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### 3. The European Community and the Hague Conference on Private International Law

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#### I. Introduction

On 3 April 2007, the European Community<sup>2</sup> became a Member of the Hague Conference on Private International Law<sup>3</sup>. In order to make this possible, the Statute of the Hague Conference, the intergovernmental organisation whose mandate it is to work for the progressive unification of the rules of private international law, had to be amended, because in its 1951 version it only allowed for States to become Members. The revised version of the Statute, which is now authentic in both English and French, opens the Conference to any "Regional Economic Integration Organisation" that is "constituted solely by sovereign States, and to which its Member States have transferred competence over a range of matters, including the authority to make decisions binding on its Member States in respect of those matters",<sup>4</sup> and the EC is the first organisation that made use of this new possibility.

Membership of the Hague Conference has to be distinguished from participation in treaty negotiations taking place within the Hague Conference. Such negotiations have always been open to Member States of the Conference as well as observers. Observers may include other intergovernmental organisations, international non-governmental organisations and non-Member States. The European Community has participated in Hague Conference meetings as an observer since the Ninth Session in 1960 (the first Session after creation of the European Economic Community).

Whether an observer can become Party to a Hague convention depends on the wording of the convention concerned. Traditionally, Hague conventions are open to Member States and non-Member States of the

1. The views expressed in this contribution are personal to the authors and do not necessarily reflect those of the Hague Conference on Private International Law.
2. Hereinafter also referred to as "the Community", or "the EC".
3. Hereinafter also referred to as "the Hague Conference" or simply "the Conference".
4. Article 3 (paragraphs 2 and 9) of the Statute (see *infra* note 9).

Conference. Moreover, the two most recent Hague Conventions (*Convention of 30 June 2005 on Choice of Court Agreements* and the *Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary*) provide for Regional Economic Integration Organisations (REIOs) to become a Party, although at the time of adoption of these two Conventions it was not yet possible for REIOs to become Members of the Hague Conference as such. The legal position of observers during negotiations, however, is formally weaker than that of Members – a fact that was felt to be more and more at odds with the growing external competence of the Community in the field of private international law.

In order to shed light on these three different aspects – membership of the Conference, participation in the negotiation of conventions and becoming a Party to a convention, this article is divided into two main parts. In Part II it will be described how the Community and its Member States participated in Hague Conference negotiations under the previous version of the Statute, using as an illustration the negotiations that resulted in the *Hague Convention of 30 June 2005 on Choice of Court Agreements*. Part III is dedicated to the content of the amendments to the Statute and the negotiations leading thereto. Moreover, it will highlight the important difference between being a Member of the Hague Conference, and being a Party to a Hague convention.

## II. First Encounters: The role of the European Community in the negotiations on specific Hague instruments, in particular the *Convention on Choice of Court Agreements*

Since the entry into force of the Treaty of Amsterdam<sup>5</sup> and the resulting acquisition of competences in the field of private international law by the European Community, the Community has participated in the negotiation of a number of Hague conventions, namely the *Convention of 30 June 2005 on Choice of Court Agreements* and the *Convention of 5 July 2006 on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary*. Particularly interesting as an example for the evolving relationship between the European Community and the Hague Conference is the *Convention on Choice of Court Agreements*. The negotiations that ultimately

5. See the EC Treaty as revised by the Treaty of Amsterdam, OJ C 340, 10.11. 1997, p. 1, which entered into force on 1 May 1999.

led to this Convention, which was unanimously adopted by the Twentieth Diplomatic Session of the Hague Conference on 30 June 2005, cover a time span of thirteen years – from 1992 to 2005 – during which the competence of the European Community with regard to private international law, and consequently also the Community's role in the negotiations in The Hague, changed considerably. These negotiations thus illustrate in an exemplary manner the creation and development of external competence of the European Community and its manifestation in multilateral negotiations with third States.

### A. The history of the negotiations and the evolving role of the European Community

In 1992, by letter from the Legal Adviser of the Department of State to the Secretary General of the Hague Conference, the United States of America proposed that the Hague Conference seek to prepare a new convention on the recognition and enforcement of judgments.<sup>6</sup> At that time, the Community's powers in the area of private international law were primarily governed by Article 220 of the Treaty establishing the European Community (EC Treaty) and therefore a subject of intergovernmental co-operation among the EC Member States as well as with third States. When the EC Treaty was amended by the Treaty of Maastricht<sup>7</sup> as of 1 November 1993, co-operation of the EU Member States in the field of Justice and Home Affairs became part of the newly-created so-called "Third Pillar", but remained a subject of intergovernmental co-operation.<sup>8</sup> There was no legal basis establishing competence for the Community to enact secondary Community law in this field and no external Community competence for private international law in relations with third States.

6. See Peter H. Pfund, *Contributing to Progressive Development of Private International Law, The International Process and the United States Approach*, 249 [1994-V] *Recueil des cours* 9, p. 83; Andrea Schulz, *International Organizations: The Global Playing Field for US-EU Cooperation in Private Law Instruments*, in: Ronald A. Brand (ed.), *Private Law, Private International Law, & Judicial Cooperation in the EU-US Relationship*, p. 237 (2005), p. 257.

7. See the consolidated version 1992 of the Treaty establishing the European Community, OJ C 224, 31.8.1992, p. 1.

8. See Articles K.1 No 6 and K.3(2) c) of the Treaty on European Union as amended by the Treaty of Maastricht, OJ C 191, 29.7.1992, p. 1.

Until the late 1990s, the practice of the Hague Conference with regard to the elaboration of a new convention, based on its 1951 Statute<sup>9</sup> (which entered into force in 1955) and the Rules of Procedure, was to negotiate a preliminary draft convention in several meetings of a Special Commission, normally spread over a period of approximately three years. Discussions were often technical and not too politicised, and Member States often sent – exclusively or together with one or more civil servants – private international law scholars, high-ranking judges and experienced practising lawyers to The Hague to negotiate these conventions. At the last meeting of the Special Commission, a preliminary draft convention would be adopted by vote. After a period of internal consultation within the Member States of the Hague Conference, the next – and normally final – step towards the adoption of a new Hague convention would then be a Diplomatic Session, which normally took place about a year after the adoption of a preliminary draft convention by the Special Commission, and would also proceed on the basis of voting.<sup>10</sup>

1. *Work on a global convention on jurisdiction, recognition and enforcement*

The Seventeenth Session of the Hague Conference on Private International Law, during the celebration of the Centenary of Hague Conference meetings in 1993, tentatively took a positive decision with regard to the United States proposal.<sup>11</sup> Preparatory work was carried out between 1992 and 1996, and the tentative decision was formally confirmed at the conclusion of the Eighteenth Session in 1996. It was decided “to include in the Agenda of the Nineteenth Session the question of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters”.<sup>12</sup> Subsequently, the Secretary General of the Hague Conference convened a Special Commission, which held five meetings of one or more weeks between June 1997 and October 1999.<sup>13</sup> At a meeting in June 1999,

9. For the full text of the 1951 Statute of the Hague Conference as well as of the amended version of 2007, see the website of the Hague Conference at < www.hcch.net > under “Conventions”.
10. See *infra* under III. C. 4.
11. Final Act of the Seventeenth Session, Part B, No 2, Hague Conference on Private International Law, *Proceedings of the Seventeenth Session*, Tome I (1995), p. 43.
12. Final Act of the Eighteenth Session, Part B, No 1, Hague Conference on Private International Law, *Proceedings of the Eighteenth Session*, Tome I (1999), p. 47.
13. For further details, see Peter Nygh & Fausto Pocar, Report on the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted by the Special Commission, Preliminary Document No 11, available at < www.hcch.net > under “Conventions”, then “Convention 37”, then “Preliminary Documents”, p. 25 *et seq.*

the Special Commission was supposed to complete its work but some extra time was needed, and at an additional gathering in October 1999 the “preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters”<sup>14</sup> was adopted by vote in accordance with the Hague Conference’s Rules of Procedure. The draft contained rules on jurisdiction as well as on the recognition and enforcement of judgments given in a Contracting State by a court having Convention-based jurisdiction. A Diplomatic Session was expected to take place in 2000.

At the time of adoption of the preliminary draft Convention in October 1999, the Hague Conference on Private International Law counted 47 Member States, including all of the then fifteen Member States of the European Community. The Community was invited to participate as an observer. During the negotiations which led to the Choice of Court Convention, the Community delegation comprised representatives of the European Commission, the Council (including of the respective Presidency and the Council Secretariat) and the European Parliament.

On 1 May 1999, the Amsterdam Treaty revising the EC Treaty entered into force, and it had important consequences in the field of private international law: this field of law was moved from the Third to the First Pillar,<sup>15</sup> which meant that the Community was from now on entitled to enact regulations, directives and other acts of secondary Community legislation on private international law matters. Following the case law of the European Court of Justice,<sup>16</sup> this also had consequences for the external competence of EC Member States to negotiate with third States: if and to the extent that there is internal Community law for a certain subject matter, the Community consequently acquires exclusive external competence covering the same scope. Even if such Community law is not

14. The text of the preliminary draft Convention 1999 and its Explanatory Report by Nygh & Pocar have been published in Preliminary Document No 11 (*supra* note 13).
15. Article 61 *et seq.*, in particular Article 65, of the EC Treaty as revised by the Treaty of Amsterdam (*supra* note 5).
16. See in particular Case 22/70, *Commission/Council*, [1971] ECR 263; Opinion 1/76, *European laying-up fund*, [1977] ECR 741; Opinion 1/94, *WTO*, [1994] ECR I-5267; the Open Skies decisions: Case C-467/98, *Commission/Denmark*, [2002] ECR I-9519; Case C-468/98, *Commission/Sweden*, [2002] ECR I-9575; Case C-469/98, *Commission/Finland*, [2002] ECR I-9627; Case C-471/98, *Commission/Belgium*, [2002] ECR I-9681; Case C-472/98, *Commission/Luxembourg*, [2002] ECR I-9741; Case C-475/98, *Commission/Austria*, [2002] ECR I-9797, and Case C-476/98, *Commission/Germany*, [2002] ECR I-9855; and Opinion 01/03 on the competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2006] ECR I-1145.

yet in place, but *could* be enacted because there is internal competence over a certain subject matter, the Council may decide under Article 300 of the EC Treaty that external Community competence should be exercised by way of negotiating a treaty between the Community and one or more third States on such matter.

Between 1997 and 1999, negotiations aiming at a revision of the very successful Brussels Convention<sup>17</sup> had taken place within the Community, and the result was adopted by the Council on Justice and Home Affairs on 27 May 1999, a few weeks after the entry into force of the Treaty of Amsterdam. The Council adopted the *substantive content* agreed upon by the working group charged with the revision. Concerning the *form* of the revised instrument, the Council, in light of the new legislative powers of the Community created by the Treaty of Amsterdam, invited the Commission to submit a proposal for a Community instrument which would incorporate the substantive results agreed. When the Special Commission reconvened in The Hague in June 1999 to finalise a preliminary draft Convention on jurisdiction and foreign judgments, a proposal for a Community Regulation covering the same ground was therefore imminent within the EC.<sup>18</sup>

At the time of the June 1999 meeting of the Special Commission, there were diverging views and some amount of uncertainty as to what this meant for the negotiations in The Hague. Until then, some delegates of EC Member States had been given almost "academic freedom" for the negotiations in The Hague by their respective States, and the multiplicity of contributions greatly enriched the discussion. Now the European

17. *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968*, OJ C 27, 26.1.1998, p. 1.
18. It was presented two weeks after the Special Commission: see the Proposal of the Commission, Com (1999) 348 final, 14.7.1999, OJ C 376, 28.12.1999, p. 1, and the Revised Proposal, Com (2000) 684 final of 26.10.2000, OJ C 62, 27.2.2001, p. 243. On 1 March 2002, the Brussels Convention was replaced by Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1 (the Brussels I Regulation), for 14 of the then 15 EC Member States. Since 1 May 2004, the Regulation also binds the ten new Member States that joined on that date, and since 1 January 2007 also Bulgaria and Romania which joined the Community on that date. The Brussels Convention remained in force between Denmark, which due to Protocol No 5 to the EC Treaty as revised by the Treaty of Amsterdam is not bound by Community law in this area, and the 14 EC Member States Parties to it. An agreement between the Community and Denmark along the lines of the Brussels I Regulation now replaced it on 1 July 2007 (see OJ L 299, 16.11.2005, p. 62 and OJ L 94, 4.4.2007, p. 70).

Commission gently started to allude to the duty of loyalty under Article 10 of the EC Treaty,<sup>19</sup> which might be of some importance while a Community instrument is under preparation. In June 1999, it was suggested that this might already apply to some extent where a proposal was not yet on the table but would be forthcoming in the very near future. At the October 1999 meeting of the Special Commission, this position was reiterated by the European Commission and was now based on its Proposal of July 1999 for a Brussels I Regulation.<sup>20</sup> However, the reference to Article 10 of the EC Treaty did not remain uncontested. Several delegates of EC Member States were of the view that external Community competence could only exist once there was a Community instrument in force which governed the same matter internally. And it was expected that the future Brussels I Regulation would only come into force after adoption of the new Hague Convention, which was envisaged for late spring/early summer 2000. In June 1999, practically no coordination took place among EC Member States. The one-week meeting held in October 1999 during the Finnish Presidency of the Council of the European Union, which adopted the preliminary draft Convention by vote, was the first Hague Conference meeting to see at least some formal coordination of EC Member States.<sup>21</sup>

Nevertheless, when the preliminary draft Convention was adopted by vote in October 1999, as provided by the Rules of Procedure, even this still rather limited coordination among EC Member States led to what was perceived by some other Member States of the Conference as "block voting". Moreover, the voting at the last meeting of the Special

19. EC Treaty as revised by the Treaty of Amsterdam (*supra* note 5).

20. See *supra* note 17.

21. It might be interesting to consult the Working Documents submitted during the negotiations, which are the basis for the discussions in The Hague. During the meetings of the Special Commission held in June 1997 (9½ working days) and March 1998 (8½ working days), the relationship between proposals made by one or more EC Member States and proposals made by non-EC States was 30% to 43% (1997) and 50% to 50% (March 1998). Nevertheless, the resulting text very much resembled the Conventions of Brussels (*supra* note 17) and Lugano (*Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, OJ L 319, 25.11.1988, p. 9), which was not satisfactory to other delegations. Consequently, at the November 1998 meeting the relationship was 53% of proposals from non-EC States seeking to change this to only 15.6% proposals from EC States. Similarly, during the June 1999 (10 working days) and October 1999 (5½ working days) meetings, the EC Member States apparently felt little need to make proposals for amendments because the text already reflected their wishes. In June 1999, 36% of the working documents were submitted by non-EC States while about only 15% came from EC Member States; in October the percentage was even more telling: 45% to 16%.

Commission in October 1999 produced rather narrow majorities on many key articles, thus leaving a large number of delegations unhappy with the result. Consultations carried out in the Member States of the Hague Conference on the October 1999 preliminary draft Convention suggested that the draft was primarily acceptable for those States that were already Parties to the *Conventions of Brussels of 27 September 1968*<sup>22</sup> and *Lugano of 16 September 1988*<sup>23</sup> on *Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, but that it was unlikely to receive global support.<sup>24</sup> This, together with rising doubts whether traditional rules, relying very much on locating certain acts (place of performance of a contract, place of the injury etc.) would be able to deal appropriately with legal issues raised by the Internet and electronic commerce, and concerns of the United States of America that the Convention combined with the rather generous system on the recognition and enforcement of foreign judgments in the United States might create a serious imbalance in this respect, led Member States of the Hague Conference, in May 2000, to postpone the Diplomatic Session to June 2001, to suspend formal negotiations and to conduct informal discussions on how to reach consensus on specific issues, including intellectual property and e-commerce.<sup>25</sup> It was felt that more time than that available at a Diplomatic Session was needed to prepare the Convention, and it was therefore decided to split the Diplomatic Session in two. A first part of three weeks was to be held in June 2001 which should, moreover, no longer proceed by vote but by consensus.

22. *Supra* note 17.

23. *Supra* note 21.

24. For the concerns expressed by several States, see the letter from Jeffrey D. Kovar, then Assistant Legal Adviser for Private International Law at the United States Department of State, to the Secretary General of the Hague Conference of 22 February 2000, available at < <http://www.cptech.org/ecom/hague/kovar2loon22022000.pdf> >.

25. See Permanent Bureau of the Hague Conference, Informational note on the work of the informal meetings held since October 1999 to consider and develop drafts on outstanding items, Preliminary Document No 15, available at < [www.hcch.net](http://www.hcch.net) > under "Conventions", then "Convention 37", then "Preliminary Documents", para. 1.

## 2. *Emerging Community competence and the search for consensus in The Hague*

After a series of informal meetings hosted by individual States in 2000 and 2001,<sup>26</sup> delegations accordingly resumed their formal negotiations in June 2001. In the meantime, the Brussels I Regulation had been adopted,<sup>27</sup> thus creating an exclusive Community competence with respect to the matters governed by the Regulation. At the same time, membership of the Hague Conference had been constantly growing. While in 1993, at the beginning of the informal discussions on a global Convention on jurisdiction and enforcement, the Hague Conference counted 40 Member States, there were 47 of them in October 1999, and 53 in June 2001 when the so-called First Part of the Diplomatic Session took place. The number of proposals from non-EC Member States rose to an impressive 60% of all Working Documents submitted during this meeting, and the now almost daily coordination meetings of the EC Member States were to a large extent spent on the elaboration of common positions of the Community and its Member States on the proposals made by other delegations. Since there had not been any need to coordinate the positions of the EC Member States in the past, the views on some issues within the Community diverged widely. This division often ran parallel with the division between civil and common law, and the common law Member States of the Community tended to agree with other common law jurisdictions rather than with their civil law fellow Member States of the Community. There were also other dividing lines, however. The number of proposals stemming from the EC Member States remained at 18% of all working documents submitted, and therefore close to the rate at previous meetings. On the other hand,

26. Meetings in various compositions, sometimes open, sometimes limited to selected States and/or delegates, were held upon invitation by Canada, Scotland, Switzerland and the United States of America in Ottawa (Canada), Noordwijk (the Netherlands), Edinburgh (Scotland – United Kingdom), Basel and Geneva (Switzerland) and Washington, D.C. (United States of America). The Ottawa meetings focused on e-commerce and the Geneva meeting on intellectual property issues, while the others covered the whole range of issues under discussion in The Hague. See, for a summary description of the informal meetings, the report drawn up by the Permanent Bureau of the Hague Conference on Private International Law, Informational note, Preliminary Document No 15 (*supra* note 25).

27. See *supra* note 18.

external Community competence started to produce some effects: the number of joint proposals made by one or more EC States with one or more third States decreased significantly (to 5% as compared to 31% at the meeting before).<sup>28</sup> And it was the First Part of the Diplomatic Session in June 2001 which saw the first two working documents submitted by the European Commission.

The meeting produced a draft entitled "Interim Text".<sup>29</sup> The structure of the 1999 draft remained largely unchanged and therefore continued to resemble the structure of the Conventions of Brussels and Lugano. However, the consensus rule was applied strictly in June 2001. Wherever consensus on the previously achieved, European civil law-style rule was not possible, a second alternative paragraph, often following United States suggestions, was added. As a result, the text contains a large number of square brackets, options, variants and alternatives. It is rather difficult to understand, even for those having participated in the negotiations, and did not bring about much harmonisation. Rather than to converge, positions seemed to drift apart again. The wide range of issues covered by the draft made it seem doubtful, in particular in light of the ongoing globalisation of Hague Conference membership together with the ensuing growth of the number of Member States and of the variety of legal systems and traditions at the negotiating table, that consensus could be achieved on a text within any reasonable time.

3. *Change of focus: consensus-based negotiations leading to the Choice of Court Convention*

In April 2002, therefore, the Commission on General Affairs (Commission I) of the Nineteenth Session of the Hague Conference (now comprising 59 Member States of the Conference) decided to change the working method: the Permanent Bureau was invited to establish an informal working group, reflecting the legal traditions of the Member States of the Hague Conference, including the new Member States such as, e.g., Brazil, New Zealand, Russia and South Africa<sup>30</sup>. This informal working group was to try to draft a text that could serve as a basis for future work. The group was

supposed to work on a consensus basis and use a "bottom-up approach", starting from the one basis of jurisdiction in previous drafts that seemed the least controversial, namely choice of court clauses in business-to-business cases. The group was further invited to examine other bases of jurisdiction on which consensus seemed possible. As possible "candidates", the Special Commission on General Affairs and Policy listed: general defendant's forum, submission, counter-claims, branches, trusts and physical torts.<sup>31</sup>

Between April and September 2002, the informal working group was established, and the Permanent Bureau prepared a paper to facilitate the discussions of the group which dealt with choice of court clauses in business-to-business cases as well as with submission, counter-claims and the general defendant's forum.<sup>32</sup> The group held its first meeting in October 2002. It was chaired by Allan Philip from Denmark and comprised participants from Argentina, Brazil, China, Egypt, the European Commission, Germany, Italy, Japan, Mexico, New Zealand, Russia, South Africa, Spain, Switzerland, the United Kingdom and the United States of America. During the three meetings of the group between October 2002 and March 2003,<sup>33</sup> a text on exclusive choice of court clauses in business-to-business cases was drafted<sup>34</sup> while it was not possible to reach consensus on other bases of jurisdiction. Unlike its 1999 and 2001 predecessors which had resembled the Conventions of Brussels and Lugano, this new draft now more resembled the *New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards* – a development that seems logical since choice of court agreements and arbitration

28. At earlier meetings between 1997 and 1999 this rate had been 7%, 14%, 8% and 6%, respectively.

29. Available at < www.hcch.net > under "Conventions", then "Convention 37", then "Preliminary Documents" under "Interim Text".

30. This decision was prepared by several studies of the Permanent Bureau: see Preliminary Documents Nos 16, 17, and 18 preceding the Conclusions of Commission I of the Nineteenth Session, at < www.hcch.net > under "General Affairs and Policy".

31. This last expression was used in order to exclude mere financial damages and damages to intangible rights (intellectual property, reputation). See, for the Conclusions of the Commission, < www.hcch.net > under "General Affairs and Policy".

32. Andrea Schulz, Reflection paper to assist in the preparation of a convention on jurisdiction and recognition and enforcement of foreign judgments in civil and commercial matters, Preliminary Document No 19, available at < www.hcch.net > under "Conventions", then "Convention 37", then "Preliminary Documents".

33. See the reports of the three meetings (Preliminary Documents No 20, 21 and 22) at < www.hcch.net > under "Conventions", then "Convention 37", then "Preliminary Documents".

34. The draft text, accompanied by a report reflecting the discussions in the informal working group, has been published in: Andrea Schulz, Report on the work of the informal working group on the Judgments Project, in particular on the preliminary text achieved at its third meeting – 25-28 March 2003, Preliminary Document No 22. It is available at < www.hcch.net > under "Conventions", then "Convention 37", then "Preliminary Documents".

agreements both aim at enhancing party autonomy with regard to the choice for a certain dispute resolution system.

The text elaborated by the group was submitted to the Special Commission on General Affairs and Policy of the Conference<sup>35</sup> at its meeting in April 2003. This meeting, as well as further consultation subsequently carried out by the Secretary General of the Hague Conference among the now 62 Member States of the Conference in 2003, demonstrated that there was sufficient support for a Special Commission to be convened on the basis of the draft text. The Special Commission met in The Hague from 1-9 December 2003<sup>36</sup> and again from 21-27 April 2004 and produced a new preliminary draft Convention.<sup>37</sup> Like the informal working group, the Special Commission was chaired by Allan Philip from Denmark, and a considerable change of atmosphere was noticeable during the negotiations which had now returned to the formal stage. In the fourth year of Community external competence, the EC and its Member States had found an operable internal working method for coordination and were externally back on the scene as a proactive player. Moreover, the bi-polarisation of the negotiations between the EC and the United States of America, which had temporarily overshadowed the negotiations in The Hague, disappeared again, due *inter alia* to the fact that other voices now made themselves heard, e.g., Australia, China, Japan, Korea, Russia and many more. Moreover, as a result of the growing diversity of legal systems represented, the consensus-based negotiations were now accepted as the appropriate

35. This is a plenary meeting of Member State representatives which has met to prepare the Diplomatic Sessions – since 2003 on an annual basis – and, increasingly, to decide on the work programme of the Conference. Under the revised Statute (Article 4, paragraph 1), as “Council on General Affairs and Policy”, it now “has charge of the operation of the Conference”.
36. The text produced at the December 2003 Special Commission (Working Document No 49 E Revised – Proposal by the Drafting Committee), together with an Explanatory Report drawn up by Trevor C. Hartley and Masato Dogauchi (Preliminary Document No 25), is available at < www.hcch.net > under “Conventions”, then “Convention 37”, then “Preliminary Documents”.
37. The text produced at the April 2004 Special Commission (Working Document No 110 E Revised – Proposal by the Drafting Committee) together with an Explanatory Report drawn up by Trevor C. Hartley and Masato Dogauchi (Preliminary Document No 26), is available at < www.hcch.net > under “Bonventions”, then “Convention 37”, then “Preliminary Documents”.

way to handle these matters within the Hague Conference.<sup>38</sup> The Chairman of the Special Commission, coming from Denmark as the only EC Member State<sup>39</sup> which is not bound by secondary Community legislation in the field of private international law, was able to build bridges between the negotiating parties. Being a renowned arbitrator himself, he moreover managed to allay any fears that may have existed in the world of international arbitration that a competing convention might be forthcoming, which would deprive them of cases and income.

Consultations among Member States of the Hague Conference (the EC of course presenting a common position following internal coordination among its Member States) led to an overall rather positive view on the prospective success of such an instrument. Moreover, in the meantime, the international business community and several national bar associations had pronounced themselves very strongly in favour of this prospective new Hague Convention. A draft Explanatory Report on the April 2004 draft was produced by Trevor C. Hartley (United Kingdom) and Masato Dogauchi (Japan) in December 2004,<sup>40</sup> and a Diplomatic Session was tentatively envisaged for January or February 2005. However, when Allan Philip, the Chairman, died unexpectedly in September 2004, the planning had to be reconsidered. With a view to preparing and facilitating the negotiations at the Diplomatic Session, the Drafting Committee met twice; once informally, once formally, in January and April 2005. The informal meeting in January 2005 was hosted by the European Commission in Brussels in connection with an EC public hearing on the preliminary draft Convention, which was also attended by several representatives of third States such as China, Russia and the United States of America. The formal meeting took place in The Hague in April 2005 and led to the production of language to “pick and choose from” for the various policy choices that

38. The *Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary*, which was negotiated between 2000 and 2002 and thus fell “in between” the negotiations of the global jurisdiction and enforcement Convention, was the first Hague convention ever to be adopted on a consensus basis. The adoption of this Convention in December 2002 concluded the Nineteenth Session which had initially been dedicated to the elaboration of a global convention on jurisdiction, recognition and enforcement. For the text and status of the Convention as well as for further information, see < www.hcch.net > under “Conventions”, then “Convention 36”.
39. The United Kingdom and Ireland, although not automatically bound by Community law in this field, have reserved the possibility to opt in under Protocol No 4 to the EC Treaty as amended by the Treaty of Amsterdam.
40. See *supra* note 37.



still had to be made by the Diplomatic Session.<sup>41</sup> A Diplomatic Session – the Twentieth – was convened for June 2005, and former Vice-Chair Andreas Bucher from Switzerland (equally a European, albeit from a non-EC Member State, not bound by EC coordination obligations and an arbitrator himself), was elected Chairman.

During the Diplomatic Session, the EC delegation actively participated in the negotiations. In its capacity of observer, the Community presented six Working Documents, and six other Working Documents emanated from the EC together with one or more other States. In one case, the total number of States sponsoring a particular Working Document amounted to ten third States plus the 25 EC States at the time – clearly a sign that the meeting as a whole was now striving for co-operation and consensus. Moreover, members of the delegations of EC Member States and of the representation of the Community participated in all informal working groups and presented the coordinated position of the Community there. The Drafting Committee equally comprised delegates of EC Member States as well as representatives of the European Commission.

## B. The Convention on Choice of Court Agreements

### 1. The content of the Convention in brief

On 30 June 2005, the Twentieth Diplomatic Session unanimously adopted the *Convention on Choice of Court Agreements*. The Convention applies in international cases<sup>42</sup> and contains three basic rules addressed to three different courts in Contracting States: provided that an exclusive<sup>43</sup> choice of court agreement concluded between two or more parties is valid according to the standards established by the Convention, (1) the chosen

41. See Andrea Schulz, Report on the meeting of the Drafting Committee of 18-20 of April 2005 in preparation of the Twentieth Session of June 2005, Preliminary Document No 28, available at < [www.hcch.net](http://www.hcch.net) > under “Conventions”, then “Convention 37”, then “Preliminary Documents”.

42. For the purpose of applying the Chapter on jurisdiction, a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State (Article 1(2)). For the purpose of applying the Chapter on recognition and enforcement, it is sufficient that the judgment to be recognised or enforced is from another Contracting State (Article 1(3), Article 8).

43. A choice of court agreement that designates the courts of a Contracting State, or one or more specific courts of one Contracting State, is deemed to be exclusive unless the parties have explicitly provided otherwise (Article 3 b)).

court has to take the case and may not decline jurisdiction in favour of another Contracting State that might be a more appropriate forum; (2) any court in a Contracting State other than that of the chosen court has to suspend or dismiss proceedings if it is seised in spite of the choice of court agreement; and (3) a judgment given by the chosen court has to be recognised and enforced in all other Contracting States. The Convention contains its own form requirements<sup>44</sup> for the choice of court agreements which exclude the application of any more rigid form requirements that might be contained in national law.<sup>45</sup> Although there is no autonomous Convention rule governing the substantive validity of the choice of court agreement, harmonisation of this aspect is achieved by way of a conflict-of-laws rule in the three key Articles addressed to the chosen court (Article 5), any court seised but not chosen in a Contracting State other than that of the chosen court (Article 6 a)), and any court before which the recognition or enforcement of a judgment given by the chosen court of another Contracting State is sought (Article 9 a)). All three courts have to apply the law of the State of the chosen court (including its choice-of-law rules) to the substantive validity of the choice of court agreement<sup>46</sup>.

In spite of this rather straightforward content, the Convention contains 34 Articles. Its chapters on “General Clauses” (Chapter IV) and “Final Clauses” (Chapter V) include a number of provisions which are of great importance for the European Community. This concerns in particular the rules on the relationship with other instruments (Article 26) and the rules on the participation of REIOs in Articles 29 and 30. These latter two provisions will be discussed first because they are relevant for the status of the European Community and its Member States as Parties to the Convention.

44. See Article 3 c).

45. Should national law contain more generous form requirements, a choice of court agreement that does not comply with the Convention's form standards may still be valid under national law but would nevertheless not fall within the scope of the Convention.

46. See the Explanatory Report by Trevor C. Hartley and Masato Doguchi which is available on the Hague Conference's website at < [www.hcch.net](http://www.hcch.net) > under “Conventions”, then “Convention 37”, then “HCCH Publications”, at para. 94, and Andrea Schulz, The Hague Convention of 30 June 2005 on Choice of Court Agreements, 2 [2006] *Journal of Private International Law* 243, p. 251-253.

## 2. Participation of Regional Economic Integration Organisations in the Hague Choice of Court Convention

Article 29 of the 2005 *Hague Convention on Choice of Court Agreements* allows an REIO to become a Party to this Convention. The provision is based on the precedent of the Hague Securities Convention,<sup>47</sup> which was adopted in 2002 and was the first Hague convention ever to contain an REIO clause. According to Article 29, an REIO which has competence over some or all of the matters governed by the Convention may equally sign, accept, approve or accede to it. The REIO shall in that case have the rights and obligations of a Contracting State to the extent that the organisation has competence over matters governed by the Convention. In the case of the European Community, this Article would be used in the case of shared or mixed competence, *i.e.*, where both the Community and its Member States are (partly) competent for the matters governed by the Convention and would therefore both join it. Article 30 of the 2005 *Hague Convention on Choice of Court Agreements* moreover contains a true novelty, going beyond Article 29 and its predecessors in earlier conventions, *e.g.*, in the Cape Town Convention<sup>48</sup> and the Hague Securities Convention adopted in 2002. Article 30 provides for the case where *only* the REIO and not its Member States also join the Convention. With regard to the European Community, this Article would be used in case of *exclusive* external competence of the European Community for *all* matters covered by the Hague Convention. In 2005, when the Convention was adopted, the European Court of Justice had not yet delivered its opinion on the competence to conclude the revised Lugano Convention<sup>49</sup> and consequently, there were concrete reasons for the Twentieth Diplomatic Session to draft for both cases – that of shared or mixed competence and that of exclusive Community competence. Moreover, the possibility to choose between these two Articles may prove useful for other REIOs in the future. Should the Community declare under Article 30 that it exercises competence over all the matters governed by the 2005 *Hague Convention on Choice of Court Agreements* and that its members will not be Parties to the Convention, the Member States would be bound by virtue of the signature, acceptance, approval or accession of the European Community (Article 30(1)).

47. See *supra* note 38. Article 18 of the Hague Securities Convention was modelled on Article 48 of the *Convention on international interests in mobile equipment of 16 November 2001* (the Cape Town Convention), elaborated under the auspices of UNIDROIT.

48. *Supra* note 47.

49. *Supra* note 16.

## 3. The relationship between the Hague Choice of Court Convention and other international instruments

### a) Overview

The 2005 *Hague Convention on Choice of Court Agreements* also contains a very comprehensive provision governing its relationship with other international instruments (including secondary Community legislation) in Article 26. In this paper, it is only possible to give an overview of the basic principles.<sup>50</sup>

The rules in Article 26(2)-(6) only apply in cases where both instruments, under their own terms, would cover the situation in question *and* such application would lead to incompatible results. Between the Hague Convention on the one hand, and the Conventions of Brussels and Lugano, or the Brussels I Regulation<sup>51</sup> on the other, such conflicts will be rare. They may arise, however, and it was necessary to provide a solution. The operation of the *lis pendens* rule in cases where a non-chosen court is seised first and the chosen court is seised second is the conflict case which is most likely to occur. The legal situation under the different instruments concerned and its solution in Article 26 of the Hague Convention will now be described in order to illustrate the operation of Article 26.

Article 17 of both the Brussels Convention and the Lugano Convention (and Article 23 of the Brussels I Regulation) contain a rule on choice of court agreements. Such an agreement is deemed to be exclusive and confers jurisdiction upon the chosen court. Although there is no explicit rule to this effect, any court other than the chosen court has to decline jurisdiction provided that the agreement is valid. In principle, therefore, the rules of the Conventions of Brussels and Lugano and the Brussels I Regulation do not seem to differ from Articles 5 and 6 of the Hague Choice of Court Convention. However, there are differences. Article 6 of the Hague Convention gives absolute priority to the *chosen court*. It obliges any court seised but not designated in the choice of court agreement to come to its own conclusions concerning the validity of the choice of court agreement,<sup>52</sup> and, in case of a positive result, to suspend or dismiss the case – regardless of whether it is the court first seised, or whether another court (in particular the chosen court) was seised first. The Conventions of Brussels

50. See also the Explanatory Report by Hartley/Dogauchi (*supra* note 46), paras 265-310. For a discussion of Article 26, see also Andrea Schulz, *The Hague Convention of 30 June 2005 on Choice of Court Agreements*, 2 [2006] *Journal of Private International Law* 243, p. 265-267.

51. See *supra* note 18.

52. In doing so, the court seised but not chosen has to apply the law of the State of the chosen court, including its choice-of-law rules (Article 6 a)).

and Lugano and the Brussels I Regulation, on the other hand, which have a wider scope and contain several bases of jurisdiction that are not necessarily mutually exclusive, contain a *lis pendens* rule. Here, according to the ECJ, the *court first seised* has absolute priority, and any court second seised – be it the chosen court or any other – has to suspend proceedings until the court first seised has declined jurisdiction, e.g., because of a valid choice of court agreement in favour of the courts of another State.<sup>53</sup> For Article 17 of the Conventions of Brussels and Lugano and Article 23 of the Brussels I Regulation to apply, it is sufficient for one of the parties to be domiciled in the European Community or in a State Party to the Lugano Convention, respectively.<sup>54</sup> This means that a court designated in a choice of court agreement and situated in a State Party to both the new Hague Convention and the Brussels or Lugano Convention (or a State where the Brussels I Regulation applies) can be exposed to conflicting obligations under the two instruments in question if that same court is seised second.

Let us assume that the European Community and all its Member States, or the Community alone, join the Hague Choice of Court Convention along with Norway, Switzerland (both States Parties to the Lugano Convention) and the United States of America. Let us further assume that two private parties, one resident in the United States of America, the other in Norway, conclude a choice of court agreement in favour of the courts of Switzerland. If one party now sues the other before a Norwegian court instead, and subsequently the other party sues in Switzerland, the Swiss court would have to decide whether to apply the Hague Convention or the Lugano Convention. Under its own terms, the Lugano Convention does cover this case and would oblige the chosen court in Switzerland to stay or dismiss proceedings until the Norwegian court, which was seised first, has found that it lacks jurisdiction. Under the Hague Convention, which also covers the case, the chosen court in Switzerland would proceed with the case even if the Norwegian court has not (yet) dismissed the case pending before it. It may be expected that under both instruments, the Norwegian court will ultimately dismiss the case because of the choice of court agreement, and the Hague Convention has in principle opted for speed by allowing the chosen court to proceed with the case already before this decision of the Norwegian court.

53. See Case C-116/02 – *Gasser/MISAT*, [2003] ECR I-14693, at para. 54 on Article 17 of the Brussels Convention. The States Parties to the Lugano Convention have undertaken an obligation to observe the case law of the ECJ on the interpretation of the Brussels Convention also with regard to the application of the Lugano Convention.

54. Case C-412/98 – *Group Josi Reinsurance Company/Universal General Insurance Company*, [2000] ECR I-5925, at paras 57, 61.

However, there are situations where the Hague Convention gives way to the other instrument. In this respect, Article 26 of the Hague Convention distinguishes between other international treaties (paragraph 2) and Community instruments (paragraph 6) containing rules on jurisdiction which might lead to incompatible results. We will first explain the rule on international treaties in paragraph 2, which determines the relationship between the Hague Choice of Court Convention and the Conventions of Brussels and Lugano, as well as the Agreement between the Community and Denmark, which replaced the Brussels Convention as of 1 July 2007.<sup>55</sup>

b) *The Hague Convention and other general treaties containing rules on jurisdiction, in particular the Conventions of Brussels and Lugano and the Agreement between the Community and Denmark*

Under Article 26(2), the Hague Convention gives way to other general (earlier or later) treaties where none of the parties are resident in a Contracting State that is not a Party to the other treaty. In other words, paragraph 2 allows other treaties to prevail over the Hague Convention in two groups of cases: cases which do contain an international element, but are not sufficiently connected to the Hague Convention to require it to prevail, and cases considered “internal” to another treaty. It is recalled that for the purposes of the Chapter of the 2005 Hague Convention on jurisdiction, a case is internal if the parties are resident in the same Contracting State and neither the relationship of the parties nor any other elements relevant to the dispute, regardless of the location of the chosen court, are connected with a State other than the State of residence of the parties.<sup>56</sup> It does not matter whether the parties to the choice of court agreement all reside in States that are Parties to both the Hague Convention and the other treaty, or in States Parties to the other treaty only. To give an illustration: Assuming that all States Parties to the Lugano Convention join the 2005 Hague Convention, the Lugano Convention would prevail in the courts of a State Party to both Conventions if all the parties are resident in a “Lugano State”.<sup>57</sup> It would also prevail in the courts of a State Party to both Conventions if one of the parties is resident in a State Party to both

55. See *supra* note 18.

56. Article 1(2); see *supra* note 42.

57. This is in line with the general rule of “*Lex posterior derogat legi priori*”; see Article 30(3) of the *Vienna Convention of 23 May 1969 on the Law of Treaties*. For an in-depth discussion of these aspects of international treaty law, see Andrea Schulz, *The relationship between the Judgments Project and other international instruments*, Preliminary Document No 24, at < [www.hcch.net](http://www.hcch.net) > under “Conventions”, then “Convention 37”, then “Preliminary Documents”.

the Lugano and the Hague Convention and the other in a State that is neither a Party to the Lugano Convention nor to the Hague Convention.

Only where the case (in terms of residence of the parties) has an element external to the other treaty *and* connected to the Hague Convention (because one of the parties resides in a State that is *only* a Party to the Hague Convention, but not to the other treaty), the Hague Convention prevails.<sup>58</sup> In the hypothetical example given above, which involves Norway, Switzerland and the United States, this would be the case because one of the parties to the choice of court agreement is resident in a State Party to the Lugano Convention that is also a Party to the Hague Convention (Norway) and the other party to the choice of court agreement is resident in a State Party to the Hague Convention only (the United States of America).

This is a logical and politically well-balanced solution because in the relations between two States Parties to the Hague Convention, this rule makes a treaty to which all States concerned by a particular case are Parties (the Hague Convention) prevail over another treaty to which not all of the States concerned are Parties, even though the latter treaty might cover the case in spite of this merely unilateral connection. However, this rule requires an "escape clause", which is illustrated by the following continuation of our above example: where one party to the choice of court agreement resides in a State Party to both the Lugano Convention and the Hague Convention (Norway in our example), and the *other* party resides in a State Party only to the Hague Convention (the United States in our example), the Hague Convention would prevail in the courts of the State Party to both instruments (Switzerland as the court chosen, but second seised in our example) under Article 26(2). However, as described above, it is possible that the two instruments impose conflicting obligations on the court concerned.<sup>59</sup> Article 26(3) of the Hague Convention therefore ensures that the State Party to both Conventions is not obliged to breach its *pre-existing* obligations under the other treaty (here: the Lugano Convention) *vis-à-vis* any State that is a Party to that other treaty but not to the Hague Convention. The chosen court in Switzerland will therefore be allowed to suspend or dismiss proceedings as required by Article 21 of the Lugano Convention until the Norwegian court first seised has found that it lacks jurisdiction.<sup>60</sup> This will also apply to the *revised* Lugano

58. Article 26(2).

59. See *supra* note 53 and the adjoining text.

60. The same would apply if the court first seised (but not chosen) was located in another State Party to the Lugano Convention which, unlike Norway in our hypothetical, has not also joined the Hague Convention.

Convention and the Agreement between the Community and Denmark, although those are *later* treaties as compared to the Hague Convention because of the specific rule in Article 26(3), second sentence.

c) *The Hague Convention and Community instruments containing rules on jurisdiction, in particular the Brussels I Regulation*

The relationship between the Hague Convention and Community instruments (e.g. the Brussels I Regulation) is dealt with in Article 26(6). The rule is the same as the rule for international treaties in Article 26(2) just described for the Conventions of Brussels and Lugano and the Agreement between the Community and Denmark. There is no need, however, for an "escape clause" parallel to paragraph 3. Community law only allows the Community (in the case of exclusive external competence) or the Community and *all* its Member States (in the case of shared or mixed external competence) to join the Hague Convention. While it may happen that not all States Parties to the Lugano Convention join the Hague Convention, this is not conceivable for the Community Member States bound by the Brussels I Regulation. Consequently, even where Article 26(6) determines that the Hague Convention shall prevail over the Brussels I Regulation because one of the parties to the choice of court agreement is resident in a State Party to the Hague Convention which is not a Community Member State, a court of a Community Member State cannot be in a situation such as the Swiss court in the example described above, risking a breach of its obligations *vis-à-vis* another Community Member State under the Brussels I Regulation. Since necessarily both Community Member States concerned will be Parties to the Hague Convention, their mutual obligations under the Regulation will have been amended by the Hague Convention in those situations where the Hague Convention prevails because of the connection with another (third) State Party to the Hague Convention which is not an EC Member State. Consequently, no "escape clause" similar to Article 26(3) is needed here. Again, it has to be recalled that these rules will only need to be applied where both instruments in question would claim application according to their own terms, and would moreover lead to incompatible results. Such conflicts between the Brussels I Regulation and the 2005 Hague Convention are likely to be rare. Like for the Lugano Convention, the application of the *lis pendens* rule, which applies under the Brussels I Regulation but not under the Hague Convention, is an example.<sup>61</sup>

61. See *supra* note 53 and the Explanatory Report by Hartley/Dogauchi (*supra* note 46), paras 295-310.

By accepting that the Hague Convention prevails if one of the parties is resident in the European Community and the other in a non-EC State which is a Party to the Hague Convention, the European Community agreed to slightly reduce the territorial scope of Article 23 of the Brussels I Regulation which, according to its own terms, would already apply if one of the parties is domiciled in an EC Member State.<sup>62</sup> Moreover, the European Community Member States will no longer apply restrictions on choice of court agreements in business-to-business insurance cases where one of the parties is resident in a State Party to the Hague Convention that is not a Member State of the European Community.

This compromise was agreed upon for the benefit of achieving a global instrument. For non-EC States, such a global instrument would be of little interest if the Community Member States continued to apply the Brussels Regulation to cases where one of the parties to a choice of court agreement is resident or domiciled in a non-EC State, regardless of whether that State is linked to the EC and its Member States by this new Hague Convention. However, the impact on the Brussels I Regulation is limited to a minimum: the Regulation remains unaffected where both parties to the choice of court agreement are resident in a Community Member State and where one party is resident in a Community Member State and the other party in a third State that is not a Party to the Hague Convention. Only where the non-EC party is resident in a State Party to the Hague Convention does the latter prevail in case of conflict.

d) *The Hague Convention and instruments containing rules on recognition and enforcement*

At the stage of recognition and enforcement, the Convention does not affect the application of other (earlier or later) treaties; however, the judgment shall not be recognised or enforced to a lesser extent than under the Hague Convention (Article 26(4)). Similarly, Article 26(6) b) states that the Convention does not affect the rules of an REIO on the recognition and enforcement of judgments as between its Member States. The restriction that the judgment may not be recognised and enforced to a lesser extent than under the Hague Convention does not apply to EC instruments; this is based on the assumption that these will normally be more generous as concerns recognition and enforcement.<sup>63</sup>

62. See *supra* note 54.

63. This is correct in most cases; insurance may be the only exception within the scope of the Hague Convention. See for further illustration Hartley/Dogauchi, Explanatory Report (*supra* note 46), paras 304-310.

e) *The Hague Convention and treaties on specific subject matters which contain rules on jurisdiction, recognition or enforcement*

Treaties on *specific* subject matters which also contain rules on jurisdiction and/or recognition and enforcement are treated in paragraph 5 of Article 26. No matter whether they are earlier or later than the Hague Convention, these treaties remain unaffected; but only if the Contracting State concerned in the particular case has made a declaration in respect of the treaty under this paragraph. In that case, other Contracting States shall not be obliged to apply the Convention to that specific matter to the extent of any inconsistency, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the Contracting State that made the declaration.

4. *Concluding remarks*

The history of the negotiations which led to the Choice of Court Convention, and the Convention itself, are an excellent illustration of the coming into being of external Community competence and its application in practice. New legal issues, such as the participation of the Community as a Party to a Hague convention and the relationship between a Hague convention and secondary Community legislation, arose during these negotiations, and after a somewhat painful transition period appropriate solutions were developed that also met the agreement of other States participating in the now consensus-based negotiations.

However, even if this particular Convention was eventually completed – and unanimously adopted – without the EC being a Member of the Hague Conference, it was felt that a more formalised solution was required, allowing for the Community to participate in the negotiations on an equal footing with other Members of the Conference and offering the same opportunity to future REIOs. The following part of this article will describe how this challenge was successfully mastered by amending the Statute of the Hague Conference.

### III. Formalising the Relationship: The Accession of the European Community to the Hague Conference on Private International Law

#### A. Introduction

On 3 April 2007, during a ceremony at the new Academy Building on the grounds of the Peace Palace at The Hague, the President of the Council of

the European Union (EU)<sup>64</sup>, acting on behalf of the European Community<sup>65</sup>, deposited the Community's instrument of acceptance of the Statute of the Hague Conference on Private International Law. Earlier that morning, the Council on General Affairs and Policy of the Conference<sup>66</sup> had unanimously decided to admit the European Community<sup>67</sup> as its first Member Organisation. As a result, the Community, which, as we have seen, until then formally had the status of an observing international organisation in the Hague Conference, became its 66th Member. This accession by the EC to the Statute left unaffected the status of the current 27 Member States of the Community in the Conference, all of which already were, and remain, Members of the Conference in their own right.

The accession of the EC to the Conference was prepared through negotiations among the Member States of the Conference, in which the EC took an active part. These negotiations started four years before in April 2003 and were concluded in June 2005, when the Twentieth Session of the Hague Conference on Private International Law<sup>68</sup> unanimously accepted a series of amendments to its original Statute. These amendments came into effect on 1 January 2007 and paved the way for the accession by the EC.<sup>69</sup>

64. As Germany held the Presidency of the European Union from 1 January–30 June 2007, it was the German Minister of Justice who deposited the instrument of acceptance in the hands of the representatives of the Statute's depositary, the Ministry of Foreign Affairs of the Kingdom of the Netherlands.
65. On the Community side, the accession of the EC to the Hague Conference was approved by Council Decision 2006/719/EC of 5 December 2006 (OJ L 297, 26.10.2006, p. 1). The European Parliament gave its assent to the accession, reflecting the fact that the Hague Conference constituted an organisational framework involving co-operation procedures within the meaning of Article 300(3) EC Treaty.
66. *Supra* note 35.
67. The Community, not the Union, since under the Treaty establishing the European Community, only the Community has legal personality (Article 281) and competence for matters of private international law (Articles 61 *et seq.*).
68. The First Session of the Hague Conference on Private International Law took place in 1893. Six more Sessions were held in 1894, 1900, 1904, 1925 and 1928, prepared by the Netherlands Standing Government Committee on Private International Law, but without the support of any permanent organisational structure. After a dormant period, the Hague Conference convened again in 1951, and it was then that it was established as an intergovernmental organisation with its own Statute. For a short description of the Conference, see Hans van Loon, *The Hague Conference on Private International Law: an Introduction*, in: Peter J. van Krieken & David McKay, *The Hague: Legal Capital of the World*, pp. 517-526 (2005).
69. See Final Act of the Twentieth Session of the Hague Conference on Private International Law, 30 June 2005, under C (pp. 24 *et seq.*), available at < <http://www.hcch.net/upload/finalact20e.pdf> >.

This negotiation process was prompted by a letter of 19 December 2002 co-signed by the President of the Council and by the Commissioner for Justice and Home Affairs at the time, and sent to the Secretary General of the Conference expressing the wish of the Community to join the Conference as a Member.

For a proper understanding of what follows, it is important to remember that, although the Conference's purpose is "to work for the progressive unification of the rules of private international law",<sup>70</sup> the Statute neither in its original nor in its amended version establishes a link between membership of the intergovernmental organisation, the Hague Conference on Private International Law, and the status of its Members – or any non-Members for that matter – in respect of each of the conventions<sup>71</sup> (and other instruments such as recommendations) negotiated under the auspices of the organisation. The question whether the EC, or any other REIO, or indeed any State – Member or not of the Conference – may sign or join any such convention is not determined by the Statute, but exclusively by each convention. As we have seen in Part II, *supra*, only two conventions adopted following the entry into force of the Treaty of Amsterdam on 1 May 1999 (but before the accession of the Community to the Conference), *i.e.*, the *Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary*, and the *Hague Convention of 30 June 2005 on Choice of Courts Agreements*, make express provision for the Community to sign and join these Conventions.

Therefore, the main concern of the letter of 19 December 2002 – although it touched upon the question of "accession to instruments in areas where the Community is competent" – was not so much whether the Community could sign or become a Party to Hague conventions, but the legal position of the EC in the Conference in respect of ongoing and future negotiations on such conventions, and of decision-making on certain aspects of general affairs and policy of the Conference. Since the coming into force of the Treaty of Amsterdam, a practice had developed within the Conference according to which its Member States had implicitly accepted that the EC

70. Article 1 of the Statute (*supra* note 9).

71. Before 1951, the Conference adopted seven conventions on various topics of private international law in the field of legal co-operation and of family law. From 1951 till 2007, the Conference adopted thirty-six conventions in three broad areas: international legal co-operation and litigation; international protection of children, vulnerable adults, family relations and family property relations (including succession); and international commercial and finance law. See the website of the Conference at < [www.hcch.net](http://www.hcch.net) >.

took part in the negotiations very much as if it was *de facto* already a Member,<sup>72</sup> but the formal position remained that the Community participated in an observing capacity only. Yet, as the 2002 letter argued, this formal position risked increasingly being at odds with the expanding external competence of the EC, which under Community law led to increasing negotiating powers in relation to third States.<sup>73</sup> From the perspective of the Conference, it was important to encourage the EC, through an adequate organisational structure, to work within the framework of the Conference rather than without it.<sup>74</sup> This was all the more the case since private international law issues were increasingly taking on a global dimension that could no longer adequately be addressed through co-operation at the regional level only, which the Conference was being called upon to deal with.<sup>75</sup>

The request for Membership by the Community came at a critical moment in the life of the Conference. As was explained above,<sup>76</sup> the negotiations on a global Convention on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (the "Judgments Convention") had reached a delicate stage. The challenge, therefore, was to conceive a working method that would enable the Conference to deal with the EC request for membership without upsetting the remainder of its heavy work programme, in particular the work on the Judgments Convention. Careful preparation and consultation were needed. Fortunately, there were a few precedents in other intergovernmental organisations, albeit not with a primary law-making mission, which had admitted the EC as a Member, and the EC letter itself made reference to the Community's accession to the United Nations Food and Agricultural Organization (FAO). The

concurrence in time of the negotiations on the Judgments Convention and the admission of the EC, and the aim of bringing both to a conclusion at the Twentieth Session, were not without risk (for both projects), but indeed turned out to be a successful strategy.

Already during the meeting of the Special Commission on General Affairs and Policy held from 1-3 April 2003, it became clear that many Member States, in particular those that were not also Members of the EC, were concerned about the division of competences between the EC Member States and the EC, and the continuing evolution of this division. In practical terms, their concern was to be able to know, at any given moment during ongoing or future negotiations, whether it was the Community, or the EC Member States, that had authority to negotiate and to adopt a convention. In addition to this principal issue, other questions were raised: the modalities of participation and eligibility of the representatives of the EC as officers of drafting committees and other committees; the voting rights of the EC; and the financial implications of EC membership. A preliminary question concerned the need for formal amendments to the Statute, the Rules of Procedure and, possibly other bylaws of the Conference. And, in relation to the Conference's "*acquis de La Haye*", the rich collection of Hague conventions drawn up since 1893, questions arose on the possible effect of continuing transfers of competence from the EC Member States to the EC, both on EC Member States that were Parties to such conventions, and on those that were not yet Parties but wished to join such instruments.

#### B. The procedure established for dealing with the admission request

The 2003 Special Commission agreed that the Secretary General would convene an informal advisory group of experts which would examine the issues linked to the request, and assist him in the preparation of recommendations for the next meeting of the Special Commission in April 2004.<sup>77</sup> It was provided that this group should include "persons with experience in public international law as well as in the work of the Hague Conference, representing various regions in the world and different legal systems". The informal advisory group, chaired by the Ambassador of the People's Republic of China to the Netherlands, Mrs Xue Hanqin, first met

77. See the Conclusions of the Special Commission, available on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under "Work in Progress", then "General Affairs", p. 10.

72. This had been facilitated by the Conference's liberal practice for observers generally. Observers in the Conference have traditionally been allowed to speak and participate in the discussions, and make written proposals, but naturally without the right to vote; these participation rights are restrained only towards the end of the negotiations in order to restrict the final round of negotiations to the Members.

73. See *supra* under II. A.

74. This was certainly the view of the Permanent Bureau, the Hague Conference's secretariat; there was little explicit discussion of the basic objectives of EC Membership in the Conference during the negotiations, the focus being rather on its modalities.

75. See Hans van Loon, *Unification of Private International Law in a Multi-Forum Context*, in: Eva-Maria Kieninger (ed.), *Denationalisierung des Privatrechts, Symposium anlässlich des 70. Geburtstages von Karl Kreuzer*, pp. 33-52 (2005).

76. See *supra* under II. A. 2.

from 21-23 January 2004. On the second and third day, the group was joined by experts from the European Commission. The format and composition<sup>78</sup> of the informal group made it possible to address the issues both in a principled manner and with a focus on the specific characteristics and needs of the Conference. So, in relation to the question of competences and needs of the EC had provided further explanations, it soon appeared that the detailed and rigid model of the FAO, justified as this might be for the purposes of the FAO,<sup>79</sup> would be quite impracticable for extended negotiation processes on private international law matters such as take place within the Hague Conference.

There was an additional need for more flexibility, which was emphasized in particular by experts from non-EC Member States of the Conference: it was seen as a great potential loss if, as a result of transfers of competence to the Community combined with rigid adherence to the division of competences, the experts and delegates from individual EC Member States would no longer be in a position to give expression to the variety of European legal systems in the negotiations. This concern related especially to the early stages of discussions and negotiations, when it was important to obtain full pictures of, and perspectives from, the different legal systems represented in the Hague Conference. As will be seen, the outcome of the debate was indeed an agreement on a procedure that is flexible, but with the possibility of obtaining clarity at any given moment during the negotiations on the exact division of competences between the EC Member States and the EC.

The informal advisory group quickly agreed on the principle that membership of the EC should not lead to any additional voting power and that whenever the EC exercised its right to vote, its Member States should

78. The group included, in addition to its Chair, diplomatic representatives, government officials, judges and professors from Australia, Belgium, Brazil, Canada, Egypt, France, Germany, Italy, Japan, Netherlands, Russia, Spain, Sweden, United Kingdom, United States of America, as well as representatives of the European Community.

79. See, e.g., Gerald Moore, *The Alternative Exercise of Membership Rights – a Form of Membership for Regional Economic Integration Organizations in FAO* [unpublished, on file with the authors], and Antonio Tavares de Pinho, *L'admission de la Communauté économique européenne comme membre de l'organisation des Nations Unies pour l'alimentation et l'agriculture (FAO)*, No 370 [1993] *Revue du Marché commun et de l'Union européenne* 656, pp. 656-673; both authors were legal counsel of the FAO. For a critical assessment of the EC's FAO membership, as well as a more general analysis of EC membership of international organisations, from the perspective of a staff member of the European Commission, see Jörn Sack, *The European Community's Membership of International Organizations*, 32 [1995] *Common Market Law Review* 1227, pp. 1243-1247.

not exercise theirs, and conversely. However, agreement on the question as to how many votes the EC should have when it came to a vote, and under what conditions, turned out to be a much thornier issue. Some experts argued that the logic of the request for membership by the EC implied that the EC should have only one vote when it exercised its voting rights. The fact that since 2000 the Conference had been operating on the basis of consensus took off some of the pressure to reach an early agreement on the voting question. Nevertheless, it would take until the latest stages in the negotiations until agreement was finally reached on the voting rules.

On the basis of the Secretary General's report on the work of the informal advisory group, the 2004 Special Commission on General Affairs and Policy, which met from 6-8 April, unanimously expressed the view that, as a matter of principle, the EC should become a Member of the Conference. The Special Commission dealt with the preliminary issue of the need for a modification of the Statute, and decided that the admission of the EC would indeed require such a modification, as well as a modification of the Rules of Procedure of the Conference and, possibly, of the Regulations on Budgetary Matters – depending on whether the EC should contribute to the annual Budget as a Member or just cover administrative expenses arising from its membership. The modifications should not be limited to the admission of the EC but, following the example of the FAO, should allow for the admission of any Regional Economic Integration Organisation to which its Member States would have transferred competence on matters of private international law. It was furthermore decided that the occasion of amending the Statute should be used to undertake limited revisions of some other provisions, not related to the admission of REIOs, so that they might better conform to current practices as they had developed since the Statute came into force nearly fifty years before. The Secretary General was invited, with the assistance of the informal advisory group, to draw up a complete proposal for the next meeting of the Special Commission.<sup>80</sup>

The informal advisory group met for the second time on 16-17 December 2004, again with Mrs Xue Hanqin in the chair, and managed to narrow even further the areas where agreement was still lacking. On this basis, six draft Recommendations ultimately to be adopted by the Twentieth Session of the Conference in June 2005 were drawn up, which were submitted to the Special Commission on General Affairs and Policy held 31 March-

80. See Conclusions of the Special Commission held from 6-8 April 2004 on General Affairs and Policy of the Conference, available on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under "Work in Progress", then "General Affairs", p. 10.



1 April 2005.<sup>81</sup> They related, among other matters, to amendments to the Statute, the establishment of an authentic English version of the amended Statute (the original Statute being authentic in French only), amendments to the Rules of Procedure, to certain assurances to be given by the Community, and to the decision to be taken to admit the EC as a Member. After a full debate, the Special Commission adopted the proposals, with few amendments.<sup>82</sup> The Twentieth Session, after extensive discussions, adopted the Recommendations which appear under C in the Final Act signed on 30 June 2005. Member States were invited to cast their votes on the amendments, and on 30 September 2006 the necessary two-thirds majority of votes by 44 Member States, including 23 of the current 27 EC Member States, was reached,<sup>83</sup> so that the amendments could come into force on 1 January 2007. This made it possible for the decision on the admission of the Community to take place on 3 April 2007 at the first meeting of the Conference's Member States on general affairs and policy following the entry into force of the amendments to the Statute.

### C. The issues posed by the admission request and their resolution

#### 1. REIO eligibility requirements

Article II, paragraphs 3 and 4, of the FAO Constitution<sup>84</sup> provided the starting point for the deliberations on the criteria for admission of an REIO

81. See Preliminary Documents Nos 20, 21A and B of February 2005 for the attention of the Special Commission on General Affairs of March/April 2005, available on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under "Work in Progress", then "General Affairs".

82. See Preliminary Document No 32B of May 2005 for the attention of the Twentieth Session, available on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under "Work in Progress", then "General Affairs".

83. The 44 Member States that cast their vote before 30 September 2006 were Albania, Argentina, Australia, Austria, Belgium, Bosnia & Herzegovina, Bulgaria, Canada, China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Malaysia, Malta, Mexico, Monaco, the Netherlands, New Zealand, Norway, Panama, Peru, Romania, Russia, Slovakia, Serbia, Slovenia, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, the United Kingdom and the United States of America. The remaining four EC Member States, Luxembourg, Poland, Portugal and Spain, as well as Chile and South Africa, cast their votes before 3 April 2007.

84. See Basic Texts of the Food and Agricultural Organization of the United Nations, Volumes I and II-2006 edition, Vol. I, A, Constitution, available at < <http://www.fao.org/docrep/009/j8038e/j8038e00.htm> >.

to the Hague Conference,<sup>85</sup> which ultimately resulted in the following provision of the amended Statute of the Conference (Article 3):

1. The Member States of the Conference may, at a meeting concerning general affairs and policy where the majority of Member States is present, by a majority of the votes cast, decide to admit also as a Member any Regional Economic Integration Organisation which has submitted an application for membership to the Secretary General. References to Members under this Statute shall include such Member Organisations, except as otherwise expressly provided. The admission shall become effective upon the acceptance of the Statute by the Regional Economic Integration Organisation concerned.
2. To be eligible to apply for membership of the Conference, a Regional Economic Integration Organisation must be one constituted solely by sovereign States, and to which its Member States have transferred competence over a range of matters within the purview of the Conference, including the authority to make decisions binding on its Member States in respect of those matters.

[...]

A preliminary question had arisen during the negotiations prior to the Twentieth Session, namely whether it was appropriate to maintain the term "REIO" adopted by the FAO at a time when the EC's competences were still limited mainly to economic matters. Although those competences had evolved beyond the economic area, it was felt that "REIO" had become a term of art and, since the economic field still very much occupied the EC, should be maintained. Surprisingly, however, during the Twentieth Session, the Russian delegation, seconded by the observer from the Eurasian Economic Community,<sup>86</sup> insisted that the term should be

85. Many of these issues arose already in the context of the EC admission to the FAO, and, since they appeared there for the first time, were discussed in much greater depth than was necessary in the context of the Hague Conference. See the literature referred to *supra* note 79. These discussions remain relevant, as background for a full understanding of Articles 3 and 8 of the amended Statute of the Conference, in particular in those instances where the wording of the FAO texts did not give rise to discussion in the context of the Conference.

86. The Eurasian Economic Community is, as its name indicates, a trans-regional organisation; its purview, although mainly focused on economic matters, also extends, e.g., into the development of common guidelines on border security.

broadened, so as to include other international organisations.<sup>87</sup> Although the EC was prepared to accept the Russian position, the United States and most other States preferred to retain the well-established term “REIO”. In the end, a compromise was reached, and the following paragraph 9 was added at the end of Article 3:

‘Regional Economic Integration Organisation’ means an international organisation that is constituted solely by sovereign States, and to which its Member States have transferred competence over a range of matters, including the authority to make decisions binding on its Member States in respect of those matters.

Another issue of a political nature unexpectedly arose during the Diplomatic Session: the Chinese delegation, obviously concerned about the possibility of an Asian, or Asian-Pacific REIO to which Taiwan would have been admitted as a “sovereign State”, insisted upon the inclusion of the word “solely” in paragraph 2 of Article 3, in an effort to exclude any such organisation from future membership of the Conference.<sup>88</sup> This proposal was accepted, and in the light of this history the adverb “solely” should be understood as qualifying the adjective “sovereign” only, and not the expression “sovereign States” as a whole (the EC, the REIO *par excellence*, consists not only of its Member States but, as a supranational body, also of an institutional framework of its own: Council, Commission, Parliament, Court etc., empowered to take decisions that are binding upon its Member States).

At the request of the EC, but contrary to Article II, paragraph 4, of the FAO Constitution, Article 3, paragraph 2, of the Statute as amended does not require that a majority of the REIO Member States be Members of the Conference. The EC view – supported by Member States from other continents such as Africa, where regional organisations were emerging with a possible interest in joining the Conference at a later stage – was that in a situation where an REIO had competence over a particular matter

87. The term “regional economic integration organisation” was coined in a series of treaties on environmental protection, including the *Geneva Convention on Long-range Transboundary Air Pollution* and the *Bonn Convention on the Conservation of Migratory Species of Wild Animals*, both from 1979. However, the 1982 *United Nations Convention on the Law of the Sea* uses the broader expression “international organization”. Article 3, paragraph 9, of the amended Statute of the Conference, proposed by the Russian delegation, is an attempt to combine the two expressions.

88. It may be noted that, under Article XII of the Agreement Establishing the World Trade Organization, “Chinese Taipei” in 2002 acceded to the World Trade Organization, not as a State, but as “a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the multilateral trade agreements”. See Agreement available at < [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf) >.

within the purview of the Conference, it was irrelevant whether any of the Member States of the REIO were also Members of the Conference. Against this, it was argued that since the main “product” of the Conference, the conventions on private international law, depend for their implementation on courts, authorities and officials of States, it may be problematical for an REIO to ensure in its relations to Member States of the Conference that are not also REIO Members, that convention obligations are fully implemented by REIO Members that are not themselves also Members of the Conference.<sup>89</sup> The discussion on this point was, in its context, purely theoretical, since all EC Members were Members of the Conference. However, the Community obviously wished to create a precedent for future admissions of REIOs to organisations to which not all REIO Members did belong, and on this point the EC view prevailed.

It will be noted, finally, that, in line with the requirement for the admission of new Member States to the Conference, but in contrast with Article II(3) of the FAO Constitution, which requires a two-thirds majority, a simple majority of the Member States present at a “meeting concerning general affairs and policy” of the Conference,<sup>90</sup> is all that is required for the admission of an REIO to the Hague Conference.<sup>91</sup>

## 2. Declaration and exercise of competences

As indicated in the Introduction to Part III, the question of how the Community competences should be declared and exercised was the principal issue to be resolved. The upshot of the negotiations is to be found in Article 3, paragraphs 3-7, of the Statute:

3. Each Regional Economic Integration Organisation applying for membership shall, at the time of such application, submit a declaration of competence specifying the matters in respect of which competence has been transferred to it by its Member States.
4. Each Member Organisation and its Member States shall ensure that any change regarding the competence of the Member Organisation or in its membership shall be notified to the Secretary General, who shall circulate such information to the other Members of the Conference.

89. Another argument advanced against deleting the words “a majority of which are Members of the Conference” was that this might have financial consequences, if REIOs were not to contribute to the budget.

90. I.e., a meeting of the Council on General Affairs and Policy – see *supra* note 35 – or a meeting of the Diplomatic Sessions.

91. Provided the quorum (Article 3, paragraph 1) is reached.

5. Member States of the Member Organisation shall be presumed to retain competence over all matters in respect of which transfers of competence have not been specifically declared or notified.
6. Any Member of the Conference may request the Member Organisation and its Member States to provide information as to whether the Member Organisation has competence in respect of any specific question which is before the Conference. The Member Organisation and its Member States shall ensure that this information is provided on such request.
7. The Member Organisation shall exercise membership rights on an alternative basis with its Member States that are Members of the Conference, in the areas of their respective competences.

Article II, paragraphs 5-8, of the FAO Constitution<sup>92</sup> provided the basis for these rules. However, the FAO General Rules of the Organisation,<sup>93</sup> the Provisional Guidelines for the participation of the EC in FAO meetings,<sup>94</sup> and the Rules of Procedure of the Codex Alimentarius Commission (CAC),<sup>95</sup> a body jointly constituted by FAO and WHO, regulate in considerably more detail how within the FAO and the CAC the REIO/EC competences must be declared and exercised. Under these regulations there is an obligation for either the REIO or its Member States to indicate before any meeting which of them has competence in respect of any specific question to be considered in the meeting, and indeed, to declare so in respect of each agenda item,<sup>96</sup> preferably at least two working days beforehand; failure to do so will prevent the EC from effectively participating in the meeting.<sup>97</sup> It was readily agreed that requirements with such a level of detail would not work for comprehensive negotiations of a legislative nature, such as those undertaken by the Conference; issues were often interrelated and evolved in the course of the negotiations, especially in the early stages of discussions when the general orientation and the structure of a future convention are still to be determined, and it would be

92. Cf. *supra* note 84.

93. Article XLI, see Basic Texts of the FAO, *supra* note 84, Vol. I, B, General Rules of the Organization.

94. Available on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under "Work in Progress", then "General Affairs" as Annex 2 to Preliminary Document No 21B of February 2005, < [www.hcch.net/upload/wop/genaff\\_pd21be.pdf](http://www.hcch.net/upload/wop/genaff_pd21be.pdf) >.

95. Rule II, see Codex Alimentarius, Procedural Manual, Rules of Procedure of the Codex Alimentarius Commission, available at < [ftp://ftp.fao.org/codex/Publications/ProcManuals/Manual\\_15e.pdf](ftp://ftp.fao.org/codex/Publications/ProcManuals/Manual_15e.pdf) >, pp. 6, at pp. 6-7.

96. FAO Provisional Guidelines (*supra* note 94); CAC Rules of Procedure, Rule II, 5.

97. FAO Provisional Guidelines (*supra* note 94), p. 3 ("Implications of a failure to produce a statement of competence and voting rights").

difficult or even impossible to draw the line between Community and EC Member competences. On the other hand, it was clearly unacceptable to provide no mechanism at all for obtaining clarity on the distribution of competences. In this regard the FAO General Rules<sup>98</sup> and the Rules of Procedure of the CAC<sup>99</sup> were of assistance, because they provide that any Member may, at any time,<sup>100</sup> request a Member Organisation or its Member States to provide the necessary clarity, and the Member Organisation or the Member States concerned are obliged to provide such information. This rule, elevated to the level of a "constitutional" provision, now appears in Article 3, paragraph 6, of the Statute of the Hague Conference with a few minor amendments.<sup>101</sup>

The result is a system that is relatively simple and that should not cause any difficulties in the daily operation of negotiations in the Conference. At the outset, when the REIO applies for membership, there will be a declaration of competence (Article 3, paragraph 3). Such a declaration has indeed been deposited by the EC, first in general terms in its letter of 19 December 2002, subsequently in more detail when it joined the Hague Conference on 3 April 2007.<sup>102</sup> Any Member of the Conference may assume that the EC Members have retained competence over all matters in respect of which transfers of competence have not been specifically declared (paragraph 5). Any subsequent change of competence shall be notified to the Conference (paragraph 4), in the absence of which paragraph 5 will apply. If queries still remain, then paragraph 6 provides a remedy. Finally, paragraph 7 establishes the principle of non-additionality for the exercise of

98. Rule XLI, 1.

99. Rule II, 6.

100. Cf. FAO Provisional Guidelines (*supra* note 94), p. 4 (under "voting").

101. The request may be addressed to *both* the REIO *and* (not: *or*) its Member States (paragraph 6), because it was argued that one should not assume that in (future) REIOs other than the EC the transfer of competences would occur in a manner similar to that of the EC, and there might be REIOs, for example, where the REIO could only provide such information with the assistance of its Member States, or vice versa. For the same reason, paragraph 4 requires that the REIO *and* its Member States shall ensure that any change regarding the competence of the REIO (or its membership) shall be notified to the Conference.

102. The Declaration was approved by the EU Council of Ministers together with its approval of the EC's accession to the Hague Conference (OJ L 297, 26.10.2006, p. 4). The Declaration is equally available on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under "Conventions", then "Statute of the Hague Conference", then "Status Table". In the list of Members, click on the "D" in the row concerning the European Community.

competence.<sup>103</sup> In the case of “mixed competence”, where a subject matter dealt with by the Conference covers both issues within the competence of the EC and issues within the competence of its Member States,<sup>104</sup> both the EC and the Member States may take part in the negotiations, but they must each restrict themselves to the matters falling within their own spheres of competence.<sup>105</sup> Finally, it may be noted that at the end of the day, when the decision is to be made whether the Community and/or the EC Member States will join a Hague convention, the support of the Council will always be needed – this reduces to some extent the importance of the issue of competences in relation to the work of the Hague Conference.

### 3. Modalities of participation and eligibility for election

At the 2005 meeting of the Special Commission on General Affairs and Policy of the Conference, the United States of America proposed that the Statute should clarify expressly that participation in meetings of REIO representatives and of those of its Member States should be on an alternative basis. While other delegations supported the wish to provide more clarity on “the exercise of membership rights” in what ultimately became paragraph 7, the view prevailed (for reasons similar to those that led to the rejection of detailed rules on the declaration and exercise of membership rights) that open discussion without rigid checks on competences, should be encouraged as a way to obtain full information and achieve consensus. It was felt that it could be left to the Chair of meetings to control the level of participation. In the end, the United States of America accepted to withdraw its proposal to insert in paragraph 7 the words “[membership rights] including participation in meetings”.

We may conclude, therefore, that the principle of non-additionality as expressed in paragraph 7 applies generally in the Conference, including to participation and eligibility for election for offices such as membership of drafting committees or other subsidiary bodies, but is to be applied with some flexibility in order to achieve the best results in the negotiations. This

103. As Moore (*supra* note 79, at p. 11) points out in respect of EC membership of FAO, the essence of REIO membership is that there is “one single bundle of membership rights that should be exercised alternatively by the regional economic integration organization and its member states depending on which of the two ha[s] competence on any given matter. Of fundamental importance, both theoretically and politically, [is] the notion that on no occasion should the bundle of rights become larger or smaller, by whomsoever exercised”.

104. Cf. FAO Provisional Guidelines (*supra* note 94), p. 2 (under “Declarations in respect of specific agenda items”).

105. *Ibidem*, p. 4 (under “voting”).

is in fact already current practice in the Conference: the EC has participated in drafting committees and in formal and informal working groups and this has generally given satisfactory results.<sup>106</sup> If more guidance were needed, it would always be possible, under Article 14 of the Statute, to draw up implementing regulations (inspiration for which could then be found in the aforementioned FAO Provisional Guidelines).

### 4. The right to vote

Traditionally, the Conference proceeded through voting, although there was always an understanding that in certain cases a vote could be reconsidered (the history of the Conference provides several examples of such reconsideration of a vote on a vital issue),<sup>107</sup> and wise Chairs always took consensus-building as their prime objective.<sup>108</sup> As was explained above,<sup>109</sup> since 2000 the Conference has adopted a different practice and has proceeded on the basis of consensus. The amended Statute provides that the Diplomatic Sessions and all other meetings (with the exception of those on the admission of Members and on financial matters) “shall, to the furthest extent possible, operate on the basis of consensus” (Article 8, paragraph 2); the Rules of Procedure have been amended accordingly. Nonetheless, *in extremis* voting may be unavoidable, and therefore the question of the voting rights of REIOs and their Member States had to be addressed. Article 3, paragraph 8, deals with this issue:

The Member Organisation may exercise on matters within its competence, in any meetings of the Conference in which it is entitled to participate, a number of votes equal to the number of its Member States which have transferred competence to the Member Organisation in respect of the matter in question, and which are entitled to vote in and have registered for such meetings. Whenever the Member Organisation exercises its right to vote, its Member States shall not exercise theirs, and conversely.

As already indicated when we discussed the procedure for admission of the EC, the debate focussed on the number of votes the EC would have in the exceptional case where a vote had to be taken. The Community took the

106. See *supra* at II. A. 3.

107. A famous example is offered by the reconsideration of the vote on the issue of legal aid in the context of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Article 26) – see the Explanatory Report by Elisa Pérez-Vera, in: *Proceedings of the Fourteenth Session*, Tome III, p. 426 (at p. 468) and for the reopening of the debate on the vote, *ibidem* (pp. 246-248).

108. See T. Bradbrooke Smith, Achieving results at international meetings: why the Hague Conference succeeds, in: Alegria Borrás *et al.* (eds.), *E Pluribus Unum, Liber Amicorum Georges A.L. Droz*, pp. 415-444 (1996).

109. See *supra* under II. A.

view that a vote cast by the EC in a Conference meeting would bind the EC Member States, whether present or not at the meeting, and not by proxy (as some delegations had argued) but directly, since the EC is a supranational entity. Therefore, they argued, the EC should always have as many votes as it has Members.<sup>110</sup> Other delegates drew the opposite conclusion: if one entity, then one vote only.<sup>111</sup> Many delegations, however, preferred the solution adopted in the Amendments to the Rules of Procedure of the CAC, according to which a Member Organisation may exercise a number of votes "equal to the number of its Member States which are entitled to vote in such meetings and present at the time the vote is taken". They felt that granting the EC as many votes as it had Members was unjustified since the voting tradition of the Conference supposed that each vote was based on an informed opinion about the issue in question. Moreover, if the Community view on voting was followed, individual EC Member States might feel discouraged to participate in meetings.

In the end, agreement was reached on a formula inspired by the FAO Provisional Guidelines according to which the number of votes of the REIO is "equal to the number of votes of its Member States [...] entitled to vote in and hav[ing] registered for the meeting in question".<sup>112</sup> This would mean that provided that any individual EC Member State has registered for the full duration of, for example, a Special Commission meeting, that State need not be actually present in the meeting room in order to be included in the number of votes the EC could cast at any special moment.

It may be noted that REIOs are not involved in the decisions on the admission of new Members to the Conference. Hence, they are excluded from voting on these matters. This applies equally to new Member States (Article 2, paragraph 2, of the Statute) and new Member Organisations (Article 3, paragraph 1): these decisions are to be taken by the Member

110. With possible qualifications in view of the special position of Denmark, and, possibly also of the United Kingdom and Ireland (see also *supra* notes 18 and 39).

111. This position was not pushed too hard, however. The FAO precedent also pointed in a different direction: the FAO Constitution provides that an REIO has a number of votes equal to the number of its Member States entitled to vote. There was also an indirect link between the number of votes an REIO would have in the Conference and the financial contribution of its Member States to the budget of the organisation; there was no wish to alter the basis of the latter which might have been the case if the "one vote only" policy had carried the day.

112. See FAO Provisional Guidelines (*supra* note 94) (under "Conduct of the meetings, Determining a quorum", p. 4), "[...] provided that any necessary formalities have been complied with, it is not required that each of the individual Member States actually be present in the meeting room for the EC to be able to vote".

States only. With regard to new Member States, there is a link with the financial aspects of membership, in which REIOs are also not involved.

##### 5. Financial aspects

Article 9 of the Statute deals with the budget of the Hague Conference. Following its amendment to take into account the consequences of the accession of REIOs, the provision now reads as follows:

1. The budgeted costs of the Conference shall be apportioned among the Member States of the Conference.
2. A Member Organisation shall not be required to contribute in addition to its Member States to the annual budget of the Conference, but shall pay a sum to be determined by the Conference, in consultation with the Member Organisation, to cover additional administrative expenses arising out of its membership.
3. In any case, travelling and living expenses of the delegates to the Council and the Special Commissions shall be payable by the Members represented.

The rule of paragraph 2 is in essence the same as that found in Article XVIII, paragraph 6, of the FAO Constitution.<sup>113</sup> It maintains the principle that the Member States are exclusively in control of the financial running of the organisation (and hence have an exclusive say over related matters, in particular the admission of new Member States). The word "additional" was added at the request of the Community in order to strictly limit the "sum" due by the REIO to the extra costs its membership implies for the Conference – which is fair enough. It does not, however, provide clear guidance as to how these extra costs should be calculated. In respect of the EC, these and other aspects will have to be clarified in further consultations. Ultimately the decision belongs to the Council of Diplomatic Representatives of the Conference (Article 10 of the Statute).

##### 6. Effect of evolving EC competences on existing Hague conventions

As mentioned in the Introduction to Part III, the evolving EC competences in the field of private international law may also have an effect on existing Hague conventions. New Community instruments may supersede such

113. "A Member Organization shall not be required to contribute to the budget [...] but shall pay to the Organization a sum to be determined by the [Organization] to cover administrative and other expenses arising out of its membership in the Organization. A Member Organization shall not vote on the budget."

conventions for those EC Member States that are Parties to them and in the relations between EC Member States only, to the extent that the EC instrument so prescribes and the Hague Convention so allows.<sup>114</sup> They may also affect the right of EC Member States that are not yet Parties to a certain Hague convention to join this convention, to the extent that as a result of the exercise of its competence by the Community, individual EC States are no longer free to join the Hague convention in question. Whether that is the case will depend on the nature and the subject matter of the Community instrument on the one hand, and of the convention in question on the other.

If the Community instrument and the convention both deal with applicable law rules – operating *erga omnes* –, one will in principle exclude the other: in so far as a Community instrument establishes applicable law rules on specific contracts such as sales or agency, they cannot coexist with Hague conventions on the same topics.<sup>115</sup> With regard to a Community instrument on jurisdiction and recognition and enforcement of judgments, a conflict may arise with a Hague convention in situations, usually involving EC Member States only, where both claim to be applicable.<sup>116</sup> To the extent that a Community instrument deals with judicial and administrative co-operation, it may supersede the convention (i.e. in the

114. Cf. Article 41 of the *Vienna Convention on the Law of Treaties*.

115. The *finesses* of the outcome of the negotiations on a Regulation on the law applicable to contractual obligations ("Rome I") will determine if, and to what extent this Regulation will be compatible with the *Hague Conventions of 1955 and of 1986 on the law applicable to international sales* and of 1978 on the law applicable to agency, each of which are in force for a certain number of EC Member States. Similar remarks may be made in relation to the current negotiations for a Regulation on the law applicable to non-contractual obligations ("Rome II"), the *Hague Convention of 1971 on the Law Applicable to Traffic Accidents* and the *Hague Convention of 1973 on the Law Applicable to Products Liability*.

116. Examples include the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ("Brussels II bis"), in relation to the Hague Convention of 1996 on the International Protection of Children, and the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I") in relation to the Hague Choice of Court Convention, see *supra* under II. B. 3. c).

relations with other EC Member States) if the convention so allows,<sup>117</sup> or it may coexist with it.<sup>118</sup> A more complete description and analysis of these various possibilities would exceed the limits of this contribution.

It is, however, of great significance that, as its legislative work in the field of private international law develops, the Community carry out an examination of the "*acquis de La Haye*". Not only will this save the Community a duplication of efforts, it will also enable it to enrich its portfolio of Community instruments – the result of consultations among EC Members only, and binding upon EC Member States only – with Hague conventions which are the fruit of *global* negotiations and which, if ratified by both EC Member States and other States, provide important links with non-EC Members. Therefore – even though, as we have seen in the Introduction, the Statute of the Hague Conference does not make any direct connection between membership of the organisation and the Hague conventions –, it was important that in the context of the accession of the Community to the Hague Conference, the Community should accept to examine which Hague conventions it might be in the interest of the Community to join. Where necessary – because of the absence of a clause providing for the accession of an REIO – this may occur either through ratification by its Member States in the interest of the Community or through the adoption of a Protocol by all the States Parties to a Hague convention.

To this end, when it acceded to the Statute on 3 April 2007, the Community deposited the following Declaration:

The European Community endeavours to examine whether it is in the interest of the Community to join existing Hague Conventions in respect of which there is Community competence. Where this interest exists, the European Community, in cooperation with the Hague Conference will make every effort to overcome the difficulties resulting from the absence of a clause providing for the accession of a Regional Economic Integration Organisation to these Conventions.

117. Examples include the Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters and the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters in relation to the Hague Service Convention of 1965 and the Hague Evidence Convention of 1970, respectively.
118. The idea of the provisions on children in the Brussels II bis Regulation (see *supra* note 116) is that they build on the 1980 *Hague Convention on the Civil Aspects of International Child Abduction*, while limiting, in accordance with Article 36 of this Convention, the restrictions to which the return of a child may be subject.

In order to facilitate consultations within the Community with a view to this examination, the Permanent Bureau prepared a document for the attention of the Community and its Members<sup>119</sup>.

It is worth noting, that in a further effort to ensure good co-operation between the Community and the Hague Conference, the Community Declaration continues:

The European Community endeavours to make participation possible of representatives of the Permanent Bureau of the Conference in meetings of experts organised by the European Commission where matters of interest to the Conference are being discussed.

Such combination of resources can only be beneficial to both the European Community and the Hague Conference.

#### IV. Concluding remarks

From the examination of the historic developments including the effect of emerging external Community competence for negotiations taking place within and conventions adopted by the Hague Conference on Private International Law, it has become apparent that the relationship between the EC and the Hague Conference is an evolving and multi-faceted one. The role of the Community in Hague Conference negotiations, membership of the EC in the Hague Conference as an intergovernmental organisation, and adherence of the EC to individual Hague conventions are separate, albeit related issues.

The creation and gradual expansion of external Community competence for issues of private international law, which initially had a factual impact upon the negotiation of conventions within the Hague Conference, eventually led to an amendment of the Conference's Statute and Rules of Procedure, and to the accession of the EC to the Conference.

A beginning has been made with the opening-up of meetings organised by the European Commission to representatives of the Permanent Bureau of the Hague Conference. As concerns Community participation in the two recent Hague Conventions open to REIOs, an impact assessment was prepared for the Securities Convention in 2006, and discussions within the Community are under way. Concerning the Choice of Court Convention, the Commission has launched an impact assessment in 2007, to be followed by a Commission proposal towards early 2008.

119. See < [www.hcch.net](http://www.hcch.net) > under "Work in Progress", then "General Affairs and Policy".

There remains the issue of the participation of the Community, or the collectivity of its Member States, in older Hague conventions which do not contain an REIO accession clause, but for which there is shared or mixed Community or even exclusive Community competence. It is hoped that in the near future, a solution can be found which takes into account the fact that many EC Member States are already Parties to the conventions concerned, and the benefit that adherence by the Community itself or all Community Member States to these conventions could bring by building bridges between the Community and the rest of the world. This, together with the fact that, on 3 April 2007, the European Community was unanimously welcomed as a Member of the Hague Conference on Private International Law, is reason enough to predict that the Hague Conference will continue to be a major forum for the elaboration and monitoring of private international law treaties linking the European Community and its Member States with the other States of the world.