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**RÉSULTAT PRÉLIMINAIRE
DES TRAVAUX DU GROUPE DE TRAVAIL INFORMEL
SUR LE PROJET DES JUGEMENTS**

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**PRELIMINARY RESULT
OF THE WORK OF THE INFORMAL WORKING GROUP
ON THE JUDGMENTS PROJECT**

*Document préliminaire No 8 de mars 2003 (corrigé)
à l'intention de la Commission spéciale d'avril 2003
sur les affaires générales et la politique de la Conférence*

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for the attention of the Special Commission of April 2003
on General Affairs and Policy of the Conference*

**RÉSULTAT PRÉLIMINAIRE
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NOTE BY THE PERMANENT BUREAU

In accordance with the Decision of Commission I of the Nineteenth Session of the Conference of 24 April 2002, the Permanent Bureau set up an informal working group to prepare a text on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters to be submitted to a Special Commission. Among the core areas identified by Commission I,¹ the informal group chose to start working on choice of court agreements for commercial transactions. The group held three meetings, each of a duration of three days. The group drafted a text focussed on choice of forum and the recognition and enforcement of judgments in civil and commercial matters, which it considers, as such, to be sufficiently advanced to be submitted to a Special Commission now, or at least after one further meeting of the group.

The group discussed other issues among those identified by Commission I, such as defendant's forum, counterclaims, and submission to the jurisdiction of the court. The group was not able to go deeply enough into these subjects within the time available to permit any final conclusions with respect to the possibility of drafting convention texts on these issues.

Finally, it should be noted that a survey has recently been conducted by the International Chamber of Commerce regarding "business practices on jurisdictional issues"; the preliminary results will be available at the meeting of the Special Commission on 1 April 2003.

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

**WORKING GROUP
DRAFT TEXT ON CHOICE OF COURT AGREEMENTS**

The States signatory to the present Convention,

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

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

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

CHAPTER I PRELIMINARY PROVISIONS

Article 1 Scope

1. This Convention shall apply to agreements on the choice of court concluded in civil or commercial matters.
2. This Convention shall not apply to -
 - a) agreements between a natural person acting primarily for personal, family or household purposes (the consumer) and another party acting for the purposes of its trade or profession, or between consumers;
 - b) individual or collective contracts of employment.
3. This Convention shall not apply to proceedings relating to -
 - a) the status and legal capacity of natural persons;
 - b) maintenance obligations;
 - c) matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships;
 - d) wills and succession;
 - e) insolvency, composition or analogous matters;
 - f) [admiralty or maritime matters] [contracts for the carriage of goods by sea];
 - g) [anti-trust or competition claims];
 - h) nuclear liability;
 - i) rights *in rem* in immovable property;
 - j) validity, nullity, or dissolution of a legal person and decisions related thereto;
 - k) validity of patents, trademarks and [other intellectual property rights – to be defined].
- [4. Proceedings are not excluded from the scope of the Convention if a matter referred to in paragraph 3 arises merely as an incidental question. However, a judgment resulting from such proceedings shall have effect under this Convention only as between the parties.]

5. This Convention shall not apply to arbitration and proceedings related thereto, nor shall it require a Contracting State to recognise and enforce a judgment if the exercise of jurisdiction by the court of origin was contrary to an arbitration agreement.
6. Proceedings are not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any person acting for a State is a party thereto.
7. Nothing in this Convention affects the privileges and immunities of sovereign States or of entities of sovereign States, or of international organisations.

Article 2 Definitions

1. In this Convention -
 - a) "choice of court agreement" means an agreement whereby two or more parties designate, for the purpose of deciding disputes which have arisen or may arise between them in connection with a particular legal relationship, the courts of one or more States or one or more specific courts;
 - b) "exclusive choice of court agreement" means a choice of court agreement which designates the courts of one State or one specific court to the exclusion of the jurisdiction of any other courts. A choice of court agreement which designates the courts of one State or one specific court shall be deemed to be exclusive unless the parties have provided otherwise;
 - c) "judgment" means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court or an officer of the court, provided that such determination relates to a judgment which may be recognised or enforced under this Convention.
2. For the purposes of this Convention, an entity or person other than a natural person shall be considered to be habitually resident in the State -
 - a) where it has its statutory seat;
 - b) under whose law it was incorporated or formed;
 - c) where it has its central administration; or
 - d) where it has its principal place of business.

Article 3 Formal validity

A choice of court agreement shall be valid as to form [only]² if it was entered into -

- a) in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference;
- b) orally and evidenced in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference;
- c) in accordance with a usage which is regularly observed by the parties to the choice of court agreement; or
- d) in accordance with a usage which the parties to the choice of court agreement knew or ought to have known and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.

² The word "only" was placed in square brackets because there is no consensus yet as to whether the form standard under the Convention shall preclude less rigid national form standards from creating a grey jurisdiction under national law outside the Convention.

CHAPTER II JURISDICTION

Article 4 Jurisdiction of the chosen court

1. If the parties have agreed in an exclusive choice of court agreement that a court or the courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or the courts of that Contracting State shall have jurisdiction, unless the court finds that the agreement is null and void, inoperative or incapable of being performed.
2. Paragraph 1 shall not apply in the courts of a Contracting State if all the parties are habitually resident in that State and have agreed that a court or courts of that same Contracting State shall have jurisdiction to determine the dispute.
3. Nothing in this Convention shall affect subject matter jurisdiction [or the internal allocation of jurisdiction among the courts in a Contracting State].

Article 5 Priority of the chosen court

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

- a) that court finds that the agreement is null and void, inoperative or incapable of being performed;
- b) the parties are habitually resident in that Contracting State and all other elements relevant to the dispute and the relationship of the parties, other than the choice of court agreement, are connected with that Contracting State; or
- c) the chosen court has declined jurisdiction.

Article 6 Interim measures of protection

Nothing in this Convention shall prevent a party from requesting provisional and protective measures on an interim basis from any court or prevent any court from granting such measures.

CHAPTER III RECOGNITION AND ENFORCEMENT

Article 7 Recognition and enforcement

1. A judgment given by a court of a Contracting State designated in a choice of court agreement shall be recognised or enforced, as the case may be, in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only if -
 - a) the court addressed finds that the choice of court agreement was null and void;
 - b) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence;
 - c) the judgment was obtained by fraud in connection with a matter of procedure;
 - [d) the judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed;] or
 - e) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.

2. In addition, recognition or enforcement of a judgment given by a court of a Contracting State designated in a choice of court agreement other than an exclusive choice of court agreement may be refused if -
 - a) proceedings between the same parties and having the same subject matter are pending before a court that was seised prior to the court of origin, either in the State addressed or in another State, provided that in the latter case the court is expected to render a judgment capable of being recognised or enforced in the State addressed; or
 - b) the judgment is inconsistent with a judgment rendered, either in the State addressed or in another State, provided that in the latter case the judgment is capable of being recognised or enforced in the State addressed.
3. Without prejudice to such review as is necessary for the purpose of the application of the provisions of this Chapter, there shall be no review of the merits of the judgment rendered by the court of origin.
4. The court addressed shall not give greater effect to a judgment than it has in the State of origin.
5. Proceedings for recognition or enforcement may be suspended, or dismissed without prejudice, 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.

Article 8 Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce -
 - a) a complete and certified copy of the judgment;
 - b) if the judgment was rendered by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
 - c) all documents required to establish that the judgment has effect in the State of origin;
 - d) if the court addressed so requires, a translation of the documents referred to above, made by a person qualified to do so.
2. An application for recognition or enforcement may be accompanied by the form annexed to this Convention and, if the court addressed so requires, a translation of the form made by a person qualified to do so.
3. No legalisation or other formality may be required.
4. 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 the production of evidence of the choice of court agreement, and any other necessary documents.

Article 9 Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the State addressed so far as this Convention does not provide otherwise. The court addressed shall act expeditiously.

Article 10 Costs of proceedings

Where a party seeks recognition or enforcement of a judgment in a Contracting State under this Convention, and recognition or enforcement is refused, an order for payment of costs and

expenses of the proceedings before the court addressed shall, on the application of the person entitled to the benefit of the order, be enforceable under this Convention in any other Contracting State.

Article 11 Damages

1. A judgment which awards non-compensatory damages, including exemplary or punitive damages, shall be recognised and enforced to the extent that a court in the State addressed could have awarded similar or comparable damages. Nothing in this paragraph shall preclude the court addressed from recognising and enforcing the judgment under its law for an amount up to the full amount of the damages awarded by the court of origin.
2. 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 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 13 Settlements

Settlements to which a court designated in a choice of court agreement has given its authority shall be recognised or enforced, as the case may be, under this Convention in the same manner as a judgment.

CHAPTER IV GENERAL CLAUSES

Article 14 No discrimination in procedural matters

Procedural rules of a Contracting State shall not be applied in a manner that discriminates against parties that are nationals of, or habitually resident in, other Contracting States when applying this Convention.

Article 15 Limitation of jurisdiction

Upon ratification of this Convention, a State may declare that its courts may refuse to determine disputes covered by a choice of court agreement if, except for the choice of court agreement, there is no connection between that State and the parties or the dispute.

Article 16 Limitation of recognition and enforcement

Upon ratification of this Convention, a State may declare that its courts may refuse to recognise or enforce, as the case may be, a judgment of a court in another Contracting State if all parties are habitually resident in the State addressed, and all other elements relevant to the dispute and the relationship of the parties, other than the choice of court agreement, are connected with the State addressed.

Article 17 Uniform interpretation

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

Article 18 Non-unified legal system

In relation to a State in which two or more systems of law with regard to any matter dealt with in this Convention apply in different territorial units, any reference to the law or procedure of a State shall be construed as referring to the law or procedure in force in the relevant territorial unit.

Article 19 Relationship with other international instruments

This matter has not yet been discussed.

CHAPTER V FINAL CLAUSES

Article 20 Signature, ratification, acceptance, approval or accession

Article 21 Non-unified legal system

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

Article 22 Regional Economic Integration Organisations

Article 23 Entry into force

Article 24 Reservations

Article 25 Declarations

Article 26 Denunciation

Article 27 Notifications by the Depositary

Annex to the Convention

FORM A
CONFIRMATION OF JUDGMENT

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

(THE COURT OF ORIGIN).....

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

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

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

_____ (PLAINTIFF)

Case / Docket Number:

v.

_____ (DEFENDANT)

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

1. This Court based its jurisdiction over the parties on their choice of court agreement found in or evidenced by the following documents or indicia of agreement:

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

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

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

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

6. This judgment was rendered by default:

YES _____ NO _____

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

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

YES _____ NO _____

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

YES _____ NO _____

List of documents:

Dated this _____ day of _____, 20__.

Signature and/or stamp by an officer of the Court