

**Special Commission  
on international jurisdiction  
and the effects of foreign judgments  
in civil and commercial matters**

**(10 – 20 November 1998)**

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**Proposal by the Drafting Committee**

*Preamble*

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(not yet discussed)

CHAPTER I            SCOPE OF THE CONVENTION

*Article 1            Substantive scope*

1            This Convention applies to civil and commercial matters.

2            The Convention does not apply to the following matters –

*a*            civil status and legal capacity of natural persons;

*b*            maintenance obligations;

*c*            matrimonial property regimes [and other rights and obligations arising out of marriage]<sup>1</sup>;

*d*            wills and succession;

*e*            insolvency, composition or analogous proceedings;

*f*            social security;

*g*            arbitration and proceedings related thereto;

[*h*            questions of administrative law;]

*i*            taxation and customs;

*j*<sup>2</sup>

[3            A dispute is not excluded from the scope of the Convention by the mere fact that a governmental agency or other governmental instrumentality is a party to the proceedings.]

[4            The Convention applies to disputes within its scope of application regardless of the nature of the body exercising judicial authority on behalf of the State.]<sup>3</sup>

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<sup>1</sup>            This may need to be extended to relationships having consequences analogous to those of marriage.

<sup>2</sup>            The questions of liability for nuclear activity will be dealt with in Article 37 (relations with other conventions).

<sup>3</sup>            The Commission may wish to consider whether this paragraph, if acceptable, should apply only to recognition and enforcement.

*Article 2*            *Geographical scope*

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(not yet discussed)

CHAPTER II            GROUNDS OF JURISDICTION

*Article 3*            *Defendant's forum*

Subject to the provisions of this Convention –

*a* a natural person may be sued for any claim in the courts [of the Contracting State] [of the place] where that person is habitually resident [, or, if the habitual residence cannot be determined, where that person is domiciled];

*b* a legal entity may be sued for any claim before the courts [of the Contracting State] [of the place] where it has been incorporated or formed, or where it has its central management, or, if that place cannot be determined, the place of its principal activity.

1 If the parties have agreed that a court or courts of a State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction unless the parties have agreed otherwise.

2 Such agreement shall be valid as to form, if it was entered into –

*a* in writing or by any other means of communication which can be evidenced by a text; or

*b* orally and confirmed in writing or by any other means of communication which can be evidenced by a text; or

*c* in accordance with a usage which is regularly observed by the parties; or

*d* in accordance with a usage of which the parties were or ought to have been aware and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned; or

[*e* in accordance with any other form accepted by the court seised].

3 Reservation of protective forum - to be decided

4 Reservation of exclusive jurisdiction - to be decided

[5 Where such an agreement designates a court or courts of a non-Contracting State, courts in Contracting States shall [decline jurisdiction] [or suspend proceedings<sup>4</sup>] [unless the court or courts chosen have themselves declined jurisdiction].]

*Nota bene:*

With regard to choice of court clauses, the following topics are still to be considered:

1 Sufficient links between the forum and the litigation

2 Provisional and protective measures

3 Warranty

4 Intervention

5 Appearance of the defendant

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<sup>4</sup> If this solution is accepted by the Special Commission, additional rules may have to be considered.

*Article 5            Appearance by the defendant*

1    Subject to the provisions of this Convention, a court has jurisdiction if the defendant proceeds on the merits without contesting jurisdiction.

2            Variant 1

The defendant has the right to contest jurisdiction. Without prejudice to provisions of the law of the forum allowing more time, this right shall be exercisable

[Option 1    – within a reasonable time after the commencement of the proceedings]

[Option 2    – at least up to the time of the first defense on the merits].

Variant 2

The defendant has the right to contest jurisdiction not later than the time of the first defense on the merits.

*Article 6            Contracts*

Variant 1

A plaintiff may bring a claim, in matters relating to contracts, in the courts of a Contracting State if

- 1    the plaintiff's habitual residence or seat is located in that State; and
- 2    the defendant engaged in activity in that State that constituted a significant step
  - a*    in the creation of the contract obligation on which the claim is based, such as solicitation of business, or
  - b*    in the defendant's preparation to perform the obligation on which the claim is based, or
  - c*    in the performance of the obligation on which the claim is based.

Variant 2

- 1    A plaintiff may bring a claim, in matters relating to contracts, in the Contracting State in which the obligation in question was to be performed under the terms of the contract, provided that a significant part thereof was in fact performed. If the claim is based on several obligations, the principal obligation shall be determinative.
- 2    The preceding paragraph shall not apply where the obligation in question is to pay for goods or services.

*Article 7            Contracts with consumers*

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(not yet discussed)

*Article 8            Contracts with employees*

.....  
(not yet discussed)

*Article 9            Branches*

The plaintiff may bring a claim in the courts of a Contracting State in which a branch, agency or other establishment [, or an employee or other representative] of the defendant is situated or has acted for or on behalf of the defendant in conducting regular commercial activity, including promotional activity directed at that State or the sale of goods or provision of services in that State, provided that the action is based on a claim that relates to such activity.

*Article 10          Torts or delicts*

1    The plaintiff may commence an action based on a claim in tort or delict in the courts of the Contracting State –  
*a*    in which the act or omission of the defendant that caused the injury occurred, or

*b*    in which the injury arose, provided that the defendant could reasonably foresee that the activity giving rise to the claim could result in such injury in that State, including activity through commercial channels known by the defendant to extend to that State.

2    The plaintiff may also commence an action in accordance with the preceding paragraph when either the act or omission, or the injury is threatened.

[3    If an action is commenced in a jurisdiction other than that where the act or omission that caused the injury occurred or where the defendant is habitually resident or has its seat, the court shall have jurisdiction only in respect of the injury that occurred in that State.]

1 A court that is seised or is about to be seised of proceedings on the merits and which has jurisdiction under the Convention has jurisdiction to take provisional or protective measures [in connection with those proceedings].

2 A court of the place where property is located has jurisdiction to take provisional or protective measures in respect of that property.

*Nota bene:*

With regard to provisional and protective measures, the following topics are still to be considered:

- 1 Should the rule in the first paragraph be extended to any court having jurisdiction under the Convention?
- 2 Should a choice of court clause prevent other courts from taking provisional or protective measures, unless the parties have agreed otherwise?
- 3 Should there be a third paragraph as follows: “A court of a Contracting State has jurisdiction to take provisional or protective measures if their effect is limited to the territory of that State.”?
- 4 Definition of provisional or protective measures?
- 5 Extraterritorial effects of orders *in personam*
- 6 Recognition and enforcement

1 General jurisdiction of a State over the defendant may not be based exclusively on one or more of the following [in particular] –

- a* the presence in the territory of the State of property belonging to the defendant, [or the seizure by the plaintiff of property situated there];
- b* the nationality of the plaintiff ;
- c* the nationality of the defendant;
- d* the domicile, habitual or temporary residence of the plaintiff within the territory of the State;
- e* the carrying on of commercial or other activities by the defendant within the territory of the State;
- f* the service of a writ upon the defendant within the territory of the State [with the exception of actions based on a violation of human rights protected by international conventions];
- g* [a unilateral specification of the forum by the plaintiff];
  
- h* [the declaration of enforceability or registration of a judgment].

2 Unless otherwise provided in the present Convention, the grounds under paragraph 1, sub-paragraphs *b, c, d, f* and *g* may not also serve as grounds to establish special jurisdiction.]

I 1 When an action having the same subject matter is already pending between the same parties in the court of another Contracting State, the court second seised shall stay the case if it is to be expected that the court first seised will, within a reasonable time, render a decision capable of being recognised under this Convention in the State of the court second seised.

2 The court second seised shall decline jurisdiction as soon as it is presented with a decision rendered by the court first seised which complies with the requirements for its recognition or enforcement under this Convention.

[3 Variant 1

For the purposes of the preceding paragraphs, a court is seised when an application has been made before it and the document instituting the proceedings or an equivalent document has been duly served on the defendant.

Variant 2

For the purposes of this Article, a court is deemed to be seised at the date on which the document instituting the proceedings or an equivalent document is filed with the court, provided that the document is received within fifteen days (from the date of filing) by the authority or person responsible for service. Failing this, the court is deemed to be seised when service is effected.

However, if the document must be served before being filed with the court, the court is deemed to be seised at the date on which the document instituting the proceedings or an equivalent document is received by the authority or person responsible for service, provided that the document is filed with the court within fifteen days of receipt by the plaintiff of proof of service. Failing this, the court is deemed to be seised when the document is filed<sup>5</sup>.]

[II 1 If the court first seised determines that the court second seised in another Contracting State has jurisdiction and is [manifestly] more appropriate to resolve the dispute, it may suspend proceedings and direct the party concerned to request the court second seised to exercise its jurisdiction in place of the court first seised.

2 In determining the appropriateness of a forum the courts concerned will consider all relevant factors and in particular –

*a* the distance between the habitual residence, or the seat of each of the parties and the court seised,

*b* the nature and location of the evidence capable of contributing to the resolution of the dispute and the procedure necessary to obtain such evidence.

3 The courts seised may proceed to an exchange of views.

4 If the court second seised determines that it has jurisdiction and accepts jurisdiction in place of the court first seised, the latter shall decline jurisdiction.

If the court second seised refuses to exercise jurisdiction, the court first seised shall revoke the suspension of the proceedings.

[5 Such procedure shall not have the effect of allowing a party to invoke a limitation period [time bar] with respect to a claim which was not subject to such limitation when it was pending before the court first seised.]]<sup>6</sup>

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<sup>5</sup> Variant 2 was not fully discussed.

<sup>6</sup> The problem of the effect of a declaratory action on *lis pendens* remains to be examined.



Variant 1

I        In the absence of an express choice of court by the parties [or an exclusive jurisdiction], a court of a [Contracting] State having jurisdiction under the provisions of the Convention may, [by way of exception and] at the request of any party at an early stage of the proceedings, suspend consideration of the case [or decline jurisdiction] if it considers that another [Contracting State] court has jurisdiction and would [clearly] [manifestly] be better placed in the particular case to try the dispute and to promote the ends of justice.

II        In deciding whether to suspend consideration [or decline jurisdiction], the requested court shall consider [the following factors] [all the relevant factors, including in particular the following] –

*a*        the balance of convenience for the parties to the proceedings [and their witnesses] having regard in particular to:

- the availability and situation of the evidence and the location of the parties and the witnesses,
- [–        the language of the witnesses and the documents in the proceedings,]
- the likely relative speed and cost of proceedings in the two courts;

*b*        whether one court and not the other will be applying its own law;

*c*        the desirability of avoiding a multiplicity of legal proceedings and the risk of conflicting decisions;

*d*        how far the litigation has progressed in the other court;

*e*        the enforceability of any decision which may result; and

*f*        the relative strengths of the connections with the two courts of the parties and the dispute.

[III      The requested court may consult with the other court, while fully respecting the rights of the parties, before deciding whether to suspend [or decline jurisdiction] in favour of that court.]

[IV      The requested court [shall] [may] require the defendant to give such undertakings as meet the ends of justice, including an undertaking that he will not rely on a period of limitation or prescription having expired.]

[V        If the requested court decides to suspend [or decline jurisdiction] in favour of the courts of a non-Contracting State it may order the defendant to lodge security in the requested court in an amount to satisfy any judgment of the other court in favour of the plaintiff and to cover the costs.]

[VI      The requested court shall decide on the question whether to suspend [or decline jurisdiction] without [undue] delay.]

VII      In the event that the other court does not assume jurisdiction, the requested court shall [revoke the suspension of the case and] proceed to consider the case.

VIII     In the event that the other court assumes jurisdiction, the requested court may decline jurisdiction.

(The following paragraph could be included in the Chapter on Recognition and Enforcement)

IX        A decision may not be refused recognition or enforcement on the ground that the court addressed takes the view that the court of origin should have declined jurisdiction.

Variant 2

No provision permitting the judge to decline jurisdiction.]

*Article 25 The notion of decision*

1 The rules of this Chapter shall apply to all decisions given by [the courts] of<sup>7</sup> a Contracting State, irrespective of the name given by that State to the decision.

2 They apply also to

[a decisions which order provisional or protective measures and]

b an award of judicial costs or expenses [even if such award does not proceed from a court], provided that it relates to a decision which may be recognised or enforced under this Convention.

*Article 26 General rule*

1 A decision rendered in a Contracting State shall be recognised in another Contracting State if it is final in the State of origin.

2 To be enforceable in the State addressed, a decision must be enforceable in the State of origin.

*Article 27 Grounds for refusal of recognition and enforcement*

1 Recognition or enforcement of a decision may however be refused-

a if the decision was rendered by a court not having jurisdiction under this Convention,

[b if proceedings [between the same parties and] having the same subject matter are pending before a court of the State addressed and those proceedings were the first to be instituted,]

c if the decision is irreconcilable with a decision rendered [between the same parties], either in the State addressed, or in another [Contracting] State, provided that in the latter case the decision is [capable of being] recognised or enforced in the State addressed,

d if recognition or enforcement of the decision would be manifestly incompatible with the public policy of the State addressed.

2 In questions relating to the jurisdiction of the court of origin, the authority of the State addressed shall be bound by the findings of fact on which that court based its jurisdiction [unless the decision was given by default].

3 Without prejudice to such review as is necessary for the purpose of application of the preceding provisions, there shall be no review of the merits of the decision rendered by the court of origin.

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<sup>7</sup> See Article 1.

*Article 28 Decisions rendered by default*

A decision rendered by default shall not be recognised or enforced unless the defaulting party has had, in the circumstances, sufficient time and opportunity to present his defense.

*Article 29 Documents to be filed*

1 The party seeking recognition or applying for enforcement shall furnish –

*a* a complete and certified copy of the decision;

*b* if the decision was rendered by default, the original or a certified copy of a document establishing that the document which instituted the proceeding or an equivalent document was brought to the knowledge of the defaulting party;

*c* all documents required to establish that the decision is final in the State of origin and, as the case may be, that the decision is enforceable in that State;

*d* if the authority addressed so requires, a translation of the documents referred to above, made by a person so qualified to do so.

2 No legalisation or other like formality may be required.

3 If the terms of the decision do not permit the authority addressed to verify whether the conditions of this Convention have been complied with, that authority may require the production of any other necessary documents.

*Article 30 Procedure*

1 The procedure for the recognition, declaration of enforceability or registration for enforcement of the decision is governed by the law of the State addressed. The authority addressed shall act expeditiously.

2 If the decision contains provisions which are severable, one or more of them may be separately recognised, declared enforceable or registered for enforcement<sup>8</sup>.

*Article 31 Costs of proceedings*

No security, bond or deposit, however described, shall be required by reason only of the nationality or habitual residence of the applicant [in a Contracting State] to guarantee the payment of judicial costs or expenses.

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<sup>8</sup> The Drafting Committee is of the view that this provision should be placed in the Article dealing with the effects of the decision (Article 32).

Variant 1

A party granted legal aid in the State of origin shall be extended such aid under equivalent conditions [to the most favourable extent] provided by the law of the State addressed in any proceedings for the recognition or enforcement of a decision.

Variant 2

Persons habitually resident in a Contracting State shall be entitled, in proceedings for the recognition or enforcement of decisions in another Contracting State, to legal aid under the same conditions as apply to persons habitually resident in the requested State.

*Article 32              Effects of the decision*

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(not yet discussed)

*[Article 32 bis      Damages*

1            In so far as a decision awards non-compensatory damages, it shall be recognised at least to the extent that similar or comparable damages could have been awarded in the State addressed.

2            *a*            [In exceptional cases] when the debtor, after proceedings at which the creditor has the opportunity to be heard, satisfies the authority addressed that in the circumstances, including those existing in the state of origin, [grossly] excessive damages have been awarded, recognition may be limited to a lesser amount.

*b*            In no event shall the authority addressed recognise the decision in an amount less than the amount of damages which that authority could have awarded in the circumstances, including those existing in the state of origin.

3            References in this Article to damages include, where appropriate, judicial costs and expenses.]