EXÉCUTION DES JUGEMENTS
ENFORCEMENT OF JUDGMENTS

Doc. prél. No 28
Prel. Doc. No 28

Mai / May 2005

HccH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

RAPPORT SUR LA REUNION DU COMITÉ DE REDACTION DU 18 AU 20 AVRIL 2005 EN PREPARATION DE LA VINGTIEME SESSION DE JUIN 2005

préparé par Andrea Schulz, Premier secrétaire

* * *

REPORT ON THE MEETING OF THE DRAFTING COMMITTEE OF 18-20 APRIL 2005 IN PREPARATION OF THE TWENTIETH SESSION OF JUNE 2005

prepared by Andrea Schulz, First Secretary

Document préliminaire No 28 d'avril 2005
à l'intention de la Vingtième session de juin 2005

Preliminary Document No 28 of April 2005
for the attention of the Twentieth Session of June 2005

Permanent Bureau | *Bureau Permanent*
6, Scheveningseweg 2517 KT The Hague | *La Haye* The Netherlands | *Pays-Bas*
telephone | *téléphone* +31 (70) 363 3303 fax | *télécopieur* +31 (70) 360 4867
e-mail | *courriel* secretariat@hcch.net website | *site internet* http://www.hcch.net

RAPPORT SUR LA REUNION DU COMITÉ DE REDACTION DU 18 AU 20 AVRIL 2005 EN PREPARATION DE LA VINGTIEME SESSION DE JUIN 2005

préparé par Andrea Schulz, Premier secrétaire

* * *

REPORT ON THE MEETING OF THE DRAFTING COMMITTEE OF 18-20 APRIL 2005 IN PREPARATION OF THE TWENTIETH SESSION OF JUNE 2005

prepared by Andrea Schulz, First Secretary

TABLE OF CONTENTS

I. INTRODUCTION

1 At its meeting held on 31 March / 1 April 2005, the Special Commission on General Affairs and Policy of the Hague Conference adopted the following conclusion:

> **"Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters**
>
> The Special Commission welcomed the preliminary draft Convention on Exclusive Choice of Court Clauses elaborated during the meeting of the Special Commission on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, which was held from 21-27 April 2004. It noted with great appreciation that an Explanatory Report on the preliminary draft Convention has been prepared by the Co-Reporters, Trevor Hartley and Masato Dogauchi, with a view to facilitating consultation. The Special Commission further took note of the fact that a Diplomatic Session has been convened by the host Government which will take place from 14 to 30 June 2005, and welcomed the progress report on preparatory work carried out in preparation of that Session. It noted that an informal meeting of the members of the Drafting Committee, plus some *ad hoc* replacements / attendants, had taken place in Brussels in early February. The following people participated: Paul Beaumont, Alegría Borrás, Andreas Bucher, Masato Dogauchi, Trevor Hartley, Jeff Kovar, Gottfried Musger, Kathryn Sabo, Sun Jin and Mario Tenreiro as members of the Drafting Committee. David Goddard, equally a member of the Drafting Committee, was unable to attend. Some members who were unable to attend the meeting in whole or in part were represented by others: Alexander Matveev by Konstantin Kosorukov and Peter Trooboff by Ron Brand. Miloš Hatapka also attended the meeting in full, thereby covering the partial absence of Mario Tenreiro. In addition, Thierry Hoscheit from Luxembourg was invited with a view to increasing the participation of French-speaking participants. Jiang Danming from China, who was in Brussels for the Hearing organised by the European Commission, equally participated. The Permanent Bureau was represented by Andrea Schulz and Nicola Timmins.
>
> The Special Commission agreed that the meeting in Brussels had been necessary and useful in order to discuss future work in light of the unexpected death of the Chairman of the Special Commission, Allan Philip, and that the Drafting Committee, chaired by Gottfried Musger, assisted by those others present at the Brussels meeting, should meet at the Permanent Bureau from 18-20 April 2005, and possibly at later dates, if necessary, with a view to preparing language suggestions for some of the issues identified in the preliminary draft Convention and the Explanatory Report. The composition of this group is without prejudice to the future composition of the Drafting Committee of the Diplomatic Session."

2 In accordance with this conclusion, the Drafting Committee on the Judgments Project, plus most of the *ad hoc* participants mentioned above, held a meeting of 3 days in The Hague from 18-20 April 2005. The meeting was chaired by Gottfried Musger from Austria and attended by Paul Beaumont, Alegría Borrás, Ron Brand, Andreas Bucher, Masato Dogauchi, David Goddard, Trevor Hartley, Miloš Hatapka, Konstantin Kosorukov, Jeff Kovar, Kathryn Sabo, Sun Jin, Mario Tenreiro and Peter Trooboff. Thierry Hoscheit was unable to attend. The Permanent Bureau was represented by the Secretary General, Hans van Loon, and First Secretary Andrea Schulz. Participants attended in their personal capacity and are therefore neither in a position nor willing to commit or bind any government.

3 In order to facilitate consultation within Member States, the following Report presents the proposals achieved at the meeting and reflects the discussions leading to these results under the heading of the provisions concerned. Proposed changes to the present text of the preliminary draft Convention are highlighted in bold. In preparation of the Diplomatic Session, a consolidated document containing both the preliminary draft Convention and the proposed alternative language will be prepared and circulated as Working Document No 1 which will be the basis for the discussions in June during the Diplomatic Session.

4 In addition to carrying out the tasks conferred upon the Drafting Committee by the mandate above, *i.e.* to provide language for the policy options to be chosen by the Diplomatic Session, some minor drafting inconsistencies were identified in the preliminary draft Convention during the meeting, and proposals to remedy them are included in this document. In the English version, this applies to the proposal to replace all references to a matter "referred to in Article 2(2)" by "excluded under Article 2(2)".

5 Due to time constraints, the Drafting Committee was not able to prepare a full French version of the drafting proposals. The French text was prepared by the Permanent Bureau after the meeting. Here as well, it is proposed to remedy some drafting inconsistencies contained in the preliminary draft Convention. The Drafting Committee already identified that this applies to the chapeau of Article 7, where some words had to be deleted. Subsequently, the suggested replacement of "*visée à l'article 2(2)*" by "*exclue en vertu de l'article 2(2)*" like in the English text was added by the Permanent Bureau. Likewise, as a consequential change to drafting decisions taken by the Drafting Committee relating to the words "conclusion", "adoption" and "entry into force" in Article 23, the word "*conclure*" in the French version of paragraph 5 was replaced by "*se joindre à*" in order to match the English, non-legal "enter into" (as opposed to the above-mentioned terms of art which are used in a different context in that Article).

II. COMMENTS ON THE INDIVIDUAL DRAFTING PROPOSALS

1. Drafting issues related to intellectual property (IP)

a) Article 2(2) *k)*

6 The current Article 2(2) excludes some matters from the scope of the Convention. The IP-related provision in Article 2(2) *k)* reads:

> "2. The Convention shall not apply to the following matters –
> (...)
> *k)* [intellectual property rights other than copyright or related rights, except in proceedings pursuant to a contract which licenses or assigns such intellectual property rights[including proceedings for infringement of the right to which the contract relates]];[1]
>
> [1.] According to this draft, validity as a principal issue is excluded from the scope of the Convention."

The policy intended to be expressed by these words had been that:

- litigation concerning validity of IP rights other than copyright or related rights as the object of the proceedings should be excluded from the scope of the Convention,
- contractual litigation concerning IP rights should be included in the scope of the Convention,
- sheer piracy would in most cases not be covered because there would not be a choice of court agreement.

7 The Explanatory Report of Masato Dogauchi and Trevor Hartley (Prel. Doc. No 26) explains this policy in paragraphs 36-44. However, already during the Special Commission of April 2004 there were some doubts as to whether the wording of Article 2(2) *k)* of the preliminary draft Convention (in its first part until the set of internal square brackets) actually expressed this policy. The drafting technique of a very wide exclusion from scope (IP rights) with an internal exception (except ...) which defines the ultimate reach of the scope, leads to ambiguity. Another question is whether the language defining the contractual litigation covered ("pursuant to a contract which licenses or assigns ...") is broad enough or missed out some contracts that should be covered. Therefore subparagraph *k)* was put into square brackets. These doubts were later confirmed by consultations. Some stakeholders feared that, where proceedings were brought "pursuant to a contract", all IP litigation was thereby brought back into the scope of the Convention, including litigation which had validity of an IP right as its object.

8 The second, internal set of square brackets around the last part of current Article 2(2) *k)* relates to a separate issue, albeit of a similar nature. Paragraph 42 of the Explanatory Report states:

> "42 **Infringement proceedings.** It was intended that the Convention should apply to litigation concerning the scope of an intellectual property licence. Such proceedings may be brought either in contract or in tort. In some countries, the parties are required only to plead the facts: it is for the court to determine the appropriate legal characterization. Whether the court chooses contract or tort may depend on which is easier to prove. In other countries, the parties themselves decide whether to sue in contract or tort. They may have good reasons (such as the opportunity to obtain higher damages) for choosing one or the other. Most delegates felt that it should not depend on these accidental considerations whether or not a case was covered by the Convention. Some delegates thought that the wording of sub-paragraph *k)* was sufficient to cover proceedings in both contract and tort without the additional words in square brackets; others thought that the additional words were necessary to avoid misunderstanding."

9 In order to resolve these two drafting issues, the Drafting Committee proposes to replace Article 2(2) *k)* with the following paragraphs:

> *"**k)*** **validity of intellectual property rights other than copyright or related rights;**
>
> **[*k bis)* infringement of intellectual property rights other than copyright or related rights[, except where infringement proceedings are or could have been brought pursuant to a contract for the transfer or use of such rights];]**"

10 This drafting would make clear that *only* the *validity* of IP rights (other than copyright or related rights) and – if sub-paragraph *k bis)* is adopted – *infringement* of such rights are excluded from the scope. So IP as such, and in particular IP-related contract litigation, is within the scope of the Convention. Moreover, the second part of sub-paragraph *k bis)* avoids the danger of narrowing too much the types of IP-related contracts covered: although in general, infringement of IP rights other than copyright or related rights is outside the scope of the Convention, contract-related infringement proceedings would be included in the scope. The exception for infringement proceedings would thus be narrowed to mere piracy cases where there is no contractual link between the right-holder and the infringer.

b) Article 2(3)

11 Article 2(3) of the preliminary draft Convention (Work. Doc. No 110 Revised) currently reads:

> "Notwithstanding paragraph 2, proceedings are not excluded from the scope of the Convention where a matter referred to in that paragraph arises merely as an incidental question and not as an object of the proceedings."

12 A first proposal is to replace the words "referred to" in the second line by "**excluded under**". During consultations it was pointed out that the rule in paragraph 3 is intended to deal with matters excluded under paragraph 2, and that "referred to" would also apply to, *e.g.*, copyright and related rights which are mentioned in ("referred to"), but not "excluded under", paragraph 2. (This also applies to Articles 6, 10(1) and 20(1)[1], see below). Therefore the following wording is suggested:

> "Notwithstanding paragraph 2, proceedings are not excluded from the scope of the Convention where a matter **excluded under** that paragraph arises merely as an incidental question and not as an object of the proceedings."

13 A second proposal aims at clarifying the effect of this rule on incidental questions in more practical terms. The legal concept of incidental question versus object (or subject) of the proceedings is not equally well known in all legal systems. Consultation, in particular among IP stakeholders, has shown that the current drafting of Article 2(2) *k)* with its exclusion and the subsequent exception from the exclusion, combined with the incidental-question-provision in paragraph 3, would be a source of confusion. Therefore the Drafting Committee proposes to add a second sentence to paragraph 3 which exemplifies what the general rule could mean in more concrete terms.

> **"In particular, proceedings are not excluded from the scope of the Convention merely because a matter excluded under paragraph 2 arises by way of defence."**

14 Where a plaintiff brings proceedings the object of which would be within the scope of the Convention (*e.g.* for royalties under an IP licence), it is normally by way of defence that an issue outside the scope of the Convention is raised, *e.g.* invalidity of the IP right. There is only one set of proceedings both on the initial claim and the defence. The new second sentence makes clear that such defence does not move these proceedings as such outside the scope of the Convention.

15 Where, on the other hand, a counterclaim is brought (albeit based on the same arguments just mentioned, *e.g.* invalidity of the IP right), this counterclaim is a separate claim which has its own object (in this case the invalidity of the IP right, which, under the proposed new Article 2(2) *k)*, would be clearly excluded from the scope of the Convention). This does not mean that the proceedings on the counterclaim could not continue; it only means that the Convention, including its Articles 5, 7 and 9, would not apply to the proceedings and the resulting judgment *on the counterclaim*. The initial claim for royalties would remain within the Convention.

---

[1] Note by the Permanent Bureau: Due to an omission, in Article 20(1) the words "referred to in" were retained in the documents in English which the participants took home from the meeting. Following the general decision of the Drafting Committee to make this change in the Articles concerned, in this document, the words "referred to in" have therefore been replaced by "excluded under" in Article 20(1).

c) Article 6 - Suspension of proceedings in connection with incidental question

16 Article 6, which is in square brackets, currently reads:

> *"Article 6 Stay of proceedings in the chosen court*
>
> [Nothing in this Convention shall prevent the chosen court from suspending or dismissing the proceedings before it, in particular in order to allow the courts of the State under the law of which an intellectual property right arose, to give a judgment on its validity, provided that such dismissal does not prevent the proceedings from being recommenced.]"

17 This provision is in square brackets for several reasons set out in the Explanatory Report (Prel. Doc. No 26, para. 114). Although in substance the Article only says that the Convention does not deal with the issues of stay or dismissal in the situations described, and leaves them to internal law, it was feared that the Article might encourage the exercise of discretion not to hear a case (stay under the doctrine of *forum non conveniens*). Moreover, while it had been intended to deal with a stay or dismissal in cases where a matter excluded under Article 2(2) arises as an incidental question, the language seems to be broader than that, thereby contradicting the obligation under Article 5(2) not to stay or dismiss proceedings in favour of the courts of another State. Another concern is the apparently unlimited time which could be allowed by internal law for such a stay. Therefore, the following new language is suggested:

> ***"Article 6 - Suspension of proceedings in connection with incidental question***
>
> **[This Convention neither requires nor precludes the suspension of proceedings before the chosen court for such reasonable time as is necessary to allow another court to decide a matter excluded under Article 2, paragraph 2, which arises as an incidental question, in particular to allow the courts of the State under the law of which an intellectual property right arose to give a judgment on its validity.]"**

18 The term "neither requires nor precludes" echoes the language adopted by the Special Commission for Article 8. In addition, although the policy remains the same and the Convention does in general not deal with such suspension provided for by internal law, Article 6 now sets a time limit. It thereby links in with Article 5(2) which prohibits a court to decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State and ensures that eventually, the court chosen and seized will have to resume and finish the proceedings. Among those present, it was felt that the reference to "dismissal" was superfluous and that in the English version, the non-technical term "suspension" (as opposed to "stay") would be sufficient. Moreover, the proposed new wording limits the suspension referred to in this Article 6 to cases where a matter excluded under Article 2(2) arises as an incidental question. Introduced by the words "in particular", proceedings relating to IP rights, where validity of the right arises as an incidental question, are mentioned as a prominent example which gave rise to this provision.

19 It is proposed to change the title in order to reflect the new, narrower scope and to retain the word "suspension" in English, as used in the Article itself, instead of the more technical term "stay".

d) Article 10 - Incidental questions

20 Here, for the reasons mentioned above, the same change as in Article 2(3) and 6 is proposed, *i.e.* to replace "referred to in" by "excluded under".

> "(1) Where a matter **excluded under** Article 2, paragraph 2, arose as an incidental question, the ruling on that question shall not be recognised and enforced under this

Convention."

21 The basic rule relating to the recognition and enforcement of a judgment can be found in Article 9. Article 10(1) relates to the (non-)recognition of a ruling on an incidental question relating to an excluded matter which is "embedded" in the judgment, and states that the transfrontier effect of such ruling is not governed by the Convention. The Drafting Committee had some discussion as to whether further words could be added to this paragraph in order to clarify that the exemption from the obligation to recognise and enforce under the Convention as stated by Article 10(1) applies *only* to the "embedded" ruling on the incidental question, and does not extend to the judgment as a whole. This paragraph only aims to prevent *the Convention*[2] from giving collateral estoppel-type effect to this ruling. Words like "as such", "separately", "independently" and "itself" were debated and abandoned. It seems that none of these words would bring greater clarity to the present text.

2. Article 7 - Obligations of a court not chosen

22 The Drafting Committee screened all provisions of the preliminary draft Convention in order to examine whether their wording is broad enough to cover situations where the parties to the dispute are different from the original parties to the agreement (*e.g.* because of assignment, subrogation, succession, merger). The only provision where a need for a change was identified is Article 7. Its chapeau reads presently:

> "Where the parties have entered into an exclusive choice of court agreement, any court in a Contracting State other than that of the chosen court shall suspend or dismiss the proceedings unless – "

23 This seems to limit the application of the Article to cases where only the original parties who entered into the choice of court agreement are later engaged in proceedings before a court not chosen. In order to make sure that that court would have to apply Article 7 to any parties, as long as they are bound by an exclusive choice of court agreement (concluded by themselves or otherwise binding them), the following wording is proposed:

> "**A** court in a Contracting State other than that of the chosen court shall suspend or dismiss **proceedings to which an exclusive choice of court agreement applies** unless –"

24 Moreover, it was stated that the French version of the chapeau of Article 7 in the preliminary draft Convention contained excessive language ("*qui désigne un tribunal ou les tribunaux d'un Etat contractant*"). This had been deleted in the English version during the last Special Commission because it was implicit in the definition of an exclusive choice of court agreement in Article 3 *a)*. It was therefore suggested to bring the French version in line with the English version and delete these words.

3. Inconsistent judgments – Articles 9(1) *f)* and 11

a) Article 11 – Judgments in Contravention of exclusive choice of court agreements

25 Article 11 of the preliminary draft Convention is in square brackets. As explained in the Report (Prel. Doc. No 26, paras. 172 *et seqq*.), this was intended to be a "blocking rule". Its purpose was to impose an obligation on Contracting States not to recognise certain judgments given "in contravention of an exclusive choice of court agreement",

[2] As stated in footnote 46 of the Explanatory Report, it may be given effect on some other basis under national law. The Convention does not deal with this, and it was felt preferable not to suggest any drafting changes to make this explicit.

regardless of whether these judgments were given in a Contracting State or a non-Contracting State.

26 The Report equally demonstrates that the present wording raises a number of questions. It refers to Article 7 (which allows a court seised but not chosen to exercise jurisdiction and hear a case under certain conditions), but in an Article 11-situation we are no longer at the jurisdiction stage. At the "Article 9 and 11-stage" of recognition and enforcement, what does the reference to Article 7 mean for a court which is faced with a request to recognise and enforce a foreign judgment? Does the court have to check whether *the court which gave the judgment*, although it was not the chosen court, had the right to do so under Article 7 (or would have had the right, had the State of origin been a Contracting State)? Or does the court addressed have to check whether it could *itself* have given a judgment on the merits under one of the exceptions in Article 7 (regardless of whether the court which actually gave the judgment also had this right) and, if it could have done so, it is as well entitled to recognise a foreign judgment?

27 These two policies are identified in paragraphs 175 *et seq*. of the Explanatory Report, and wording is proposed there for both of them.

28 Another question pointed out in paragraph 173 of the Explanatory Report and raised during the discussions of the Drafting Committee was whether Article 11 should apply to judgments from Contracting States as well as from non-Contracting States. This was not discussed during the Special Commission of April 2004.

29 In the discussions it was pointed out that it might be superfluous to impose such a blocking obligation with regard to judgments from other Contracting States. One should trust that their courts would apply the Convention, including its Article 7, correctly. There were doubts whether Article 11 was necessary at all, but if so, it would probably only be needed for judgments from non-Contracting States. Such States, however, are not under any Convention obligation and can therefore not act "in contravention of this Convention". The wording would therefore have to be adapted.

30 The Drafting Committee discussed whether, in light of this understanding, language simpler than the two Variants proposed in paragraph 175 of the Explanatory Report could be found. It also identified the link to Article 9(1) *f)* which *allows* to refuse recognition and enforcement of a judgment *under the Convention* if there is an inconsistent judgment. The current Article 11 goes beyond that and intends to state that, even where such recognition and enforcement might be possible under *internal law*, it *has to be refused*.

31 The following text maintains this policy, limited to judgments from non-Contracting States. It treats judgments from Contracting States better than judgments from non-Contracting States because Article 11 does not apply to the former. It is hoped that this will create an incentive to join the Convention.

> *"Article 11 Judgments in contravention of exclusive choice of court agreements*
>
> **[Where the parties are bound by an exclusive choice of court agreement, the courts of a Contracting State shall not recognise or enforce a judgment from a non-Contracting State if the judgment would have been given[3] in contravention of the Convention if the State of origin had been a Contracting State.][1]**
>
> **[1] This provision (in common with all the provisions of this Convention) is subject to Article 23."**

[3] Note by the Permanent Bureau: It was pointed out after the meeting that for the sake of consistency with the language used in Article 9(1) *g)*, the word "given", which was missing in the draft distributed to participants, would have to be added here in the English version.

32 This wording would apply regardless of whether there already is a judgment given by the chosen court in a Contracting State. While Article 11 imposes an obligation not to recognise a judgment from a non-Contracting State under internal law, including other treaties to which that State is a Party, a State may be under a treaty obligation to recognise such judgment. This conflict will be resolved by the proposed Article 23(3) which provides for the priority of "older" treaty obligations.

33 The proposal is in square brackets because the current Article 11 is also in square brackets, and it has not yet been decided whether it is at all necessary. Moreover, the brackets also indicate that this proposal is dependent on several policy choices yet to be made by the Diplomatic Session, about which some explanation can be found in paragraphs 173 *et seqq.* of the Explanatory Report (Prel. Doc. No 26).

b) Article 9(1) *f)*

34 The above examination of Article 11, which is in square brackets in the preliminary draft Convention, gave rise to a re-examination of Article 9(1) *f)* which equally deals with inconsistent judgments.

35 According to the present text, the existence of a judgment given in the State where recognition and enforcement is sought – regardless of whether it was given earlier or later than the judgment to be enforced under the Convention – is a reason to refuse recognition and enforcement of a Convention judgment. Moreover, both judgments from other Contracting as well as non-Contracting States can be a reason to refuse recognition and enforcement, provided that they were given earlier than the Convention judgment to be enforced, fulfill the conditions necessary for their recognition in the requested State, and were not given in contravention of the Convention.

36 It appeared that the drafting of Article 9(1) *f)* gives rise to some uncertainty. Although it should be obvious that a judgment given by a chosen court would normally not be "in contravention of the Convention", there is some ambiguity in the text as to which judgment (the one for which recognition is sought under the Convention or the one which could be a reason to refuse recognition?) the word "inconsistent" in the last line refers. The new proposal tries to remedy this. Furthermore, like in Article 11 the language was adapted in order to reflect that only Contracting States can be under Convention obligations and therefore act "in contravention of the Convention".

37 For the sake of clarity, the Drafting Committee proposes to spell out the different options separately and to replace Article 9(1) *f)* with the following:

> *"f)* the judgment is inconsistent with a judgment given in a dispute between the same parties in the requested State; or
>
> ***g)*** **the judgment is inconsistent with an earlier judgment between the same parties and involving the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State[under an international agreement], and provided that:**
>
> ***i)*** **in the case of a judgment given in a Contracting State, it was not given in contravention of this Convention;**
>
> ***ii)*** **in the case of a judgment given in a non-Contracting State, [it would not have been given in contravention of this Convention if the State of origin had been a Contracting State]."**

38 The last part has been placed in square brackets because it is new. If the requested State has to recognise the earlier judgment under an "older" international treaty, which implicitly creates an obligation to refuse the recognition of the judgment given by the chosen court, Article 23(3) and its rule on the priority of "older" treaty obligations would apply.

4. Article 15 - Damages

a) Minor drafting issues concerning the present text of paragraph 1

39 It was mentioned that during consultations, the language of Article 15(1) had been criticised as not being entirely clear. It should reflect the policy that the rules on the non-compensatory part of the judgment contained in paragraph 1 did not affect the obligation to recognise and enforce any other part of the judgment awarding something different. Therefore it was suggested to add the words "part of a" at the beginning of paragraph 1.

40 Equally based on comments received during consultations, it was proposed to add the words "if, and" before "to the extent that". This does not reflect any policy change, but for some it provides greater clarity while others felt that it was unnecessary but would not harm.

41 The proposed redraft of Article 15(1), which does not affect the existing wording of paragraphs 2 and 3 as contained in the preliminary draft Convention, reads as follows:

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

b) Drafting proposals to implement a possible policy decision of the Diplomatic Session

42 The preliminary draft Convention prepared by the Special Commission of April 2004 contains a footnote to Article 15 which reads: "It was proposed that paragraph 2 be deleted." In order to facilitate the work of the Diplomatic Session, the Drafting Committee proposes the following redraft of the remaining provisions, should the present paragraph 2 indeed be deleted. This text is limited to the necessary drafting consequences of omitting paragraph 2, and does not reflect the possibility of further policy proposals consequential on such a deletion.

> "1. A **part of a** judgment which awards non-compensatory damages, including exemplary or punitive damages, shall be recognised and enforced **if, and** to the extent that**,** a court in the requested State could have awarded similar or comparable damages.
>
> 2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.
>
> 3. Nothing in this **Article** shall preclude the court addressed from recognising and enforcing the judgment under its law for an amount up to the full amount of the damages awarded by the court of origin."

5. The time factor

a) Article 16 *bis* - Transitional provisions

43 The preliminary draft Convention prepared by the Special Commission of April 2004 does not yet contain a transitional provision. It has to be decided, in particular, whether the Convention shall apply to

- choice of court agreements concluded before the entry into force of the Convention (for the State of the chosen court, of the court seised, of the court addressed for recognition and enforcement or for all those States?), and
- if also choice of court agreements concluded before the entry into force of the Convention for one or more of the States mentioned above were covered, whether the Convention shall only apply to proceedings instituted before the Convention's entry into force (again: for which State?), and which are pending at the time of entry into force,
- as well as to the recognition and enforcement of any judgment given after the Convention's entry into force (for which State?) but resulting from proceedings instituted before.

44 The policy choice will be for the Diplomatic Session to make. Since the issue was now discussed for the first time, the discussions held by the Drafting Committee are reported below in order to facilitate discussions at the Diplomatic Session:

45 The main purpose of the Convention is to protect and strengthen party autonomy. The answer to the question asked in the first indent above is the first test whether and how the Convention can achieve this aim: It can be assumed that two parties, wherever they are resident, when choosing a court in a certain State where the Convention is in force, want the Convention to apply. At that point in time (when concluding their agreement), they cannot foresee when, if at all, litigation will arise between them and which courts in which other States might be seised by one of them in spite of their agreement. So their autonomy to be protected focuses largely on the chosen court. The parties would know that the presumption of exclusivity of the choice of court agreement as well as the form requirements and the obligations imposed on the chosen court by Article 5 of the Convention would apply.

46 Once the judgment, to which the Convention applies, is given by the chosen court in a Contracting State, the parties can also trust that recognition and enforcement of the resulting judgment will be granted under the Convention in other Contracting States, regardless of whether the Convention was already in force in the State addressed at the time the agreement was concluded, at the time the proceedings were instituted or at the time the judgment was given. The only thing that matters for the requested State is whether it is a Contracting State at the time when the foreign judgment is submitted for recognition and enforcement, and whether the judgment was based on an exclusive choice of court agreement concluded after the Convention entered into force in the State of the chosen court.

47 To make the Convention applicable to choice of court agreements concluded before the entry into force for the State of the chosen court would have one fundamental effect in common law countries: it would make the Convention's presumption of exclusivity of the choice of court agreement applicable retroactively. This would reverse the current legal situation in these jurisdictions, on which the parties will probably have relied, trusting that their choice would not be exclusive, and that the court could apply the doctrine of *forum non conveniens* if circumstances so required. Moreover, they could not, at the time their agreement was concluded, foresee which other courts might be seised by one of them. Likewise, they could not foresee where, at the time enforcement might be sought in the future, assets of the judgment debtor would be located. Therefore, the purpose of the Convention (protection of party autonomy) does not call for a focus on any State other than the State of the chosen court.

48 As stated before, although being aware that this would limit the scope of application in time of the Convention, the Drafting Committee felt unable to present language sufficiently pragmatic and workable to spell out any retroactive effect of the Convention going beyond this approach. This can be justified by the fact that such limitation in time (to choice of court agreements concluded after the entry into force for the State of the chosen court) would only be temporary in nature until a larger number of States has joined the Convention. And if parties had entered into a choice of court agreement before the Convention came into force for the State of the chosen court they could redo or amend it after that date if they wanted to benefit from the Convention.

49 For these reasons, the following rule is proposed:

"Article 16* bis - *Transitional provisions

1. This Convention shall apply to exclusive choice of court agreements concluded after its entry into force in the State of the chosen court."

50 This rule focuses on the will of the parties and on the chosen court. At the time of their agreement, the parties cannot foresee whether one of them will later seise a court of another (Contracting or non-Contracting) State. Therefore, for the general rule on the Convention's application in time, the latter is not the State to focus on. However, if the Convention applies to the choice of court agreement, and then one party seises the court of a non-Contracting State for which the Convention enters into force while the proceedings are pending, the question arises again whether the court seised shall now be put under the obligation contained in Article 7, although such obligation did not exist when proceedings were commenced. Discussions in the Drafting Committee led to the following proposal, which suggests that Article 7 shall not apply to the court seized but not chosen if the Convention enters into force for that State while the proceedings are pending:

"2. This Convention shall not apply to proceedings instituted before the Convention entered into force in the State of the court seised."

b) The time factor in other provisions

51 Subsequently, the Drafting Committee examined a number of provisions which contain a time element.

aa) Article 1(2)

52 It was felt that the time element in Article 1(2) involved a policy choice, and the drafting alternatives were already sufficiently identified by the different text elements in square brackets of the preliminary draft Convention. So no drafting proposals were made for this Article.

bb) Article 18 - Limitation of jurisdiction

53 The Drafting Committee noted that the current text of Article 18 does not contain any reference to a time element. The group tried to identify the policy behind the Article. As stated in paragraphs 210 *et seq.* of the Explanatory Report (Prel. Doc. No 26), the intention is to give those States who do not wish to make their legal system available to unconnected external parties, a possibility to avoid this. On the other hand, the feeling that the scope of the Convention should not be narrowed more than absolutely necessary by this declaration was widely shared. Therefore, the group felt that the policy chosen by the Special Commission of April 2004 was that, as long as there was a connection with the State of the chosen court at any time (either at the time the agreement was concluded or at the time of commencement of proceedings), the proceedings should be

within the scope of the Convention without a possibility for an opt-out declaration.

Some were of the opinion that the current wording, without a time reference, already expressed this policy choice. Others suggested that some additional wording, which is therefore proposed in square brackets, might clarify the policy already intended:

> *"Article 18 Limitation of jurisdiction*
>
> Upon ratification, acceptance, approval or accession, a State may declare that its courts may refuse to determine disputes **to which an exclusive choice of court agreement applies** if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute**[either at the time the agreement is concluded or at the time of commencement of the proceedings]**.

54 Moreover, it is suggested to replace the words "covered by an exclusive choice of court agreement" by "to which an exclusive choice of court agreement applies" in order to bring this Article in line with the language used in other provisions.

cc) Article 19 - Limitation of recognition and enforcement

55 Article 19 of the preliminary draft Convention already contains a time element: it applies "if the parties are resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, are connected only with the requested State, at the time the agreement is concluded." In the Explanatory Report (Prel. Doc. No 26, footnote 214) it is pointed out that there is some ambiguity as to whether that time element applies to both the residence of the parties and the relationship of the parties and all other elements relevant to the dispute.

56 The Drafting Committee had a discussion on this question. It was felt that it could be examined also at a later date (*e.g.* when the judgment is submitted for recognition and enforcement) whether, at the time the agreement was concluded, the parties were resident in the requested State. Most participants considered it to be impossible, however, that the court addressed could assess whether, at the time the agreement had been concluded, the relationship of the parties and all other elements relevant to the dispute had been connected only with the requested State. There was, in most cases, not yet a dispute at the time the agreement was concluded, so that the elements relevant to a then future dispute could hardly be examined with regard to their relationship with a particular State. To expect a different court to do that retroactively seemed even more impractical. Therefore most participants concluded that the policy must have been to apply this time requirement only to the residence of the parties. However, there was no full agreement on this issue. Therefore, since policy issues were not to be decided in the Drafting Committee, and in light of the original intention of the proponents of the draft, it is proposed to move the words "at the time the agreement is concluded" up before the words "the parties are resident in the requested State" in order to make it clear that the time requirement refers *in any event* to the residence of the parties. Whether it also applies to the other connecting factors of this provision remains open under this proposed redraft, and a policy choice will have to be made by the Diplomatic Session.

> "Upon ratification, acceptance, approval or accession, a State may declare that its courts may refuse to recognise or enforce a judgment of a court in another Contracting State if, **at the time the agreement is concluded**, the parties are resident in the requested State and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, are connected only with the requested State."

6. The problem of flexibility: Article 7 – Obligations of a court not chosen and Article 20 - Declarations with respect to specific matters

57 In the past, a certain tension was identified between making the Convention as mandatory and predictable as possible, on the one hand, and rules of national or international law which exclude party autonomy with regard to specific subject matters, on the other hand. In particular, this conflict could arise where the law of the State of a court seised but not chosen (Article 7) or of the State where recognition and enforcement is sought (Article 9) claims exclusive jurisdiction over a specific matter to which the choice of court agreement applies, but there are also other bases for not enforcing exclusive choice of court agreements.

58 In such cases, the court – obliged by the Convention not to take the case under Article 7 or to recognise and enforce the foreign judgment under Article 9 while in the view of this State its own courts retain jurisdiction (which, in some States is considered exclusive) over the matter in question – is in a conflict. In some extreme cases, public policy might be the way out but the conflict with internal rules on exclusive jurisdiction is unlikely to reach that threshold in certain jurisdictions. Moreover, in some legal systems the concept of public policy refers to general interests rather than the interests of any particular individual, including a party.

59 The Explanatory Report (Prel. Doc. No 26, Annex I) describes several possible solutions which would involve changing Article 7. Three of them are mentioned in footnote 7 to Article 7 of the preliminary draft Convention (Work. Doc. No 110 Revised). The Drafting Committee did not deal with these options because they have been sufficiently set out in that footnote and in the Explanatory Report.

60 Moreover, in the Explanatory Report a declaration system was proposed as a possible alternative (see Prel. Doc. No 26, Annex I, p. 59). The Drafting Committee suggests the following language for this:

> ***"Article 20 – Declarations with respect to specific matters***
>
> **1. A State may declare that it will not apply the Convention to a specific matter other than those excluded under[4] Article 2, paragraph 2[which falls within the exclusive jurisdiction of the courts of that State].**
>
> **2. With regard to that matter, the Convention shall not apply in other Contracting States where an exclusive choice of court agreement designates a court of the State that made the declaration.**
>
> **3. The declaration may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.**
>
> **4. The declaration shall be notified to the Depositary.**
>
> **5. A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.**

[4] Note by the Permanent Bureau: Due to an omission, in Article 20(1) the words "referred to in" were retained in the documents in English which the participants took home from the meeting. Following the general decision of the Drafting Committee to make this change in the Articles concerned, in this document, the words "referred to in" have therefore been replaced by "excluded under" in Article 20(1).

6. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the Depositary. Such a declaration shall not apply to exclusive choice of court agreements concluded before it takes effect.[3]

3. Provisions in relation to the making of declarations have been included in this draft for ease of reference. When the final clauses are drafted, these provisions can be removed from Article 20 and included in the general Article 29 dealing with declarations."

61 The Article provides for a declaration with regard to a specific subject matter, similar to those listed in Article 2(2). The words in square brackets at the end of paragraph 1 intend to limit the coverage of the declaration even more, namely to matters which fall within the exclusive jurisdiction of the State making the declaration because the existence of such exclusive jurisdiction in the internal law of that State will in most cases be the reason for a declaration. (It is recalled that a possible conflict with exclusive jurisdiction provided for in another treaty will already be resolved by the proposed new Article 23.) The reference to "exclusive jurisdiction" is in square brackets because from a comparative point of view, this term bears some ambiguity and is not even known in some legal systems.

62 If a State makes such declaration, it will not apply the Convention to matters covered by the declaration. So the courts of that State may take jurisdiction despite an exclusive choice of court agreement in favour of the courts of another Contracting State, and the State making the declaration is under no obligation to recognise a judgment given by the chosen court in another Contracting State.

63 Where an exclusive choice of court agreement designates a court of the State that made the declaration, the Convention will not apply in other Contracting States. In other words, the courts of these other Contracting States would not be obliged to decline jurisdiction under Article 7 if they were seised in spite of the agreement, and a judgment given by the chosen court in the State that made the declaration will not be recognised and enforced in other Contracting States under Article 9. This provides for reciprocity and transparency and should be an incentive not to take advantage of the declaration possibility in an excessive way.

64 Declarations under this Article are possible both at the time of signature, ratification, acceptance, approval or accession and at any time thereafter. The latter allows further flexibility where new critical matters arise *after* the entry into force of the Convention for a particular State. However, a declaration made after the entry into force of the Convention for the State concerned will not cover choice of court agreements concluded before the declaration takes effect. This strengthens party autonomy and transparency.

7. Article 23 - Relationship with other international instruments

65 The Explanatory Report (Prel. Doc. No 26, paras. 222-239) as well as consultations carried out by the negotiating Parties have shown that Article 23 does not yet deal with all possible conflicts between this Convention and other international instruments in a satisfactory way. It has to regulate the relationship between this Convention and other general instruments on jurisdiction, recognition and enforcement as well as instruments on specific subject matters, between this Convention and earlier or later instruments, and between this Convention and legislation of Regional Economic Integration Organisations (REIOs), in particular the European Community. Some of the problems with the existing text are:

66 Paragraph 4 was drafted with a view to disconnecting the *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* of 27 September 1968 (Brussels I Convention), the *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* of 16 September 1988 (Lugano Convention) and *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (the Brussels I Regulation). The Explanatory Report has pointed out that this paragraph is not sufficient to solve the conflicts arising with the Lugano Convention because not all States Parties to the Lugano Convention might become Parties to the Hague Convention. This might put those States Parties to both the Hague and the Lugano Convention under conflicting obligations vis-à-vis Hague States and other Lugano States which are not Hague States. Similar conflicts may arise for other instruments if not all States Parties to them join the Hague Convention.

67 Moreover, on its face, it would be difficult to apply paragraph 4 to the Brussels I Regulation because it only applies to international instruments to which a Contracting State is a Party. However, the European Community which will probably also be a Contracting Party to this Convention, is not "a Contracting State" to the Brussels I Regulation. Other difficulties are pointed out in the Explanatory Report.

68 The Drafting Committee therefore proposes a restructured new Article 23. This Article deals with *conflicts* between the Hague Convention and other international instruments – it covers situations where both the Convention and the instrument "want" to be applied and lead to different results. This Article is only relevant and applicable in "Hague States" which are also "instrument States". In other (Hague or instrument) States, the conflict does not exist.

69 Such "other instruments" can be "general" conventions (like Lugano and the *Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters* (Minsk, 22 January 1993, as amended on 28 March 1997) – the Minsk Convention), conventions on specific subject matters (maritime law, transport law), legislation of REIOs (both with a general and a specific character) – see paragraph 6.

70 The following text is proposed:

Paragraph 1: Priority of the "other" instrument as general principle

> **"1. Except as provided in paragraphs 2 and 4, this Convention shall not affect any international instrument in force in a Contracting State, whether concluded before or after this Convention, unless a contrary declaration is made by the Contracting States bound by such instrument."**

71 The general rule is that the other instrument applies. The time factor (whether the other instrument is prior to the Hague Convention or not) is irrelevant. Except where it prevails under paragraphs 2 and 4, the Hague Convention only applies where the Parties to the other instrument make a declaration to this effect.

72 Paragraph 1 only covers situations where all Hague States with a relevant connection to the case are *also* instrument States. This is not explicitly said, but follows from the "Except as provided in paragraph(s) 2" at the beginning of the paragraph.

Paragraph 2: Priority of the Hague Convention

> **"2. This Convention shall prevail over any international instrument applicable in a Contracting State, whether concluded before or after this Convention, if the chosen court is situated, or a party is resident, in a Contracting State in which the instrument is not applicable."**

73 If there is a relevant connection of the case to a Hague State which is not also an instrument State, the Hague Convention has priority. The relevant connection is defined by either the residence of a party or the location of the chosen court.

74 Like paragraph 1, paragraph 2 applies irrespective of whether the other instrument is prior to the Hague Convention or not. This has two consequences:

a) Hague States which want to conclude (future) instruments will have the obligation, under the Hague Convention, to determine the scope of application of the future instrument in a way that, under the conditions of Article 23(2), gives priority to the Hague Convention, or to insert a disconnection clause in the new instrument.

b) In case of instruments which are "older" than the Hague Convention, paragraph 2 may lead to a conflict of two treaty obligations (see footnote 17 of the preliminary draft Convention). This conflict is solved by paragraph 3.

Paragraph 3: Respect for "older" treaty obligations

> **"[3. Notwithstanding paragraph 2, a Contracting State shall not be required to apply this Convention to the extent that to do so would be incompatible with obligations to a non-Contracting State under a treaty concluded prior to the adoption of the text of this Convention[, and in respect of which the Contracting State has made a declaration under this paragraph].]"**

Alternative version of paragraph 3:

> **"[3. Notwithstanding paragraph 2, a Contracting State shall not be required to apply this Convention to the extent that to do so would be incompatible with obligations to a non-Contracting State under a treaty which entered into force for that Contracting State prior to the date on which this Convention entered into force for that Contracting State[, and in respect of which the Contracting State has made a declaration under this paragraph].]"**

75 Paragraph three covers a rather rare situation which, however, as some delegations maintain, must be resolved: In a State which is Party both to the Hague Convention and an (older) international treaty, a court is confronted with a case with a relevant connection, in the sense of paragraph 2, to a Hague State, which is not also a treaty State. So under paragraph 2, the Hague Convention would apply. On the other hand, this court is obliged, under the "older" treaty, to apply that treaty, because there exists a relevant connection under the treaty (*e.g.* the residence or the nationality of a party) with a treaty State which is not also a Hague State. Under these circumstances, paragraph 3 provides that the court will not be obliged to violate the "older" treaty obligation by applying the Hague Convention. Thus, the "older" obligation is given priority.

76 There are two versions of paragraph 3 which reflect different options to define "older" treaty obligations. Under paragraph 3 in the main text, the relevant dates are defined once and for all in an "objective" way. The decisive factor is whether the treaty was concluded before or after the adoption of the Hague Convention. "Adoption" is the agreement of the States which took part in the drawing up of a Convention with its form and content. Unless the circumstances suggest otherwise, the act of adoption does not amount to consent to be bound by the Convention.[5] In case of this and other Hague Conventions, the adoption is the signing of the Final Act on the closing day of the Diplomatic Session.[6] The date of "conclusion", which is the relevant date for the other treaties in question, is, in case of a bilateral treaty, the date on which it is signed by both

[5] A. Aust, Modern Treaty Law and Practice, 2000, p. 66.
[6] See also Article 9 of the Vienna Convention on the Law of Treaties.

States. A multilateral treaty is generally regarded as having been concluded on signature of the Final Act (or other means by which it is adopted), or, if applicable, on the date the treaty is opened for signature, whichever is the later.[7] So the question whether the Hague Convention or the treaty applies would be answered for all States Parties to the Convention and a specific treaty in the same way because for each Convention, there would only be one single date of conclusion or adoption.

77 The alternative version of paragraph 3 relates to the actual entry into force of the treaty and the Hague Convention in the State concerned (where a court has to decide whether it gives priority to the Convention or the treaty). This may seem more "logical" under public international law (because it would really be the "older" obligation *of the State concerned* which prevails), but it may lead to confusion for practitioners in different Contracting States. They will not have a clear answer whether the Convention or the treaty will apply. In case of multilateral treaties, this question could be answered differently in each Contracting State which is also party to the treaty (because both the entry into force of the Hague Convention and of the treaty could be at different dates). In case of a multinational commercial contract which has to be assessed in relation to several conflicting multilateral treaties, this seems a daunting task.

78 Article 3 does not cover instruments of REIOs. As far as we can see, the only *existing* REIO-instruments are at present those of the European Community (Brussels I Regulation, European Enforcement Order Regulation). But because under Community law, it is not possible that some Community Member States join the Hague Convention and others do not, the question dealt with in paragraph 3 will never arise. Thus, Community instruments fall exclusively either under paragraph 1 ("internal case" of the Community) or under paragraph 2 (relevant connection with a non-EC–State). Because of that, it is not necessary to mention REIO-instruments in paragraph 3. But it would not harm either.

79 The bracketed language in paragraph 3 provides for a declaration system intended to add further clarity to the priority problem.

Paragraph 4: Special Rule for Recognition

> **"4. Notwithstanding paragraph 2, this Convention shall not restrict the application of an international instrument in force in a Contracting State, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State designated in an exclusive choice of court agreement. [However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.]"**

80 Paragraph 4 deals with the recognition and enforcement of judgments given in a Hague State by a court designated in an exclusive choice of court agreement. According to the first sentence of paragraph 4, such judgment may also be recognised under another instrument. As Article 9 of the Convention does not exclude this, this first part of paragraph 4 seems to be a non-rule. However, the bracketed part of paragraph 4 (last sentence) would make clear that the Convention prevails as to the extent of recognition and enforcement where the other instrument would be less favourable than the Convention.

81 Paragraph 4 does not deal with obligations under other international instruments *not* to recognise judgments given by a chosen court (*e.g.* because of the obligation to recognise an older judgment of another court which is inconsistent with the "Hague" judgment). These cases are covered by paragraphs 1-3:

[7] A. Aust (*supra* note 5), p. 66.

- If only instrument States are involved, the instrument would prevail (para. 1).
- If a Hague State which is not an instrument State is involved, the Hague Convention would prevail (para. 2).
- If there is an "older" treaty obligation versus a non-Hague-State not to recognise the "Hague" judgment, this obligation would prevail (para. 3).

Paragraph 5: Instruments on specific subject matters

> **"5. [Notwithstanding paragraphs 2 and 4, this Convention does not affect the ability of one or more Contracting States to apply or to enter into international instruments which, in relation to specific subject matters, govern jurisdiction or the recognition or enforcement of judgments, even if all States concerned are Parties to this Convention.][4]**
>
> **[4] If a declaration system of the kind envisaged in the revised Article 20 is adopted, this paragraph may not be necessary."**

82 Instruments on specific subject matters are covered by paragraphs 1-3. So once again, the following rules apply:

- If only instrument States are involved, the instrument would prevail (para. 1).
- If a Hague State which is not an instrument State is involved, the Hague Convention would prevail (para. 2).
- If there is an "older" treaty obligation versus a non-Hague-State (in particular exclusive jurisdiction over matters covered by the instrument), this obligation would prevail (para. 3).

83 Paragraph 5 would change these rules for *future* instruments on specific subject matters. Under paragraph 2, the Hague Convention would, in case of conflict, prevail over the instrument if a Hague State which is not Party to the instrument, is involved in the case. Contrary to that, paragraph 5 would lead to an absolute priority of future instruments on specific subject matters. There are precedents for such a rule, for instance in Article 57 of the Lugano Convention. However, at least in theory, such rule could undermine the Convention framework. Therefore, this provision is in square brackets. As expressed in the footnote, paragraph 5 could be seen as unnecessary if a declaration system is adopted. In this case, Contracting States of the Hague Convention would be free to become Parties to future instruments on specific matters. Where such instruments contain rules inconsistent with the Hague Convention (*e.g.* on exclusive jurisdiction), the States concerned could make a declaration under the proposed Article 20, which would lead to the non-application of the Hague Convention to that matter. So no conflict would exist. Instruments would in this context be treated in the same way as (new) national rules of Hague Contracting States on exclusive jurisdiction.

84 In the French version produced by the Permanent Bureau, as a consequential change to drafting decisions taken by the Drafting Committee relating to the words "conclusion", "adoption" and "entry into force" in Article 23, the word "*conclure*" was replaced by "*se joindre à*" in order to match the English, non-legal "enter into" (as opposed to the above-mentioned terms of art which are used in a different context in that Article). As explained for paragraph 3, there is a policy choice to be made as to whether the relevant moment for defining which treaty is "older' should be objective (i.e. one date per Convention) or subjective (focusing on each State concerned separately). Therefore, two different versions are proposed for paragraph 3. Concerning paragraph 5, the same choice implied in the words "enter into" (which could mean both) would have to be made if more precise language along the lines just mentioned were desired, but no drafting suggestions were discussed at the meeting.

Paragraph 6: Definition of "international instrument"

> "6. For the purposes of this Article, "international instrument" means an international treaty or rules made by an international organisation under an international treaty."

85 This definition is also contained in Article 23 of the preliminary draft Convention. It should be noted that paragraph 6 is not relevant for the question of "prior treaty obligations" under paragraph 3.

8. Insurance matters

86 At an informal preparatory meeting held in Brussels on 1 and 2 February 2005 (see above p. 4), the group had looked into some problems concerning insurance matters. Concerns had been raised at the last Special Commission meeting that from the text it should be clear that litigation arising out of a contract for insurance or reinsurance would not be excluded from the scope of the Convention if the insured risk was a matter excluded under Article 2(2) (see para. 47 of the Explanatory Report, Prel. Doc. No 26). There were similar concerns raised about clarifying that Article 15 could not be used to refuse recognition and enforcement of the full award where a judgment ordered an insurer or reinsurer to reimburse punitive or excessive damage on the basis of a contract of insurance or reinsurance, *i.e.* where these damages constituted the insured risk (see para. 204 of the Explanatory Report, Prel. Doc. No 26). The Drafting Committee did not have time to examine these earlier drafts at its meeting from 18-20 April but requested that they should be included in this Report for the sake of information:

Option 1:
Two paragraphs (x1, x2 or x3 plus y) to be added at the end of Article 15:

Article 15

(x1) The fact that a judgment requires an insurer to indemnify the insured against payment of non-compensatory damages or excessive compensatory damages shall not under any circumstances permit a court of a Contracting State to limit its recognition or enforcement.

(x2) The preceding paragraphs shall not apply to a judgment rendered pursuant to a contract of insurance to the extent that the judgment requires the insurer to indemnify the insured against payment of non-compensatory damages or excessive compensatory damages.

(x3) For the purpose of this Article, damages shall not be considered as non-compensatory or grossly excessive if they have been awarded to indemnify the insured under the terms of a contract of insurance.

(y) For the purpose of the preceding paragraph, insurance includes reinsurance.

Option 2:
"Horizontal" separate article clarifying insurance/reinsurance issues throughout the Convention

Article Y (on insurance contracts)

[(1) Insurance is not excluded from the scope of this Convention merely because it relates to any of the **matters excluded under**[8] Article 2 paragraph 2.]

(2) Recognition and enforcement of a judgment requiring an insurer to indemnify the insured pursuant to a contract of insurance shall not, in whole or in part, be refused solely because the damages indemnified could be characterised as non-compensatory or grossly excessive.

[(3) Article 15 does not apply to a judgment requiring an insurer to indemnify the insured pursuant to a contract of insurance.]

(4) For the purpose of this Article, insurance includes reinsurance.

N.B. It has to be clarified whether reference should also be made to the indemnification of policy-holders and beneficiaries.

[8] Note by the Permanent Bureau: Following the general decision of the Drafting Committee to replace the words "referred to in" by "excluded under" in the present document, this change was implemented by the Permanent Bureau in Article Y(1).

A N N E X

IP-RELATED DRAFTING ISSUES

Article 2(2) *k)* – replace with the following paragraphs:

k) **validity of intellectual property rights other than copyright or related rights;**

[*k* bis*)* **infringement of intellectual property rights other than copyright or related rights[, except where infringement proceedings are or could have been brought pursuant to a contract for the transfer or use of such rights**];] or

Article 2(3) – amend as follows:

Notwithstanding paragraph 2, proceedings are not excluded from the scope of the Convention where a matter **excluded under** that paragraph arises merely as an incidental question and not as an object of the proceedings.

In particular, proceedings are not excluded from the scope of the Convention merely because a matter excluded under paragraph 2 arises by way of defence.

Article 6 ***Suspension of proceedings in connection with incidental question***

[This Convention neither requires nor precludes the suspension of proceedings before the chosen court for such reasonable time as is necessary to allow another court to decide a matter excluded under Article 2, paragraph 2, which arises as an incidental question, in particular to allow the courts of the State under the law of which an intellectual property right arose to give a judgment on its validity.]

Article 10 *Incidental questions*

1. Where a matter **excluded under** Article 2, paragraph 2, arose as an incidental question, the ruling on that question shall not be recognised and enforced under this Convention.

PARTIES

Article 7 Obligations of a court not chosen

A court in a Contracting State other than that of the chosen court shall suspend or dismiss **proceedings to which an exclusive choice of court agreement applies** unless –

INCONSISTENT JUDGMENTS

Replace Article 9(1) *f)* with the following:

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

g) **the judgment is inconsistent with an earlier judgment between the same parties and involving the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State[under an international agreement], and provided that:**

i) **in the case of a judgment given in a Contracting State, it was not given in contravention of this Convention;**

ii) **in the case of a judgment given in a non-Contracting State, [it would not have been given in contravention of this Convention if the State of origin had been a Contracting State].**

Article 11 Judgments in contravention of exclusive choice of court agreements

[Where the parties are bound by an exclusive choice of court agreement, the courts of a Contracting State shall not recognise or enforce a judgment from a non-Contracting State if the judgment would have been given[1] in contravention of the Convention if the State of origin had been a Contracting State.][2]

[1] Note by the Permanent Bureau: It was pointed out after the meeting that for the sake of consistency with the language used in Article 9(1) *g)*, the word "given", which was missing in the draft distributed to participants, would have to be added here in the English version.

[2] This provision (in common with all the provisions of this Convention) is subject to Article 23.

Article 15 Damages

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

If paragraph 2 of Article 15 is deleted, Article 15 could be redrafted as follows:[3]

1. A **part of a** judgment which awards non-compensatory damages, including exemplary or punitive damages, shall be recognised and enforced **if, and** to the extent that**,** a court in the requested State could have awarded similar or comparable damages.

2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

3. Nothing in this **Article** shall preclude the court addressed from recognising and enforcing the judgment under its law for an amount up to the full amount of the damages awarded by the court of origin.

[3] This text is limited to the necessary drafting consequences of omitting paragraph 2, and does not reflect the possibility of further policy proposals consequential on such a deletion.

THE TIME FACTOR

Article 16* bis *Transitional provisions

1. This Convention shall apply to exclusive choice of court agreements concluded after its entry into force in the State of the chosen court.

2. This Convention shall not apply to proceedings instituted before the Convention entered into force in the State of the court seised.

Article 18 Limitation of jurisdiction

Upon ratification, acceptance, approval or accession, a State may declare that its courts may refuse to determine disputes **to which an exclusive choice of court agreement applies** if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute**[either at the time the agreement is concluded or at the time of commencement of the proceedings]**.

Article 19 Limitation of recognition and enforcement

Upon ratification, acceptance, approval or accession, a State may declare that its courts may refuse to recognise or enforce a judgment of a court in another Contracting State if**, at the time the agreement is concluded,** the parties are resident in the requested State and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, are connected only with the requested State.

Article 20 Declarations with respect to specific matters

1. A State may declare that it will not apply the Convention to a specific matter other than those excluded under[4] Article 2, paragraph 2[which falls within the exclusive jurisdiction of the courts of that State].

2. With regard to that matter, the Convention shall not apply in other Contracting States where an exclusive choice of court agreement designates a court of the State that made the declaration.

3. The declaration may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

4. The declaration shall be notified to the Depositary.

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

6. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the Depositary. Such a declaration shall not apply to exclusive choice of court agreements concluded before it takes effect.[5]

[4] Note by the Permanent Bureau: Due to an omission, in Article 20(1) the words "referred to in" were retained in the documents in English which the participants took home from the meeting. Following the general decision of the Drafting Committee to make this change in the Articles concerned, in this document, the words "referred to in" have therefore been replaced by "excluded under" in Article 20(1).

[5] Provisions in relation to the making of declarations have been included in this draft for ease of reference. When the final clauses are drafted, these provisions can be removed from Article 20 and included in the general Article 29 dealing with declarations.

Article 23 Relationship with other international instruments

1. Except as provided in paragraphs 2 and 4, this Convention shall not affect any international instrument in force in a Contracting State, whether concluded before or after this Convention, unless a contrary declaration is made by the Contracting States bound by such instrument.

2. This Convention shall prevail over any international instrument applicable in a Contracting State, whether concluded before or after this Convention, if the chosen court is situated, or a party is resident, in a Contracting State in which the instrument is not applicable.

[3. Notwithstanding paragraph 2, a Contracting State shall not be required to apply this Convention to the extent that to do so would be incompatible with obligations to a non-Contracting State under a treaty concluded prior to the adoption of the text of this Convention[, and in respect of which the Contracting State has made a declaration under this paragraph].]

4. Notwithstanding paragraph 2, this Convention shall not restrict the application of an international instrument in force in a Contracting State, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State designated in an exclusive choice of court agreement. [However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.]

5. [Notwithstanding paragraphs 2 and 4, this Convention does not affect the ability of one or more Contracting States to apply or to enter into international instruments which, in relation to specific subject matters, govern jurisdiction or the recognition or enforcement of judgments, even if all States concerned are Parties to this Convention.][6]

6. For the purposes of this Article, "international instrument" means an international treaty or rules made by an international organisation under an international treaty.

Alternative version of paragraph 3:

[3. Notwithstanding paragraph 2, a Contracting State shall not be required to apply this Convention to the extent that to do so would be incompatible with obligations to a non-Contracting State under a treaty which entered into force for that Contracting State prior to the date on which this Convention entered into force for that Contracting State[, and in respect of which the Contracting State has made a declaration under this paragraph].]

[6] If a declaration system of the kind envisaged in the revised Article 20 is adopted, this paragraph may not be necessary.