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LES CONVENTIONS D'ELECTION DE FOR DANS LE CONTENTIEUX INTERNATIONAL : LEUR UTILISATION ET LES PROBLEMES JURIDIQUES QU'ELLES SOULEVENT DANS LE CADRE DU TEXTE PROVISOIRE

établi par Avril D. Haines
pour le Bureau Permanent

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CHOICE OF COURT AGREEMENTS IN INTERNATIONAL LITIGATION: THEIR USE AND LEGAL PROBLEMS TO WHICH THEY GIVE RISE IN THE CONTEXT OF THE INTERIM TEXT

submitted by Avril D. Haines
for the Permanent Bureau

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à l'intention de la Commission I
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1 This Note is designed to assist in assessing the potential impact of Article 4 of the Interim Text[1] on choice of court agreements, in light of current practice. At this point, it is only possible to report on a preliminary survey of the treatment of choice of court clauses in international litigation. Nevertheless, based on this initial research it is fair to say that choice of court clauses are widely utilised in several commercial industries[2] and that there are a number of difficulties experienced in practice with regard to the enforcement of choice of court clauses in contracts, even within the business to business (B2B) context.[3] These areas are described below indicating the potential value of a Convention in contributing to their resolution as well as certain issues which need to be addressed.[4]

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[1] The Interim Text that was produced during the June 2001 Diplomatic Session is available on the Hague Conference's website at www.hcch.net.

[2] Choice of court clauses are commonly included in insurance contracts, cross-border distributorships, loan contracts, guarantees and international commercial agreements generally. This is borne out by the case law that follows in this Note and by statements made to the Permanent Bureau by lawyers in the various industries. In addition, there is scholarship reflecting this fact. *See e.g.,* Richard Garnett, *The Enforcement of Jurisdiction Clauses in Australia*, 21(I) UNSW L. J. 1, 2 (1998); William W. Park, *Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 19 (1998). Jurisdiction clauses are also widely used in contracts for the carriage of goods by sea. *See e.g.,* Meir Yifrach, *An Overview of Choice of Forum Clauses Under Israeli Law,* [July 1999] J. BUS. L. 389, 389 (1999) (noting that "[m]ost, if not all, marine bills of lading found in Israel contain a foreign jurisdiction clause."); Peter Wetterstein, *Jurisdiction and Conflict of Laws Under the New Rules on Carriage of Goods by Sea*, *in* NEW CARRIAGE OF GOODS BY SEA: THE NORDIC APPROACH INCLUDING COMPARISONS WITH SOME OTHER JURISDICTIONS 328 (1997). Choice of court provisions are utilized in contracts entered into electronically. *See* Gabrielle Kaufmann-Kohler, *Choice of Court and Choice of Law Clauses in Electronic Contracts in* ASPECTS JURIDIQUES DU COMMERCE ÉLECTRONIQUE, ZURICH (SCHULTHESS) 2000, pp. 19-47 (2001).

[3] This Note focuses on B2B choice of court clauses, since Article 7 deals with consumer contracts and thus the scope of Article 4 is relegated to B2B.

[4] A Convention dealing with choice of court agreements could offer a viable alternative to arbitration clauses in situations in which a court may be a preferable forum within which to resolve a particular dispute. Reasons why a choice of court clause might be preferable to parties in some circumstances include: 1) A full appeal on the merits is generally available in court litigation; 2) In contrast to courts of law, there are no formal rules of evidence in arbitration. For a thorough discussion, *see* C. Brower & A.C. Smutny, *Arbitration Agreements Versus Forum Selection Clauses: Legal and Practical Considerations, in* INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION 37, 48-49 (J. Goldsmith ed. 1996) [hereinafter Brower & Smutny]. 3) The availability of discovery is generally more limited in the context of arbitration and is largely made available at the discretion of the arbitrators. This may lead parties to prefer a court of law where, for example, they anticipate needing such rules in the factual development of a case. *see* Brower & Smutny 46-48. 4) Judges are sometimes viewed as more predictable and more likely to follow precedent than arbitrators. This can be attributed at least partially to the fact that arbitrators are often in the position of applying a body of law that is unfamiliar to some if not all of the arbitrators in a particular dispute. *See also* William W. Park, *Illusion and Reality in International Forum Selection,* 30 TEX. INT'L L. J. 135, 137 (1995) (stating that "an arbitration clause, at least to the minds of some lawyers, will suffer from the alleged tendency of certain arbitrators to "split the difference" between the parties rather than to render a principled decision. Almost every practitioner has a horror story about some arbitrator who made good on Solomon's threat to cut the baby in two."). With regard to predictability, consider for example, Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52 (1995), in which the Court upheld an arbitral award for punitive damages notwithstanding the fact that the relevant choice-of-law provision called for the application of New York law which prohibits arbitrators from awarding punitive damages. 5) Arbitration is not always cheaper and faster than litigation in a court of law. In some cases, the flexibility of arbitration may lead to greater delays and costs than litigation. In addition, the parties to an agreement may only foresee the need for dispute resolution in situations requiring the enforcement of clear obligations. *See* David Goddard, *Rethinking the Hague Judgments Convention: A Pacific Perspective,* 3 Y.B. OF PRIVATE INT'L LAW 27, 39-40 (2001) ("there are many situations in which claims are brought to enforce clear obligations – to pay for goods, for example, or to return confidential information following the expiry of a contract – where there is no dispute of substance between the parties. There is no point in incurring the cost and delay involved in setting up an arbitral tribunal, then taking steps to enforce the award. The plaintiff will want to go to court and get an enforceable judgment, using a low cost summary procedure."). 6) Unless arbitration takes place in a State that provides for the joinder of related arbitral proceedings, there is no forced consolidation of related arbitrations. 7) Interim relief is not predictably available in arbitral proceedings. *See* William W. Park, INTERNATIONAL FORUM SELECTION 103 (1995); Brower & Smutny 39-41. 8) Arbitral awards are private, while court

WHEN THERE IS NO CONNECTION BETWEEN THE DISPUTE OR THE DEFENDANT AND THE CHOSEN FORUM

2 In some cases a chosen court may refuse to assert jurisdiction on the ground that the forum has an insufficient connection to the parties or the dispute. For example, Swedish courts have the discretion to dismiss a action when the connection with Sweden is weak.[5] This is also true in Switzerland. Under Swiss law, even if a court in Switzerland is the chosen court in a valid forum selection clause, the court may decline to accept the case, except when one party has its domicile, ordinary residence or business establishment in the agreed upon Canton or when Swiss law governs the matter of dispute.[6] In some cases the court may be restrained by statutory jurisdictional limits or constitutional law. However, generally courts are amenable to the assertion of jurisdiction over a defendant when he or she has voluntarily submitted to such jurisdiction and frequently consider a choice of court agreement to be evidence of such a submission to the jurisdiction of the forum chosen in the agreement. For example, Article 26 of the Republic of Korea's Code of Civil Procedure asserts that a Korean court has jurisdiction when the parties have consented to that court's jurisdiction, provided that consent was freely entered into and is evidenced in writing.[7]

3 Nevertheless, there are at least some jurisdictions that do not consider a choice of court agreement to be evidence of a defendant's submission to the jurisdiction of the chosen

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decisions are a matter of public record. There is some public benefit to the transparent development of law and this provides an additional reason for governments to encourage the litigation of issues in courts when it makes sense for the parties to do so.

[5] *See* J.J. Fawcett, *General Report, in* DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW 18-19 (1995) [hereinafter DECLINING JURISDICTION]. Danish courts when applying their national law to a forum selection clause, will not enforce a clause that directs the parties to a jurisdiction that has no connection to the dispute. *See* Philip S. Thorsen et al., *Forum Selection Agreements Under Danish Civil Law, in* INTERNATIONAL JUDICIAL ASSISTANCE IN CIVIL MATTERS 77, 78 (Suzanne Rodriguez & Bertrand Prell eds., 1999). Of course it should be noted that Member States of the European Union are obliged under the Brussels Convention to accept jurisdiction as the chosen court, but this only applies to situations in which one of the parties to the dispute is domiciled within a Member State of the European Community. *See* Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. L 299/32, as amended by 1978 O.J. L 304/1, 1982 O.J. L 388/1, 1989 O.J. L 285/1, 1997 O.J. C 015/1, 1998 O.J. C 027/1, 2000 O.J. C 160/1, 2001 O.J. L 012/1 [hereinafter Brussels Convention] *available at* http://europa.eu.int/eur-lex/en/lif/dat/1968/en_468A0927_01.html. New York abolished a law that only permitted actions against foreign corporations when there was a connection between the defendant or the dispute and the forum (NY Bus. Cor. Law s. 1314 (b)(1)-(5) and NY Banking Law s. 200(b)). Since then, New York enacted a forum selection statute mitigating this requirement (Gen Oblig. Law s. 5-1402). For a discussion of the New York Forum Selection Statute, *see* David Bender, *Choice of Law and Choice of Forum*, 600 Prac. L. Inst. 429, 467-469 (2000). On the other hand, France, for example, does not require there to be a link between the chosen court and the dispute or the defendant in an international contract with a choice of court clause. Cass. com. 19 dec. 1978, *Clunet* 1979.366, n. Gaudemet-Tallon, *Rev. Crit*. 1979.617, n. Huet (In the case of two French parties that chose a Swiss forum, the court considered the choice of court agreement to be valid) However, this has been a controversial point in France with regard to the operation of Article 17 of the Brussels and Lugano Conventions. *See* Christophe Bernasconi & Alexandra Gerber, *Der räumlich-persönliche Anwendungsbereich des Lugano-Übereinkommens*, 3 Revue suisse de droit international et de droit européen 1/1993, p.39, 60.

[6] Swiss Private International Law Statute, art. 5(3). It should be noted that Swiss courts are obliged under the Lugano Convention to accept jurisdiction as the chosen court, but this only applies to situations in which one of the parties to the dispute is domiciled in a Contracting State to the Lugano Convention. Thus, if a company from Japan and a company from the United States have a forum selection clause in their contract identifying a Swiss court as their chosen forum, the Lugano rules do not apply and instead, a Swiss court would apply Swiss law when addressing the enforceability of the choice of court provision.

[7] In B2B cases a written forum selection clause in Germany gives the court selected jurisdiction to hear the case. *See* § 38 para. (1) Zivilprozessordnung (ZPO). The majority of Australian state and federal rules recognise submission to the jurisdiction by way of a choice of court agreement as a basis for service on a foreign defendant outside the forum. *See* Richard Garnett, *The Enforcement of Jurisdiction Clauses in Australia,* 21(1) UNSW L. J. 1, 2 (1998).

forum. For example, in *McRae v. J.D./M.D*,[8] a Florida court in the United States held that a jurisdiction clause was not sufficient to create personal jurisdiction over an out-of-state defendant because Florida's long-arm statute did not provide for the creation of jurisdiction by contractual submission.[9]

4 In the alternative, a court may exercise jurisdiction over a case in violation of a choice of court clause if it determines that the chosen foreign court's lack of connection to the dispute and the parties is enough to justify ignoring an otherwise valid clause. For example, in the Republic of Korea, the Supreme Court refused to enforce a choice of court agreement between two Korean companies which conferred jurisdiction on the New York courts.[10] The Supreme Court of Korea supported the lower court's decision to go ahead with the case, notwithstanding the choice of court agreement, since there was no "reasonable connection"[11] between the dispute and the New York court.[12] The court went on to add that any choice of court agreement may be found invalid if it is unduly unreasonable or unfair.

5 Being able to bring suit in a forum which is unconnected to the dispute or the defendant may be of importance to parties who prefer to choose a truly neutral forum for disputes arising out of their contractual relationship[13] or who wish to take advantage of the special expertise of the judges in a particular court.[14] The current draft of article 4 of the Convention would allow the courts of a State Party to assert jurisdiction over cases in which

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[8] 511 So.2d 540 (Fla. Sup. Crt 1987). Although the parties to this dispute were from different states within the United States of America, the same reasoning would apply with regard to a foreign defendant. There was a similar decision in Australia. *See* Mondial Trading Pty Ltd v. Interocean Marine Transport Inc. (1985) 60 ALJR 277, 65 ALR 155 (Dawson J, High Court of Australia). In most jurisdictions the law has been amended, however, a choice of court agreement by itself is not sufficient to authorise service on a defendant outside Australia in the High Court, Tasmania, Western Australia and the Australian Capital Territory.

[9] *Compare with* Vanier v. Ponsoldt, Supreme Court of Kansas, No. 66276, May 22, 1992 (holding that by incorporating a forum selection clause into their contract, the parties effectively waived any challenge to personal jurisdiction in the chosen forum). *See also* National Union Fire Ins. Co. of Pittsburgh, PA v. Williams, 637 N.Y.S.2d 36, 38-39 (1996) (finding that the contractual selection of the forum alone "affords a sound basis for the exercise of personal jurisdiction over a foreign defendant and renders the designated forum convenient as a matter of law.").

[10] 96da20093; date of sentence: Sept. 9, 1997.

[11] It may be argued that the bracketed language in Article 4(4) of the Interim Text provides another court, other than the chosen one, with the means to consider the reasonableness of the clause when questioning its substantive validity, however different States define substantive validity in different ways. *See* the Interim Text, art. 4(4) ("[t]he substantive validity of an agreement conferring jurisdiction shall be determined in accordance with the applicable law as designated by the choice of law rules of the forum."). This question is discussed more fully *infra* para. 14-16.

[12] Another similar example can be found in the United States. A U.S. Steel caster brought suit in both contract and tort against a German Steel manufacturer in U.S. federal court. The district court held that a choice of forum clause in the contract pointing to German courts was "unreasonable," since the evidence and the activities relating to the dispute were all in the United States. The federal appellate court subsequently upheld this decision. Copperweld Steel Co. v. Demag-Mannesmann-Bohler, 578 F.2d 953 (3rd Cir. 1978).

[13] In fact, William W. Park writes in his book on jurisdictional clauses that "[a] typical court-selecting jurisdiction clause in an international contract normally provides for the exclusive jurisdiction of courts in a country other than the residence of either party." WILLIAM W. PARK, INTERNATIONAL FORUM SELECTION 13-14 (1995).

[14] For example, financial institutions frequently include choice of court provisions in their contracts selecting English courts because of the expertise of commercial court judges in England. *See* Andrew Clark, *A Toast from Wall Street: Examines London's Pre-eminence in Bank Litigation,* FINANCIAL TIMES, Dec. 19, 1995, at 9.

there exists a valid choice of court provision, whether or not a nexus exists between the dispute or the defendant and the forum chosen. [15]

FORUM NON CONVENIENS

6 The doctrine of *forum non conveniens* permits courts to refuse to hear an action on the ground that it may be tried more conveniently or efficiently in an adequate alternate forum indicated by the requirements of justice.[16] In the context of a choice of forum clause, this doctrine may be used as a defence to the plaintiff bringing suit in the forum chosen by agreement between the parties. Nevertheless, a stay is rarely granted in these circumstances, because courts generally give strong weight to a choice of court agreement when evaluating the factors in determining an appropriate forum. For example, in Hong Kong *forum non conveniens* is a valid defense against the exercise of an exclusive choice of forum agreement. In such cases, the court puts the burden on the defendant to show that there is another available forum that is clearly more appropriate than the one chosen by the plaintiff.[17] Also, in the common law jurisdictions of Australia, England, New Zealand, Canada, Israel and the United States[18], in the mixed jurisdiction of Scotland[19] and in the civil law jurisdiction of Quebec,[20] the doctrine of *forum non conveniens* is generally an available defence[21] to the enforcement of a choice of court provision. [22]

7 Although most civil law jurisdictions do not have the general discretion to dismiss a case that the doctrine of *forum non conveniens* provides,[23] there are different variations on this same theme.[24] Japan, for example, has a parallel doctrine known as the "special

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[15] Of course this presumes that the choice of court agreement is valid, which the Korean court or others may dispute in light of the lack of connection between the dispute or the defendants and the chosen forum. Nevertheless, the Pocar-Nygh Report takes care of this possibility by stating firmly that "[t]here is no requirement in Article 4 that the forum chosen have any connection with either of the parties, the subject matter of the dispute or the applicable law." The Report on the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters by Peter Nygh and Fausto Pocar, Preliminary Document No. 11 of August 2000, p. 43 [hereinafter POCAR NYGH REPORT].

[16] The doctrine of forum non conveniens, which originated in the mixed system of Scotland, is intended to serve a variety of public interest factors including the avoidance of forum shopping, administrative difficulties due to court congestion; interest in having localised controversies adjudicated locally; interest in having diversity cases tried in a forum familiar with the law that governs the dispute; and the avoidance of unnecessary problems involving conflicts of law. The doctrine has been adopted gradually in common law legal systems. *See generally* J.J. Fawcett, *General Report, in* DECLINING JURISDICTION 10-26.

[17] Yu Lap Man v. Good First Investment Ltd. (1998) HKLRD (Yrbk) 104; T & K Electronics Ltd. v. Tai Ping Insurance Co. Ltd. (1998) 1HKLRD 172.

[18] It is interesting to note that in the United States a federal appellate court recently refused to review the denial of a *forum non conveniens* motion on an interlocutory basis, thus leaving open the possibility that the appellate court would, after a judgment was rendered by the trial court, overturn the lower court's decision and ignore the choice of court clause by applying *forum non conveniens. See* United States Fidelity and Guaranty Co. v. Braspetro Oil Services Co., 199 F.3d 94 (2d Cir. 1999).

[19] For a history of the origin of the doctrine of *forum non conveniens* in Scotland and its application therein, *see* Paul Beaumont, *Great Britain: Forum Non Conveniens*, in DECLINING JURISDICTION 207-221.

[20] Article 3135 of the Civil Code of Quebec codifies *forum non conveniens:* "Even though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide." It is worth noting, however, that the judicial system in Quebec is based on a common law tradition.

[21] By contrast, New York state law does not allow *forum non conveniens* to be used as a defence to a valid forum selection clause if the parties have chosen New York law as the applicable law and have consented to jurisdiction pursuant to §5-1402 of the General Obligations Law. N.Y. C.P.L.R. §327(b) (McKinney 1990).

[22] *See generally* J.J. Fawcett, *General Report, in* DECLINING JURISDICTION 10-21.

[23] For example, France, Belgium, Germany, Switzerland, Italy, Greece, Finland and Argentina do not have the doctrine of *forum non conveniens.*

[24] *See* J.J. Fawcett, *General Report, in* DECLINING JURISDICTION 24-27 (listing a variety of "*forum non conveniens* substitutes" in civil law countries).

circumstances" consideration which allows a Japanese court to dismiss an action if taking jurisdiction is found to be contrary to the principles of justice in consideration of the special circumstances of an individual case.[25] The Convention as currently drafted does not allow for the possibility of applying *forum non conveniens* in situations in which there exists an exclusive choice of court clause.[26]

IDENTIFYING THE SCOPE OF THE CHOICE OF COURT CLAUSE

8 Some courts have held that non-contractual claims arising out of a contractual relationship between the parties, are nevertheless separate from the contract and thus the choice of court agreement does not apply to these claims.[27] A clever plaintiff can thereby avoid a choice of court clause in a contract by pleading alternate non-contractual theories. This scenario can result in inconsistent decisions resulting from overlapping issues being tried in different fora at a considerable expense to the parties involved, not to mention a waste of judicial resources. One example of this approach can be found in the United States.[28] Nevertheless this is not a simple issue. There may also be situations in which States or parties would prefer that related claims are not brought under the auspices of the forum selection clause.[29] This question is not currently addressed in the Interim Text.[30]

EXCLUSIVITY

9 Critical to the effective functioning of a choice of court provision is the assurance that courts not selected by the agreement will issue a stay of litigation inconsistent with the clause. In the process of determining whether or not to grant a stay, most countries' courts draw a distinction between exclusive and non-exclusive jurisdiction clauses, requiring strong

[25] Apparently this doctrine can be applied when there is a choice of court clause, although it is unclear what the result would be in such a case. For a thorough discussion of this doctrine and other related aspects of Japanese law *see* Masato Dogauchi, *The Hague Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters from the Perspective of Japan,* Japanese Journal of Private International Law, No.3 (2001) (forthcoming).

[26] Article 22 of the Interim Text, which delineates exceptional circumstances for declining jurisdiction and is in essence the Convention's substitute for the doctrine of *forum non conveniens*, explicitly notes that it only applies when "the jurisdiction of the court seised is *not* founded on an exclusive choice of court agreement valid under Article 4 …."

[27] This issue has also arisen in the context of enforcing arbitration agreements. *See* Richard Garnett, *Enforcing International Arbitration Agreements in Australia*, 2 Commercial Dispute Resolution J. 88, 94-6 (1995).

[28] Although the vast majority of courts have applied forum selection clauses broadly in the U.S., there are exceptions. *See* Morgan Trailer Mfg. Co. v. Hydraroll, Ltd., et al., 759 A.2d 926, 931 (2000) (holding that a forum selection clause did not apply to distributor's non-contract claims against the manufacturer, in which the distributor alleged tortious interference with the employment relationship, misappropriation of trade secrets, tortious interference with customers, unfair competition, conspiracy, and punitive damages because they did not involve the sale of products upon which the contract was based); Jacobson v. Mailboxes, Etc. U.S.A., Inc., 419 Mass. 572 (1995) (declining to apply the choice of court clause to wrongs allegedly committed before the parties entered into the agreement).

[29] For example, it may be appropriate to delineate between contractual claims between the parties and claims that may be brought against a subsidiary in relation to the contract. This could easily be done by asserting that a forum selection clause can only be enforced against the signatories to the agreement.

[30] The Report adjoining the Convention could be helpful with regard to this issue, along with carefully worded model clauses.

cause for not granting a stay when the clause is exclusive.[31] However, the different methods used by various States in their interpretation of the exclusivity of a forum selection clause vary and can cause considerable confusion for foreign litigants. Many courts will assume that a clause is permissive unless the clause states explicitly that it is exclusive.[32] For example an Australian court considering an application for a stay on the basis of a clause stating that "… this agreement shall be construed according to the laws of England … and shall be deemed to constitute a submission to the High Court of Justice therein for the determination of any dispute or difference arising thereunder" found the clause to be non-exclusive and proceeded to hear the case. [33] In the United States, as in Australia, federal courts construe forum selection clauses as permissive unless the clause explicitly states that it is "exclusive." For example, the eleventh circuit held that a forum selection clause stating that "the place of jurisdiction is Sao Paulo/Brazil" was not clearly exclusive and therefore declined to enforce it.[34] In Hong Kong, even the use of the word "exclusive" in the clause is only indicative and not conclusive.[35] Other jurisdictions, such as France,[36] take the opposite position that a

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[31] For example, in Israel an application to stay an action before the court which has been filed in violation of a forum selection clause will probably not be granted if the choice of court clause is non-exclusive; however, if the clause is exclusive, the plaintiff must "substantiate a good or strong cause" which would justify bringing suit outside of the exclusively selected forum. Meir Yifrach, *An Overview of Choice of Forum Clauses Under Israeli Law,* [July 1999] J. BUS. L. 389, 390 (1999).

[32] This is not the case in most of Europe. Under Article 17 of both the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 and the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1988, if parties to a contract have agreed to litigate disputes in a Contracting State of either of these Conventions, that State's courts shall have exclusive jurisdiction. *See also* The Brussels Regulation, which explicitly presumes a clause to be exclusive. Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, O.J. L 12/1, art. 23(1) (December 22, 2000) [hereinafter Brussels Regulation] (stating that "[s]uch jurisdiction shall be exclusive unless the parties have agreed otherwise."). It is important to note that this provision only applies to forum selection clauses that stipulate the jurisdiction of a Contracting State and thus if an English court were to encounter a clause choosing a forum outside of a Contracting State to the Brussels or Lugano Conventions, English common law principles would be applied. English common law principles with regard to this subject can be found in Sohio Supply Company v. Gatoil (USA) Inc. [1989] 1 Lloyd's Rep. 588 (stating that whether or not a jurisdiction clause is exclusive depends on its true construction and whether the clause obliges the parties to resort to the relevant jurisdiction, irrespective of whether the word "exclusive" is used). This is in fact the case that the Hong Kong court uses in its analysis, although the method of determining what the "true construction" of a clause is, differs somewhat. *See infra* footnote 35 and related text.

[33] Contractors Ltd v. MTE Control Gear Ltd. (1964) SASR 47. *See also* Green v. Australian Industrial Investment Corporation (1989) 90 ALR 500; Armitage Brick Ltd v. Thiess Contractors (unreported, Supreme Court of Queensland, Court of Appeal, 25 August 1992); Enzacor Technology v. Ko (unreported, Supreme Court of Victoria, Smith J., 22 March 1993); and more recently *TNT Shipping and Development v. QBE Insurance* in which the court held a clause in an insurance policy to be non-exclusive where it provided that "this insurance is subject to English jurisdiction." (Unreported, Supreme Court of New South Wales, Hunter J. 7 November 1994). *Cf.* Gem Plastics v. Satrex Maritime (unreported, Supreme Court of New South Wales, Rolfe J., 9 June 1995) (finding a choice of court clause in an insurance contract which provided that the "insurance is subject to South African jurisdiction" to be exclusive, but nevertheless rejecting the application for a stay on other grounds); FAI Insurance Co. v. Marine Mutual Protection and Indemnity Association (1996) 41 NSWLR 117 (finding that the forum selection clause in a contract of reinsurance between international insurers was exclusive).

[34] Citro Florida, Inc. v. Citrovale, SA, 760 F. 2d 1231 (11th Cir. 1985). *See also* Hull 753 Corp. v. Elbe Flugzeugwerke GmbH, 58 F. Supp. 2d 925 (N.D. Ill. 1999) (asserting jurisdiction over the case, the Court held that a clause which read: "The place of jurisdiction shall be Dresden" was permissive); Weiss v. La Suisse, 69 F. Supp. 2d 449 (S.D.N.Y. 1999) (asserting jurisdiction over the case, the Court held that a clause which read (when translated from French and German): that the policyholder has "the right to take any dispute between themselves and 'la Suisse' either before the judge of the competent court of their domicile in Switzerland or in front of the civil court in Lausanne" was permissive); Hartford Fire Insurance Company v. Novocargo USA Inc., 2001 WL 945276 (S.D.N.Y. 2001) (holding that a choice of court clause which stated that "[a]ny dispute arising under and in connection with this Bill of Lading shall be governed by German Law and determined by the courts of Bremen" was permissive and thus the case could be tried in New York).

[35] Yu Lap Man v. Good First Investment Ltd, [1998] HKLRD (Yrbk) 104 (Feb. 24, 1998) (noting that "[t]he question of whether a clause was exclusive was one of construction. It depended on whether on a true construction the clause obliged the parties to resort to a relevant jurisdiction, irrespective of whether the word "exclusive" was used; and whilst the surrounding circumstances could be considered, the negotiations or the subjective intention of the parties in construing a contract should not be considered.").

clause is exclusive unless it explicitly states that it is permissive. Finally, still other jurisdictions, such as Japan, do not take a presumptive position either way. While it might seem obvious that one should simply draft such a clause in as explicit a manner as possible, this is not as easy as one might imagine. Much of the litigation surrounding the interpretation of these clauses is based on different translations offered by the plaintiff and the defendant. Because of language barriers that exist between parties to an international agreement, this is particularly troublesome, creates uncertainty, delay and is expensive.[37]

10 An additional issue to be considered within the context of exclusivity is who carries the burden of proving that the clause is exclusive. In Israel, for example, it is up to the defendant seeking a stay of proceedings to convince the court that the forum selection clause is exclusive.[38] This may create additional and unpredictable expenses for an unwitting defendant who will be forced to litigate the question of exclusivity in order to get a stay granted. The Interim Text presumes that a clause is exclusive and by utilising this uniform approach, could reduce the amount of litigation over the exclusivity issue. In addition, model clauses could be drafted, as has been done in the case of arbitration.[39]

11 Even if a choice of court clause which directs that the dispute be brought in another jurisdiction has been determined by a court to be exclusive, that court will occasionally invalidate the clause for other reasons. While this is considered to be unusual in B2B contracts, the practice varies from country to country and can provide a basis for expensive litigation and delay in the proceedings.[40] There are a number of different doctrines dealing with the validity of a clause, which are discussed below, conceptually separated out into two categories: formal or procedural validity and substantive validity.

FORMAL VALIDITY

12 Choice of court clauses can be declared invalid on formal or procedural grounds. For example, in Switzerland, the Swiss Statute on Private International Law insists that choice of court clauses identify a particular court.[41] In Belgium, jurisdiction clauses in certain contracts

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[36] *See* Civ. 1re , 5 mars 1969, Rev. Crit. 70.546 n. Gaudemet-Tallon; Paris, 14 nov. 1975, Rev. Crit. 77.526 n. Alexandre.

[37] Richard Garnett argues, for example, that the distinction that Australian courts have drawn between exclusive and non-exclusive jurisdiction clauses has in fact reduced the effectiveness of such clauses, since requests for stays are almost always rejected in the case of a clause determined by the court to be non-exclusive. *See* Richard Garnett, *The Enforcement of Jurisdiction Clauses in Australia,* 21(1) UNSW L. J. 1, 2 (1998).

[38] Meir Yifrach, *An Overview of Choice of Forum Clauses Under Israeli Law,* [July 1999] J. BUS. L. 389, 390 (1999).

[39] *See e.g.,* United Nations' Commission on International Trade Law (UNCITRAL) model clauses, International Centre for Settlement of Investment Disputes (ICSID) model clauses, American Arbitration Association (AAA) model clauses, International Chamber of Commerce (ICC) model clauses, London Court of International Arbitration (LCIA) model clauses.

[40] This is especially true when the decision not to grant a stay cannot be appealed until a final judgment has been rendered. This is the situation, for example, in the United States. *See* Chasser v. Achille Lauro Lines, 844 F.2d 50 (2d Cir. 1988), *aff'd* Lauro Lines v. Chasser, 109 S.Ct. 1976 (1989) (holding that an interlocutory order denying defendant's motion to dismiss damages action on the basis of contractual forum selection clause was not immediately appealable under the collateral order doctrine).

[41] Swiss Private International Law Act, art. 5; *see* Andreas Bucher & Andrea Bonomi, Droit international privé, 2001, p.31, n° 117; IPRG, Internationales Privatrecht, edited by Paolo Michele Patocchi & Elliott Geisinger, article 5 n° 5, p. 83.

are invalid if not written in Dutch.[42] There are likely to be many other twists to national laws in different countries that may invalidate a choice of court clause, thereby frustrating the clear intentions of the parties involved. However, the Interim Text could resolve this problem, since paragraph 2 of Article 4 sets out the conditions which must be met for the formal validity of a choice of court agreement, thereby precluding the application of national law on the subject.[43]

13 Another area in which formal validity problems may arise is with regard to agreements concluded on-line, precluding the existence of traditional paper-based requirements such as "writing," "signature" and "original." For example, there is a lack of consistency that exists in Latin America with regard to legislation which determines when an electronic data message satisfies the conditions necessary to have reached an agreement. Colombia, for example, has enacted a law which tracks the United Nations' Commission on International Trade Law's (UNCITRAL's) Model Law on Electronic Commerce's functional equivalent approach[44] exactly, whereas Mexico's law provides simply that electronic data messages will only satisfy code writing requirements if "the data message or electronic means is (1) attributable to the obligated person and (2) accessible for subsequent reference."[45] Argentina and Brazil, on the other hand, have not yet enacted rules addressing the legal inter-changeability of data messages and traditional paper-based writings.[46] As a result it is simply not clear what legal effect will be given to electronic documents in these countries' courts. The Convention's language could resolve many such problems, since it clearly follows the UNCITRAL functional equivalent approach.[47]

SUBSTANTIVE VALIDITY

14 Choice of court clauses can be declared invalid for various reasons that come under the catch-all phrase of substantive validity, which presumably is anything not regarded as formal. The difficulty this presents is that what one country regards as substantive is not the same as another country's definition and thus this category becomes somewhat difficult to define.[48] For some States, issues of reasonableness may be included within this category, for others unfairness or laws that invalidate jurisdiction clauses in particular types of contracts are included. However, generally the phrase includes such issues as incapacity, mistake,

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[42] In *Elefanten Schuh v. Jacqmain* the European Court of Justice held that the arbeidshof, a Belgian court, was not entitled to hold a choice of court clause invalid on the grounds that it was not written in Flemish since Article 17 of the Brussels Convention established conditions relating to formal validity which were both necessary and sufficient. 1981 ECR 1671.

[43] The Pocar-Nygh Report states that paragraph 2 of Article 4 "sets out the conditions which must be met for the validity as to form of the agreement. They set out, in alternatives, conditions which are both minimum and maximum requirements and thus exclude the application of national law on the subject." POCAR NYGH REPORT 45.

[44] The "functional equivalent approach" is based on establishing for the purposes of using modern means of communications and storage of information, what is in fact a "functional equivalent" for paper-based concepts such as "writing," "signature" and "original." For a thorough description of the "functional equivalent" approach, *see* UNCITRAL's Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996): Introduction to the Model Law, The "functional-equivalent" approach 15-18 *available at* http://www.jus.uio.no/lm/un.electronic.commerce.model.law.1996/I_e.html.

[45] *See* Robert Kossick, *The Internet in Latin America: New Opportunities, Developments, and Challenges* 13 FLA. J. INT'L L. 263, 269 (Summer 2001) (citing Decreto por el que se Reforman y Adicionan Diversas Disposiciones del Código Civil para el Distrito Federal en Materia Comun y para Toda la República en Materia Federal, del Código Federal de Procedimientos Civiles, Del Código de Comercio, y de la Ley Federal de Protección al Consumidor, approved by the Comision de Comercio de la Camara de Diputados, Apr. 6, 2000, approved by the Pleno de la LVII Legislatura de la Camara de Diputados, Apr. 26, 2000, approved by the Mexican Senate, May 3, 2000 *at* http://www.natlaw.com/ecommerce/docs/e-commerce-iniciative-mexico.htm).

[46] *Id.* at 269.

[47] *See* Interim Text, art. 4(2)(a). Also, *see supra,* footnote 43 (quoting the POCAR NYGH REPORT).

[48] *See e.g.,* STEPHEN O'MALLEY AND ALEXANDER LAYTON, EUROPEAN CIVIL PRACTICE 568 (1989).

misrepresentation, fraud, and duress.[49] In essence, whenever the litigant claims that there is *in substance* no legally binding agreement upon the choice of court, the clause's substantive validity will be in question.

15 With regard to procedural or formal validity, national rules on contractual form can be replaced by those in the Convention, thereby producing greater uniformity with regard to enforcing choice of court clauses in international contracts. However this is generally not considered to be an option with regard to substantive law, as the Convention is not intended to affect substantive law and presumably should not be used to influence the way in which national courts approach these questions. Nevertheless, the Convention can provide a uniform rule as to which court has the competence to address particular issues and what law should be applied when doing so.[50] With regard to certain defences, it may be appropriate to ensure that only the chosen court, applying its own choice of law rules, should make a determination as to the validity of the clause. This may, for example, be true with regard to the doctrine described below as reasonableness. On the other hand, it is difficult to justify forcing a party to go to the chosen court to litigate, when he or she was the victim of fraud and entirely misled as to the nature or effect of the jurisdiction agreement, which is, as a result, null and void according to applicable national law in the court seised. The New York Convention[51] may offer a reasonable parallel that can be drawn upon with regard to this very difficult issue. Article II allows a court of a Contracting State to the New York Convention to take jurisdiction over a case despite the existence of an agreement to arbitrate only if the court seised "finds that the said agreement is null and void, inoperative or incapable of being performed."[52] The additional advantage of paralleling a Convention that has been widely applied for so many years is that it brings along with it case law that will restrict the scope of what might otherwise appear to be ambiguous wording. For example, issues such as "reasonableness" have not been interpreted to be contained within the phrase "null and void, inoperative or incapable of being performed."[53] Finally, with such wording included in the text, the adjoining report could make clear that any additional objections to the validity of the clause would have to be litigated in the chosen forum which would apply its own choice of law rules.

16 There is, in addition, the question raised at the June 2001 Diplomatic Session with regard to non-negotiated agreements in which the drafting party is a business with

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[49] In many cases, issues described here come under public policy, and as described in footnote 65, issues one might expect to come under public policy may fit under the doctrine of "unreasonable and unjust." In sum, these categories defy strict characterisation and must be dealt with in as clear a manner as possible within the context of the Convention.

[50] The Judgments Project is not intended to deal with choice of law, only with matters of jurisdiction and recognition and enforcement, nevertheless the option of having the Convention refer to the choice of law in this situation was raised during the June 2001 Diplomatic Session and thus it is mentioned here as a possibility. *See* the Interim Text, art. 4; Forum Clauses in B2B Contracts - Report from Informal Working Group, Working Document No. 28, for the Nineteenth Session (June 8, 2001).

[51] Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This Convention, commonly referred to as the New York Convention, provides for the recognition and enforcement of arbitral awards in over 125 countries around the world.

[52] Id. at art. 2.

[53] *See generally* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 154-158 (1981).

considerably greater bargaining power than the assenting party.[54] Examples of professionals and small non-profits purchasing software packages over the Internet with choice of court agreements pointing to distant forums were discussed. One possibility that was raised is to allow any court the opportunity to invalidate a choice of court clause on the grounds of unfairness, however, this could substantially reduce the usefulness of the Convention for businesses that require a fair measure of reliability in the enforcement of choice of court clauses, as it is very difficult to predict what various jurisdictions will determine to be "fair" and virtually impossible to define precisely what constitutes a "weaker business." On the other hand, some have argued that it is unreasonable to preclude a challenge on this basis in all courts. A middle ground might be to ensure that only the chosen court, applying its own choice of law rules, should make a determination as to the unfairness of the clause. What is clear is that this area requires substantially more work and will need to be discussed in future meetings.

Reasonableness / forum conveniens

17 Reasonableness and *forum conveniens* are relatively widespread doctrines utilised in many common law countries to invalidate choice of court clauses which have been determined to be exclusive and point to another jurisdiction. For example, English common law principles require that a stay of proceedings commenced in the forum be granted when there exists an exclusive foreign jurisdiction clause, unless the plaintiff is able to show a strong cause for not doing so.[55] Strong cause is evaluated according to a list of factors designed to address issues of convenience, efficiency and fairness.[56] These factors have on

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[54] Gustaf Möller, a justice of the Supreme Court of Finland, has explained that the Scandinavian Acts on Contracts, for example, all contain an article in § 36 which provides that a court may disregard a contract term if it finds it unreasonable for a party, usually the "weaker party." Justice Möller also noted that the article is applicable to choice of court clauses and arbitration clauses. In fact, both Finnish and Swedish courts have disregarded arbitration clauses as unreasonable in a B2B contract when applied against a small enterprise which was considered to be a weaker party. *See e.g.,* NJA 1979 s. 666 (in which the Swedish Supreme Court held that an arbitration clause in a particular B2B contract should be disregarded, since it deprived the economically weaker party in this case of the right to enforce his claim); HD 1996:27 (in which the Finnish Supreme Court held that an arbitration clause in a franchise agreement could be an unreasonable contract term, however, in this particular case, the agreement was found to be reasonable and thus enforceable). *See also* Gustaf Möller, *Om jömkning av skiljeavtal,* JFT 441-462 (1996)*;* LARS HEUMAN, SKILJEMANNARÄTT 122-133 (1999).

[55] *See* The El Amria, [1981] 2 Lloyd's Rep. 119.

[56] Mr. Justice Brandon formulated the principles by which strong cause is evaluated in The Eleftheria, [1969] 1 Lloyd's Rep. 237 and then restated them as Lord Justice Brandon at the Court of Appeal in The El Amria, [1981] 2 Lloyd's Rep. 119, 123,124. The factors are the following: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the Court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded:

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.

(b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.

(c) With what country either party is connected, and how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

occasion been used to justify the invalidation of a choice of court clause.[57]

18 Australian courts have on a number of occasions invalidated foreign exclusive jurisdiction clauses because of factors such as convenience and fairness. Two examples are particularly instructive.[58] In *Lewis Construction v. Tichauer*, an Australian company brought suit in the Supreme Court of Victoria against a French company for breach of contract in relation to the supply of a defective crane.[59] The contract between the parties contained an exclusive jurisdiction clause pointing to France and a choice of law provision pointing to French law. Nevertheless, the Australian court refused to grant a stay of the proceedings. The court reasoned that because the majority of the evidence was located in Australia, it would be more convenient to litigate the dispute in Australia and forcing the plaintiff to litigate in France would be a "positive injustice." In *Lep International v. Atlanttrafic Express Service*,[60] an Australian company brought suit in Australia against a United States company for breach of contract in relation to the damage of goods on a voyage from New York to Sydney. The contract between the parties contained an exclusive jurisdiction clause pointing to New York. Nevertheless, the Australian court refused to grant a stay of the proceedings. The court reasoned that since the evidence concerning the damage was located in Australia, it would be more convenient to litigate the dispute in Australia and the defendant was already involved in litigation within Australia. In more recent cases, the Australian courts appear to show greater respect for exclusive jurisdiction clauses,[61] however, there is clearly some risk involved in relying on the courts' practice with regard to choice of court clauses.

19 In the United States exclusive choice of court clauses are generally enforced in federal court,[62] however this is not the case in many state courts within the United States.[63] For example, in a recent case between an American distributor and a British manufacturer in

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[57] For example, *see* MC Pearl [1997], 1 Lloyd's Rep. 566.

[58] Another example worth mentioning is *Ramcorp v. DFC Financial Services* in which a stay was refused despite the existence of an exclusive choice of court clause pointing to the courts of New Zealand. (unreported, Supreme Court of New South Wales, Waddell CJ in Eq., 30 April 1990). The Australian court was persuaded by the plaintiff's argument that it would be denied a legitimate "juridical advantage" by being forced to sue in New Zealand because New Zealand had taken away its right to injunctive relief through legislative action.

[59] [1966] VR 341.

[60] [1987] 10 NSWLR 614.

[61] *See* CSP Computer Security Products v. Security Dynamics Technologies Inc., (unreported, Fed. Ct, Heerey J, 12 April 1996); Apscore International v. Grand Canyon Technologies, (unreported, Fed. Ct., Lethane J., 12 Dec. 1996); Stern v. National Australia Bank, [1996] 34 IPR 565.

[62] In M/S Bremen v. Zapata Off-Shore Co., the Supreme Court of the United States ruled that forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." 407 U.S. 1, 10 (1972). This decision was applied by the U.S. Supreme Court in Carnival Cruise Lines, Inc. v. Shute, which enforced a choice of court clause as between two passengers and a cruise line which appeared on the cruise line's ticket. 111 S. Ct. 1522 (1991).

[63] A foreign litigant might not think that a state court's approach would be of importance to them, since it is possible to remove a case from state court to federal court on the basis of diversity of citizenship. For example, diversity exists where one of the parties is from the United States and the other party is from a country outside of the United States. Federal courts in the United States, sitting in diversity, will apply federal law when analysing the enforceability of a foreign forum selection dause, although this is not an absolute. *See* Young Lee, Student Note, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts,* 35 COLUM J. TRANSNAT'L L. 663 (1997). Nevertheless, a foreign litigant cannot be sure to always have access to federal court. If, for example, the foreign company, as is often the case, has a subsidiary in the same state in the United States as the plaintiff, that turns out to be an indispensable party to the suit, the diversity requirement will be defeated and there may be no possibility of removing the case to federal court, unless there is subject matter jurisdiction because of a federal question. Under these circumstances, the state court will apply state law to the question of whether or not to enforce the choice of court clause. This would change with a Convention on the subject, as illustrated by the New York Convention and its implementing legislation, the Federal Arbitration Act (FAA). The FAA is applied in state court in lieu of state law with respect to arbitration clauses.

Pennsylvania state court,[64] the parties had executed an exclusive distributorship agreement with the following forum selection clause: "This Agreement and each contract made between the parties hereunder for the sale of the Products will in all respects be interpreted in accordance with the laws of England and the parties hereby submit themselves to the exclusive jurisdiction of the English Courts." The American company brought suit in the United States, arguing that the forum selection clause was unreasonable. The trial court ruled to enforce the forum selection clause, however the appellate court overturned the decision, holding that the agreement was unreasonable since its enforcement would "seriously impair" the plaintiff's ability to pursue the action.[65] The Court found the fact that the "records, personnel, and witnesses were in the United States" and that the foreign company had a Pennsylvania division as important to its analysis of the reasonableness of the clause. There are other examples of state courts invalidating choice of court agreements, including Alabama which coincidentally has one of the highest jury award rates in the United States and is particularly hostile towards choice of court clauses.[66] The question of reasonableness was discussed at the June 2001 Diplomatic Session in a working group and it was made apparent during that discussion that there was some uncertainty as to whether the current draft of the Convention looks to national law or precludes a challenge on this basis. Clearly this issue should be addressed in future negotiations. One possibility might be to make it clear that issues such as convenience and reasonableness are only to be addressed by the court chosen in the choice of court agreement.

PUBLIC POLICY

20 Another reason that courts will give for refusing to enforce an exclusive choice of court provision is public policy. This may be done either at the jurisdictional stage or at the recognition and enforcement stage. At the jurisdictional stage, the court seised may decide that the jurisdiction clause which points to another forum is invalid for public policy reasons or at the recognition and enforcement stage, the court may hold that no action is sustainable because it is contrary to the States' principles of public policy.

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[64] Morgan Trailer Mfg. Co. v. Hydraroll, Ltd., et al., 759 A.2d 926 (Pa. Super. Ct. 2000).

[65] The phrase "unreasonable and unjust" covers a wide range of issues in U.S. case law. Consider, for example, *Continental Grain Export Corp. v. Ministry of War Etka Co.* in which a Delaware corporation filed a breach of contract action against Iran in New York federal district court. 603 F. Supp. 724 (1984). The contracts in dispute had forum selection clauses that pointed to Iran, but the U.S. district court held that they would not enforce them since the clauses were "unreasonable and unjust." The court reasoned that an Iranian court would not afford a United States plaintiff a fair and full hearing. *See id.* at 729. One might have expected the court to use a public policy exception, since they based their ruling on language from the landmark case of M/S Bremen v. Zapata Off-shore Co., 407 U.S. 1 which does in fact state that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." This case, along with Copperweld, *supra* footnote 12, demonstrates the difficulty in categorising these various cases and in defining the scope of "reasonableness".

[66] *See e.g.,* Davenport Machine & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432 (Iowa Sup. Crt 1982) (holding that "clauses purporting to deprive Iowa courts of jurisdiction they would otherwise have are not legally binding in Iowa."); Investors Guaranty Fund, Ltd. v. Compass Bank, 779 So.2d 185 (Ala Sup Crt 2000) (holding a forum selection clause in bondholder policies to be unenforceable because unfair and unreasonable); Saxe v. Anderson Kill Olick & Oshinsky, P.C., 1996 WL 456360, No. CV 960385479S (Conn. Super. Ct. July 23, 1996) (holding that "parties cannot by consent confer jurisdiction upon courts where the law has not given it or take it away where the law has given it."); Scott v. Tutor Time Child Care Systems, Inc. 33 S.W.3d. 679 (Mo, 2000) (holding that public policy considerations of avoiding duplication of effort and potential problems of collateral estoppel, res judicata, or inconsistent adjudications resulting from separating trials of related claims militated against the enforcing forum selection clause).

21 States will commonly identify particular types of contracts for which there are public policy reasons to avoid the application of forum selection clauses. Courts located in these States will generally refuse to enforce such clauses, either because of a statute or on the ground that the clause violates public policy. Frequently the public policy reasons for invalidating choice of court clauses are related to a concern over unequal bargaining power. Although typically, such situations refer to consumer contracts, which are outside of the scope of Article 4, there are other relationships of concern even within the B2B context. For example, the Brussels Regulation, which will come into force within the European Union on March 1, 2002, provides separate rules for choice of court agreements contained in insurance contracts[67] that are intended to protect the weaker party. In the United States, several states' courts have refused to enforce exclusive choice of court provisions in franchise agreements. [68] The European Court of Justice invalidated a choice of law clause in an agency contract because it would have avoided the application of a Council Directive that set forth regulations with regard to commercial agents[69] which was, according to the court, mandatory in nature.[70] While the court has not had the opportunity to rule on a choice of court clause selecting a forum outside of the European Union in an agency contract, it would seem likely that a similar decision would be reached unless the chosen forum would apply the Council Directive to the case at issue. Finally, several countries have restrictions on jurisdiction clauses in employment contracts.

22 If the Convention were to afford courts an opportunity to invalidate a choice of court clause at the jurisdictional stage for public policy reasons, this might well open up a host of other unanticipated issues which could reduce the predictability of the application of the Convention. On the other hand, it is likely to be important to the countries involved that this Convention not interfere with their public policy as applied to certain types of relationships that may contain a power imbalance, despite the fact that both parties are businesses. One way of doing this without losing the important certainty of understanding how the Convention will apply is to carve out of the scope of the Convention these specific types of contracts; however, it should be noted that this approach can be taken too far and that everything should be done to include as many types of contracts as possible so as to avoid a confusing patchwork of when the convention applies and when it does not apply.

23 At the recognition and enforcement stage of the proceeding, once a judgment has been received from the chosen court, the court addressed may refuse to recognise and enforce that judgment on public policy grounds. Grounds that have been used by various courts to refuse recognition and enforcement for public policy reasons include undue

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[67] *See* Brussels Regulation, art. 13. The Brussels Regulation also provides separate rules for choice of court agreements contained in consumer contracts and employment contracts, and although employment contracts are generally relevant to Article 4, since they may exist between two businesses, the employment contracts dealt with in the context of the Brussels Regulation only refer to contracts between an employer and an individual and thus are not relevant here. *See* Brussels Regulation, art. 18, 21.

[68] For example, *see, e.g.,* Kubis & Perszyk Assocs. V. Sun Microsystems, 680 A.2d 618 (N.J. 1996) (invalidating a forum selection clause in a franchise agreement that would have sent the parties to California to litigate their dispute). California, Illinois, Indiana, Iowa, Maryland, Michigan, Minnesota, New Jersey, North Carolina, North Dakota, Rhode Island, South Dakota, and Washington all "have judicial rules, statutes, or administrative rules which either hold forum-selection clauses in franchise agreements invalid or subject them to a high degree of scrutiny when the clauses specify a forum outside of a franchisee's home state." *See* James Zimmerman, *Restrictions on Forum Selection Clauses in Franchise Agreements and the Federal Arbitration Act: is State Law Preempted?*, 51 VAND. L. REV. 759, 773 (1998).

[69] Council Directive 86/653/EEC on the co-ordination of the laws of member States relating to self-employed agents, 1986 O.J. L. 382/17.

[70] Ingmar GB Ltd. v. Eaton Leonard Technologies Inc. 2000 ECR I-9305.

influence, duress, coercion,[71] illegality,[72] policy,[73] procedural or substantive justice.[74] The Interim Text currently allows States to refuse to recognise or enforce a judgment on the basis that it would "be manifestly incompatible with the public policy of the state addressed."[75] States should, given the strong words expressed in this article, be even more circumspect with regard to exercising this exception. In any event, cases that use a public policy exception in order to avoid enforcement of a judgment based on a choice of court provision in a B2B contract appear to be relatively rare.

CONCLUSION

24 While this is only a preliminary study of the enforceability of choice of court clauses in various countries and is certainly not exhaustive, it is apparent that a Convention including a provision such as Article 4 on choice of court agreements between businesses would have an impact on the law in at least several jurisdictions and could potentially create greater predictability and reliability in this arena for commercial parties.

In sum, the advantages of such an instrument might be to:

- provide jurisdiction in courts where there is no connection between the dispute or the defendant and the chosen court;
- prevent the use of *forum non conveniens* and similar doctrines as a defence to litigating in the court chosen in a jurisdiction agreement;
- provide a uniform rule with regard to exclusivity as a way of cutting down costly litigation over the intended meaning of a jurisdiction agreement;
- harmonise the formal or procedural validity issues, thereby avoiding costly litigation over inconsistencies in applicable procedural law;
- reduce the substantive validity issues that can be addressed by any court other than the chosen court;
- reduce and clarify the extent of the public policy exception as used to take jurisdiction in violation of a choice of court clause.

The drafting could also provide an opportunity for the drawing up of model choice of court clauses.

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[71] *See* Israel Discount Bank of New York v. Hadjipateras in which the English courts held that undue influence, duress and coercion are acceptable public policy reasons for refusing to recognise and enforce a judgment. [1984] 1 WLR 137, CA.

[72] *See* Soleimany v. Soleimany in which the Court of Appeal noted in dicta that it would be against public policy to recognise a foreign judgment enforcing a contract in the situation where the foreign court has found as a fact that it was the common intention of the parties to commit an illegal act in a foreign State which England regards as friendly. [1998] 3 WLR 811. *Cf.* Boardwalk Regency Corpn v. Maalouf (1992) 88 DLR (4th) 612, Ont CA (enforcing a foreign judgment for gambling debts even though the debts were not recoverable under the law of the province where enforcement was sought and the activity giving rise to the debt would be criminal).

[73] *See* for example, a decision by the German Federal Supreme Court on June 4, 1992 refusing to enforce exemplary and punitive damages as a matter of public policy. BGHZ 118, 331 (Case IX ZR 149/91).

[74] Such as making sure that the court of origin did not violate the defendant's right to due notice and a proper opportunity to be heard. *See e.g.,* Adams v. Cape Industries plc [1990] Ch 433 (in which the court determines that the procedure was so terrible that substantive justice was violated); Jacobson v. Frachon (1927) 138 LT 386 at 390 (Lord Hanworth), 392 (Atkin LJ).

[75] Interim Text, art. 28(f).