level of risk under the draft Convention on the basis that the risk had been acceptable under the 2005 Convention.

27. **The Chair** was not sure whether either delegation had answered his question. The Chair clarified that his question was premised on the fact that the exclusion was intended to have the same scope as the 2005 HCCH Choice of Court Convention (he noted that he had not heard interventions to the contrary, and most people agreed there was no policy difference). Therefore, assuming the exclusion was intended to have the same scope, why should different language be used to describe its ambit? The Chair clarified that the issue did not relate to a different carve-out, or a different risk. He illustrated the point by supposing that a court heard an argument about whether a particular choice of court agreement was exclusive or non-exclusive: Irrespective of the decision by the court on this technical matter, why should the same subsequent exclusion be described with different language?

28. **A delegate from Canada** sought to clarify the Chair's question: Was the Chair referring to a joint understanding as to the meaning of "intellectual property" under the 2005 HCCH Choice of Court Convention? Was the Chair enquiring as to whether the delegations maintained the same definition for the purposes of the draft Convention?

29. **The Chair** explained that he thought the starting premise was that the exclusions should be co-extensive. After all, delegations indicated they did not intend any policy difference between the phrases "intellectual property" and "intellectual property and analogous matters". The Chair asked, if that presumption were correct, why should it be described with language different to that under the 2005 Choice of Court Convention?

30. **A delegate from the People's Republic of China** did not think anyone could answer the Chair's question in a reasonable way. He sought to respond to comments from other delegates. Firstly, he addressed the argument that judges may be misled or confused. The delegate highlighted that lawyers and attorneys would be involved at the recognition or enforcement stage and that, to his knowledge, common law judges were required to have information from the parties before they made their decision. The delegate suggested that the problem would not arise in this hypothetical scenario. Even if it did, the delegate did not see how it posed a real danger to anyone. Secondly, the delegate addressed the meaning of the term "intellectual property". The delegate considered that judges would understand "intellectual property" as an ambiguous term. The delegate highlighted that the term "intellectual property" had interesting phrasing in international Conventions, and that international Conventions clearly state that "intellectual property" is not a closed list: the term is intended to evolve over time, with different legal systems, and with the real world. The delegate turned to another argument concerning the term "analogous matters" in other provisions. The delegate asked whether the "analogous matters" were the same in these provisions, or different. He considered that the presence of the term "analogous matters" in other provisions did justify its inclusion in the intellectual property exclusion. Finally, the delegate referred to fundamental principles of treaty law. The delegate considered that if "analogous matters" appeared in this provision, it would reflect that all parties in the negotiating process had agreed upon the terminology. He remarked that this posed a problem for many of the delegations. Recalling the intervention by the delegate from Brazil, the delegate from the People's Republic of China did not think the HCCH to be the right venue to make decisions nor create rules on intellectual property. The delegate stressed that this was the fundamental reason it could not accept the words "analogous matters". The delegate considered that the internal or domestic use of the term "analogous matters" by other States did not affect the People's Republic of China; however, its use in an international instrument posed a problem from a treaty law perspective.

31. **A delegate from Brazil** developed upon the preceding discussions. The position of Brazil was that there should be a reference to the international treaties and Conventions that had already been concluded (rather than an attempt to compile an exhaustive list of every type of intellectual property right). Recalling the intervention of the delegate from the People's Republic of China, the delegate from Brazil explained that the HCCH should not attempt to innovate or create new law with respect to intellectual property. She considered the fact that the Plenary was discussing intellectual property did not mean that it had the authority or the role to introduce new intellectual property law concerning "analogous matters". The position of Brazil was that the language of "analogous matters" should be removed from Article 2(1)(m) and from the scope of the Explanatory Report.

32. **Another delegate from Brazil** addressed whether there should be a departure from the language of the 2005 HCCH Choice of Court Convention. His reading of Article 2(2)(n) and (o) from the 2005 Convention revealed that there was a link to contractual matters. The delegate highlighted that those provisions referred to one particular intellectual property right: copyright, a very limited and well-known type of intellectual property. The delegate underscored that, with the exception of copyright, everything else was excluded using only the words "intellectual property rights". On the understanding that the Plenary did not wish to depart from that reading, the delegate considered that the Convention did not require the words "and analogous matters".

33. **A delegate from the European Union** noted that the difference did not seem to be a matter of policy concerning the substance (*i.e.*, what should, and should not, be excluded), but rather it was a matter of finding the proper incentive to motivate a judge in the requested State to consult the Explanatory Report. The delegate noted that paragraph 26 of the Explanatory Report highlighted that "civil or com-


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mercial matters" is an autonomous concept. The same would apply to intellectual property. The delegate considered that, where the understanding of intellectual property in the requested State was identical to that in the State of origin, a judge probably would not bother to consult the Explanatory Report on the meaning of "intellectual property". The delegate emphasised that the real issue arose if the same notion were interpreted differently: for example, the delegate supposed the circumstances where the State of origin characterised a right as an intellectual property right and issued a judgment, but the requested State did not consider it to be an intellectual property right. The delegate considered that in such cases the result of court proceedings on the merits would likely be different if brought in the requested State, leading to the assumption that a judge in the requested State would not like the judgment he or she is presented with. The delegate remarked the judge would thereby be motivated to consult the Explanatory Report to examine whether he or she was, in fact, obliged to recognise the judgment under the Convention (noting that intellectual property concepts are subject to interpretation). The delegate also supposed the inverse situation, where the State of origin did *not* characterise a right as an intellectual property right and rendered judgment on that basis, which was then presented for enforcement in another contracting State. She suggested the requested court may have doubts if it considered the judgment involved intellectual property issues, and therefore the judge would consult the Explanatory Report regardless of whether the words "and analogous matters" were in the Convention. Finally, the delegate recalled that it was precisely the possible impact upon the 2005 HCCH Choice of Court Convention that encouraged the European Union to support the deletion of "and analogous matters". Otherwise, the European Union considered that either proposal compelled the same result so long as the Explanatory Report said the right things.

34. **A delegate from the United States of America** attempted a second response to the Chair's question. He suggested that "intellectual property" included copyright in the sense of the 2005 HCCH Choice of Court Convention. However, he highlighted that the 2005 Convention dealt separately with the concepts of copyright and intellectual property. He contrasted this with the approach of the draft Convention, which treated intellectual property as a whole. The delegate considered that in the intervening period of time between the instruments, there had arisen significant instruments in the fields of rights management information and technological protection measures. The delegate explained that these were not considered to be "related rights"; rather, they were matters tangential to intellectual property, considered to be intellectual property by most experts in the field. The delegate observed that the current treatment of copyright (as an aspect of intellectual property) reflected how concepts can arise in time. The delegate summarised that the words "analogous matters" would not only serve as a signal to individuals using the Convention, but it would 'future-proof' the Convention to enable its wide adoption. "And analogous matters" encapsulated the fringe, tangential concepts which weren't necessarily intellectual property *per se*, but which were widely viewed within that penumbra of rights.

35. **The Chair** suggested that some confusion remained and sought to clarify the point: the 2005 HCCH Choice of Court Convention excluded validity of intellectual property rights (other than copyright and related rights, which were brought back in). The Chair emphasised that the exclusion was a broad exclusion of *all other* intellectual property rights. The intended effect of the exclusion extended not only to intellectual property rights recognised as such in all States, but also to rights of a similar character that were not recognised as intellectual property rights in some States yet were in others. The Chair emphasised that, even if it weren't squarely focused on at the time, it was certainly how the provision ought to be read now. The Chair reiterated that the effect of the exclusion was achieved in the 2005 Convention using only the language of "intellectual property" and not "analogous matters". The Chair posed the question: Why, under this Convention, should the same umbrella exclusion be signalled using different language? The Chair acknowledged that this consideration was not decisive, but considered it worthy of reflection.

36. **Un délégué de la Suisse** indique que les interventions de la Chine et du Brésil, entre autres, l'ont convaincu. Il exprime sa préférence pour ne garder que « la propriété intellectuelle » sans « les matières analogues » car comme l'a indiqué l'Union européenne, c'est au juge de l'État requis d'interpréter le terme « propriété intellectuelle ». De plus, cela permet un alignement sur la *Convention de La Haye du 30 juin 2005 sur les accords d'élection de for*.

37. **A delegate from Japan** raised two points. Firstly, he highlighted that the 2005 HCCH Choice of Court Convention dealt not with "intellectual property" but "intellectual property rights". He considered there to be a slight difference. Secondly, the delegate expressed concern as to whether the Plenary had in fact reached consensus on the substance or not. However, the delegate could be flexible if the term "intellectual property" truly included both the rights that were internationally accepted as intellectual property, and other similar matters (such as matters treated by some, but not all, States as intellectual property). The delegate noted that Japan would never support the policy of including other similar matters within the scope of the Convention.

38. **A delegate from Israel** responded to the need for different language from the 2005 HCCH Choice of Court Convention. The delegate explained that the 2005 Convention is from 2005, and that the field of intellectual property is subject to rapid development. In the 14 years since conclusion of the 2005 Convention, the delegate observed that changes had occurred. While not an expert on the history of WIPO, the delegate noted the WIPO Intergovernmental Committee's discussion on traditional knowledge, folklore and genetic resources (matters also referred to in para. 56 of the Explanatory Report) only began its work in 2001 and so in 2005 was still new and it was unsure whether it will continue to operate. The delegate suggested it may be that because of that, in 2005, no one thought to explicitly refer to such rights in the 2005 Convention. The delegate also noted that the Explanatory Report to the 2005 Convention did not refer to certain types of intellectual property. She suggested that the passing of time may be responsible for this difference, also in light of the fact that the WIPO Intergovernmental Committee still operates.

39. **The Chair** agreed with the delegate from Israel and expressed assurance that the Plenary was acutely aware of the evolution of intellectual property matters. However, his question concerned 'the here and now', in particular how the 2005 HCCH Choice of Court Convention should now be read, and whether the delegations thought that that exclusion should extend to the rights the character of which was more debated. The Chair noted he had not heard serious suggestions to the contrary. On the understanding that the draft Convention and the 2005 Convention were sister Conventions, the Chair considered that a difference in language was possible but would need to be justified. He highlighted that the Conventions were more likely to be read differently if they bore different language.

40. **A delegate from the European Union** remarked that the European Union had always expressed its flexibility on this issue. In light of that, the delegate could not help but feel bewildered by other delegations, who had previously approached the European Union to ask after its approach on intellectual property, whether it would maintain a strict position, and whether it would risk the success of the Convention on intellectual property. The delegate had stated emphatically it would not stand in the way, because it wanted the Convention to be a success. The delegate recalled that the European Union had moved miles away from its position, and made a proposal that reflected a small aspect of what it initially proposed. Realising its proposal would not gain traction, the European Union demonstrated its willingness to drop intellectual property matters completely from the scope of the Convention. The delegate expressed exasperation that, now, hours and days had been spent upon how exactly the exclusion should be phrased, even though there was agreement as to its substance. The delegate called on other delegations to lay the issue to rest, in view of the fact that there was no policy difference. The delegate reiterated that his delegation had expressed a slight preference. However, given that the delegations arguing for the exclusion had basically completely achieved their policy objective on the exclusion, perhaps there could be some flexibility as to the precise wording.

41. **The Chair** noted there were no further interventions and sought to bring the very thorough and exhaustive discussion to a close. The Chair noted that he sought to make three observations about keeping the issue in perspective. First, the Plenary was no longer debating whether the whole of intellectual property should be in or out, or whether fields that generate millions of decisions per year (*e.g.*, copyright) should be in or out. The Plenary had agreed to exclude those matters, yet it was still discussing how to express the exclusion. Secondly, the Chair emphasised there was no policy difference in relation to the rights at the outer edges of the concept of intellectual property (*i.e.*, rights that were evolving towards broad acceptance, or rights accepted as having similar characteristics to intellectual property rights in some States but not others). The Chair highlighted this was an amorphous and moving field. Nonetheless, the intention was that all those rights, and judgments about them, should be excluded. The Chair recalled it had been repeatedly acknowledged that it would be a peculiar and anomalous result if the requested State declined enforcement of a judgment regarding an intellectual property right recognised globally, but then allowed recognition and enforcement where the judgment concerned a right that was recognised in the State of origin but not the requested State. Thirdly, the vast majority of intellectual property judgments would be about rights of a familiar kind (*i.e.*, patents, trademarks and copyright). The Chair emphasised that the subject of discussion reflected less than one percent of intellectual property judgments that might one day circulate under this instrument. The Chair stressed that, clearly, 99 percent of judgments would be excluded, yet now the Plenary was discussing how best to treat those judgments having a less-broadly-accepted intellectual property character. Against that backdrop, it seemed to the Chair that there were preferences both ways. He acknowledged that both sides had been clearly explained and argued, with good reasons in favour of each. The Chair did not consider that either approach had a monopoly of good reasons and stressed the need to balance pointers each way in making a choice. He explained how many of the arguments cut both ways. For example, some delegates had advocated that new intellectual property law should not be invented through the term "analogous matters". Yet delegates opposing this view argued that simply using the term "intellectual property" expanded the concept to a broader understanding than the term "intellectual property" had before. The Chair emphasised the Convention was a private international law instrument and did not purport to create intellectual property law. The Chair considered the arguments for clarity also cut both ways. In light of the above, the Chair returned to the idea that the Convention was a companion Convention to the 2005 HCCH Choice of Court Convention. He emphasised the desire for the Conventions to be read together, and that there needed to be good justification if the same result were sought to be achieved using different language. The Chair noted, with the obvious exception of copyright, that a different outcome was not sought. Given the views were finely balanced, and in a spirit of pragmatism, the Chair's proposal was to resolve the issue without "analogous matters", reflecting the approach under the 2005 Convention. The Chair asked whether there were any delegations that strongly opposed this position, who believed consensus could be obtained on another approach.

42. **A delegate from Canada** listened in detail to the Chair's summation and valued what the Chair had said. He sought to make two minor points. Firstly, the Chair's reference to the 2005 HCCH Choice of Court Convention was a false comparison. Echoing the intervention by the delegate from Japan, the delegate from Canada emphasised that "intellectual property" and "intellectual property rights" were two very distinct matters. There had been lengthy and protracted discussion on this issue in the informal working group. Secondly, the delegate cautioned against diminishing the economic impact of those rights that may not be universally adopted. He remarked there was a great deal of concern and money spent, especially in the pharmaceutical industry, for those rights. The delegate wanted to underscore that the judgments, which concerned the small percentage of rights being discussed, represented significant value.

43. **The Chair** considered these to be fair reminders, and he was sensible to the scope of these factors. Again, the Chair repeated that the Plenary had to resolve the issue. He considered this to be an opportunity for States to demonstrate their commitment to reaching a conclusion and suggested that the Plenary proceed on the basis of consensus that Article 2(1)(m) read "intellectual property". The position was adopted by consensus. The Chair congratulated the Plenary.

44. **A delegate from Israel** suggested that the preceding discussion be included in the Explanatory Report, in particular, that the term "analogous matters" had not ultimately been adopted due to concerns that it would be inconsistent with the language of the 2005 HCCH Choice of Court Convention.

45. **The Chair** noted that the *travaux préparatoires* would reflect that there was no intention that a different result would arise from "and analogous matters", because the Plenary still intended to exclude all issues which States saw as yielding a similar character to intellectual property. The *travaux préparatoires* would also reveal that the intention was to 'future-proof' the Convention. The Chair expressed confidence that the co-Rapporteurs understood the importance of conveying how the Plenary had arrived at this position. The Chair then invited further, specific polite suggestions.

46. **A delegate from Brazil** asked whether the delegates would have access to the text and scope of the Explanatory Report. She also asked whether the Explanatory Report


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would refer to the 2005 HCCH Choice of Court Convention and other current treaties and Conventions in place.

47. **The Chair** recalled the Secretary General had explained in some detail how the Explanatory Report would be settled, and the Chair was reluctant to rehash the explanation. The Chair explained the process had been mapped in considerable detail and that there would be opportunities to review and provide comments on the Explanatory Report. The Chair recorded that the Plenary desired for the substance of the afternoon's discussions to be reflected in the Explanatory Report, particularly with reference to consistency with the scope of the exclusion in the 2005 HCCH Choice of Court Convention.

48. **A *co-Rapporteur*** explained that the *co-Rapporteurs* intended to reflect three main elements in the Explanatory Report. First, the exclusion should be interpreted in a broad way to extend not only to universally recognised intellectual property rights, but also to non-universally recognised yet similar intellectual property rights. Secondly, the *co-Rapporteurs* intended to include examples of non-universally recognised rights (such as the example already reflected in the Explanatory Report). Thirdly, the *co-Rapporteurs* intended to justify the wording adopted. In particular, the words "intellectual property" should be understood to share a parallelism with the 2005 HCCH Choice of Court Convention. In this respect, the *co-Rapporteurs* could include a discussion as to the decision to not use the words "and analogous matters". With regard to the suggestion that there be a list, the *co-Rapporteurs*' intention was to retain the current wording, rather than elaborating a long list. The *co-Rapporteurs* thought that a long list could be dangerous and a slippery slope.

49. **A delegate from Brazil** requested that the *co-Rapporteurs* consider including a list of only the treaties in force right now and avoid making a list of typical or specific intellectual property. This would encompass Brazil's decision here.

50. **The Chair** responded that this approach reflected what the *co-Rapporteurs* had intended, namely, that they would not attempt a comprehensive list of intellectual property rights.

51. **A delegate from the European Union** reiterated that the Plenary should not discuss every word of the Explanatory Report. However, she noted for the record that the Explanatory Report should say that the intellectual property exclusion would not have the effect of excluding all contractual disputes from the scope of this Convention, which was a common understanding and had also been the common understanding in the informal working group.

52. **The Chair** thanked the delegate from the European Union and noted that this was common ground that had already been covered.

53. **A *co-Rapporteur*** understood that the Plenary would provide examples to the *co-Rapporteurs* of the limitation of the exclusion with respect to contractual disputes.

54. **A delegate from the United States of America** was more concerned about the *travaux préparatoires* and the negotiating history, rather than the Explanatory Report. He recalled the suggestion of the delegate from Brazil that there was a distinction between pre-existing and future treaties. The delegate from the United States of America stressed it was not his understanding that there was a temporal difference, nor that the terminology distinguished between intellectual property rights that exist now and rights that may exist in the future.

55. **The Chair** agreed and recalled that part of his summary referred to the 'future-proofing' dimension of the language. He reiterated that the language encompassed intellectual property rights as they evolve and become broadly recognised or evolve and become recognised only in one or two States without broader traction. The Chair considered this concluded the discussion on the Explanatory Report. He turned the discussion to Article 8.

*Article 8*

56. **The Chair** observed there were no Working Documents on Article 8(1) and (2).

57. **A delegate from Switzerland** indicated that option 3 of her proposal included something on Article 8(2).

58. **The Chair** agreed – the 'something' being deleted. The Chair clarified that he had no Working Documents on Article 8(1). The Chair asked whether Article 8(1) could be adopted by consensus.

59. **A delegate from Australia** wished to flag that the exact scope of Article 6 may still be in play but that, in the event that Article 6 disappeared, the Plenary could revert and delete the references in some other way.

60. **The Chair** agreed that Article 8 could expand or contract, provided there was something in Article 6 that required that effect. If Article 6 disappeared, the Chair agreed that obviously redundant references would have to be deleted.

61. **A delegate from the European Union** also referred to Article 6. As it was currently drafted, Article 6 referred only to "States" and not courts, yet Article 8 referred to "a court other than the court referred to in that Article ruled". The delegate explained that the reference to "that Article" really referred to nothing, because Article 6 did not refer to a "court". She acknowledged that this could only be amended once the scope of Article 6 had been decided. The delegate clarified that it would be fine if Article 8(1) were adopted on the assumption that all other follow-up references and changes would be left to the Drafting Committee.

62. **The Chair** clarified that totally mechanical references would be amended by the Drafting Committee. However, if there were amendments to Article 6 which are consequential, they should be included along with the proposal to change Article 6. Having clarified these technical matters, the Chair concluded that the Plenary had adopted Article 8(1) by consensus. Turning to Article 8(2), the Chair noted Working Document No 66 from the delegation of Switzerland.

63. **A delegate from Switzerland** suggested the proposal in Working Document No 17 from the delegations of Israel and Brazil.

64. **The Chair** noted that Working Document No 17 from Israel and Brazil amended the reference to "State" and not "court" in Article 8(1). He enquired whether the delegation of Brazil was content to leave this to the Drafting Committee.

65. **A delegate from Brazil** agreed to leave this to the Drafting Committee.



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66. **The Chair** noted that there were split proposals in relation to what used to be paragraphs 2 and 3. The Chair enquired whether this was a live proposal or whether it had been superseded by discussions.

67. **A delegate from Brazil** explained the proposal was supposed to relate to other provisions concerning intellectual property but that, since the issue had been dropped, the proposals were no longer relevant. He asked whether the co-sponsoring delegation of Israel had any further comments on the split proposal.

68. **The Chair**, noting that the delegate from Israel had nodded in agreement with the delegate from Brazil, concluded the proposal had been superseded.

69. **A delegate from Switzerland** had assumed there would be a proposal to delete Article 8(3). She observed there was no such current proposal. The delegate thanked the Secretariat for the efficient production of the Working Document and apologised for introducing it so late (she explained that the issues had been discussed up until four o'clock in the informal working group). The delegate was conscious of producing a Working Document on provisions that remained the subject of discussion in a working group. In that regard, she asked for advice on the procedure for producing Working Documents and whether delegates should proceed to make proposals on issues still being discussed by informal working groups. She noted that it may be undesirable to flood the Plenary with multiple proposals and asked whether the Chair wished to suggest a different approach.

70. **The Chair** sensed that it would be more helpful to focus on discussions within the informal working group, rather than providing 'freeze frames' of a particular delegation's views in the form of a Working Document. The Chair emphasised it was only important to have a Working Document in relation to Article 8(3) if the chair of the informal working group concluded that consensus was unlikely to be achieved in the group. If that were the case, the matter needed to be brought back to the Plenary. Similarly, in circumstances where there was text in square brackets in Working Document No 50, the text could not simply be adopted.

71. **A delegate from Switzerland** proceeded to explain her preference to retain Article 8(3). She noted that redrafting would be required in light of the discussions on intellectual property. The delegate thought Article 8(3) still served a useful purpose, even if its relevance had narrowed significantly now that intellectual property was completely excluded from scope.

72. The delegate then introduced two drafting options based on the idea that Article 8(3) would be retained. The first option mirrored closely the sister provision in the 2005 HCCH Choice of Court Convention: there, Article 10(3) referred to a "ruling on the validity of an intellectual property right other than copyright or a related right". Option 1 of Working Document No 66 mirrored the exclusion in Article 2. There was also a consequential drafting change in sub-paragraph (a), as it would no longer be a reference to "Article 6(a)", but rather a reference to "under the law of which the right arose". The delegate then turned to option 2, which she described as slightly narrower. The option mirrored the original text of Article 8(3), however the reference would be to "an intellectual property right required to be granted or registered" in place of the reference to the former "Article 6(a)" which had now vanished from the Convention. The same approach was taken in Article 8(3)(a), where similar text was copied in place of the reference to Article 6(a).

73. The delegate then posed the question: Why did Article 8(3) serve a useful purpose? She explained that, first, Article 8(3) reduced the potential for frivolous defences in situations where intellectual property arose as a preliminary matter. Second, it ensured respect for the State where the right arose and thereby protected the territoriality principle.

74. The delegate then turned to option 3, which she indicated had adopted a slightly different approach. The option was based on the idea that, were Article 8(3) to disappear, then Article 8(2) should be deleted as well. The delegate acknowledged that intellectual property issues were not the only issues covered by Article 8(2), however she expressed no great sympathy for Article 8(2) and noted she would not be saddened by its departure. However, if Article 8(2) were to stay, the delegate preferred also for Article 8(3) to stay. The delegate repeated that the Working Document had been produced at short notice, and upon recent realisation that it was necessary. She suggested that other avenues may potentially be explored, *e.g.*, rephrasing Article 8(2) along the lines of paragraph 322 of the Explanatory Report (which referred to the Explanatory Report of the 2005 HCCH Choice of Court Convention), which provided that the exception should only be used if the court of the requested State would have decided the preliminary question in a different way. The delegate explained that there was no Working Document to that effect and that it would require further reflection among delegates if there were strong appetite for the deletion of Article 8(3). The delegate remarked that she wanted to flag this final alternative option as a way out of the dilemma.

75. **The Chair** summarised that there were three concrete proposals, and a slightly amorphous fourth choice, to frame the choices before the Plenary. The Chair was reminded that he had missed a proposal on Article 8(3) for its deletion, proposed by the delegations of the United States of American and Canada. He invited each of the delegations to speak on the proposal.

76. **A delegate from the United States of America** recalled that his delegation proposed to delete Article 8(3), to be consistent with its policy position that all intellectual property should be excluded. For those who strongly desired the retention of Article 8(3), the delegate suggested that the effect of Article 8(3) could be borne adequately by Article 8(2). He added that his delegation was currently working through the technical issues and examples resulting from the exclusion of intellectual property, which he intended to share with the informal working group tomorrow. However, the delegate foreshadowed that he saw some technical issues that would lead to absurd results should the Article be kept as it is. To be consistent with the policy of excluding intellectual property from the scope of the Convention, the delegate proposed to delete Article 8(3). He further observed that the policy here was very different from Article 10 of the 2005 HCCH Choice of Court Convention and that, given intellectual property had been completely excluded, the draft Convention should deviate from the 2005 Convention.

77. **The Chair** outlined the architecture of Article 8. Article 8(2) provided that "[r]ecognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply" (*i.e.*, a matter out of scope, by virtue of the various Art. 2 exclusions), "or on a matter referred to in Article 6 on which a court other than the court


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referred to in that Article ruled" (*i.e.*, an exclusive jurisdiction matter under Art. 6). The Chair emphasised that the function of Article 8(3) was to limit the circumstances in which the ability to refuse recognition or enforcement, by reference to a preliminary issue ruling, is permitted. Therefore the premise of Article 8(3) was that it was only relevant to preliminary rulings on matters outside the scope of the Convention (*e.g.*, intellectual property rights that are out of scope): for those preliminary matters that were out of scope, Article 8(3) prescribed preconditions for refusal of recognition or enforcement of a judgment (*e.g.*, a contract judgment where there was a preliminary issue as to the validity of an intellectual property right) in the requested State.

78. **A delegate from Norway** concurred with the Chair's interpretation of Article 8(3). Her understanding was that Article 8(3) did not become redundant as a consequence of the exclusion of intellectual property matters. It was also not a 'back door' to reintroduce intellectual property matters that were now excluded. She recalled the consensus in the informal working group that judgments on contractual matters, based on preliminary questions concerning intellectual property rights, may circulate under the Convention. She echoed the comments made by Switzerland saying that, in theory, this issue can be dealt with in Article 8(2); however, she expressed sympathy for a higher degree of predictability and protection of the territoriality principle. Therefore, she considered Article 8(3) still performed a function that conformed to the ideas of the Convention.

79. **The Chair** apologised to the delegation of Canada for not giving it the floor after the United States of America, since the former was a proponent of Working Document No 21. He gave the floor to Canada.

80. **A delegate from Canada** recalled that his delegation still supported the deletion of Article 8(3). Further to the comments made by the United States of America, he questioned the utility of having this provision. While there had been discussion as to whether certain intellectual property contracts should be included, there had been no consensus concerning a judgment on intellectual property contracts based on a ruling as to the validity of the intellectual property right. Further, he emphasised that it was ambiguous as to whether contract judgments requiring a decision on validity were within the scope or not. Yet, he stressed that Article 8(3) would clearly put such judgments within the scope, because the provision has to have some utility. With respect to Article 8(2), the delegate expected a good faith interpretation and implementation of the draft Convention. He was of the view that Article 8(2) should be applied considering the importance of the excluded preliminary matter vis-à-vis the final judgment. For example, if it were clear that the validity of a patent was raised merely for strategic purposes, the requested court should be able to determine that the intellectual property preliminary question was merely argued for gamesmanship and not as a substantive issue. For these reasons, the delegate supported the deletion of Article 8(3).

81. **A delegate from Israel** outlined the importance of Article 8(2) and opposed its deletion. He considered Article 8(3) should be deleted.

82. **The Chair** indicated that this issue would be resolved tomorrow. He further outlined the importance of the work of informal working groups to achieve consensus in the Plenary. Turning to organisational matters, the Chair proposed to have relatively little Plenary discussion and more informal working group meetings tomorrow. He proposed the following schedule: the informal working group on general and final clauses would meet between 9.00 a.m. and 10.30 a.m., the informal working group on tenancies would meet between 10.30 a.m. and noon, and the informal working group with respect to judgments pertaining to governments would meet between noon and 1.30 p.m. He further asked whether the informal working group on intellectual property matters should meet tomorrow.

83. **The chair of the informal working group on intellectual property matters** indicated that the likelihood of reaching consensus on Article 8(3) within the group was slim.

84. **The Chair** proposed that the Plenary will convene as usual at 2.30 p.m. He asked whether delegations objected to that schedule. After **a delegate from Canada** queried whether the Plenary would start its discussion with intellectual property, the Chair confirmed that discussions would resume on the issues that have been identified as outstanding.

85. **A delegate from the People's Republic of China** queried whether the objection mechanism or bilateralisation issues would be covered in the informal working group on general and final clauses. He considered that the informal working group would not reach a consensus on that issue.

86. **The Chair** was of the view that this issue had been taken as far as it could be in the informal working group. He indicated that the proposal would be discussed within the Plenary. He stated that the informal working group should cease work on Article 24 and focus on other final clauses. The Chair noted that the chair of the informal working group on general and final clauses nodded with respect to this course of action.

87. **A delegate form Israel** queried whether issues other than Article 8(3) would be discussed in the afternoon.

88. **The Chair** explained that the Plenary would commence with Article 8(3) and a discussion of the work of the informal working group, and attempt to resolve the issues, either by consensus reached in those groups or by working through them in the Plenary.

89. **A delegate from the European Union** questioned whether the informal working group on general and final clauses needed to convene another meeting. In her view, there were three categories of provisions. The first was the standard clauses which would go through in the Plenary without much debate. The second category of provisions concerned difficult policy questions, such as the objection mechanism where there was a proposal. The delegate observed that the group might not be able to go any further on that question. The third provision was Article 23, where the working group did not produce any text; however, she added that there was a proposal.

90. **The chair of the informal working group on general and final clauses** agreed that if the Plenary did not intend to deal with the objection clause, and if the discussions on Article 24 were postponed until a decision had been made on Article 6, then the only matters for discussion would be minor details that did not require a meeting.

91. **A delegate from Australia** echoed the comments made by the European Union. There was no value for the informal working group to meet at this point. Concerning the working group on immovable property, he noted that he had circulated a document for consideration, along with two options. He indicated that the proposal would be considered after having reviewed the proposal from Israel and Brazil.

92. **A delegate from the European Union** observed that if the working group on general and final clauses did not meet, then the remaining time may be used to discuss the objection mechanism. He considered it important for the Plenary to discuss this issue and to hear all the voices to reach a consensus.

93. **A delegate from Switzerland** queried whether the informal working group on tenancies and immovable property could meet at 9.30 a.m. to have more time.

94. **The Chair** suggested the following schedule. The informal working group on tenancies and immovable property will have two hours and will meet between 9.30 a.m. and 11.30 a.m., and the informal working group with respect to judgments pertaining to governments would meet between 11.30 a.m. and 1.00 p.m. unless more time was required. Then the Plenary would resume. He further mentioned that decisions would be made on Article 8(2) and (3) and that the Plenary should initiate a conversation on Article 29 *bis* and Working Document No 24 REV. He added that the Plenary should expect to hear reports from the informal working groups on tenancies and governments as to whether the issues had been resolved.

95. **A delegate from Uruguay** asked whether the very final paragraph of the Convention would be left to the Drafting Committee or to the informal working group on general and final clauses.

96. **The Chair** noted that it was in principle left to the Drafting Committee. He suggested that the delegate from Uruguay consult the Permanent Bureau if he required further information. The Chair proposed to conclude the meeting and to enjoy the reception hosted by the delegation of Romania.

97. **A delegate from the European Union** indicated that coordination would occur on 26 June at 8.15 a.m.

98. The meeting was closed at 6.25 p.m.

## Procès-verbal No 13

## Minutes No 13

*Séance du mercredi 26 juin 2019 (après-midi)*

*Meeting of Wednesday 26 June 2019 (afternoon)*

1. La séance est ouverte à 14 h 30 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

2. **The Chair** opened the meeting and thanked the delegation of Romania for hosting a lovely reception the previous evening.

3. **The Secretary General** discussed organisational details for the signing of the Final Act the following Tuesday. He explained that the session would begin at 12.00 p.m., and that delegates were to be seated in the Great Hall of Justice by 11.55 a.m. Further, Members needed to confirm by e-mail before the afternoon tea break tomorrow how many persons from their delegation would take part in the ceremony. The Secretary General stated that, from the Secretariat's perspective, all Members' delegates would be invited to sign the Final Act, and that it was for the heads of the delegations to consider whether that was appropriate.

4. **The Chair** listed the matters that the Plenary had to address between the current meeting and the Final Reading of the text: 1) Article 8(2) and (3), 2) report from the informal working group on tenancies, 3) report from the informal working group on governments, 4) Article 29 *bis*, 5) final clauses, 6) general clauses and, in particular, discussion of Articles 18, 23 and 24, 7) Plenary decision on tenancies, 8) Plenary decision on governments, 9) Preamble, 10) recommended form, and 11) other open matters including Article 2(1)(g) and (p), the text in the Explanatory Report on Article 5(1)(k) and earlier suggestions by particular delegations to revisit the language of provisions already considered and adopted, where it had to be determined whether the latter would occur at First Reading or Second Reading of the text.

5. **A delegate from Denmark** queried, in relation to item number 6) (general clauses and specifically Arts 18, 23 and 24), whether the Chair's reference to Article 24 was in fact referring to Article 29 *bis*, akin to the Chair's reference in the previous afternoon's session.

6. **The Chair** clarified that he did mean Article 24 for item number 6), and drew attention to the two live proposals in Working Document No 46 REV and Working Document No 59. The Chair noted that both Article 24 and Article 29 *bis* had to be finalised by the Plenary.

7. **A delegate from Denmark** apologised for the intervention and explained that he had misheard the Chair's outline of item number 4).

*Article 18*

8. **A delegate from the European Union** proposed that the Plenary first discuss Article 18 because the matter could be quickly addressed. The delegate acknowledged that, regarding the European Union's proposal in Working Document No 15, there was neither objection nor enthusiasm, and in the spirit of compromise the delegation was willing to withdraw the proposal.

9. In light of the decision to withdraw the proposal, **the Chair** confirmed with the meeting that the text of Article 18 in Working Document No 50 was adopted by consensus.

*Article 8(2) and (3)*

10. **The Chair** reminded the Plenary that the current proposals for Article 8(2) and (3) were contained in Working Document No 66 from the delegation of Switzerland, Working Document No 21 from the delegations of the United States of America and Canada, and Working Document No 72 from the delegations of Norway, the European Union and Uruguay. Working Documents Nos 66 and 21 had been

introduced by their proponents in the previous session, and as such the Chair invited the proponents of Working Document No 72 to introduce their proposal.

11. **A delegate from Norway** introduced Working Document No 72 and explained that the joint proposal was along the lines of what the Plenary had begun to discuss in the previous session. She recalled that Article 8(2) concerned the possibility to enforce decisions that were based on preliminary questions on areas that were excluded from the Convention. The delegate offered the following example, which was based on the fact that the Convention excluded the legal capacity of the parties. She supposed that a court of origin could render a decision upon a contractual matter in which legal capacity had been raised as a defence by one of the parties, such that that party was not supposed to perform the contract because it did not have legal capacity: therefore the contract would not have been binding, the party would not be obliged to perform it, and there would be no default. If the court of origin rendered a decision on the question of the contractual default, but in the course of doing so also considered the defence on legal capacity, that would be a decision which fell within the scope of Article 8(2). Article 8(2) stated that the requested court may refuse recognition or enforcement. Paragraph 322 of the Explanatory Report explained that the discretion to refuse recognition and enforcement was not completely free and it should be exercised within some boundaries. One such boundary in the Explanatory Report was that the requested court considered it would have decided the preliminary matter differently from the decision by the court of origin. This limitation to the discretion was something that the Explanatory Report considered important; in footnote 221 of the Explanatory Report, it stated that "[t]he *co-Rapporteurs* wish to note that given that this is a substantive requirement, it may be preferable for it to be explicitly mentioned in the text". The Explanatory Report itself suggested that this was something that should be reflected in the text of the Convention, and the Report was not inventing this requirement but referred to the Explanatory Report to the *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 HCCH Choice of Court Convention") (hereinafter, "Hartley/Dogauchi Report"). In the interests of clarity, predictability, effectiveness, and of discouraging the abusive presentation of frivolous defences, Working Document No 72 proposed to move into the text of Article 8(2) the substance of what was said in the draft Explanatory Report. The delegate explained that the proponents did not consider that there was a discrepancy with the parallel text in the 2005 HCCH Choice of Court Convention, because it reflected the content of the Hartley/Dogauchi Report. Finally, the delegate noted that the text of Article 8(2) referred to Article 6, which was still being discussed in an informal working group. Therefore, the need for follow-up changes to this reference could not be excluded, but at this stage the proponents did not propose any change to that reference.

12. **The Chair** invited the proponents of Working Document No 66 and Working Document No 21 to open the discussion.

13. **A delegate from the United States of America** thanked the Chair and expressed two questions concerning the language in the text of Working Document No 72. Firstly, the delegate queried how the limitation in Article 8(2), which required the requested court to determine whether it would have decided the matter differently, related to the rule on not reviewing the merits in Article 4(2). Secondly, the delegate remarked that the proviso followed two different clauses, a matter to which the Convention did not apply and a matter referred to in Article 6. He enquired whether the proviso referred back to the most concurrent of those or to both of them.

14. **The delegate from Norway** clarified that the intention was that it should refer to both, but of course Article 6 had yet to be decided and so there may need to be some changes in that respect.

15. **The Chair** posed a question to the proponents based on a scenario in which Article 6 remained. If, for example, there were a preliminary question relating to rights *in rem* in immovable property and neither the court of origin nor the requested court were in the State in which the property was situated, the Chair enquired whether the proposal required the requested State to form a view on an issue that it might well consider was an issue for a third State, and not for its court.

16. **A delegate from the European Union** answered in the affirmative to the Chair's question, and noted that the proposal did not contain anything new because it was already included in the Hartley/Dogauchi Report and reproduced in the current draft Explanatory Report. The delegate opined that it was simply a matter of clarification. He recognised that the rule was a little odd in relation to the Chair's question, which was why the delegation of the European Union had advocated for Article 8(3). In Article 8(3), it was only the proper forum which made the assessment, which was particularly important for intellectual property matters. However, the Plenary had not considered that to be important and the current proposal reflected that conclusion. In relation to the first question from the delegate of the United States of America (How did the obligation on the court of the requested State under Art. 8(2) relate to the prohibition of a review on the merits?), the delegate remarked that the question illustrated why the second sentence in Article 4(2) was particularly necessary, which stated that it did not preclude such examination as was necessary for the application of the Convention.

17. **A delegate from Switzerland** supported the proposal for the reasons stated by the proponents. The delegated noted that there was no contradiction with her proposal in Working Document No 66, except the proposal to delete Article 8(3) altogether. In reply to the Chair's question, the delegate remarked that the Hartley/Dogauchi Report could not be exactly replicated for the draft Convention, because the 2005 HCCH Choice of Court Convention excluded immovable property and validity of intellectual property rights from its scope, such that there was no Article 6 equivalent in that Convention. Nevertheless, on a preliminary basis, the sentence could be used for Article 6 matters if it was understood in a broad sense, because the decision on an immovable property right may be reserved to the court of the State in which the property was located. Therefore, it was perfectly fair to refer to it in both issues.

18. **A delegate from the People's Republic of China** sought clarification as to whether the language applied to the first part of the sentence, or only to the second part of the sentence.

19. **The Chair** explained that the proviso applied both where a preliminary ruling was on a matter to which the Convention does not apply, and where the preliminary ruling was on a matter referred to in Article 6. It applied to both limbs.

20. **A delegate from the People's Republic of China** agreed with the Chair regarding the understanding of Arti-

cle 6 but expressed hesitations similar to those shared by the delegate from the United States of America. He was concerned for the way in which the provision would be applied by a court in practice. The delegate opined that the wording in the proposal seemed to greatly extend the authority of the requested court: in each and every case the court of the requested State could decide the matter differently. That meant that the requested court could decide the matter first, then examine whether the result was in line with the determination of the court of origin. This changed the basic policy of Article 8(2), which was supposed to act as a safeguard. The delegate considered that the intention was to provide the requested court with a discretion, not a kind of obligation. The delegate considered further consideration of this delicate issue was required.

21. **A delegate from Israel**, commenting generally on the proposal, concurred with the concerns expressed by the delegate from the People's Republic of China. The delegate sought an explanation as to why the text was not included in the 2005 HCCH Choice of Court Convention, and whether there was a reason for making a distinction in the draft Convention. Further, the delegate highlighted that the *co-Rapporteurs*' text in paragraph 322 used the word "should". The delegate did not consider this term reflected consensus of an obligation, that the result would prevail only when there was this additional term. The delegate indicated that it was difficult for them to accept the proposal.

22. **Another delegate from Israel** enquired as to a matter in the Explanatory Report: In relation to preliminary questions on intellectual property, would the requested State be required to apply its own law for intellectual property protected or registered in a different country? In her opinion, that was what the draft Explanatory Report and proposal suggested. The delegate sought clarification from the proponents.

23. **A delegate from the European Union** emphasised that the last question from the delegate from Israel demonstrated the need for Article 8(3): a specific rule for intellectual property matters in Article 8(3) would prevent the issue raised by the delegate from Israel. The delegate expressed she had never understood why the delegation of Israel sought to delete Article 8(3).

24. **The Chair** acknowledged, as pointed out by the delegate from Switzerland, that the proviso could refer to the court of the requested State deciding the preliminary matter differently, because the requested court may decide that a third State should decide the matter. When the proviso referred to "decid[ing] this matter differently", it did not preempt what law it would apply; rather, normal choice of law processes applied to determine the applicable law.

25. **A delegate from Norway** fully subscribed to the observations of the Chair. She suggested the Chair's observations applied to the issue raised by the delegate from the People's Republic of China. The issue raised by the People's Republic of China (regarding the added wording in their proposal) assumed that the requested court had jurisdiction to decide the preliminary matter. However, the provision did not create jurisdiction by which a requested court could decide preliminary issues, nor did it oblige the requested court to apply its own law. Indeed, upon a simple application of private international law rules, the requested court may conclude that neither it nor the court of origin had jurisdiction. Alternatively, the requested court could conclude that the court of origin had resolved the preliminary question on the assumption that a certain law was applicable, and that was not an assumption to which the requested court subscribed. The delegate highlighted that there were many possibilities.

26. **A delegate from the United States of America** did not support Working Document No 72 and needed to consider its impact further. The delegate understood that the policy decision had been made to exclude intellectual property from the scope of the Convention because a subset of intellectual property issues, including validity and ownership, was too divergent and complex across jurisdictions. He recalled that much discussion occurred in the working group on intellectual property earlier in the week regarding what contracts, if any, would be excluded by Article 2(1)(m). In the spirit of compromise, the delegation of the United States of America was willing to concede that a civil and commercial contract which tangentially included intellectual property should not be withheld from scope; the delegate explained that he did not wish to elevate form over substance in a manner inconsistent with the spirit of the Convention. However, any contract that required a determination of substantive intellectual property law was necessarily outside scope, in accordance with the broader policy decision to exclude all intellectual property. The delegate explained that intellectual property issues that were raised as a defence, but which could have been brought as an object of a proceeding (*e.g.*, in a declaratory judgment action), should therefore be seen as being akin to an object of a proceeding (rather than a preliminary question) when making these determinations. Chief among the substantive law determinations, arguably, could be said to be validity. Therefore, any contract judgment that considered validity as a preliminary question must be out of scope. In light of this, the delegate considered inconceivable why a provision should specifically address the issue of a preliminary question of intellectual property validity in Article 8(3). The delegate drew attention to paragraph 196 of the Hartley/Dogauchi Report, which stated that Article 10(3) (the analogue to Art. 8(3) in the draft Convention) "may be unnecessary". The delegate proposed that it was, in fact, unnecessary.

27. Aside from the foregoing policy reasons for excluding intellectual property, the delegate stated that Article 8(3) would also lead to some odd results. The delegate provided the following example: the delegate explained that it was possible to obtain different judgments from the U.S. Patent and Trademark Office (an administrative tribunal) and a district court on the validity of a patent. Opposing decisions could lead to some odd results for the purposes of Article 8(3): a U.S. court that recognised a foreign judgment would have to elevate that foreign judgment over a U.S. court's determination. It would elevate the foreign judgment over a U.S. court and how they would decide that judgment. If Article 8(3) was deleted, it would eliminate the possibility of such a strange result. Further, the delegate pointed out some definitional ambiguity in Article 8(3); "competent authority" was the term used but there was no definition. In the United States, it was not just intellectual property offices that would be considered a competent authority, but other tribunals, such as the International Trade Commission (ITC), which was an administrative tribunal, had jurisdiction over intellectual property matters. However, the ITC in the United States had no conclusive effect on U.S. courts. To the extent that Article 8(3) would require a U.S. court to give some conclusive effect to the ITC, by way of the draft Convention, it would conflict with its internal law, and would be yet another reason that the delegation of the United States of America could not support including Article 8(3).


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28. **The Chair** requested that delegates speak more slowly to assist the translators, since the translation process faced particularly special challenges in areas of technicality. The Chair reminded the Plenary of the core example used for discussions in relation to intellectual property, where validity of an intellectual property right arose as a preliminary question but was not the object of the proceedings. The Chair supposed an example scenario where a licensor claimed against a licensee for fees payable under a license agreement, and the licensee filed a defence on various grounds including a challenge to the validity of the licensed intellectual property or the licensor's ownership of that intellectual property. It was clear that the decision of the court of origin on that preliminary question was outside scope and would not circulate, under Article 8(1). However, if the licensor was successful in recovering the license fee (*e.g.*, because the court of origin determined that the challenge to validity was misconceived or that the licensor was the owner), the money sum award would be based on a ruling on a matter outside the scope of the Convention. Therefore, Article 8(2) provided that recognition and enforcement of that money judgment could be refused. This scenario was addressed by the proposal in Working Document No 72, and currently found in Article 8(3) (as well as Art. 10(3) of the 2005 HCCH Choice of Court Convention with an almost identical qualification as Art. 10(2)). The Chair emphasised that it was necessary to engage squarely with that situation which could arise, and which did present precisely the dilemma at which Article 8(2) was aimed.

29. **A delegate from Canada** expressed some concern with the Chair's explanation, primarily because of the presumption that his example did not qualify under the new exclusion in Article 2(1)(m). The delegate cautioned against the example: in order for Article 8 to apply, it must not be excluded under 2(1)(m). The delegate explained that these concerns also extended to his delegation's concerns for Article 8(3), which were explained yesterday.

30. **Another delegate from Canada** explained that their delegation's concern with the proposal in Working Document No 72 was that it would also apply to matters excluded under Article 19 declarations. As the delegate from Israel had pointed out, in the current draft text of the Convention and the draft Explanatory Report, it was neither a condition nor an obligation. The delegate preferred to maintain the original text in Article 8(2).

31. **A delegate from Singapore** noted that the arguments made by the delegate from the United States of America were premised on the exclusion of contracts involving any intellectual property determinations from the scope of the Convention, however no consensus in the informal working group as to the exclusion of these contracts had been reached. The only consensus established was that the Convention did not exclude contracts simply because they were connected to an intellectual property matter, or involved an intellectual property determination.

32. **A delegate from Sri Lanka** noted that, concerning the reference in Working Document No 72 to Article 6, Article 6 contained subject matter which was still under discussion in an informal working group. She sought to clarify whether the exclusivity of the State of origin or State where the property was situated, which was protected by Article 6, was somehow diminished or compromised by the wording of the proposal.

33. **The Chair** explained that the proposal proceeded on the basis that Article 6 was still available under Working Document No 50, but that if it were to be removed, consequential amendments were necessary.

34. **A delegate from the People's Republic of China** agreed with the Chair and his excellent example, which in his view demonstrated that further consideration by the Plenary was necessary. The delegate noted that his position did not touch upon Article 8(3), but only Working Document No 72, which his delegation did not support because it enlarged the scope which was only supposed to be applied to intellectual property, and because the delegation was uncertain how the added wording would apply in the real world. Article 8(3), however, was also another issue.

35. **The Chair** invited the delegate from the People's Republic of China to express a view with respect to Article 8(3). Members of the Plenary were also invited to share their views on which approach they preferred, whether Article 8(2) and (3) were cumulative or alternatives.

36. **A delegate from the People's Republic of China** preferred to retain Article 8(3). Under the 2005 HCCH Choice of Court Convention, there were already some real cases and endeavours that should be reflected in the draft Convention. The delegate emphasised that Article 8(3) was very important for the intellectual property world, because it was a way to reflect the principle of territoriality. The delegate recalled the Plenary had earlier had a heated debate and reached general agreement on that issue. Article 8(3) was a way to protect what the Plenary had already agreed to have protected in some way.

37. **A delegate from Canada** sought two clarifications on the impact of Article 8(3) on Article 2(1)(m). Firstly, how did it affect the interpretation of Article 2(1)(m) and, in particular, did Article 8(3) have any impact on the determination of the scope of Article 2(1)(m)? The delegate also sought to confirm, should Article 8(3) be included, that preliminary determinations on validity would be relevant for Article 8(3) but also could be relevant for assessing a judgment for the purposes of Article 2(1)(m).

38. **A delegate from the European Union** explained that the judgment had to fall within the scope of the Convention. As discussed in the Plenary the day before, regarding judgments relating to intellectual property which might exceptionally fall within scope, the Plenary had concluded that some intellectual property-related contractual judgments would still be within the scope. The delegate recalled that the Chair gave some examples: some contractual judgments that would obviously be out, others that would obviously be in, and those which fell in the grey area where the judge would have to consider it on a case-by-case basis. It was explained that only once the first hurdle had been overcome and it was concluded that the judgment was within scope could Article 8(3) be applied. That is, there first had to be a judgment on some issue, which was the object of the proceedings and which fell within the scope of the Convention. Then, where the judgment had also determined a preliminary issue which was not the enforceable content of the judgment and was in the reasoning of the judgment, which was outside the scope, Article 8 kicked in in its entirety. The first paragraph stated that this finding, which was somewhere hidden in the reasons of the judgment, had no effect in other Contracting States under the Convention. Paragraph 2 stated that the requested court is even entitled to reject recognition and enforcement of the judgment in its entirety, even though what it ordered was an innocent money judgment, if it was based on a finding which was on a matter outside the scope. Finally, for intellectual property, because the Plenary considered that territoriality was so

important, as the delegate from the People's Republic of China recalled, their proposal stated that the requested State should not put itself into the shoes of the proper forum, and only if the proper forum had made a determination, then this would overrule. However, in other cases, the requested court had to enforce it, because after all it was an innocent money judgment.

39. **Another delegate from the European Union** addressed the question by the delegate from Canada regarding the impact on the interpretation of Article 2(1)(m), and stated that the only impact it had was that there were some contractual issues related to intellectual property that did remain within the scope of the Convention. If everything was completely excluded, then there would not be any need for Article 8(3). However, the provision does not have any impact on the precise definition of which contractual issues still fell within scope, which the delegate understood was the consensus of the Plenary. Article 8(3) still left a certain amount of issues, which were still under discussion and which may be left to some constructive ambiguity, but Article 8(3) would be relevant for those issues that remain within scope in the contractual field. It was in this area where the proponents deemed that Article 8(3) was relevant, useful and necessary.

40. **The Chair** further added to the explanation from the delegate of the European Union. He emphasised the necessity of reading the instrument as a whole, and opined that Article 8(3) did not have any interpretive significance for Article 2(1)(m), in light of Article 2(2). Considering Article 2(2) and the discussion of that provision in the Explanatory Report, the Chair explained the structure of the provisions: under Article 2(1), certain matters were excluded from scope, including intellectual property. However, Article 2(2) then stated that "[a] judgment is not excluded from the scope of this Convention where a matter to which this Convention does not apply arose merely as a preliminary question in the proceedings in which the judgment was given, and not as an object of the proceedings". The Chair emphasised this was followed by the important clarification that "[i]n particular, the mere fact that such a matter arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings". Whether a matter was "an object of the proceedings" would fall to be determined on a case-by-case basis. The point emphasised by the Chair was that it was very clear there could be a defence which explicitly invoked an issue contained in Article 2(1), without such a defence taking the main judgment outside the scope of the Convention. The whole point of Article 8 was that it then dealt with both the ruling on the preliminary issue, and confirmed that it does not circulate merely because the 'big' judgment was in scope. Also, in paragraph 2, if the overarching judgment was, for example, a money judgment which was predicated on a ruling on the preliminary question, it also may not circulate. The question was whether the delegates wished to qualify this in some way, either along the lines in Article 8(3) which was the qualification found in the 2005 HCCH Choice of Court Convention, or the qualification suggested in Working Document No 72, which picked up on an indication in the Hartley/Dogauchi Report and sought to include that qualification in the text. That structure, which required an examination of whether the issue was the object of the proceeding or just a preliminary question, was an important feature of the instrument.

41. **A delegate from Israel** explained that Israel had engaged in an extensive examination of the situations in which Article 8(3) would have effect. Israel had come to the conclusion that the Article created good outcomes in some situations, but in other situations it created absurd outcomes. The delegate supposed a scenario where there was a patent registered in Israel, and the Israeli patent was licensed to one party. Both parties – the licensor, who is the owner of the Israeli registered patent, and the licensee – live in State X, and a case for breach of the licensing agreement was brought and heard in State X. The court in State X declared the Israeli patent invalid and therefore ruled that the licensor had to pay remuneration to the licensee because he gave him an invalid license. Then, this judgment, if it could still circulate under Article 2(1)(m) (of which the delegate was uncertain, and sought clarification from the Plenary), the judgment had to be recognised and enforced in Israel. The alternative, in accordance with Article 8(2) and (3), was that the patent owner in Israel (of a valid patent in Israel) had to go to an Israeli court and ask the court to declare his patent indeed valid. If the patent owner failed to do so, then an Israeli court would be obligated to recognise and enforce the monetary judgment of State X, because it had no grounds to refuse the judgment. This was one of the situations with which the delegate was concerned because it affected the territoriality issue. At the same time, she also recognised that it was desirable to encourage the defendant to go to the proper forum for their claim that the patent was invalid. This would be a 'good' outcome. However, the absurd results, as described, concerned the delegation more than the results which were good.

42. **A delegate from the United States of America** noted that the simple, innocuous licensing situation under discussion in the Plenary was perhaps not an accurate depiction of the scope of all the situations that Article 8(3) potentially dealt with. The delegate supposed the following scenario: where there is an intellectual property licensing agreement that restricted territorial scope, if there was a question of whether someone had gone outside of their scope and there was a judgment (*e.g.*, awarding not only a monetary award for the additional sales that were done outside of the endorsed region, but also some injunction to enjoin that party from further sales), those elements would now be within scope. It was a very important consideration; Article 11 had been deleted so the Convention was not just limited to monetary judgments, and therefore it was not that simple.

43. The delegate also reiterated his point earlier, that in the United States of America there was potential for opposing decisions at varying points in time in an intellectual property office, in a commercial court, and in an administrative capacity or also in a federal district court. Building upon the point made by the delegate from Israel, Article 8(3) would mandate absurd results. Further, the Hartley/Dogauchi Report had already acknowledged that Article 10(3) (the sister provision to Art. 8(3) in the draft Convention) was not necessary. The delegate posited that it was similarly not needed in the draft Convention, and did lead to absurd results.

44. **A delegate from the Republic of Korea** clarified his understanding that Article 8(2) would only apply when the judgment was based on a ruling on a preliminary matter, and that Article 8(3) was the exception to Article 8(2). Therefore, Article 8(3) only applied where the judgment was based on a ruling on the preliminary matter. The delegate queried whether the concept of "preliminary question" in private international law was a narrow one, so that Article 8 requires the resulting judgment to rely on whether intellectual property was valid or not. In the 2005 HCCH Choice of Court Convention, infringement was included, and therefore whether the infringed right was valid or not was entirely within the concept of a preliminary matter. However, intellectual property infringement would be out-


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side the scope of this Convention, and in a contract, the invalidity of intellectual property would be relevant in a different manner. For example, suppose the parties agreed to offer intellectual property as a security, and, although the intellectual property were invalid, the parties still treated the security as valid. One could argue, in that situation, that the money judgment did not rely on the validity of the intellectual property. The delegate therefore wondered whether Article 8(3) would play a minor role. The delegate reserved the position on whether to include Article 8(3).

45. **The Chair** clarified that Article 8(3) was a qualification to Article 8(2), and only arose where Article 8(2) was engaged and the preliminary question concerned intellectual property. Article 8(3) applied only if the appropriate court either had decided the issue or was considering it. The delegate from the Republic of Korea was correct about the logical structure of the provision.

46. **A delegate from Switzerland** thanked the delegate from Israel for their example, which merited serious consideration and engagement. The delegate opined that they were not sure how desirable it was to depart from the 2005 HCCH Choice of Court Convention text, but that they were willing to add additional text to Article 8(3) to the effect that where the requested State was the State where the right was registered or under whose law the right arose, it would be perfectly legitimate to refuse recognition and enforcement. The concerns expressed by the delegate of Israel could be accommodated by adding something to the text of Article 8(3), rather than removing Article 8(3), since the delegate from Israel had stated that they did consider that Article 8(3) did in general serve a useful purpose.

47. **The Chair** noted that it had to be determined whether the Plenary needed more time to decide the matter or whether it should proceed to decide it. If the Plenary were to proceed, some structure to its decision had to be established. The Chair proposed that, first, the Plenary should decide whether it wanted a provision along the lines of Article 8(2) or wanted to delete it. If it were deleted, that would mean that everything else was deleted; if it was not, then the Plenary would need to consider secondly whether to qualify it in one of the two ways proposed. The Chair concluded that the Plenary desired not to delay the decision. Therefore, the first question to determine was whether to adopt option 3 in Working Document No 66, which was to delete the ability to recognise or enforce a judgment if and to the extent that it was based on a ruling on a matter outside the Convention.

48. **A delegate from Switzerland** commented that the proposal would not mean removing this ability. The proposal to remove Article 8(2) was because of the view that it invited refusal of recognition and enforcement, but its deletion would not completely remove the ability. The deletion would leave more scope for national law to determine how to address these issues.

49. **The Chair** sought to clarify the intervention from the delegate from Switzerland. In the Chair's opinion, if Article 8(2) were included, it was still addressed to the national legislature, with which the delegate from Switzerland concurred. Therefore, national law could still elect not to take advantage of it, and so having the provision also left it as something that national law could make a call on. The question therefore was whether the Plenary wanted to explicitly confirm that it was open to a Contracting State to provide for refusal of recognition or enforcement in the situation described in paragraph 2.

50. **A delegate from the United States of America** intervened, not to answer the Chair's question, but to emphasise that it was a persistent objector. The delegation of the United States of America had a slightly different understanding of what "may" means in that it did more than merely provide guidance to legislatures.

51. **A delegate from Israel** expressed that they wished to keep Article 8(2).

52. **A delegate from the People's Republic of China** noted that Article 8(2) was without a bracket, and queried why the Plenary was to discuss the possibility of deleting it, because only some of the parties had raised the question.

53. **The Chair** clarified that Working Document No 66 proposed to delete it.

54. **A delegate from the People's Republic of China** expressed that the first question was supposed to be whether there was broad support to delete Article 8(2), not the other way, because Article 8(2) was in the original text of the draft Convention. The delegate suggested that some of the new delegates in the Plenary may not have appreciated the ongoing process of this particular issue, which was very important and had a long history, and so it had to be approached cautiously, to first establish if there was broad support to change what had been established there. The delegate also expressed a desire to keep Article 8(2).

55. **A delegate from the European Union** noted that the European Union was a co-sponsor of Working Document No 72, which kept Article 8(2) (albeit with additional text in it). For the European Union, it was not a simple yes or no question. In their opinion Article 8(2) and (3) were part of one comprehensive package that should make sure that a Contracting State cannot escape from obligations under the Convention simply because the defendant in the original proceedings raised a frivolous defence which led to the creation of a preliminary question that subsequently permitted a completely discretionary ground of refusal. In the delegate's opinion, if Article 8(2) was understood in a reasonably narrow way (and Work. Doc. No 72 reflected that understanding as did the Hartley/Dogauchi Report), then that should be the continuing policy decision. If it was the generally agreed policy line, then the delegate was already somewhat comforted, but one could still discuss whether it should be in the text or the Explanatory Report. However, if the policy line were to come under criticism and there were a mood in the Plenary to say no, Article 8(2) provided a completely discretionary, unlimited possibility to refuse under any circumstances, then the deletion of Article 8(2) might be preferable to providing such an extremely broad version of it.

56. **The Chair** appreciated the delegate from the European Union's position but explained that the matter needed to be presented to the Plenary in a logically structured way, in circumstances where an informal working group had not been able to develop a balanced package and for consensus to be sought on that package. A narrower, more structured process needed to be adopted, which essentially turned on the question whether there were a consensus to adopt a particular obligation preventing Contracting States from exercising the freedom under national law to take a particular approach.

57. **A delegate from Switzerland** proposed as an alternative structure, in light of the preceding comments from other delegates, that it may be better to consider Article 8(3), and then consider whether the edition to Article 8(2) was

desirable, and finally then to ask whether Article 8(2) would remain.

58. **The Chair** thanked the delegate from Switzerland for their suggestion, but noted that there were also advantages and disadvantages with that approach. Further interventions on the decision-making process were sought from the Plenary.

59. **A delegate from Brazil** remarked that Brazil shared the same understanding as the delegate from the People's Republic of China, and expressed that Brazil would like to keep the text in Article 8(2) and that there was no strong support in the Plenary for deleting it. The delegate expressed that the proposal by the delegate from Switzerland on the decision-making process did adopt the approach specified by the delegate from the People's Republic of China; the point that was already in brackets, Article 8(3), could first be discussed, which might lead to a different decision-making process because the paragraph was already there between brackets. Then, it was possible to bring a different approach to Article 8(2).

60. **A delegate from the United States of America** noted that when considering Article 8(2) as well as Article 8(3), and while appreciating the issue it sought to address, the delegate wondered whether Article 2(2) was sufficient such that Article 8(2) and (3) could be eliminated. To facilitate the resolution of a number of matters, it was the delegate's preference to delete Article 8(2) and to just rely on Article 2(2) to achieve much of what was required.

61. **A delegate from the Republic of Korea** preferred to retain Article 8(2), noting that in paragraph 322 of the Explanatory Report the *co-Rapporteurs* stated "the requested State would have decided the preliminary question in a different way, and therefore the decision on the main object would also have been different". Therefore, there was a limitation, and if it were noted, then in the delegate's opinion Article 8(2) would not present too much danger for abuse.

62. **A delegate from the European Union** agreed with the comments of the delegate from the Republic of Korea and confirmed that it was exactly the understanding of the delegation of the European Union. However, the delegate highlighted that the *co-Rapporteurs* had commented that it was a substantive standard one does not see directly from reading the text of Article 8(2), which was precisely the underpinning for why Working Document No 72 was presented, to actually bring it out in the text of Article 8(2). To move ahead constructively, although Article 8(2) and (3) were a package and the Plenary would need to look at it as a package after discussing all of its elements, the delegate proposed that it could be useful to confirm with the Plenary if the policy line in paragraph 322 of the Explanatory Report was universally endorsed. The Plenary would then have a common policy understanding of that provision. If that were the case, then the delegation of the European Union would be willing to move ahead with the text in Article 8(2), perhaps leaving open whether it needed to be included in the text or just remain in the Explanatory Report. Although, the latter route would be a sub-optimal solution in their opinion. Nevertheless, if the policy line were confirmed, that would provide great comfort from their perspective.

63. **The Chair** noted that, in terms of policy, some refinements of the simple text provided in Working Document No 72 had already been offered in the discussion. For example, recognition or enforcement might be refused "if the requested court considered that it would have decided the issue and would have decided it differently", or "if the requested court considered that some other court should have decided the issue and not the court of origin", which was the point made by the delegate from Switzerland earlier. Further, there was the helpful example from the delegate from Israel, "if the requested court considered it should have decided the issue even though no proceeding was pending before it", which was a variant which may not need to be dealt with explicitly in Article 8(2) but may need to be dealt with in Article 8(3), and which Article 8(3) did not currently deal with. That was part of the problem of putting the matter as a package; there had been some acceptance, even from delegations who broadly liked Article 8(3), that there may be things missing from it. So, the idea that the requested court would not invoke Article 8(2) merely because there was a preliminary ruling, even though it was obvious it would have decided the case and would have decided it the same way, was common ground.

64. **A delegate from Israel**, in relation to the comments by the delegate from the European Union, confirmed that Israel could go along with the current text and have paragraph 322, maybe with an addition or polite suggestion for the *co-Rapporteurs* to refer to what their colleague had presented with respect to international intellectual property. The delegate could agree with the final sentence that "[t]he Hartley/Dogauchi Report clarifies that this exception should be used only […]". The delegate could agree with including Article 8(2) without the proposed edition by the delegation of the European Union, and to confirm the understanding in paragraph 322 along with the addition of the reference to the example on intellectual property.

65. **The Chair** advised that he intended to structure the discussion on Article 8 to take a view of the full package of wording proposed by various delegations, and that he would then ask the Plenary to decide on the various packages of wording. The Chair framed this as a hypothetical question of whether, if there were to be an Article 8(2), it would also be desirable to adopt an Article 8(3), and if so, whether that should be option 1 as contained within Working Document No 66. He noted that structuring the discussion in this manner took account of the previous intervention by the delegate from Switzerland as regarded the proper ordering of presentation of the proposals. Accordingly, the Chair requested those delegations that consider there should not be an Article 8(3) to identify themselves.

66. **A delegate from the United States of America** advised that, even if Article 8(2) were retained, his delegation would support deletion of Article 8(3).

67. **A delegate from the European Union** preferred to retain both Article 8(2) and Article 8(3).

68. **The Chair** requested delegations to only identify support to delete Article 8(3) at that stage.

69. **A delegate from Israel** expressed her delegation's preference to delete Article 8(3), but noted that she could remain flexible on this position, and would like to discuss the scope of Article 8(3) should it remain in the draft Convention.

70. **A delegate from Canada** noted that although her delegation was sympathetic to the concerns captured within the proposals to add Article 8(3), her delegation would prefer to delete Article 8(3).

71. **A delegate from Mexico** supported the removal of Article 8(3).


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72. **The Chair** noted that there was no consensus to include Article 8(3). He turned then to test the question of whether there was consensus to include an Article 8(2).

73. **A delegate from Switzerland** explained that in circumstances where Article 8(3) was removed, her delegation did not think Article 8(2) would do anything except point towards the possibility of denying recognition and enforcement, and on that basis, her delegation would propose to delete it, as it is not necessary.

74. **The Chair** invited delegations supporting the inclusion of Article 8(2) to identify themselves.

75. **A delegate from the People's Republic of China** expressed his delegation's support to retain Article 8(2). He noted that his delegation fully agreed with the policy position mentioned by the delegate from the European Union. Responding to the Chair and the delegate from Switzerland, the delegate opined that the Convention would need to be applied *bona fide*, and would need to follow the interpretative guidance of the Explanatory Report. The delegate otherwise registered his concerns that, from a process perspective, Article 8(2) was not contained in square brackets, and that this was the first proposal to arise suggesting that Article 8(2) be deleted. He explained that it would not make sense for one delegation to table a proposal for deletion as one of the three options, causing the Plenary to dramatically alter the direction of the discussion, where such a proposal is tabled without broad support.

76. **The Chair** explained that there would be a requirement to keep Article 8(2) unless there was a consensus to delete, and that he was presently testing that consensus.

77. **A delegate from Israel** echoed the concerns raised by the delegate from the People's Republic of China. He observed that Article 8(2) had always been a mainstay of the draft Convention, and that there was no reason to change it. In respect of the comparison to the 2005 HCCH Choice of Court Convention, he endorsed earlier comments of the European Union, and requested that such comments be addressed in the Explanatory Report. The delegate concluded that his delegation would consider ways to contribute to building a consensus on Article 8(3).

78. **The Chair** requested delegations to confine discussion to Article 8(2), and the question of whether it should be adopted in the absence of Article 8(3).

79. **A delegate from Singapore** expressed his delegation's preference to retain Article 8(2). He explained that it would serve a useful purpose in protecting decisions on excluded matters.

80. **A delegate from Switzerland** wished to clarify that discussion in Plenary was not limited to matters in square brackets. She highlighted that it had been stated repeatedly that the entire text of the draft Convention existed within square brackets until the Plenary had made a final decision on the text. She added that this was tempered by the principle that there would need to be consensus for creating obligations under international law for States, and the present question was whether the present text would create an additional obligation, which would require consensus. The delegate reiterated that there was no rule against proposals on matters not currently in square brackets.

81. **The Chair** endorsed the remarks of the delegate from Switzerland, noting that the entire draft Convention as set forth in Working Document No 50 would remain in square brackets. He explained that there is no presumption for or against any text, with or without square brackets. He added that the question under scrutiny was whether this Article would require State Parties to assume an additional obligation, and if so, there would need to be a consensus to adopt the text, to make the draft Convention a more rather than less demanding instrument. He observed that certain delegations had approached Article 8(2) on the basis that the provision would increase flexibility for requested States, and on that basis, leaving it out would limit flexibility and impose an additional obligation. The Chair concluded that omission of Article 8(2) would therefore require consensus. In this regard, the Chair concluded that he sought to test the wishes of delegations to retain Article 8(2), in which case consensus to omit it would not be present.

82. **Delegates from Uruguay and the Republic of Korea** expressed their delegations' preference to keep Article 8(2) in the draft Convention, each with a preference for the drafting contained in Working Document No 72.

83. **Delegates from Japan and Brazil** also preferred to retain Article 8(2).

84. **The Chair** recorded that there was no consensus to delete Article 8(2), but then turned to test consensus in relation to Working Document No 72, containing a specific suggestion for amendment of Article 8(2). He explained that Article 8(2) in Working Document No 72 would operate in the same direction that Article 8(3) was intended to operate. He observed that the text would impose a restriction on the exercise by the requested State of the ability to decline recognition or enforcement. He added that there would need to be a consensus to impose such a restriction. He reflected that there was some suggestion to broaden the policy already explained in the Explanatory Report, noting that some interventions had indicated the necessity of a more nuanced understanding of that policy, for example, one that does not contemplate that the requested State would necessarily have decided the matter at all.

85. **A delegate from the European Union** wished to correct the record and noted that his delegation remained committed to the proposal under its Working Document and would not be content just to confirm the policy line in the Explanatory Report. However, he conceded that, if it were resolved that there should be no change to the draft text, the Explanatory Report could repeat the policy line of the Explanatory Report of the 2005 HCCH Choice of Court Convention (on which he observed there was a consensus) but also reflect the discussions and specific cases discussed in the Plenary. The delegate considered this would strengthen the Explanatory Report's expression of the policy.

86. **The Chair** suggested that the Explanatory Report should capture the Plenary's policy discussion, but that the text amendments proposed by the European Union in Working Document No 72 were not supported. Noting no objection to that approach, the Chair found that there was no consensus to adopt Working Document No 72. The Chair next queried whether Article 8(2) could be adopted in its original language, as appeared in Working Document No 50. Noting no objection to that approach, the Chair declared that Article 8(2) as appeared in Working Document No 50 was adopted.

87. **A delegate from Israel** intervened to request that the Plenary's discussion on intellectual property in relation to Article 8 also be recorded in the Explanatory Report.

88. **The Chair** recalled that the text in the Explanatory Report was not being adopted by the meeting but was open to discussion to assist the *co-Rapporteurs*. He referred the matter to the *co-Rapporteurs* for their further consideration.

89. **An observer for the International Association of Judges (IAJ)** offered his organisation's remarks to the Plenary on the draft Convention. He noted that in the future operation of the Convention, judges would have the task of giving this Convention power within legal practice. He explained that this was tethered to the concept of 'law in action'. He summarised his remarks by reference to three P's – principle, practice, and the Permanent Bureau. He noted that the establishment of a Convention like this was of great importance and that the International Association of Judges supported its promulgation. He highlighted the achievement of general trust in all the national judiciaries required the acceptance of judgments from judges from all over the world, and that this trust would be essential in the rule of law. Quoting Hugo Grotius, the observer considered that where there is no access to justice, war may begin, and added that the draft Convention would be a landmark for judiciary worldwide. He explained that judges have assessed the draft Convention on minimum principles, and that the Convention respected the minimum principles in Opinion 13 of 2010 issued by the Consultative Council of European Judges (the "Opinion") on the role of judges in the enforcement of judicial decisions. However, he noted that the Opinion did not go as far as recognition and considered only enforcement. He added that the draft Convention did not contain an ability for a judge to suspend or postpone enforcement to take account of particular litigants (as existed in para. 24 of the Opinion), and that there were no detailed regulations about the cost of procedures. Despite this, he noted that the draft fulfilled almost all the requirements of the Opinion. He noted that his organisation was neutral on the inclusion of intellectual property law or anti-trust law, but expressed his organisation's preference to have a Convention with a wide scope. He also noted that even a narrower Convention would nonetheless be desirable. Second, on practical matters, the observer explained that his organisation had been assessing the impact of the draft Convention on the daily work of judges. He shared his conclusion that, in general, the draft Convention could be worked with by judges. Finally, he noted that the Permanent Bureau had reached out to his organisation to play a role in the implementation of the Convention and that in light of Article 21 of the draft Convention, his organisation had agreed to this. He explained that although it would not be a judge's task to reach unanimous interpretation of the draft Convention, judges generally saw the necessity for unity and for the predictable quality of judicial decisions. The observer echoed the remarks of the Explanatory Report, underscoring that the objective of the draft Convention could only be attained if all courts applied the draft Convention in an open-minded way. He touched on the need for further awareness, and considered the need for further national and international training. He indicated that his organisation may wish to have a practical discussion with the Permanent Bureau on that point. The observer concluded by thanking all delegations and wishing the Plenary a fruitful discussion.

90. **The Chair** thanked the observer for his remarks and noted the key role of the judiciary in the future implementation of the Convention.

91. **A delegate from the People's Republic of China** sought clarification on certain matters, and offered his delegation's remarks on the Article 8 discussions. He noted that the discussions contained important principles. The delegate remarked that the observations of the European Union and the Chair referred to a package of policy suggestions under Article 8, and he requested an update on how the deletion of Article 8(3) would affect the package. The delegate added that if Article 8(3) were deleted, this would be to delete Article 10 of the 2005 HCCH Choice of Court Convention. He noted that this would lead to a discrepancy with that other Convention, despite the policy considerations still being the same. He noted that in that Convention, delegations had tried to reflect some very important policies concerning the territory of intellectual property rights. He noted that insofar as current delegations could not find better words or better approaches to address the same issues, it would be important to make clear the intention of any differing approach, within the Explanatory Report. He explained that, as from an interpretation of the treaty law, it might provide judges interpreting the draft Convention with some substantive indications as to how and why the draft Convention intended to adopt an approach other than that under the 2005 Convention.

92. In relation to the delegate's first question, **the Chair** responded that the package terminology arose as a result of earlier suggestions that, instead of determining the inclusion of Article 8(2) and then subsequently Article 8(3), the correct course would be to decide whether either or both Article 8(2) or (3) should be adopted, as a package. He recalled that the consensus was for the retention of Article 8(2). He noted that there was also consensus that Article 8(2) did not need any further additions.

93. In relation to the delegate's second question, the Chair remarked that delegations had arrived at a conscious decision not to follow the model of the 2005 HCCH Choice of Court Convention so far as Article 8(3) was concerned, as the Plenary did not wish to impose that explicit constraint on the exercise of the Article 8(2) power. However, he added that the Plenary had also decided to reiterate the policy framework for making that decision in the Explanatory Report, noting that the power to decline recognition or enforcement under Article 8(2) should not be exercised frivolously or casually. Rather, such a power must be exercised in good faith, and not exercised where the requested court would not give a different answer, or where the requested court did not consider that some other court should address the matter. He commented that he would not expect the power to be exercised if there had been a strategically transparent attempt to raise a preliminary question in an inappropriate court.

94. The Chair asked whether any delegation wished to improve upon or qualify this summary. Noting there was none, the Chair concluded discussion of this item.

*Report of the informal working group on immovable property*

95. **The chair of the informal working group on immovable property** noted that the purpose of the latest meeting had been to consider a suggestion from delegations of Brazil and Israel for the words "use" and "possession" in the description of rights *in rem* in Article 6(b). He observed that despite discussion of that suggestion, there was ultimately no consensus to adopt that proposal within the informal working group, and in that regard the proponents had brought that proposal to the Plenary in the form of Working Document No 73. The chair reported that the informal working group had otherwise considered suggestions in relation to Articles 5, 6 and 7, insofar as they related to immovable property. He noted, however, that there was no consensus in favour of these proposals, and it was agreed that delegations could bring these proposals formal-


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ly to the Plenary. He highlighted that one such proposal was contained in Working Document No 69. The chair also confirmed that there was a common understanding of the informal working group with respect to the matters in Working Document No 67, put forward by the delegate from Australia. He added that there may be further compromises around various proposals that would continue to develop. The delegate concluded by thanking all participants for their enthusiastic participation in the informal working group, and noted that it had allowed participants to improve understandings of other positions.

96. **The Chair** thanked the working group and noted the relevant Working Documents for future discussion.

*Report of the informal working group on matters relating to governments*

97. **The chair of the informal working group on matters relating to governments** explained that the informal working group had considered the possibility of an additional exclusion at the end of Article 2(1)(q), now proposed formally in Working Document No 74 by the delegation of Argentina. The delegate requested that discussion be reserved until the following day, indicating that there was potential for the group to reach an agreed position. The chair otherwise advised that in relation to Article 2(4) and (5), there would not be any proposal from the informal working group, as there was no consensus on the suggested points. The chair added that at least one delegation would make a proposal on Article 2(4) and (5), to discuss in Plenary. In relation to Article 20, the chair reported good progress towards a consensus text, such that there would be merit in postponing discussion of Article 20 in Plenary until this could be developed further within the working group.

98. **The Chair** granted the informal working group further time to narrow matters for Plenary. The Chair noted reluctance to curtail time for the Plenary to meet and invited the informal working group to meet before the Plenary at 8.30 a.m., with the Plenary to commence at 10.00 a.m.

*Article 29* bis

99. **The Chair** introduced further discussions on Article 29 *bis*. He commented that Working Document No 24 REV was the main proposal for discussion, and that in addition to the original proponents, the Working Document had gained the delegation of Turkey as a further proponent. The Chair requested the proponent States to introduce their proposal.

100. **Un délégué de la Suisse** explique que sa délégation est disposée à commencer mais que d'autres sont, bien entendu, invitées à ajouter de nouveaux arguments. Il ajoute que sa délégation souhaiterait souligner quelques considérations d'ordre historique, technique et politique. Il note que les considérations d'ordre historique sont importantes dans ce contexte pour vraiment comprendre et définir la proposition. Il estime que l'histoire commence en 2014-2015 et rappelle qu'à ce moment-là, la délégation de la Suisse avait proposé dans le contexte de motifs de reconnaissance ou de refus, des motifs de refus très larges basés sur des procédures équitables, par exemple « *due process* » conformément à la compréhension américaine. Pourtant, il explique que d'autres délégations voulaient que l'on restreigne ces motifs de refus. Il rappelle que sa délégation a toujours insisté sur le fait que la question du caractère ouvert ou fermé de la Convention pouvait revenir dans la discussion. Le délégué constate dans les documents du Groupe de travail en 2014 que sa délégation avait dit de manière explicite : « *the question of openness is one for a later stage* ». Il souligne alors que sa délégation avait l'intention de présenter ce mécanisme depuis des années et a accepté des motifs de refus très restreints, étant entendu que sa délégation pouvait revenir sur la question du caractère ouvert ou fermé de la Convention plus tard. Comme deuxième rappel historique, il constate que sa délégation a déjà renoncé à des mécanismes d'objection beaucoup plus larges, par exemple un « *opt-in* », et il souligne que sa délégation a déjà fait des concessions. Comme dernier rappel historique, il estime que dans les 39 Conventions récentes de l'HCCH, 35 contiennent, d'une manière ou d'une autre, un mécanisme qui limite le cercle de candidats ou envisagent des mécanismes d'acceptation ou d'objection. Ceci est un rappel historique très important dans ce contexte particulier, pour l'examen de ladite proposition. Quant aux questions techniques et politiques, le délégué remarque que de l'avis de sa délégation il est nécessaire de pouvoir exprimer une objection à tout moment dans l'alinéa (a), « *at any time* », parce que les déclarations sont possibles à tout moment. Deuxièmement, s'il est possible d'exprimer une objection à tout moment, cela enlève le besoin de faire une objection lorsqu'un nouvel État adhère à la Convention. Sinon, s'il s'agit d'un « *one shot* », où l'on ne peut s'opposer qu'au moment de la ratification, cela augmente la nécessité de faire une objection. Mais ladite proposition supprime cette pression de l'État et lui permet de ne pas soulever d'objection, pour laisser voir comment la Convention fonctionnera concrètement, et seulement si cela est vraiment nécessaire pour faire une objection ultérieurement. Le délégué indique aussi que ce type de mécanisme d'objection permettra à un plus grand nombre d'États de ratifier. En conclusion, le délégué estime que sa proposition constitue un élément clé du succès de cette Convention.

101. **A delegate from the United States of America** thanked the delegation of Switzerland for his introductory comments. He recalled that the decision to sign, ratify, accede or approve the draft Convention would be taken in States by persons who were not present and who had not been engaged in the negotiation process. The delegate urged other delegates not to substitute their judgment for that of those decision-makers. He cautioned that to do so may encourage decision-makers to decide ultimately not to become Party to the Convention, which would not facilitate the circulation of judgments. He advised that his delegation supported the inclusion of an Article 29 *bis* mechanism, to promote the circulation of judgments by encouraging States to become Party to the draft Convention. He conceded that, although such an Article might not maximise the number of treaty relationships, it may permit more States to become Party to the Convention itself. The delegate added that an Article 29 *bis* mechanism would be essential for the United States of America to become a Party to the Convention. He added that if the Plenary approved Article 29 *bis* in Working Document No 24 REV, there would need to be follow-up amendments to Article 32 to clarify the obligations on the depositary, and Article 17, regarding transitional provisions, as to when the effective date is with respect to particular judgments.

102. **A delegate from Japan** intervened to emphasise the importance of Article 29 *bis*(4) regarding the "at any time" objection. He explained that from the point of view of his delegation, this paragraph was key to the issue of non-discrimination. He considered that there was consensus on that principle itself, though he noted the difficulty in arriving at a non-discrimination clause for certain individual issues except for Article 15. He stated that there was almost no explicit obligation concerning non-discrimination under the draft Convention, and that delegations would need to

accept certain different treatment that would not be tantamount to discrimination. However, he noted that if they were to find serious discrimination in a Contracting State, for example, discrimination against Japanese judgments under the Convention compared with domestic judgments, or discrimination against Japanese citizens and companies in proceedings, there would be grounds to object to treaty relations with that Contracting State. He noted that this would be a general matter of the treaty relations between Japan and the Contracting State, not a matter that would be dealt with by the refusal grounds in each individual case. He added that he did not believe Japanese citizens and companies would be discriminated against in other States' procedures, and that if there were no discriminatory treatment of Japanese citizens and companies in proceedings in other countries, there would be no need to use paragraph 4. However, he cautioned that his delegation would need to continuously review the proceedings of other countries to confirm non-discrimination. He concluded that Japan would wish for the ability to do this at any time after the Convention entered into force and would support paragraph 4 for this reason.

103. **A delegate from Turkey** remarked that most HCCH Conventions contained some form of objection provisions. He considered that such provisions may broaden the accession rate of State Parties to the draft Convention, and for this reason it was supported by his delegation.

104. **The Secretary General** intervened to explain that the Permanent Bureau took no position to support any particular approach to the text, but he reported on meetings with the depositary, whom the Permanent Bureau had seen fit to involve in an early consultation. He reported that the depositary had acknowledged that a mechanism under paragraph 4 would certainly increase their duties and their responsibilities, but that they also recognised that it was not for them to take a decision as to whether or not to include such a mechanism. The Secretary General advised that the depositary had raised a practical question as to how best to reflect the status of the Convention on their official website. He added that the depositary had commented that, if there were language in paragraph 4 to underscore the exceptional character of a late objection, the depositary would simply accept such late objections without assessing in any way whether or not the declaring or objecting State would have referred to exceptional circumstances or explained these exceptional circumstances. This comment would simply underscore that the depositary would not take any risk of accountability in that regard, and basically just assume that objections would be regular. Finally, the Secretary General conveyed the depositary's comments on a difference in the drafting in paragraph 1, where the draft referred to "relations" between States, and paragraph 3 where the draft refers to "treaty relations". The Secretary General advised that the depositary had a clear preference for the expression "relations", not "treaty relations", based on common treaty language.

105. **A delegate from Singapore** registered his delegation's support for the joint proposal. He noted that other Conventions had contained bilateralisation mechanisms, and that these had not prevented those Conventions from being successful. He noted, for example, that the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* contained such a mechanism. He reasoned that if such a mechanism were important in a procedural treaty, it was even more important that there be a similar mechanism for the draft Convention, because it would impose very broad, wide-ranging substantive obligations on parties. The delegate also highlighted that, as a practical point, where delegations would embark on approval processes to ratify the treaty, the first question that would be raised in national legislatures was, "Who is the counterparty?" That was a very important question. So, in this Convention, which is an open Convention, where States do not know the potential counterparties, it is important to have a mechanism like this present mechanism.

106. **A delegate from Israel** expressed support for the proposal and noted its importance to certain States. As regarded paragraph 4, she aligned her delegation with the comments made by the delegate from Switzerland, and noted that paragraph 4 may create more of an incentive to withdraw a declaration that they had already made, which may have been made tactically and pre-emptively because they would lose the chance to make another declaration in the future, and may also even encourage States not to make a declaration to begin with, for the same reasons.

107. **A delegate from Uruguay** explained that in the spirit of consensus, his delegation was willing to support the proposal.

108. **A delegate from Canada** advised that her delegation would not support the proposal. Her delegation suggested that it would be an unnecessary addition and noted concerns that it would be detrimental to the success of the draft Convention. She added that the grounds for creating a qualifying judgment that circulates under the draft Convention and the grounds under Article 7 for refusing are sufficient.

109. **A delegate from the People's Republic of China** observed the difficulty of this issue for the draft Convention. He encouraged States to consider the history of HCCH Conventions, and noted that not all of these Conventions contained bilateralisation provisions. He recalled that each State under the Convention should sit in sovereign equality, and each State should have minimum trust in other States, their courts and judges. The delegate queried how the concept of non-discrimination, mentioned by other delegations, could be used to justify this provision, in circumstances where the Article allowed other States to object. He suggested that this may create an alarming level of discrimination, and explained that the 2005 HCCH Choice of Court Convention contained no such provision, and it was meant to function quite well. The delegate added that he found it an inconsistent policy position for the delegation of Singapore to support a bilateralisation mechanism, in circumstances where the forthcoming *United Nations Convention on International Settlement Agreements Resulting from Mediation* (hereinafter, "Singapore Convention") contained no such provision. The delegate commented that the scope of operation of the Convention was very limited, due to the fact that where a minority of States had made objections to obligations, those were adopted, on the basis of no consensus, as the Convention cannot impose obligations on States. The delegate suggested that this process had taken already introduced sufficient limitations to address States' concerns. He recalled that the Convention contained grounds of refusal, including public policy, and noted that judges would be clever enough to know how to refuse a judgment in those circumstances, which is understandable and acceptable. However, he suggested that this provision may allow the political manipulation of the Convention. He reflected that the Convention is about judicial assistance, promoting international trade and investment and should allow the recognition of judgments and that this provision may damage that purpose. In endorsing the comments of the delegate from Canada, the delegate from the People's Republic of China suggested that the provision may frighten away States that wished to be Party to the Convention.


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The delegate added two further supplements to his intervention. He noted that if the HCCH traditions are followed, there has not previously been this kind of two-way bilateralisation provision that enabled later-joining States to make this kind of objection. The delegate also remarked that, in the 2005 Convention, there was no reservation clause. He added that, should a State not want any treaty relationships with some country, it is very easy for them to use the general treaty law to achieve the same effect. He recalled that many experts had worked for many years to achieve this Convention.

110. **A delegate from Singapore** observed that although some Conventions do not have bilateralisation mechanisms, including, as mentioned, the 2005 HCCH Choice of Court Convention, the forthcoming Singapore Convention, and also the 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention), were private international law instruments fundamentally based on respect for party autonomy, and there would be fewer policy reasons for objections than under the present draft Convention.

111. **A delegate from the European Union** recalled that there had been no text on bilateralisation introduced into the draft Convention throughout the Special Commissions, because at that stage of the discussion, such a proposal did not enjoy sufficient support. He agreed, however, that it was clear from records of the Special Commission that this issue would be revisited at the Diplomatic Session. He noted that his delegation had come prepared to engage in constructive discussion on such a rule, and that, while his delegation did not request such a rule, he noted that this is a politically important issue for a considerable number of delegations. The delegate added that the main consideration for his delegation was that it could not support any mechanism that would undermine the success of the Convention. In that regard, the delegate highlighted that a similar mechanism to the HCCH *Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (hereinafter, "1971 HCCH Judgments Convention") could not be supported, as that was a cumbersome "opt-in" mechanism. He explained that such a bilateralisation mechanism was one of the reasons that that Convention is a failure. The delegate outlined that the mechanism presently being discussed was not the same type of mechanism as in the 1971 HCCH Judgments Convention. Also, the present mechanism was not radically different from other HCCH Conventions, including the objection mechanism in the HCCH *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*. It preserved the rights for parties to consider whether they want to enter into a bilateral relationship with other Contracting States. He added that it was clear that this mechanism had not undermined the success of that Convention, which was the policy question raised by the delegate from the People's Republic of China. The delegate observed that the proposal contained two elements. He explained that on the one hand, the proposal contained an entry-level control mechanism, such that an objection could be made at the time of ratification. He pointed out that this was not unheard of, but the difference in comparison with other HCCH Conventions was that this mechanism would not only apply in relation to acceding States that are not Members of the Organisation or which had not been present at the Diplomatic Session. Rather, it would be a comprehensive mechanism that would apply to any Contracting States of the Convention. The delegate considered that this was in fact a change, but one that could be justified, amongst other things, by the broad scope of the draft Convention and the structure of the HCCH. The delegate explained that the HCCH had become a very global and diverse Organisation with lots of Member States from all four corners of the world, and so to broaden a known mechanism from other Conventions, to a slightly or considerably different setting, and make that objection mechanism applicable among all Contracting States, was something that his delegation could accept on its merits. But the delegate cautioned that there was a policy difference between an entry-level objection mechanism and paragraph 4 of the proposal, insofar as the latter preserved the right to make an objection to continuing relations with an existing Contracting State at any point after the moment of ratifying the Convention. He acknowledged the comments of the delegate from the People's Republic of China, that such a mechanism is unusual and unknown to other HCCH Conventions. The delegate declined to take a strict position, noting his delegation's desire to build consensus, but wished to ensure that at that stage, there was a policy difference on those two issues, and the need to strike a fair balance was recorded.

112. **A delegate from the Russian Federation** added that the questions in Article 29 *bis* were important to her delegation, as they would have a direct relationship on the future operation of the draft Convention. She highlighted that the ideas presented within Working Document No 24 REV were not a surprise, nor were they new. The delegate expressed familiarity with arguments on each side of the proposal. The delegate supported the comments of the delegate from the European Union that this proposal contained new elements that previous HCCH Conventions did not have. She added that at this stage it would be important to consider possible formulations to enable the most universal application of the draft Convention, to provide the possibility for the widest level of participation possible. The delegate suggested that it would be necessary to find a fair balance with the Convention's underlying purpose. She noted that although the Preamble had not yet been agreed or discussed, it would be linked to the advancement of access to justice through judicial cooperation and certainty, and to establish a regime that provides a certainty and predictability in relation to recognition and enforcement of foreign judgments. She underscored that these goals should be kept in mind when drafting the general and final clauses, for all stakeholders, including not only judges, but legal and natural persons who would be the beneficiaries of the Convention and its provisions. The delegate concluded by urging that a cautious balance needed to be struck in the provisions.

113. **A delegate from the Republic of Korea** recalled that there had been significant discussion of the provision in the informal working group on this matter. The delegate explained that this question was in its essence a policy decision and noted her delegation's hesitation in accepting the proposal. She echoed the remarks of the delegate from the European Union that this mechanism would be unprecedented, but she also accepted that the Convention is itself unprecedented, as a 'game-changer'. She also underscored the comments of the Permanent Bureau that there may be practical difficulties in the practical reality of the provision. Finally, the delegate expressed support for the comments raised by the delegate from the People's Republic of China, noting that there was already the treaty law mechanism for reservations.

114. **A delegate from the Philippines** explained that his delegation had no strong position on the provision but wished to raise some practical considerations on the operation of the Article. He considered that objection should not be seen as a judgment on the maturity of the legal system of the acceding State, as to do so would present a diplomatic problem. He hypothesised that, if his State were to accede

to this Convention, and the existing Member States were to object to his State, then his State would not accede to the Convention, and that his State would have to deal bilaterally with the different States before acceding to ensure that they would not object. He suggested that this was the diplomatic reality of objections. The delegate recalled he had these experiences when the Philippines joined the HCCH *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (hereinafter, "HCCH Apostille Convention"). He considered that although the HCCH Apostille Convention was a safer and more neutral Convention, having four objections during that process was unexpected. The delegate also considered that, in relation to paragraph 4, a mechanism of continuous objection might have some effect on the stability of the Convention itself. He advised that having a stable system is more preferable for the judges tasked with enforcing this draft Convention.

115. **A delegate from Australia** mused that the proposal created a sense of cognitive dissonance for his delegation. He explained that his delegation had generally always supported expansion of the HCCH's membership and an increase in the number of connected States. He recalled that the Council on General Affairs and Policy had also recently met and stressed the principles of inclusiveness and universality. He added that including these provisions may go against the grain of the HCCH's mission. On the other hand, the delegate accepted that the growth of the HCCH engendered complexity including, bluntly, political considerations that were not an issue previously, even 10 years ago. From the position of the Australian delegation, the delegate believed that some kind of mechanism would be needed to assist existing and future Members, and he joined in the comments of the delegate from the European Union that he would wish to help build a consensus to achieve that aim. He concluded by thanking the proponents for the proposal, expressed his understanding for the opposing views, and reiterated the need for a consensus approach.

116. **The Chair** remarked that the Plenary had witnessed a useful first discussion of the policy issues surrounding Article 29 *bis*. He considered that there were serious, genuine policy concerns on behalf of the proponents, and also on the part of delegations concerned about the substance and terminology of a provision of this kind. He suggested that the Plenary would need to find its way between all those concerns, to respond to them and respect them. The Chair noted that there were strong indications that some mechanism would need to be included, but that there were certain matters of substance and terminology to be better expressed. He referenced the comments of the delegate from the People's Republic of China and its understandable hesitation about the objection language. However, the Chair asked the Plenary to bear in mind that almost any mechanism will have some degree of novelty. On the other hand, he considered that the discussion should not overstate the novelty of treating as separate decisions the acts of i) becoming a Party to a multilateral instrument of this kind, and ii) accepting bilateral relations with the other States. He remarked that that had been the model under the 1971 HCCH Judgments Convention. The Chair added that, on the other hand again, that instrument had failed, due almost certainly to the burdensome nature of that process, which required a whole network of separate bilateral arrangements between each pair of States. He added that there was no delegation suggesting that approach, but that the suggestion that some sort of separate bilateral decision should be made is not wholly unprecedented. He urged States to really engage seriously with the concern that requiring such a decision to be made might itself pose problems or be a deterrent. He considered that this was exactly the sort of issue that would need to be discussed in good faith, in a more informal way. He considered that another approach could be to send the matter back to the informal working group, or left to informal discussion, but that he would leave delegations to reflect on those options.

*Final clauses*

117. **The Chair** introduced further discussion of Working Document No 50.

*Article 25*

118. Noting no extant proposals or Working Documents in relation to Article 25, **the Chair** concluded that Article 25 was adopted by consensus.

119. **A delegate from Canada** suggested a brief amendment to the Explanatory Report, at paragraph 431. The delegate proposed that rather than saying "whereby a State is bound by the draft Convention", it would be perhaps better to say "where a State expresses its consent" or "consents to be bound".

120. **The Chair** referred the matter to the *co-Rapporteurs* for further consideration.

*Article 26*

121. Noting no extant proposals or Working Documents in relation to Article 26, **the Chair** concluded that Article 26 was adopted by consensus.

*Article 27*

122. At the invitation of the Chair, **the chair of the informal working group on general and final clauses**, introduced discussion of Working Document No 71, as it regarded Article 27. He noted that there were three changes in total to the drafting of Article 27 (and Art. 30) under the Working Document, and that none of the changes were changes of substance. He explained that these were the proposed deletion of "similarly" in paragraph 1, and deleting the words "that is a Party to it" in Article 27(4), as those words would be superfluous.

123. Noting no objections to Working Document No 71, **the Chair** concluded that the proposal was accepted and that Article 27, as amended, was adopted by consensus.

*Article 28*

124. Noting no extant proposals or Working Documents in relation to Article 28, **the Chair** concluded that Article 28 was adopted by consensus.

125. **A delegate from the European Union** noted that his delegation still had an outstanding Working Document on the Explanatory Report in relation to Article 28, regarding the role of the Court of Justice of the European Union. He added that this matter had been discussed in Plenary before. He considered that there may be some ability to resolve the balance of his delegation's concerns through informal contacts, so as not to impose further discussion on the Plenary at that stage.

126. **The Chair** recorded no objection to proceeding in that manner.


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*Article 29*

127. In response to a question from the delegate from Switzerland, **the Chair** noted that discussion of this Article was reserved, noting that it was closely linked with the Plenary's decisions on Article 29 *bis*.

*Article 30*

128. At the invitation of the Chair, **the chair of the informal working group on general and final clauses** reintroduced discussion of Working Document No 71, as it regarded Article 30. He explained that the modifications proposed by the informal working group on this Article were brief, and related to paragraph 5. The proposal deleted the wording "before the court" and replaced it with the wording "in the State".

129. Noting no objections to Working Document No 71, **the Chair** concluded that the proposal was accepted and that Article 30 was adopted by consensus.

*Article 31*

130. Noting no extant proposals or Working Documents in relation to Article 31, **the Chair** concluded that Article 31 was adopted by consensus.

*General clauses*

*Article 23*

131. **The Chair** introduced discussions of Article 23, noting Working Document No 63, which contained the proposal of the working group on general and final clauses, and Working Document No 70 from the *co-Rapporteurs*, setting out certain updated text in relation to Article 23 matters.

132. **The chair of the informal working group on general and final clauses** explained that it was the proposal of the informal working group to amend Article 23(1) in Working Document No 63. He explained that paragraph 1 was the only provision that would be altered and that nothing would change in paragraph 2 or 3. He added that sub-paragraph (a) would be left alone, and that the proposal would amend sub-paragraph (b) and convert it into a new provision, sub-paragraph (c *bis*). He explained that there would be no change to sub-paragraph (c), and that the proposal would delete sub-paragraph (d), as this could be subsumed by (c *bis*). Examining the new (c *bis*), the delegate explained that Article 23 was a copy of Article 25 of the 2005 HCCH Choice of Court Convention. He added that under that Convention, the one and only connecting factor was residence. He explained that in the draft Convention, however, there were a greater number of connecting factors, especially in Article 5 which included the principal place of business, branch, agency, or other establishment, the place of performance of a contractual obligation, where property is situated, and so on. The delegate proposed to make a basket of these connections, to save the need to list them in the provision, and to refer to them as "connecting factors" in the short wording of sub-paragraph (c *bis*).

133. **The Chair** confirmed his understanding that this proposal was just a presentational change, in which the reference in sub-paragraph (b) to habitual residence in a State, and in sub-paragraph (d) to connections with a State, had been converted into a (c *bis*) which referred to a "connecting factor" that included habitual residence.

134. **Un délégué du Canada** prend la parole pour souligner une modification nécessaire dans la version française de l'alinéa (a) de l'article 23(1). Il remarque que dans la version française, la terminologie préférée est « au droit » de l'État en question. Il ajoute que ce point peut être discuté au sein du Comité de rédaction.

135. **Le Président** est d'accord, cette question relève des prérogatives du Comité de rédaction.

136. **A delegate from the United Kingdom** queried the operation of the new provision (c *bis*). She recapitulated that the reference to "connection with" a relevant territorial unit, which is what was found in the 2005 HCCH Choice of Court Convention, had now changed under this proposal to a basket of connecting factors with a territorial unit. The delegate explained that, on the understanding that a reference to connecting factors is ordinarily made in the context of rules relating to jurisdiction, it would make sense to talk about connecting factors in Article 5, because these would be rules of indirect jurisdiction. She added however that her delegation would require reassurance on whether changing "connection" to "connecting factors" in the context of this Article could adequately deal with all possible connections in relation to territorial units in this Convention, and whether the wording would also be sufficient to deal with other situations which were not directly about jurisdiction (being either direct or indirect jurisdiction). The delegate highlighted, by way of example, Article 15 security for costs measures, explaining that the test of whether a court is allowed to make a security for costs measure is in part predicated on questions such as the domicile or residence of a party. She stated that domicile and residence are connecting factors that the Plenary would be familiar with from jurisdictional rules, but suggested that these factors were used in a very different context in Article 7. She provided by way of further example Article 7(2)(b) where a court examines whether the dispute has a close connection with a particular requested State. She queried whether the proposal intended any substantive change as opposed to merely a change in drafting by changing the wording from "connection" (used previously as the sort of basket of general connections that might be appropriate to a territorial unit) to now using the words "connecting factor".

137. **A delegate from Switzerland** suggested that it may be wiser to keep both sub-paragraphs (d) and (c *bis*) in the text. She added that the change to the term "connecting factors" was perhaps sensible, because connecting factors would refer not only to habitual residence, but other matters with respect to jurisdiction. The delegate advised that it might be sensible, or at least might not hurt, to keep the term "connection" as well.

138. **A delegate from the European Union** advised that the matter had been the subject of discussion in the informal working group. She explained that the provision had originally been copied directly from the 2005 HCCH Choice of Court Convention, but that the informal working group considered that the same clause would not work here. The delegate commented that this type of provision is also apt to be discussed at the Diplomatic Session, echoing the previous day's remarks of the delegate from Canada, that the Plenary would need first to know what the other operative Articles would say, before being able to refer to connecting factors mentioned in this Article. She stated that the informal working group on general and final clauses had discussed following the traditional approach used in HCCH Conventions, *i.e.*, having a very explicit Article on non-unified legal systems, recalling that the final clauses committee or the working group on non-unified legal systems in

the past had the painful task of going through every single Article, picking out all the connecting factors mentioned, and listing them in Article 23. She concurred that this would include all the connecting factors in the catalogue of Article 5, in Article 6, Article 7, and Article 15. She added that in the 2005 Convention, the only jurisdictionally relevant connecting factor was the residence of the parties. She explained that as with any Convention in this area, there were also references to laws and references to court. She pointed out that Article 19 of the 2005 Convention allows a State to declare that its courts may refuse recognition or enforcement of a judgment, if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State. She noted that this was addressed by sub-paragraph (d) but all relevant connections were mentioned in the Convention. She reinforced the policy idea introduced by the chair of the informal working group on general and final clauses: that it would be preferable to have a basket where these factors could be placed, and have a nametag put on it, which, in this regard, would be the term "connecting factor". The delegate considered that Article 15 would be covered. She added that there may be a point to the intervention of the delegate from Switzerland, *i.e.*, in keeping "connection", because a "connection" is not a "connecting factor". The delegate therefore agreed that keeping sub-paragraph (d) may be preferable, because the sub-paragraph cannot otherwise go into the basket of sub-paragraph (c). She added that, in her view, maintaining the basket called "connecting factor" would remain the better drafting technique for the draft Convention, rather than having a one-page list of all the connecting factors which are distributed across the diverse provisions of the draft Convention. She concluded that the change was not intended to be a change in policy, and that it was only meant to be a drafting simplification. She requested that the Explanatory Report state that clearly.

139. **A delegate from Canada** aligned her delegation with the comments of the delegate from the European Union. She agreed that in the case of this Convention it was not workable to have a laundry list of factors as a drafting technique, and that such a style would not assist the readers of the Convention. She added that her delegation did not consider that there would be any problem with the Article 15 reference to a party being domiciled or resident and sub-paragraph (c *bis*); she opined that (c *bis*) would work for those. The delegate added that she understood the objection raised by Switzerland, and would have no objection to retaining sub-paragraph (d), in the same sense as sub-paragraph (a), where, textually, the draft Convention had in its Articles "law of a State", or "procedure of a State", whereas in sub-paragraph (c), textually, the draft Convention would say "court" or "courts of a State", and in Article 7(2)(b) and Article 5(1)(g), we have "close connection", and "substantial connection". In that way, "connected" should be retained. The delegate concluded by noting that (c *bis*) would be sufficient to cover the other factors. She suggested that the Explanatory Report could do further work in this regard, and that it would be a useful exercise for the Explanatory Report to include a list of all of these factors where Article 23 would come into play.

140. **A delegate from the People's Republic of China** intervened stating that he understood the concerns of the delegations of the United Kingdom, Switzerland, the European Union, and Canada. He remarked that his delegation could support the inclusion of both sub-paragraphs (d) and (c *bis*).

141. **A delegate from the United Kingdom** clarified her delegation's question. She stated that under no circumstances had her delegation been suggesting the retention of Article 5(1)(b). She added that her intervention had related to the suggested nametag in Article 23. She advised that if the Plenary could be content that the term "connecting factor" would take in all relevant kinds of factors, *i.e.*, all connections that are necessary, then her delegation would be satisfied that that is how the provision should read. On the contrary, she wondered that if delegations had actually considered that "connecting factor" would have a more limited meaning, then the question would in fact be about what nametag it should be given. The delegate concluded by stating that she had not suggested that Article 23 include a long list of connecting factors.

142. **A delegate from the European Union** emphasised that there was no intention from any delegation to suggest a list of connecting factors. He explained that the proposal was now to retain sub-paragraph (d) as well as sub-paragraph (c *bis*). He remarked that his instinct was that this approach was probably correct, as it would be stretching the wording "connecting factor" to refer to those places that talk about "connection" very specifically, and that the text wouldn't normally use "connecting factor" in that way. He advised that on reflection, that was the easier approach and he apologised for his responsibility in proposing the text at the working group stage. He concluded that as the least complicated solution, (d) could be retained as well as (c *bis*). He considered that the order in which these appeared would not be that important.

143. **The Chair** queried why the term "connection" was not preferred, as a broader term that could include "connecting factor" within it. He noted that the term "connection" was quite general, and that the proponents had seemed to prefer "connecting factor" as a term with a technical meaning that might be narrower, but that would cause concern as it is not broad enough. He noted that if the result was to include reference to both "connections" and "connecting factors", that may be aesthetically undesirable.

144. **A delegate from the European Union** explained that the reference in Article 23 had originally been to the specific words in other Articles of the Convention, *i.e.*, "connection" and "habitual residence". However, he then clarified that when a drafting decision had been taken to refer to these within a basket labelled "connecting factor", the informal working group did not consider that they needed to retain the term "connection" because they thought that it would be included within "connecting factor". The delegate accepted that there may be some ambiguity about whether "connection" referenced in those two specific Articles, 7(2)(b) and 18, could be subsumed successfully within "connecting factor". As one of the proponents, and having heard the concerns of the delegations, he could be persuaded that it might be better to separate "connection" from "connecting factor". He considered that this was not necessarily a matter of significant importance to his delegation.

145. **The Chair** intervened to further query why that drafting referred to a connecting factor "in" a State. He suggested that the better drafting may be in relation "to" a State.

146. **A delegate from the European Union** explained that the informal working group could further consider that wording.

147. **The Chair** observed that there did not appear to be any policy disagreement, and that no delegation wanted a long list of connecting factors within Article 23. He added


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that most delegations wanted to ensure that the drafting of Article 23 was broad enough, and for this to be expressed as concisely as possible, but not so concisely that something would be missed out. He stated that drafting in the Plenary was not a very effective method, and he asked those with technical expertise to confer to consider the matters of discussion, and specifically to consider the interaction between sub-paragraphs (d) and (c *bis*).

*Article 29* bis

148. **The Chair** queried whether there was an appetite to reconvene the informal working group to consider the opposing policy positions expressed in relation to Article 29 *bis*.

149. **A delegate from the United States of America** preferred to speak informally outside of the working group to achieve some level of common ground. He added that the informal working group was mandated to consider text to reflect agreed policy on the provisions, whereas he saw a further need for interested delegations to discuss policy.

150. **A delegate from Switzerland** intervened in order to coordinate with those interested delegations, and particularly those who had voiced a real concern, in relation to the proposed mechanism under Article 29 *bis*.

*Other matters*

151. In response to an intervention from a delegate from Israel, **the Chair** indicated that Working Document No 75, proposed by the delegation of Japan, which considered intellectual property matters in the context of the Explanatory Report, was unlikely to be discussed in the Plenary, or at least, would not be discussed with any priority before a substantive Convention text.

152. **The Chair** closed the meeting at 6.50 p.m.

## Procès-verbal No 14

## Minutes No 14

*Séance du jeudi 27 juin 2019 (matin)*

*Meeting of Thursday 27 June 2019 (morning)*

1. La séance est ouverte à 10 h 20 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

*Article 24*

2. **The Chair** re-introduced discussions of Article 24, relationships with other instruments. He noted that there were interlinkages between Article 24 and Article 6, which had not been decided upon, but he stressed that he wanted to make progress and understand what was proposed in Article 24. He recorded that the informal working group had previously met to discuss matters further, and he noted two proposals for consideration under Working Document No 46 REV and Working Document No 59.

3. **A delegate from Japan** explained firstly that Japan had previously propounded Working Document No 41 which had garnered consensus in the informal working group. He noted that the delegation of Japan had reflected on the issue on which the informal working group had not reached consensus and also changed its position on a consensus issue. In this regard, he would suggest Working Document No 46 REV as the relevant starting point for further discussion. He stated that the general principle was that the Convention should use the time of the conclusion of the draft Convention as a point in time to distinguish other instruments before the draft Convention from those after the draft Convention. He added that, as demonstrated within Preliminary Document No 9 REV REV, if the draft Convention uses the point of time of the entry into force of the draft Convention for each Contracting State, there would be discrepancies in treatment of the same instrument. He suggested that such discrepancies were not desirable because it may cause complexities in the application of the draft Convention. He added that this would be a departure from the HCCH *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 HCCH Choice of Court Convention"). He noted that in relation to the Explanatory Report to the 2005 HCCH Choice of Court Convention (hereinafter, "Hartley/Dogauchi Report"), paragraph 283 explained that, concerning the relevant point in time, the general view is that the time of conclusion of the treaty in question is decisive, and not entry into force. He stated that the 2005 Convention used a unique technique, and suggested that the draft Convention could return to general principles to avoid discrepancies. However, noting the hesitation of some in using the time of conclusion, from the viewpoint of the delegation of Japan, he considered that certain delegations had wished to keep flexibility to make instruments after the conclusion of the draft Convention. Therefore, he stated that Japan decided to change its position, to make the draft Convention more generous. In this regard, under Working Document No 46 REV, he explained that he would propose the deletion of the second sentence of paragraph 3. As a result, the second sentence of paragraph 4 would also be deleted. The delegate summarised that this would mean that the draft Convention would always give way to another instrument as concerns recognition or enforcement of judgments between the Parties to that instrument.

4. **A delegate from the European Union** explained that her delegation would fully support the revised proposal of Japan under Working Document No 46 REV. She suggested that it would simplify Article 24, which was already complex enough. The delegate also remarked that this formulation of the rule would increase the readability and make the provision easier to apply, because the 1969 *Vienna Convention on the Law of Treaties* would also give priority to later treaties on the same subject matter, and this also relied on the date of conclusion. She opined that this would not mean that the draft Convention would create obligations before it entered into force. She considered that if the draft Convention were to be adopted (hopefully on 2 July 2019) then only at that point could it exist and be studied in that light. She


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suggested that when contemplating whether to ratify it at a later time, a State would have to compare it with other instruments to which it was either a Party or might wish to become a Party, and that the State would have to examine which conflicts could arise. She added that her delegation considered that because the draft Convention is so generous and would give precedence to practically all other instruments, either earlier or later, this provision should facilitate adherence to this Convention for States. The delegate noted that the proposal tried to bring in line the language of paragraphs 3 and 4 to ensure equal treatment between this instrument and a treaty on the one hand, and on the other hand this instrument and the rules of an REIO.

5. **A delegate from Switzerland** supported the proposal and indicated its availability to respond to any questions of other delegations.

6. **The Chair** invited the co-proponents of Working Document No 59 to introduce their proposal, comparing this against Working Document No 46 REV and explaining any policy differences.

7. **A delegate from the Republic of Korea** thanked the informal working group for its hard work on this complex issue, and for the helpful discussion within Preliminary Document No 9 REV REV which included examples of conflicts with graphics and diagrams. The delegate introduced Working Document No 59, noting that this proposal would introduce three basic changes. She noted that the first change would occur in paragraph 1, to provide further clarification, but she added that her delegation could be flexible on that. She noted that the next change would be the deletion of paragraphs 2 and 3, merging these into one paragraph with new wording. The delegate observed that there was no basic difference as to how the rule should operate, but that her delegation's formulation may be simpler. She added that the main gist of the proposal was to have a give-way clause. She echoed the comments of the delegation of Japan that it would also be important to have a baseline on what was the relevant time before conclusion, and after conclusion of this Convention, to decide what would be considered a "later" treaty. The delegate also referenced the comments of the delegate from Japan insofar as he stated the general view of the Hartley/Dogauchi Report at paragraph 283. She also noted that the footnote to paragraph 283 explained that the general view was not without different views. The delegate added that the proposal from the Republic of Korea would not touch upon the baseline of when the Convention had entered into force, as her delegation's view was that this was basically a public international law or treaty law issue. In that way, she noted that her delegation was hesitant to put in a baseline on this matter in this private international law Convention. She accepted that this was probably the differing view to the other proposal, but that the give-way rule would be the same. She stated that the third amendment would leave the notwithstanding clause intact within Working Document No 59, but that her delegation could be flexible on the wording of the notwithstanding clause.

8. **A delegate from Israel** joined with the Republic of Korea, as co-proponent of Working Document No 59, in thanking the chair of the informal working group for his hard work. The delegate also summarised the differences between Working Document No 59 and Working Document No 46 REV. He explained as a preliminary point that he saw, like the delegation of the Republic of Korea, that there was no reference to "this notwithstanding" to Article 6, and so his delegation would have no problem of deleting it also from this text. He explained that the aim of adding this wording was to reflect what he thought was a consensus, but he added that his delegation would not insist on the wording if it were not a consensus position. He recalled that the other main difference between Working Document No 59 and Working Document No 46 REV was whether there should be a departure from what was in Article 26(3) of the 2005 HCCH Choice of Court Convention, where the 'bright line' would be the entry into force of this Convention for the Contracting State. He added that his proposal does not refer to this timeline. His delegation was concerned with referring to the timeline of conclusion of this treaty, and that as was mentioned by the delegate from the European Union, this date could be 2 July 2019. The delegate opined that it would be very premature to create any status for the treaty: it may be problematic for the treaty to have any sort of impact on States, especially where such States were not Party to the treaty. He added that he understood the attractiveness and ease of having only one date, but that, echoing the remarks of the delegation of the Republic of Korea, he was unsure that such a position would correspond with public international law. He noted that he had considered the relevant references in the Hartley/Dogauchi Report and believed that this referred to successive treaties. He advised that he was not sure that the future treaties would be considered as successive treaties or even as the same subject matter. He referred to experiences in other forums, where the issue of successive treaties basically on the same relevant subject matter was decided not to be reflected in the text. He added that this would be the implication here because of its very sensitive nature. The delegate noted that his delegation had proposed alternative language which would have the advantage of avoiding the need to refer to any point in time, thereby avoiding the need to significantly depart from the 2005 Convention, or from what his delegation viewed as the position under public international law, which he understood that others viewed differently. He suggested that upon consultation and reflection, his delegation's view was that it was inappropriate to refer to a conclusion of a treaty. He understood that in trying to think of matters in a different way, his delegation's suggested approach might create discrepancies amongst States. But he also expressed the hope that there would not be many later treaties after this treaty, because there will not be a need for such treaties, and that this wording would therefore only cater to rare cases. The delegate concluded that his delegation did not consider that such rare cases should create a principle which, in his delegation's view, would not correspond with public international law, and would be a departure from the 2005 Convention.

9. **The Chair** observed that he could not find any factual scenario as between Working Document No 46 REV and Working Document No 59 giving a different result.

10. **A delegate from the Russian Federation** joined in thanking the informal working group and the chair for their hard work on these issues. The delegate explained that her delegation's concerns related to the date to be used as the starting point for calculation of compatibility of other treaties with the draft Convention. She advised that her delegation considered that the Convention should not affect the status of pre-existing treaties. She added that her position was that the date of calculation should be the date of entry into force for each particular State. The delegate understood the rationale of the joint proposal of Japan, the European Union and Switzerland, and the desire to have a single date. However, she cautioned that the simplest route was not always best, and that the rule should take into account other considerations. Firstly, she noted that there had been many previous discussions on public international law concerning how earlier and later treaties would correspond to

the Convention. She expressed familiarity with the arguments and noted that she did not wish for a long discussion of these points at this stage. She echoed the comments of the delegation of Israel, suggesting that this situation is more complex than it seemed at first glance. She added that as the Convention was to be concluded on a particular date, following Working Document No 46 REV, and from that point, the Contracting State would need to bear this Convention in mind when concluding other treaties to ensure that there are no contradictions. She noted, however, that for a State that is not a Party to the draft Convention and for which the Convention had not entered into force, as and until this Convention entered into force for that State it would be free to negotiate international treaties (and the terms and conditions of recognition and enforcement) in any way that it considered appropriate. She added that if the State decided to join this Convention, as the delegation of the European Union correctly pointed out, such a State would face the situation where they will have to study the whole corpus of international treaties, including bilateral and multilateral treaties perhaps concluded after the date of conclusion of this Convention, for compatibility. She advised that if that State were to find some contradictions, there would be a question of what to do. Either the State would have to correct the corpus of its international treaties to avoid these contradictions, or there would be a question as to whether it was possible for that State to join this Convention. From her delegation's position, the calculation of the date as suggested in the joint proposal may prevent other States from joining this Convention, because it would not be able to correct the international treaties concluded after the conclusion of this Convention if there are any contradictions in those treaties. She highlighted that this may cause problems, and that her delegation's preference was to keep as a starting point of calculation the entry into force of the Convention for the Contracting State. She noted that this position was preferable, although more difficult, and that it would be difficult for her delegation to accept another date as the starting point. Her delegation's view was that international obligations would arise under the draft Convention for a State from the moment it entered into force for that Contracting State.

11. **The Chair** requested delegations to exercise restraint in keeping interventions concise and in avoiding multiple interventions on the same topic. He added, in response to the comments made by the delegate from the Russian Federation, that he was not certain of the need to review other instruments, precisely because Working Document No 46 REV, paragraph 3, would provide that the draft Convention does not affect the application of those later instruments. The Chair also noted that the level of abstraction of the problem was not useful to advance the discussion, and requested delegations to furnish concrete examples.

12. **A delegate from Japan** thanked the delegations of Israel and the Republic of Korea for their proposal. He sought to explain a slight difference between his delegation's proposal and the joint proposal from the Republic of Korea and Israel. The delegate believed that there would be no difference between the proposals relating to treatment of instruments to be concluded after the conclusion of the draft Convention. He considered that, if, under Working Document No 59, the second sentence of Article 24(2) were to be deleted, there would be no difference concerning the treatment of other instruments concluded after the conclusion of the draft Convention. But the delegate suggested that there would be a difference in the treatment of instruments concluded before the conclusion of the draft Convention under the joint proposal from the Republic of Korea and Israel. Under their proposal, the draft Convention would only give way to other instruments as between the Parties to the instrument. He considered that this may be problematic in a situation where a State was Party to an earlier instrument under which it had an international obligation towards another State that was not a Contracting State under the draft Convention, and where the international obligation conflicted with an obligation under the draft Convention. In that case, the State would need to revise the other instrument before ratifying, acceding or approving the draft Convention. The delegate added that this could be a big hurdle for a State to become a Party to the draft Convention, and in that light, the current proposal by Japan, the European Union and Switzerland, was much more generous; the draft Convention would give way to all the other instruments concluded before the draft Convention. He suggested that the 2005 HCCH Choice of Court Convention also had the similar give-way rule on this issue in its Article 26(3). In that regard, he also stated his preference for his delegation's more generous co-proposal.

13. **The Chair** replied that his previous remarks had focused on the question of later treaties. He could not see a policy difference. Nor could he see a case where there would be a different outcome produced by either of the proposals, except for the second sentence in paragraph 3 of Working Document No 46 REV and paragraph 2 of Working Document No 59, however the Chair noted that the proponents of each had indicated flexibility with these matters. He added that his understanding mirrored that of the delegation of Japan, insofar as Working Document No 46 REV would be more deferential to other instruments where they were concluded earlier, than under Working Document No 59. He concluded therefore, that in terms of maximising deference to other treaties, it would be better to accept Working Document No 46 REV.

14. **A delegate from the United States of America** joined in thanking the chair of the informal working group, as well as other delegations involved in this process. He advised that his delegation was not persuaded that the discussion should focus on the relative timing of instruments under this provision. He registered his concern that any reference to such timing might ultimately have the effect of limiting discretion in the future, if certain States were to establish what they might ultimately consider to be a better regime. The delegate stressed that his delegation would not want to unnecessarily limit the application of more specific Conventions, such as a potential Convention pertaining to judgments concerning sale of ships, if anything were to occur in that area. Looking to the proposals, and particularly at Working Document No 46 REV, the delegate highlighted that the obligation was stated in the negative. He presumed that the draft Convention would affect the application of another treaty were it not prevented pursuant to the text provided in Working Document No 46 REV, however this was not entirely clear. His delegation preferred a clear statement: the positive statement in paragraph 2 of Working Document No 59. With respect to what was just stated, his delegation generally preferred to avoid the limitation as between Parties. He noted with approval that either formulation avoided a reference to Article 6.

15. **A delegate from Israel** suggested that, if there were a matter of concern for the delegation of Japan, and for others, the delegation of Israel would be in a position to agree to the policy. He explained that his delegation might have made a distinction vertically that was not actually meant. His delegation considered the only distinction still outstanding as that raised by the delegation of the United States of America, as to whether the draft Convention should use either i) the proposal in Working Document No 46 REV as

to when the treaty was concluded, or ii) the text would not use anything, which his delegation proposed. He added that a third proposal would be iii) a return to the language used in the 2005 HCCH Choice of Court Convention, which was not proposed by anyone. This third approach was an option for his delegation, and the delegate noted that it would be consistent with the general view that the Convention ought to align with the drafting of the 2005 Convention. His delegation would have concerns if the point of conclusion of the Convention were referred to, and he recalled that this was also his major concern with the previous Working Document presented by the European Union (apart from this matter, Israel was in complete agreement with the idea). He supported using one paragraph instead of two, as well as having more clear or positive language in the provision.

16. **A delegate from Switzerland** suggested that delegates should not overstate the importance of this discussion. She explained that the matter was less important now that there was a departure from the original drafting, which had been the cause for previous concern for her delegation. She noted that she had an interest in these issues and had enjoyed the discussions led by delegates from Japan and the European Union, during the course of which significant research had been conducted as to how this issue is usually treated in multilateral treaties. The delegate mused that there could be no possible greater level of flexibility in favour of later treaties than under Working Document No 46 REV. The delegate advised that the only thing that could be more flexible would be the treatment of judgments that arose from other Contracting States to the draft Convention that were not also Parties to the later instrument. She added that, where judgments were not recognised and enforced because of a later instrument, although they would have to be recognised and enforced under the draft Convention, this was the point where the balance between Contracting States would become distorted. She explained that her delegation would on the one hand be willing to have such a give-way clause for earlier treaties, because otherwise (and as mentioned by the delegate from Japan) States may be deterred from joining the Convention. On the other hand, as for later treaties, the delegate considered that it would only be fair to allow departure from the draft Convention with respect to judgments originating from Contracting States of the later instrument, and to be more generous to judgments coming from elsewhere, because that would always be possible under Article 16. But she cautioned that creating a give-way clause that would make it legitimate under the Convention to refuse recognition and enforcement of judgments from other Contracting States that were not Parties to the later instrument would not be acceptable.

17. **The Chair** sought to focus the discussion on the proposals before the Plenary and stated that the joint proposal under Working Document No 59 did not make that kind of proposal.

18. **A delegate from Switzerland** explained that her delegation had understood the intervention by the United States of America as being supportive of this sort of greater flexibility, beyond what was proposed in Working Document No 46 REV. The delegate expressed concern with such a provision, if proposed, and stated that her delegation would prefer to have no provision at all if that were the case. She accepted that the Plenary may be guilty of being overly perfectionist in this instrument, adding that it may be just as good to have no provision at all.

19. **The Chair** encouraged delegations to consider the interventions carefully and not provide policy responses to proposals that did not exist. He considered that the Plenary discussion should move on, as the policy differences were sufficiently narrow, and that this issue should be kept in perspective.

20. **A delegate from Uruguay** intervened to thank the informal working group and the proponents of the two Working Documents in this matter. He voiced his delegation's support for the joint proposal of Japan, the European Union and Switzerland, as it clearly stated the applicable policy position which his delegation could join. He noted that the result produced no overlap among the instruments that may apply in the same case, because they will not be mutually affected in any case. Uruguay preferred this relevant approach, as Uruguay was Party to regional treaties already in force for the recognition and enforcement of foreign judgments. The delegate also added that in his delegation's view, this proposal was clearer and easier to understand for those who must apply this Convention.

21. **A delegate from Brazil** joined in thanking the informal working group and the proponents of the Working Documents. The delegate noted the importance of the discussions to issues of public international law. The delegate highlighted a potential compatibility in both proposals, in the deletion of the latter part of paragraph 3. He queried the implications of deleting this last phrase in paragraph 3, especially with regard to Article 6 of the draft Convention. To his understanding, nothing in national law could be against Article 6. But he noted that according to the current proposals in each Working Document, the same Contracting State could potentially apply a different rule by means of a treaty. He queried again whether this was the correct implication of the proposal and sought further clarification from the Plenary.

22. **Delegates from Mexico, Australia and Canada** each registered their thanks to the working group and the proponents of the Working Documents. The delegates each supported the joint proposal from the delegations of Japan, the European Union and Switzerland.

23. **A delegate from Israel** confirmed that his delegation did not consider that the proposal would correspond with public international law, and requested that this be reflected in the record. But he also noted that his delegation could accept the proposal. In relation to the comments of the delegation of Brazil, his delegation did not understand that core proponents of the other proposal had meant for States to override an obligation under Article 6. He added that under international law, States were required to act in good faith and could not conclude agreements which would breach international obligations towards third-party States. The delegate suggested that if it could help the delegation of Brazil, a statement to this effect could be put into the Explanatory Report. The delegate generally observed that his delegation had proposed this Article because they had considered it helpful, but that conversely he had not really understood why it was needed, because its effect was obvious. He mused that perhaps even stating the obvious would not be necessary.

24. **The Chair** suggested that these matters may be better addressed when there was greater clarity as to the finalised content of Article 6. Noting a clear preference for Working Document No 46 REV, and a slim policy difference, the Chair asked delegates whether the Plenary could proceed on the basis of Working Document No 46 REV.

25. **A delegate from Brazil** stated that his delegation could agree to proceed on the basis of Working Document No 46 REV. His delegation had not been fully persuaded by

some of the discussions on difficult issues presented, but he did not intend to delay matters further. He noted that his delegation was pleased that the delegation of Israel had explained some of the reasoning behind deletion of paragraph 3. He identified with the comments by the delegation of Israel insofar as the text may not be needed, because it might state the obvious. He considered that, to the extent that the text would state the obvious, his delegation would be in a position to agree that the whole Working Document could have its contents or a clarification paragraph put into the Explanatory Report. He noted that there had been some consideration in the Plenary that Article 6 might need to be considered first. He suggested that this text could be kept in square brackets until the Article 6 question had been resolved, and that afterwards the implications on this last phrase could be considered once the final decision was taken as regarded Article 6.

26. **The Chair** indicated that his preferred approach would be to adopt Article 24, but to leave open the possibility for delegations to propose a consequential amendment to this Article, after the Plenary had discussed Article 6. The Chair noted that the common ground to both proposals would be to delete paragraph 3.

27. **A delegate from the Republic of Korea** reported that her delegation would be content to proceed on the basis of Working Document No 46 REV, but wished to still note the merits of the policy position under Working Document No 59, as there had been some consensus on the timeline position.

28. **The Chair** observed that in the context of final issues in the draft text, delegations were mostly discussing matters with merits on both sides, and that there was accepted difficulty in determining a preferred position. He posited that neither proposal was without merit, but each had some advantages and disadvantages. He observed that it would not be possible to have two provisions about the same thing in a draft Convention. He queried whether the consensus approach was to proceed on the basis of Working Document No 46 REV.

29. **A delegate from Brazil** took the position that his delegation could not agree to the deletion of the last paragraph, without first discussing Article 6. He remarked that if the Plenary were to proceed with deletion, the delegation of Brazil would prefer to keep it in brackets, and to later see how the Article would fare in light of Article 6.

30. **The Chair** suggested that an equivalent approach to ensure that no further square brackets were introduced would be for any interested delegation, which could include the delegation of Brazil, to submit a Working Document suggesting the restoration of deleted text. He recalled that there was no difference as to whether text appeared in square brackets or otherwise, in terms of the level of support required to add or remove wording from the final text.

31. **A delegate from the Russian Federation** voiced concerns in relation to striking out "entered into force for that Contracting State" in Working Document No 46 REV.

32. **A delegate from the People's Republic of China** observed the difficulties for the Chair in making progress on the matter, and concurred with the Chair's proposal. He made the further suggestion that square brackets around Article 6 could be sufficient to show that these matters were not finalised yet.

33. **The Chair** thanked the delegate from the People's Republic of China, and called for more interventions. In relation to the comments of the delegation of Brazil, he expressed that he would consider, albeit with a heavy heart, the suggestion to leave square brackets around the last sentence until the Plenary had discussed Article 6. In relation to the comments from the delegation of the Russian Federation, he noted that the deletion of the identified words was not proposed within any Working Document at present; there was no suggestion of using that time point as a distinction. He remarked that delegations with any major problem with any provision, and who could build support with other delegations, could revisit that provision on Second Reading. The Chair observed that he had received indications from both proponents of Working Document No 59 that they were willing to be flexible and, in a commitment to making progress, that they were willing to proceed on the basis of Working Document No 46 REV. In that regard, he urged the Plenary to consider any strong objection to proceeding on the basis of Working Document No 46 REV. In recognising that Article 6 was unresolved, he suggested that the Plenary retain the last sentence of paragraph 3 in square brackets for now, and that it not be deleted. Noting no objection to that approach, the Chair concluded discussions of Article 24. He added that he would hold over any discussion about the Explanatory Report in relation to Article 24 until Article 6 was eventually decided.

*Article 23*

34. **The Chair** introduced discussions of Article 23. He referred to Working Document No 79 and explained that the concerns expressed by delegates in the previous session about "connection" and "connecting factor" had been addressed by including both paragraphs, as had been suggested by several speakers yesterday. Also, the preposition in sub-paragraph (c *bis*) had been addressed by the informal working group and changed from "in" to "in relation to". The Chair stated that the most recent version of Working Document No 79 met the concerns arising from the previous version. The Chair enquired whether any delegates had some outstanding concerns with the text as set out in Working Document No 79. The Chair concluded that the text of Article 23 as appeared in Working Document No 79 was adopted by consensus, and invited discussion on the Explanatory Report in relation to Article 23.

35. **A delegate from the United States of America** noted that Article 23 was important to the United States of America. He remarked its treatment in the Explanatory Report was also extremely important and helpful. The delegate thanked the *co-Rapporteurs* for their efforts and opined that the Article must be read in conjunction with the Explanatory Report.

36. **A delegate from the European Union** also thanked the *co-Rapporteurs* and explained that the European Union had been unable to coordinate on the matter with the delegations of the Member States of the European Union before the current session. He was uncertain as to how to deal with the situation procedurally, and requested to delay the discussion of the Explanatory Report on the Article.

37. **The Chair** reminded the delegate that the Plenary was not approving the Explanatory Report but that this time was simply a window to provide polite suggestions to the *co-Rapporteurs*. The opportunity to provide polite suggestions at a later stage was not foreclosed.

38. **A delegate from the European Union** requested whether the Plenary could return with suggestions during the Diplomatic Session in the coming days.

39. **The Chair** agreed that such opportunity could occur within the later discussion on the Explanatory Report during the Diplomatic Session, if time permitted.

40. **A delegate from Uruguay** referred to the matter raised by the delegate from Canada in yesterday's session concerning the French version of the text of Article 23, where the Spanish language was quite similar to the French on the point. From a conceptual point of view, it was very important for the delegation of Uruguay to translate "law" as "*droit*" instead of "*loi*".

41. **The Chair** confirmed that the matter was referred to the Drafting Committee for consideration.

*Preamble*

42. **The Chair** outlined that proposals for the Preamble were contained in Working Document No 2 from the Permanent Bureau, Working Document No 65 from the European Union and Working Document No 78 from the People's Republic of China.

43. **The First Secretary (Mr Ribeiro-Bidaoui)** introduced Working Document No 2, prepared by the Permanent Bureau in consultation with the Chair of the Special Commission. The first aim of the proposal was to draft the key underlying policies of the Convention which had informed the long journey of negotiations since day one of the Judgments Project. The second aim was to draft such principles in a way that would frame the future promotion of the Convention, an aspect of the Preamble which would benefit from not being overlooked. The third aim was to reiterate the complementary nature of the Convention and the 2005 HCCH Choice of Court Convention. Finally, another aim of Working Document No 2 was to embrace the challenge of drafting a text that could endure and survive the discussions of the Plenary Session. The First Secretary reiterated that Working Document No 2 was only a draft, and that it would necessarily have to be discussed and amended to ensure it would be the Member States' Preamble of the Member States' Convention.

44. **The Chair** noted that it would be helpful for the delegates to have the 2005 HCCH Choice of Court Convention Preamble before them since there were some very deliberate parallels adopted by the Permanent Bureau.

45. **A delegate from the European Union** introduced Working Document No 65 and explained that the proposal was an upshot of the Plenary's discussion on the principle of effectiveness in the context of its discussion on Article 14. Since it was very important, not only to the delegation of the European Union but also to other delegations, to highlight the principle of effectiveness in the application of the Convention, which included, but was not limited to, the principle of non-discrimination, the delegate believed it would be a useful asset to include language in the Preamble that would both highlight the general objective of the Convention to facilitate recognition and enforcement and also the importance of effectiveness in that context.

46. **A delegate from the People's Republic of China** introduced Working Document No 78 and stated that the structure of their proposal was based on the Preamble of the 2005 HCCH Choice of Court Convention, and that the key words in the proposal were underlined. The phrase "global circulation of foreign judgments" in the third recital should also have been highlighted. In the first recital, the words "easy", "rules-based", "multilateral trade" and "free mobility" were included to emphasise the core rules of the Convention. In the second recital, "internationally unified" core rules was used to describe and reflect the hard work spent by all the participants in the Judgments Project and to characterise the nature of the core rules, which have been internationally unified and were different from customary law rules. In the third recital, the inclusion of "multilateral judicial cooperation", "possibility" and "global circulation of foreign judgments" was proposed. "Possibility" reflected the fact that the Convention established an international legal regime which made the recognition and enforcement of foreign judgments possible. "Global circulation" was proposed to reflect and to characterise the multilateral and universal recognition and enforcement of foreign judgments.

47. **The Chair** proposed that the text of the Preamble be revised outside of the Plenary and sought observations from delegates to better inform the conversation, with a view that the Permanent Bureau would later introduce a new text.

48. **A delegate from Australia** thanked the proponents for their suggested edits and observed that the Preamble for the 2005 HCCH Choice of Court Convention was slightly easier, used fewer words and adjectives, and that in his opinion there was something a little bit more direct about it, which would be desirable.

49. **A delegate from the United States of America** echoed the sentiments expressed by the delegate from Australia, and emphasised that they had a strong preference for a shorter reference and preferred the provisions in Working Document No 2. The delegate noted that the other Working Documents introduced some interesting concepts, some of which were probably absolutely correct but many which the delegate did not fully understand. Their position was to retain the original draft.

50. **A delegate from Japan** also expressed a desire for a simple Preamble and therefore supported Working Document No 2, but also noted some revision might be necessary. The delegate asked a question to the delegate from the People's Republic of China regarding Working Document No 78, that the word "multilateral" was used in several places – "multilateral trade", "multilateral judicial cooperation" – which in his opinion seemed to kick out bilateral trade and bilateral judicial cooperation, and wondered whether that was the proponent's intention.

51. **A delegate from the People's Republic of China** clarified that their delegation also did not desire a long Preamble, but there were some elements of the Convention which the Plenary may take for granted but may not be apparent in the text. In response to the question from the delegate from Japan, it was advised that if any international declaration was considered, for example the most recent joint statement by the People's Republic of China and the European Union, they emphasised rules-based *multilateral* trade and investment. The delegate emphasised that the Hague Conference on Private International Law was a multilateral organisation, and that the draft Convention was a multilateral Convention. Regarding the second question from the delegate from Japan concerning multilateral judicial cooperation, it was explained that the draft Convention concerned multilateral judicial assistance, so the wording encompassed what the Plenary was trying to do and trying to achieve. It was also the reason why their delegation was against bilateralisation; the Plenary was not here to just create a model law to be accepted bilaterally. The emphasis

on multilateral judicial cooperation was not to have any negative effect on bilateral judicial cooperation.

52. **The Chair** noted that productive discussions about the Preamble had occurred during the coffee break, and a revised version of the Preamble would be circulated for the Plenary to review and consider.

*Recommended form*

53. **The Senior Legal Officer (Ms Zhao)** introduced Working Document No 3 REV and noted that the recommended form was not part of the Convention, and that the purpose of the document was to speed up the procedure for recognition and enforcement. Given the complementary nature of the 2005 HCCH Choice of Court Convention and the draft Convention, the starting point for preparing the draft form was to use as a basis the recommended form of the 2005 Convention. As explained in the footnote of Working Document No 3 REV, there were three main differences between the draft form and the 2005 Convention form and, therefore, some structural changes. For example, the current form grouped the awards of the judgments together under point 5 rather than listing them as separate points. A similar change had also occurred in point 6, which grouped the effects of the judgment together. Substantive changes were also made, where the reference to choice of court agreements, which were the core of the 2005 Convention, were deleted from the current form. In addition, for clarity and ease in using the current form, the relevant Article numbers were included in each point, which would need to be revisited later on to be in line with the number of the provisions in the draft Convention.

54. **The Chair** confirmed that the footnotes in the form in Working Document No 3 REV would be omitted from the official version.

55. **A delegate from Brazil** suggested that to make the form clearer, in point 2 "court of origin" should precede "case-reference" as a person using the form may not understand whether to use the requested or requesting Contracting Party's case number. Also, in point 3 to include "parties to the procedure", but that that was not very important. Further, under contact details, to include the languages in which the contact person may communicate. However, the most relevant one which the delegate desired to be addressed if possible was point 2 and including "court of origin" in the beginning of the description of the field.

56. **The Chair** recognised that the proposal was simple and clear enough to depart from the normal procedural rule whereby the textual changes required a Working Document, and instructed the delegates to note the proposal "court of origin case/docket number".

57. **A delegate from Canada** remarked that point 6.1 stated, "This judgment is enforceable in the State of origin", but that the Convention did not only apply to judgments that were enforceable and that the inclusion of "or has effect in the State of origin" was proposed.

58. **The Chair** commented that that proposed language was not included in the 2005 HCCH Choice of Court Convention, even though the same rules about enforcement or having effect were present in that instrument, and that he was not sure why.

59. **Un délégué de la Suisse** intervient pour appuyer la suggestion de la délégation du Brésil qui consiste à proposer que le formulaire inclue une section consacrée à la désignation de la langue de communication.

60. **The Chair** explained to the Plenary that under point 11, after "contact details", there was "tel.", "fax", "e-mail" and then the suggestion was to add after that "contact languages", for example. With respect to the suggestion made by the delegate from Canada, the Chair expressed that it may not be possible to have a single question because they might have different answers, but that he may be incorrect on this point.

61. **A delegate from Switzerland** disagreed with the Chair's understanding, and questioned whether a court would actually issue the form for a judgment that would have no effect.

62. **The Chair** explained that the issue was that in some States, judgments do not have effect if the time for review has not expired or if it was under review, and that the purpose of point 6.2 of the form, in his understanding, was to ask an objective question about that to allow the appropriate legal conclusions to be drawn.

63. **A delegate from Switzerland** agreed but queried whether it would be expected that a court would issue the form for a judgment that was not even effective yet. However, in the delegate's opinion there was no harm including in point 6.1 "This judgment *is effective in the State of origin*" before "is enforceable". It was emphasised that one using the form could learn over time that elements were perhaps omitted in the old recommended form for the 2005 HCCH Choice of Court Convention and were added.

64. **The Chair** sought to confirm with the Plenary whether there was any concern with the language proposed by the delegate from Switzerland.

65. **A delegate from Canada** explained that their initial suggestion simply tried to address the situation where there was a judgment which was of such a nature that it did not lend itself to enforcement in the sense of execution, such as a declaratory judgment or a judgment raised as a defence. In those cases, it was effective, but by its nature it was not necessarily enforceable. The delegate was of the view that it would be useful to cover those cases to avoid subsequent questions, but that if the Plenary felt that it was not necessary they could withdraw their suggestion.

66. **The Chair** agreed that the matter should be addressed and that it was preferable for the Permanent Bureau to prepare a Working Document No 3 REV REV which incorporated the suggestions made in the discussion.

67. **A delegate from the Republic of Korea** queried whether there was a need to specify the date when review was no longer possible, because the requested States which would only recognise those types of judgments would find that information relevant.

68. **The Chair** noted that the form sought to draw a line between questions that immediately related to the status of the judgment in the court issuing the certificate, without the office of that court needing to understand the rules that might apply in other courts, including appellate courts. The form sought to stay squarely within the competence of the registry staff as much as possible, with which the Chair noted several delegations expressed agreement. The Chair also underscored that it was a recommended form, and that any Contracting State or court office that felt it was able to

be more helpful could add more information, just as they could also provide less information.

69. **A delegate from Spain** sought clarification with respect to the proposal from the delegate from Canada, which may cause confusion in some jurisdictions: when referring to the "judgment has effects", whether the delegate from Canada referred to *res judicata* effects. The delegate explained that in many jurisdictions, the two typical effects of a judgment were enforceability and *res judicata* effects; enforceability was already included in point 6.1 of the form, and the new edition that "the judgment is effective in the State of origin" would only be understood as that the judgment has *res judicata* effects. If that was the case, it would be helpful to clarify that somewhere, because he anticipated that for a Spanish court it would be difficult to understand what is meant by the "judgment has effects", because there may be many different effects of a judgment, and just a broad category of "effects" would be surprising for certain jurisdictions.

70. **The Chair** acknowledged the proposal from the delegate from Canada to withdraw its earlier suggestion. The Chair concluded that Working Document No 3 REV, incorporating the amendment in point 2 "court of origin" before "case reference/docket number" and in point 11 "contact languages" under contact details, was adopted.

71. The Chair also announced that the informal discussion on Article 29 *bis* which took place yesterday would continue during lunch in the seminar room, and that any delegates interested in the provision could participate.

72. **A delegate from the People's Republic of China** noted that their delegation had submitted a Working Document concerning reservations, which they thought could also help to resolve the problem of Article 29 *bis* and requested that the informal discussion also consider their proposal.

73. **The Chair** outlined that there was an existing proposal to have a no reservations clause as well as a new proposal from the People's Republic of China to have an explicit reference to reservations, and encouraged the participants in the informal discussion to find a sensible middle-ground policy.

*Tenancies and immovable property*

74. **A delegate from Singapore** confirmed that their proposal in Working Document No 43 had been superseded by Working Document No 69.

75. **A delegate from Saudi Arabia** also confirmed that they had no objection with the outcome of discussions which had followed their proposal and that their proposal in Working Document No 45 had been superseded and they would agree with the outcome of the informal working group.

76. **The Chair** noted that the current proposals were contained in Working Documents Nos 67, 69, 73 and 83. The proponents of these Working Documents were invited to introduce their proposals, and the Chair asked the delegate from Australia to explain in their introduction of Working Document No 83 the contingent status of Working Document No 67.

77. **A delegate from Switzerland** introduced Working Document No 69 and thanked the participants of the informal working group for engaging constructively in an attempt to find common ground on this issue, which was rather sensitive for many delegations, as well as the chair of the informal working group for his diligent and skilful handling of the group. The delegate's proposal contained two options to show that there might be different ways to approach the difficult issue. The delegate recalled that in the draft text of the Convention a compromised solution was included which had been arrived at with some difficulties, and that subsequently it appeared that some delegations had concerns, which came from different angles and starting points. The current draft text for Article 6 created an obligation under public international law to refuse recognition and enforcement of certain judgments, an obligation which caused considerable concern for their delegation and they preferred not to have such an obligation. On the other hand, the delegate highlighted that there were concerns by some delegations, in particular with respect to leases of, use of and possession of immovable property, that they did not find were sufficiently covered in the current Article 6(c). When considering how to address this issue, the delegation had thought it might have been helpful to try to accommodate in some way both of those concerns.

78. Firstly, in option 1, the competing concerns would be addressed by creation of an exclusive filter for all rights in respect of immovable property, which was built conceptually on what was previously discussed for judgments on intellectual property. With the proposed exclusive filter for judgments ruling on rights in respect of immovable property, those judgments would only be recognised and enforced if they were given by a court in the State where the immovable property was situated. The benefit of the filter was that it would greatly simplify matters with respect to the distinction between rights *in rem* and tenancies that were not rights *in rem*, because there would only be a single, exclusive filter. The delegate explained that no State would have to be concerned about having to recognise or enforce judgments concerning rights in immovable property situated in their State, if the judgment was given abroad, which in the delegate's opinion would serve to accommodate the concerns of those States that were gravely concerned about this. The other part of the package was to remove Article 6. The four delegations making the proposal in Working Document No 69 did not wish to have that obligation in the Convention. The delegate also noted that there would be follow-up changes to Article 16.

79. The delegate further explained that option 2 in Working Document No 69 addressed the matter from a different angle, by creating an exclusion from scope. An exclusion from scope was not the proponents' first preferable option, but they were aware that situations may arise where consensus on how to approach certain issues could not be established. If no consensus on the approach adopted in option 1 could be reached, the proponents submitted that the matter should be handled as it was in the 2005 HCCH Choice of Court Convention and to exclude tenancy matters from the scope of the Convention, which would consequentially lead to the deletion of all the Articles dealing with tenancies. The delegate also highlighted that their proposal adopted the language proposed by the delegation of Australia, "leases (tenancies) of immovable property", because the proponents believed that it was a good linguistic change that addressed the questions of delegations in this respect.

80. **A delegate from Japan**, a co-proponent of Working Document No 69, further expressed that concerning the two options in the proposal, option 1 solved the concerns of Member States who had certain rules on exclusive grounds of jurisdiction for judgments which ruled on rights *in personam* in immovable property. Option 2 did not resolve the


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concerns of those States because the draft Convention obliged Contracting States to recognise and enforce judgments that ruled on a right *in personam* other than judgments concerning leases of immovable property, if those judgments were eligible for recognition and enforcement under Article 5(1). The delegate pointed out that that was the difference between the two options. While both options were put on the table, the delegate strongly preferred option 1 for several reasons. For example, if option 2 were adopted, a judgment that ruled on rights *in rem* in immovable property rendered by a State where the immovable property was situated would not be circulated under the draft Convention, and therefore a costs order for the proceeding would not be circulated under the draft Convention. The delegate's understanding was that there was no reason to deny circulation of such a cost order. However, he also noted that, based on the spirit of compromise, option 2 could be agreed to if it was demonstrated that option 1 was not possible.

81. **A delegate from Singapore**, also a co-proponent of Working Document No 69, noted that for all Member States, there were matters which they regarded as within the exclusive jurisdiction of the domestic courts and did not wish foreign courts to adjudicate upon. The delegate acknowledged that these matters were diverse and included intellectual property, competition, privacy and even sovereign debt restructuring. To further complicate matters, it had become quite apparent that no two Member States in the Plenary shared the exact same view on which matters should be the subject of the exclusive jurisdiction of the domestic courts. Despite these challenges, the delegate recognised that the delegations had come a long way in reaching consensus on the subjects which should be outside the scope of the Convention and on which subjects foreign judgments should circulate. To a large extent, the progress made was because the Member States had adopted two main principles: the principle that when it comes to the creation of additional obligations on Contracting States, this should only be done where there was consensus, and, secondly, that items excluded from the scope of the Convention continued to be governed by national law. For example, while intellectual property has been excluded from the scope of the Convention, individual countries retained the right to decide, under their national law, whether they wished to recognise foreign intellectual property judgments and, if so, the terms on which they would do so.

82. The delegate expressed concern with the current draft of Article 6 because, in their opinion, it defied those two principles. First, Article 6 imposed obligations on Contracting States on issues where there was no consensus. Second, the obligations which Article 6 imposed on States were particularly onerous and far-reaching, because they restricted the ability of Contracting States to recognise foreign judgments even according to their national law. If Article 6 were to exist, there would be constant pressure from States to increase the scope of Article 6 to matters on which they wish to assert exclusive jurisdiction. If one took that position to its logical conclusion, the Convention would end up dealing with the non-recognition, rather than the recognition, of judgments, which was against the aim of the Convention.

83. In relation to the issue of immovable property, the delegate emphasised that it was a particularly difficult issue to resolve because there was a large range of rights relating to immovable property. On the one hand, there were issues relating to ownership of land; on the other hand, there were various types of rights such as easements, tenancies, licenses and even the right of farmers to graze on the land. Some States treated these rights as rights *in rem*, and other States treated them as *in personam* rights. The Member States had attempted to come to a compromise on the wording of Article 6, which was why in the proposal in Working Document No 43 the proponents sought a compromise and preserved Article 6(b), because the proponents had deduced that all States agreed that issues relating to the ownership of land should be within the exclusive jurisdiction of the State where the land is situated. However, it emerged that that compromise was not possible and that proposal was withdrawn, because the kind of rights in immovable property which different States sought to protect were simply too diverse. In light of the issues that had emerged in relation to Article 6, the current proposal was submitted to delete Article 6 and, in return, create an exclusive filter for rights in immovable property, with no distinction between rights *in rem* and rights *in personam*. The fundamental principle behind the exclusive filter was that no State would be forced to enforce judgments relating to land situated in their country, which would preserve the exclusive jurisdiction of their domestic courts in relation to land issues and preserve the status quo in relation to national law on what type of foreign judgments they wished to recognise, which the delegate believed would be the best way forward.

84. **A delegate from the United States of America**, also a co-proponent of Working Document No 69, thanked the members of the informal working group, and particularly the chair, whose discussions helped to understand the different interests, the different approaches to these issues, and, in particular, the complexity of the issue. It was noted that the 2005 HCCH Choice of Court Convention dealt with these matters by simply excluding from scope rights *in rem* in immovable property, which was the approach in option 2 of Working Document No 69 but, as expressed by the other proponents, was the second-best solution. The delegate noted that the history of the negotiations of this matter had included concerns for rules of exclusive jurisdiction in this area, which was reflected in the compromise in Article 6 of Working Document No 50. It was acknowledged that, for some delegations, that compromise would assist in ratifiability of the Convention. However, for the United States of America, it would complicate ratifiability. The delegate opined that what Article 6 did was create tension with the basic Convention policy of the circulation of judgments, by resulting in a prohibition on the circulation of some judgments. It also appeared to set forth a rule of direct jurisdiction in a Convention focused on indirect jurisdiction.

85. Option 1 in Working Document No 69, which emerged from the working group discussion, dealt with the matter in a new Article 5(3). Like Article 6(b), the provision gave special status to judgments on rights *in rem* in immovable property, but it created a rule of exclusive circulation of judgments from the State in which the property was situated. Option 1 did give special status to those judgments, but the delegate explained that it did not go as far as Working Document No 50 did in Article 6. The delegation was of the opinion that the limitation was justified in order to prevent the avoidance of a rule of prohibition of judgment circulation as well as to focus on the enhanced circulation of judgments under the Convention. The particular approach adopted in option 1 would avoid problems which could otherwise result because of the very different approaches and understandings of the concept of rights *in rem* in immovable property. The delegate remarked that one of the things which became clear from the informal working group was that all the members were working from very different conceptions of what a right *in rem* meant, and that they saw option 1 as a way that remained consistent with the basic principles of the Convention while at the same time recog-

nised the concerns that had been raised, that every State wanted its law to be able to deal with matters of immovable property in its own State. The delegate emphasised that this solution created rules that would not result in as many problems because of the different approaches and understanding of what those rights are.

86. **A delegate from Brazil** introduced Working Document No 73 and explained that the proposal reflected a position which Brazil had adopted for a long time, to protect the exclusive jurisdiction of its country. The history of the negotiation of the Convention showed that the Brazilian delegation would not have accepted that all exclusive jurisdictions were protected in the Convention with such a global intention and scope. They realised that they should choose between having a global Convention or having protections to their situations of exclusive jurisdictions. At the same time, there were three pillars that were on the table, the same three pillars that brought the HCCH Member States to the first phase of the project in 2001. After years and years, the HCCH Members unfortunately failed to achieve a compromise solution, which led the Members to negotiate the 2005 HCCH Choice of Court Convention. When the project was resumed, by means of a decision by the Council on General Affairs and Policy in 2011 or 2012, it was agreed that there were three pillars to consider: i) having direct grounds of jurisdiction, ii) having protection of exclusive jurisdiction of Member States and iii) having common grounds for recognition and enforcement of foreign judgments. At a certain point in time, few delegations were against the decision to have treatment on direct grounds of jurisdiction and they took a very difficult decision that they should realise that they could not move forward on having direct grounds of jurisdiction here, and should keep the other two pillars in the work of HCCH. In relation to the other two pillars, the recognition and enforcement of judgments and the protection of exclusive jurisdiction of the countries, they also realised that they should not protect all situations of exclusive jurisdiction on which they could not agree.

87. Therefore, the delegate recalled, the Members had agreed on having a core provision that would say which exclusive jurisdictions they are talking about, and that agreement has been built in layers of protection to deliver to the Convention a minimal level of protection to the exclusive jurisdiction situations. The first level of protection was to accept judgments which came from only one country in one specific situation, and then the Member States had discussed whether or not to have a different rule by means of international law. Then, the Members built the second layer on that agreement, that they should keep situations of exclusive jurisdiction and they should not give a different rule by means of national law, which was what was included in Article 16. The delegate explained that what the HCCH Members had now been trying to build was the third layer of protection, which was that they should protect exclusive jurisdiction and should also not bring a different rule by means of national law *and* then they should not bring a different rule by means of another international instrument. That was what Article 24(3) stipulated in the last sentence. Now, there was a package of provisions; one of them was already in brackets, but the others were not. The Member States came to the Diplomatic Session with no brackets in Article 6, which represented that they had achieved a very difficult and sensitive compromise on having such cooperation in the Convention. The delegate noted that the Brazilian delegate was unhappy with that, because many situations of exclusive jurisdiction were out of the scope of Article 6 of this Convention. In an attempt to enlarge the protection, the delegate reminded the Plenary that they had previously introduced Working Document No 27 to this Diplomatic Session with the delegation of Israel in a way that would enlarge the protection to cover not only tenancies, whatever it meant for countries, but also all rights *in personam*. That was the position the Brazilian delegation had adopted at the beginning of the Diplomatic Session. The delegate commented that from the beginning of the discussion on the first or second day of the Diplomatic Session, they had realised that the Plenary could not agree on that and that their delegation had been flexible, and participated in the informal working group wisely chaired by Mr Andrew Walter. The working group had discussed concrete situations that would not be covered by Article 6, but which were important for the delegations of Brazil and Israel. Those concrete and specific situations now appeared in two magical terms in the proposal in Working Document No 73, "the right to possession" and "the right to use". After the whole history of negotiating days and the package of layers of protection, these were the minimum grounds that the delegates from Brazil and Israel would agree to regarding protecting an exclusive jurisdiction basis. The delegate reminded the Plenary that their delegations had already demonstrated a lot of flexibility during the Session; they withdrew proposals, and agreed on language which did not accord with their initial instructions.

88. Another delegate from Brazil explained this was an important subject to Brazil, which was historically relevant not just from the arrival of the Portuguese in Brazil in the 15th and 16th centuries, but before that. For some indigenous populations, the whole idea of exclusive control over land was an ancient idea to those populations. Now, and since those times, possession of land was particularly subject to dispute. Nowadays, the main issues that were relevant to Brazil were the possession of indigenous land, the possession of rural land for agriculture, possession due to the protection of the natural forest, possession for means of Uruguayan settlements, and possession to access rivers and sea. The historical evolution of possession of land led to an *in personam* description of such rights in Brazil. This description was strongly related to the protection of other rights of constitutional dignity, other than property and other *in rem* rights. So, Brazil *in personam* rights relating to immovable property had a comparison with other kinds of constitutional dignity, in comparison with *in rem* rights of immovable property. The delegate quoted and repeated the words of another delegate in the informal working group on governments' morning discussion: this Convention was not limited to money judgments.

89. The delegate shared an example that expressed how enabling the availability of separation for recognition and enforcement of a judgment related to immovable property might distress the balance which Brazil was trying to achieve, but had not quite achieved yet. Two persons that were habitual residents in State X entered into an agreement for the lease of an apartment situated in Rio de Janeiro, Brazil, for a period of two years. The decision on that lease was made taking into consideration the use of the apartment by an elder, the father of the tenant, and the location nearby a medical centre favoured the agreement due to the health care treatment of the elder. Thereafter, the tenant did not surrender possession of the apartment to the owner at the end of the term, arguing that the elder's medical treatment had not finished. The lessor then brought proceedings in State X, falling within the Article 5(1)(a) habitual residence filter of jurisdiction against the lessee, and was granted a judgment for the eviction of the apartment; injunction, otherwise the tenant was ordered to pay for the rent and 100% of that rent monthly until effective repossession occurred. The tenant had assets in State Y, different from State X and Brazil, and the lessor sought recognition


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and enforcement of the injunction in that State. Under Brazilian law, such a situation raised special protection to the active possessor, and the recognition and enforcement of the State X judgment in State Y intended to compel the lessee to act against a right that he was entitled to under Brazilian law. The delegate explained that this example demonstrated how the circulation of a judgment of immovable property from one country to a third country might affect the situation in the country where the immovable property is situated.

90. **A delegate from Israel**, co-proponent of Working Document No 73, added that if the HCCH Members wanted a universal Convention, and that they were of the opinion that this policy should be in a universal Convention, then both Article 6(b) and (c) with the addition from the delegations of Brazil and Israel were vital and were the key to have as many countries as possible join the Convention.

91. **The Chair** closed the meeting at 1.05 p.m.

## Procès-verbal No 15

## Minutes No 15

*Séance du jeudi 27 juin 2019 (après-midi)*

*Meeting of Thursday 27 June 2019 (afternoon)*

1. La séance est ouverte à 14 h 40 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

*Tenancies and immovable property – Article 5(1)(h), Article 5(3), and Article 6*

2. **The Chair** noted Working Document No 69 and Working Document No 63 had been introduced before the lunch break, and now Working Document No 83 was proposed by the delegations of Australia, the European Union and Norway.

3. **A delegate from the European Union** introduced Working Document No 83. He remarked that the European Union had attended the Diplomatic Session on the basis of a solution in relation to rights *in rem* and tenancy in the context of Article 6 that had been hard fought to reach. He noted it was an uneasy compromise for a number of delegations. He remarked that Article 6 had withstood repeated attempts to change the provision, which were to no avail. The delegate explained that the European Union was uneasy but sufficiently comfortable with the draft text, and considered that there was probably no better solution for which there could be consensus. For that reason, his delegation did not want to reopen the text. The delegate also highlighted that the European Union had been strongly committed to the protection of parties via an exclusive measure of protection. The exclusive measures were the two cases dealt with in the draft Article 6 in the current text: namely, rights *in rem*, and tenancy. Regarding rights *in rem*, the delegate considered that the Explanatory Report appropriately reflected that rights *in rem* are a narrow concept: it should not reflect a broad notion of anything to do with immovable property. Rather, it should only concern the proceedings the very object of which was the right *in rem* concerned. Concerning tenancies, the European Union was strongly attached to the provisions, particularly for long-term residential tenancies. The delegate highlighted that it is a strong system of protection through mandatory rules concerning tenancies that his delegation sought to preserve through Article 6. However, against the wishes of the European Union, the Pandora's Box of Article 6 had been opened. The delegate remarked it was therefore unsurprising that there were proposals going in two different directions: on the one hand, there were proposals which sought to strengthen the system of exclusive rules under Article 6 and, on the other hand, there were proposals to do away with the system that Article 6 had established. Being confronted with this discussion at a policy level, the delegation of the European Union had done some further soul-searching and had concluded that the Article 6 approach was not indispensable to secure the protections it had thought necessary. The European Union considered there to be an alternative approach that was more desirable than what had been done before: to develop an exclusive filter in the Convention solely for the purposes of circulating the relevant judgments, without the additional protection afforded by Article 6. The delegate acknowledged that Article 6 could have provided a degree of protection, albeit limited, however the European Union ultimately considered that the disadvantages of the Article 6 approach outweighed its benefits. The only utility of Article 6 was that it obliged Contracting Parties to refuse the recognition and enforcement of judgments where neither the State of origin nor the requested State was the State in which the immovable property was situated. However, the delegation of the European Union came to the view that this was neither necessary nor desirable. The delegate acknowledged the approach under Working Document No 69 (proposed by the delegations of Japan, Singapore, Switzerland and the United States of America), which contained an Article 5(3) exclusive filter, and which deleted Article 6 in its totality. Yet, the European Union did not support this approach and considered it necessary to make an additional proposal, for two reasons.

4. First, the delegate considered option 1 of Working Document No 69 to overshoot in its protection. The proposed Article 5(3) in Working Document No 69 referred not to "rights *in rem*" or "long-term tenancy" but, in a general fashion, to "a right in respect of immovable property". The delegate highlighted that this was a new notion. He also stressed that it was extremely broad, and vague, and with uncertain meaning; the exclusive filter would thereby exclude many things. However, the European Union considered an exclusive filter for such matters was unnecessary. The delegate gave the example of a purely contractual dispute over the sales price of immovable property, which would certainly not be covered by the current draft text of Article 6(b) (this example reflected a narrow conception of rights *in rem*, derived from the Explanatory Report). However, the proposed Article 5(3) in Working Document No 69 concerning "a right in respect of immovable property"

might indeed extend to such a dispute. The delegate explained that this would produce the result that a judgment, which ruled on a dispute between two persons from State X concerning immovable property in State Y, could only circulate if it were rendered in State Y. This result did not make sense to the delegate, who preferred a narrow conception of rights *in rem*. He therefore did not support option 1 of Working Document No 69. The delegate also did not support option 2 of Working Document No 69: while it resolved the problem by excluding all rights *in rem* and tenancies from the scope, it also undesirably narrowed the scope of the Convention.

5. Secondly, the delegate cited a political reason. He recalled that the European Union did not consider that Article 6 was the best approach to deal with rights *in rem* and tenancy issues. Further, the European Union had observed a qualitative difference amongst the other States concerning the political sensitivity aroused by Article 6(b) as compared with Article 6(c). The delegate was convinced that, even for those who staunchly defended Article 6 in a general sense, they were much more attached to Article 6(b) than Article 6(c). Taking into consideration that rights *in rem* was a narrow notion meaning that not a huge quantity of judgments would circulate under Article 6, or would be required to be refused under Article 6(b), and moving away from a dogmatic approach, the delegate explained that the practical obligations imposed upon States by Article 6 were not *qualitatively* large. Therefore, the delegate advocated a move away from Article 6 and favoured the adoption of an exclusive filter for long-term and residential tenancy purposes (the delegate explained that the level of protection was not as necessary for commercial leases as it was for residential tenancies). He suggested keeping Article 6(b) only to protect rights *in rem* as a compromise proposal. He considered this to be a fair compromise, which responded to the necessity of finding reasonable middle ground. He was concerned that the Plenary would otherwise agonise over other solutions only to ultimately return to the current draft text.

6. **A delegate from Australia** thanked the delegations for their participation in the working group. He commented that the discussions had been lively and enjoyable. He sought to emphasise a couple of points. Firstly, Australia sought to reach a compromise. He noted that many delegations were concerned about the impact of Article 6 upon issues of direct jurisdiction. Equally, many delegations considered rights *in rem* in immovable property to be of great importance. The delegate explained that the proposal in Working Document No 83 sought to balance these concerns: it narrowed Article 6 to serve the first concern, yet preserved the broad-based protection in respect of circulating judgments upon rights *in rem* in immovable property. Secondly, he recalled the Chair had asked the delegate to explain the relationship between Working Document No 83 and Working Document No 67. In the event a proposal from either Working Document No 83 or Working Document No 69 were successful, then Working Document No 67 could fall away. If however there were no such changes, then Australia still advocated Working Document No 67 on the basis that it seemed to reflect the consensus of the working group in respect of the definitions of tenancies.

7. **A delegate from Norway** subscribed to the explanations of the previous two delegations. She wished to highlight the way in which the other proposals were too expansive and why they therefore could not be supported. She explained that the expansion of the Article 5(3) filter, or a complete exclusion of the matters from scope under Article 2, would be over-protective and unnecessary. She acknowledged that enforcement was not prohibited by these matters and that enforcement could still be achieved under national law. However, this was not a satisfactory solution because it fragmented the result under different national laws, in a way that did not fit with the purpose of the Convention. She promoted Working Document No 83 as the only solution that achieved an acceptable balance between the two opposing interests. On the one hand, the proposal ensured the circulation of specific decisions if they emanated from the court with jurisdiction, and on the other hand the proposal preserved the mechanism of the Convention where decisions were more civil or commercial in nature (even where they somehow related to immovable property). The delegate considered that a balance had thereby been achieved: the proposal retained the additional filter for tenancy (defined as a "lease" in the proposal), introduced an Article 5(3) exclusive filter, and reduced the Article 6 measures to only rights *in rem*.

8. **The Chair** urged delegations to be precise in their subsequent discussions. He asked each delegation to i) identify their preferred approach, ii) identify any other approach that was possible but less attractive and, iii) identify whether they held strong objections to any approach, and if so explain why.

9. **A delegate from Sri Lanka** noted Article 6 was acceptable to Sri Lanka. She sought clarification of the meaning of "*in rem*" and "tenancy". The delegate explained that title to land and long-term tenancies were core concerns of great sensitivity to Sri Lanka, because they impacted constitutional issues pertaining to devolution. She also noted that there were myriad laws pertaining to tenancies. Therefore, the insulation of "immovable property" in both ownership and long-term leases, in the context of litigation, was an essential safeguard for Sri Lanka if it were to sign up to the Convention. In that light, Working Document No 83 was unacceptable to Sri Lanka. It diluted the protection in Article 6 more than was contemplated. The particular problem under Working Document No 83 was that the protection pertaining to residential tenancies was maintained (which was a concern for particular delegations), but not for long-term tenancies (whether residential or otherwise), even though it had been discussed in the informal working group. The delegate supported Working Document No 73 because it clarified rights *in rem*. The delegate also considered Working Document No 67 to be acceptable, and indeed desirable. However, the delegate emphasised her preference for the original form of Article 6. If there was a decision to move away from the original expression, and if there were to be a compromise solution, the delegate would consider moving to either of the options in Working Document No 69 but not Working Document No 83. She remarked that it would be wrong to say that Sri Lanka had been dogmatic about its concerns, and emphasised that the concepts pertaining to land were very sensitive to the political nature of States.

10. **The Chair** thanked the delegate from Sri Lanka for her structured response, and urged brevity upon the delegates.

11. **A delegate from Argentina** noted the different proposals. She expressed her preference for Working Document No 73 tabled by Brazil and Israel, and fully subscribed to the explanations provided by each of the proponents.

12. **The Chair** asked whether the delegate from Argentina could identify any positions that were 'possible' for her delegation.


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13. **A delegate from Argentina** remarked that if, and only if, the approach in Working Document No 73 did not work, she preferred to keep the original text.

14. **The Chair** noted this was not currently proposed in any of the Working Documents.

15. **A delegate from the People's Republic of China** was conscious of all the approaches and fully supported the approach of the delegation of Brazil. At the same time, the delegate considered the proposal from Australia contained in Working Document No 67 to be acceptable. The delegate did not hold a strong policy position concerning the proposal from the European Union. However, he could not accept Working Document No 69 because his delegation had historic memories of what this private international law conference was supposed to emphasise and achieve. He recalled that the emphasis was on the production of special rules concerning exclusive jurisdiction, and that Article 6(2) was the only one the majority had agreed upon. The delegate did not want, at this late stage of the process, to withdraw from what the Plenary could already have achieved.

16. **A delegate from Israel** expressed support for Working Document No 67, and thanked the delegate from Australia as the provisions in Articles 5(1)(h) and 6(c) were much clearer.

17. **A delegate from Uruguay** supported the proposal of the delegation of Australia in Working Document No 67 and the proposal of the delegations of Brazil and Israel in Working Document No 73. He believed that they clarified the current wording. While the delegate understood and supported the idea that the whole Convention would be in a huge square bracket until Tuesday, he also believed that the proposal by the delegations of Japan, Singapore, Switzerland and the United States of America (Work. Doc. No 69) reflected a whole different approach to what had been agreed so far and was without square brackets in the draft Convention. He considered it to be among the Working Documents with the most substantial difference from the current text of the draft Convention. He described the Plenary as being reticent to change the core agreement reflected in the draft text so far. The delegate was flexible on the issue, and was not married to the current solution, but stressed that his flexibility could be framed within a new consensus to be reached in the Plenary. The proposal of Australia in Working Document No 67 and the proposal of Brazil and Israel (Work. Doc. No 73) were an improvement upon the current situation, whereas the proposal in Working Document No 83 was based upon a different policy choice. The delegate was open to discuss that policy choice but, being realistic, sought to keep the current solution with the improvements made by Working Document No 67 and Working Document No 73.

18. **A delegate from Brazil** responded to the Chair's request for delegations to identify preferred solutions and indicated that he supported Working Document No 67 proposed by Australia. He considered it to reflect an improvement. However, he sought clarification: Were the other delegations in a position to keep the text as it appeared in the draft Convention (reflected in Work. Doc. No 1)?

19. **The Chair** acknowledged that he should allow the delegations to express their support for the current text, and realised it would be useful for the Plenary to address that possibility. He enquired whether Brazil could identify proposals it considered 'possible' to support but, noting that the delegate shook his head, gave the floor to Japan.

20. **A delegate from Japan** spoke to the options he considered to be 'possible'. From the point of view of Japan, it could move forward only if the draft Convention did not have indirect influence on the rules of exclusive jurisdiction in many States. In that regard, it was clear that Working Document No 83 did not touch upon its proponents' rules of exclusive jurisdiction, however it did for other States who had wider rules of exclusive jurisdiction. To the delegate's understanding, the informal working group considered such rules of exclusive jurisdiction to be the essence of discussion. From that point of view, he did not think Working Document No 83 was 'possible'. Instead, he preferred option 1 in Working Document No 69. Further, he believed option 1 in Working Document No 69 could coexist with Article 6. He believed this would reflect a different policy and Japan's preference was for the deletion of Article 6. However, if States wished to retain Article 6(b), the delegate suggested Article 5(3) (from option 1 in Work. Doc. No 69) and Article 6(b) could be blended together.

21. **A delegate from the Republic of Korea** expressed satisfaction with the current versions of Article 6(b) and Article 6(c) as they stood in Working Document No 50. Out of the Working Documents, the delegate preferred the approach in Working Document No 83 in general. He also considered Working Document No 73 to be acceptable if "possession" were mentioned without "the right to possession"; and if it were clear that "right to use" only related to "*in rem* right to use".

22. **Un délégué du Canada** exprime sa reconnaissance à ceux qui ont travaillé sur cette question, et en particulier, le président du Groupe de travail. Il indique que le texte actuel de l'article 6(c) ne convient que très peu à sa délégation. Pour cette raison, le Canada aurait une préférence pour la première option, telle que présentée dans le Document de travail No 69. Il souligne toutefois que sa délégation peut faire preuve de flexibilité et pourrait accepter les propositions des Documents de travail Nos 67 ou 83, à condition toutefois de supprimer la référence à la période de six mois. Il poursuit en expliquant que la proposition contenue dans le Document de travail No 73 complique la question au lieu de la simplifier, bien qu'il en comprenne les raisons sous-jacentes.

23. **A delegate from the Russian Federation** could live with the initial phrasing of Article 6 as it was contained in Working Document No 1.

24. **The Chair** clarified whether the delegate wished to identify other 'possible' options. The delegate declined, and the Chair gave the floor to the European Union.

25. **A delegate from the European Union** could not support Working Document No 73. He associated himself to some extent with the intervention by the distinguished delegation of the Republic of Korea, in the sense that the words "rights *in rem*" would obviously fall within the rights *in rem* provision. However, the delegate did not think this needed to be said in the main text. The delegate also had no problem with rights arising from possession as being considered as *in rem* rights but, again, considered that these clarifications could be made in the Explanatory Report. He would not support such changes in the main text.

26. **A delegate from the United States of America** sought to assist the Chair. In addition to its preference for option 1 in Working Document No 69, the delegation could also support option 2 in Working Document No 69, and could accept Working Document No 83. However, he was opposed to Working Document No 73. After the Chair en-


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quired whether the delegate could support the current wording as reflected in Working Document No 50, the delegate responded that the United States of America would prefer instead one of the changes being discussed right now.

27. **A delegate from Singapore** supported the proposal from the European Union in Working Document No 83 as an acceptable compromise solution. He recalled his delegation's opposition to Article 6 as a whole, however he acknowledged that Article 6(b) was sufficiently universal to justify the kind of 'super protection' afforded by Article 6. Anything that went beyond this narrow, universal understanding of rights *in rem* was not acceptable.

28. **The Chair** attempted to map a path forward. The backdrop of the discussion was that there was a lack of agreement as to how to address rights *in rem* in immovable property, and that if there were no agreement it would be excluded from scope. This seemed to be a great shame, because there was a high degree of comfort in the room for some judgments concerning immovable property to circulate. For example, the Chair had not heard anything to suggest that a judgment should not circulate where it related to rights *in rem* in immovable property and was rendered in the State in which the land was situated. That seemed to be pretty obvious to the Plenary. The Chair remarked that it would be a 'failure of choice' if disagreements concerning structure meant that these matters were excluded from scope. At the same time, he remarked that the history and content of the current 'package' demonstrated that Articles 5 and 6 were interdependent. He considered that treating Articles 5 and 6 as a 'package' satisfied the concerns of some delegations but did not go far enough for others. In that respect the Plenary could consider each provision on an issue-by-issue basis, and make separate decisions as to each. However, the Chair wished to see whether the Plenary could agree on a package that struck a balance. The Chair then made tiered proposals: First, could there be consensus to keep Article 6 as it appeared in Working Document No 50, coupled with the modifications to Articles 5 and 6 as they appeared in Working Document No 67? Second, and if that could not be accepted, did Working Document No 83 reflect an overall consensus, or were there strong objections to it? Third, and if that could not be accepted, did Working Document No 69 reflect an acceptable consensus? If no package could be accepted, then the Chair proposed to work through each provision on an issue-by-issue basis (*i.e.*, the Plenary would consider Art. 6 and each of the relevant proposed amendments). Having stated the course for consideration, the Chair turned to the first package proposal: Could the existing text from Working Document No 50 be retained with the modifications from Working Document No 67, or was that unacceptable?

29. **A delegate from Switzerland** noted that she did not know what 'unacceptable' meant in that context. Recalling the interventions from the United States of America and Singapore, the delegate from Switzerland preferred not to retain the current text.

30. **A delegate from the United States of America** shared the same concern regarding the interpretation of acceptability as the delegation of Switzerland.

31. **A delegate from Israel** noted his obvious preference for the proposal of Israel. However, after hearing the discussion in the room the delegate was convinced that the approach described by the Chair would be best: that is, to retain the text with modifications from Working Document No 67. He realised that some States may not like the solution, but that Israel considered it the best option at the moment.

32. **A delegate from Singapore** could retain Article 6(b) in its current form but could not accept Article 6(c) in any way.

33. **The Chair** recorded that this meant 'no', the proposal was unacceptable to the delegation of Singapore.

34. **A delegate from Sri Lanka** associated her position with the delegate from Israel: Working Document No 67 plus the present format would work for her delegation.

35. **The Chair** did not need to hear whether the proposal was agreeable; he only sought interventions from States where the proposal was not possible. He foreshadowed that he would test consensus as to other possible solutions as well (in which case the Plenary would have to choose between the different 'packages'), however there would need to be a high degree of enthusiasm for alternative proposals if the current proposal obtained consensus. However, after observing some voices of concern (particularly from the proponents of Work. Doc. No 69), the Chair concluded that there was no consensus on the first package proposal. He then sought to test the second 'package': Working Document No 83. He reminded the Plenary that, if every package were ruled out, he would proceed to consider the provisions issue by issue, which would produce very narrow results as to immovable property.

36. **A delegate from Brazil** responded negatively to the Chair's test for consensus on Working Document No 83. The delegate recalled that years and years of work had proceeded upon the basis that Article 6 had no square brackets. For more than 1,600 days there had been text on exclusive jurisdiction in Article 6. For more than 1,335 days there had been no obligation upon States to change national laws, but a compromise that States would not establish something different in national law. For that reason, Brazil was not in a position to leave without something in the language along the lines of Working Document No 83.

37. **The Chair** understood the delegation's concern that some sort of package involving Article 6 had been in contemplation for a very long time. However, he reminded the Plenary, as he had said in every meeting, that all the text was in implicit square brackets and nothing was certain until a decision had been made at the Diplomatic Session. It was for this Diplomatic Session, here and now, to reach consensus on issues that would impose obligations upon future Parties to the Convention.

38. **A delegate from Japan** emphasised his first preference was to delete Article 6, but that he could agree with Article 6(b). However, he could not live with Working Document No 83 because of its proposed Article 5(3).

39. **The Chair** concluded that the second package did not have immediate consensus. He proposed the third package: Was there consensus on option 1 in Working Document No 69? Having asked the question, the Chair observed that many signs were flourishing.

40. **A delegate from Norway** could not live with option 1 in Working Document No 69.

41. **A delegate from Israel** could not accept either option in Working Document No 69.


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42. **A delegate from the European Union** had spoken at length on this before. He confirmed that both options under Working Document No 69 were unacceptable.

43. **A delegate from the People's Republic of China** concurred with the last sentence of the delegation of the European Union.

44. **A delegate from Brazil**, for the same reasons he had provided, was not in a position to live with the proposal.

45. **A delegate from the Republic of Korea** was not willing to accept option 1. The delegation wished to retain Article 6(b), and was uncertain as to the meaning of "right in respect of immovable property".

46. **The Chair** observed that the interventions were sufficient to indicate there was no consensus on the third package. Therefore, given none of the packages had obtained consensus, the Chair had no alternative but to consider each particular proposal to ascertain whether there was consensus on each. The Chair began by directing the Plenary to consider whether Article 6 should contain a positive obligation *not* to recognise and enforce the two categories of judgments (mentioned in Art. 6 of Work. Doc. No 50). First, he turned to Article 6(c): Were there delegations who could not support the positive obligation *not* to recognise or enforce judgments on tenancies for a period of more than six months?

47. **A delegate from the European Union**, not wanting to complicate the process, had a suggestion: if, having embarked upon the laborious process of considering provision by provision, there were no consensus, the result would be that the whole issue was excluded from scope. However, he recalled that there was substantial reluctance to adopt the package from Working Document No 69 which proposed total exclusion from scope as one of its options. He remarked that this produced a paradoxical solution. He therefore appealed to other delegations to consider that there had been less objection to the first two package proposals (highlighting that the third package, Work. Doc. No 69, fairly stood no chance of achieving consensus). He observed there was a lesser degree of resistance to package two (and acknowledged the European Union's self-interest in that proposal) and package one.

48. **The Chair** regarded the delegate's intervention as more passionately put than the Chair's earlier warning that the failure to obtain consensus on a package would entail the possibility for no consensus at all on any of the individual provisions. This would be a shame because there seemed to be consensus that some provision would be acceptable. However, the Chair proposed to continue down the path of considering issue by issue. He did not rule out the possibility of returning to consider packages at a later point, but for the moment he redirected the Plenary to consider Article 6(c) and whether there was opposition to the imposition of a positive obligation *not* to recognise and enforce under national law judgments of that kind.

49. **A delegate from Switzerland** did not wish for the Article 6(c) obligation to be imposed.

50. **A delegate from Singapore** opposed Article 6(c) in any form. **A delegate from the United States of America** took the same position, as did **a delegate from Japan**.

51. **The Chair** concluded it was clear that there had been no consensus to impose a positive obligation *not* to recognise and enforce judgments of this kind. That did not mean they could not circulate (the Chair noted he would come to how they were dealt with under Art. 5 shortly). On this decision-making approach, a judgment in that category would not appear in Article 6. The Chair then turned to Article 6(b), concerning rights *in rem* in immovable property. The Chair wanted to test whether there was consensus on 6(b) and, if that were the case, he proposed to put Working Document No 73 to the Plenary to see if the consensus could be extended further. Thus, the Chair asked first whether there could be consensus to include Article 6(b) in its original form.

52. **A delegate from Switzerland** had grave concern with respect to Article 6(b). Her flexibility with Article 6(b) depended upon how Article 24 would be addressed, but on the whole the delegation of Switzerland preferred not to have Article 6(b).

53. **A delegate from the United States of America,** like the delegate from Switzerland, preferred not to have Article 6(b). However, he would not block consensus. He flagged that the United States of America would be concerned about how the issue would be referenced in Article 24.

54. **The Chair** enquired of the delegate from Switzerland whether she adopted the same nuanced position as the delegate from the United States of America, and noted that she agreed. The Chair proposed to mark Article 6(b) in square brackets as a possible component to a new 'package' proposal. Treating Article 6(b) in that manner, he sought to test whether Working Document No 73 could extend upon this possible area of consensus.

55. **A delegate from Switzerland** had serious concerns, not because rights *in rem* of the kind in Article 6(b) should not be preserved, but because she did not want to attempt any sort of autonomous definition of rights *in rem*, nor entertain any attempt to include rights that were not in fact rights *in rem*. She expressed her strong opposition to this approach.

56. **A delegate from the European Union** confirmed that he could not support Working Document No 73. However, he was of the view that the concerns of its proponents could be accommodated to a great extent by addressing the issue in the Explanatory Report.

57. **A delegate from Singapore** aligned himself with the delegation of Switzerland and could not accept any suggestion that Article 6 cover right to possession nor right to use.

58. **A delegate from the United States of America** could not support the additions.

59. **A delegate from Norway** could not accept the proposal.

60. **A delegate from Brazil** recalled the possible way forward suggested by the delegate from the European Union. As far as the delegate from Brazil understood, the delegations from the Republic of Korea and the European Union had indicated their openness to consider drafting improvements. While Brazil did not want to enlarge the policy decision (and simply wished to refine the explanation), he encouraged the Chair to explore an option whereby amendments were made to change the text. The delegate from Brazil signalled he could be flexible under that approach.

61. **The Chair** reiterated that the informal working group had already looked at drafting and emphasised the need for progress. He remarked that there was a great deal of scope

to address the reassurances sought by including them in the Explanatory Report. He suggested the Explanatory Report could explain that the provisions applied to all rights *in rem* (*i.e.*, rights against the world in general) including "rights to possession" and "rights to use" where such rights were considered to be "rights *in rem*". He observed that many delegations indeed agreed that most of the territory would be covered by "rights *in rem*". The concern arose with respect to specifying "rights to possession" and "rights to use" as rights *in rem*: if they were indeed included amongst "rights *in rem*", then there was no need to specify it in the text; however if they were not included amongst "rights *in rem*", specifying them as such in the text represented a broadening of the concept which was confusing and made some States uncomfortable. The Chair elaborated that the confusion arose from the fact that the same rights could be characterised as "rights *in rem*" by one State but not in others. The Chair was confident that the Explanatory Report could capture the understanding that "rights to possession" and "rights to use" were treated differently by different States in this respect. Having outlined the area of disagreement, the Chair nonetheless returned to the focus of current discussion which was the proposal to amend the text under Working Document No 73.

62. **A delegate from Israel** indicated that if there were no support for Working Document No 73 he would not block consensus. However, he reiterated his dismay that Israel had never purported to widen the scope of the provision, and thought it misleading to characterise the position of Israel as such. The delegate expressed his support for the Chair's suggestion but stressed that Israel did not attempt to widen the scope. He emphasised that Israel could be flexible and not insist on its position. The delegate expressed his disappointment that the same kind of flexibility had not been demonstrated by other delegations.

63. **A delegate from Canada,** like the delegate from Switzerland, could not accept Working Document No 73. The delegate was open to consider including text in the Explanatory Report along the lines suggested by the Chair, although she emphasised the need for caution in its treatment of these matters.

64. **A delegate from the People's Republic of China** took the floor to support the concerns of the delegation of Brazil, who he considered to be an important contributor to the whole process. The delegate from the People's Republic of China suggested that, if there could be consensus to address those matters in the Explanatory Report, then there could be consensus to address those matters in the text of the Convention. The delegate sought to address two issues. First, if everyone considered the scope of the definition of "rights *in rem*" to be the same, then whether the word appeared in the text or the Explanatory Report did not pose any additional obligations because it was already there. Therefore, the rules concerning the need for consensus to introduce an obligation did not apply, because nothing was sought to be brought in or expanded. Secondly, even if there were no agreement as to whether all the senses of "rights *in rem*" were included, the delegate suggested that the words "where appropriate" could resolve the issues: the text could thus read "*where appropriate* including the right to possession and the right to use". He explained that the words did not entail a change in the legal meaning of the text or the Explanatory Report.

65. **A delegate from Japan** could not support Working Document No 73. He stressed his hope that the draft Convention would not have any indirect influence on the national laws and rules of exclusive rules of jurisdiction.

66. **The Chair** enquired whether any delegations against Working Document No 73 would be comforted by the addition of the language "where appropriate". He observed there was no support for this proposition. The Chair therefore summarised the position: the proposal in Working Document No 73 did not command broad support, let alone a consensus. Yet it was almost universally accepted that "rights to possession" and "rights to use" could qualify as "rights *in rem*" and that, where they did, they fell within the paragraph. He suggested this could carefully and concisely be reflected in the Explanatory Report. The Chair noted that the *co-Rapporteurs* nodded in support. Proceeding on that basis, the Chair explained Article 6(b) would become 6, given that there was no Article 6(c).

67. **A delegate from Brazil** thought it important to keep things well recorded in the minutes of the Diplomatic Session. In that regard he wished to emphasise his support for the proposal from the delegation of the People's Republic of China and thanked the delegations of the Republic of Korea and the European Union for their attempts to change and improve the language in an effort to reach consensus. However, observing that there was not strong support for the words "where appropriate", the delegate was in a position to live without the proposal. He therefore made the same appeal as the delegate from Israel: the delegate from Brazil was eager to see the flexibility of other delegations with respect to their package proposals.

68. **The Chair** directed the Plenary to the package proposals. He recalled that the delegate from Japan had correctly observed that Article 6(b) could co-exist with a number of different formulations of Article 5. Putting Article 6(b) to one side (on the basis that it might be adopted by consensus as part of a new package) the Chair proposed to consider Article 5, and then Article 24, before stepping back to consider whether on the whole there could be consensus. The Chair therefore turned to Article 5 and the minimum adjustment to it contemplated by Working Document No 67 (the adjustment, he noted, inspired no opposition). The question became whether an alternative proposal commanded consensus, or whether the approach under Working Document No 67 could be adopted (which would affect a change to Art. 5(1)(h) and *not* introduce a new Art. 5(3)). An alternative option was option 1 in Working Document No 69, and the option in Working Document No 83 relating to Article 5. The Chair noted that one of the barriers to the acceptability of Working Document No 83 was the restriction to periods of more than six months. The Chair asked the proponents of Working Document No 83 whether that was an essential element of the proposal.

69. **A delegate from Australia** could live without the reference to six months.

70. **A delegate from the European Union** saw a marked difference between short- and long-term leases, but would not block consensus if the Plenary were to give up the distinction.

71. **A delegate from Norway** had a clear preference for keeping the distinction, but would not block consensus if that was what was needed.

72. **The Chair** proposed that there were three possible approaches. First, one possibility was Working Document No 69 (the insertion of Art. 2(1)(h) and the deletion of Art. 5(3)). A second approach was Working Document No 83 (which included both Art. 2(1)(h) and Art. 5(3)). A third approach involved simply deleting the reference to the length of the tenancy in Article 5(3). The Chair turned to


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the second approach and asked whether there were any strong opposition to Working Document No 83 in its current form.

73. **A delegate from Japan** recalled he had already said he had strong opposition. He indicated that a lot of delegations may have different rules on exclusive grounds of jurisdiction (including Japan) and that it was his understanding that the draft Convention should not touch on national rules of exclusive grounds of jurisdiction, even if indirectly.

74. **The Chair** clarified that the delegate from Japan required the additional breadth of protection afforded by paragraph 3 of Working Document No 69.

75. **A delegate from Brazil** admired the Chair's attempt to bring consensus. However, he strongly opposed Working Document No 83.

76. **A delegate from Japan** suggested that if Working Document No 83 were adopted, judgments ruling upon a "right to use" could circulate under Article 5(1). He wanted to make that point clear.

77. **A delegate from Switzerland** did not express strong opposition but needed to clarify the effect of Working Document No 69. She emphasised that Switzerland had intended the Working Document as a package. Paragraph 3 was very broad and, for Switzerland it was part of a package that included the total deletion of Article 6. If Article 6 were not totally deleted, then Switzerland no longer wished to have Article 5(3) in the broad form it took in the Working Document. If Article 6 were not totally deleted, the delegation of Switzerland would support the treatment of Article 5 in Working Document No 83. The delegate was flexible as to the duration of the tenancies if that was something that would accommodate consensus. However, the extreme breadth of Article 5(3) in her previous proposal would become inappropriate, because there needed to be some kind of balance.

78. **The Chair** acknowledged that this was why he initially sought to obtain consensus on the basis of packages, however that approach had not worked. The Chair indicated the need for a coffee break, and asked the delegates to consider: Could the Plenary, however begrudgingly, accept the approach in Working Document No 83 but with a reference to "a period of more than six consecutive months" deleted? But before that, he urged the Plenary to consider coffee.

79. Before turning to Working Document No 83 REV, the Chair suggested the First Secretary introduce Working Document No 2 REV REV, which was the draft Preamble.

*Working Document No 2 REV REV*

80. **The First Secretary (Mr Ribeiro-Bidaoui)** indicated that Working Document No 2 REV REV reflected some of the previous proposals and resulted also from bilateral consultations. In the document, "for all" had been added in the concept of access to justice; the multilateral character of trade, investment and mobility was underlined; following a proposal of the delegation of the European Union, "to facilitate the effective recognition and enforcement of such judgments" had been added; and the importance of predictability and certainty in relation to the global circulation of foreign judgments was outlined.

81. **The Chair** thanked the delegations for their flexibility on this matter. He further asked whether it could be adopted by consensus.

82. **A delegate from the United States of America** noted that his delegation went through some informal consultations on the matter. He was of the view that the draft Convention should promote bilateral and multilateral trade. He further expressed support for the language used in Working Document No 2 REV REV.

83. **The Chair** noted that it was agreed by consensus and outlined that solid progress was being made. Then, he directed the debates towards Working Document No 83 REV. He stated that the document deleted the reference to a period of six months. Further, he pointed out that Japan had become a proponent and queried the latter to indicate the changes that have been made in this concern.

*Working Document No 83 REV*

84. **A delegate from Japan** pointed out the existence of a so-called 'grey zone' where some rights might be considered as *in rem* in certain countries, which means that they fall under the scope of the exclusive jurisdiction provision, whereas they might be seen as *in personam* in others, which means that they do not fall under the scope of the exclusive jurisdiction provision. In his view, this discrepancy might prevent States from joining the Convention, if the Convention would not deal with it properly. He thought that during the Special Commission meetings, a judgment that ruled on a contractual right in relation to the registration of immovable property was within the scope of Article 5(1), rather than Article 6. He added that it was unclear whether such rights were *in rem* or *in personam*. For these reasons, his delegation suggested putting them under Article 5(3).

85. **The Chair** remarked that almost all delegations wanted to make changes in Working Document No 83 REV. He continued saying that the Plenary should find a practical way forward relating to this issue. Then, he checked whether there were any serious difficulties with proceeding on the basis of Working Document No 83 REV as a pragmatic compromise approach.

86. **A delegate from Sri Lanka** agreed with the deletion of Article 6(c). In her view, it would allow long-term leases to circulate under national law according to paragraph 3 in Article 5. Further, she suggested the deletion of the word "residential" and expressed her concerns on that point.

87. **The Chair** asked the room if someone had concerns about deleting the word "residential".

88. **A delegate from Canada** said that she had concerns and further asked whether the comments made by Sri Lanka were not addressed under Article 6(b). She added that a long-term commercial lease would be treated in many instances as a right *in rem* in Canada.

89. **The Chair** agreed, saying that as a matter of common law, a long-term lease creates rights *in rem*.

90. **A delegate from the European Union** echoed the comments made by the delegation of Canada in the sense that the concerns raised by the delegation of Sri Lanka could be dealt with in the Explanatory Report, with respect to Article 6(b). He suggested following a uniform interpretation of those long-term leases and defining them as rights *in rem*, irrespective of national law. He further added that the Plenary could reach a consensus on that point.

91. **The Chair** agreed and recalled the need for an autonomous interpretation of this instrument. He thought that the views expressed by various delegations were that long-term

leases create rights *in rem*. He added that Article 6(b) allowed a greater protection than Article 5(3). He asked Sri Lanka whether this approach could be acceptable.

92. **A delegate from Sri Lanka** stated that her concerns arose because of the lack of certainty as to what a right *in rem* was but with this clarification, she added that it would be acceptable for her.

93. **The Chair** asked the room if there was consensus to proceed on this basis. Otherwise, a limb-by-limb approach might be required.

94. **A delegate from Israel** indicated that his delegation could go along with the proposal. However, he outlined that there could be different applications of the same right under Articles 5(3) and 6(b), depending on the situation of the property. On that point, he suggested adding a clarification in the Explanatory Report.

95. **A delegate from Brazil** thanked the delegation of Japan for its flexibility and further sought clarification concerning the proposal. In his view, it was a package where issues of exclusive jurisdiction were addressed, irrespective of the application of Articles 16 and 24(3). He was not sure about having a different policy from the proposal regarding the deletion of the last sentence of Article 24(3). However, he thought that comments made by Israel did not match the understanding of the Plenary and sought further clarification on that point. Then, he questioned whether the term "registration" in paragraph 3 should be kept. In his view, there was no policy difference regarding long-term leases to be treated as rights *in rem* and subjected to Article 6(b) and Article 16. He further asked the Chair whether the suggestion made by the latter regarded an international concept of rights *in rem*, which includes long-term leases.

96. **The Chair** replied saying he suggested building a package. He added that the debates will concern the relation between Article 6 and 24 and whether there was a policy difference. He noted that if a consensus might not be reached overall, then an alternative must be found. He continued saying that the Plenary would then come to Article 24, so the question could not be answered now. Concerning Article 6(b), the Chair explained that in many systems, very long-term leases give rise to rights *in rem*. He added that it would be unsatisfactory if they did not enjoy the Article 6(b) protection. Then, he remarked that delegations gave conflicting views on whether the character of the right should depend on the law of the place where the land was situated or not.

97. **A *co-Rapporteur*** was of the view that all legal concepts included in the Convention should receive a uniform interpretation to ensure a uniform application. He said that it was inconsistent with Article 21 if the same right may be qualified as *in rem* and subjected to Article 6(b) in some jurisdictions and not in others. He suggested saying that tenancy needs to receive the qualification as a right *in rem* in all Contracting States to ensure a uniform application.

98. **A delegate from the European Union** observed that an autonomous definition under the Convention did not necessarily mean that every long-term lease must be qualified as a right *in rem*. He added that, if the law applicable to the right stated that it was *erga omnes*, then it should be regarded as a right *in rem* under the Convention, even though it was not called "right *in rem*" under the applicable law.

99. **The Chair** asked whether it could be agreed to build the package on immovable property by adding Article 5(1)(h) and Article 5(3), as found in Working Document No 83 REV.

100. **A delegate from Brazil** observed that his delegation was flexible to go along those lines subject to the following comments. First, the language should be slightly adjusted. On this point, he echoed his intervention with respect to the word "registration" in paragraph 3. Secondly, he proposed to cover Article 24(3) in the package. Thirdly, he suggested the creation of a uniform concept of rights *in rem*, which includes long-term leases. However, he added that he was still hesitant because he did not know what the relevant duration should be. Further, Brazil was not familiar with this kind of legal category. However, he outlined that he was flexible to accommodate the compromise. He outlined his openness to discuss those points and added that his delegation would be in position to agree on this call.

101. **The Chair** indicated that he needed to press the Plenary a little bit to make progress. He pointed out that it was the third time the Plenary came back to the overall package when discussing Article 24. Concerning the language suggestions, the Chair strongly suggested making a decision on the text which delegations had in front of them. Further, he indicated that if Brazil had a language improvement to suggest, it might persuade a significant number of delegations and then put it forward at the Second Reading. In his view, the autonomous interpretation was not a question with regard to the duration of the lease. Rather, the key was whether the rights were *erga omnes*, irrespective of what they might be called in the State of origin.

102. **A delegate from Switzerland** sought clarification of the scope of the discussion. In her view, the debates concerned Article 5(3), but it seemed that Article 6 was also covered. She further said that she was unwilling to discuss the latter provision.

103. **The Chair** indicated that the debates concerned Article 5(3), but in order to ascertain whether that was acceptable or not, clarification was sought by Sri Lanka and offered by a number of delegates on how Article 6 should be understood.

104. **A delegate from the European Union** stated that if the Plenary would go along with the understanding that was discussed before, it should help the delegation of Brazil with their specific concerns. He explained that this was not specific to long-term leases, but that it also applied to possession issues, which were also protected *erga omnes*.

105. **A delegate from Israel** pointed out that this Article and Article 6(b) were connected. In his view, it was also part of the package and he would be happy to have the clarification made by the European Union indicated in the Explanatory Report.

106. **A *co-Rapporteur*** clarified what he had to say in the Explanatory Report. First, with regard to the concept of rights *in rem*, as paragraph 266 of the Explanatory Report stated, rights *in rem* were rights that directly concern an immovable property and were enforceable against everybody (*erga omnes*). He continued saying that the Explanatory Report contained a list of undisputable rights *in rem* (*e.g.*, ownership, mortgages, etc.). He added that the Explanatory Report could also include the reference to leases having, in certain circumstances, effect against third parties. The second point he wanted to raise concerned the new category included in Article 5(3). He would appreciate it if


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some delegation, at least Japan, could give some examples allowing a better understanding of that new legal concept.

107. **The Chair** agreed that helpful information about this point appeared in the Explanatory Report. He then suggested the Plenary add this approach to Article 5 to the immovable property package, in Working Document No 83 REV.

108. **A delegate from Brazil** suggested that his delegation would be happy to proceed in that way provided that it could see the draft language to be included in the Explanatory Report before agreeing to this package.

109. **The Chair** observed that progress needed to be made on the text. He outlined the high level of clarity and comfort everyone had about the text of the Explanatory Report which would moreover go through a subsequent process. Then, he reminded delegations that no decision on the language of the Explanatory Report would be made in the Plenary. The meeting could ask the *co-Rapporteurs* to confirm a certain understanding of the text, but could not pin down every word of the Explanatory Report.

110. **A delegate from Brazil** agreed to proceed on that basis provided that in the future, discussions will allow a better understanding of this new category of long-term leases. He hoped that the text of the Explanatory Report would be clear enough to allow States to create a new legal category. Otherwise, if there were no clear understanding of what a long-term lease is, any decision from Brazil would be understood as a right *in rem* because there was not any distinction in that State.

111. **The Chair** recalled that the Explanatory Report was not allowed to create new rules about long-term leases or any new legal category. Rather, it would explain the scope of Article 6(b). It would also explain that to the extent that a residential lease of immovable property did not create rights against third parties that come within Article 6, judgments related to such a lease will then instead fall under Article 5(3). Article 5(3) would also create a high level of protection. The Chair further stated that he appreciated the flexibility shown and noted that progress was being made. He suggested the Plenary then turn to Article 24 and to Working Document No 46 REV.

*Article 24*

112. **The Chair** suggested taking two interventions who favoured keeping the last sentence of Article 24(3), and two others who favoured the deletion of that sentence; then, a decision would be made.

113. **A delegate from Brazil** sought clarification. Namely, he was in position to support the intention of the text, based on the possible compromise solution that was achieved on the whole package on the protection of situations of exclusive jurisdiction. In his view, international agreement brought by the Convention should be followed on the basis of national law, according to Article 16, but also on the basis of other international treaties. Then, he expressed support for keeping the last sentence in paragraph 3 of Article 24.

114. **The Chair** suggested that this issue would be discussed, and then the Plenary would decide whether the package could be adopted by consensus. Otherwise, the room would resume the debate and proceed limb by limb. He further asked for two interventions suggesting the deletion of the sentence.

115. **A delegate from Switzerland** thought that the protection of good faith in international dealings should be sufficient in this context. She added that keeping this sentence in paragraph 3, but not in paragraph 4, would create a discrepancy between States and Regional Economic Integration Organisations. For these reasons, deleting the sentence would increase her comfort level with the whole package.

116. **A delegate from the United States of America** echoed the comments made by Switzerland and said that in the case of a violation of this treaty, international law already provides avenues and remedies. Thus, he did not see the need for specification in this instrument.

117. **The Chair** sought clarification with respect to the obligation of good faith Switzerland mentioned and asked what constraints it imposed in this respect.

118. **A delegate from Switzerland** thought that this would need to be explored on a case-by-case basis. So, she would rather not have this sort of provision in the text.

119. **A delegate from Israel** remarked that he understood the sensitivities from both sides. He further echoed comments made by the United States of America saying that if two States have a treaty in which they agree to violate the obligation under Article 6, it should be seen as a violation of international law. He added that he did not see how this case could not be considered a violation. For this reason, he supported the deletion of the sentence. He suggested to put this clarification forward in the Explanatory Report if it could help Brazil. He recalled that there is no dispute resolution clause in the Convention. Then he encouraged other delegations to be flexible on that point, as it was an important issue for Brazil.

120. **A delegate from Switzerland** indicated that her delegation was very uncomfortable with assuming this obligation in international law. Then, she asked other delegations to show flexibility on that point.

121. **A delegate from Japan** expressed support for the deletion of the sentence. However, he outlined that his delegation might show some flexibility.

122. **The Chair** outlined that in the absence of this sentence, the obligation of good faith applies. However, he realised that this question depends on the circumstance; thus, more precision might not be achieved. He observed that against that backdrop, to include this sentence was to include an additional obligation to defer to Article 6, regardless of the content of other treaties concluded after this Convention.

123. **A delegate from the European Union** indicated that it was a crucial moment of approaching a consensus. He was of the view that this sentence should be deleted. However, he pointed out that he did not want to send the signal of blocking the consensus.

124. **The Chair** asked the Plenary whether consensus could be reached on the overall package of immovable property provisions: Article 6, reduced to Article 6(b), Article 5 as found in Working Document No 83 REV, and Article 24(3) with the inclusion of the last sentence. He outlined the lack of enthusiasm of certain delegations, and further stated that if the Plenary could not proceed with this whole package, it would be necessary to unpack it.

125. **A delegate from Switzerland** asked whether consensus might be reached without the last sentence of Article 24(3).

126. **A delegate from Australia** noted that there was another element to this package that was particularly important for those against the deletion of the last sentence, namely, Article 16, which was another safeguard of the overall package because recognition and enforcement remained subject to Article 6, with Article 6(b) still in existence.

127. **The Chair** agreed, saying that national law could not derogate from Article 6 providing for the recognition and enforcement of judgments on this narrow set of issues from a State other than the State in which the land was situated. The Chair asked what material difference it would make if, in addition, subsequent treaties could not derogate from Article 6. He queried whether the United States of America could live with that approach.

128. **A delegate from the United States of America** indicated that he would have preferred the Chair having asked whether consensus could be reached to remove the reference to Article 6 from Article 24. However, to reply to the question that was asked, he added that his delegation reluctantly would not block consensus.

129. **The Chair** asked whether Switzerland had the same reluctant approach.

130. **A delegate from Switzerland** stated that her delegation also would not block the consensus. However, she further highlighted her concerns on this point, and she added that it would cause difficulty when ratifying the Convention in the future.

131. **The Chair** summarised the situation. Namely, delegations expressed comfort about the obligation of good faith and proposed the deletion of the sentence. The Chair then asked whether it would be a serious obstacle to progress if, against the backdrop of that good faith obligation, the sentence was omitted. He further queried whether Brazil could proceed on the basis that everything that has been discussed on immovable property was agreed, and then allow the Explanatory Report to emphasise the obligation of good faith in this context with the language of the last sentence of Article 24(3) omitted.

132. **A delegate from Brazil** thought that consensus had been reached the other way around. He further expressed his gratitude to Switzerland and the United States of America for agreeing with the text despite their concerns.

133. **The Chair** remarked that he was checking if his understanding of the position in relation to trying to reach a consensus the other way around was right. He suggested to proceed on the basis that Article 6, reduced to Article 6(b), Article 5 as found in Working Document No 83 REV, and Article 24(3) with the inclusion of the last sentence were adopted. He outlined the concerns expressed but noted that this might be the only realistic prospect for dealing with these issues rather than excluding all immovable property from the scope. He echoed the comments made by Brazil and thanked delegations for their flexibility and for not blocking the consensus. The Chair noted that square brackets around Article 6 were removed.

134. **The Chair** directed the discussion towards declarations with respect to judgments pertaining to governments. He gave the floor to the chair of informal working group IV to introduce Information Document No 6.

*Declarations with respect to judgments pertaining to governments*

135. **The chair of informal working group IV** drew the attention of the Plenary to Information Document No 6 of June 2019 and added that he would mention briefly Information Document No 5 of April 2018, which was the previous report from this working group. Before that, he thanked all the members of the group for their cooperative approach. Then, he explained that there was a consensus from a technical point of view on Article 20(1) and (2). He remarked that the text was bracketed because the policy as to whether the Plenary should adopt Article 20 was still to be decided. Paragraph 1 made clear that the declaration can only be made in relation to a State, a natural person acting for that State, a government agency of that State, or a natural person acting for such a government agency. He noted that legal persons that do not qualify as government agencies cannot be the subject of a declaration under paragraph 1. Another change regarded the last sentence of paragraph 1, making clear that the declaration cannot distinguish between judgments where the State, a government agency of that State, or a natural person acting for either of them was a defendant or a claimant. Further, he added that the group agreed on the text of Article 2(1)(q) from a technical and substantive point of view. Article 2(1)(q) was a new issue that had not been discussed previously, before the Diplomatic Session. It was a concern raised by Argentina most recently in Working Document No 74. Having reached a consensus on that point, he thought that Argentina might rescind that Working Document. He further indicated that Information Document No 6 provided polite suggestions for the Explanatory Report. These suggestions addressed concerns raised by Argentina and Brazil. He added that the group reached a consensus on that point, in paragraph 71 of the Explanatory Report. It clarified that the applicable rules on immunities were relevant to the question of whether a State can be found liable under the Convention. He remarked that States can apply their interpretation of immunity law to decide whether a judgment should be recognised and enforced since Article 2(5) states that nothing in the Convention affects immunities of States. He pointed out then that the other changes were smaller, namely, the language of the Explanatory Report was slightly softened ("three criteria" instead of saying "three core criteria") whereas the criteria remained unchanged. In terms of new ideas, it had been agreed by consensus to add, regarding Article 20, that natural persons who were or were not officials but were acting for the State or a government agency could be included in a declaration under Article 20. Information Document No 6 further clarified that political subdivisions of a State (including regional and local governments) can be included in a declaration under Article 20. Then, he indicated that the group tried to set a starting point for the Explanatory Report on the new Article 2(1)(q). However, he added that the language was not intended to be an exhaustive interpretation of this new Article. Namely, the document picked up some language from the United Nations General Assembly resolution 69/319 of 10 September 2015, on "Basic Principles on Sovereign Debt Restructuring Processes", and also reflected some language of the 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property*. He emphasised that there was a clarification at the end of the paragraph saying that all types of sovereign debt restructuring through unilateral State measures, regardless of the State agency involved, were excluded from the scope of the Convention. The chair of informal working group IV turned to Information Document No 5 of April 2018, the previous report from this working group, and highlighted matters where a consensus had not been reached: first, on Article 2(4) and


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secondly, on the language in the Explanatory Report with respect to legal persons other than government agencies exercising sovereign functions. He further added that there were other issues in the Explanatory Report regarding Articles 2 and 20 which remained open.

136. **The Chair** asked Argentina whether Working Document No 74 could be disregarded.

137. **A delegate from Argentina** nodded in agreement.

138. Before turning to Articles 2(4) and 20, **the Chair** asked whether it could be agreed by consensus to add Article 2(1)(q) as it appeared in Information Document No 6. The Chair noted that Article 2(1)(q) had been adopted by consensus. He then directed the debate towards Article 2(4), Article 20, and Working Document No 76.

*Article 2(4), Article 20, and Working Document No 76*

139. **A delegate from the Russian Federation** introduced Working Document No 76. First, she recalled that her preference was to delete Article 2(4) and to retain paragraph 5. If this could not be accepted, she proposed to add a paragraph to Article 20. She indicated that this proposal was written before the final text of the informal working group. The purpose of this proposal was to clarify the scope of application of the declaration that can be made under Article 20.

140. **The Chair** summed up the three points to be discussed. First, Article 20(1) and (2) as proposed in Information Document No 6, secondly, the proposal to add a paragraph in Article 20, as proposed in Working Document No 76 and, thirdly, to delete Article 2(4), as proposed in Working Document No 76.

141. **A delegate from Israel** indicated that Article 20 was of great importance to her delegation. Concerning the three points raised by the Chair, she was in line with paragraphs 1 and 2 of Article 20, as proposed by the informal working group. Concerning Article 20(4), she pointed out that she shared the same concern as the Russian Federation. However, she saw Article 20 as a very delicate compromise that took time and effort to be achieved, so she did not favour opening the text here. On the same path, she did not support the proposal to delete Article 2(4).

142. **A delegate from the United States of America** explained that his delegation was waiting for an answer from its capital on those points, so anything he said would be provisional. However, he was confident in supporting the text of Article 20(1) and (2). He added that he was against the deletion of Article 2(4), which needed to be read against Article 1 and in tandem with Article 2(5). He added that Article 2(4) aimed at building up an autonomous Convention definition of "civil and commercial" saying that a matter did not lose its civil and commercial nature solely because the government is a party. In other words, it allowed government litigation within the scope of the Convention. He added that the package was completed with an explicit preservation of immunities in Article 2(5). In his view, if Article 2(4) were deleted, it may well throw the States back to comparative law concepts of "civil and commercial", which were highly uneven in this area. Further, he added that it would create discrepancies with the HCCH *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 HCCH Choice of Court Convention"). Finally, he stated that it may interfere with the notion of what "civil and commercial" means in various HCCH Conventions.

143. **A delegate from Japan** expressed support for Article 20(1) and (2). However, he was not in favour of the proposed Article 20(4). Concerning Article 2(4), he was not in a position to support the proposal, echoing the comments made by the delegation of the United States of America on that point. However, he outlined that, in his view, the latter provision only aimed to clarify and did not have any policy impact. Further, he saw no reason to depart from the 2005 HCCH Choice of Court Convention.

144. **A delegate from the European Union** was grateful for the work that had been carried out in the informal working group by all the delegations involved. He further recalled that his delegation did not want to have Article 20 included in the Convention. He added that any flexibility in relation to Article 20 was predicated on the assumption that Article 2(4) remained unchanged and we allow a limited possibility to declare out of the consequences that Article 2(4) implies. He pointed out that a result had been reached, in terms of Article 20(1) and (2), that the European Union could live with. He said that, without repeating what he had already said in his earlier interventions, he could not support the deletion of Article 2(4). He indicated that in his view, Article 20(4) was not a potential solution to the concerns raised by the delegation of the Russian Federation. He added that giving a declaration *erga omnes* effects would be a fundamental change to the way declarations were generally treated under the Convention. In his view, the concerns raised by the delegation of the Russian Federation regarded immunity issues, where different jurisdictions have different views as to how far the concept of immunity reaches. He thought that the status quo, without having the Convention in place, was that if litigation was going on somewhere against (and outside) that State, it could argue immunity from jurisdiction in that place and if it did not succeed, and there was a judgment, that would then be enforced somewhere else. He continued saying that the State has the possibility to go to that other State where enforcement was sought and argue all grounds of immunity in that third State. As a result of Article 2(5), he thought it was clear that this Convention did not change that status quo. All the possibilities that States had in order to argue immunity in the context of recognition and enforcement would be preserved. In his view, this issue was clear from the Convention and the Explanatory Report. He shared his hope that it would provide the delegation of the Russian Federation with some comfort.

145. **Un délégué de la Suisse** indique que sa délégation n'est pas favorable à l'article 20 dans la mesure où cette disposition va à l'encontre de l'esprit de la Convention. Cependant, s'il y a consensus, la Suisse ne s'y opposera pas. Pour ce qui est de l'article 20(4), il estime que sa délégation ne peut pas soutenir cette proposition. Enfin, il explique que la Suisse pourrait accepter la suppression de l'article 4(2) si l'article 20 venait également à être supprimé, ce qui ne sera visiblement pas le cas.

146. **A delegate from Australia** echoed the comments made by the European Union and shared the same point of view. He added that his delegation wanted to make the same proposal with regard to the Explanatory Report, if it could give some comfort to the delegation of the Russian Federation.

147. **The Chair** suggested proceeding on the basis of a package including Article 20(1) and (2) as indicated in Information Document No 6, Article 2(4) and (5), and information in the Explanatory Report that Article 2(5) of the Convention does not prevent the ability of a State to raise all existing arguments in relation to immunity in the State of origin and in the requested State when it comes to

recognition and enforcement, and to assert immunity from execution, even if the judgment were to be recognised in that State. He asked whether the delegation of the Russian Federation could live with this approach.

148. **A delegate from the Russian Federation** remarked that the clarification made by the European Union was very helpful. She was in line with the proposal to put additional clarification in the Explanatory Report on the operation of Article 2(5).

149. **A delegate from Canada** expressed support with Article 20(1) and (2) as stated in Information Document No 6. She added that she was not in line with the proposals from the delegation of the Russian Federation.

150. **The Chair** suggested to adopt Article 2(4) and (5) as stated in Working Document No 50, and Article 20 as set out in Information Document No 6. He asked whether there was a consensus.

151. **A delegate from Mexico** said that he did not block consensus but wanted to raise for the record that he shared the view of Israel, because it was a matter of great importance to his delegation. He outlined that from the very beginning he supported the deletion of Article 20(2). However, he indicated that he would go along with the text and not block consensus.

152. **The Chair** recorded that many delegations have shown exceptional flexibility in reaching this result.

153. **A delegate from the People's Republic of China** noted that he is not to block consensus. However, he drew the attention of the room to Working Document No 82 from his delegation that proposed to delete paragraphs 387 and 388 in the Explanatory Report with respect to Article 20.

154. **The Chair** indicated that the text was adopted. Then, he turned to any polite suggestions with respect to the Explanatory Report, starting with Working Document No 82.

155. **A delegate from the People's Republic of China** addressed Working Document No 82. The delegate remarked that the text did not refer to a "legal person". The original Explanatory Report still mentioned the scope with regard to State-owned enterprises. However, the delegate considered that, if there were nothing in the text about a legal person, there was no need to mention State-owned enterprises at all. For that reason, the delegate suggested deleting the related paragraphs in the Explanatory Report.

156. **The Chair** turned to Working Document No 26 and sought to clarify with the delegate from Brazil whether the proposal had been overtaken by the suggestions of the informal working group reflected in Information Document No 6.

157. **A delegate from Brazil** was happy to accept the new version of the paragraphs reflected in Information Document No 6 and was flexible not to insist upon the position in Working Document No 26.

158. **A delegate from the European Union** reacted to Working Document No 82 from the delegation of the People's Republic of China. He recalled there had been difficult discussions regarding the construction of Article 20 but that, through flexibility on all sides and common understanding, the delegates had solved the problems relating to legal persons and/or State-owned enterprises in Article 20. The flexibility of the delegation of the People's Republic of China was a key component to finding that compromise. Against that background, the European Union was able to drop its initial request for clarification in the text of Article 20 itself that the declaration would not extend to certain entities. The delegate agreed that since the text now excluded all legal persons, legal persons could not benefit from an Article 20 declaration. However, he saw merit in retaining the aspects of the Explanatory Report which the People's Republic of China now sought to delete. The reasons were twofold. First, the Explanatory Report provided the valuable explanation that, notwithstanding Article 20, if any entity (including legal entities) carried out sovereign functions, it fell outside of civil and commercial matters. For these specific "sovereign" activities, even if undertaken by a purely private entity (the delegate recalled that sovereign power could be delegated by States to purely private entities, as well as to entities who were partially or totally State owned – there was no discrimination between different types of entities in that respect), he thought it useful to keep that clarification. Secondly, the delegate considered it meritorious to clarify that Article 20 was not available to legal entities where they performed no sovereign functions. The delegate recalled that the delegation of the People's Republic of China had been particularly concerned with singling out particular types of legal entities. The delegate emphasised this did not need to be done; it was acceptable simply to clarify that any legal person was excluded, irrespective of the ownership or structure of that entity. He requested that these clarifications remain in the text.

159. **Another delegate from the European Union** offered an additional point of clarification: it was understood in the informal working group that there could be governmental agencies that had separate legal personality and could thereby be considered legal persons. He wanted to clarify that a governmental agency with separate legal personality but exercising sovereign functions could be subject to the declaration.

160. **A delegate from Norway** stated that she would be glad to see Article 20 go, but in the spirit of compromise, she had agreed to its adoption. However, she was concerned about ensuring that State-owned enterprises were not covered by an Article 20 declaration. She noted that everyone agreed to this in substance, and asked that the Explanatory Report reflect it. She acknowledged that it could be drafted differently than what was currently contained in paragraphs 387 and 388. She emphasised that the inclusion of an explanation in the Explanatory Report as to the limited scope of Article 20 was an important aspect of the compromise on that Article. She explained that it would be difficult to accept the deletion of that explanation.

161. **A delegate from Brazil** seconded the intervention by the delegate from Norway. As far as he understood, there was no policy difference amongst the Plenary. The delegate considered that, given there was such an obvious consensus on the policy (that the judgments would circulate because there was no possibility of making a declaration), there was no merit in insisting upon addressing the point explicitly in the Explanatory Report. In that respect the delegate supported the proposal of the People's Republic of China as the common understanding was quite obvious.

162. **The Chair** considered it obvious that aspects of the Explanatory Report would be deleted where the relevant provisions had also been deleted. He emphasised it was necessary for the *co-Rapporteurs* to explain the new provision and to address the "government entities" in respect of which declarations could be made. The Chair proposed to leave the matter to the *co-Rapporteurs* to address this point,


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which States could then comment upon once they received the draft Explanatory Report in accordance with the procedure outlined by the Secretary General. The Chair acknowledged it had been a big day, and that some delegations had had to accept some hard compromises. He extended his gratitude to them and congratulated the Plenary on a successful day. The Chair was confident the First Reading could be completed by afternoon tea on 28 June. He identified the remaining significant issues related to Article 29 *bis*, and Article 2(1)(g) and 2(1)(p) as well as other open matters that were the subject of Working Documents.

163. The meeting ended at 6.15 p.m.

## Procès-verbal No 16

## Minutes No 16

*Séance du vendredi 28 juin 2019 (matin)*

*Meeting of Friday 28 June 2019 (morning)*

1. La séance est ouverte à 09 h 30 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

2. **The Chair** opened the meeting and proposed that the Plenary finish the First Reading in the current session before lunch, since the Drafting Committee needed plenty of time to prepare the text of the revised draft Convention for the Second Reading of the text, which would occur tomorrow. The Chair emphasised that delegates should endeavour to keep their interventions short and concise, and strive for focus, brevity and the absence of repetition. It was also advised that Working Proposal No 1 from the Commission on General Affairs and Policy concerning matters relating to intellectual property be addressed by the Plenary on Monday after the Second Reading.

3. **Le Secrétaire général** prend la parole pour faire quelques annonces d'ordre administratif concernant le dîner formel, la cérémonie de clôture et la signature de l'Acte final.

*Article 2(1)(g)*

4. **The Chair** reminded the Plenary of the proposals in Working Document No 28 from the delegation of the United States of America and Working Document No 77 from the delegation of the People's Republic of China, and invited the delegation of the People's Republic of China to introduce their proposal.

5. **A delegate from the People's Republic of China** introduced Working Document No 77 and explained that their proposal attempted to accommodate some of the concerns expressed in the Plenary about including marine pollution as a whole in the exclusions from scope. The delegate pointed out that marine pollution belonged to a very specialised area which should be handled by the International Maritime Organisation, if at all. Also, pollution and environmental issues are dealt with by another important United Nations agency, the United Nations Environment Programme and the United Nations Environmental Assembly. The delegate noted that these organisations were currently attempting to introduce some very important systems and Conventions concerning transboundary pollution issues, including maritime issues. Also, regarding the *United Nations Convention on the Law of the Sea* (hereinafter, "UNCLOS"), Members of the United Nations were currently trying to introduce a very important mechanism concerning the systems and laws for areas beyond national jurisdiction. The delegate explained that the proposal in Working Document No 77 was to exclude these two very specialised and restricted areas which were currently being dealt with by other international organisations which had greater authority, capacity and knowledge to handle this important area. The proposal sought to ensure that the process of concluding the current Convention did not prejudice these very important processes, and was presented as a compromised approach. The delegate reminded the Plenary that it was not the intention of the Members of the HCCH to touch upon areas which already had specialised international organisations or international Conventions. Secondly, it was clarified that what fell within the scope of the Convention according to the proposal was marine pollution covered by national jurisdiction. Domestic judgments on such matters should and could circulate under the Convention.

6. **A delegate from the European Union** noted that their delegation's earlier position was that while the European Union was open to accepting carve-outs from the exclusion of marine pollution from the scope of the Convention, it was important to exclude ship-source pollution in its entirety because it was covered by other international Conventions. The delegate highlighted that the proposal by the delegation of the People's Republic of China adopted a different approach; it did not deal with the source of the pollution but rather the transboundary nature of the pollution. The delegate indicated that a combined approach, that excluded all sorts of ship-source and transboundary pollution no matter its source, would be agreeable to their delegation and they were preparing a text incorporating such an approach which they would be able to present as a new Working Document.

7. **A delegate from Japan** echoed the comments made by the delegate from the European Union and thanked the delegation of the People's Republic of China for their compromise proposal.

8. **The Chair** asked the delegate from the People's Republic of China if they would be comfortable if, in addition to their proposal, ship-source marine pollution was also excluded.

9. **A delegate from the People's Republic of China** explained that their delegation's objective with their proposal was that the current Convention would not intrude into areas governed by other international Convention systems, so the proposal by the delegate from the European Union for the exclusion of ship-source marine pollution was acceptable.

10. **The Chair** proposed to make an oral amendment to the text of Working Document No 77 to include "ship-source marine pollution".

11. **A delegate from the United States of America** thanked the other delegations for their flexibility and creativity when working on the issue, expressed their support for the amendment and advised that a paper proposal incorporating that amendment was intended to be submitted by their delegation.

12. **The Chair** asked the Plenary whether there were any objections to dealing with the textual amendment orally, and concluded that there were no objections. The Chair proposed that Article 2(1)(g) include "transboundary marine pollution, marine pollution beyond national jurisdiction, *ship-source marine pollution*", and concluded that it was adopted by consensus. The Chair also expressed thanks to the delegates for the way in which they consulted on this issue and resolved it.

13. **A delegate from Israel** shared that their understanding was that marine pollution which was not ship-source and was in territorial waters was within the scope of the Convention, and requested that such a clarification be included in the Explanatory Report.

14. **A delegate from the European Union** in response stated that, subject to correction from the delegate from the People's Republic of China, judgments relating to marine pollution claims which fell within the scope of the Convention would in his view not be limited to the judgments covered by the explanation just given by the delegate from Israel, and included judgments relating to exclusive economic zones rather than just territorial seas. He requested to know whether the Plenary could clarify the matter.

15. **The Chair** asked the delegation of the People's Republic of China whether the intention when using the phrase "beyond national jurisdiction" was to refer to pollution beyond the exclusive economic zone.

16. **A delegate from the People's Republic of China** explained that the wording "beyond national jurisdiction" had a uniform understanding by law of the sea experts, who understood that the meaning of the term was that it was definitely beyond the territorial seas or internal sea of a country. Some areas of the seas were under national jurisdiction, but some areas were definitely outside national jurisdiction, like the high seas and the Areas, which were defined as being beyond any national jurisdiction. The delegate emphasised that law of the sea experts were very familiar with the term, and offered to provide some text for the Explanatory Report on the matter.

17. **A delegate from Israel** thanked the delegate from the European Union for raising the important point and recalled that there were discussions in the United Nations for a Convention concerning areas beyond national jurisdiction, as the delegate from the People's Republic of China had noted. The delegate explained that in those discussions the idea was, as the delegate from the European Union had expressed, beyond national jurisdiction was the high seas including the exclusive economic zone. For the delegation of Israel, "beyond national jurisdiction" was the common term. Although with respect to the exclusive economic zone, it was difficult to say whether a State did have national jurisdiction or not, which did matter. Whether or not national jurisdiction covered the exclusive economic zone, the delegate's understanding of the proposal by the delegate from the People's Republic of China was that it covered the high seas, just beyond 200 nautical miles.

18. **A delegate from the People's Republic of China** expressed that most of the HCCH Members, those who were also Members of UNCLOS, understood and accepted the concept of the exclusive economic zone. The delegate was very cautious about preserving the position of all the Members at the Diplomatic Session, and sought to avoid not doing so because it may create problems. For their delegation, it was definitely correct that there was national jurisdiction in some aspect in relation to the exclusive economic zone.

19. **A delegate from the Philippines** also requested a clarification that national jurisdiction included territorial waters, contiguous waters and the exclusive economic zone.

20. **The Chair** responded to the delegate from the Philippines' question and explained that, as the delegate from the People's Republic of China had commented, the matter was a little more complicated because it depended on the view that different States adopted about what their national jurisdiction was. It was highlighted that the delegate from the People's Republic of China had explained that for parties to UNCLOS, national jurisdiction extended for certain purposes to the exclusive economic zone, so that would be outside it. The Chair proposed to allow the phrase, which was reasonably familiar to experts in the area of the law of the sea, and concluded that there was agreement in the Plenary for that suggestion. Further, the Chair stipulated that the term in the Explanatory Report would be explained in a way that was consistent with the orthodox understanding of the phrase, and noted that the delegation of the People's Republic of China had offered to liaise with the *co-Rapporteurs* to share such a text with the Plenary, who would then have an opportunity to comment on that text.

21. **A delegate from Argentina** further clarified that some State Parties are obligated by UNCLOS, but many provisions, including areas subject to national jurisdiction, and beyond national jurisdiction, are also under customary international law. So when referring to areas of national jurisdiction, it is not only State Parties to UNCLOS that share that common ground. The delegate explained that they were happy to leave the explanation to the delegate from the People's Republic of China but also emphasised that it was quite a sensitive issue that needed to be very clear within the scope of the Convention.

22. **A delegate from Canada** noted that the Plenary seemed to be agreeing to something that was not well-defined among the Members, and that there seemed to be an agreement that it could perhaps be left not well-defined. The delegate remarked that it was one of those areas, like other issues of public international law, where care needed to be taken that the Explanatory Report did not inadvertently take a position on something and suggest that the HCCH Members were attempting to harmonise something that was not harmonised.

23. **The Chair** concurred with the views expressed by the delegation of Canada and reminded the Plenary that they were able to provide polite suggestions to the *co-Rapporteurs* on this matter.

*Article 2(1)(p)*

24. **The Chair** referred to Working Document No 85 from the delegations of Australia, the European Union and the United States of America, and stated that it superseded


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earlier Working Documents from the proponents, such as Working Documents Nos 4 and 29. The Chair also reminded the Plenary of the other existing proposals in Working Document Nos 7, 25, and 38, which had not yet been formally addressed by the Plenary, and invited the proponents of Working Document No 85 to introduce their proposal.

25. **A delegate from the European Union** introduced Working Document No 85 and highlighted that the initial preference of their delegation was to include all private enforcement matters relating to competition within the scope of the Convention, as reflected in Working Document No 4. However, in the spirit of compromise, it was deemed appropriate to engage with other delegations to introduce a new proposal that would be based, on the one hand, on the exclusion of competition matters and, on the other hand, the inclusion of conduct which was widely accepted as being anti-competitive, as shown also in the work in the area of competition law by the Organisation for Economic Co-operation and Development (OECD). The delegate reiterated that the amount of judgments that would circulate under the exception in their proposal was very limited in number. Their proposal did not concern the circulation of any administrative, regulatory or criminal decisions, which were, plainly, out of the scope of the Convention. The current proposal was based on the initial proposal brought by their co-sponsor, the delegation of the United States of America, and it concerned hard-core cartel conduct. There were also certain additions to the current proposal in relation to potential competitors, covering, for instance, situations where two parties which were not yet competitors in the market decided through an agreement or concerted practice that one of them would not even join the market, preventing a potential competitor from even entering the market. Another important concept in this proposal was the idea of "concerted practice". European Union competition law distinguishes, on the one hand, written formal agreements and, on the other, also informal contacts which are referred to as concerted practice. The delegate expressed that they would be happy if the Explanatory Report reflected their understanding of the definition of concerted practice.

26. **A delegate from the United States of America**, another proponent of Working Document No 85, noted that the delegation's initial preference was for a complete exclusion of competition law but that they had attempted to seek a middle-ground. One reason for their initial preference was the great uncertainty about what an international legal obligation entered into at this point in time would bind Contracting States to with respect to future judgments in the rapidly changing field of competition law. The proposal, therefore, focused on the parts of the competition field which were well-established and generally universally understood, which was identified as a ground from which to move forward.

27. **A delegate from Australia**, another proponent of Working Document No 85, also noted that like the delegation of the European Union, their delegation was keen to include competition matters within the scope of the Convention and that they were grateful to the delegation of the United States of America for working with their capital a number of times over the course of the Diplomatic Session to achieve the inclusions in scope reflected in their current proposal.

28. **A delegate from Israel** noted that it also supported the full inclusion of anti-trust and thought it was a good way to promote values of fair competition. However, the delegate also appreciated the opposing concerns of other States on the matter and was happy to see that a compromise was reached, which they could fully support.

29. **A delegate from Japan** echoed the statements made by the delegate from Israel.

30. **A delegate from the Republic of Korea** emphasised that their delegation did not intend to protect hard-core cartels which were included in the proposal. However, the delegate opined that a hard-core cartel meant specific cooperation between competitors where there was no intention or proposal to involve the creation or enhancement of economic efficiency, but instead to create unfair economic access, such as monopoly power formation, consolidation, price-fixing, output restriction or customer restriction. Therefore, the criteria for determining whether an unfair activity was a hard-core cartel could be distinguished by whether or not there was an unfair measure proposed. The delegate expressed that it is public understanding that State authorities must reasonably determine the existence of a hard-core cartel according to a number of complex factors. It was his delegation's view that whether there was a hard-core cartel could not be regarded as merely a civil or commercial matter and left to the determination of another State's court, because of the fundamental differences between States. For instance, if there were a cartel case, the judge had to determine whether the cartel was a hard-core cartel, and if the judge decided that it did seem to be a hard-core cartel case, then the judge would have to look into whether the competitor had engaged in a specific proposal or intention. The delegate expected that the judge would have some difficulties with this decision, because the criteria of the decision were closely related to the public interest. It was emphasised that this matter was complicated and that there were a lot of practical problems and political issues. In a simple civil or commercial case, a natural person may not be able to prove that they were not a participant in a hard-core cartel. For these reasons, the delegate had no choice but to hesitate to accept the new proposal.

31. **A delegate from the People's Republic of China** noted that the matter was an important issue to many delegations, and recognised that, as the delegate from the People's Republic of Korea noted, in the anti-trust area the principles, policies and detailed rules and regulations were very different among States. This was the main reason why his delegation was hesitant to include anti-trust in the Convention, for reasons very similar to those concerning intellectual property. However, the understanding of the delegate was that the Plenary did not seek to try to introduce some uniform substantive rules concerning anti-trust for each and every State, but only intended to reflect in the Convention some understandings commonly accepted and generally understood by the Member States in the Session. Therefore, for the sake of compromise, the delegate explained that he would not obstruct consensus if all delegations were to accept the proposal. The delegate also requested that the proponents clarify the exact meaning of a "concerted practice", and that if the definition were to be addressed by the *co-Rapporteurs* some text would need to be provided to the Plenary to understand the exact scope of the phrase.

32. **The Chair** invited the proponents to elaborate further on concerted practices, and how these differed from agreements, and also from simple competitive behaviour where one competitor responded to another's price. The Chair asked whether the proponents could briefly refer to the hallmarks of concerted practice, reiterating that they are not attempting to harmonise national laws.

33. **A delegate from the European Union** agreed that there was no intention to harmonise any aspects of competition law, but that the discussion concerned practices which were widely-accepted, internationally, as anti-competitive, as attested by the OECD work in the area. The delegate explained that an agreement referred to a written or formal agreement, while a concerted practice referred to unwritten or informal contact between actual or potential competitors. For instance, in case of horizontal anti-competitive agreements in the form of a cartel, it was not unusual in this situation that parties did not have a written agreement but rather had informal contact with each other. The delegate explained that such meetings could happen quite informally, in some hotel located next to an airport for example, and the parties would typically not put anything in writing about the division of markets and establishing prices. These were the types of informal contact where concerted practice would be relevant. The delegate expressed that they would be happy for the Explanatory Report to reflect the current conversation in the Plenary. He emphasised that there was certainly no intention of the delegation of the European Union to harmonise whatever practice was not accepted internationally as being anti-competitive.

34. **The Chair** reiterated that there was no attempt to harmonise national law, but rather to refer to hard-core anti-competitive conduct that was, for example, the subject of the OECD recommendations in the paper provided by the delegation of the United States of America, which also defined a hard-core cartel in terms of anti-competitive agreements, anti-competitive concerted practices, anti-competitive arrangements, to do various things. The Chair confirmed that it was language that was used internationally and not just in the European Union, and the intention was to, without harmonising national law, pick up that focal example of highly, crudely anti-competitive conduct without limiting it to explicit written or even oral agreements.

35. **A delegate from Singapore** thanked the proponents for the proposal but expressed reservations about even having a limited category of anti-trust matters in the Convention. The delegate's view was that competition matters, whether brought by a public authority or a private party, affected the economic industrial policy of a State. Further, it was the opinion of the delegate that where the anti-competitive behaviour occurred in a State, the court in the State where the action took place was best placed to resolve the issues. There could still be differences among jurisdictions in determining the threshold at which certain actions were regarded as anti-competitive. For these reasons, the delegate was unable to support the proposal.

36. **A delegate from the Republic of Korea** explained that, as with the case of intellectual property, their position was that it was not appropriate to insert important and controversial cases at this late stage of the discussion. Regarding anti-trust matters, the delegate emphasised that they should be excluded as a whole for two reasons. Firstly, anti-trust matters were fundamentally concerned with interests of the public, so they should not be treated as simply and categorically civil or commercial matters. Second, in line with the view of other delegations, it was important to keep the current Convention in line with the legal perspective of the HCCH *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 HCCH Choice of Court Convention"), which categorically excluded the entirety of anti-trust because of its very sensitive nature and because there was no precedent that an anti-trust case was recognised and enforced in a foreign country by either national law or international law, and the delegate noted that little had changed since then. For these reasons, the delegate was deeply concerned that if anti-trust matters were included in the Convention, it would bring forth unexpected and negative consequences, and expressed the desire to see the Convention concluded in such a way that contributed to certainty in private international law.

37. **The Chair** reminded delegates not to intervene twice on the same issue and that interventions should be brief.

38. **A delegate from Norway** expressed that they desired the inclusion of anti-trust in the Convention in a much broader sense than what was in the current proposal which, however, did not seem possible. Therefore, the delegation supported the proposal.

39. **Un délègue de la Suisse** exprime son soutien pour la position et les arguments présentés par la délégation de la Norvège.

40. **A delegate from Peru** expressed the preference to exclude anti-trust from the scope of the Convention.

41. **A delegate from Mexico** stated that they followed the reasoning of the delegation of the Republic of Korea and also desired the exclusion of anti-trust.

42. **The Chair** noted that it was reasonably clear that there was no consensus to include even a limited category of anti-trust in the Convention and suggested that the Plenary proceeded on the basis that Article 2(1)(p) encompassed only "anti-trust (competition)", and sought interventions on his proposal.

43. **A delegate from the European Union** commented that the matter was by no means something that the proponents were trying to introduce at the last minute into the scope of the Convention, and that it was an issue which had been discussed, including in an informal working group, for a considerable time. It was the delegate's opinion that important progress had been made in the working group to inch towards a more consensual view on the issue, and that the outcome of that work and the work carried out in the context of the Diplomatic Session brought together a pretty broad group of delegations.

44. The delegate also highlighted, which he ordinarily would not do, that the European Union consisted of 28 Member States of HCCH, so if the supporters were counted there was broad support for the limited inclusion within the scope of the Convention, which was a compromise solution from the perspective of all delegations. As the comments of the delegate from the People's Republic of China indicated, they were not enthusiastic about the provision but in the spirit of compromise they were willing to accept it. The delegate submitted that those delegations with outstanding concerns even with the limited scope of cases to be currently included in the Convention, still had the option to make a declaration under Article 19 and to not have the proposal applied to them. The delegate's opinion was that the Plenary was in a situation of broad support for the proposal. He called on those opposing delegations to consider whether an Article 19 declaration would not be sufficient in the spirit of compromise to protect their interests in relation to competition matters.

45. **A delegate from Brazil** reminded the Plenary that their delegation had previously submitted Working Document No 25 and that they wanted to have the whole inclusion in scope. The current proposal was considered a middle-ground solution in light of the objections made in the


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Plenary, and the delegate expressed support for the proposal and also kindly called upon all objecting delegations to consider the declaration system in a way that would accommodate their concerns.

46. **A delegate from Japan** clarified the reason for the departure from the 2005 HCCH Choice of Court Convention by way of example. If a company from the United States of America and a Japanese company entered into a contract which had an exclusive choice of court agreement in favour of U.S. courts, their dispute should be resolved only in a court of the United States of America. However, if the 2005 Convention included anti-trust matters, then a Japanese court could never do private enforcement because of the exclusive grounds of jurisdiction from the exclusive choice of court agreement. From the delegate's point of view, this outcome could not be accepted and therefore in the 2005 Convention anti-trust was excluded. However, those kinds of exclusive choice of court agreements were not dealt with in the current Convention, which was a very good reason to depart from the 2005 Convention.

47. **A delegate from the Republic of Korea** reiterated that their delegation was hesitant to accept the compromise solution because of additional reasons they wished to convey. The compromise solution wanted to begin with stronger regulations. However, many States had export cartel exemptions, and the OECD recommendations did not intend to abolish them. If Working Document No 85, though being a compromise solution, should be adopted, States would enter into a wholly new situation where even export cartels would be totally under the control of civil and commercial litigation in other Contracting States. Also, the possibility of a declaration under Article 19 in the delegate's opinion was not a safeguard, because of the nature of the Convention that circulates one Contracting State's judgment in another Contracting State. However, when talking about economic regulation, even in the private relations context, the more natural approach was the regulation of market behaviour in one State and in another State, or regulation or regulatory intervention over residents in one State or another. In contrast, the scope of the Article 2(1)(p) proposal did not touch upon whether it was talking about one market, or the residents in one State market, but only focuses on the circulation of one State's judgments in another State. Further, because the Plenary was dealing with some more sensitive issues with a more regulatory nature, and noting that even hard-core cartels had some distinct characteristics, it was emphasised that the matter should be left to some other day and to some other, more innovative fashion.

48. **A delegate from Israel** joined the call from the delegation of the European Union and noted that the proposal referred to very minimal core issues of anti-competition. For their delegation, it was very important to have at least something included for anti-trust in the Convention.

49. **The Chair** recognised that a huge amount of work had occurred on this issue over many years and that it was not a last-minute development, but was something that had been the subject of active and ongoing discussions for many years in which any interested party had been able to participate. Second, there was a great deal of support in the room for including in the instrument a very modest subset of particularly objectionable anti-competitive behaviour that was widely acknowledged as harmful. The Chair noted that even States with some reservations about the idea, particularly the delegation of the People's Republic of China, had conveyed that although they were unenthusiastic, they were willing to be flexible, recognising the hard work which had gone into the matter and the level of support for it, which was a very constructive approach to negotiations. The Chair opined that many of the concerns raised related to proceedings that were in fact not civil or commercial; a great deal of enforcement took place by regulators in the field of competition law, and proceedings for a penalty or injunctive relief by a regulator were simply out of scope and would not be brought back into scope by a slight modification of the anti-trust exclusion. The Chair also highlighted that it was also available to a State with a serious concern about anti-trust to make an Article 19 declaration so that, for their State, anti-trust was completely excluded. In relation to the issues such as export cartels, which were endorsed because they were a matter of public policy, an attempt by a foreign judgment to undermine a cartel permitted and encouraged by the law of that State for export purposes would likely run into some public policy issues and would likely be unenforceable in that State if it was brought for enforcement, in any event. The Chair emphasised that there were a lot of safeguards and there was the ultimate backstop, for States which did not believe that those safeguards worked, of an Article 19 declaration. The Chair encouraged the delegations that had expressed hesitations to reflect on how important that opposition was to them during the coffee break.

50. The meeting resumed at 11.30 a.m.

51. **The Chair** noted that there were active discussions for possible refinements to Article 2(1)(p) to further review whether there was an approach manageable to all delegations. The Chair advised that the Plenary would return to Article 2(1)(p) at 2.30 p.m.

52. **A delegate from Mexico** expressed that they would be grateful for a further extension of time, so that they could receive further instructions from their capital in light of the time zone differences.

53. **The Chair** confirmed that the matter would be returned to at 2.30 p.m. for now, and if that was unworkable then the Plenary would consider an alternative time for discussion.

*Article 29* bis

54. **The Chair** reintroduced discussion of Article 29 *bis*, noting distribution of Working Document No 24 REV REV, jointly proposed by the delegations of Japan, Switzerland and the United States of America. He requested the co-proponents to introduce and explain the further revisions to the Working Document.

55. **A delegate from the United States of America** advised that he would only speak to the revisions captured within Working Document No 24 REV REV insofar as they made adjustments to textual matters and he stated that he would seek not to reintroduce policy discussions. The delegate confirmed that the joint proposal brought about significant optical changes to the text of Article 29 *bis*. He noted that the proposal contained two alternative options for the Plenary to consider, option 1, and option 2. While noting the preference of his delegation for option 1, he advised that the proponents had included option 2 in the interest of constructive flexibility, having considered feedback from a number of other delegations. He added that the focus of the wording had generally been amended to focus on the establishment of relations and notifications instead of objections. As for the differences between the two proposed options, the delegate explained that the context and content of 29 *bis*(4) was the departure point. As for option 1, paragraph 4 contained the possibility to object to ongoing treaty relations, whereas option 2 would not have this possibility.

He further noted that explanations had been included at the end of the proposal, but that this explanation particularly focused on the intended approach in the implementation of the provision in respect of REIOs. He confirmed that it was the view of the United States of America that if a REIO became Party to the draft Convention, Article 29 *bis* would apply to the whole of the REIO, and not just its individual members.

56. **A delegate from Japan** spoke in support of the proposal, and thanked the delegation of the People's Republic of China for their efforts to move the discussion forward. The delegate observed that there would have been some difficulties in dealing with this issue by a reservation mechanism. The delegate registered his delegation's preference for option 1 of the proposal, but noted that his delegation would consider option 2 to demonstrate constructive flexibility.

57. **Un délégué de la Suisse** constate que le Document de travail retranscrit l'esprit de compromis dans la formulation de la proposition qu'il renferme ; ce Document de travail a fait l'objet d'une deuxième révision.

58. **A delegate from the European Union** thanked the co-proponents of Working Document No 24 for producing a re-revised version. The delegate reported that the European Union could live with an option that did not contain paragraph 4 of option 1, *i.e.*, the option that only allows the entry-level mechanism. The delegate also highlighted that the co-proponents had considered in the revised draft proposal the specific implications of the proposal for REIOs, and the delegate voiced his delegation's appreciation for, and agreement with, the way that these implications were explained in the proposal. The delegate concluded that his delegation could support the changes suggested in option 2 of the proposal.

59. **A delegate from the People's Republic of China** joined in thanking the co-proponents of Working Document No 24 REV REV for their attempts to accommodate comments of other delegations. The delegate stated that there may be two further matters not yet raised which would mean that his delegation could not accept the proposal. First, the delegate echoed comments made on the previous day by the delegation of Singapore regarding party autonomy within other private international law instruments, including the 2005 HCCH Choice of Court Convention, the forthcoming *United Nations Convention on International Settlement Agreements Resulting from Mediation* (the Singapore Convention on Mediation), and the 1958 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention). He added that in the draft Convention, many of the jurisdictional filters were themselves based on party autonomy, such as Article 5(1)(e), (f), (g), (l) and (m). He opined that, in this way, there was no difference between the draft Convention compared with these other Conventions, and that the Article 29 *bis* mechanism may allow for a court to object to enforcement of judgments that have been created in circumstances where parties have subscribed to the jurisdiction of that court. The delegate suggested that this outcome was unreasonable and not logical, and that the draft Convention must support party autonomy. Secondly, the delegate raised concerns with the original text of the bilateralisation mechanism in light of States subsequently acceding to the Convention and making this kind of objections. He noted that at present, only two Contracting States would be required to bring the Convention into effect, however, the delegate expressed concerns between the effects clause and the bilateralisation clause, as, hypothetically, theoretically and legally, the first two States to ratify the Convention could make a bilateral declaration in respect of each other, and in such circumstances the Convention could legally come into effect, but would not apply between these two States. The delegate concluded that his delegation was not in a position to block consensus on the provision to progress the draft Convention, if all other delegations want to move forward in adopting some form of Article 29 *bis*. However, he stated that in that situation, the only proposal that his delegation could reasonably consider would be option 2 within the joint proposal options, noting that this option would create only a one-time possibility for notifications, and is much more neutrally worded and would only apply in exceptional situations.

60. **A further expert from the People's Republic of China (Hong Kong SAR)** observed that, on the question of entry into force, there would need to be follow-up amendments made to Article 29 to synchronise Article 29 *bis* with the 12-month period stated thereunder. The delegate added that under Article 60 of the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (hereinafter, "2007 HCCH Child Support Convention"), there was a similar provision providing for the entry into force of the relevant instrument only after the end of the period during which objections may be raised.

61. **A delegate from Israel** registered her delegation's support for the changes presented within the joint proposal. She indicated that, as between the presented options, her delegation would prefer option 1, as they saw its paragraph 4 as a positive contribution. She added that, in the spirit of consensus, option 2 could be acceptable as well. The delegate suggested the need to clarify the term "State of origin" as within option 2, paragraph 4. She explained that although the intended meaning is clear, as it would describe either a State declaring or a State declared about (being, within the meaning of this Article, the two States which have treaty relations), there was a concern that the drafting was currently too wide and could be taken to refer to a third State unintentionally. At the suggestion of the Chair, the delegate agreed that adding explanatory wording to the Explanatory Report was the most desirable approach and that there would be no need to change the text of the Article.

62. **A delegate from Australia** intervened to address the concern raised by the delegate from the People's Republic of China regarding the interrelationship of effect and bilateralisation clauses. The delegate noted that this question had been considered within the informal working group, and that the conclusion was that the provisions would not have the effect that the delegate from the People's Republic of China was concerned about, on either a temporal or language basis. The delegate explained that the Convention's provisions on entry into force provide that the Convention would enter into force upon a second ratification or accession of a State. On the basis of the scenario presented, if there were two Contracting States that had ratified the Convention, the Convention would come into force, even if one of them had notified that they did not want to have relations with the other under the bilateralisation mechanism. The delegate noted that the Convention wouldn't actually be operative in the sense the States wouldn't actually be able to circulate judgments between them once the 12-month period had expired, however, he believed that the Convention itself would be in force at that point, and that the present language would be satisfactory to achieve that outcome. The delegate added that, as regarded the options in the Working Document, the delegation of Australia had previously had some hesitation about these provisions, in


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light of the need for universal application of the Convention and to include as many States as possible. However, understanding that such a mechanism may be necessary to take the Convention forward for some States, the delegate registered his preference for option 1, noting that this wording would make the draft Convention more accessible to join, and that it may head off pre-emptive declarations under the 'one shot' doctrine. The delegate also expressed his delegation's comfort with option 2.

63. **Un délégué de la Suisse** remercie toutes les délégations qui se sont exprimées et qui ont fait preuve de flexibilité. Pour répondre aux questions soulevées, il note que la plupart des filtres de reconnaissance contiennent un élément relatif à l'autonomie des parties, mais bon nombre d'entre eux ne la concernent pas, par exemple l'article 5(1)(a) qui concerne le défendeur ou l'article 5(1)(g). Il ajoute que pour cette raison sa délégation pense qu'il existe une distinction à faire entre cet instrument et la *Convention de La Haye du 30 juin 2005 sur les accords d'élection de for*, et que cette distinction reste toujours valable. Quant à l'entrée en vigueur de la Convention et l'éventuel mécanisme mentionné, le délégué estime que cela doit rester une situation spéciale, que d'avoir un instrument entré en vigueur mais qui ne puisse pas être appliqué. Il rappelle cependant que ce genre de situation n'est pas totalement exceptionnel, par exemple, dans le contexte de l'Union européenne, dans la mesure où les instruments entreront en vigueur à une date donnée, mais deviendront opérationnels à une date ultérieure. Il ajoute qu'il ne pense pas que cela soit une solution idéale, mais il est de l'avis que cela puisse fonctionner. Deuxièmement, il tient à souligner que, selon sa délégation, ce mécanisme n'est pas destiné à être utilisé à la légère et doit être utilisé dans des circonstances exceptionnelles. Il exprime son espoir que dans la pratique il ne s'avérera pas nécessaire d'avoir très souvent recours à ce mécanisme.

64. **The Chair** summarised discussions and observed concerns about option 1, paragraph 4. He suggested that, in the interests of efficiency and progress, the Plenary consider adoption of option 2, in which there appeared to be fewer issues that would prevent reaching consensus. Noting no objection to that approach, the Chair declared option 2 adopted, and thanked all delegates for their flexibility.

65. **A *co-Rapporteur*** raised a further query surrounding technical timing points to be considered by the Explanatory Report in light of the matters raised by the delegates from the People's Republic of China and Australia. He distinguished in this regard the timing for entry into force and effectiveness in the draft text, noting that when the treaty entered into force, *i.e.*, three months after a State had ratified, it would only become effective after 12 months. He suggested in this regard that a change may be due under Article 17, determining the application in time of the Convention. He stated under Article 17, the reference was made to entry into force, but that it should instead be made to the effectiveness of the Convention, conforming with discussions on Article 29 *bis*.

66. Suggesting that this was a drafting change to Article 17 rather than a policy change, **the Chair** remitted the matter to the Drafting Committee.

67. **A delegate from Australia** suggested language to assist the Drafting Committee, based on discussions in the informal working group, which had considered the matter. He stated that Article 17 may be amended to refer to the time at which the Convention was "in force as between that State and the requested State".

*Reservations*

68. **The Chair** introduced discussions on a further potential Article on reservations. The Chair noted the existence of proposals in Working Document No 12 from the European Union and Working Document No 81 from the People's Republic of China on this matter.

69. **A delegate from the People's Republic of China** expressed his delegation's wish to withdraw Working Document No 81. The delegate explained that the design of the Working Document had been to address concerns with Article 29 *bis*, however, he explained that as that provision had been resolved and adopted, his delegation's Working Document would not be pressed.

70. In relation to Working Document No 12, **a delegate from the European Union** recalled that the European Union's strongly preferred position was to exclude the possibility to make reservations, in line with other HCCH Conventions. However, the delegate added that his delegation was not so strongly attached to that position that it would let it become an obstacle to a compromise solution. He concluded that as a sign of flexibility, the delegation of the European Union could live with a silent solution.

71. **The Chair** confirmed with the delegations that both Working Documents were withdrawn, and in that regard, concluded that there were no outstanding proposals for a provision on reservations.

*Article 29*

72. **The Chair** reintroduced discussions on Article 29. He observed that there were no submitted proposals within Working Documents to deal with the text, but that there were certain options in Article 29 contained with square brackets that had been a placeholder for previous discussions. He referred to Working Document No 50 and recalled that it remained open to delegates to make a choice between three or six months on entry into force under Article 29(1).

73. **The chair of the informal working group on general and final clauses** recalled that during working group discussion on this question, delegates appeared to largely register their preference for three months.

74. **The Chair** requested to hear any objections to a three-month period, emphasising that this was not to be confused with the separate effectiveness mechanism, which granted a more generous timeframe for effectiveness between States.

75. **A delegate from the United States of America** intervened to raise a potential drafting issue. He recalled that there had been previous discussion about potential inconsistency between the entry into force period and Article 29 *bis*, and that this was different from the discussion just embarked upon about entry into force without there being any real treaty relationships. He explained that he had understood those previous concerns raised by the delegate from the People's Republic of China, that it may be odd to have a treaty enter into force with a State prior to expiry of the objection or notification period under Article 29 *bis*. The delegate noted that the informal working group had heard discussion on linking the entry into force period to the period built into Article 29 *bis*, but he apologised that there was no formal proposal putting forward that position. He added that, to address this issue, the United States of America would now informally propose similar wording to the 2007 HCCH Child Support Convention, such that the

Convention would enter into force the day after expiry of the period during which notifications could be made in accordance with Article 29 *bis*(2). He summarised that this would guard against parties having treaty relationships that would exist in the six to nine-month period prior to a decision as to whether the Convention may not have effect between them.

76. **The Chair** suggested that the proposal of the delegation of the United States of America would be consistent with the questions raised by the delegation of the People's Republic of China. The Chair considered that the answer to those concerns provided by the delegation of Australia had focused on the logic of Article 29(1), insofar as it may operate at a time before relations had become effective between two States. The Chair voiced his agreement with that logic and that Article 29(1) could be either three months or six months. He added, however, that Article 29(2) may require further consideration as to whether it should be aligned with the 12 months in Article 29 *bis*. The Chair suggested that the Plenary consider inserting three months as the relevant time limit in Article 29(1), and 12 months as the relevant time limit within the two limbs of Article 29(2).

77. **A delegate from the European Union** indicated that in the context of the notification mechanism under Article 29 *bis*, his delegation would require an appropriate period of time for European Union institutions to coordinate on potential notifications, or on the decision not to make notifications. The delegate added that this might not be exclusively a European Union concern, but that other delegations would also potentially require time for parliamentary processes. He stated that 12 months was an indispensable minimum. He also noted that this timeframe was the same as in the 2007 HCCH Child Support Convention. The delegate endorsed the comments of the Chair, noting the need to make follow-up changes to secure at least 12 months, not necessarily in Article 29(1), but necessarily in Article 29(2).

78. **Un délégué de la Suisse** appuie la suggestion du délégué des États-Unis d'Amérique. Il considère que la suggestion est très valable, car elle établit un lien entre la période au cours de laquelle la notification peut être faite et le temps nécessaire pour l'entrée en vigueur. Le délégué estime que cela serait préférable à une période de temps, qui serait exprimée en mois, car la période au cours de laquelle des objections peuvent être formulées dépend de la notification reçue par le dépositaire. Il rajoute qu'en théorie, cela pourrait signifier quelques jours au-delà de 12 mois. Le délégué estime alors que la proposition du délégué des États-Unis d'instaurer une synchronicité entre les deux périodes serait préférable à une période de 12 mois. Le délégué indique que sa délégation pourrait soumettre une proposition formelle à cet égard.

79. **A delegate from Australia** expressed no objection to the approach suggested by the delegation of Switzerland. He offered a further clarification on the question of timing within Article 29. He noted that the time limit in Article 29(1) would have to be shorter than Article 29(2), or the Convention would have no Contracting States who would be able to make objections. He concluded that the time limit contained under Article 29(1) could therefore only be between three months and 12 months.

80. **A delegate from Canada** advised that her delegation had refrained from commenting on Article 29 *bis* during its discussion, despite not supporting that provision, as it equally did not want to block consensus. The delegate noted that it would now intervene in respect of Article 29 to ensure that its concerns could be addressed. The delegate suggested that internal alignment of Article 29 would need to be considered more carefully, highlighting, for example, that there is no period of objection for a subsequent extension to a territorial unit, so there should be no 12-month period for paragraph (b). The delegate also suggested that in reference to the 12-month period, for simplicity, the text should refer to the "first day of the month, following the expiration of 12 months". The delegate referenced discussions in the informal working group on that point.

81. **The Chair** accepted the offer of the delegation of Switzerland to formulate a formal proposal for text to reflect the concerns discussed.

*Article 30 and Article 32*

82. At the invitation of the Chair, **a delegate from the European Union** introduced Working Document No 87 REV, proposing drafting changes to Articles 30 and 32. The delegate firstly confirmed that the changes in the proposal were only technical amendments and had no policy implications. With regard to the amendment to Article 30, she explained that the proposal was to delete Article 28 (Accession of an REIO without its Member States) from the list of declarations. She noted that Article 30 was an Article stating at which time declarations may be made, that they have to be made to the depositary, and when they take effect. The delegate observed that in the 2005 HCCH Choice of Court Convention, the corresponding Article did not contain a provision for declarations made by an REIO upon signature, ratification or accession. She observed that obviously Article 28 had been added to the list in Article 30 by mistake and should not be there, because the two REIO Articles create their own rules on when and to whom declarations may be made by the REIO. Moreover, some of the rules in Article 30 did actually not fit REIOs. She added that this was why the general Article on declarations had not been extended to the two REIO rules in the 2005 Convention. The delegate suggested following the same approach in this draft Convention. The delegate also clarified that there will be two REIO Articles: i) one Article dealing with situations where only the REIO will join the Convention, and its Member States will be bound by way of being members of the REIO, and ii) another Article dealing with situations where there is shared competence, and therefore both the REIO and its Member States will join this Convention. The delegate noted that, for Article 32, the proposal simply contained a set of follow-up changes. The delegate explained that the Article concerned the next step in the process, *i.e.*, where the depositary has received declarations, notifications and withdrawals from States and REIOs. She noted that Article 32 sets out a list of obligations of the depositary who has received the declarations, notifications, etc., including the obligation to share this information with the Member States of the HCCH and the Contracting Parties to the Convention. Because Articles 27 and 28 allow REIOs to sign, ratify or accept the Convention or accede thereto like a State, reference to these Articles needs to be made in Article 32(a). The delegate also pointed out that point (c) was some sort of basket where all the declarations, notifications, etc., have to be mentioned, noting that many of them are indeed mentioned in Article 30. She concluded by noting that because the REIO declarations and notifications are not mentioned in Article 30, they would therefore need to be listed here in Article 32 explicitly. The delegate explained that she would be pleased to take any questions on these matters.

83. **A delegate from Canada** suggested that Article 30 be referred to the Drafting Committee to explore consistency. She observed that some of the Articles listed in Article 30(1)


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already had their own timeframe for when they can be deposited, for example, Article 26, which already has essentially the same content as Article 30(1). However, the delegate also commented that Article 26 does not deal with subsequent declarations, which suggested that there may be some overlap, but also some level of incompleteness, to be addressed by the Drafting Committee.

84. **Un délégué de la Suisse** note que sa délégation propose d'inclure une référence à l'article 29 *bis* dans l'article 32 et que cette proposition fera partie de la proposition formelle qui sera soumise sur la date d'entrée en vigueur.

85. **The Chair** requested that the proposal to be submitted by the delegation of Switzerland should not include square brackets, as the Drafting Committee would be left to take charge of ensuring correct cross-referencing.

*Other matters*

*Article 7(1)(d)*

86. At the invitation of the Chair, **a delegate from the European Union** introduced Working Document No 68. The delegate confirmed that the purpose of the document was to correct a drafting issue. The delegate advised that one ground for refusal in Article 7 concerned the situation where the proceedings in the court of origin were contrary to an agreement, including a non-exclusive choice of court agreement, or a designation in a trust instrument. The delegate commented that the current wording was slightly unclear, because it said "under which the dispute in question was to be determined in a court other than the court of origin". She opined that this would have the result that, if a court in city X was designated in the agreement, but the judgment came from city Y in the same State, this would be a ground for refusal under the draft Convention. However, the draft Convention should only be dealing with international jurisdiction and not with the allocation of cases within one State. Hence, the text should be clarified by amending the words to read "in a court of a State other that the State of origin".

87. Noting no opposition to the proposal, **the Chair** declared that the modifications to Article 7(1)(d) were accepted.

*Recommended form*

88. **The Chair** noted the distribution of Working Document No 3 REV REV, authored by the Permanent Bureau. He acknowledged that the recommended form contained changes agreed verbally in Plenary. He requested that any concerns be raised at the Second Reading, if at all.

*Article 24*

89. At the invitation of the Chair, **a delegate from Switzerland** introduced Working Document No 86. The delegate indicated that the Working Document contained follow-up amendments to Article 24 in light of the Plenary's decision to adopt Article 24. She added that the delegation could not make a proposal on including Article 6 in the REIO clause, because there was strong opposition to including Article 6 within Article 24. She noted that as a policy position, it was most appropriate that States and REIOs were dealt with equally in this context. In that regard, the delegate highlighted that her delegation had built upon language previously discussed with co-proponents of Working Document No 46. The delegate also noted for clarity and fairness that there was a slight difference between that and the structure of Article 24(2) and (3) as they stand now. She explained that the *chapeau* of Article 24(4) only refers to "as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Member State of the Regional Economic Integration Organisation", noting that this differs from the structure of Article 24(2) and (3), because there was no reference to a judgment coming from a court of a Contracting State of the other instrument. The delegate concluded that, if the drafting were considered to be unacceptable, and complete parallelism was desired, her delegation would be willing to work to submit a revised Working Document.

90. **A delegate from the European Union** thanked the delegation of Switzerland for returning to this point. The delegate recalled that in all previous Article 24 proposals, the European Union had always proposed having the same solution for REIO rules and international agreements with respect to the reference to Article 6. The delegate observed that as a consequence of the heated debate during the previous Plenary, the parallelism in the structure of Article 24 had been lost, and that the current proposal attempted to correct that. The delegate remarked that even though the current drafting of the provision may in fact give an extra privilege to REIOs, his delegation would have no problem accepting the proposal in Working Document No 86. He noted that the position of the European Union had always been to ensure parallelism in this respect.

91. **Another delegate from the European Union** recalled that during the discussion in the informal working group on the relationship with other instruments, participating delegations had made clear that parallelism was crucial. She added that the delegation of the European Union would accept this standpoint. In that regard, the delegate confirmed that her delegation was ready to narrow down its own freedom. She stated that the proposed drafting would not leave any room for interpretation as to which judgments falling under the current European Union rules would be covered by Article 24(4). The delegate recorded her delegation's satisfaction with the very clear drafting, and her delegation's agreement to the proposal.

92. **The Chair** clarified for the Plenary that the present proposal would in effect limit the extent to which the internal rules of an REIO could produce a result different from what would otherwise be reached under the draft Convention. The Chair noted that, given the European Union had accepted the wording as the sole REIO, there would need to be compelling reasons not to adopt the proposal.

93. **A delegate from Japan** advised that, in his delegation's view, pure parallelism would be necessary and there would be no reason not to adopt the proposal. He noted that this proposal was closely linked to a general issue of how to deal with an REIO itself and the issue was not only for the European Union, although the European Union itself might have a strong interest in it. He opined that it would be quite difficult to decide whether REIO rules should be superior or inferior and the basic principle of equal treatment should be adopted. The delegate further remarked that if the distinguished delegation of Switzerland could make any improvements to make this provision capture more precise parallelism, his delegation would be prepared to support such a proposal. The delegate concluded however that he did not wish to stand against consensus on the current text proposed in the Working Document.

94. **A delegate from the European Union** thanked the delegate from Japan. Addressing his remarks, the delegate noted that the parallelism that would truly matter concerns

the rules in future instruments, and in this regard there was complete parallelism in the Swiss proposal. She accepted that there may not be parallelism in the Swiss proposal with regard to existing treaty rules and REIO rules, *i.e.*, rules adopted before this Convention was concluded. However, the delegate also remarked that she did not expect any REIO other than the European Union to adopt any rules contradictory to the Convention between now and the completion of the draft Convention on 2 July 2019. The risk mentioned by the delegation of Japan would therefore be merely theoretical.

95. **The Chair** suggested adoption of Article 24(4) as set out in Working Document No 86, and that any interested delegation could attempt to refine the text and submit a further proposal if warranted.

96. **A delegate from Brazil** remarked that the proposal may create a different position to that agreed previously by the Plenary in relation to Article 6. The delegate noted that his delegation was not in a position to block the text, and would be likely to join the proposal in future. However, he suggested that the proposal be kept in brackets for now, and then on Second Reading, there could be the ability to exclude the brackets. He noted that his delegation was not otherwise in a position to support the proposal.

97. **The Chair** requested that the delegation of Brazil elaborate its concerns, noting that the drafting in his view appeared to conform to the previous position taken by the delegation of Brazil, in introducing additional constraints on departing from Article 6 by an REIO.

98. **A delegate from Brazil** confirmed that his delegation would require more time to come to an understanding of the effects of the proposal before it could be supported.

99. **The Chair** suggested that the proposal could be allowed to pass, and any problems be raised during the Second Reading.

100. **A delegate from Brazil** requested confirmation whether the Chair would permit his delegation to raise any strong objection to the provision at a later stage during the Second Reading. The delegate added that his delegation was likely to agree, but would wish for more time to establish whether it could be in a position to agree to the text.

101. **The Chair** concluded that the discussion of this item should resume after the luncheon break, to allow the delegation of Brazil the opportunity to reflect on the text of the draft proposal.

*Immovable property*

102. At the invitation of the Chair, **a delegate from Norway** introduced Working Document No 83 REV REV, a co-proposal of the delegations of Australia, the European Union, Japan, Norway, the United States of America, Switzerland and Israel. The delegate remarked that the proposal was designed to clarify the immovable property textual package adopted previously. The changes proposed were in relation to Article 5(3), and clarification in the Explanatory Report to cater to questions that arose in discussion of 5(1)(h) and its relationship with Article 6. The delegate recalled that in relation to Article 5, the Plenary had resolved to add wording that was meant to cover judgments relating to the registration of immovable property. She explained that the formulation adopted was very broad and it may actually be interpreted to go beyond judgments on the act of registration, to cover any contractual matters, if such a contract somehow required registration. The delegate remarked that that would be too broad of a scope, and that it would be beyond the intention of the provision. She added that the proposed wording under the new Working Document was designed to avoid this misunderstanding by clarifying that judgments ruling on the registration of immovable property are the object of Article 5(3). She noted that the proposal suggested certain further analysis for inclusion in the Explanatory Report to capture previous policy discussions on long-term tenancies or other kinds of contracts that in some States can be considered to have effects *erga omnes* (while not in others). She also explained that the proposal would ask the Explanatory Report to now clarify that, if a contract had effect towards a third party, it would be considered to be a contract having effects *in rem*, with a clarification specifying that the question of whether the effects are towards third parties or not is to be determined under the law of the place where the property is situated. The delegate concluded that she was aware of a parallel proposal from the delegation of Brazil with similar suggested wording for the Explanatory Report.

103. **A delegate from Japan** observed that the text adopted during the course of the previous day's negotiations might have unintentionally broadened the intended operation of Article 5(3). He surmised that, during the course of discussions, the delegates had only considered the scenario of a judgment ordering the registration of immovable property itself, and that they did not consider a judgment for the payment of money relating to the registration of immovable property, and hence it was desirable that new wording be explored. He noted that a judgment ruling on registration of immovable property that was based on rights *in rem* clearly falls within the scope of Article 6(b). But he also noted that there would be some judgments that ruled on the registration of immovable property based on rights *in personam* under the law of the State in which the property was situated, and that the policy position would be to include such registration judgments in the scope of Article 5(3) because, in some cases, the jurisdictional grounds provided in Article 5(1) would not be appropriate for those judgments. He added that Article 6(b) applied to judgments ruling on rights *in rem* in immovable property, *i.e.*, rights with *erga omnes* effect under the law of the State where the properties are situated, and that the proposed wording added to Article 5(3) had no influence on it because it was clear from the words of Article 6, "Notwithstanding Article 5", that Article 5 never applied to a judgment that ruled on the registration based on rights *in rem*.

104. **A delegate from the European Union** thanked the delegation of Japan for its flexibility on these issues and endorsed the explanation given by the delegate from Japan. The delegate wished to correct the record to explain that it was never the intention of the previous text to have a wide meaning. He noted that the proposal stated that the deletion of the words "a contractual right relating to" was meant to avoid misunderstandings as to the scope of the provision, but the delegate did accept that it could have created misunderstandings. He reiterated that despite this, the provision was not in fact designed to have a broad effect.

105. **A delegate from Israel** advised that the most important element of the proposal for his delegation was reference to the law of the State in which immovable property was situated. He added that his delegation would welcome an explanation in the Explanatory Report of the linkage between Articles 6 and 5(3) with the acknowledgement that in certain circumstances, rights *in rem* could apply in Article 6.


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106. **The Chair** recalled that the additional language suggested for paragraph 266 of the Explanatory Report was also considered when the matter was summarised previously during the course of the previous day's discussions.

107. At the invitation of the Chair, **a delegate from Brazil** introduced discussions of Working Document No 88. The delegate firstly referred to the large consensus in the joint proposal under Working Document No 83 REV REV and explained that his delegation would be able to compromise and accept the suggested change in the text as put forward by the proponents of that Working Document, as well as its proposals for clarifications to be made to the Explanatory Report. The delegate noted that Working Document No 88 was intended to be similar in this regard, describing features of the package on immovable property agreed previously, to assist the *co-Rapporteurs* and to bring the discussions from the Plenary into the Explanatory Report.

108. **The Chair** observed that the proposal to delete words in Article 5(3) had received no objections, and that that change was adopted. He then considered whether there was any objection to the explanations under Working Document No 83 REV REV, as regards the reference to the law of the State in which the immovable property is situated. Noting no objection, the Chair requested the *co-Rapporteurs* to include those comments in the Explanatory Report.

109. **A delegate from Singapore** thanked the co-proponents of the relevant Working Documents, and noted that his delegation had no issue with Working Document No 88 if Working Document No 83 REV REV were also adopted. The delegate suggested that the two proposals were complementary and that a possible solution would be to combine both Working Documents.

110. **The Chair** agreed and, noting that there was no objection to that approach, he confirmed that the suggestions made by both Working Documents should be taken into account in the Explanatory Report.

111. **Un délégué de la Suisse** confirme que sa délégation vient de soumettre la proposition et encourage des délégations intéressées à prendre connaissance de la proposition pendant la pause.

112. **The Chair** closed the meeting at 1.00 p.m.



# Procès-verbal No 17

# Minutes No 17

*Séance du vendredi 28 juin 2019 (après-midi)*

*Meeting of Friday 28 June 2019 (afternoon)*

1. La séance est ouverte à 14 h 30 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

2. **The Chair** opened the afternoon meeting with an important practical announcement: the delegates would be permitted to wear informal dress at the meeting of the Plenary on Saturday morning. The Chair then remarked that a document on anti-trust matters was being prepared, and sought confirmation from the delegate from the People's Republic of China.

3. **A delegate from the People's Republic of China** indicated that a Working Document was being prepared, co-sponsored by the delegations of Australia, the European Union, the United States of America and the People's Republic of China. In that regard he described it as a historic Working Document.

*Article 17, Article 29* bis*, Article 32*

4. **The Chair** directed the Plenary to a discussion about consequential amendments to the final clauses. He identified Working Document No 89 from the delegations of Japan, Switzerland and the United States of America which contained consequential amendments to Article 17, Article 29 *bis* and Article 32.

5. **Un délégué de la Suisse** indique que la première modification proposée est celle suggérée par l'un des co-Rapporteurs, à savoir, reconsidérer la formulation de l'article 17 et remplacer « *in* » par « *as between* ». Le délégué attire l'attention du Comité de rédaction sur le fait que le co-Rapporteur avait également suggéré de remplacer « *in force* » par « *effective* ». De son avis, il ne s'agit pas là d'une modification quant à la substance du texte. Pour ce qui est du deuxième changement, il propose de prendre en compte un délai plus court à l'article 29(1) et (2)(b), à savoir trois mois, avec une référence à l'article 29 *bis*(2). Il termine avec la troisième modification qui concerne l'article 32 et qui propose d'ajouter une référence à l'article 29 *bis* tout en biffant « *of declarations* » car le nouvel article 29 *bis* fait référence au terme « *notification* ». Dès lors, cette dernière proposition a pour but de préciser que la possibilité de retrait s'applique non seulement aux déclarations, mais aussi aux notifications.

6. **The Chair** noted that Working Document No 89 proposed the deletion of the words "first day of the month following" from Article 29. The Chair remarked that the

delegate from Canada and the Secretary General indicated that these words in fact reflected a practical rule for the depository. He further asked whether it was acceptable to Switzerland.

7. **Un délégué de la Suisse** précise que cela ne pose pas de problème.

8. **The Chair** concluded the words "first day of the month following the" had been revived by the delegate from Canada and should be included.

9. **A delegate from Canada** made further drafting suggestions and proposed that the text should read "on the first day of the month following the expiration of the period during which notifications may be made". This phrasing required further amendments to Working Document No 89.

10. **The Chair** agreed that the phrase "expiration of" should also be restored to the Working Document, such that the text read: "on the first day of the month following the expiration of the period during which notifications may be made in accordance with Article 29 *bis*(2)". The Chair observed nodding from the Plenary.

11. **A delegate from Canada** referred to Article 29 *bis* (2)(b) and requested that the Drafting Committee consider the inconsistency in Article 30(4) regarding the time period. She highlighted the need to determine substantively which of the provisions would apply to the case, and the need to consider the time period.

12. **The Chair** enquired whether there was consensus on Working Document No 89 as amended by the slight adjustments discussed before.

13. **A *co-Rapporteur*** was still uncertain as to the wording of Article 17 concerning entry into force. He supposed the following scenario: imagine that State A was the first State to ratify the Convention and that, after one week, State B also ratified the Convention. According to Article 29 *bis*(1), the Convention would enter into force three months after both ratifications, from the date of the second ratification. However, both States would still have 12 months in which to make an objection. The *co-Rapporteur* enquired as to the effect of the Convention during those 12 months: it was the *co-Rapporteur*'s understanding that the Convention would not apply. However, how would Article 17 then be understood? The *co-Rapporteur* remarked that the Convention would be in force (according to Art. 29(1)), but that it would not apply and would be ineffective between States A and B until after the lapse of 12 months. In that respect the *co-Rapporteur* sought to clarify that the reference in Article 17 was not to the fact that "the Convention was in force", but rather that 'the Convention was effective' or 'applied' between the two States. The *co-Rapporteur* sought guidance as to the collective effect of Article 29, Article 29 *bis* and Article 17.

14. **The Chair** thought the phrase "as between" resolved the issue. He noted that Switzerland had asked the Drafting Committee to consider the issue.

15. **A delegate from Switzerland** understood that Article 29(2) would only apply to accessions and ratifications (et cetera) that took place *after* the initial entry into force. She stressed that the language was "there*after* this Convention shall enter into force".

16. **The Chair** noted that the *co-Rapporteur*'s question had been directed to the operation of Article 17, not Article 29.

17. **A delegate from Switzerland** acknowledged this, but considered that a situation could arise in which the Convention entered into force after the first three months of signature. It may thereby be seen as in force between the first two States ratifying it. However, this would mean that the States had no opportunity to make a declaration. The delegate suggested that the Drafting Committee consider these provisions and flag issues for the Second Reading of the Convention.

18. **A delegate from the European Union** sought not to refer too many matters to the Drafting Committee. He agreed that the *co-Rapporteur* had correctly resolved the issue and there would be no doubt as to the operation if the word "effective" was used.

19. **A delegate from Australia** agreed with the delegate from the European Union.

20. **The Chair** enquired whether the delegations from Switzerland, Japan and the United States of America were prepared to replace the words "in force" with the word "effective". Noting that the delegations were in agreement, the Chair proceeded on the basis that the proposed words in Article 17 of Working Document No 89 should read "the Convention was *effective* as between". The Chair then concluded that Working Document No 89, as amended, was adopted by consensus.

*Article 30*

21. **The Chair** then noted that Article 30(1) as set out in Working Document No 87 had not been adopted as the Plenary had been awaiting consequential changes. Given that no changes were forthcoming, and observing no interventions to the contrary, the Chair concluded that Article 30(1) as set out in Working Document No 87 was adopted by consensus. The Chair noted that the remaining paragraphs of Article 30 had already been adopted.

*Article 32*

22. **The Chair** noted Article 32 was yet to be adopted. He noted the version proposed in Working Document No 87 with the modification already adopted in Working Document No 89. This meant that the Plenary should now consider the proposed text for Article 32(c) in Working Document No 87 without the words "of declarations".

23. **A delegate from Canada** did not submit a Working Document because her delegation anticipated that the cross-references would be considered by the Drafting Committee. However, taking to heart the concerns to minimise the work of the Drafting Committee, the delegate proposed that Article 32(a) and Article 32(c) each contain a reference to Article 26. The delegate acknowledged that her proposal was subject to the decisions of the Drafting Committee on Article 26.

24. **A delegate from the European Union** believed this issue could be left to the Drafting Committee. The delegate from the European Union had anticipated that the delegate from Canada would intervene before the adoption of Article 30 (given that Art. 26 was also mentioned therein). Given that Article 26 was mentioned in Article 30, it was also included in the reference to Article 32(c). The delegate from the European Union had understood that the delegate from Canada wished to delete the reference to Article 26 from Article 30. If that approach were to be adopted, then Article 26 needed to be mentioned explicitly in Article 32.


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25. **The Chair** indicated that this matter should be dealt with by the Drafting Committee. He proposed to adopt Article 32 as it stood in Working Document No 87, and noted that the operative provisions could be tidied by the Drafting Committee. Noting no interventions to the contrary, the Chair concluded Article 32 as it appeared in Working Document No 87 (as amended by Work. Doc. No 89) had been adopted by consensus. The Chair then sought interventions concerning the explanations of Article 29, Article 29 *bis*, Article 30 and Article 32 in the Explanatory Report.

26. **A delegate from Canada** sought to put her comments on the record that, depending upon the outcome of the Drafting Committee, her delegation may suggest an addition to the Explanatory Report with respect to paragraph 1 of Article 30. This would clarify that, in her view, Article 30(1) applied only to all the Articles referenced within it, but Article 30(2) to (5) applied to all declarations in the Convention. The delegate acknowledged that this may have some consequences for the REIO provisions.

27. **The Chair** thanked the delegate from Canada for her helpful intervention.

*Article 24*

28. **The Chair** directed the discussion to Article 24 as reflected in Working Document No 86. He recalled that the delegation of Brazil was the only delegation expressing hesitation upon this matter.

29. **A delegate from Brazil** thanked the Chair for the time to consider its final decision and indicated he was now in a position to support the proposal in Working Document No 86.

30. **A delegate from Switzerland** wished to place on the record her thanks to the delegations that supported the solution in Working Document No 86, which somewhat reduced the discomfort with the decisions that had occurred yesterday.

31. **The Chair** concluded that Article 24 as it appeared in Working Document No 86 was adopted by consensus. The Chair sought interventions regarding its explanation in the Explanatory Report.

32. **A *co-Rapporteur*** noted that the relevant paragraphs of the Explanatory Report would need to be completely redrafted given that it had significantly changed. In that respect, there was little utility in making suggestions on the existing draft.

33. **A delegate from the European Union** noted that the exchanges within the informal working group on the relationship of the Convention with other instruments would be helpful to the *co-Rapporteurs*, because they had brought the Plenary to the text which was now adopted.

34. **The Chair** joked that the proud parent of Article 24, the delegate from Japan, was likely to be happy to discuss the provision in as much length and depth as the *co-Rapporteurs* could possibly desire.

*Article 2(p) – Anti-trust matters*

35. **The Chair** noted that Working Document No 85 REV was currently being distributed to the Plenary. He emphasised that this was the last proposal of the First Reading of the text of the Convention. He recalled that Working Document No 85 REV was a historic Working Document, as the delegate from the People's Republic of China had identified, because it was co-sponsored by the delegations of Australia, the People's Republic of China, the European Union and the United States of America.

36. **A delegate from the People's Republic of China** thanked the other proponents of the Working Document for their open and supportive approach. He added that the current proposal reflected the concerns and policy issues raised by several delegations. Namely, it was based on the text of the United States of America, on the concerns of the European Union, and on consultations made with other delegations, in particular Singapore. He outlined the importance of the last part of the paragraph, which stated that both the conduct and its effect must have occurred in the State of origin. He added that the proposal also included words that were of great importance for the European Union.

37. **A delegate from the European Union** expressed his gratitude to the other proponents. In his view, this document constituted a way forward and could create a consensus. He outlined that the purpose was not to extend the extra-territorial effect of those conducts. His delegation was able to go along with this text even though it constituted a departure from the initial European Union line to include all competition matters in the scope. He added that the European Union had shown a great deal of flexibility and openness on several matters, and this proposal was a perfect example of it. He hoped that this attitude would find reciprocity in the room. **Another delegate from the European Union** added for the record that this had not been coordinated among the Member States of the European Union. On this point, he observed that this issue would be reviewed again in the case of a serious problem even though he was rather optimistic.

38. **A delegate from the United States of America** thanked everyone in the room for their openness and flexibility in order to reach a solution. He hoped that the proposal would carry through to the end.

39. **A delegate from Mexico** pointed out that he understood the concerns and appreciated the efforts put forward. However, he had instructions from his capital and his delegation was not able to join the consensus on the approval of this text. He outlined that the Minister of Foreign Affairs had to consult the Minister of the Interior on this specific matter and no answer had been provided yet. Then, he stated that he did not block consensus but clarified that he reserved the position of his delegation on the matter.

40. **The Chair** explained that the important point was that the delegation did not support the proposal, but did not block consensus either. He added it did not have any substantive meaning to reserve a position in a situation where the Plenary decided to move on.

41. **A delegate from Japan** expressed full support for the proposal.

42. **A delegate from the Republic of Korea** noted that although she had practical concerns on the matter, her delegation participated in the debate and went along with the compromise decision because she wanted the draft Convention to have a successful conclusion.

43. **A delegate from Singapore** thanked the proponents of the Working Document and noted the compromise that had gone into its formulation. He indicated that although Singapore would still prefer the exclusion of competition from the Convention, they could go along with the text.

44. **A delegate from Mexico** clarified that he was not blocking consensus but rather that his delegation was not joining the consensus.

45. **The Chair** took the remark into account and repeated that he saw no particular meaning in reserving a position.

46. **A delegate from the People's Republic of China** came back to the point raised by Mexico. He further explained that in international treaty law, reserving a position had a legal effect within the country but did not affect the legal position on the particular issue. Then, he opined that Mexico should not be worried about its position.

47. **The Chair** recalled that he was trying to clarify that reserving a position did not alter the procedural rules in relation to an adoption at the First Reading.

48. **A *co-Rapporteur*** indicated that within the scope of the exclusion, there were two connecting factors with the State of origin: the conduct and the effect. Further, he recalled, Article 5 applied. Thereafter, he asked whether a clarification could be brought regarding the terms "conduct" and "effect": in particular, whether the conduct referred to the agreement or concerted practice, and whether the effect should occur in the market of the State of origin, as it is the case in competition law.

49. **The Chair** observed that the proponent nodded. He further summarised the situation: the filter of Article 5 applied in any case, the term conduct should be understood as referring to the agreement or concerted practice, and the effect referred to the State of origin.

50. **A delegate from Peru** indicated that, even though he had clear instructions to exclude anti-trust matters from the scope of the Convention, he would not block consensus.

51. **The Chair** asked whether the Plenary could proceed on the basis that Article 2(1)(p) will read as set out in Working Document No 85 REV. He noted that it was adopted by consensus and further thanked the proponents and delegations for their spirit of flexibility. Then, he turned to proposals with respect to the Explanatory Report. He suggested taking some brief interventions, though noted that extensive discussion on these proposals would not be particularly useful until the *co-Rapporteurs* had produced a revised draft Explanatory Report.

*Working Document No 64*

52. **The Chair** turned to Working Document No 64, which related to Article 5(1)(k)(ii). He noted that it was pretty self-explanatory.

53. **A delegate from the United Kingdom** outlined that there were three important points in this proposal. First, the requested court would interpret the terms of the trust instrument as a whole. The court might consider other circumstances of the case only as an aid to interpreting whether the terms of the trust instrument disclose an implied designation. Second, the court would always look at factual evidential exercise, which related to the trust document itself. Third, the Working Document made some non-exhaustive examples of the kind of evidence that the court might look at.

54. **A delegate from the Republic of Korea** thanked the delegate from the United Kingdom and the delegate from Singapore for their flexibility. In the course of discussions, the delegate realised that accommodating both concerns would be a delicate issue. The delegate extended his thanks to Professor Harris.

55. **A delegate from Israel** added a polite suggestion, recommending that the Explanatory Report explain that if there were a conflict, the court could apply a most connecting factor test.

56. **The Chair** thought there were limits as to how far the Explanatory Report could explain general principles of interpretation. The Chair then turned to Working Document No 11 from the European Union in relation to REIOs and the suggestions in relation to paragraph 444 in the Explanatory Report.

*Working Document No 11 (common courts)*

57. **A delegate from the European Union** summarised that the explanation had been carried over from a similar if not identical explanation in the Explanatory Report to the HCCH *Convention of 30 June 2005 on Choice of Court Agreements*. The suggested text was of some importance to the delegation of the European Union. He noted that a limited number of delegations had had concerns on the proposal in the beginning. However, the delegate indicated that during the Diplomatic Session, other delegations had expressly, implicitly or informally informed the European Union that this did not affect them further. For that reason, the delegate sought either their silence or confirmation on the proposal.

58. **The Chair** encouraged 'silence' to be the preferred indicator of those States' level of comfort. Observing no reservations, the Chair then turned to the Working Documents touching upon intellectual property: Working Document No 75, Working Document No 80, and Working Document No 84.

*Working Documents Nos 75, 80 REV and 84 (intellectual property)*

59. **A delegate from Japan** explained that Working Document No 75 recorded the delegation of Japan's understanding of the important words "intellectual property". The delegate stressed he would never ask the *co-Rapporteurs* to write the Explanatory Report exactly as it appeared in a Working Document, however he emphasised two essential elements of his proposal. First, he highlighted that "intellectual property" should be interpreted broadly in the requested State, and that it should include not only rights universally recognised as intellectual property but also those analogous rights that were not universally accepted as intellectual property, yet were recognised as intellectual property in some States. Secondly, the delegate stressed some contracts relating to intellectual property were inside the scope and others were out. In this respect the delegate considered two sentences to be essential: "Article 2(1)(m) does not exclude all contractual matters that have an intellectual property aspect"; and "[h]owever, a judgment is excluded if the dispute is better characterized as an intellectual property matter instead of as a contractual matter". These were the essential aspects of those documents.

60. **A delegate from the People's Republic of China** addressed Working Document No 80 REV. He thanked the delegation of the United States of America, which had co-sponsored the Working Document. The text had been helpfully provided by colleagues from the United States of America in the informal working group. In this document, the People's Republic of China emphasised that "intellectu-


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al property" should be broadly understood to include the concept of "analogous matters". The delegate sought to emphasise that the term "analogous matters" was important for some States. The proposal also retained the examples of rights captured by the term which had been provided by the United States of America. He remarked that the proposal was strictly in line with the discussions that had occurred in the informal working group, and invited the delegation of the United States of America to elaborate.

61. **A delegate from the United States of America** thanked the People's Republic of China for collaborating on the proposal. He also remarked on the similarities between Working Document No 75, Working Document No 80 REV and Working Document No 84. He sought to draw the *co-Rapporteurs*' attention to the second paragraph of its proposal, especially the critical first sentence thereof that had been discussed in the informal working group. He underscored the understanding of the United States of America that disputes regarding licencing contracts were necessarily outside the scope of the Convention because they effectively take substantive intellectual property determinations into account. The delegate highlighted that this was not to say that all contractual disputes were out of scope if they had some *de minimis* intellectual property component – the delegate clarified that the United States of America would consider such contractual disputes to be within scope.

62. **A delegate from Israel** addressed Working Document No 84. The delegation sought to reflect its understanding of the agreement of the informal working group in the Working Document. It built upon the work of the delegations of Japan and Canada, after Canada submitted a Working Document to the informal working group on intellectual property. The delegate remarked that there were a few important aspects for Israel. First, the delegate aligned her position with the delegates from Japan and the People's Republic of China in the sense that the scope should include universally recognised intellectual property rights and "analogous" or non-universally recognised intellectual property rights. Secondly the delegate stressed that this interpretation was for the purposes of the Convention only and did not apply outside the scope of this instrument. Thirdly, the delegate expressed her preference not to include long lists of instruments or rights in the Explanatory Report, which she feared could lead to discussions and further confusion. However, if the lists were retained, the delegate politely suggested that all lists be styled as non-exhaustive lists. Fourthly, she sought to clarify that the square brackets in the text of the proposal in Working Document No 84 simply reflected the language of the proposal from Canada which she understood had been adopted by the informal working group. The brackets were to indicate that there had been some minor conflict as to the terms "judgment" or "matter", upon which Israel did not take a strong position. Finally, the delegate remarked that any examples in the Explanatory Report should make the text clearer. If there were no consensus or agreement on the examples, the delegate suggested it would not be horrible to delete them.

63. **A delegate from the European Union** thanked each of the proponents of the three proposals, and echoed that there was a considerable degree of overlap between them. The delegate remarked that the European Union fully subscribed to the three essential elements raised by the delegate from Japan. The delegate also agreed with the view expressed by the delegate from Israel that it would be preferable not to have long lists of rights and that references to instruments were sufficient. The delegate also fully subscribed to the view expressed by the delegate from Israel that the autonomous concept of intellectual property was only for the purposes of the present Convention, because the Plenary did not purport to regulate intellectual property in this Convention. The delegate also wanted to put on the record that the European Union disagreed with the view of the United States of America that licencing contracts would always be outside the scope of the Convention. She recalled vividly that in the informal working group there had been consensus on the sentence identified by the delegate from Japan ("Article 2(1)(m) does not exclude all contractual matters that have an intellectual property aspect"). She recalled that the informal working group had also agreed that the examples should reflect matters that were obviously "outside" and obviously "inside", and leave constructive ambiguity in between. She highlighted that the examples given for "obviously outside" matters included standard essential patents, compulsory licencing and FRAND issues. The delegate continued that one matter suggested to be "inside", and which had met agreement in the informal working group to her understanding, was the situation where a party sued another under a licence contract for the payment of royalties and there was simply disagreement as to how the royalties would be calculated. The delegate considered this to be a contractual issue which did not involve a substantive law determination on intellectual property law. She thought that each of the Working Documents reflected this concept and was content for each to be presented to the *co-Rapporteurs* for their consideration.

64. **A delegate from Brazil** had consulted with the proponents on the issue. He expressed his current preference for the wording of Working Document No 80. He followed the European Union on a number of objections. He expressed his preference to not include a tentative list of types of intellectual property in the text of the Explanatory Report. He also reaffirmed his preference not to have the expression "analogous matters" in the Explanatory Report, given that it had been hotly discussed and resolved within the Plenary. However, he would not oppose its inclusion so long as the Explanatory Report also reflected the ideas in Working Document No 80.

65. **A delegate from the People's Republic of China** sought to comment on Working Document No 75 and Working Document No 84. The reason his delegation did not prefer either Working Document was because he considered them to contain clear determinations as to what "analogous" rights were. The delegate highlighted that the third sentence of each proposal was: "Traditional knowledge, genetic resources and traditional cultural expressions are commonly invoked as examples of this latter category." The delegate did not consider it appropriate for the Explanatory Report to have this type of determination, and the People's Republic of China could not accept it.

66. **The Chair** assured the Plenary that the *co-Rapporteurs* would proceed on the basis that the use of some illustrative examples were helpful, but that bright lines should not be drawn where there was doubt. Noting there were no further interventions, the Chair turned to ask whether the *co-Rapporteurs* sought any general positive comments from the delegates.

*Article 5(1)(d)*

67. **A *co-Rapporteur*** sought clarification as to footnote 116 to paragraph 165 in the Explanatory Report and, in particular, whether States considered the filter regarding branches in Article 5(1)(d) could apply to natural persons acting in a professional or business capacity. The *co-Rapporteur* contrasted two jurisdictional filters: Article 5(1)(b) reflected the principal place of business of a natural person, whereas

Article 5(1)(d) referred to a branch, agency or other establishment. It was clear that this second filter applied to legal persons, however it was not clear to the *co-Rapporteurs* whether this filter could also apply to natural persons. He enquired whether a natural person could also have a secondary establishment covered by Article 5(1)(d) – *e.g.*, in the case of a lawyer who had a principal place of business in one country, but has a branch in another.

68. **A delegate from the European Union** considered that Article 5(1)(d) could apply to natural persons. He considered that Article 5(1)(b) would apply for the principal place of business, but Article 5(1)(d) could apply if the person maintained a secondary place of business. He acknowledged that a professional may indeed operate out of more than one jurisdiction and where a dispute arose in the second jurisdiction, it would be perfectly sensible for the jurisdictional filter in Article 5(1)(d) to apply.

69. **The Chair** recalled that Article 5(1)(b) was intended as an equivalent of the "habitual residence" test for a business. He explained that a party could be sued in relation to any business matters in their central place of business, but that it was not intended that Article 5(1)(d) operate differently as between legal and natural persons. In either case, where there was a branch, agency or other establishment in a State, and a claim was brought arising out of the activities of that branch, agency or establishment, the judgment could also circulate. The Chair observed that many of the delegates were nodding. The Chair acknowledged the Plenary had arrived at the momentous point of completing the First Reading, with a text that had no square brackets in it.

*Article 7(1)(e), Article 14(1)*

70. **Un délégué de l'Uruguay** rappelle qu'il reste le Document de travail No 90, présenté par les délégations de la République de Corée et de l'Uruguay.

71. **A delegate from the Republic of Korea** thanked the delegations from Uruguay and Switzerland and the *co-Rapporteurs* for their valuable advice in preparing the Working Document. The intention of the Working Document was not to change anything about Article 14(1) or Article 7(1)(e), but to supplement them by emphasising the principle of non-discrimination and the importance of honouring the spirit of the Convention.

72. **A delegate from Uruguay** thanked the delegate from the Republic of Korea. He considered the Working Document to be self-explanatory and reflected the concerns of Uruguay for the absence of express recognition of *res judicata* of the foreign judgment when it is inconsistent with a judgment given in the requested State at any time. He thought the Explanatory Report would benefit from this clarification.

73. **A delegate from the European Union** thanked the delegations from Uruguay and the Republic of Korea for their proposal. The delegate did not wish to make the process difficult, however he recalled that there had been discussions in the Plenary, which did not garner sufficient support, for the deletion of the term "earlier" from the text of the refusal ground. The delegate wished to preserve the substance of this outcome, and he expressed concern that the proposed addition to the Explanatory Report would undermine that result. The European Union had no problem as to what was in the text regarding excluding the possibility where there had been an abuse of procedure in order to obtain another judgment: the delegate thought this could clearly be expressed in the Explanatory Report. However, the proposed text in Working Document No 90 appeared to create the impression this would be the normal case, and that there were few other justifications that could be imagined as to why one would refuse to recognise a judgment although it had been obtained earlier. The delegate sought to highlight that there were no rules on *lis pendens*: it may well be that proceedings in the requested State began much earlier than in the State of origin, and therefore it may equally have been an abuse of procedure to start other proceedings in the State of origin. The delegate underscored the need for balance in the text and the Explanatory Report, and felt that this could be left in the capable hands of the *co-Rapporteurs*.

74. **A delegate from Singapore** echoed the comments of the delegate from the European Union. The Explanatory Report would create a kind of qualifier to Article 7(1)(e) that was not discussed during the Plenary, and the delegate did not think the text should go in as it stood.

75. **A delegate from Israel** joined with the concerns of the other delegations.

76. **The Chair** did not require further interventions in support. The Chair invited final interventions for the First Reading.

*Intellectual property*

77. **A delegate from Mexico** enquired why the text on intellectual property would remain in the Explanatory Report given that intellectual property had been excluded from the Convention.

78. **The Chair** sought to understand the question. He highlighted that the next version of the Explanatory Report would discuss the Convention as it now stood. It would not address Articles that have disappeared, however there would be a brief discussion on intellectual property because there is an exclusion relating to intellectual property. In that context, there needed to be an explanation of the exclusion.

*Second Reading*

79. **The Chair** then wished the Drafting Committee all the best with its work. The Plenary would resume tomorrow morning at 9.30 a.m. to begin the Second Reading of the Convention. The Chair reiterated that delegates were not required to wear formal dress.

80. **A delegate from Israel** sought clarification as to the process of the Second Reading, in particular what was permitted and what was not.

81. **The Chair** explained that the Second Reading would proceed on an Article-by-Article basis, dealing with any Working Documents that may be submitted. If there were sufficient support in the room, Articles may be revisited. The Plenary would also consider changes or suggestions made by the Drafting Committee. He highlighted that the introduction of changes during the Second Reading would face more of a burden, and he expressed his hope that delegates would continue to work by consensus such that it would not be necessary to explore precisely how this worked. He articulated his expectation that any Working Documents sought to be introduced in the Second Reading should be supported by multiple sponsors after wide consultation. The Chair asked delegations to exercise self-restraint if they recognised broad opposition to a proposal.


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82. **The Secretary General** recalled the usages of the HCCH, given that the Rules of Procedure were not extremely clear on the process. In the Second Reading, usage dictated that a proposal must be made in writing, and that the Working Document must have at least one co-sponsor. Rule 17 in the Rules of Procedure suggested that the discussion be limited only to two speeches in favour, and two speeches against the proposal. The Secretary General expressed his hope that this process would remain academic, because consensus continued to be the overarching principle.

83. **The Chair** echoed that there were strict rules. However, if there were only a modest number of proposals, and if States adopted a restrained and cautious approach, the process could proceed relatively informally. If, however, there were a multitude of proposals and pressure on time, the Chair indicated he would adopt a more formal approach.

84. **The Secretary General** sought to emphasise that this was a crucial moment on the historic journey towards a new Convention. He suggested that at this stage the delegates congratulate each other and realise the moment that had been reached on the journey. Bravo!

85.*The Plenary applauded.*

86. **The Chair** first expressed his relief that the intervention of the Secretary General had proceeded without metaphors: the Chair joked this was an example of the restraint he sought from delegates during the Second Reading. Secondly, in fairness to others, the Chair directed that Working Documents should be prepared sooner rather than later, and that delegates should actively seek co-proponents and support now.

87. **The Secretary General** noted that the new text emerging from the Drafting Committee would be published on the Secure Portal as soon as possible. The Secretary General directed delegates to the Secure Portal if they planned to submit a Working Document on the basis of the new draft text.

88. **The Chair of the Drafting Committee** reminded the Drafting Committee that they would meet in half an hour at the Permanent Bureau to start work, with a view to finishing early in the night. He expressed his hope that it would be a night document, and not a nightmare.

89. **A delegate from the European Union** joked that anyone who had clapped their hands earlier had now forfeited their right to submit a Working Document in the Second Reading. He reminded the European Union delegations of a short coordination meeting in the Historic Reading Room.

90. The meeting closed at 4.07 p.m.

# Procès-verbal No 18

# Minutes No 18

*Séance du samedi 29 juin 2019 (matin)*

*Meeting of Saturday 29 June 2019 (morning)*

1. La séance est ouverte à 10 h sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

2. **Le Président** remercie le Comité de rédaction pour le travail effectué la veille et qui a produit le Document de travail No 91.

3. At the invitation of the Chair, **the Chair of the Drafting Committee** thanked the Permanent Bureau for their cooperation in finalising the text late the previous evening. As the Chair was to proceed Article by Article, the Chair of the Drafting Committee explained that he would not provide any general considerations of the issues which were more delicate to discuss. He emphasised that there were questions in the document where the Drafting Committee had attempted to reflect the outcome of the debate during the Diplomatic Session, which was more difficult for some issues than for others. It was explained that it was necessary for the Drafting Committee to remain faithful to and reflect what was discussed in the Plenary, as well as to improve and beautify the text and maintain parallelism with the HCCH *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 HCCH Choice of Court Convention"). With the more difficult issues, the delegate signalled that he would take the floor to explain the relevant changes made by the Drafting Committee.

4. **The Chair** began reading through the text of the draft Convention in Working Document No 91.

*Preamble*

5. **A delegate from the Russian Federation** indicated that their delegation had a proposal for the Preamble to be submitted in a Working Document for review by the Plenary at Second Reading of the text.

6. **The Chair** reiterated that at this time, delegates should only intervene to identify a problem with the current text. The Chair concluded that there was consensus that the text of the Preamble reflected the outcome of the First Reading.

*Article 1*

7. **The Chair** noted that no changes had been made to the text of Article 1.

*Article 2*

8. At the invitation of the Chair, **the Chair of the Drafting Committee** explained that in relation to Article 2(1)(g), the Drafting Committee was aware of the compromise regarding marine pollution and that the Drafting Committee attempted to keep the text as it was agreed by the Plenary, but had added the words "marine pollution in areas beyond national jurisdiction" for the purpose of consistency with other international instruments which concerned this subject.

9. **The Chair** concluded that there was consensus that the text of Article 2(1)(g) reflected the outcome of the First Reading and that the text of Article 2 was adopted.

*Article 3*

10. **The Chair** concluded that the amendment in Article 3(2)(b) reflected the outcome of the First Reading and that it was adopted by the Plenary.

*Article 4*

11. At the invitation of the Chair, **the Chair of the Drafting Committee** noted in Article 4(2) that the first sentence was untouched but that the second sentence, which was previously phrased in the negative, "[t]his does not preclude such consideration", was amended to "[t]here may only be such consideration as is necessary for the application of this Convention". The delegate emphasised that the outcome of the new draft was the same as the previous language, but that it made the point more clearly.

12. **The Chair** agreed that the amendment conveyed the stringency of the exception in Article 4(2): that if it was not necessary to review the merits for the application of the Convention, then a review of the merits should not happen. The Chair also noted that the amendment was a restoration of the analogue provision in the 2005 HCCH Choice of Court Convention, and concluded that there was consensus in the Plenary to accept the Drafting Committee's changes to Article 4.

*Article 5*

13. **The Chair of the Drafting Committee** explained that in relation to Article 5(1)(h), the words in parenthesis in the English version of the text, "(tenancy)", were absent from the French version because the expression was unnecessary in the French language.

14. **The Chair** concluded that there was consensus in the Plenary to accept the changes made by the Drafting Committee to Article 5.

*Article 6*

15. **The Chair of the Drafting Committee** noted that for Article 6, a singular rather than plural reference to Article 5 was included, as a result of the outcome of the Plenary negotiations on tenancies and immovable property.

16. **The Chair** concluded that there was consensus in the Plenary to accept the changes made by the Drafting Committee to Article 6.

*Article 7*

17. **The Chair of the Drafting Committee** explained that the Drafting Committee in Article 7(1)(e) and (f) had amended the expression "judgment given in the requested State" to "judgment given by a court of the requested State" to avoid a misunderstanding, because it was possible that the irreconcilable judgments were from courts located in the same State.

18. **The Chair** concurred that the relevant factor was that it was a court of the State, rather than the location of the court, and provided the example of the Privy Council, when it previously had appeal jurisdiction for New Zealand matters. Despite that it was based in London, when the Privy Council heard an appeal from New Zealand, it was a court of New Zealand. The Chair concluded that there was consensus in the Plenary to accept the changes made by the Drafting Committee to Article 7.

*Article 8*

19. **The Chair** highlighted that, in Article 8, an amendment was made to refer to States, rather than to courts, and that paragraph 3 had been deleted, and concluded that there was consensus in the Plenary to accept the changes made by the Drafting Committee.

*Articles 9 and 10*

20. **The Chair** noted that no amendments were made to Articles 9 and 10.

*Article 11*

21. **The Chair** noted that Article 11 had been removed from the text in conformity with the decision made by the Plenary.

*Article 12*

22. **The Chair** noted that no amendments were made to Article 12.

*Article 13*

23. **The Chair of the Drafting Committee** highlighted that in Article 13(1)(d) an amendment was made to "the State of origin *stating* that the judicial settlement or a part of it is enforceable". It was explained that since Article 13(1)(d) concerned a certificate in relation to a court-approved judicial settlement, the certificate would state, rather than itself establish, that the judicial settlement was enforceable.

24. **The Chair** concluded that there was consensus in the Plenary to accept the changes made by the Drafting Committee to Article 13.

*Article 14*

25. **The Chair** noted that no amendments were made to Article 14.

*Article 15*

26. **The Chair** noted that in Article 15, "in" was substituted with "by a court of", and that there was consensus in the Plenary to accept the amendment.

*Article 16*

27. **The Chair** noted the amendment to the heading of Article 16 and concluded that there was consensus in the Plenary to accept the changes made by the Drafting Committee.


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*Article 17*

28. **The Chair of the Drafting Committee** explained that the Drafting Committee included the expression "had effect" instead of "was in force", in light of the previous changes that were made to Article 29 *bis*. The delegate shared that the Drafting Committee had discussed the difference between the two expressions at length, and had concluded that it was better in Article 17 to refer to the *effect* of the Convention rather than it being in force, because the provision was linked to Article 29 *bis*.

29. **The Chair** concluded that there was consensus in the Plenary to accept the changes made by the Drafting Committee to Article 17.

*Article 18*

30. **The Chair** noted that no amendments were made to Article 18.

*Article 19*

31. **The Chair** noted an amendment to Article 19 had been made, from "a court in a Contracting State" to "a court of a Contracting State" and concluded that there was consensus in the Plenary to accept the changes made by the Drafting Committee to Article 19.

*Article 20*

32. **The Chair of the Drafting Committee** recalled that a number of textual proposals had been made with respect to Article 20, including the addition to the last sentence of paragraph 1 that was contained in square brackets in Working Document No 91, "or is the party seeking recognition or enforcement or the party against whom recognition or enforcement is sought in the requested State". The delegate explained that when the Drafting Committee had discussed how to make the provision clearer, it was decided to change the provision quite substantially to try to reflect exactly what had been decided by the Plenary. The Chair of the Drafting Committee invited the Chair of the informal working group on governments to explain in further detail the changes the Drafting Committee had deemed necessary.

33. **The chair of the informal working group on governments** at the outset apologised for a mistake in the square-bracketed text at the end of paragraph 1, which should have stated "sought in the *declaring* State" and not "sought in the requested State". The delegate explained that the policy of the informal working group on governments had been clear, that a declaration could not be made in such a way as to permit the declaring State to make a declaration only when it received a judgment against it in another Contracting State. The informal working group had attempted to reflect that policy in the drafting of their proposal of Article 20, but had struggled to get that drafting correct. So, when the Drafting Committee had looked at it, the Drafting Committee was uncertain whether the text agreed to in the Plenary properly reflected that policy. The Drafting Committee had concluded that it was safer for the policy goal to be stated explicitly in the text, that the declaration shall not distinguish between judgments when the State, government agency of that State or a natural person acting for either of them was a defendant or claimant in the proceedings before the court of origin, and to refer to the situation where they were the party who was seeking recognition and enforcement or were the party against whom recognition or enforcement was sought in the requested State.

34. The chair of the informal working group on governments reiterated that there was no intention to change the policy, and that the aim was simply to have drafting which would achieve the policy objective with no ambiguity. It was recognised that the result had been that the text was slightly heavier, but that it was deemed necessary in order to ensure the provision was crystal clear. Nonetheless, the text was included in square brackets, since the Plenary had to authorise the textual change and not just the Drafting Committee.

35. **The Chair** recalled that the policy which had been agreed to in the Plenary was that an Article 20 declaration could not depend on whether a judgment was favourable or not to the State, government agency of that State or a natural person acting for either of them.

36. **A delegate from Israel** shared that they could agree on the policy point, but that in their opinion the new addition to Article 20 was not desirable. The result of the amendment was that it made paragraph 2 more cumbersome and sent a message that States which issued an Article 20 declaration were already assumed to be abusing the paragraph. The delegate stated that since the policy had been agreed to by the Plenary, it was possible to deal with the situations specified in the new addition to Article 20 instead in the Explanatory Report. It was emphasised that the delegate would be happy without the new addition and to delete from the first paragraph "or is the party seeking recognition or enforcement or the party against whom recognition or enforcement is sought in the requested State", because the Plenary did not want a huge paragraph that blew out of proportion the risk of abuse of Article 20 declarations and sent the wrong message.

37. **A delegate from the Russian Federation** expressed that they echoed the intervention made by the delegate from Israel; they had no problem on the policy, but agreed that such situations could be covered by the Explanatory Report because, based on the general policy, it was possible to omit something despite drafting paragraph 1 in Article 20 heavier and heavier. Therefore, it was more desirable that the policy be fully captured by the Explanatory Report.

38. **The Chair** concluded that there was consensus to omit the square-bracketed language in paragraph 1 of Article 20, since there was no difference in policy between the versions and the concern captured in the new edition could always be reflected in the Explanatory Report. The Chair noted that if any delegation considered that it was in fact important to include the language in the provision, they could introduce such a proposal in a Working Document at Second Reading.

39. **A delegate from Australia** expressed that they did not have an objection to the Chair's suggestion, but that they believed that it was worth noting that there was a substantive difference between the original text of Article 20 agreed to in the Plenary and the amended version contained in Working Document No 91, which was all the more reason that the text in square brackets be brought back to the Plenary in the form of a Working Document. The delegate shared that, in his opinion, the additional text did not reflect what was agreed to in the Plenary; what had been agreed to was that a State could not pick and choose which judgments pertaining to its government would be enforceable, and that the intention was that making a declaration was a serious decision.

40. **The Chair** clarified that the question was whether the text in paragraph 1 should include both situations: the ref-

erence which was not in square brackets to whether the State, government agency of that State or a natural person acting for either of them is a defendant or claimant in the proceedings as well as the reference to whether they were the party seeking recognition or enforcement or the party against whom recognition or enforcement was sought. The Chair concurred that whether it was helpful to include both situations would benefit from longer reflection, and that whether there should be an alignment of the text with what the Plenary intended to achieve in the policy was a matter for the Second Reading. The Chair concluded that there was consensus that the square-bracketed text in Working Document No 91 be removed and instructed delegates to similarly cross out that text in Article 19(1) of Working Document No 92.

41. **A delegate from the European Union** expressed that as an outcome of the First Reading, it was important to clarify that there was an agreement that there should be clarity in the Explanatory Report about the policy, and thereafter the Plenary could then debate what the delegations should do in the Second Reading. However, the delegations of both Israel and the Russian Federation stated that there was no disagreement on the policy that was trying to be achieved. Therefore, it was extremely important that the policy be fully and accurately reflected in the Explanatory Report, even if for some reason the Plenary was not able to fully and accurately reflect it in the text.

42. **The Chair** agreed that there was no dissent expressed regarding the policy at all, only about the heaviness of the provision. Even if there were to be no further changes to the text, the Chair explained that the policy could and should be captured in the Explanatory Report and noted that the delegations of Israel and the Russian Federation nodded in agreement. It was reiterated that the delegations that expressed concern about the text had no problem with explaining the policy in the Explanatory Report. With that adjustment, the Chair concluded Article 20 was finalised and the Plenary could accept the provision as an accurate record of the First Reading.

*Article 21*

43. **The Chair** noted that there were no amendments to Article 21.

*Article 22*

44. **The Chair** stated that the amendments to Article 22 were just the changes explicitly made in the Plenary, and concluded that the changes were accepted by the Plenary.

*Article 23*

45. **The Chair** stated that the changes to Article 23 were simply what was discussed in the Plenary, except in paragraph 2 where the reference to "the preceding paragraph" was amended to "paragraph 1" and concluded that the changes were accepted by the Plenary.

*Article 24*

46. **The Chair of the Drafting Committee** explained that the amendments to Article 24 were to implement Working Document No 86, but that there was nothing in particular to note.

47. **The Chair** concluded the Plenary accepted all the changes in Article 24.

*Article 25*

48. **The Chair** noted that in Article 25, the Drafting Committee had made the language slightly more archaic in two paragraphs.

49. **The Chair of the Drafting Committee** explained that the change was due to the request made by the depositary of the Convention. The depositary preferred to have the expression "shall be open" rather than "is open", which the Drafting Committee thought could be accommodated in that situation.

50. **The Chair** concluded the Plenary accepted all the changes in Article 25.

*Article 26*

51. **The Chair of the Drafting Committee** highlighted that in Article 26 the Drafting Committee had merged paragraphs 1 and 2 for consistency purposes because they had detected a duplication in Articles 26 and 30 and the Drafting Committee had preferred to leave everything in Article 30, and then make a reference to Article 26. Accordingly, it was appropriate to merge the two paragraphs. He emphasised that the change was just a drafting matter.

52. **The Chair** recalled the need that the delegation of Canada identified to make Articles 26, 30 and others fit together better and not say the same thing twice, or the same thing with slight differences. The Chair concluded the Plenary accepted all the changes in Article 26.

*Article 27*

53. **The Chair** expressed that the amendments were self-explanatory and concluded the Plenary accepted all the changes in Article 27.

*Article 28*

54. **The Chair** noted that in Article 28 there was an amendment to the title, and concluded that there was consensus in the Plenary to accept the changes made by the Drafting Committee to Article 28.

*Article 29*

55. **A delegate from Canada** informed the Plenary that their delegation would be submitting a proposal as a Working Document, it was presumed at Second Reading, to make a minor amendment to paragraph 2(b) simply to track the change in paragraph 2(a) where there was a 12-month period for the entry into force.

56. **The Chair** acknowledged the delegate from Canada's intention and concluded that there was consensus in the Plenary to accept the changes made by the Drafting Committee to Article 29.

*Article 29* bis

57. At the invitation of the Chair, **the Chair of the Drafting Committee** shared that Article 29 *bis* was a difficult provision, and that the Drafting Committee had implemented the proposal in Working Document No 24 REV REV and tried to improve the clarity of the language. Still, the Drafting Committee felt that it was necessary to clarify the moment from which the Convention was effective between the two first Contracting States, which may require further drafting which could not be achieved in the late evening


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session because it was considered that the members of the Drafting Committee should have a clear mind for the task. It was expressed that the matter could also be discussed in the Plenary, but that the delegate simply wanted to flag the issue that it might be appropriate to see when exactly the Convention would come into effect for the first two Contracting States, which was not clear under the current provisions.

58. **The Chair** noted that the statements by the Chair of the Drafting Committee were just something for the Plenary to reflect on and consider whether or not any drafting was necessary. The Chair explained that it may well be that there may be a difference between when the Convention came into force and governed the process for the Convention operating between two States, and when it actually operated between them for the purpose of recognition and enforcement of judgments. It was not obvious if the matter did need to be addressed, but it was emphasised that the delegations should reflect on the question raised by the Drafting Committee.

59. **The Secretary General** drew attention to the introduction in paragraph 1 of the words "regarding the other", which was to make absolutely clear and sure that the declaration mechanism only applied between the declaring States, and did not prevent the entry into force and effectiveness of the Convention between other States. It was an important clarification, on which the Drafting Committee spent quite some time.

60. **A delegate from the People's Republic of China** submitted a question concerning the legal issue on Article 29 *bis*, whether it was possible for a State which was the subject of a declaration by another State to not establish treaty relations who still wanted to apply the Convention to recognise judgments from any States who were signatories to the Convention, meaning to unilaterally apply the Convention.

61. **The Chair** stated that, in his opinion, the answer to the question from the delegate from the People's Republic of China was in the negative, but not as the text was currently drafted, and if that were to be the policy the language may need to be adjusted in the Second Reading, which was another question which should also be reflected upon.

62. **A delegate from Switzerland** indicated that she did think it was possible, because a State could always have a provision in their national law that it would apply the Convention unilaterally, so no changes in the language were required.

63. **The Chair** concurred that the possibility was always available under national law, but explained that the State would not be performing a Convention obligation with such unilateral recognition; it would just be using its national law. The Chair concluded that the text reflected the outcome of the First Reading and that the Plenary accepted the changes in Article 29 *bis*.

*Article 30*

64. **The Chair** noted that the amendments in Article 30 were only to tidy up necessary cross-references and adoption of the three-month period in paragraph 4.

65. **A delegate from the Russian Federation** sought clarification that Article 20 was included, and so a declaration could be made on Article 20 at any moment, since the square brackets had been removed.

66. **The Chair** affirmed the intervention from the delegate from the Russian Federation, and concluded that the Plenary accepted the amendments in Article 30.

*Article 31*

67. **The Chair** noted that in Article 31 there was a minor change to write "12" in numerals rather than letters, and concluded there was consensus in the Plenary to accept the change made by the Drafting Committee to Article 31.

*Article 32*

68. **The Chair** noted that there were modest drafting changes, cross-references and some execution language added after Article 32, and concluded that there was consensus in the Plenary to adopt the changes by the Drafting Committee to Article 32.

*Execution language*

69. **A delegate from the European Union** highlighted a small mistake that had been made by the Drafting Committee in the text "to each of the Members of the Hague Conference on Private International Law at its Twenty-Second Session", which for the avoidance of doubt should be "at the time of its Twenty-Second Session", because it was not just the Members present at the meeting. The delegate shared that the Drafting Committee had a discussion and tried to delete similar words, but in his opinion there was no need to refer to a date, but there was a need to state "at the time of" to ensure that there was no ambiguity.

70. **A delegate from Israel** stated that he noticed in Article 32 there was no reference to declarations made under the current Articles 18 and 19, and sought a clarification from the Secretary General that the intention was that, even without text, these declarations would be made public, because in the delegation of Israel's opinion there should be a way for States to be aware of these declarations when they were made. The delegate stated that if it was not in the text but that it would in fact be the practice, that was fine, but also they did not necessarily consider that it would be a notification by the depositary.

71. **A delegate from Switzerland** shared that she had asked the same question in the Drafting Committee meeting because it was not immediately obvious from the text, but explained that it was a cross-reference to Article 30 which, in turn, referred to all the other declaration Articles.

72. **A delegate from South Africa** sought clarification about whether the proposal was to remove the phrase "on the 2nd day of July".

73. **The Chair** clarified that in fact the proposal was to include "at the time of" before the phrase "its Twenty-Second Session", to make it clear the question was who were the Members at the present time and not who participated in the Diplomatic Session.

74. **A delegate from Switzerland** wondered whether the text should mirror the formula of the 2005 HCCH Choice of Court Convention which used "as of the date of".

75. **The Chair** explained that the Secretary General thought that the phrasing was not as eloquent and "at the time of" was preferable. The Chair concluded that the Plenary accepted the execution language with the minor proposal in Article 32.

76. **A delegate from the People's Republic of China** noted that the previous texts all used the words "the date of", not "at the time of".

77. **The Chair** explained that it was the Secretary General's opinion that "the date of" was a little confusing because the Twenty-Second Session did not just have one date but ran for a period, and so "at the time of" dealt with the whole duration and there was no confusion because no State had become a Member during the period.

78. **The Chair** confirmed that the text from the First Reading had been concluded in the Plenary, and that there was no need to re-print Working Document No 92. However, he invited the delegations to make two hand-written changes: to delete the language in square brackets in Article 20(1) and, at the end in the execution language, to add "at the time of" before "its Twenty-Second Session".

79. **The Chair of the Drafting Committee** extended his warm thanks to all the members of the Drafting Committee for the extremely outstanding work that they performed the previous evening as well as his thanks to the staff of the Permanent Bureau for having worked even later into the night to provide the documents for today.

80. **The Chair** also extended thanks on behalf of himself and all delegations to the Permanent Bureau, as well as to the Chair of the Drafting Committee for his patient and committed work.

*Second Reading*

81. **The Chair** explained that, having received only one Working Proposal before the Second Reading, the Plenary would be allowed to finish early to give time for reflection on the text over the weekend.

82. The Plenary embarked on a Second Reading of the Convention, using Working Document No 92 as the base text.

*Articles 1 to 4*

83. Noting no extant proposals or Working Documents in relation to the Preamble, Article 1, Article 2, Article 3, or Article 4, **the Chair** concluded that these Articles were adopted on Second Reading.

*Articles 5 and 6*

84. **The Chair** observed that there had been a proposal submitted in relation to Articles 5 and 6 under Working Document No 94. The Chair invited introduction of the proposal by its co-proponents, Brazil and Israel.

85. **A delegate from Israel** explained that the Working Document would not propose a policy change, but would produce a presentation and drafting change in Articles 5 and 6. The delegate noted that on current drafting, the "notwithstanding" clause appeared in Article 6, and that the proposal would invert the ordering, to instead put this at the beginning of Article 5(1). The delegate explained that on the sequential reading of the Articles, for visibility, it would be better to have this clause within Article 5(1) than Article 6. He added that he was not convinced that "subject to" was necessarily correct wording, but thought that this issue could be reviewed by the Drafting Committee.

86. **A delegate from Brazil** agreed with the comments of the delegation of Israel, and emphasised that the Working Document attempted to address a pure drafting issue. He explained that his delegation could remain open to wording suggestions but that the main goal was to give correct indications to practitioners on how to apply the Convention. He also agreed that the wording "subject to" could be finessed.

87. **A delegate from the United States of America** recognised that Articles 5 and 6 would need to be read together and his delegation understood that the legal effects of those provisions may not be significantly different under the joint proposal. However, the delegate explained that the delegation of the United States of America was concerned about the proposal and could not support it, due to emphasis issues. The delegate noted that the emphasis change of the proposal would suggest that the purpose of the Convention is to not recognise and enforce judgments on the limited grounds of Article 6, rather than promoting recognition and enforcement on the basis of Article 5.

88. **A delegate from the European Union** requested that this proposal not be pressed by the propounding delegations. He explained that to press the proposal would require internal coordination within the European Union, and that he would prefer not to have to do that unless necessary. He also gave indications that at least one European Union Member State may object to the proposal.

89. **The Chair** noted that there was no consensus to make the change. Noting that the co-proponents did not wish to intervene further, the Chair declared that the unamended Articles 5 and 6 were adopted on Second Reading.

*Articles 7 to 9*

90. Noting no extant proposals or Working Documents in relation to Article 7, Article 8, or Article 9, **the Chair** concluded that these Articles were adopted on Second Reading.

*Article 10*

91. **A delegate from Uruguay** offered a polite suggestion for the Drafting Committee in relation to alignment between the French and English texts in Article 10. The delegate noted that the reference in English to "damages" was expressed more broadly in the French as "*dommages et intérêts*" and that this could perhaps be considered and addressed.

92. **A delegate from the European Union** thanked the delegate for his proposal but suggested that the text should not be amended, noting that this may create an *a contrario* implication as the provision was derived from the 2005 HCCH Choice of Court Convention, and should otherwise remain consistent with it.

93. **A delegate from the People's Republic of China** thanked the delegate from Uruguay for the suggestion, and concurred with the position of the delegation of the European Union.

94. **The Chair** concluded that there was no consensus to amend the wording in the Article, and declared the unamended Article 10 adopted on Second Reading.

*Articles 11 and 12*

95. Noting no extant proposals or Working Documents in relation to Article 11 or Article 12, **the Chair** concluded that these Articles were adopted on Second Reading.


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*Article 13*

96. **A delegate from the People's Republic of China** posed a question for the Drafting Committee, surrounding the use of the phrase "court addressed" in Article 13. He noted that the formulation "court of the requested State" was preferred elsewhere than in Article 13 and queried if there was any significance to its varied use in this Article.

97. **The Chair** considered the position and noted that the draft Convention used the same language of both "court addressed" and "court of the requested State" in Article 13 as was used in the 2005 HCCH Choice of Court Convention.

98. **A delegate from the European Union** thanked the delegate from the People's Republic of China (Hong Kong SAR) and suggested that perhaps the text in paragraph 1 could be amended to read "court of the requested State". He explained that this may be desirable to express the concept that the obligation to act expeditiously would be a systemic obligation on the legal system of the requested State.

99. **A further delegate from the European Union** underlined that there is a definition of "the requested State" in Article 4, but that "court addressed" was not defined, and suggested that the phrase "court of the requested State" would be more consistent.

100. **The Chair** queried whether there was consensus to change the reference to "court addressed" in Article 13(1) to read "courts of the requested State".

101. **A delegate from Israel** requested further explanation on why the plural *i.e.*, "courts of the requested State" would need to be used to express the matter as a systemic obligation. The delegate cautioned that the plural expression was not used elsewhere.

102. At the request of the Chair, **the Chair of the Drafting Committee** expressed his views of the drafting question. He suggested that Article 13(1) be changed to refer to "court of the requested State", and that the Drafting Committee could consider any further issues of consistency.

103. **The Chair** noted that it was implicit in either language that the reference was intended to be reference to the relevant court, and suggested that the language could refer to "court of the requested State", whichever court that may be. Noting no objection to that proposal, the Chair noted that that change would be carried out in Article 13(1).

104. **A delegate from the People's Republic of China** queried whether the Plenary should see fit to make a global change from "court addressed" to "court of the requested State", noting that the phrase "court addressed" also made an appearance in Articles 10 and 12.

105. **The Chair** commented that the change may not be appropriate in Article 10(2) or 12(2), as those Articles refer to a specific court, which may favour the language "court addressed". The Chair also highlighted that the terminology "court addressed" featured in, and was explained by, the Explanatory Report. He also noted that the language mirrored the 2005 HCCH Choice of Court Convention. He concluded that although the change would be required to address internal inconsistency within Article 13, it could be left alone in the other Articles.

106. The Chair noted that there was no objection to the suggested approach and declared that Article 13, as amended, was adopted on Second Reading.

*Articles 14 to 18*

107. Noting no extant proposals or Working Documents in relation to Article 14, Article 15, Article 16, Article 17, or Article 18, **the Chair** concluded that these Articles were adopted on Second Reading.

*Article 19*

108. **The Chair** reminded the Plenary that the square-bracketed text in Article 19(1) within Working Document No 92 should be considered as having been deleted, when considering this Article. Noting no opposition to that approach, the Chair concluded that Article 19 was adopted on Second Reading.

*Articles 20 to 25*

109. Noting no extant proposals or Working Documents in relation to Article 20, Article 21, Article 22, Article 23, Article 24, or Article 25, **the Chair** concluded that these Articles were adopted on Second Reading.

*Article 26*

110. **A delegate from the European Union** intervened to propose that in Article 26(3), there was an errant comma that ought to be deleted.

111. Noting no objection to that proposal, **the Chair** declared that Article 26 was adopted on Second Reading with that change incorporated.

*Article 27*

112. **A delegate from South Africa** queried whether there should be an indefinite article added to the title of the provision, to refer to "*a* Regional Economic Integration Organisation".

113. **The Chair** replied that the omission of such indefinite articles was not usually a concern, and that this was also a feature of the 2005 HCCH Choice of Court Convention. Noting no consensus to adopt the change, the Chair concluded that the unamended Article 27 was adopted on Second Reading.

*Article 28*

114. **A delegate from Switzerland** noted her delegation's intention to introduce a Working Document on Article 28(2).

115. **A delegate from Canada** also noted that it intended to submit a proposal and would liaise with the delegation of Switzerland to see if an agreed text could be created.

116. **The Chair** advised that Article 28 was not adopted and would be subject to further proposals. As such, it would be reserved for discussion on Monday.

*Article 29*

117. **A delegate from the Republic of Korea** noted that Article 29(1) did not cross-refer to Article 29(4) in circumstances where it may be helpful to allow this referral.

118. **The Chair** responded that he did not believe that withdrawal would need to be considered in paragraph 1. He explained that if a notification was withdrawn, then the position would be that there is no notification by either of them regarding the other, and that paragraph 1 would sim-

ply apply on its terms. Noting no consensus to adopt the change, the Chair concluded that the unamended Article 29 was adopted on Second Reading.

*Articles 30 to 32*

119. Noting no extant proposals or Working Documents in relation to Article 30, Article 31, or Article 32, **the Chair** concluded that these Articles were adopted on Second Reading.

*Execution wording*

120. **The Chair** noted that the Plenary had proposed insertion of the language "*at the time of* its Twenty-Second Session […]", in relation to the execution wording. Noting no opposition to the proposed revised execution wording, the Chair concluded that this execution wording was adopted on Second Reading.

*Recommended form*

121. **The Chair** recalled that Working Document No 93, containing the recommended form, had been updated from Working Document No 3 REV REV by the Permanent Bureau. The Chair explained that, consistent with the change to Article 12(1)(d), referring to a certificate of a court of the State of origin stating that a judicial settlement or part of it is enforceable in the same manner, the language in the fourth item in the list in section 8 of the recommended form should be aligned by adding the word "*stating* that the judicial settlement […]". Noting no objection to that modification, the Chair declared the recommended form adopted with this modification, on Second Reading.

*Spanish language translation*

122. **A delegate from Argentina** noted that the use of both the French and English languages for the text of Conventions has been a long tradition of the HCCH while also noting that there is no reference to the said languages in the Statute as official languages, and queried whether there was any update on the timing and procedure of the translation of the Convention into the Spanish language.

123. **The Secretary General** replied that both French and English were the official languages of the text and that neither the French nor the English versions would themselves be a translation, both having official status. He added that the HCCH would not produce an official Spanish text, and that it would be for Spanish-speaking delegations to produce their own version of the text. The Secretary General commented that this would be the position for German and other languages other than English and French. He noted that the Permanent Bureau could, within its resources, informally assist Spanish-speaking delegations to produce a text, though it could not itself formalise a Spanish translation of the text.

124. **The Chair** remarked that the French and English texts, as the authentic texts, could act as interpretive aids of each other in case of ambiguity. He advised, however, that there was no other text in any other language being worked on or that would be approved, and that the text of any other translation would not have authoritative or authentic status.

125. **A delegate from Argentina** clarified that she had wanted to understand with a greater degree of clarity the process for the production of a Spanish text. The delegate added that Spanish, unlike German, was an official language of the United Nations.

126. **A delegate from Mexico** intervened to clarify that in previous discussions, where matters had concerned consistency between languages and issues in the translation of difficult concepts (such as, for example, privacy rights), delegations were previously advised to consult with the Permanent Bureau to coordinate and ensure uniformity of the foreign language translation. The delegate explained that his delegation would be happy to assist the Permanent Bureau in relation to practical coordination for such Spanish translation matters.

127. **The Secretary General** recalled that an informal Spanish translation of the draft text was already in existence. He invited all Spanish-speaking States to coordinate and update the text. The Secretary General noted that the Permanent Bureau would encourage all States using a foreign language, UN-official or otherwise, to coordinate to create a translation, to promote the wide and proper dissemination of the formal text. The Secretary General advised that, unfortunately, there was no formal mandate to the Permanent Bureau to produce a Spanish text, and highlighted that this was due to budgetary and resourcing issues. He explained that Spanish-speaking States could be offered some coordination through the HCCH Representative Office in Buenos Aires, which could assist with informal suggestions to align and sanitise the text, but there was no responsibility with the Permanent Bureau to produce a Spanish text. However, he concluded that the Permanent Bureau was hopeful and would assist, resources permitting, to ensure that the text could be produced.

128. The Secretary General next made several announcements regarding further procedural formalities. He noted that after the conclusion of the Second Reading on Monday, Plenary would then sit as the Diplomatic Session, under the Chair of the Session, and could decide by consensus not to have a Third Reading. The Secretary General suggested that this had been done previously where there were no outstanding issues. Finally, the Secretary General encouraged Members to register their attendance in advance of the closing ceremony.

129. **The Chair** noted that he had no indications as to whether there would be consensus to perform or dispense with a Third Reading. He also noted that during Monday, the Plenary would need also to sit to address the Session's Commission on General Affairs and Policy, chaired by Mr Andrew Walter.

130. The meeting was closed at 12.30 p.m.


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# Procès-verbal No 19

# Minutes No 19

*Séance du lundi premier juillet 2019 (matin)*

*Meeting of Monday 1 July 2019 (morning)*

1. La séance est ouverte à 9 h 40 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

2. **The Chair** opened the meeting, and proposed to begin with Working Document No 95 REV followed by Working Document No 96. The Chair highlighted myriad small changes in the French version of Working Document No 96, and proposed that the delegations take 15 minutes of reading time before commencing discussions. The Chair also expressed thanks to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and the host, Mr Paul Vlas, President of the Twenty-Second Session, for the lovely dinner on Saturday evening. The Chair invited the introduction of Working Document No 95 REV, a proposal from the delegations of Switzerland, Australia, Canada, Israel, Japan and Uruguay. The Chair recalled that the Working Document concerned the issue held over in relation to Article 28, and that there was also to be a follow-up clarification in Article 29, which the Chair requested the proponents of Working Document No 95 REV to explain.

*Article 28*

3. **A delegate from Switzerland** began to introduce Working Document No 95 REV and thanked all those who had engaged in the discussions in the technical matter concerning the entry into force and the establishment of relations pursuant to the Convention. She stated that she would walk the delegations through the changes step by step. Firstly, Article 29(1) dealt with the entry into force of the Convention. The proponents wanted to first clarify when the Convention entered into force and find a date that would be easily identified by everyone, including the depositary, who should be able to understand when exactly the Convention entered into force. It was explained that the proponents had chosen a date which they hoped would prevent the situation whereby the Convention entered into force before it would have effect for any State. Whilst the situation could not be ruled out 100%, they were 99.9% certain it would be avoided. Therefore, the Convention would enter into force on the first day of the month following the expiration of the period during which a notification may be made in accordance with Article 29(2) with respect to the second State that had deposited its instrument of ratification. The intention was to make sufficiently clear when the Convention would actually enter into force. It was further explained that Article 29(2) dealt with entry into force for individual States that joined the Convention subsequently, and that it also referred to the period for notifications in accordance with Article 29(2). The revised text clarified that declaration notifications with respect to those States were envisaged here, and the reference to Regional Economic Integration Organisations (REIOs) had been deleted because it was considered that it was sufficiently clear from other provisions of the Convention that this also referred to such REIOs. Also, the text clarified in Article 28(2)(b) what happened if subsequent to the entry into force of the Convention for a State, that State extended the Convention to further territorial units, which was just a drafting clarification in the proponents' view. Finally, the delegate explained that the follow-up change in Article 29 made clear when the Convention started to produce effects for two Contracting States, and also picked up changes made in Working Document No 95 REV to refer to "this Convention" rather than "the Convention" in Article 29. There was also a small change in Article 29(2), where the proponents wished to refer to the date of the notification by the depositary, because they assumed that this notification would have the same date for all States. Therefore, it would actually be clear that it was the date of the notification and not perhaps the date of the receipt of the diplomatic mail, where the latter could create quite a bit of confusion regarding when the Convention would actually start or when those notifications may actually be made. Further, it aligned with the objection system in the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (hereinafter, "2007 HCCH Child Support Convention"). The delegate hoped that these technical changes would be acceptable and thanked the co-proponents and those who engaged in the process of drafting the final clauses over the weekend.

4. **The Chair** invited interventions from the other co-proponents.

5. **A delegate from Australia** thanked the delegate from Switzerland for raising the issue and for working very hard on it over the weekend, and further expressed thanks to everyone else involved.

6. **Une déléguée du Canada** prend la parole pour souhaiter à tous une bonne fête nationale aujourd'hui, car le premier juillet est la fête nationale du Canada. Elle exprime aussi sa gratitude pour le dîner formel et remercie les délégations qui ont travaillé sur la proposition pendant le weekend. Elle explique que sa délégation appuie la proposition et elle ajoute deux commentaires. Tout d'abord, en ce qui concerne le projet français, la délégation du Canada pense qu'il faudrait faire référence à « la présente Convention » au lieu de « la Convention », mais la déléguée accepte que ceci ne soit qu'une question de détail pour le Comité de rédaction. Deuxièmement, elle suggère qu'il est très important que le Rapport explicatif fournisse des explications plus détaillées sur l'extension en vertu de l'article 25, l'entrée en vigueur pour les unités territoriales prévue à l'article 28(2)(b), et le rapport entre les déclarations envisagées par l'article 25 et l'article 28 avec l'article 30 et les paragraphes 3 et 4. Elle estime également qu'il existe une différence mineure entre la date effective de la déclaration sous l'article 30 par rapport à l'article 28(2)(b), mais que cela ne soit qu'un détail. Elle demande à avoir la proposition à l'écran.

7. **A delegate from Israel** thanked the delegate from Switzerland for coordinating the important and technical proposal and the other delegations who had engaged in the matter. The delegate commented that, for their delegation, it was a little bit of a pity to let go of the idea of the Convention entering into force after three months, but they were convinced that the current proposal was legally the right

way to do this and, now, there would not be a discrepancy between entry into force and the Convention having legal effect, which was a more unified, legally sound rule.

8. **The Chair** concurred with the sentiments expressed by the delegate from Israel, and shared that he too was reluctantly persuaded that it had to be a later date. However, the consequences of the earlier entry into force were sufficiently peculiar from a technical sense that the Chair was persuaded that the previous timing was not possible.

9. **A delegate from Japan** also expressed thanks to the delegate from Switzerland, and shared that he believed that with the new revision in Working Document No 95 REV, the relationship between entry into force and the establishment of treaty relations was now very clear.

10. **A delegate from Uruguay** thanked the delegate from Switzerland for raising the issue and coordinating the work on the matter, as well as the other co-proponents.

11. **The Chair** invited further interventions.

12. **A *co-Rapporteur*** expressed gratitude to the proponents of Working Document No 95 REV and requested a clarification from them, regarding why in Article 28(1) and (2)(a) in the new version of Article 28, there was a cross-reference to Article 29(2) but not one to Article 29(3). The *co-Rapporteurs* thought it would be helpful to have an explanation of the reason for this.

13. **A delegate from Switzerland** explained that in Article 29(3) there was no period of time involved, as the State may notify the depositary of its notification upon the deposit of its instruments.

14. **The Chair** added that upon the deposit of its instrument, time started to run under Article 28(2) for other States that were already Parties to that instrument. So, Article 29(2) would always be the later point in time at which it became clear that neither State was giving a notice in relation to the other, and therefore the Convention could have effect as between those two States. Therefore, there was to be no reference to Article 29(3) because it would not work grammatically, because there was no time period in Article 29(3), and, more importantly, logically Article 29(2) would always be the later date, the expiry point when treaty relations would begin.

15. **A delegate from Switzerland** expanded further that, on the marginal chance that the second State entering into the Convention made a notification under Article 29(3) against the first State, then there would not be treaty relations between those two Contracting States, but nevertheless the Convention would enter into force after the period for making notifications expired.

16. **The Chair** opined that there was 0.1% chance of that occurring and it may be an overstatement to label it a risk, because the likelihood of a second State going to the trouble of becoming Party where the only other State that was a Party was one with which it did not want to establish relations, in his opinion, was a prospect that involved a huge vote of confidence in the Convention in the abstract, without actually wanting it to do anything in practice.

17. **A *co-Rapporteur*** sought further clarification regarding the matter in relation to a third State: if a third State upon ratification wanted to make a notification with regard to one of the two previous States, on the *co-Rapporteurs*' reading that could only occur under Article 29(3), because that was the newcomer provision. Since there was no cross-reference to Article 29(3) in Article 28, on their understanding then there was no indication of when the treaty would come into force.

18. **A delegate from Switzerland** explained that the Convention enters into force when the period expired for making notifications against the third State, and it did not matter with respect to entry into force for that State whether it made any notifications; that was only relevant to the question of with whom treaty relations were established. Again, there was an improbable case that the third State made a declaration against all previous Parties, but in her opinion there did not need to be a draft on this.

19. **The Chair** expressed appreciation on behalf of the Plenary to those involved in the discussion on the issue, which required hard technical labour on a Sunday, and gratitude to the people who had worked their way through the detail. The Chair noted that there were no suggestions that there was a problem with the formulation in Working Document No 95 REV and that the proponents had been able to give very helpful explanations of the technical operation, and the *co-Rapporteurs* would enjoy writing a few intricate paragraphs that would spell it out, with the benefit of this discussion. The Chair emphasised that the discussion had established exactly how it would work, and after some personal consideration, the Chair had become comfortable that it was the best way to tackle the matter. The Chair concluded that the modifications to Articles 28 and 29 indicated in Working Document No 95 REV were adopted by consensus.

20. **Une déléguée du Canada** demande s'il serait utile d'examiner la version française du Document de travail No 95 REV au point actuel de la discussion. **Le Président** est d'accord et accepte que du travail devait être réalisé sur la version française du texte à l'écran. **La déléguée** souligne un point de rédaction à l'article 28, paragraphe 2(b), dans la version française et suggère d'ajouter « la *présente* Convention » pour que la phrase se lise « *this Convention* » conformément à la version anglaise.

21. **The Secretary General** explained that if the English version uses "the Convention", this would normally be translated as "*la Convention*", whereas if the English phrase uses "this Convention", it would usually be translated as "*la présente Convention*". He remarked that the second occurrence in paragraph 2(b) may not need this change.

22. **A delegate from Switzerland** pointed out that in the English version, "this Convention" was referred to for the first time for "a territorial unit to which this Convention has been extended […] after the Convention has entered into force", and that it was the same in the French version. She therefore hoped that "this Convention" did not need to come up twice.

23. **Un délégué de la Belgique** indique que le Document de travail lui donne l'occasion de prendre la parole pour la première fois. Il suggère qu'il peut exister un léger désaccord entre les textes français et anglais à l'article 29, paragraphe 2. Après un échange avec le Président, il réalise qu'il travaille à partir d'une ancienne version et retire son commentaire.

24. **Le Président** encourage les autres interventions françaises, notant qu'il y en avait très peu lors de la Session diplomatique. Il confirme que la délégation du Canada était satisfaite du libellé de la version française du Document de travail No 95 REV et qu'il n'était pas nécessaire de modifier le texte. En l'absence d'autres interventions, le Président


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conclut que le Document de travail No 95 REV a été adopté par consensus.

*Working Document No 96*

25. In relation to Working Document No 96, **the Chair** explained that it was usually the case that the Permanent Bureau, after the work had finished, went through one last time to check for minor typographical issues and clarifications. In some previous instruments, this exercise had occurred between the Second and Third Readings. In the context of other instruments, the Chair recalled that there had even been an authorisation to the Permanent Bureau after the Convention had been concluded to tidy up minor issues and discrepancies within four weeks. In light of the timing of the work of the Diplomatic Session, the Permanent Bureau had spent many hours on Sunday and worked carefully through the English and French texts together to identify minor discrepancies and minor points of clarification that they felt might be helpful, the outcome of which was Working Document No 96 E and F. The Chair invited the Secretary General to speak on Working Document No 96 and proposed that the Plenary would go through the two language documents side by side, Article by Article, to ask if there were any questions or comments before confirming that these adjustments could be made.

26. **Le Secrétaire général** prend la parole pour remercier officiellement le Gouvernement des Pays-Bas, et en particulier son Ministère des Affaires étrangères, pour la belle réception de samedi soir. Il remercie ses collègues du Bureau Permanent, en particulier l'équipe linguistique, qui a été très impliquée dans l'exercice de pré-toilettage du texte. Il remercie les délégués qui ont communiqué soit par courrier électronique, soit verbalement, des contributions au projet, afin de mieux refléter la version anglaise dans la version française. Il remercie aussi notamment le Comité de rédaction et son président. Il constate que ce Document de travail No 96 F est soumis en consultation avec le président du Comité de rédaction, et que la plupart des modifications apportées sont purement rédactionnelles, sans aucun impact sur le contenu. Pour commencer avec le préambule, il explique que le Bureau Permanent souhaitait exprimer en français le concept du commerce multilatéral fondé sur des règles, l'investissement et la mobilité. Il déclare que cela se traduit par « à l'échelon multilatéral » dans la version française. Ensuite, dans l'article 2(5), il introduit un changement afin de mieux refléter le caractère impératif qui ressort de la formulation anglaise, « *Nothing in the Convention shall affect privileges and immunities* », et en français cela se traduit par, « La présente Convention n'affecte en rien les privilèges et immunités ». Il explique que cela est un départ de la *Convention du 30 juin 2005 sur les accords d'élection de for* (« Convention Élection de for de 2005 »), pourtant il pense que cela est un changement positif. Quant à l'article 5(1)(b) et (i), il constate que le texte reflète plus précisément, et rend mieux justice, au contenu de la version anglaise, ce qui n'était pas le cas avec la version précédente. Quant à l'article 5(3), il remarque que le texte introduit l'expression « (bail d'habitation) » entre parenthèses après la phrase « bail immobilier résidentiel » car la tradition juridique francophone utilise les deux formulations, selon le système juridique concerné. Il note que la technique de rédaction diffère légèrement de la version anglaise, où le texte met le mot « *tenancy* » entre parenthèses. Il suggère que cette explication puisse apparaître dans le Rapport explicatif. Et puis, à l'article 17, il mentionne que dans la version anglaise, il fait référence à la résidence. Il ajoute qu'au cours de cette Session diplomatique, la Plénière n'a pas vraiment discuté de la référence à la résidence à l'article 17. Il note que l'on parle de résidence habituelle, ce qui est bien entendu le concept tiré du choix de Convention Élection de for de 2005. Il demande au Président d'expliquer cette question plus tard, en suggérant qu'il soit important de prendre une position officielle lors de la Session diplomatique sur cette question lorsqu'il s'agit du choix des termes. Il passe à l'article 19 et il note que le Bureau Permanent a changé le titre de l'article 19, « Déclarations relatives aux jugements concernant *un État* », une expression plus large, qui reflète le contenu de l'article. Dans l'article 22(4), il fait référence « aux Organisations régionales d'intégration économique » au pluriel dans la version française, parce que cela est une meilleure technique de rédaction et qu'un changement identique a été apporté à l'article 25. Ensuite, à l'article 31, il explique simplement que le changement y figurant vise à suivre une rédaction plus récente de cet article utilisée dans la *Convention du 23 novembre 2007 sur le recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille* (« Convention Recouvrement des aliments de 2007 »). Il suggère que, là encore, la technique de rédaction soit plus appropriée pour exprimer l'idée contenue. En conclusion le Secrétaire général tient à souligner qu'il est très important que le Bureau Permanent consacre tout le temps nécessaire à la version française pour s'assurer qu'elle est de bonne qualité et qu'elle reflète aussi fidèlement et précisément que possible la version anglaise.

27. **The Chair** thanked the Permanent Bureau for preparing the document and emphasised the need to strike a balance between completing the task efficiently and avoiding rushing delegations.

*Preamble*

28. **The Chair** began with the Preamble, and asked if there were any interventions in relation to the suggested changes in the French version, noting that the English version had not changed.

29. **A delegate from Switzerland** asked whether, since World Trade Organization (WTO) expressions were used in the Preamble, for the French text the phrases had also been taken from the French version of WTO documents.

30. **Le Secrétaire général** explique que le Bureau Permanent a consulté des documents de l'Organisation de coopération et de développement économiques (OCDE), qui utilisent une formulation légèrement différente. Ils utilisent le « système D », qui n'est pas utilisé dans la version anglaise. Mais il rassure la délégation de la Suisse en ce que cela n'a aucune incidence sur le contenu ou la substance de l'expression.

31. **The Chair** concluded that the Plenary confirmed by consensus the changes to the Preamble.

*Article 1*

32. **The Chair** stated that no discussion on Article 1 was necessary as no changes had been proposed and the provision was already adopted.

*Article 2*

33. **The Chair** highlighted that changes had been made in the French version to Article 2(1)(g), and (4) and (5), and to Article 2(2) in the English version.

34. **A delegate from the European Union** noted a discrepancy in Article 2(2) in the French text in the second sentence, which stated "*invoquée dans le cadre d'un moyen*

*de défense*", but in the English text it stated "arose by way of defence". The delegate explained that the French text looked strange in their delegation's opinion, and that they had consulted the *Convention of 30 June 2005 on Choice of Court Agreements* (hereinafter, "2005 HCCH Choice of Court Convention"), which stated "*soulevée à titre de défense*". The 2005 HCCH Choice of Court Convention formulation was an oral suggestion the delegate wished to propose.

35. **The Chair** explained to the Plenary that the delegation of the European Union suggested in Article 2(2) to use the same language as the 2005 HCCH Choice of Court Convention, which was indeed "*soulevée à titre de défense*" rather than "*invoquée dans le cadre d'un moyen de défense*", and asked the French-speaking delegations if the former was a better way of expressing the idea.

36. **Une déléguée de la France** explique qu'au niveau de la rédaction, sa délégation préfère garder la formulation actuelle. Elle indique que si l'on parle de la phrase « soulevée à titre de défense », on a l'impression que cela serait le seul moyen de défense qui pourrait être invoqué. Elle constate qu'il puisse y avoir plusieurs moyens de défense. Elle accepte qu'il n'y ait pas de grande différence entre les deux propositions.

37. **Une déléguée du Canada** note que le Comité de rédaction a examiné cette question et s'est demandé si un sujet pouvait effectivement être invoqué comme moyen de défense. Elle explique qu'elle pensait que ce libellé était plus logique, mais que le Comité de rédaction n'avait nullement l'intention de changer le sens sous-jacent du libellé.

38. **The Chair** concluded that the oral adjustment proposed by the delegation of the European Union would not be made.

39. **A delegate from the United States of America** emphasised that their point was somewhat related to that made by the delegate from the European Union; they noticed that in both Article 2(5) and Article 10 some slight adjustments had been made to the French text which led to a slight deviation from the French language text of the 2005 HCCH Choice of Court Convention, even though the English language had remained the same. The delegate wished to state their understanding that the adjustments in the French text involved no consequential change in meaning from the 2005 Convention.

40. **The Chair** agreed that it was helpful to be absolutely explicit about that, and recalled that the Secretary General said in his introductory remarks that there was no intention at all to change the meaning of these provisions. The Chair's understanding of Working Document No 96 was that the matters it dealt with were matters of *toilettage* (alignment), and that there was no change to the substance of the provisions between the 2005 HCCH Choice of Court Convention and the current instrument; they marched hand in hand.

41. **A delegate from the People's Republic of China** referred to Article 2(2) in the English version and opined that it was not necessary to add the words "scope of the", because in the 2005 HCCH Choice of Court Convention the three words were not included and, at the same time, the French version of the paragraph already had some meanings, but it was not clear in the English version. Therefore, the delegate preferred to keep in line with the 2005 Convention. He explained that, reading the French version of Article 2(2), it seemed to only concern the application of the Convention, but the English version also touched upon the scope of the Convention. It might have been a very minor difference between the two versions, but the delegate preferred the English text to be kept as it was.

42. At the invitation of the Chair, **the Secretary General** explained that there was no intention to change the meaning as from the 2005 HCCH Choice of Court Convention, but that the Permanent Bureau had noted in the French version that it did say "*n'exclut pas le jugement du champ d'application de la Convention*" which is also the title of the concerned Article. In purely linguistic terms one cannot exclude a judgment from the Convention, but one can exclude a judgment from the scope of the Convention, and therefore this is purely a drafting technicality.

43. **A delegate from the European Union** expressed that it really did not make any difference; it was in the 2005 HCCH Choice of Court Convention without "the scope of" and nobody had ever doubted that that was what it meant, and one could benefit from the French text to confirm that that was what it meant. The delegate explained that they had no strong position on the matter, but if the delegate from the People's Republic of China did not want to change it from the 2005 Convention, he understood perfectly well that position and could live with it.

44. **The Chair** acknowledged that although excluding "a judgment from the Convention" rather than "a judgment from the scope of the Convention" may not have been the most aesthetically pleasing phrase one could imagine in English, nonetheless there was, in practice, only one thing that it could mean, and it was also language used in the 2005 HCCH Choice of Court Convention. If there were any doubt about it, one could refer to the exclusion from the "*champ d'application de la Convention*" in the French version. Whilst not wanting to undermine the efforts at beautification of those who worked yesterday, the Chair's suggestion to the Plenary was that they would not make the change to the English version of Article 2(2), and concluded there was no objection to that suggestion. With respect to the French version, the Chair observed that he had not heard any concerns about the suggested changes and concluded that the Plenary approved of the changes in the French version of Working Document No 96 for Article 2.

*Article 3*

45. **The Chair** sought interventions in relation to the minor edits in both the English and French texts of Article 3.

46. **A delegate from the European Union** stated, first, that she was speaking under the control of the French-speaking delegations and that their delegation welcomed the addition of the words "of the proceedings" and "*de la procédure*". However, in their opinion there was a risk of misunderstanding with the change in the French version of Article 3(1)(b), "*à condition que cette dernière*", because "*cette dernière*" would in their view relate to "*la procédure*" and what was meant was "*la fixation*". The delegate proposed that it would be better to use the same technique as in the English version, which was to state "provided that the determination relates", and that would then be "*à condition que cette fixation ait trait*".

47. **Un délégué de la Belgique** indique qu'il avait l'intention de faire le même commentaire. Il note que « cette dernière » semble faire référence à « la procédure ». Cependant, en anglais, c'était clair que « cette dernière » faisait référence à « la fixation des frais ». Il conclut alors que la version française devrait être la suivante : « à condition que cette fixation ». Il accepte que cela soit répétitif, mais cela


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sera beaucoup plus clair. Sur une autre question, il remarque que la phrase « greffier du tribunal » apparaît dans l'article 3, et se traduit en anglais par « *officer of the court* ». Il considère qu'il faut distinguer entre cette disposition et l'article 12(1)(d), où les concepts se traduisent différemment ; dans l'article 12 le texte « *officer of the court* » se traduit en français par « une personne autorisée du tribunal ». Il préfère cette version-là, car ce n'est pas nécessairement un greffier qui signe un document, et il suggère une version plus neutre qui permette aux autres d'effectuer la fonction. Le registraire, par exemple, sera quelqu'un qui signe un document. Donc il propose d'accorder la terminologie qui se trouve à l'article 12 dans l'article 3.

48. **Le Président** répète les deux propositions des délégations de l'Union européenne et de la Belgique.

49. **Le Secrétaire général** constate que le Bureau Permanent a bien pensé à la question de l'expression « cette dernière ». Il considère que « cette dernière » renvoie à l'ensemble de l'expression, à la fixation des frais ou dépens de la procédure. Il ajoute qu'il n'y avait aucun désaccord quant au fond et qu'il sera d'accord de voir la reformulation proposée dans la version française.

50. **The Chair** suggested using "*cette fixation*" instead of "*cette dernière*". Noting no opposition, this change was made. He requested interventions on the second suggestion made in relation to the Article, the change from "*greffier*" to the more neutral "*une personne autorisée du tribunal*".

51. **Le président du Comité de rédaction** souscrit aux observations de la délégation de la Belgique selon lesquelles l'article 3 pourrait adopter la même expression que l'article 12.

52. **Le Président** conclut que la modification sera apportée à l'article 3(1)(b), en remplaçant le terme « greffier » par le terme plus neutre « une personne autorisée du tribunal ». Le Président, ne constatant aucune objection, déclare que l'article 3 est adopté.

*Article 4*

53. **The Chair** noted there were no suggestions in relation to the French version and only one minor drafting change in the English version, and concluded that the change was adopted by the Plenary by consensus.

*Article 5*

54. **Le Secrétaire général** observe qu'il y a une erreur de rédaction à l'article 5(1)(b). Il constate que la révision de la phrase finale est allée trop loin dans la rédaction, et il demande d'apporter la correction suivante au texte, afin que le texte se lise « et la demande sur laquelle se fonde le jugement résultait de son activité professionnelle ».

55. **The Chair** sought interventions in relation to any of the suggested changes to Article 5 in the English or French version.

56. **A delegate from Switzerland** requested that the proposed oral amendment to Article 5(1)(b) be repeated to the Plenary.

57. **The Chair** explained that the point was that an error was introduced in the French version in the edit made. The whole point of Article 5(1)(b) was that one of the filters for a natural person carrying on a business was that proceedings were brought in the principal place of business, regardless of whether the claim arose out the activities in that State.

58. **A delegate from Switzerland** clarified that the oral proposal was not to make the change contained in the French version of Article 5(1)(b) of Working Document No 96.

59. **The Chair** confirmed that understanding and added that the idea was not to make the change, which was an overshoot, so the French version now read "*résultait de son activité professionnelle*". The Chair reiterated that the whole point was that one could bring a claim in the State of origin in relation to business activities anywhere, and that the edit to the French version went awry on this. The Chair concluded that Article 5 was adopted with the other minor recommended changes.

*Article 6*

60. **The Chair** noted that there were no extant proposals in relation to Article 6.

*Article 7*

61. **The Chair** highlighted that there was a change to the title, the much-vexing question of "and" and "or" which it seemed the Plenary spent half an hour discussing once every two years. The Chair remarked that there was no right answer.

62. **A delegate from Uruguay** queried whether a follow-up change was necessary to replace "or" in the first part of paragraphs 1 and 2.

63. **The Chair** confirmed that no change should be made to paragraph 1, but that the question was whether in the context of an Article that provides that either recognition or enforcement may be refused in certain circumstances, it should state "recognition and enforcement" because it covered both. It was explained that the aesthetic choice that had been made was to switch to "and". The Chair concluded the text was adopted by consensus.

*Article 8*

64. **Un délégué de la Belgique** rappelle que la version anglaise de l'article 8(2) a été légèrement modifiée au cours de la Plénière afin de lever une ambiguïté. Il note que le texte fait référence à un juge d'un État, mais qu'il importe peu que ce soit d'une ville ou d'une autre ; il importe qu'il soit le tribunal d'un État spécifique. Il considère que cette ambiguïté a été dissipée de l'anglais, mais elle persiste dans le texte français, car le texte ne répète pas le mot « État » à la fin de la phrase. Il suggère, d'un point de vue rédactionnel, d'ajouter à l'article 8(2), à la fin de la phrase, le texte suivant : « une matière visée à l'article 6 qui a été rendue par un tribunal d'un État autre que l'État désigné dans cette disposition ». Il note que le mot « celui » pourrait faire référence au tribunal de l'État, et que l'on pourrait croire que le renvoi au tribunal de l'État en question serait par exemple le tribunal de La Haye plutôt que celui d'Amsterdam. Il suppose que ce n'était pas l'intention de l'article.

65. **Le Président** répète la proposition et exprime son soutien pour la proposition. Et il demande si ce changement peut être fait.

66. **Une déléguée du Canada** déclare avoir compris autre chose de la proposition, basée sur l'ordre des mots proposé par le Président.

67. **Un délégué de la Belgique** constate que le Président a légèrement modifié sa proposition en la résumant, mais qu'il n'y avait aucun désaccord quant au fond. Il suggère de soumettre le texte au Comité de rédaction pour une reformulation appropriée.

68. **The Chair** concluded that the appropriate wording would be "*d'un État autre que l'État désigné dans cette disposition*". He noted no objection from French-speaking delegations as to that wording.

69. **Une déléguée du Canada** suggère de modifier les deux paragraphes de l'article 8 (para. 1 et 2) qui contiennent le même libellé.

70. **The Chair** requested help from other French-speaking delegations as to that further suggestion, as they needed some more views to get the matter right.

71. **Un co-Rapporteur** indique qu'étant donné que chaque clause renvoie à l'article 6, le libellé devrait être identique dans les paragraphes 1 et 2. Elle fait remarquer que cela est identique dans la version anglaise.

72. **Le Président** exprime son soutien pour l'intervention du co-Rapporteur.

73. **The Chair** proposed to make paragraph 1 parallel to paragraph 2 so that it also reads "*d'un État autre que l'État désigné dans cette disposition*". The Chair concluded that the changes were adopted by consensus.

*Articles 9 to 13*

74. **The Chair** noted that there were no changes to Articles 9, 11 and 13. In Articles 10 and 12(1), there were small changes in the French version, which the Chair concluded were adopted by consensus.

*Article 14*

75. **The Chair** highlighted that there was one suggested change in the French version of Article 14 which needed to be addressed.

76. **Un délégué de la Suisse** remarque qu'il existe une erreur grammaticale dans le texte français dans l'article 14(1). Il suggère de restructurer la phrase, pour qu'elle se lise, « Aucune sûreté ou caution ni aucun dépôt », parce que « dépôt » est au masculin. Il rappelle que cette formulation est conforme à l'article 14 de la *Convention du 25 octobre 1980 tendant à faciliter l'accès international à la justice*.

77. **Un délégué de la Belgique** reconnaît que la suggestion de la délégation de la Suisse a mieux respecté la grammaire française. Il répète la formulation pour le Président.

78. **Le Président**, ne constatant aucune objection, déclare que la reformulation de l'article 14(1) est adoptée. Le Président, ne notant aucune intervention sur le changement proposé par le Bureau Permanent à l'article 14(2), déclare que l'article 14 est adopté.

79. **Un délégué du Canada** explique qu'elle a attendu la fin de la discussion sur le texte pour soulever un point de fond. Elle note qu'il n'y avait point de discussions dans le cadre de l'article 14 ainsi que l'article 17 et qu'il y a une raison logique de référer à la « résidence » plutôt que « résidence habituelle ». Elle demande s'il serait utile que la Session diplomatique indique à ce moment-là qu'il s'agissait d'une décision délibérée prise en pleine connaissance de cause.

80. **The Chair** recalled that the Secretary General wished to deal with the matter raised by the delegate from Canada in the context of Article 17, and explained that that was where he intended to address and particularly emphasise it, because Article 17 was where it was more important.

81. **A delegate from Brazil** requested that the session be briefly paused until interpretation could be resumed.

82. **A delegate from Switzerland** stated that when considering the reference to "resident" in Articles 14 and 17, in the delegate's opinion it was not entirely the same issue, and queried whether it should only be addressed in Article 17, even though it was not necessarily the same issue.

83. **The Chair** explained that he sought to address it in Article 17 because that was where the Permanent Bureau thought it was particularly helpful to have something in the record from the Diplomatic Session to emphasise the deliberate choice that was made. The Chair confirmed that the delegate from Switzerland was content with the proposed course of action.

*Articles 15 and 16*

84. **The Chair** noted that there were no proposed changes to Articles 15 and 16.

*Article 17*

85. **The Chair** recalled that, as the Secretary General had stated, because Article 17 had not been the subject of lengthy discussion at the Diplomatic Session, there was no reference in the record of the Diplomatic Session to the deliberate choice to use the word "resident" rather than "habitually resident" in Article 17. The purpose of the current discussion was not to re-open that choice which had been made, but simply to emphasise that it was a deliberate decision that it was intended to be a different and broader concept than habitual residence in this context.

86. **Une déléguée du Canada** répète ses précédents commentaires concernant l'article 14 dans le cadre de l'article 17. Elle note à nouveau qu'il y a une raison logique de référer à la « résidence » plutôt que « résidence habituelle ». Elle estime qu'il est utile que la Session diplomatique indique que ce fut une décision consciente, prise en pleine connaissance de cause.

87. **The Chair** concurred that it was also a deliberate decision and also deliberately a different concept, and it was appropriate that the Minutes also recorded that.

*Articles 18 to 25*

88. **The Chair** noted that there were no proposed changes to Articles 18, 20, 21 and 24. In Article 19, the Chair highlighted that the reference to "governments" had been changed to a reference to "a State" in the title and that some punctuation had been fixed in the English version, which he concluded was adopted by consensus. Further, in Articles 22 and 25, the reference to a singular Regional Economic Integration Organisation was made plural, against the prospect that they blossom and flourish, which was adopted by consensus. In Article 23, there was a small drafting change in the French version. Noting no objections, he declared it to be adopted by consensus.


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*Articles 26 to 29*

89. **The Chair** noted that there were no proposals on Article 26 in Working Document No 96.

90. **Un délégué de la Suisse** remarque que dans l'article 26(1) il y a une liste de termes : « signer, accepter, approuver cette Convention ou y adhérer ». Il suggère d'ajouter un « ou » entre les termes « accepter » et « approuver », et que cela suivra une rédaction plus récente de cet article utilisée dans la Convention Élection de for de 2005 et la Convention Recouvrement des aliments de 2007. Il note que la même question se pose à l'article 32.

91. **Le Président** note que le Secrétaire général soutient cette modification, et il suggère aussi de supprimer une virgule superflue. En l'absence d'autres interventions, le Président conclut que la modification a été adoptée par consensus. Le Président, ne notant aucune intervention sur les articles 27 et 28, déclare qu'ils sont adoptés.

92. **Une déléguée du Canada** fait référence au Document de travail qui a été discuté ce matin.

93. **The Chair** agreed with the reference made by the delegation of Canada to the previous Working Document, and instructed the Plenary that the discussion of the draft French text had to be read subject to the changes made in accordance with Working Document No 95. The Chair recalled that in Article 29(2), the language approved by the Plenary in the morning session was "the ratification" rather than "this ratification", which in the Chair's opinion was more consistent with the French version. He suggested to revert to "the", not "this", and so to not adopt the tracked change in Working Document No 96.

94. **Une déléguée du Canada** suggère que l'article 28 doit aussi être comparé dans les Documents de travail No 95 REV en anglais et No 96 en français.

95. **The Chair** explained that he was attempting to take a shortcut because no new issues had been raised in relation to that Article by Working Document No 96, so it seemed to him that the decision had been made in the morning session and the Plenary did not need to discuss it further. However, to ensure all delegations were absolutely clear on what had just been considered, the Chair recalled that when the Plenary was considering Working Document No 95 they had approved the changes shown in it in relation to Article 28. Those were the approved versions of Article 28, paragraphs 1 and 2, and the Plenary in relation to Article 28 did not need to make any new decisions in light of Working Document No 96. With regard to Article 29, the approved versions were paragraphs 1 and 2 as set out in Working Document No 95 in English and French, and the Plenary was not making any changes to those paragraphs arising out of Working Document No 96. However, there remained a change to paragraph 3 of Article 29 suggested in Working Document No 96, to change "the Convention" to "this Convention", and in French to "*la présente Convention*". The Chair concluded that the change to Article 29(3) was adopted by consensus.

*Article 30*

96. **The Chair** noted that there were no changes suggested in Working Document No 96 in the English but that there were some drafting adjustments in paragraph 3 of the French version.

97. **Le Président**, ne notant aucune intervention sur l'article, déclare que l'article 30 est adopté.

*Article 31*

98. **A delegate from the European Union** expressed that they understood why the Secretary General referred to "multi-unit State", however it was not referred to anywhere else in the Convention. They were worried it would cause confusion and they preferred to use the language referred to earlier in the Convention, in particular "non-unified legal systems" in Article 22. In the second sentence, instead of "multi-unit", rather say "a Contracting State with two or more territorial units to which the Convention applies", which tracked the language used earlier in the Convention, notably in Article 22(3) which referred to "a Contracting State with two or more territorial units". **Another delegate from the European Union** submitted that if the changes were made to the English version, the French text would then read "*peut se limiter à certaines unités territoriales d'un État contractant, comprenant plusieurs unités territoriales*", and that "*auxquelles*" would need to be changed from plural, feminine to singular, masculine.

99. **A delegate from Canada** stated that they understood the change suggested by the Permanent Bureau in Article 31 actually tracked the 2007 HCCH Child Support Convention, and a concern was that there was less of a link between Articles 25 and 31. However, the delegate noted that the 2007 Convention equivalent to Article 25 still had the "old" formulation of "non-unified legal system" but the denunciation Article did refer to "multi-unit" States, which had not caused any problem for the 2007 Convention. The delegate explained that they could accept the formulation proposed by the Permanent Bureau or retain the formulation contained in the original draft which was taken from the 2005 HCCH Choice of Court Convention because, frankly, from their perspective the result was the same.

100. **A delegate from the European Union** clarified that their starting point in the text proposed by the Permanent Bureau was that they had discovered a discrepancy between the English and the French versions, because the words "to which the Convention applies" referred back to multi-unit States in the English, and in the French it referred to "*plusieurs unités*", because it was in the feminine and plural. The delegate's starting point was this ambiguity, which they thought would be best fixed by returning to the pre-2007 language. **Another delegate from the European Union** also proposed to revert back to the previously agreed language, if that would solve the problem.

101. **A delegate from Canada** responded to the comments made by the delegation of the European Union about the question of territorial units and application of the Convention, and explained that their delegation read all of the versions of the denunciation text as saying that the denunciation may be limited to certain territorial units to which the Convention applies. In their opinion, the English and French versions both stated that it applied to the territorial units, not to the State.

102. **A delegate from Switzerland** suggested that putting the wording in the active and referring to language that was used elsewhere was quite easy: "The denunciation may be limited to certain territorial units of a Contracting State with two or more territorial units to which this Convention applies."

103. **The Chair** reiterated that, in the English version of Working Document No 96, there was the first sentence

proposed by the Permanent Bureau, and then the second sentence read: "The denunciation may be limited to certain territorial units […]". He instructed to cross out "multi-unit" and replace it with "Contracting", and to insert the words "with two or more territorial units to which this Convention applies". Then the French version could also be redrafted.

104. **A delegate from Switzerland** expressed that in their opinion the suggested change would not really work because, for example, Switzerland would also be a State with several territorial units in which the Convention applied, but the point was that it must be a non-unified legal system. Therefore, perhaps the provision should read "a State referred to in Article 25".

105. **Une déléguée du Canada** indique qu'en fonction des difficultés rencontrées dans les commentaires, questions et suggestions des autres délégations, sa délégation pense que la solution la plus simple serait de conserver le projet d'article dans sa forme originale et de le laisser inchangé.

106. **Le Président** se félicite de la suggestion de la délégation du Canada de conserver simplement le paragraphe 1 de l'article 31 dans son libellé actuel.

107. **The Chair** explained that the Secretary General would suggest keeping the first sentence changed by the Permanent Bureau, and concluded that first sentence in the active was adopted. With respect to the second sentence, the Chair explained that the proposal was not to make the change shown in Working Document No 96, but rather it would continue to read: "The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies", and exactly the same approach would be adopted in the French version.

108. **Le Président** résume le fait que le texte en français conservera la première phrase de l'article 31 dans le Document de travail No 96, et l'article sera modifié comme suit : « Tout État contractant peut dénoncer la présente Convention par une notification écrite au dépositaire », et la deuxième phrase restera dans son libellé actuel : « La dénonciation peut se limiter à certaines unités territoriales d'un système juridique non unifié auxquelles s'applique la présente Convention. »

109. **A delegate from the People's Republic of China** pointed out that in the first line of Article 31(1) it should not be "*tout*" but "*un*", because in Articles 19, 22 and 25 "*tout*" was not used.

110. **The Chair** explained that it was a notification in writing addressed to the depositary in English, so in French it should be "*une notification écrite au dépositaire*".

*Article 32*

111. **Un délégué de la Suisse** rappelle que la même modification apportée à l'article 26 devrait être apportée à l'article 32. Il suggère d'ajouter « ou » entre les termes « accepté » et « approuvé », dans la liste de termes : « signé, ratifié, accepté, approuvé la présente Convention ou y ont adhéré ».

112. **Le Président** répète la proposition. Il demande si ce changement peut être fait.

113. **Un délégué de la Belgique** soutient la modification mais il explique que cela nécessiterait un autre changement de formulation, c'est-à-dire d'ajouter le pronom « qui » pour que le texte se lise « qui y ont adhéré ».

114. **The Chair** stated that the proposal was to add "*ou*" between "*accepté*" and "*approuvé*", the pronoun "*qui*", for grammatical correctness, and concluded that the Plenary adopted the proposal by consensus and that the *toilettage* (alignment) of the French text was completed.

115. **A delegate from the United States of America** thanked the Permanent Bureau and all involved in finalising two equally authentic texts, and remarked that much of the discussion which had just occurred departed from the practice that had taken place over the first two weeks, where the delegations actually had physical text in the form of a Working Document, which could often be helpful for reasons that the delegations had just experienced. The delegate explained that the purpose of their intervention was to clearly state that they wanted to reflect that, should there be any resulting discrepancies in the equally authentic texts despite the Plenary's best efforts, those discrepancies were not intentional. The delegate reiterated that there may be some discrepancies that do result from the procedure that was just applied by the Plenary, however, it was the hope of the Plenary that it had achieved two texts which were equally authentic in treatment and content. However, the possibility did exist that there may be some deviation since the Plenary had been drafting, as other delegates had so artfully phrased, 'on the hoof'. The delegate wanted to ensure that the record reflected that the final *toilettage* (alignment) and the linguistic changes were made on the floor in pretty quick time.

116. **The Chair** agreed that he strongly discouraged such an approach but, in the interests of time and circumstances where unexpectedly it had transpired that the last-minute work gave rise to some concerns, a pragmatic approach had been adopted. However, it should not signal any enthusiasm for working in such a way in the future or that any work today in relation to Working Document No 96 produced any substantive changes to the document that has been prepared up to and including the Plenary's last substantive discussion as part of the Second Reading, which took place in relation to Working Document No 95. The goal was only to improve in modest ways the expression of policy already adopted in both languages through a more carefully considered process.

117. The Chair shared that a very sensible and helpful suggestion was made by the Secretary General, that the Permanent Bureau would produce a Working Document No 97 in English and French which reflected the final outcome of the work from the morning session.

118. **The Secretary General** concurred that what reflected the outcome of our negotiation was what would be reflected in the Final Act, which was what technically and officially would be adopted by the Diplomatic Session. He commented that Working Document No 97 would simply be for information purposes without any further legal value, but was simply to reflect the outcome of what had been discussed in the morning session.

119. **Le Secrétaire général** souligne le caractère bilingue de l'Organisation et considère qu'il est absolument nécessaire et utile de consacrer plus de temps à la version française de la Convention. Il suggère également qu'un nouveau Document de travail, le Document de travail No 97, soit fourni avec les ajouts apportés au texte français pour l'information des délégations. Il rajoute que les délégués auront également la possibilité de comparer le contenu du


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Document de travail No 97 afin de s'assurer que cela est pleinement reflété dans l'Acte final, dont toutes les délégations recevront une copie ultérieurement.

120. **Une déléguée du Canada** remercie le Secrétaire général et le Bureau Permanent pour cette suggestion. Elle suggère que les délégations reçoivent le nouveau Document de travail No 97 présenté dans deux colonnes, l'anglais à gauche et le français à droite, s'il n'y a pas trop de travail pour le Bureau Permanent. Elle exprime également le désir de sa délégation d'introduire des discussions sur le titre officiel de la Convention.

121. **The Chair** shared that Working Document No 97 would be prepared during the lunch break and if there were any issues identified, a Third Reading could take place where inconsistencies could be resolved.

*Recommended form and title*

122. **The Secretary General** explained that yesterday with the assistance of some delegates the recommended form was reconsidered, in particular its French version, and it was concluded that more time was needed to ensure a sound, coherent and effective form was created. It was recalled that a delegate from the European Union had shared that the equivalent form for Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast) took several months to finalise. The Secretary General therefore proposed that the Commission on General Affairs and Policy mandate the Permanent Bureau to revise if and where necessary the form and submit that form for approval to the Council on General Affairs and Policy at its meeting in March 2020. It was emphasised that the Permanent Bureau would not perform the task alone, but in consultation with the Members as well as the Chair of the Drafting Committee. It was explained that the decision would also have an effect on the Final Act, since consequently there would be no Part B but only a reference under the Decisions taken by the Commission on future work. The Secretary General also expressed thanks to the delegation of Canada for their separate discussions about the title of the Convention, and explained that it would be extremely helpful for the Diplomatic Session to agree by consensus on the title. It was recalled that in the more recent past, the HCCH Members had agreed on the lengthy, formal title. One particular point was whether or not the title would actually refer to "foreign" judgments. The Secretary General opined that it would be helpful to have that reference to foreign judgments in the official title just to avoid any possible misunderstanding when conversing with people not familiar with HCCH, but then the short, snappy title could remain the "Judgments Convention". However, that was also a matter that the Secretary General wanted to submit to formal consideration.

123. **The Chair** firstly sought interventions on the process with respect to referring the recommended form to the Council on General Affairs and Policy.

124. **A delegate from Brazil** expressed agreement with the proposal and requested that the Council on General Affairs and Policy recommendation stipulate that the draft form reviewed by the Permanent Bureau should be circulated to the Member States no later than December 2019, and then the Member States would have enough time to consider the draft before the Council meeting in March.

125. **The Secretary General** explained that he expected that the Permanent Bureau would circulate a further draft first to all Members, and collect information, suggestions and reactions, and then send out the final draft by December at the latest. The Secretary General reminded the delegations that the cut-off date for the Permanent Bureau internally for the production of documents for the Council meeting in March was December, and emphasised that they would do their utmost to meet that deadline because they understood that Members needed enough time also to consult internally and then be in a position to approve, hopefully, the form in March 2020.

126. **The Chair of the Commission on General Affairs and Policy** requested whether the Secretary General could submit a Working Proposal so that delegations could consult it. There would then be three Working Proposals that needed to be considered in the Commission on General Affairs and Policy.

127. **The Secretary General** concurred and **the Chair of the Commission on Judgments** concluded that there would be a Working Document from the Permanent Bureau for the Commission on General Affairs and Policy to review when it meets to consider such practical issues.

128. **The Chair** sought interventions from delegates in relation to the title.

129. **Une déléguée du Canada** explique que, du point de vue de sa délégation, il semble utile d'ajouter le mot « étrangers » au titre de la Convention, car il existe par ailleurs un risque de confusion avec l'ancienne Convention de La Haye sur le même sujet. Elle pense que ce sera une stipulation valable. La déléguée fait remarquer que dans le document affiché à l'écran, en anglais, il fait référence à « la Convention HCCH de 2019 », et sa délégation préfère la forme habituelle de la « Convention de La Haye », plutôt que cette forme abrégée.

130. **A delegate from Israel** supported the addition of the term "foreign", because in their opinion it was important for domestic legislation when it referred to the Convention that it should be clear it was talking about foreign judgments. The delegate thus expressed agreement with the proposal from the delegate from Canada.

131. **A delegate from the People's Republic of China** expressed that they were flexible with the title and also agreed with the proposal by the delegate from Canada to have the word "foreign" included. Regarding whether it was called the Hague or HCCH Convention, his delegation had some other thoughts on the very important issue. First, the delegate noted that the Convention was much more important than many of the other HCCH Conventions. Secondly, to some extent, HCCH conveyed a greater universal and international perspective than the original "Hague". Therefore, the delegation of the People's Republic of China was happy to accept "HCCH Convention". It was also recalled that many other organisations had adopted a similar approach. It was reiterated that his delegation was ready to adopt "HCCH Convention" from the very new start of this very new work, under the capable leadership of their Chair and the Secretary General.

132. **A delegate from the United States of America** concurred with the proposal to include "foreign" in the title, which they thought was a helpful modifier. With respect to what word should precede "Convention", the delegate proposed a middle-ground option, to just refer to the "2019 Convention", which he understood was what they had done in all the other Conventions of the Hague Conference. Having a look at the titles, they did not have "Hague Confer-

ence", "HCCH" or anything like that. The delegate preferred not to have either "HCCH" or "Hague" and just have "2019 Convention" or "Convention", which "2019" would flow from anyway. The delegation did not express concern about the inclusion of a date, but sought to avoid geographic and marketing references.

133. **A delegate from Brazil** agreed that "foreign" should be added to the title, and with regard to what would precede "Convention" concurred with the comments made by the delegate from the United States of America. Their delegation was flexible with the reference to the year of the Convention, but they also believed that the former practice of the Hague Conference could be followed, and begin the name of the Convention itself without any reference to "Hague" or "HCCH". The delegate reiterated that they were flexible with respect to having a reference to the year of the Convention.

134. **A delegate from Israel** shared that they could support the middle-ground proposal made by the delegate from the United States of America. Regarding the year, the delegate did not have strong views but noted that the Diplomatic Session could also use the same practice of putting in parentheses the time of conclusion of the Convention.

135. **A delegate from the European Union** shared that their delegation's position on the matter was entirely uncoordinated, but that they took the view that "foreign" should be included and there should be no reference to "Hague" or "HCCH", because the past practice was just to start with "Convention on".

136. **A delegate from the Russian Federation** also agreed with the delegations of the United States of America and the European Union about not including HCCH. The delegate noted that they hoped the Convention would be very popular and often referred to, and for example the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, which it was anticipated the current Convention would mostly compete with in regard to the courts, was very often referred to as the "New York Convention". Therefore, the delegate proposed that perhaps the Plenary could also consider how the Convention would be branded, so that the short name as well as the long name could be determined.

137. At the Chair's invitation, **the Secretary General** discussed with respect to branding that HCCH Members should not be too light-hearted about it, because branding was important. It was shared that HCCH still very much had a branding issue, where the Organisation was still not known in parts of the world and regularly faced challenges to explain to people what the Organisation was and what it did. Also, the Organisation had deliberately started to increasingly use "HCCH" because it helped it to overcome the reaction sometimes received that the Organisation was Eurocentric or European-based. Against that background, the Secretary General suggested that, first of all, in the coming months there would be a new *Recueil des Conventions* (*Collection of Conventions*) that would list the core Conventions, where some may be excluded and just kept on the website. It would list all Conventions as "*Convention of* […]" without a reference to Hague or HCCH in the title; the official title of this Convention, however, would then be "*Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*". That was what would be used as the title on the record, the official source. In the Permanent Bureau's promotional efforts, referring to the shorter version, the Secretary General could imagine they would start using the expression "2019 HCCH Judgments Convention", because it would help with branding, promotion and the positioning of the Organisation. This would be an informal, unofficial use; it would not have any statutory value or effect, but it would help with promoting the Organisation and positioning it in relation to all other organisations based in The Hague, which also regularly used their own acronym – the International Court of Justice (ICJ), the Organisation for the Prohibition of Chemical Weapons (OPCW), the Permanent Court of Arbitration (PCA) and the International Criminal Court (ICC) – and then there is the HCCH. The acronym helps to position the Organisation in a very competitive environment.

138. **The Chair** sought further interventions regarding the title.

139. **The Chair of the Drafting Committee** asked whether it would be useful to also put the day and year in the short version, since there was an earlier Convention of the Hague Conference with the same title. Putting the year made it clear that it was a new Convention, not to be confused with the old one.

140. **The Chair** suggested that the Plenary leave the matter of the informal title, which had no legal significance, to the Permanent Bureau to work out whatever was the snappiest and most exciting. For the full title, the Chair recalled that there was a proposal to follow the existing practice in relation to other instruments, which was that the title on the front of the *Recueil des Conventions* (*Collection of Conventions*) was the "Convention of 2 July 2019 […]" and so on, and then inside the *Recueil des Conventions* (*Collection of Conventions*) the date was not in the bold title but below the title, "*Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*", in parentheses there would be "Concluded on 2 July 2019". The idea was for the formal title to do exactly what had been done before, and the Chair noted that he had heard no differences of view in relation to whether to include the word "foreign", that all delegations had agreed it should be included. Further, the delegations supported leaving out "Hague" or "HCCH" in the formal title, as opposed to the short, snappy branding. The Chair concluded that the formal title would include the word "foreign" before "judgments", that the front of the *Recueil des Conventions* (*Collection of Conventions*) would refer to the full date on which it was concluded, but the bolded heading inside the *Recueil des Conventions* (*Collection of Conventions*) would not.

141. **A delegate from Brazil** sought clarification that there would in fact be two official references to the treaty: the one in the document itself without the date, and the other on the website and in the *Recueil des Conventions* (*Collection of Conventions*) which would include the date.

142. **The Chair** agreed.

143. **A delegate from Canada** noted on the page displayed on the screen that there was not a definite article in English, but that when the Chair read out the title he read a definite article. As a point of clarification, she assumed that it would be "the recognition and enforcement", and that in French this would be "*Convention sur la reconnaissance et l'exécution des jugements étrangers […]*".

144. **The Chair** concluded that the Plenary could proceed on the basis of a definite article in order to mirror the French version of the title, "the recognition and enforcement", and proposed that the Session break for lunch.

145. The meeting was closed at 1.10 p.m.


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# Procès-verbal No 20

# Minutes No 20

*Séance du lundi premier juillet 2019 (après-midi)*

*Meeting of Monday 1 July 2019 (afternoon)*

1. La séance est ouverte à 14 h 50 sous la présidence de M. David Goddard QC (Nouvelle-Zélande). Les Vice-présidents de la Commission I sont Mme Kathryn Sabo (Canada), M. Boni de M. Soares (Brésil), Mme Elizabeth Pangalangan (Philippines) et Mme Tonje Meinich (Norvège).

2. **The Chair** noted the delegates had the opportunity to read Working Document No 97 and asked whether delegates had identified any problems with the carrying over of the morning's decisions into the document. He had not spotted any issues.

3. **The Secretary General** noted that the Plenary had reached an historic, momentous and emotional moment. He remarked that it was heartening to think of the many people who had contributed to the project to produce a truly important and 'game-changing' Convention. He invited the Plenary to applaud those who had done this collectively. *The Plenary applauded.* He expressed his immense gratitude to all the delegates who made the Convention happen. He commended the delegates on their commitment, bonds and friendship which comprised a unique HCCH spirit. He wished to extend his thanks to all the chairs of the informal working groups, who went the extra mile to ensure that there would be consensus, understanding, agreement and a solution on the table. He especially thanked Mr Fausto Pocar for chairing the Drafting Committee. It had been wonderful to work with him and feel his desire and willingness to make this a proper, clean and good text. He also extended his thanks to Ms Cristina Mariottini who had assisted Mr Pocar so effectively. Turning to the *co-Rapporteurs*, the Secretary General could not begin to find words that did justice to their contribution to the project. Their names would be associated with the Convention forever, and he could not think of a better duo to be associated in that form. *The Plenary applauded the* co-Rapporteurs. The Secretary General thanked the entire staff of the Permanent Bureau. He explained that the administrative staff and the linguistic team had worked into the night to prepare the Final Act. The Secretary General was immensely proud of them for making the endeavour possible. *The Plenary applauded the Permanent Bureau.* The Secretary General also thanked the legal staff and started by acknowledging past colleagues: Mr Hans van Loon, who was extremely committed to the project; Ms Marta Pertegás, who also contributed in important ways; Ms Andrea Schulz, now with the delegation of the European Union but who had previously worked at the Permanent Bureau; and Ms Louise Ellen Teitz, part of the delegation of the United States of America as well as a former colleague at the Permanent Bureau. The Secretary General extended a special thanks to Mr João Ribeiro-Bidaoui who – amongst moving between continents, adjusting to a new work environment, completing his doctoral thesis and having primary responsibility for the project – had brought the project to fruition. Mr Ribeiro-Bidaoui was ably assisted by Ms Ning Zhao who, in her unique flexibility and way of adjusting to challenges, had provided the necessary support for the success of the project. *The Plenary applauded Mr Ribeiro-Bidaoui and Ms Zhao.* The Secretary General then thanked Ms Cara North for her invaluable support to Mr David Goddard QC and for her own substantive contributions to the project. *The Plenary applauded Ms North.* The Secretary General turned to David Goddard QC. The Secretary General expressed that he was over the moon, and noted that the delegates felt like children with a new toy. He recalled that the journey had been a yellow brick road with many crossings, which required decisions that the Chair had handled masterfully. He noted that Mr Goddard had effectively combined his subject-matter expertise with leadership to guide the Plenary through complex, difficult and delicate matters, issues and questions to eventually reach consensus. The Plenary had trusted Mr Goddard, and Mr Goddard had taken them to this historic moment. The Secretary General recalled the Māori proverb *kia kaha, kia māia, kia manawannui*, which means be strong, be brave, be steadfast. Mr Goddard had been strong, brave and steadfast and as a result, the goal of the Session had been achieved. For that, the Secretary General thanked Mr Goddard. *The Plenary applauded.* The Secretary General presented Mr Goddard with gifts.

4. **The Chair (Mr David Goddard QC)** thanked the delegates and remarked that the photograph of the delegates of the Diplomatic Session would take pride of place in his new chambers in the New Zealand Court of Appeal. He noted that this destination was what success looked like: they had arrived. The delegates had done their small but important part in enhancing international legal architecture and contributing to access to justice and greater global prosperity. It was an amazing thing to have had the chance to do. Mr Goddard found it difficult to find the words to express his gratitude to the many people who played a role in this significant achievement. He thanked the Secretary General, Mr Christophe Bernasconi, to whom he and the delegates owed a great debt. Mr Goddard echoed the thanks extended by Mr Bernasconi. Mr Goddard also wished to thank the team at the Permanent Bureau for their encouragement, support and careful management of his eccentricities. Mr Goddard thanked Mr Bernasconi who had become a dear friend as well as a valued colleague. He also thanked Ms Zhao, with whom he had exchanged many hundreds of emails over the years as they worked towards a shared understanding of various issues: Mr Goddard remarked this had been a productive and enjoyable process. Mr Goddard also wished to thank the many former staff at the Permanent Bureau, including Mr Hans van Loon, Ms Marta Pertegás and Ms Cristina Mariottini. He extended his thanks to the incredibly efficient administration team. He remarked that the Diplomatic Session had run like clockwork. Turning to his personal debts of gratitude and the things that had enabled him to create the impression that he was an effective Chair, Mr Goddard thanked Ms North. Ms North had been involved with the project since the first Working Group meeting in 2013 when she was a member of the legal staff at the Permanent Bureau. She had made such an exceptional contribution at that time that Mr Goddard and Mr Bernasconi had prevailed upon her to continue working on the project after her departure from the Permanent Bureau. She had contributed excellent papers, and had personally supported Mr Goddard in his role as Chair by setting agendas, planning every day, and together regrouping at lunch time, keeping track of all the informal working groups, and mapping out possible solutions to difficult issues. Mr Goddard

had benefited from Ms North's sharp intelligence, knowledge, grasp of the project, her hard work, sense of humour and her tolerance for his. Mr Goddard also expressed his deep appreciation to Mr Andreas Bucher from Switzerland, and for all Mr Goddard had learned from him over 20 years about private international law and the art of creating an HCCH Convention. Mr Goddard thanked the interpreters, who had dealt with everything from difficult technical concepts to some very bad jokes and digressions. He finally thanked the delegates for the honour, privilege and joy of serving as their Chair. The Chair had loved being involved with the project and rejoiced in what they had built together. Turning to Jane Austen in *Sense and Sensibility*, the Chair quoted: "It isn't what we say or think that defines us, but what we do." Pausing at the end of many years of hard work, the Chair considered that everyone could be very proud of their collective endeavour.

*The Plenary applauded.*

5. The Second Reading was completed at 3.25 p.m.

6. **The President of the Session, Mr Paul Vlas**, asked the delegates whether they wished for a Third Reading. He proposed that there be no Third Reading. He enquired whether any delegation was opposed to that course of action. Observing that there were no interventions, the President noted that there was now a final text and that the Permanent Bureau could begin its preparation for the official signing of the Final Act to take place on 2 July 2019. The President asked Mr Andrew Walter to Chair the Commission on General Affairs and Policy.

7. **The Secretary General** intervened to recall the process for the finalisation of the Explanatory Report. He recalled that there was now a final agreed-upon text for the new Convention which would be formally adopted tomorrow with the signing of the Final Act. The *co-Rapporteurs* would produce the revised draft Explanatory Report to reflect the agreed upon text as quickly as possible. Then the French version would be prepared. The revised draft of the Explanatory Report would then be sent to all Members for comment. All comments received would be made available to all parties via a posting on the Secure Portal. On the basis of those received comments, the *co-Rapporteurs* would prepare a further revised draft. It is hoped the revised draft would be approved via a silent procedure, if possible, before the end of 2019. The Secretary General emphasised the importance of delegates sending comments to the Permanent Bureau and not to the *co-Rapporteurs*, for the sake of transparency and work management.

8. The meeting was closed at 3.30 p.m.

# Séances plénières
# Plenary Sessions

## Procès-verbal No 2*

## Minutes No 2*

*Séance du lundi premier juillet 2019 (après-midi)*

*Meeting of Monday 1 July 2019 (afternoon)*

1. The Session was opened at 4.25 p.m. in the building of the Hague Academy of International Law in the Peace Palace under the chairmanship of **Mr Paul Vlas** (President of the Netherlands Standing Government Committee on Private International Law).

2. **The Chair of the Session** noted that there would be time and opportunity tomorrow to speak words of thanks. However, he wished to express his sincere gratitude to Mr David Goddard for having chaired Commission I with eloquence, wisdom, humour and knowledge. The Chair was certain that he spoke on behalf of all delegates in thanking Mr Goddard. He also extended his gratitude to the Permanent Bureau, the administrative staff, the interpreters and, last but not least, all the delegates who had participated. He thanked them for their flexibility, negotiations and discussions. He offered the following metaphor: the delegates had climbed a mountain, the way up was not always easy, but the view at the top was magnificent. He encouraged the delegates to enjoy this moment.

3. **The Secretary General** wanted to record, on behalf of the Permanent Bureau, his thanks to the distinguished delegation from the European Union and the Commission for organising translations of the Convention. He noted that this was a continuation of their excellent cooperation upon translations in the past. The Secretary General also thanked the Department of Justice of the Hong Kong Special Administrative Region and the colleagues from the People's Republic of China for hosting the first major event to promote the Convention. Turning to administrative matters, the Secretary General stressed that it was important delegates be seated in the Great Hall of Justice at 11.55 a.m. The signing of the Final Act would proceed on a tight schedule in the Great Hall of Justice in the Peace Palace. The proceedings would begin with the signing of the Final Act by all Members present, following which there would be a short speech and the signing of the Convention by those Members who had indicated their intention to sign.

4. **The Chair of the Session** closed the meeting at 4.30 p.m.

* Le Procès-verbal No 1 figure dans le Tome II, *Matières diverses*. Ne sont reproduits dans ce tome que les procès-verbaux ayant trait au projet de Convention sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale.

* Minutes No 1 appears in Tome II, *Miscellaneous matters*. Only the Minutes dealing with the draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters are reproduced in this volume.

## Extrait du Procès-verbal de la Séance de clôture*

## Extract from the Minutes of the Closing Session*

*Mardi 2 juillet 2019 (après-midi)*

*Tuesday 2 July 2019 (afternoon)*

4. **The President** thanked Minister Blok for his warm words that reflected the importance of the treaty and also the HCCH as the preeminent global organisation for the unification of private international law. The President then invited First Secretary of the HCCH, Mr João Ribeiro-Bidaoui, and Senior Legal Officer of the HCCH, Ms Ning Zhao, to conduct a ceremonial Plenary reading of the Convention.

*Il est procédé à la lecture de l'Acte final.*

5. **M. Ribeiro-Bidaoui (Premier secrétaire)** lit le préambule : « Les Parties contractantes à la présente Convention, Désireuses de promouvoir un accès effectif de tous à la justice et de faciliter, à l'échelon multilatéral, le commerce et l'investissement fondés sur des règles, ainsi que la mobilité, par le biais de la coopération judiciaire, Estimant que cette coopération peut être renforcée par la mise en place d'un ensemble uniforme de règles essentielles sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale, afin de faciliter la reconnaissance et l'exécution effectives de ces jugements ».

6. **Ms Zhao (Senior Legal Officer)** continued to read the Preamble: "Convinced that such enhanced judicial cooperation requires, in particular, an international legal regime that provides greater predictability and certainty in relation to the global circulation of foreign judgments, and that is complementary to the *Convention of 30 June 2005 on Choice of Court Agreements*, Have resolved to conclude this Convention to this effect and have agreed upon the following provisions –".

7. **M. Ribeiro-Bidaoui (Premier secrétaire)** lit l'article premier (Champ d'application), premier paragraphe : « La présente Convention s'applique à la reconnaissance et à l'exécution des jugements en matière civile ou commerciale. Elle ne recouvre notamment pas les matières fiscales, douanières ou administratives. »

8. **Ms Zhao (Senior Legal Officer)** read Article 4 (General provisions), paragraph 1: "A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention."

* Le Procès-verbal de la Séance de clôture figure dans le tome II, *Matières diverses*.

* The Minutes of the Closing Session appear in Tome II, *Miscellaneous matters*.

9. **M. Ribeiro-Bidaoui (Premier secrétaire)** lit l'article 4, deuxième paragraphe : « Le jugement ne peut pas faire l'objet d'une révision au fond dans l'État requis. Il ne peut y avoir d'appréciation qu'au regard de ce qui est nécessaire pour l'application de la présente Convention. »

10. **Ms Zhao (Senior Legal Officer)** read Article 4, paragraph 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."

11. **M. Ribeiro-Bidaoui (Premier secrétaire)** lit l'article 5 (Fondements de la reconnaissance et de l'exécution), premier paragraphe : « Un jugement est susceptible d'être reconnu et exécuté si l'une des exigences suivantes est satisfaite : (a) la personne contre laquelle la reconnaissance ou l'exécution est demandée avait sa résidence habituelle dans l'État d'origine lorsqu'elle est devenue partie à la procédure devant le tribunal d'origine ».

12. **Ms Zhao (Senior Legal Officer)** read Article 15 (Recognition and enforcement under national law): "Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law."

13. **M. Ribeiro-Bidaoui (Premier secrétaire)** lit l'article 20 (Interprétation uniforme) : « Aux fins de l'interprétation de la présente Convention, il sera tenu compte de son caractère international et de la nécessité de promouvoir l'uniformité de son application. »

14. **Ms Zhao (Senior Legal Officer)** read Article 24 (Signature, ratification, acceptance, approval or accession), paragraphs 1 and 3: "This Convention shall be open for signature by all States", "This Convention shall be open for accession by all States".

15. **M. Ribeiro-Bidaoui (Premier secrétaire)** lit l'article 26 (Organisations régionales d'intégration économique), premier paragraphe, première partie : « Une Organisation régionale d'intégration économique constituée seulement par des États souverains et ayant compétence sur certaines ou toutes les matières régies par la présente Convention peut signer, accepter ou approuver cette Convention ou y adhérer. »

16. **Ms Zhao (Senior Legal Officer)** read Article 28 (Entry into force), paragraph 1: "This Convention shall enter into force on the first day of the month following the expiration of the period during which a notification may be made in accordance with Article 29(2) with respect to the second State that has deposited its instrument of ratification, acceptance, approval or accession referred to in Article 24."

17. **M. Ribeiro-Bidaoui (Premier secrétaire)** lit la clause finale : « Fait à La Haye, le 2 juillet 2019, en un seul exemplaire qui sera déposé dans les archives du Bureau Permanent et dont une copie certifiée conforme sera remise à chacun des Gouvernements représentés à la Vingt-deuxième session de la Conférence. »

*Ensuite, tous les délégués présents et le Secrétaire général signent l'Acte final.*

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