

juillet / July 1998

**RAPPORT DE SYNTHÈSE DES TRAVAUX DE LA COMMISSION SPÉCIALE DE MARS 1998  
SUR LA COMPÉTENCE JURIDICTIONNELLE INTERNATIONALE ET LES  
EFFETS DES JUGEMENTS ÉTRANGERS EN MATIÈRE CIVILE ET COMMERCIALE**

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**SYNTHESIS OF THE WORK OF THE SPECIAL COMMISSION OF MARCH 1998  
ON INTERNATIONAL JURISDICTION AND THE  
EFFECTS OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS**

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*Document préliminaire No 9 de juillet 1998 à l'intention de  
la Commission spéciale de novembre 1998 sur la question de la compétence, de la reconnaissance  
et de l'exécution des jugements étrangers en matière civile et commerciale*

*Preliminary Document No 9 of July 1998 for the attention of  
the Special Commission of November 1998 on the question of jurisdiction, recognition  
and enforcement of foreign judgments in civil and commercial matters*

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## INTRODUCTION

1 The Special Commission that met at The Hague from 3-13 March 1998 was the second<sup>1</sup> in a series of four mandated to draw up a preliminary draft Convention on international jurisdiction and the effects of foreign judgments in civil and commercial matters, to be submitted to the Nineteenth Diplomatic Session of the Conference in the year 2000. The March 1998 meeting opened with a brief welcoming address by Professor A.V.M. Struycken, President of the Netherlands Standing Government Committee for the Codification of Private International Law. The ensuing discussions were chaired by Mr T.B. Smith, QC, Expert of Canada.<sup>2</sup>

2 The experts decided to begin their discussions at the point where they had left off in June 1997, and thus to start with the regime applicable to the recognition and enforcement of foreign judgments. These issues took up the first three days of the deliberations. Afterwards, the substantive and geographic scope of the future Convention were studied. The experts then addressed matters relating to *lis pendens*, and again discussed, this time in more depth than in June 1997, a number of areas of direct jurisdiction (especially contract, tort, and forum of the branch office). The validity of choice of court clauses, a possible clause covering *forum non conveniens*, complex jurisdictions, and a possible clause permitting jurisdiction to be given to a forum of necessity, were also discussed. Each of these issues will be addressed successively in the explanations which follow. At the end of the Report, brief mention will be made of certain issues, examination of which was postponed, or which were discussed very briefly at the end of the meeting.

## SCOPE OF THE CONVENTION

3 The experts were called upon to discuss both the substantive scope of the future Convention and its geographic scope. Each of these issues will be addressed separately in this Report.

4 **Substantive scope** – Many agreed that the definition of civil and commercial matters does not correspond with the actual situation prevailing in the various legal systems to constitute a satisfactory definition of the scope of the Convention. A list of exclusions must, therefore, be inserted into the text. Several experts agreed to exclude the status and capacity of natural persons, marriage regimes, wills and successions, bankruptcies, and other similar procedures. A number of experts also confirmed a trend, which seemed to take shape in June 1997, which would exclude maintenance obligations.

5 As far as **arbitration** is concerned, while many experts noted that this particular dispute-settlement mechanism must be excluded at all costs, some nevertheless

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<sup>1</sup> The first took place at The Hague from 17-27 June 1997. Its discussions were synthesised in a document entitled: Synthesis of the work of the Special Commission of June 1997 on international jurisdiction and the effects of foreign judgments in civil and commercial matters, hereinafter cited as Prel. Doc. No 8.

<sup>2</sup> For the composition of the bureau of the Special Commission, the names of the Co-Reporters, the reader is referred to the list, supra, p. 9.

acknowledged that this exclusion must be more specific in its wording than that inserted in Article 1 of the Brussels and Lugano Conventions. It was therefore proposed that all procedures directly or indirectly involving the establishment of an arbitral tribunal or in some way related to an arbitral procedure be specifically excluded. Nevertheless, even with this clarification, some experts felt that the ambiguities could not be entirely removed. For this reason, it was proposed that a provision of the Convention be drafted specifying that the Convention does not derogate from the laws of the Contracting States with respect to arbitration. On the other hand, several examples of problems of overlap between the arbitration procedure and judicial decisions were given, showing how difficult it is to draw the dividing line between the two. This generated the question as to whether a judgment on the validity of an arbitration agreement could be recognised under the Convention. Several experts responded that such judgments were in all likelihood excluded from the scope of the Convention to the extent that they are not binding and enforceable judgments on the merits. As such they are not by nature judgments intended to be recognised or enforced under the Convention. It was also asked whether a judgment handed down by a court in defiance of an arbitration clause should or should not be enforced under the Convention. The answer to this question must probably be considered from the standpoint of the review of the jurisdiction of the court of origin. If the court addressed believes that the arbitration clause was valid, it will rule that the court of origin was not competent<sup>3</sup> and therefore refuse to recognise or to enforce the judgment rendered in defiance of this arbitration clause. If, however, the court addressed decides that the arbitration agreement was not valid, it will have to recognise or to enforce the decision handed down by the court of origin if the conditions laid down by the Convention have been met.<sup>4</sup> The question also arose as to whether the Convention should deal with cases when an arbitral award and a court judgment cannot be reconciled. It was proposed, among other solutions, that the court addressed be empowered not to recognise or enforce a judgment that would be irreconcilable with an arbitral award issued in its territory or handed down abroad but meeting the conditions for its recognition or enforcement in the State addressed. For the time being, the experts did not discuss in depth the advantages and disadvantages of such a provision. It may be noted here only that the merit of this proposal is that it poses a problem which, although not of frequent occurrence, is not a textbook case. There is, however, one difficulty associated with it that can be noted at this time: an arbitral award in most judicial systems is *res judicata*, rendered abroad. As far as its enforcement is concerned, however, it must usually be reviewed by means of an exequatur procedure or some other equivalent process, even if it was rendered in the same territory as the judge making the ruling. The question arises, then, whether it is wise to make provision for a different rule depending on the country in which the award was handed down.

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<sup>3</sup> This solution is not new. It was adopted in Article 12.3 of the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

<sup>4</sup> The difficulty here derives wholly from the law applicable to the validity of the arbitration agreement. Despite the widespread ratification of the New York Convention of 1958 by more than one hundred States, the validity of arbitration agreements is not looked at in a uniform way by these States, by reason of divergent interpretation of Article II and the existence of Article VII of the New York Convention which authorises Contracting States to apply rules which are more favourable to arbitration than those provided for by the Convention. If it is accepted that the State addressed has power to examine the validity of an arbitration agreement on which the court of origin has already come to a decision, it is necessary to say by what law it will proceed to this examination. If it is accepted that the court addressed applies the rules of the State of origin, one is then faced with the question of whether the judge addressed would be in a better position to apply these rules correctly. If, on the other hand, the State addressed applies its own rules, its own approach would take precedence over that of the State of origin without a justification for this solution being apparent. It is therefore fair to express doubt as to whether the future Convention would achieve anything useful by providing for a rule on this matter.

6 On the subject of *social security*, the experts did not consider themselves to be sufficiently well-informed with respect to concrete examples encountered in practice. A small, informal survey taken among interested parties revealed that the exclusion of social security without any specific explanation is ambiguous. Indeed, there are cases in which a social security organisation assumes the rights of an insured party and must collect moneys from third parties (companies, when accidents occur at work; tort feorsors or insurance companies, in particular).<sup>5</sup> This problem could be overcome in part if a clause were inserted in the Convention like the one proposed in the following paragraph.<sup>6</sup> One might also question whether one should exclude the actions taken by social security organisations to recover contributions owed them when, given the increase in expatriation, some of these moneys must be collected abroad. It should be noted, however, that there are bilateral agreements that would reduce the need to include this subject in the Convention.<sup>7</sup>

7 Furthermore, one delegation drew the attention of the Special Commission to the fact that procedures involving a government entity should not be excluded from the scope of the Convention. For this reason it was proposed that no action be excluded from the definition of civil and commercial matters merely because a government, a government agency, or a government instrumentality is a party to the suit; if private rights are transferred to a government, a government agency, or a government instrumentality (for example, when one such entity has become a judicial administrator, trustee, or guarantor); if the government acts as a commercial operator, that is it seeks to obtain relief for a contract, a tort, or a private right; or if the government acts as agent for a group of persons whose individual actions can be characterised as private rights (for example, cases involving the defrauding of consumer rights).<sup>8</sup> The list of entities referred to should most likely be enlarged to include private agencies with a public service mission.

8 Also proposed for exclusion from the scope of the Convention were actions relating to nuclear damage, as is the case in Article 1(7) of the Hague Convention of 1 February 1971. One delegation, however, preferred to limit this exclusion to cases covered by the Paris Convention of 29 July 1960 on Civil Liability Concerning Nuclear Energy and its Additional Protocols of 28 January 1964 and 16 November 1982, in addition to the Vienna Convention of 21 May 1963 on Civil Liability Concerning Nuclear Damage, or any amendment to these Conventions.

9 It was also explained, however, that it is no longer necessary under a double convention providing for direct jurisdiction to exclude actions involving the existence or establishment of legal persons or involving the powers of their organs, inasmuch as this

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<sup>5</sup> Besides, one may question if this situation relates to social security or falls outside its embrace. The Jénard Report (Explanatory Report on the Brussels Convention of 27 September 1968) explains that such actions come under non-Convention rules (OJEC C 59 of 5 March 1979 at p. 13).

<sup>6</sup> However, it should be noted that in some countries social security bodies are private bodies mandated to carry out a public service function.

<sup>7</sup> It is for this reason that this matter was excluded from the Hague Convention of 1 February 1971. See the Fragistas Report, Acts and Documents of the Extraordinary Session, Enforcement of judgments, p. 369. See also the Jénard Report, cited supra note 4, at p. 12.

<sup>8</sup> These examples do not constitute an exhaustive list and are provided here only by way of illustration.

exclusion, inserted in the Hague Convention of 1 February 1971 was justified only because that Convention is a single convention having no direct jurisdiction. At the time, the desire was to avoid having two contradictory decisions with regard to issues as important as the existence or establishment of legal persons. In the future Convention, this problem should be eliminated *ex ante* because the Convention will include a rule of direct jurisdiction in this regard.

**10** *Geographic scope* – Several different issues must be examined in this regard. They involve direct jurisdiction, including cases of exclusive jurisdiction and choice of court, as well as *lis pendens* and the recognition and enforcement of judgments.

**11** The least that can be said is that the proposal submitted under No 55 in Preliminary Document No 7 (including the footnote on page 73) caused such an outcry that the author of this Report hesitates to raise the issue again. It was explained particularly that the defendant is at the Convention's centre of gravity. Thus, for those experts who expressed themselves in favour of dual criteria of geographic application (*i.e.* the court seised **and** the defendant must be located in the territory of a Contracting State that might be different from one another), the consequence would be that a defendant located in the territory of a third State would not be "protected", because the court seised could continue to use its non-Convention rules against such defendant. This system could also encourage third States to ratify the Convention. Finally, this system would be the only one that could be harmonised with the system provided for in the Brussels and Lugano Conventions.

**12** As far as the rules of *direct jurisdiction* are concerned, there is no principle of public international law requiring States to limit the application of the Convention only to cases in which two conditions are met cumulatively: the court seised is located in the territory of a Contracting State **and** the defendant is located<sup>9</sup> in the territory of a Contracting State. Indeed, this second requirement, which is the basic principle on which the geographic scope of the Brussels and Lugano Conventions rests, except for exclusive grounds of jurisdiction and the choice of court, does not appear to correspond to any formal requirement attaching to the States Parties to the Convention.

Thus, there is no reason why a legislative policy cannot make the Convention applicable with respect to the rules of direct jurisdiction, only when the court seised is located in the territory of a Contracting State. If it is decided to follow this path, then the Convention should be supplemented by a provision to the effect that when the court seised has to declare itself lacking jurisdiction under the rules of the Convention, and the parties<sup>10</sup> cannot demonstrate that another court located in a Contracting State has jurisdiction under the Convention, the court seised may then declare that it has jurisdiction under the rules of jurisdiction contained in its domestic law, including the rules of exorbitant jurisdiction that would otherwise be excluded by the Convention. This second provision makes it possible to avoid the criticisms that were, for the most part, raised during the Special Commission meeting to the effect that there is no reason to deprive the court

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<sup>9</sup> A non-judicial expression is deliberately employed, allowing designation of domicile or habitual residence for physical persons, and other equivalent criteria for legal persons.

<sup>10</sup> No conclusion is reached here on the burden of proof as between the plaintiff and the defendant. However, one might perhaps consider whether, at the stage in proceedings at which the judge decides on jurisdiction, only the plaintiff would be before the court.

seised of its exorbitant jurisdiction if “the defendant is domiciled in a third State”. It is well-known that certain rules of jurisdiction will not be focused on the domicile or the habitual residence of the defendant. This is the case with regard to exclusive grounds of jurisdiction or jurisdiction based, for example, on an act or an activity.

Under the rule put forward above, application of the Convention is favoured, along with the retention of as many cases as possible in the territory of the Contracting States, since judgments rendered in this way will benefit from a less severe regime of recognition and enforcement by comparison with non-Convention rules. Also well-known are the problems posed nowadays by the so-called “reflex effect” of Article 16 of the Brussels and Lugano Conventions.<sup>11</sup> Care should be taken, then, not to reproduce this same problem in the Hague Convention.

Lastly, the scheme set out in paragraph 55 of Preliminary Document No 7 shows that the rule maintains the priority of the Brussels and Lugano Conventions or any other convention when the criteria set forth therein make them applicable. In any case, a final clause will probably reserve application of those conventions which will remain applicable despite the entry into force of the Hague Convention. This clause is traditional,<sup>12</sup> and will make it possible to preserve international harmony among conventions without being specific.

**13** On the subject of *lis pendens*, the experts were mostly in agreement that the rules of the Convention must be applied if the two courts before which a case is pending at the same time are located in the territory of two Contracting States. It may, however, be advantageous to add a rule to the Convention when the *lis pendens* occurs between the court of a Contracting State and the court of a non-Contracting State. This idea was not really discussed by the Special Commission and, for the time being, the rules of *lis*

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<sup>11</sup> The various grounds of jurisdiction under Article 16 of the Brussels and Lugano Conventions are not based on the domicile of the defendant but on different connecting criteria: the place where property is situated for proceedings in rem in respect of immovable property and tenancies in immovable property under certain conditions which differ from one Convention to the other (Article 16.1); the place where they have their seat for proceedings in relation to the validity of the constitution, the nullity or the dissolution of companies or legal persons or the decisions of their organs (Article 16.2); the place where public registers are kept in relation to the validity of entries in such registers (Article 16.3); the place in which deposit or registration has been applied for, has taken place or is deemed to have taken place, for proceedings in respect of the registration or validity of patents, trademarks, designs and other similar rights required to be deposited or registered (Article 16.4); the place of enforcement for proceedings concerning the enforcement of judgments (Article 16.5). When the connecting factor is not situated in a Contracting State, the exclusive nature of the jurisdiction conferred by this article prevents the use of Article 2 which could have been applied when the defendant is in effect domiciled in the territory of a Contracting State. This effect is said to be “reflex” to indicate that it concerns an indirect consequence of the exclusive nature of the jurisdictions provided for in the text, in that it operates to exclude the application of the Convention as a whole when the connecting factor provided for by one of the exclusive grounds of jurisdiction is not situated in the territory of a Contracting State. A concrete example will better illustrate the consequences: A French plaintiff, domiciled in France, wishes to bring an action in rem concerning immovable property situated in Morocco. The defendant is domiciled in Germany. The Brussels Convention cannot be applied because the immovable property is situated in Morocco. Controversy surrounds this reflex effect. A controversy exists on this so-called “reflex effect”. It has been brought to light by authors (essentially French, Georges Droz, Gothot and Holleaux and Gaudement-Tallon) whereas the Reporters of the San Sebastian and Lugano Conventions believe that this reflex effect does not operate and that, in the example that has been given, the Frenchman domiciled in France must then sue the defendant in Germany by virtue of Article 2 of the Convention. For our purposes, this solution seems to be the best. Nevertheless, in such a situation, the doctrine of forum non conveniens could be applied.

<sup>12</sup> The rule is traditional in the sense that it is standard to make provisions which allow conflicts between conventions to be avoided. On the other hand, its content will have to be adapted to the particular subject matter of the Convention.

*pendens* that were proposed on a preliminary basis<sup>13</sup> do not address this issue, which should be examined in detail during the November discussions.

14 Regarding the *choice of court*, the experts were divided basically into two groups. The first group maintains that the rules in the Convention governing the validity of the choice of court clause can only apply to choices of forum that designate a court<sup>14</sup> of a Contracting State. The second group of experts, however, argues that these rules of the Convention must apply even if the choice of court clause designates a court of a non-Contracting State. Being a matter of ensuring that the will of the parties is respected and simply verifying that the expression of such will is valid, it is not very clear why a distinction has to be made between the choice these parties have made, other than on the principle that the parties must be protected despite themselves. Furthermore, making a distinction according to which the clause grants jurisdiction either to a court of a Contracting State or to a court of a non-Contracting State complicates the application of the Convention. Indeed, considering the rules of temporal application and the fact that in an agreement that is contractual in nature, the date on which the choice of court clause was concluded will have to be used, there is a risk that application of the rules of the Convention regarding this issue could be postponed indefinitely. There is a real and immediate need for unification on this subject. Moreover, the Convention will include one or more rules limiting the material validity of the clauses when the Convention calls for exclusive or protective jurisdictions. On this matter, there is no clear reason not to apply the Convention if the parties have decided to choose a court located in a non-Contracting State.

15 With reference to the rules governing the applicability of those provisions of the Convention concerning the *recognition and enforcement of decisions*, the experts agreed that, as indicated in paragraph 58 of Preliminary Document No 7, two conditions must be met cumulatively: the court addressed must be located in the territory of a Contracting State, and the judgment must have been handed down by a court of a Contracting State.

#### ELEMENTS IN THE REVIEW OF A FOREIGN JUDGMENT BY THE COURT ADDRESSED

16 To facilitate the discussion, it was agreed that, initially, no distinction would be drawn between the recognition and the enforcement of the foreign judgment. As discussed later in this document,<sup>15</sup> however, when the legal regime of recognition, on the one hand, and enforcement, on the other, have been defined, it will be easier to decide which elements of review are needed for both, and which elements must be limited to enforcement of the foreign judgment alone.

17 It was also suggested that the regime applicable to the review of a foreign default judgment could be different from one designed to review a foreign judgment rendered in adversarial proceedings. The terminology that will ultimately be used in the future Convention has not yet been decided upon, inasmuch as many experts noted that the

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<sup>13</sup> Cf. *infra* Nos 96 et seq.

<sup>14</sup> The courts of a State in general could be designated rather than a specific court. But it is known that this system is more complicated to put into effect as is shown by Article 1, paragraph 1, of the Hague Convention of 25 November 1965 on the Choice of Court. On the general question of whether the jurisdictional rules of the Convention should be drafted in terms of general jurisdiction or special jurisdiction, cf. *infra* No 119 and Prel. Doc. No 8, Nos 6 et seq.

<sup>15</sup> Cf. *infra* Nos 53 et seq.



concepts of “default judgment” or “adversarial judgment” are defined very differently from one legal system to another, and the procedures in each country differ widely. The question may be more of determining whether the defendant in the proceeding of origin was actually afforded the opportunity to defend himself and to present his arguments, rather than what label to apply to the judgment itself.

18 Several experts also stressed the need to extend the review of the foreign judgment more broadly than can be done within a limited circle of States. It was, however, admitted that the longer the list of elements to be reviewed, the less the Convention would be of interest in terms of one of its objectives, *i.e.* much greater ease in circulating judgments within the States Party to the Convention. It was also noted that the task of creating the future convention must be based on a minimum of trust among the States. The balance between rigorous review of the foreign judgment and the wish to allow judgments to circulate will be difficult to find. In this regard, it should be pointed out that the elements of the review of the foreign judgment will be defined not in terms of whether it was “validly” rendered,<sup>16</sup> but in terms of any conditions or exceptions with respect to recognition or enforcement. Moreover, the possibility can be envisaged of inserting in the Convention a provision modeled on Article VII of the *New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards*, wherein the States are free to apply more liberal rules than those stipulated in the Convention.

19 It was also agreed that the discussion on review would initially be limited to judgments rendered in a Contracting State for recognition or enforcement in another Contracting State. Indeed, it would be better at first to avoid the inevitable complication that would have arisen had it been decided to discuss judgments from non-Contracting States.<sup>17</sup>

20 Finally, it was decided as a basic principle that review on the merits would be prohibited, acknowledging, however, that some elements of the review require the court addressed to examine the judgment rendered by the court of origin in some degree of detail.

21 ***Indirect jurisdiction*** – Indirect jurisdiction is taken to mean review of the jurisdiction of the court of origin by the court addressed. This is a universal condition in all legal systems, and is often the linchpin of the regime of recognition and enforcement of foreign judgments. It is based on the premise that the rules of jurisdiction used to review indirect jurisdiction are those defined by the first part of the Convention, *i.e.* the rules of direct jurisdiction. Regardless of the issue of the burden of proof, which relates to procedural issues examined later on in this report,<sup>18</sup> the experts were asked to express

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<sup>16</sup> Terminology here is very important. If the word “condition” is used it might be inferred that it is up to the applicant for recognition and enforcement to prove the existence of the factors relevant in the review. On the other hand, if one uses the term “exception”, the inference is that the burden of proof falls upon the defendant. This question of the division of the burden of proof will be addressed *infra* at No 60 and was briefly touched upon by Prel. Doc. No 4, p. 4. Moreover, the question was discussed of whether the list should be drafted using positive or negative language. No decision was taken on this issue.

<sup>17</sup> It may also be asked whether it is the function of the Convention to unify the law of the Contracting States as regards the effects of judgments from non-Contracting States.

<sup>18</sup> *Cf. infra* No 60.

their opinion on whether such review is justified under a double convention and whether the review can involve at the same time determination of fact and of law.

**22** Regarding the first question, many experts supported the idea that since the future Convention would have no uniform and mandatory system of interpretation, such as that provided for in the 1968 Brussels Convention,<sup>19</sup> the review of indirect jurisdiction is vital. Indeed, it was noted that responsibility for ensuring the proper application of the Convention cannot be left to the court of origin alone. Review of the jurisdiction of the court of origin would appear, then, to have been definitely decided upon.

**23** The exact extent of the review remains uncertain. Should it extend both to matters of fact and law? The experts were more divided on this aspect of the problem. First, it was noted that the distinction between determinations of fact and decisions of law is an extremely fine one. Some issues combine the two, both fact and law. To ensure that the system maintains a certain logic, such issues that combine the two aspects should also be reviewed by the judge addressed. It was also noted that many judgments do not include a description of the facts sufficient to allow review of the jurisdiction of the court of origin. One way to ensure this, of course, would be to require that the foreign judgment be accompanied by a document summarising the main facts established by the judge of origin. Although this idea was put forward at the start of the discussions and from time to time taken up again during them, at no time did the experts actually express their views on such a possibility. It is still too soon to say whether, as is sometimes the case with certain Hague Conventions, the future Convention now being negotiated would or would not include a form intended to facilitate the task of the court addressed. Drafting such a document could be the responsibility of either the judge of origin or, possibly, of a member of the Office of the Clerk of the court of origin, or yet again of one of the parties to the original proceeding.

**24** *Review of the law applied by the court of origin* – Very few legal systems have this review, which requires the court addressed to verify the law applied with respect to the merits by the court of origin. The court addressed conducts this review on the basis of its own rules of conflict. The review is anachronistic from both the theoretical and practical standpoints. In theory, it is odd to require (even if only implicitly) the court of origin to have applied a law designated by rules of conflict that it was unable to apply, inasmuch as each court is bound by its own system of private international law and can only apply its own rules of conflict. In practice, even when such review is required, a saving clause allows for the recognition or enforcement of the foreign judgment despite the fact that the court of origin has applied a law other than that designated by the rules of conflict of the court addressed, as long as the actual result reached by the court of origin is almost the same as the result it would have reached had it applied the law that the court addressed considered applicable. This element of review has disappeared from most modern bilateral conventions. Although it is still to be found in the Brussels and Lugano Conventions,<sup>20</sup> it is only on a residual basis, when the court of origin has had to rule on preliminary questions outside the substantive scope of those Conventions. Since most of the issues involved are “extrapatrimonial”, it was thought important to maintain the review of the law applied in order to avoid having to use the public policy exception in

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<sup>19</sup> Jurisdiction to interpret conferred on the Court of Justice of the European Communities by the annexed Protocol. Questions concerning the uniform interpretation of the future Hague Convention were briefly raised at the end of the Special Commission as described *infra* at No 118.

<sup>20</sup> See Article 27.4.

vain. It should, however, be noted that the text of the Brussels and Lugano Conventions includes the same saving clause as that referred to above.

**25** It should be pointed out that this element of review exists in the *Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*.<sup>21</sup> The text is, however, extremely limiting in that it prohibits the court addressed from objecting to the recognition or enforcement of a foreign judgment based only on the fact that the court of the State of origin applied a law other than that which would have been applied by the State addressed. Taking into account the presence of the first paragraph of this text, the second paragraph uses reverse language with regard to preliminary questions ruled on by the court of origin in matters excluded by the Convention. Indeed, recognition and enforcement can then be denied if the court of origin has arrived at a different result from that which would have been obtained if the rules of private international law of the State addressed had been applied to this matter.

**26** In light of the explanations presented during the discussion on the limited nature of the review and its rejection in recent bilateral conventions, a large number of experts stated their opposition to maintaining such review, except perhaps with respect to preliminary questions and on a residual basis.

**27** *Reasons for the foreign decision* – Not all legal systems are the same in terms of their requirements to present grounds. It should also be noted that even within the same legal system, the requirement is not always the same, depending on the type of judgment involved. For example, judgments “de référé”<sup>22</sup> usually offer very few grounds or else are not grounded at all. The following arguments are customarily used to justify the requirement to present grounds: (1) it makes it possible to ensure that the defendant’s rights have been properly respected; (2) it makes it possible to verify that the principle of adversarial proceedings has been implemented, and that all evidence and documents entered into the proceedings by one party have been brought to the attention of the other party; and (3) it makes it possible, finally, for the parties to the proceedings to understand the reasons why they may have lost the case and allows them to determine with a fair degree of certainty whether an appeal has any chance of succeeding. In this regard, stating the grounds also allows the higher courts to rule more effectively on the appeal against the decision.

**28** What is the possible usefulness of this type of review in the context of the recognition and enforcement of judgments? It is obvious that the argument based on appeal procedures has no bearing in the context of recognition and enforcement of a foreign judgment since the appeal procedures are available in the State of origin and not in the State addressed. Some experts, however, are in favour of review of the reasons because it can serve as a basis for refusing to recognise or enforce a judgment that may not have respected the rights of the defense or the principle of adversarial proceedings. If, indeed, it can be accepted that there is a direct link between the reasons given and verification that the principle of adversarial proceedings has been observed, then the interested party should be allowed to submit to the court addressed any additional document that would compensate for the absence of a statement of grounds, in order to convince the court addressed that the court of origin did indeed allow full arguments to be heard in the

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<sup>21</sup> Article 7.

<sup>22</sup> This expression, perhaps unique to the French system, describes speedy procedures giving rise to provisionally enforceable decisions, that is to say notwithstanding any appeal, either for reasons of urgency or because there is no serious dispute as to the rights of the parties to the proceedings. An equivalent might be the “summary judgments” in the common law systems.

original proceedings. It was, however, noted, particularly by practitioners who were participating in the meeting of the Special Commission as observers, that the *a priori* requirement for additional documents is too constricting, especially if all these documents must be translated into the language of the court addressed.

**29** Finally, the discussion shows that the experts agreed that no change should be introduced in the practice of the States by requiring decisions to be reasoned when this is not usually required by the State of origin. In addition, international private legal cases show the ever-increasing importance of expeditious proceedings. The requirement for decisions to be grounded may run counter to the need for speed. The explanation was, of course, offered that the more reasons given for the foreign judgment the easier the review by the court addressed. It does not, however, appear to be good legislative policy to authorise the court addressed to refuse recognition and enforcement solely on this basis. If the court addressed does not find, in the judgment, the necessary elements for conducting the review mandated by the Convention, it is authorised to request additional information from the party on whom the burden of proof rests.<sup>23</sup> It is doubtful, however, that the Convention needs to include such detailed provisions, especially inasmuch as the question has been raised as to whether the Convention should not exclude the possibility for the court addressed to refuse recognition and enforcement for lack of grounds.

**30** *Notification and procedural public policy* – Prior notification of the defendant in the original proceeding is essential for the protection of the defendant's rights. Subject to what is stated below regarding the burden of proof, it is clear from the discussions that review of prior notification of the defendant must make it possible to ensure that he had enough time to organise his defense. Some experts talked in terms of reasonable time limit. It was asked in relation to this whether it is sufficient to review only the period of notice or whether there should also be a requirement that notice be properly carried out in accordance with the conventions in force and in particular the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. Indeed, some experts suggested that if the defendant has appeared before the court of origin and was given sufficient time to organise his defense, it would not matter if he had not been properly notified. For other experts, reviewing the fact that proper notification occurred and that sufficient time was allowed for preparing a defense need only take place when the judgment of origin was delivered by default.

**31** With regard to *procedural public policy*, the importance of a didactic approach was noted. The experts did not discuss specific elements that might be included in a procedural public policy clause.<sup>24</sup> Some experts said that they hesitated to agree to a specific procedural public policy clause when they were not very sure of what would be appropriate to include in it. The advantage of such a clause would be that no separate provision would be required for establishing the impartiality of the court of origin, since this could be subsumed into a provision devoted to review of the basic guarantees of due process, or any other equivalent concept. It should be acknowledged, however, that a provision that is too vague would only lead to delays in the recognition or enforcement phase and might encourage abuses. Once again, a balance must be struck between the desire to facilitate the circulation of judgments and the need to stop those that were rendered under unacceptable conditions.<sup>25</sup>

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<sup>23</sup> On the question of the ex officio role of the judge and the division of the burden of proof, cf. infra Nos 59 and 60.

<sup>24</sup> The English text of Article 5 of the Hague Convention of 1 February 1971 may be noted here.

<sup>25</sup> The difficulties attached to procedural public policy might also give rise to a defensive reaction such as that envisaged by an accession system which is subject to acceptance as is set out infra at No 120.

**32** *Substantive public policy* – This provision is traditionally found in all national laws and in all the international conventions, whether bilateral or multilateral. This clause poses more of a drafting problem than a problem of principle. It was asked whether the new Convention should follow the tradition of the Hague Conventions and require that any violation of public policy be “manifest.” Most of the experts who expressed their views preferred to follow the tradition of the Hague Conference. Some, however, noted the ambiguity in the exact meaning of the adverb “manifestly”.<sup>26</sup> Care must be taken to maintain harmony and consistency between a public policy provision drafted restrictively and the different due process remedies recommended on various occasions during the discussions of other elements of review.<sup>27</sup>

**33** It is also customary, where the recognition and enforcement of judgments is concerned, to understand the infringement of the public policy of the State addressed in terms of the recognition and enforcement that is requested, rather than the foreign judgment itself. This distinction, apparently unknown in common law countries, is essential for countries following the Roman law tradition, and is referred to as the “attenuated effect” of public policy. The effect is referred to as “attenuated” because the link between the basic legal relationship and the court addressed is relatively weak. This relationship originated abroad, took material form there, and was adjudicated upon there, and it is only the final phase thereof, that of “recognition or enforcement”, that must be accommodated within the legal order of the State addressed. This should not cause too much trouble to the extent that the wording which could be adopted is that favoured by the beginning of Article 5.1 of the Hague Convention of 1 February 1971, the pertinent part of which provides that “~~recognition or enforcement of the decision~~<sup>28</sup> is manifestly incompatible with the public policy of the State addressed”.

**34** *Irreconcilable decisions*<sup>29</sup> – It is not easy to define the notion of “irreconcilable decisions”. The following definition could be used: two decisions are irreconcilable if they are contradictory, *i.e.* they require ~~the same person~~ to act in two opposing ways. An example will help explain this definition: one decision stipulates that the occupant of a building is its owner, while another says that the same person must pay rent to a third party. Initially, we must address only irreconcilable judgments issued by Contracting States.

**35** The first hypothesis is contradiction between a judgment from a Contracting State and a judgment rendered in the State addressed. The Special Commission experts were in disagreement over what rule to adopt in this case. Some preferred that the judicial system of the State addressed routinely prevail, regardless of the date on which each judgment was rendered. Other experts, however, preferred that the *prior tempore potior*

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<sup>26</sup> It is traditional to state that the requirement of a “manifest” violation allows the judge addressed to carry out a superficial examination of the decision because the violation must be obvious or clear. That is to say, a refusal to enforce for this reason will be relatively infrequent.

<sup>27</sup> Cf. in particular the discussion of excessive damages, the law applicable by the court of origin the reasons for decision, procedural public policy and fraud. Reference was also made to the situation in which a judgment is rendered in violation of the principles in the State addressed concerning State immunity. The substantive public policy exception should make it possible to avoid the enforcement of such a judgment in the requested State.

<sup>28</sup> Emphasis added.

<sup>29</sup> On this issue, and its connection with arbitration, see above No 5.

*jure* rule be adopted, and that the decision handed down first prevail even if this is a decision from another Contracting State.<sup>30</sup>

**36** In the second hypothesis, there are two judgments from two Contracting States, neither one from the State addressed. The majority of the experts preferred that the first judgment handed down should prevail. Some, however, envisaged a hypothetical case in which the second judgment delivered would be submitted first for recognition or enforcement in the State addressed.<sup>31</sup> In that case, and if the defendant has not taken the precaution of pointing out the existence of another judgment rendered previously in another Contracting State, the question arises as to whether the court in the State addressed must apply the *prior tempore* rule. Indeed, the court addressed will not necessarily be aware of the existence of the other judgment handed down in another Contracting State, but, even if it is, would it not be up to the defendant alone to claim *res judicata* and the possible irreconcilability of another judgment at the risk of losing his rights under that other judgment? In most legal systems, *res judicata* is not a public policy exception and it is the responsibility of the party seeking to avail of it to raise the issue.<sup>32</sup>

**37** It is not, however, sufficient to concern ourselves only with other Contracting States, as noted in the introduction to this chapter.<sup>33</sup> Indeed, it is inevitable that the court addressed will have to confront the irreconcilability of a judgment from a Contracting State and a judgment from a non-Contracting State. In such a case, there can be irreconcilability only if both judgments can, each in so far as it is concerned, be recognised and enforced under the rules that apply to it: rules derived from the new Hague Convention for the judgment from a Contracting State, and rules from either other international conventions applicable in the State addressed or from its non-Convention rules for the judgment from a non-Contracting State. If one of these two decisions fails the tests of recognition or enforcement, there is then no incompatibility, since, for the State addressed, the only decision that matters is the one that can be recognised or enforced. If, however, both decisions are capable of being recognised and enforced in the State addressed, then the same rule as that described above should be applied to address the irreconcilability of decisions from two different Contracting States.

**38** It was also asked whether the date on which a proceeding was initiated in the State of origin, in addition to the date of the decision handed down, might be pertinent with regard to this matter of the irreconcilability of decisions. Actually, this matter must be addressed in the *lis pendens* stage, and will thus be examined in the discussions devoted to that issue.<sup>34</sup>

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<sup>30</sup> The *prior tempore* rule may not be relevant in certain cases. Such is the case when one judgment imposes a guarantee while another annuls the debt guaranteed. There exists a natural hierarchy between these two decisions, which does not depend on the date on which they were respectively rendered. It would indeed be absurd to enforce a judgment against the guarantor when, the principle debt having been annulled, the guarantor is no longer liable.

<sup>31</sup> As regards recognition, this will depend on whether it is accorded by operation of law. On this question, cf. *infra* Nos 53 et seq.

<sup>32</sup> There exist nevertheless, some systems (for example, in Switzerland) in which, once made aware of the existence of a decision having the status of *res judicata*, the judge must automatically take account of it.

<sup>33</sup> Cf. *supra* No 19.

<sup>34</sup> Cf. *infra* Nos 96-100. It is assumed that the future Convention will contain a rule on *lis pendens*. If not, the provisions dealing with the irreconcilability of decisions will then have to take account of the date on which each procedure was commenced.

**39** It should, lastly, be determined under what conditions irreconcilable decisions must have been handed down. Article 5(3) of the Hague Convention of 1 February 1971, requires that irreconcilable decisions have been rendered in proceedings between the same parties, based on the same facts, and having the same purpose. Several experts expressed the view that this three-fold condition is too restrictive. Opinions were extremely divided, though, with some proposing the elimination of all preconditions and being satisfied with determination of the irreconcilability of decisions on a case by case basis as defined above;<sup>35</sup> others preferred to continue requiring that the proceedings giving rise to irreconcilable decisions have originated between the same parties, while others again preferred to maintain a substantive condition linking the two proceedings that produced the irreconcilable judgments (same purpose or same cause of action); there was a final category of experts who preferred, for the time being, to maintain the three conditions required under Article 5(3) of the 1971 Hague Convention.

**40** *Fraud* – At least four types of possible fraud can be differentiated: (1) fraud as to the jurisdiction of the court of origin; (2) fraud in relation to the applicable law; (3) fraud concerning prior notification of the defendant in the original proceeding; and (4) fraud committed in the submission of evidence to the court of origin (*e.g.*, counterfeit or falsified documents).

**41** Fraud as to jurisdiction consists of manipulating the connecting factor. This type of fraud is rare in the matters of concern to us. It can be detected by jurisdictional review, and it does not seem necessary to include review of jurisdiction-related fraud as a specific provision in the Convention.

**42** Fraud in relation to the applicable law involves a similar type of manipulation by which a law is declared applicable that is different from the one that should have been applied in the absence of manipulation of the connecting factor. If review of the law applied is kept expressly in the Convention, this will ensure review of fraud involving such law by review of the law applied. If, however, this review is eliminated,<sup>36</sup> it may not be genuinely useful to keep review of fraud as to the applicable law in the Convention. Indeed, eliminating any verification of the law applied reflects a desire not to reopen a debate on the merits. The defendant must have an opportunity to defend himself, but he must not be given a second chance to do so at the time the decision is recognised or enforced.

**43** Fraud concerning prior notification will be detected and sanctioned at the same time as the review of the notification discussed above.<sup>37</sup>

**44** The most serious, though not a very common, case occurs when there has been fraud in the production of evidence during the foreign proceeding. It might, for example, be possible to insert in the future Convention a text similar to that of Article 5, paragraph 2, of the Hague Convention of 1 February 1971, which provides that recognition or enforcement of the decision may be refused “if the decision was obtained by fraud in the

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<sup>35</sup> Cf. *supra* No 34.

<sup>36</sup> Cf. *supra* No 26.

<sup>37</sup> Cf. *supra* No 30.

procedural sense”. However, the experts were invited to discuss whether a provision such as this should be included and whether or not it should be supplemented by an additional condition whereby the party invoking the fraudulent situation should have been aware of it only after the original judgment has been rendered. Indeed, one might decide not to authorise the party invoking the fraudulent situation to raise this matter during the phase of recognition and enforcement of the judgment if he was aware of the fraud during the original proceeding and neglected to raise the problem with the judge of origin.

**45** The discussion demonstrated that several experts are opposed to having the future Convention weighed down by a specific provision relating to fraud. Other experts were extremely reserved and hesitant to accept such a provision. Still others, who might consider a provision such as that found in the 1971 Convention, specified that its effects should be limited to the case in which the party invoking the fraud became aware of it after the original judgment was handed down. This will obviously be the case when the judgment was delivered by default. It can also be envisioned, however, that even when the defendant participated in the proceeding of origin, the fraud might not have appeared during the proceedings. Besides, some experts emphasized that, in some cases, where the fraud has emerged during the course of the original proceedings the affected party may prefer not to raise the issue, because the procedural conditions in the court of origin do not guarantee that his request would be considered. This last hypothesis could be covered by procedural public policy or any functional equivalent that could be inserted in the future Convention.<sup>38</sup>

**46** *The concept of decision* – The Convention will have to define the type of decision that will be recognisable or enforceable under its provisions. Naturally, the decision will have to involve a subject not excluded from the substantive scope of the Convention. It must originate in a court or other authority<sup>39</sup> located in the territory of a Contracting State. The experts may wish to provide transitional provisions in this regard when the proceeding has been initiated in the State of origin under rules of jurisdiction other than those of the Convention, for the sole reason that the Convention was not in force in the State of origin at the time, but the judgment was delivered at a time when the Convention had entered into force in the State of origin and the State addressed. The experts also wondered whether the decision should be defined on the basis of the court or the authority that rendered it in the State of origin. Some decisions of a particular type, such as non-contentious decisions, decisions on evidence, or anti-suit injunctions, may or may not result in recognition or enforcement. Also discussed was the matter of authentic instruments and judicial settlements. Finally, must the decision be final and binding for it to be both recognised and enforced?

**47** Some of the experts agreed that the example of Article 2(1) of the Hague Convention of 1 February 1971 should be followed. That provision reads:

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<sup>38</sup> Cf. supra No 31.

<sup>39</sup> There was a fairly long discussion on the meaning of court, and on whether there is need for a very precise term in the Convention. Indeed, questions will arise in relation to the decisions of religious courts or authorities having a judicial function under the law of the State which established them. As regards religious courts, it may be thought that they will have little or no standing within the Convention, taking account of the matters excluded from its substantive scope of application. In any case, terminology should be found which allows all of these situations to be encompassed. The term “judicial authority” might be adequate. Discussion of this issue will be found in Prel. Doc. No 4, p. 11.



*“The Convention shall apply to all decisions given by the courts of a Contracting State, irrespective of the name given by that State to the proceedings which gave rise to the decision or of the name given to the decision itself such as judgment, order or writ of execution.”*

In other words, it matters little what authority or court rendered the decision if the decision is rendered in a matter covered by the Convention as in all likelihood will be stipulated in the first article of the future text. This could perhaps also apply to civil decisions rendered by criminal courts.<sup>40</sup> It was, however, pointed out that the concept of “writ of execution”, described in Article 2, paragraph 1, of the above-mentioned Hague Convention of 1 February 1971 is no longer appropriate, since this is an institution that has been removed from most national laws.<sup>41</sup> It was also specified that the Convention could include a specific provision to cover decisions involving the allocation of procedural costs. This is a relatively controversial aspect of the issue, however, and it is not certain that the experts will decide in the end to incorporate a specific provision on this subject. As for injunctions, they pose particular problems since they give rise to orders taken unilaterally, without the defendant being heard. These orders are enforceable by operation of law until the defendant raises objections, a form of redress which allows the procedure to resume an adversarial character.

**48** The experts agreed in general to exclude from the scope of the Convention any decisions on evidence, especially in order to avoid any risk of confusion with the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*.

**49** A separate case will probably have to be made for provisional and protective decisions. Indeed, the Special Commission meeting of March 1998 did not specifically discuss this issue, postponing such discussion until November 1998. It should, however, be asked whether, in addition to the provisions on direct jurisdiction that the future Convention could include on this subject, specific provisions on recognition and enforcement could also be included.<sup>42</sup> Pending a decision on this point, the experts preferred not to express themselves immediately on this aspect of the definition of the concept of decision.

**50** A long discussion was held on the concept of “final decision”. Article 4 of the Hague Convention of 1 February 1971, provides that:

*“A decision rendered in one of the Contracting States shall be entitled to recognition and enforcement in another Contracting State under the terms of this Convention ...*

*(2) if it is no longer subject to ordinary forms of review in the State of origin.”*

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<sup>40</sup> Specificities of criminal procedural rules in some countries, however, may be an obstacle to such a provision.

<sup>41</sup> Moreover, it should be noted that the expression in English “writ of execution” is not clear. It may simply be a problem of translation. But it may also be a problem arising from the absence of an analogous institution within the common law systems.

<sup>42</sup> It may be noted here that the Hague Convention of 1 February 1971 excludes provisional and protective measures (Article 2, paragraph 2).

The discussion revealed that agreement may be possible on such a definition of the notion of “final decision”. However, as far as the enforcement of a judgment of origin is concerned, if the judgment is declared to be enforceable in the country of origin but is still subject to ordinary forms of appeal, or if such appeal is still pending, the court addressed may still order enforcement provided the party benefiting from the enforcement guarantees that he will return the moneys awarded to him if the decision is set aside in the State of origin. As far as recognition is concerned, it should not be necessary for the decision to be binding in the State of origin. However, the experts did not express a very clear opinion on this point.

**51** A fairly lengthy discussion was held on the matter of authentic instruments. These are instruments that are drawn up by a public authority or, as in Scotland, entered into an official register. The instrument must be authentic in terms of not only its signature and form, but its content as well. The instrument must be enforceable by itself in the State in which it was created. In Scotland, for example, a certified extract from the register authorises execution of the instrument on the same basis as a judicial decision. To the extent that an authentic instrument is a functional equivalent of a judicial decision, it could, as such, be included in the scope of the Convention. The discussion did not lead to a decision on what the precise conditions would be for recognising and enforcing such authentic instruments, and whether such conditions would be the same as those required for judgments. This matter will be discussed at a later date.

**52** The subject of settlements was not really discussed. These are basically settlements concluded during a trial, before a court or an authority, and which are automatically enforceable under the law of the State of origin.<sup>43</sup> If the Convention were to authorise the enforcement of settlements, it should also state the specific conditions under which the settlement would be enforced in the State addressed.<sup>44</sup>

## PROCEDURAL ELEMENTS

**53** *Recognition by operation of law* – In the course of discussion, it was noted that recognition by operation of law is an ambiguous notion. Under the Hague Convention of 19 October 1996, this expression is used simply to refer to those situations in which no special procedure is required for the recognition of a foreign judgment. Nevertheless, the existence of certain conditions, which are precisely defined in the Convention, must be verified before recognition can be granted if there is any challenge thereto. In this sense, recognition by operation of law simply means that any court of the State addressed that is requested to declare a foreign judgment *res judicata* may, without any special procedure, verify the existence of the conditions for recognition of the decision invoked and recognise that decision if those conditions are met. It will also have to be decided whether review should possibly be made less stringent, apart from the requirement that the decision be executory in nature, which is not necessary for *res judicata*.

**54** *Type of procedure*<sup>45</sup> – Two positions emerged among the experts of the Special

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<sup>43</sup> It was also suggested that settlements arising from alternative methods of dispute resolutions such as mediation, should be covered by the provisions of the Convention. This suggestion was not discussed by the Special Commission.

<sup>44</sup> Cf. Article 19 of the Hague Convention of 1 February 1971.

<sup>45</sup> The following discussion deals exclusively with the situation in which there is a distinct procedure for the enforcement of the foreign judgment.

Commission. Experts in the first group suggest that the Convention should not contain any specific provision concerning procedure and simply refer matters of procedure to the law of the State addressed. Experts in the second group favour harmonising or even standardising a certain number of procedural elements essential for the proper functioning of the Convention and thus favour including some provisions on procedure in the new Convention. All, however, agree that the Convention should not be pointlessly burdened and that, if some provisions on procedure are to be included in the Convention, they should be limited to those strictly necessary.

**55** One of the matters discussed was the possibility of using a simplified procedure at first instance, one that might possibly be unilateral at first. Some experts, however, wondered about the feasibility of conducting a unilateral review in the absence of the defendant, when operating in the framework of an international convention with a relatively long list of elements for review. If this path is to be taken, the Convention would probably have to provide for a more limited list of elements for this first phase, and leave the rest of the elements to be verified at the appellate phase.

**56** With regard to the list of courts with jurisdiction to decide on the enforcement of a foreign judgment, it was acknowledged that, for practical reasons, this list cannot be included in the Convention. On the other hand, the idea that each State ratifying the Convention could, by means of a declaration, inform the depositary or the Permanent Bureau of the Conference of the list of courts with jurisdiction to hear an action for the enforcement of foreign judgments seems to have received some support. The depositary or the Permanent Bureau would be responsible for circulating this information to the Contracting States, as is currently done with regard to other Hague Conventions.<sup>46</sup>

**57** In 1996, it had been suggested that the Convention could provide for a time period within which the foreign judgment would have to be enforced. Indeed, it is often noted that procedures for recognition and enforcement are excessively lengthy and impede the free circulation of judgments. Nevertheless, one might wonder whether the burden imposed on Contracting States, were the Convention to provide for a maximum time limit, would not be counter-productive, preventing some States from ratifying the Convention out of the fear that they would be unable to observe this time limit. It is possible, however, to imagine several more flexible means of achieving a similar result. The preamble of the Convention could state that one of its objectives is to facilitate the recognition and enforcement of judgments within a short or reasonable time period. Furthermore, a sentence could be included in the part of the Convention that deals with procedural issues to the effect that the judge addressed has the obligation to rule as quickly as possible. Finally, the Explanatory Report could lay emphasis on this aspect of procedure in the State addressed. Of course, the different possibilities mentioned above should not necessarily be used cumulatively.

**58** With regard to actions for ineffectiveness, the general view was rather unfavourable towards the inclusion of such actions in the Convention. Most of the delegates expressing an opinion on this issue preferred the Convention to remain silent, though it was noted that Article 24 of the Hague Convention of 19 October 1996, indirectly provides for such a possibility.<sup>47</sup>

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<sup>46</sup> In relation to this, the Conference's website, which is in the course of completion, will constitute an indispensable tool in facilitating this circulation of information.

<sup>47</sup> Article 24 of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children provides: "without prejudice to Article 23, paragraph 1, any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in

**59 Ex Officio role of the court** – The issue debated by the experts is whether the court addressed must *sua sponte* review the decision to be recognised or enforced or, on the contrary, must limit itself to those elements challenged by the defendant who is contesting recognition or enforcement. Many of them wanted to rule out any *ex officio* role on the part of the court addressed, including the review of any violation of the public policy of the State addressed. These experts justified their position by emphasising that if the judge were permitted to examine these issues on his own initiative, major delays could result, while one of the goals of the Convention is to facilitate the recognition and enforcement of foreign judgments. Other experts, however, deemed that the review of a foreign judgment cannot be left in the hands of the defendant. Among these experts, some would agree to limit *ex officio* review by the court exclusively to issues of public policy and, possibly, verification that the defendant had prior notice in the original proceeding<sup>48</sup> and that the defendant's rights were respected.

**60 Burden of proof** – The general view of the Commission was that a party applying for recognition or enforcement should be required to transmit an authentic copy of the foreign judgment with a translation, if necessary, and a document proving that the decision is final and, for cases of enforcement, that it is enforceable in the State of origin. For default judgments, the plaintiff would also have to prove, in a manner that permitted the court addressed to check the conditions provided for in the Convention, that the defendant was actually notified. Other than these proofs required of the plaintiff,<sup>49</sup> the burden of proof should normally be on the defendant. These guidelines for the division of the burden of proof do not seem to have raised any particular difficulty in the course of discussion.

**61 Non-compensatory or excessive damages**<sup>50</sup> – The experts closely examined the issues relating to awards of damages of a non-compensatory nature and of a compensatory but excessive nature. This issue is a concern for all the delegations, just as it was a concern for the negotiators of the bilateral draft convention between the United States and the United Kingdom, Article 8(A) of which appears in Annex V of Preliminary Document No 7.

**62** One possible solution would be to revert to the public policy exception. Yet, several experts pointed out a possible contradiction between the extremely limited notion of public policy such as that which will be included in the future Convention, and the use of this same exception to deny enforcement of an award of non-compensatory or excessive damages. Furthermore, some experts also suggested that, even if the notion of public policy could possibly be broadened, such a provision would not be capable of dealing with

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another Contracting State. The procedure is governed by the law of the requested State.”

<sup>48</sup> Some would limit this *ex officio* review exclusively to default judgments.

<sup>49</sup> Consideration might be given to a list like that provided for by Article 13 of the Hague Convention of 1 February 1971.

<sup>50</sup> A thorough Consultation Paper was published by the Irish Law Reform Commission in April 1998 under the title: “Aggravated, Exemplary and Restitutionary Damages”. This Paper reached us too late to be used for this Report. When necessary, it will be referred to during the November 1998 Special Commission.

an award of excessive damages. That is why it was proposed that a specific provision be included in the future Convention. This provision could address awards of non-compensatory damages separately from those of excessive damages – though the discussion revealed that it would be difficult to divide them in that way. It is possible that in the end the problem will be covered by a single provision.

**63** With regard to *non-compensatory damages*, the future Convention could provide that the non-compensatory portion of the damage award would not be recognised if, and to the extent that, similar or comparable damages could not have been awarded in the State addressed. The question was discussed of whether sums awarded to cover legal costs are or are not compensatory in nature. What emerged from this discussion is that these sums are in effect compensatory in nature but that they are now always directly awarded as such. Thus in the United States legal costs are not awarded to the winning party, but punitive damages are, in part, granted for the purpose of covering legal costs. For this reason, it is wise to understand the term “comparable” as including every award of damages intended to fulfil the same function or objective in the State addressed as those awarded in the State of origin.

**64** With regard to *compensatory but excessive* damages, the discussion first addressed how “excessive damages” should be defined. The experts agreed that only obviously improper, or, as some experts termed them “exaggeratedly excessive,” damages would be covered by this provision. The discussion did not make clear exactly what was meant by that. Nevertheless, the standard of comparison is constituted by the damages which could have been awarded by the State addressed under similar circumstances. It might be considered – though this idea did not come up while the Special Commission was in session – that two of the circumstances to be taken into consideration would be the needs of the judgment creditor and the means of the judgment debtor. Thus, for example, in a case of bodily injury, one might imagine that a very large award of damages would not be reduced if the judgment debtor actually had the means to pay the amount, and the damages paid were going to provide the victim with a necessary means of survival in a situation where the country in which he resided did not necessarily have a system of public assistance that would come to his aid. Furthermore, many delegations remarked that any discussion before the court addressed concerning the amount of compensation to be paid should take place in the presence of both the debtor and the creditor of the foreign judgment, so that the decision of the court addressed would be rendered in adversarial proceedings. This requirement would argue for the institution of an adversarial proceeding starting from the very first phase of the recognition or enforcement action, unless a special case is made for judgments awarding excessive damages. Otherwise, that is, if the Convention provided for a unilateral first phase, the court addressed could not reduce the amount of damages during the first phase, that option being reserved for the appellate court. The advantages and disadvantages of each of these two alternatives were not discussed.

#### PROHIBITED GROUNDS OF JURISDICTION

**65** The starting point for the discussion was the list proposed by the co-rapporteurs which appears in Annex VI of Preliminary Document No 8. The discussion first addressed the idea of barring jurisdiction based on “the carrying on of commercial or other activities

by the defendant within the territory of the State”.<sup>51</sup> The discussion was greatly facilitated by a very informative document submitted by the United States delegation concerning the difference between “doing business” jurisdiction and “transacting business” jurisdiction.<sup>52</sup> The essential difference relates to the fact that “doing business” is general jurisdiction, whereas “transacting business” is specific jurisdiction. The former is reserved for defendants who engage in regular, extensive, and frequent activity in the State in question, regardless of what form of organisation they have, whether or not they own property there or have a place of business, and regardless of whether or not their principal place of business or place of incorporation is situated abroad. For “transacting business,” on the other hand, jurisdiction may be based on a single contact with the State in question, provided that such contact was directed toward that State or toward a consumer or supplier situated in that State. To invoke “transacting business” jurisdiction, the plaintiff need not show as high a level of activity as that required for “doing business” jurisdiction. Furthermore, this jurisdiction is specific, in that the action instituted against the defendant must result directly from the activity in question in the State concerned.

**66** The Special Commission discussion resulted in a finding that only general, “doing business” jurisdiction could be excluded by the provisions of the Convention as part of the list of prohibited grounds for jurisdiction. In other words, what is referred to in letter (d) of the first paragraph of the co-rapporteurs’ proposal is actually “doing business” jurisdiction and not “transacting business” jurisdiction. The same goes for all the other grounds for jurisdiction mentioned in the first paragraph of the co-rapporteurs’ proposal. All of these grounds for jurisdiction would be prohibited to the extent that they are grounds for general jurisdiction. On the other hand, some of them could be authorised if they constitute only specific jurisdictions. In this regard, it was explained that in the United States, the very great majority of decisions are based on “transacting business” jurisdiction and not “doing business” jurisdiction. In other words, one outcome of the discussion seems to be that if the “doing business” ground for jurisdiction has to be prohibited under the Convention, this might not constitute an obstacle to the implementation of this Convention in the United States or in other countries that have Constitutional restrictions like those of the United States. Of course, no position has yet been decided upon by any delegation, and it would be premature to say whether this ground for jurisdiction will or will not be prohibited under the Convention. This would be all the more relevant if the Convention includes one head of jurisdiction in matters relating to contract, another for matters relating to tort, and a third for activity conducted by a branch or establishment. These three heads of jurisdiction might well replace a general head of jurisdiction based on “doing business”.

**67** With regard to the other elements on the list, the discussion revealed that thinking has not really progressed since June 1997.<sup>53</sup> If such list is included in the Convention, it

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<sup>51</sup> Proposal of the Co-Reporters, paragraph 1, d.

<sup>52</sup> Study by Professor Paul R. Dubinsky, New York Law School, entitled “The reach of doing business jurisdiction and transacting business jurisdiction over non-U.S. individuals and entities”.

<sup>53</sup> One aspect was, however, discussed more than the others: jurisdiction founded on notice given to the defendant during his or her temporary presence in the territory of the court of origin (tag jurisdiction). This jurisdiction is indeed used in certain countries to prosecute a defendant, accused of a violation of human rights committed abroad, where the jurisdiction is based on the theory of “universal jurisdiction”. This theory has its origins in public international law. It allows for certain crimes (for example, genocide, crimes against humanity, war crimes) to be dealt with by the courts of any State willing to arrange such proceedings, being based on the idea that these crimes should not remain unpunished, while the country in which they were committed does not prosecute the perpetrators and no international tribunal can become involved. Cf. on this question: ILA, Taipei Conference (1998) Committee on Human Rights Law and Practice, “The Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences”, (first Report by Menno T. Kamminga). Nowadays, this jurisdiction seems to be used to attempt to obtain civil damages even where the victim does not reside in the country in which the court exercises jurisdiction. It is not clear that such actions are covered by the Convention. If they

should be specified whether it is exhaustive or merely illustrative. There was no progress in the discussion of this aspect of the problem. Furthermore, in accordance with the geographical scope of the Convention, some experts confirmed the idea, stated earlier,<sup>54</sup> that if the Convention applies as long as the court seised is situated in the territory of a Contracting State, and if that court lacks jurisdiction under the terms of the Convention and no other court in a Contracting State has jurisdiction under the terms of the Convention, the court seised will still be able to invoke its domestic law, including the grounds for jurisdiction that would have been barred by the Convention.

#### MANDATORY GROUNDS OF JURISDICTION

**68** The discussions held when the Special Commission met in March 1998, were truly novel in that they sought to transcend the customary dichotomy between actions in matters relating to a contract and actions in matters relating to tort and to propose a ground of jurisdiction based on “activities”. The sponsors of this proposal thus sought to avoid the difficult questions of classification generated by the distinction between contracts and torts. That is why, in the following discussions, jurisdiction based on activities will be addressed first, followed in a residual way by jurisdiction in matters relating to contract and jurisdiction in matters relating to tort. The following discussions will also examine choice of court; forum of necessity (denial of justice); jurisdiction over corporations, with its special issue of the lifting of the corporate veil; complex litigation (plurality of defendants, action on a warranty or guarantee or in any other third party proceedings, counter-claims) and related actions.

**69** *Jurisdiction based on activities* – The basic idea is that when a person or entity has engaged in activities in a given territory and this activity has given rise to litigation, the person or entity may be brought before courts in that territory with jurisdiction to decide the dispute. Thus summarised, the concept is relatively easy to understand. It is one of specific jurisdiction, since it is limited to actions directly resulting from the activity in question. But, whereas the concept is relatively easy to understand, the drafting of a provision in the Convention to reflect it exactly is more difficult. The first question to be asked is whether the defendant has to have acted directly or whether he can be made subject to the jurisdiction if he acted through a third party. In such event, must the third party be a member of the same group (parent company, subsidiary, or sub-subsidiary), or can the third party be completely independent of the defendant (independent business agent, distributor, etc.)? To avoid making this ground of jurisdiction too complex, it might be preferable to limit its application to cases in which the defendant acted directly or through an entity that is not a separate legal entity, such as a branch, establishment, liaison office, or site of business activity that includes human resources and goods or services. If, on the other hand, the defendant can be brought into the forum State even if he acted indirectly or through a third party, one might wonder if this ground of juris-

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are, it will be necessary to examine carefully the conditions necessary for the exercise of such a jurisdiction.

<sup>54</sup> Cf. supra No 12.

diction should not be considered only for a tort action (direct action against a producer for a product liability action owing to a hidden defect, for example). If the third party is a member of the same business group as the defendant, doctrines such as the lifting of the corporate veil or the company group doctrine could be invoked.<sup>55</sup>

**70** Another question to be asked is: “What is the nature, frequency or magnitude of the activity that will allow a defendant to be brought into the territory of the forum?”<sup>56</sup> In matters relating to tort, it is quite easy to see that the presence of a product that caused harm to a person domiciled in the territory of the forum could alone be sufficient if the defendant actually sold the product in question directly or through an intermediary in the territory of the forum. On the other hand, in matters relating to contract, it is harder to see what the defendant’s activity may consist of, other than specific acts of performance required by the contract. Indeed, it does not seem reasonable that one should be able to bring in a defendant by virtue of a contract if the only activity carried out in the territory of the forum was negotiating the contract or even perhaps signing it, while all the specific acts of contract performance took place abroad. The question of the weight to be attached to the soliciting of clients or analysis of the market remains open.<sup>57</sup>

**71** Jurisdiction based on activities, like any provision based essentially on factual notions as opposed to legal notions, is a bit more difficult to draft, because it is vaguer, giving the court that has to apply it more room for interpretation and thus, offering the litigants less foreseeability as to what court will have jurisdiction. That does not mean – far from it – that such a provision should not be carefully studied and refined, quite the contrary. Moreover, it should be pointed out that there is a possible analogy here with the notion of “habitual residence.” When this purely factual notion began to replace the former notion of “domicile,” the same concerns were expressed. Today, a similar adjustment is required of us for jurisdiction based on activities. We can expect that some courts might encounter certain difficulties in implementing this ground of jurisdiction. But the stakes are significant, and they need to be carefully considered. In this regard, it should be specified whether such jurisdiction should continue to allow for choice of court clauses and, possibly, for cases involving personal appearance by the defendant who does not raise the issue of the jurisdiction of the court seised. Such jurisdiction should also possibly continue to allow for protective jurisdiction (at least for consumers and workers).<sup>58</sup> Finally, such jurisdiction would have to be implemented in addition to complex jurisdictions if the Convention is actually to cover such grounds of jurisdiction.

**72** *Jurisdiction in matters relating to contract* – In the event that no agreement can be reached regarding jurisdiction based on activities or if this ground of jurisdiction was accepted but was not sufficient, then reference must be made to another ground of

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<sup>55</sup> On the question of lifting the corporate veil and of the jurisdiction in relation to companies, cf. *infra* Nos 85-87.

<sup>56</sup> One might also formulate the question by beginning with the forum of the plaintiff and asking what are the supplementary factors necessary for this forum to be acceptable.

<sup>57</sup> This is particularly important nowadays with the tremendous increase in electronic commerce and the growing interactivity of web sites.

<sup>58</sup> For consumer contracts, a more favourable rule was proposed which would allow the consumer to proceed in the place of his or her habitual residence if the contract in question was concluded in that State. This head of jurisdiction was not specifically discussed.



specific jurisdiction in matters relating to contract.<sup>59</sup> The discussions reveal that we should look for a characteristic link or the closest link between the contract, the contractual relationship between the parties, and the court on which jurisdiction will be conferred. This search leads to a focusing of jurisdiction in the place where the activities essential to performance of the contract take place. Thus, the place of payment would not be chosen when payment is made merely in exchange for goods or services. On the other hand, the place of payment could be important when payment is made in the framework of a contract the subject of which is a loan or financial benefit. Aside from the above, several options remain open. First, it should be determined whether, when a choice is made by parties to a contract to designate a place of performance specifically by means of a contractual clause, that is sufficient to confer jurisdiction on the court of that place. In this regard, we know that the Court of Justice of the European Communities, in the context of the Brussels Convention, decided that such a clause could not confer jurisdiction unless it fulfilled the requirements of a choice of court clause.<sup>60</sup> Moreover, it needs to be decided whether to favour a single forum for contract performance by looking only at the actual performance of the elements essential to the performance of the contract, or to allow for a potential outbreak of lawsuits by accepting a different place of performance depending on the obligation in dispute. Finally, for services, it is possible that the only relevant place of performance would be the place of habitual residence or domicile of the party from whom the service is due.

**73** The experts did not have time to examine in detail the specific issues raised by contracts concluded via the exchange of computer data. A few examples will make it possible to test whether contract jurisdiction, as initially contemplated, can meet the needs of electronic commerce. When a sale of goods, including payment therefor, is effected electronically, the only physical element existing will be the place where the merchandise sold is going to be situated once the contract is performed. If the subject-matter of the legal action is non-conformity of the product, hidden defect, insufficient quantity, inadequate packing, or any other reason for dissatisfaction with the product on the part of the purchaser, it would seem that the most appropriate jurisdiction would be that of the court of the place where the goods sold are physically situated. This ground of jurisdiction is difficult to invoke if the subject of the lawsuit relates to transportation (late delivery, interrupted transport, or storage in a place other than the place of final delivery). When the subject of the contract is the delivery of a service rendered entirely on-line and payment is also made electronically (electronic wallet, for example), there is not really a specific place of performance for the service, other than to consider that it was effected at the habitual residence or location of the party from whom delivery of the service is due. Clearly, this place is extremely difficult to determine, however, in view of the total freedom of movement of virtual sites, the domain names of which do not necessarily include the designation of a country. As a result, the domicile of the defendant may be an unrealistic ground of jurisdiction which could never be invoked, or only with great difficulty. In such a case, would it not then be necessary to choose jurisdiction based on the domicile of the plaintiff?

**74** *Jurisdiction in matters relating to tort* – There seems to be no doubt that jurisdiction lies with the court of the place where the act or omission on which the complaint is based was committed where this is also the place where the harm was

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<sup>59</sup> This should be clearly understood as meaning all contracts except consumer contracts and those made with workers. Moreover, this jurisdiction is residual in relation to choice of court clauses. It involves a forum that is supplementary to that of the defendant.

<sup>60</sup> *Mainschiffahrts-Genossenschaft Eg (MSG) v. Les Gravières Rhénanes SARL, aff. No C106/95, decision of 20 February 1997, Recueil I, p. 911.*

suffered. All the experts who offered an opinion seemed to be in agreement on this point. On the other hand, there is a great deal more doubt in cases where the act or omission was committed in the territory of one State, while the harm was suffered in the territory of another. Several proposals would allow a victim to take action before the court of the place where he suffered the harm, provided that he is a direct victim of the harm, that it is the original harm, and that the defendant could foresee that the act he committed could have had consequences in a State other than that in which it was committed. Obviously, each of the additional elements necessary to define jurisdiction adds to the inquiries the court must make in order to determine whether it has jurisdiction or not. Nevertheless, these additional conditions seem to be necessary to the extent that it has been indicated that, if jurisdiction is conferred on the court of the forum where the harm occurred but that has no other link with the defendant, this could be deemed an unconstitutional forum in a number of States.

**75** Thanks to a working document submitted by the U.S. delegation and prepared by Professor Ronald A. Brand, it was possible for the Special Commission to engage in a very thorough discussion of due process requirements in the United States.<sup>61</sup> Sometime during the discussion attempt was made to contrast the position of the United States Supreme Court on due process with the case law of the Court of Justice of the European Communities under the terms of Article 5.3 of the 1968 Brussels Convention and, in particular, the Court's decision in the case *Bier v. Mines de Potasse d'Alsace*.<sup>62</sup> Nevertheless, it should be recalled that for ten years now, every time the Court of Justice of the European Communities has interpreted the special grounds for jurisdiction provided for in the Brussels Convention, it has been careful to repeat again and again that these grounds for jurisdiction must be narrowly interpreted as they constitute exceptions to the principal basis for jurisdiction, that of the domicile of the defendant. The link between the court and the defendant is thus also considered very important by the Court of Justice of the European Communities, even if it does not express itself in the same way as the U.S. Supreme Court.

**76** A number of the experts agreed that any rule of specific jurisdiction giving the plaintiff the option of suing the defendant in a forum other than that of general jurisdiction should be narrowly defined in order to maintain a fair balance between the two parties to the proceeding. From this standpoint, the possibility of establishing in the Convention several jurisdictional rules for specific torts, such as defamation and product liability, was discussed. It was also noted, however, that there may be danger in such an approach which, by allowing for multiple characterisations from the start, increases the potential for litigation merely for the sake of establishing the jurisdiction of the court. For that reason, it was proposed that an effort be made to establish a general rule for all torts. This rule could take as its starting point the place where the harm was suffered and require one additional link. This link might be the place (in the same territory) where the act or omission that caused the harm occurred. This link could also be the fact that the tortfeasor directed his act toward this territory. This last alternative would help to satisfy the requirement of foreseeability for the defendant, but the evidence is more factual and objective than subjective and is therefore easier to adduce. Moreover, the criterion of foreseeability does not seem to be entirely satisfactory in relation to the objective weight of the connecting factor. The discussion then addressed the burden of

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<sup>61</sup> This document is entitled: "Due process as a limitation on Jurisdiction in U.S. Courts and a limitation on the United States at The Hague Conference on Private International Law", put forward by Professor Ronald A. Brand, University of Pittsburgh School of Law.

<sup>62</sup> Affair No 21/76, decision of 30 November 1976, Recueil 1976, p. 1735.

proof: should it rest with the plaintiff or the defendant? No precise position emerged regarding this question.

**77** *Choice of court* – As stated above,<sup>63</sup> the experts were divided on the issue of whether the rules of the Convention should be applied only if the choice of court clause designates a court of a Contracting State or if they can be applied even in cases in which the parties have decided to submit their disputes to a court of a non-Contracting State. In terms of respecting the will of the parties and in the framework of allowing the parties autonomy in expressing their intent, it would seem preferable to decide that the rules of the Convention will apply to all choice of court clauses even if they designate a court of a non-Contracting State. That having been said, the Convention could provide that such a choice of court will not be valid if its purpose is to evade an exclusive jurisdiction provided for in the Convention. Thus, this provision would limit the parties' autonomy only to those jurisdictional rules of the Convention that can be ignored by the parties.<sup>64</sup> As in the case of exclusive jurisdiction, the Convention could also provide for a rule restricting the validity of choice of court clauses in a certain number of legal relationships, such as contracts concluded with consumers or with workers. Aside from these situations, there seems to be no reason to accord parties who have included a choice of court clause more protection than they have decided to accord themselves. If they have chosen a court situated in the territory of a non-Contracting State, they have taken the risk of operating outside the scope of the Convention and obtaining a judgment that will not be benefit from the Convention's rules on recognition and enforcement.

**78** The issue of the exclusive nature of the choice made by the parties was also discussed. This issue brings up at least two distinct questions: (1) Did the parties intend to confer exclusive jurisdiction on the designated court to the exclusion of all others? (2) Did the parties intend to submit all disputes that may occur between them regardless of the specific situation that actually arises and even if the dispute between them occurs in the course of a proceeding instituted by a third party (*e.g.*, action on a warranty or guarantee)?

With regard to the first question, the experts were divided between two alternatives: either the parties are required to state specifically in the clause that their choice is exclusive; or exclusivity is presumed, the parties having then to express their will to the contrary in the clause. In the second alternative, if the clause is silent regarding exclusivity, that would automatically confer exclusive jurisdiction on the court chosen.

The second question also gives rise to two alternatives similar to those set forth above. The first alternative is that the choice of court clause is presumed to cover ~~all disputes~~ that may arise between the parties, either directly or indirectly (that is, when the proceeding is instituted by a third party and one of the parties to the choice of court clause is brought into this proceeding by the other party to the contract). In that case, in order for the clause not to be automatically applied to all disputes, including indirect disputes, the parties should express their will to the contrary in the clause. The second alternative would be to say that a choice of court clause covers only direct disputes. If the parties want their agreement on a forum to apply to indirect disputes, then they must expressly state their wish to that effect in the clause. It would be advisable for the Convention to take a position on this issue, in view of its importance from a practical standpoint. It is a situation that actually arises extremely frequently, especially in the field of product liability, where a distributor sued by a dissatisfied consumer wants to be able to bring the

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<sup>63</sup> Cf. *supra* No 14.

<sup>64</sup> Cf. Article 6 (2) of the Hague Convention of 25 November 1965 on the Choice of Court.

producer into the proceeding instituted by that consumer. The contract between the distributor and the producer will often contain a choice of court clause. The provision of the Convention on this matter could be placed either in the part of the text concerning the validity of choice of court clauses or in the part of the text concerning the various grounds for complex jurisdiction.<sup>65</sup>

**79** It should also be decided whether or not to include provisional or protective measures in the disputes covered by the choice of court clause. Here, too, the provision of the Convention on this matter could be placed either in the part of the text concerning choice of court or in the specific part of the text to be drafted on provisional and protective measures. In the interests of practice, it would be preferable to exclude provisional or protective measures from the scope of the choice of court clause.<sup>66</sup> Indeed, limiting the opportunity to request such measures to the one court chosen by the parties may considerably lessen the impact and attraction of provisional and protective measures.

**80** The question of the formal validity of the choice of court clause was also discussed. Compared with the discussions of June 1997, it would seem that the experts are more willing to accept a wider range of forms as valid, particularly with regard to the new means of communications. Thus, the existence of such a clause could be proven by any means preserving a complete record of the text and allowing for the authentication of its source by generally accepted methods or by a procedure agreed upon by the parties.<sup>67</sup> Here the clarifications given in the UNCITRAL model law on electronic commerce and its guidelines for incorporation in Article 6(1), 7 and 8, should also be taken into account as necessary.<sup>68</sup>

**81** With regard to employment and consumer contracts,<sup>69</sup> several experts proposed that rather than prohibiting any forum selection clause agreed upon before the dispute arose, choice of court clauses should be accepted as valid *ex ante*, provided that they make possible one optional ground of jurisdiction for consumers and workers, in addition to the grounds provided for in the Convention.

**82** The issue of whether the Convention should contain a provision invalidating a choice of court clause if it was obtained through coercion, undue influence, or other improper action was also discussed.<sup>70</sup> Some experts were very wary about including such a provision, which would inevitably lead to a relatively complex debate at the preliminary jurisdictional phase, which is one of the obstacles the Convention seeks to overcome.

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<sup>65</sup> Cf. *infra* Nos 88 et seq.

<sup>66</sup> Cf. Article 6 (4) of the Hague Convention of 25 November 1965 on the Choice of Court.

<sup>67</sup> This formulation is adapted from Article 7.2 of the UNCITRAL Convention on independent guarantees, which reads as follows: "An undertaking may be issued in any form which preserves a complete record of the text of the undertaking and provides authentication of its source by generally accepted means or by a procedure agreed upon by the guarantor/issuer and the beneficiary."

<sup>68</sup> See these texts at No 15, p. 23 and 25 of Prel. Doc. No 8.

<sup>69</sup> It is recalled that, according to the meaning which seems to take shape from discussion in the Special Commission, a consumer contract may be defined as a contract which also encompasses the provision of banking and insurance services, provided that the party contracting with the bank or insurance company has dealt in relation to personal or family needs, or apart from professional requirements.

<sup>70</sup> Cf. Article 4, third paragraph of the Hague Convention of 25 November 1965 on the Choice of Court.

Nevertheless, some experts said that they might agree to such a provision. A few, on the other hand, expressed the view that it would be useful to include such a provision in the future Convention.

**83** *Denial of justice* – The question of denial of justice, which was addressed in Preliminary Document No 7,<sup>71</sup> has not elicited much enthusiasm from the experts. Only six responses have been received, all from European States with Roman law traditions, including one Eastern European State. The following conclusions may be drawn from these responses: (1) very few legal systems have the forum of necessity based on a desire to avoid denial of justice; (2) States that have the forum of necessity have applied it infrequently; (3) States that apply it require that there be a connection between the matter under litigation and the forum of necessity. This is spelled out explicitly under Article 3 of the Swiss Federal Law on Private International Law, which provides that “When this Act does not provide for jurisdiction in Switzerland and proceedings in a foreign country are impossible, or cannot reasonably be required, the Swiss judicial or administrative authorities at the place with which the case has a sufficient connection have jurisdiction.” Explanations provided during the session by experts who had not responded in writing to the questionnaire confirmed this trend.

**84** The discussion revealed that the experts generally favour not including such a provision in the future Convention, although no one actually proposed that it be expressly omitted. On this latter point, it is clear that the solution finally adopted will depend on the nature of the Convention that will be decided upon. If it is a strict double convention, and it is silent on this issue, the forum of necessity may not be used within the framework of the Convention. One might wonder, in that case, whether it should not be included in the Convention as a mandatory forum. If, on the other hand, the Convention finally adopted is a mixed convention, denial of justice could be included among the authorised grounds of jurisdiction.

**85** *Forum of the branch and lifting the corporate veil* – These issues have already been addressed at some length in previous reports.<sup>72</sup> The questionnaire, inappropriately entitled “Fictitious Company,” should have been entitled “Lifting the Corporate Veil.” Here again, as for “Denial of Justice,” very few responses were received. The ones we did receive indicate that there are very few cases in which courts agree to disregard the legal personality of a company. Such a situation might be possible if a creditor has been defrauded of his rights, or if the assets or identity of two companies are confused, or if one company (often a subsidiary) is completely controlled by another (often the parent company). Cases in which the corporate veil is lifted because there is confusion between a parent company and a subsidiary are an application of the “*théorie de l'apparence*” (a theory according to which reliance may be placed on an apparent power to act in the person or entity sought to be held liable). A third party requesting that the corporate veil be lifted must demonstrate that, whereas his contract was with the subsidiary, he had grounds to believe that the parent company was making the commitment (or vice versa).

**86** The discussion revealed that in some countries, in any event, the problem encompasses more than just the relationship between a parent company and a subsidiary. In fact, some judicial systems allow a foreign company to be brought before the courts of the forum even though the foreign company concerned has done business using an independent company as an intermediary.<sup>73</sup>

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<sup>71</sup> No 68 with a questionnaire reproduced at Annex III.

<sup>72</sup> Prel. Doc. No 7, Nos 87 and 88, 123 and Annex IV; Prel. Doc. No 8, Nos 10-12 and 28-34.

<sup>73</sup> The example given relates to product liability. A foreign company, having manufactured products which

87 Independently of product liability cases, for which the solutions found under the various legal systems are similar, although expressed differently, one might question whether there is room in the future Convention for a rule that would make it possible to disregard the legal personality of one company to reach another company. Naturally this question must be differentiated from the rule making it possible to sue in the forum of the branch, the establishment, or any other centre of activity which does not enjoy a separate legal personality.<sup>74</sup>

88 **Complex grounds of jurisdiction** – There are three basic instances of complex jurisdiction: plurality of defendants, counter-claims, and guarantee/warranty or other third-party proceedings. For each of these complex jurisdictions, fraud or abuse is possible and will have to be discussed separately. Furthermore, as mentioned during the discussion of the choice of court,<sup>75</sup> the impact of a choice of court clause on these complex jurisdictions should be considered.

89 With regard to the question of **plurality of defendants**, the traditional and most commonly accepted rule in Europe consists of limiting the possibility of bringing more than one defendant before the same court by setting the condition that it must be the court of the domicile or habitual residence of one of the defendants, *i.e.* a court already possessing general jurisdiction. There is, however, at least one provision that allows more than one defendant to be brought before a court possessing specific jurisdiction. This rule is to be found in Article 129.3 of the Swiss Federal Law on Private International Law, which provides that: “If several defendants may be sued in Switzerland and if the claims are essentially based on the same facts and the same legal grounds, proceedings may be instituted against all the defendants before the same court having jurisdiction; the court before which the case was first instituted has exclusive jurisdiction.”<sup>76</sup> To avoid abuse, and prevent a defendant from being named in proceedings solely to allow the plaintiff the benefit of a forum that would otherwise be closed to him, it is frequently required that claims directed against various defendants are related.<sup>77</sup> Under some legal systems, while it is not required that all conditions for related actions be met, the minimum requirement is that the plaintiff bring a direct and personal action against each of the defendants and that the matter to be decided be the same for all defendants, or if not identical, that there be at least great similarity among the various claims.

90 At least one delegation indicated that complex jurisdiction of this type would be unconstitutional in its country and that a convention providing for such jurisdiction would therefore not be acceptable. A number of experts nonetheless wanted an effort to be made

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have caused damage, may be sued in a court of the place where the product caused the damage even if it placed its products on the market through an independent distributor. Such an action is characterised as a “direct action” in countries with the Roman law tradition. It is made possible as against the foreign producer because the jurisdiction is often founded on the place where the damage is sustained (Art. 46, third paragraph, of the French New Code of Civil Procedure or Art. 129.2 of the Swiss Federal Law on Private International Law of 18 December 1987). English law has a similar approach (cf. *Distillers Co. v. Thompson* [1971] A.C. 458, Privy Council decision on a reference from Australia).

<sup>74</sup> Cf. the discussion which has taken place on this point above No 69.

<sup>75</sup> Cf. *supra* Nos 77 et seq.

<sup>76</sup> It is to be noted, however, that this text is more of local than of international concern since there must exist a forum in Switzerland for each of the defendants.

<sup>77</sup> It is this, in particular, which was decided by the Court of Justice of the European Communities in the *Kalfelis* case, No 189/87, decision of 27 September 1988, *Recueil* 1988, p. 5565, given under Article 6.1 of the Brussels Convention of 27 September 1968.

to draft a text that would satisfactorily resolve these constitutional requirements. Indeed, it was pointed out that this kind of jurisdiction is extremely useful in international litigation, since it avoids multiple proceedings, thereby avoiding irreconcilable judgments. In the worst case, if such a text could not be drafted to satisfy all legal systems, and if the Convention finally adopted were a mixed Convention, jurisdiction based on plurality of defendants could perhaps be placed on the list of authorised, but not mandatory grounds of jurisdiction.

**91** With regard to *counter-claims*, there was no opposition to allowing a court before which a principal claim is brought also to exercise jurisdiction over counter-claims brought by the defendant. Some experts nonetheless wanted the counter-claims to have a connection with the principal claim. Others felt that counter-claims should be broadly defined. In matters relating to contract, for example, a counter-claim need not necessarily be based on the same contract.

**92** With regard to *guarantee/warranty or other third-party proceedings*, some legal systems do not admit this procedural mechanism. Moreover, some European countries in this category have obtained an exception to the Brussels and Lugano Conventions, which provide for such a forum. For those countries, guarantee/warranty proceedings are in fact not allowed; *litis denuntiatio* is the only possibility. Such a procedure is also possible under common law systems, where it is known as “interpleader,”<sup>78</sup> which is similar in its procedural mechanism to *litis denuntiatio*

**93** *Related actions* – In systems that have the related actions rule, it is not a rule of direct jurisdiction, but rather an exception that allows the joinder, before the same court, of actions initially brought before courts in different States. This rule is often limited to actions pending at the first level.<sup>79</sup> These rules generally require that the second court to be seised decline jurisdiction in favour of the first court seised. Sometimes, however, the second court may simply defer judgment.

The notion of related actions is generally defined as follows: actions or lawsuits that are so closely related that it is in the interests of the proper administration of justice that they be examined and judged at the same time, the point being to avoid the possibility of irreconcilable decisions if they were judged separately.

When one of the disputes is brought before a court which has exclusive jurisdiction, while the other is brought before a court with jurisdiction that is not exclusive, this generally gives rise to an exception to the “first – in-time” rule, and the court with exclusive jurisdiction prevails. On the other hand, if both courts have exclusive jurisdiction, the notion of related action does not apply, each court will retain its full jurisdiction, and each case will be judged separately.

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<sup>78</sup> This involves a procedure by which a determination is made as to who, among several claimants, has the right to receive an asset or a sum of money held by a third party who has no title to it. The third party may bring all of the claimants into the proceedings so that their respective rights may be determined, in order that the third party should not have to pay twice.

<sup>79</sup> This is the case with Article 22 of the Brussels and Lugano Conventions and Article 101 of the French New Code of Civil Procedure.

94 Regardless of whether the Convention provides for an exception based on related actions, the possibility of converting the related actions exception into a rule of direct jurisdiction should be examined. The question arises notably in regard to revision of the Brussels and Lugano Conventions. When the attempt was made, however, to draft a direct jurisdiction clause based on related actions, the drafting problems were such that the Working Group decided not to propose such a clause for the time being.

#### EXCEPTIONS TO DIRECT JURISDICTION

95 Since we decided to address the question of related actions as the last item discussed by the Special Commission under mandatory grounds of jurisdiction, we will not return to the matter in the discussion which follows, although, as we indicated earlier, for the moment related actions constitute an exception rather than a rule of direct jurisdiction. As such they should naturally be addressed in this chapter. The two clauses that were discussed at length by the Special Commission and that will be developed below concern *lis pendens* and *forum non conveniens*, or the power of the court to decline jurisdiction conferred upon it by a convention.

96 ***Lis pendens*** – There are in reality three main options for settling cases of *lis pendens* that might arise under the future Convention.<sup>80</sup> These three options are as follows: (1) have no specific *lis pendens* rule, and stick to a *forum non conveniens* clause, should such a clause be included in the Convention; (2) give preference to a rule that systematically gives priority to the court first seised, as in Article 21 of the Brussels and Lugano Conventions; (3) have a more flexible approach, giving preference to a rule based on a criterion other than that of time.<sup>81</sup>

97 With regard to the first approach, it is difficult at this stage to rely on a *forum non conveniens* clause. Indeed, it is not at all certain at the present stage of discussions that the Convention will contain a *forum non conveniens* clause. Furthermore, even if the Convention were to contain such a clause, its precise scope and mode of operation are not, for the moment, at all clear.<sup>82</sup>

98 Against the second option, the difficulties involved in the notion of “seising” a court may be emphasised, since there are notable differences among systems. Some systems consider that a court is seised when the case file is delivered to the office of the Clerk of the Court, even if the defendant has not yet been summoned to appear. Other systems consider that a court is seised only if the defendant has been summoned, with a resulting delay in seising the court. It was even pointed out that since the future Convention will be worldwide in scope, with time zones to be considered, the moment at which each court is

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<sup>80</sup> It is specified here, as was stated above at No 3, that the cases of *lis pendens* in the Convention which must first be dealt with are those which arise between the courts of two Contracting States. It remains to be seen whether a Convention should deal with the case of *lis pendens* between a court in a Contracting State and a court in a non-Contracting State.

<sup>81</sup> There is a fourth option which would consist in not having either a rule of *lis pendens* or a provision relating to *forum non conveniens*, but reverting to solutions a posteriori based on *res judicata* and the irreconcilability of decisions. This option seems scarcely viable but it should nevertheless be mentioned.

<sup>82</sup> Cf. the discussion *infra* Nos 101 et seq.



seised could depend simply on the time zone, with the result that the *lis pendens* solution would be a matter of pure chance.

**99** The drawbacks of the third option include the fact, which was raised on several occasions, that a flexible rule would cause additional delays in the institution of proceedings, as well as additional costs. One of the most frequently heard criticisms of a flexible solution that would allow courts seised simultaneously to consult in order to determine which one is in the best position to rule on the litigation, was that such a consultation could not be valid at all if it were to take place “behind the back of the parties.” It is, in fact, clear that any flexible solution involving possible consultation among judges should comply strictly with the adversarial principle, with the parties being given the opportunity to submit observations. Furthermore, it is easy to imagine that current communication techniques through computers (several people can be on line at the same time and consult the same documents in real time and talk to each other) would make it possible to establish communication among the judges concerned in the presence of all the parties to the proceeding.

**100** A proposal combining the *prior tempore* rule with a more flexible rule was attempted and may be summed up as follows:

(a) The second court seised defers judgment provided that the first court seised is able to hand down a decision within a reasonable time and that this decision is capable of being recognised or enforced in the territory of the court seised second.

(b) For purposes of the Convention, seising a court would be defined as taking place after the defendant has been summoned to appear and the litigation submitted to the court.

(c) If the court first seised considers that the court second seised is clearly more appropriate to resolve the dispute, it may, after ensuring that the second court agrees to exercise its jurisdiction, defer judgment and refer the parties to the second court.

It is possible that the *prior tempore* rule will be abolished in any event and that only the flexible rule set forth in (c) above will be retained and applied by the court first seised. In this hypothesis, the court second seised would be bound by the decision made by the court first seised. If the first court accepts jurisdiction, the second court should defer; if, on the other hand, the first court declines jurisdiction, the second should exercise it. In any event, the notion of seising a court must be defined in this mechanism.

If we want to avoid defining the notion of seising a court, the date on which courts are seised should no longer be considered and the courts should be required to decide together, within a brief period of time, and after hearing the views of the parties.

Furthermore, whatever *lis pendens* solution is found, it should be ensured that action is not time-barred just because the *lis pendens* rule is applied. For this reason, it would be preferable to provide for a simple deferral of judgment, rather than relinquishment of jurisdiction, until a decision is handed down. Relinquishment will not take place until the court that will in fact exercise jurisdiction has handed down its decision and it is determined that this decision can be recognised and enforced in the other territory.

**101** *Forum non conveniens* – The question of *forum non conveniens* was discussed for the first time at the March 1998 meeting of the Special Commission in connection with specific proposals submitted by delegations. The very general nature and broad application of the clause proposed, which was relatively unrestricted and applicable to all grounds of jurisdiction without discrimination, produced a rather virulent reaction against the proposal, led primarily by experts from countries with Roman law traditions. This reaction was all the more surprising because the preliminary discussions that had taken place during the Special Commission meetings on feasibility in June 1994 and June 1996 had shown relative support for a system based on an exception, to be applied selectively and with adequate restrictions.<sup>83</sup> Consequently, it is particularly difficult to reach a conclusion on this issue based on the March 1998 Special Commission discussions. Our task here is to try to reflect as faithfully as possible the discussions that took place.

**102** One of the proposals is based on the idea that the provision in the Convention would be optional. As such, it would be understood that only the States which already have the *forum non conveniens* system in their national law could continue to apply this doctrine, while States that do not have it in their national law would not be required to apply it and thereby change the habitual practice of their courts. One drawback of such a proposal that was pointed out is that predictability, which is one of the goals of the future Convention, would be compromised, since the parties would not know in advance whether the *forum non conveniens* clause would or would not be applied by the court before which they brought the proceedings. Besides, if the idea of an optional clause were to be retained, it would be necessary to decide if transfer of the case could be made in favour of a court located in a country which does not know the *forum non conveniens* doctrine. If the answer is in the affirmative, would this court be bound to accept the transfer made to it or could it refuse to do so?

**103** Also, one of the proposals allows the court to decline jurisdiction in favour of any other court, whether or not it is located in the territory of a Contracting State. The second proposal discussed during the session would, on the other hand, restrict the right of the court to decline jurisdiction to the cases in which the most appropriate court is in a Contracting State. In support of the first option, it was noted that the case may have close links with a State which is not a Party to the Convention, providing justification for the court seised to decline jurisdiction conferred on it by the Convention. The experts supporting this first option did not consider as an end in itself the desire always to preserve jurisdiction in the territory of a State Party. On the other hand, the fact that jurisdiction would then be exercised by a court in a non-party State, with the likely result that the plaintiff will lose the advantage of ready enforcement if he should win the case, could be one of the factors to be taken into account by the court seised before deciding whether to transfer the case.

**104** Both proposals provide that the *forum non conveniens* clause not be applied by the court *sua sponte*, but at the request of the defendant or any other party to the litigation. The discussion revealed that if a clause were to be accepted, its applicability would have to be limited to the situation in which the defendant requests its application. This also implies that it will be up to defendant to prove that the conditions for applying this doctrine have in fact been met.

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<sup>83</sup> Cf. the discussion summarised in Prel. Doc. No 7 at Nos 67-75 as well as the documents of the Special Commissions of June 1994 and June 1996, cited at footnote 100 of Prel. Doc. No 7.

**105** One of the proposals specifies that the defendant's request must be submitted "at the beginning of the proceedings." Some of the experts considered this precaution essential. A few would go even further and require that the court's decision be made within a brief period of time and that it not be subject to appeal. The special Commission did not discuss in depth the details of these various procedural hypotheses.

**106** Both proposals tend to make the exercise by the judge of his functions somewhat more predictable for the parties by spelling out the circumstances that he must take into consideration in deciding whether or not to decline jurisdiction. Both lists, however, are illustrative and not restrictive, making the exercise somewhat unpredictable and giving rise in part to the opposition expressed during the discussions. Despite this common point of departure, the two proposals contain lists of factors to be considered that are relatively dissimilar. One list focuses almost exclusively on matters of proof (place where the evidence is to be found, including witnesses, languages used by the witnesses and in documents), the applicable law, and the period of time during which a proceeding has already been pending before another court. In this proposal, convenience of access for parties to the litigation and witnesses is also a factor to be taken into consideration by the judge. In the other proposal, the convenience factor is supplemented by a cost assessment of the alternative procedures for the parties and witnesses. The remaining factors to be considered have to do with sound administration of justice (avoiding involving multiple judicial bodies, avoiding contradictory decisions, taking future enforcement of the judgment into account).

**107** One of the proposals contains a provision allowing the courts involved to proceed to an exchange of views. This provision makes the proposed clause similar to a provision intended to settle *lis pendens* cases and could be difficult to apply when there is no *lis pendens*. In any event, the experts' comments concerning such a provision have already been reported in the sections devoted to *lis pendens*.<sup>84</sup>

**108** Both proposals contain wording intended to allow the court seised to defer judgment and not completely relinquish jurisdiction over the case, so as to avoid consequences with regard to time bars and the possibility that the other court deemed more appropriate by the court seised also declines jurisdiction. This notion of deferring judgment, leaving aside fine points of drafting, is in fact necessary if a *forum non conveniens* clause is to be included in the Convention.

**109** One of the proposals contains a provision intended to prevent, during the recognition and enforcement stage, the court addressed from being influenced by the decision made by the court under the *forum non conveniens* provision. This provision is certainly welcome, if the *forum non conveniens* clause is restricted to the cases in which the court declines jurisdiction in favour of a court in another contracting State. On the other hand, it is hard to see how such a provision could survive if the clause were to remain as broad as the one proposed during the Special Commission meeting, allowing the court, as we pointed out earlier, to decline jurisdiction in favour of a court located in the territory of a non-contracting State.

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<sup>84</sup> Cf. supra Nos 96 et seq.

110 Neither of the two proposals contains the hypothesis in which the court seized that declines jurisdiction may (must?) require guarantees from the defendant, as suggested by at least one expert.

111 Also, nothing was said in the texts submitted about whether the *forum non conveniens* clause may be used in cases for which the Convention provides exclusive or protective grounds of jurisdiction and in cases in which the parties choose the forum. During the discussion, one expert did, however, mention that these various hypotheses would be reserved and could not give rise to application of the *forum non conveniens* clause.

112 In conclusion, it should be mentioned that several experts, as well as the Chairman, noted that the Convention will include a rule on *lis pendens* and that it should then be verified whether it is still necessary in practice to provide a general *forum non conveniens* clause. If such were the case, the clause would be useful in combining two opposing principles: certainty and concrete realities. It should be possible to find common ground for a restricted list of cases.

#### JURISDICTIONAL ISSUES NOT DISCUSSED BY THE SPECIAL COMMISSION

113 **Group actions** – The experts preferred not to address this complex question, since it has not yet been possible to prepare a comparative law note on the matter. It will not be possible to prepare this note in sufficient time for the Special Commission's November session, but it should be ready for the June 1999 session.

114 **Protective grounds of jurisdiction** – These questions had been discussed in relative depth at the Special Commission in June 1997 and were developed in Preliminary Document No 8.<sup>85</sup> They were discussed only in passing by the Special Commission at the March 1998 session, and no conclusions can be drawn at this stage.

115 **Provisional and protective measures** – The study promised by the Permanent Bureau is somewhat late inasmuch as it has been more difficult than expected to gather basic documentation on a number of legal systems. The report should be ready for distribution to the experts in sufficient time to allow them to prepare for the Special Commission of November 1998. In this regard, it was mentioned that, in contemporary international practice, injunctions ordering a party to disclose the location and constitution of its assets are increasingly frequent. It is clear, that practice will continue to develop certain instruments that will not necessarily have been foreseen at the time of the drafting of the future Convention. Provisions should be drafted in sufficiently broad language to allow application of the Convention to new situations arising in practice. Finally, the French expert informed the Special Commission that in 1996, of the two million decisions handed down, 600,000 had been handed down following provisional relief proceedings. He told the Commission that he would provide the Permanent Bureau with a report describing provisional relief proceedings for distribution to the experts so that these proceedings might be better understood and taken into consideration in future discussions on provisional and protective measures.

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<sup>85</sup> Cf. Nos 46-53.

**116 *Intellectual property*** – The Special Commission did not specifically discuss this question, but it is worth mentioning in this regard that specific cases of intellectual property rights should be kept in mind as the provisions of the Convention are drafted, particularly infringement, validity, and other related judicial actions. A working document distributed in June 1997 called the attention of the experts to the fact that the current trend in intellectual property matters is to consider that rights conferred by a patent, trademark, copyright, or any other intellectual property right may be submitted to a court other than the court of the place where those rights were registered. It would accordingly be possible to confer jurisdiction not only on the court of the place of registration, but also on the court having jurisdiction in tort, in contract, or having any other jurisdiction relevant to the intellectual property rights. In such a case, decisions handed down by the court of the place of registration would have *erga omnes* validity, whereas a decision handed down by any other court with jurisdiction under the Convention would have effects only for the parties to the litigation. It had also been suggested that a *forum non conveniens* clause might allow the court of the place of registration to decline jurisdiction in favour of a more appropriate court. Finally, it must be acknowledged that with respect to licenses, and in any litigation arising from this type of contract, most of the time there will be a choice of court clause that must be respected. For cases in which there is no choice of court clause, it should be ensured that the forum of contract, as provided by the Convention, is a fair and efficient forum with respect to license contracts.

**117 *Trusts*** – On the question of trusts, it should be recalled that a Summary Working Document had already been prepared by the Special Commission in June 1997 and was reproduced in Note 42 of Preliminary Document No 8. The discussions of the Special Commission in November will be based on that Summary Working Document.

#### UNIFORM INTERPRETATION

**118** The experts returned to the brief discussion that had taken place in June 1997. A number of experts stated that they had not been convinced by the argument casting doubt on the “democratic” nature of the panel of experts proposed in Preliminary Document No 7.<sup>86</sup> A significant number of experts expressed the view that, if the idea of expert panels were adopted, the opinions of the panels could not be binding. Various arguments were put forward to justify this position, particularly the fact that the jurisdictional authority of the courts of each State could not be limited by a binding decision made by a nonjurisdictional authority. Furthermore, some experts expressed concern about the very long delays that could be caused for individual lawsuits if expert panels were convened on each of these disputes. It was also pointed out that opinions handed down by *ad hoc* panels would have no value as precedent and would therefore be of very limited value for a uniform interpretation. In response to this argument, some experts believed that the opinions handed down by the expert panels would have the value conferred on them by the standing and experience of the experts themselves and that the impact of these opinions would be persuasive rather than binding. The possibility of convening periodic advisory commissions was raised. Several experts proposed a combination of the two systems – *ad hoc* panels in individual cases and periodic advisory commissions. One might imagine a system in which the parties could petition the court to refer a question to a panel of experts convened on an *ad hoc* basis.

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<sup>86</sup> Cf. Nos 200 and 201, also No 89 of Prel. Doc. No 8.

Another possibility would be for the court itself to request such an expert panel. In addition, periodic advisory commissions could be convened at the request of one or more States. In this event, in order to avoid the drawbacks mentioned during the discussion, the panel might be given a limited period of time (a few weeks, for example) to reach its interpretative opinion.

#### FEDERAL CLAUSES

**119** Contrary to what might be assumed, the question of federal clauses does not concern federal States alone. There are in reality three types of federal clauses: (1) federal clauses in the strict sense, *i.e.* those by which a State decides to apply the Convention either to its entire territory or to some of its federated States or regions; (2) clauses that determine whether or not the Convention is to be applied in the case of purely internal conflicts; (3) clauses that state whether the rules of the Convention are to determine the jurisdiction of the State in its entirety, or the jurisdiction of one of its specifically designated legal or judicial systems. Whereas traditionally, the question of federal clauses is addressed by an *ad hoc* committee, drawn from the Special Commission and comprised of the States concerned, it was suggested that the question, particularly with regard to the third category above, is of interest to all States, including those that have a unified legal and judicial system. It will guide the drafting of the clauses of the future Convention. It will determine, in particular, whether the jurisdiction clauses refer to the jurisdiction of the State as a whole or to internal jurisdiction as well. Accordingly, the clause assigning jurisdiction to the court of the habitual residence of the defendant may either simply designate the State of residence, or may, on the other hand, designate the place of residence. For parties to the litigation, it is preferable that, whenever possible, the provisions of the Convention be drafted in precise terms (international jurisdiction and domestic jurisdiction). This increases certainty and predictability of solutions. If, however, the Special Commission were to decide in the end that the rules of direct jurisdiction were to be drafted in terms of international jurisdiction only, it should be ensured that the rules allow verification of local jurisdiction at the recognition and enforcement stage. This question naturally has particular significance for States that do not have a unified judicial system, since the rules of procedure followed by the courts of federal States may differ greater among themselves. It is not, however, without effect for unified systems.

#### ACCESSION TO THE CONVENTION

**120** The Special Commission did not have time to discuss a question that is always the subject of one or more provisions in Hague Conventions; it concerns conditions for accession to the future Convention.

In the tradition of the Hague Conference, a distinction is made between States that were Members of the Conference at the time of the Diplomatic Session at which the Convention was adopted and those that were not Members. For the former, and sometimes also States that were invited to attend the Diplomatic Conference, it is sufficient to ratify the Convention after signing it, and to deposit their instrument of ratification with the Depositary, in this instance, the Ministry of Foreign Affairs of the Kingdom of the Netherlands. On the other hand, for States that were not Members of the Conference at the time of the Diplomatic Session concerned, the systems established by the Conventions differ. They basically take one of three forms:

- First system: the accession is valid only in relations between the acceding State and the contracting States that have raised no objection;<sup>87</sup>
- Second system: the State deposits its instrument of accession with the Depositary, then the States that have already ratified the Convention have a certain period of time to give notice of their opposition. If there are no objections during this period, the Convention will enter into force for the acceding State;<sup>88</sup>
- Third system: the accession is valid only in relations between acceding States and contracting States that have expressly declared that they accept the accession.<sup>89</sup>

**121** The following questions concern the future Convention: Is a system of tacit acceptance adequate? If not, a system of explicit acceptance should be established, as set forth above (third system). In a working document submitted by one of the delegations, however, the question was raised of whether this explicit acceptance system should apply only to States not Members of the Conference, as is traditional in the Hague Conference, or whether it should be extended to all States, including Member States.

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<sup>87</sup> Convention of 1 June 1956 Concerning the Recognition of the Legal Personality of Foreign Companies, Associations and Foundations (Art.13); Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (Art.12); Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons (Art. 42); Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (Art. 31); Convention of 25 October 1980 on International Access to Justice (Art. 32); Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (Art. 28); Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Art. 44); Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Art. 58). The time period within which Contracting States may raise objections varies, some Conventions providing for six months and others for twelve months. The two most recent Conventions provide for six months.

<sup>88</sup> Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions (Art. 20); Convention of 25 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Art. 28); Convention of 25 November 1965 on the Choice of Court (Art. 18); Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (Art. 29).

<sup>89</sup> Convention of 15 April 1958 on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods (Art. 13); Convention of 15 April 1958 Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children (Art. 17); Convention of 5 October 1961 Concerning the Jurisdiction of Authorities and the Law Applicable in relation to the Protection of Minors (Art. 21); Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations (Art. 28); Convention of 4 May 1971 on the Law Applicable to Traffic Accidents (Art. 18); Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Art. 39); Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Art. 38).