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**RAPPORT DE LA DEUXIÈME RÉUNION DU GROUPE DE TRAVAIL INFORMEL  
SUR LE PROJET SUR LES JUGEMENTS – 6 AU 9 JANVIER 2003**

*préparé par Andrea Schulz, Premier secrétaire*

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**REPORT ON THE SECOND MEETING OF THE INFORMAL WORKING GROUP  
ON THE JUDGMENTS PROJECT – JANUARY 6-9, 2003**

*prepared by Andrea Schulz, First Secretary*

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## TABLE OF CONTENTS

I. INTRODUCTION .....	4
II. CHOICE OF COURT CLAUSES .....	5
A. Defining exclusivity of choice of court clauses .....	5
B. Non-exclusive choice of court clauses and interim relief .....	6
C. Formal validity .....	7
D. Substantive validity .....	7
1. International element required? .....	7
a) General international element .....	7
b) Specific connection with forum State .....	8
2. Lack of consent and general grounds for invalidity (general escape clause) .....	9
E. Intellectual property .....	11
III. POSSIBLE OTHER BASES OF JURISDICTION TO BE INCLUDED INTO THE CONVENTION .....	12
A. Consent / waiver / submission .....	12
B. Counter-claims .....	13
1. Possible added value of a rule on counter-claims in the presence of a choice of court clause .....	13
2. Relation to set-off and possibility of extending a rule on counter- claims to claims not connected with the principal claim .....	14
C. Defendant's forum .....	15
IV. FUTURE WORK .....	17

## I. INTRODUCTION

From 6-9 January 2003 the informal working group on the Judgments Project held its second meeting of 3 days.<sup>1</sup> The meeting was chaired by Professor Allan Philip from Denmark and took place at the Permanent Bureau of the Hague Conference on Private International Law in The Hague. The members of the group, representing the global membership of the Hague Conference and a variety of legal systems, are Marie-Odile Baur (European Commission), Paul Beaumont (United Kingdom), Antonio Boggiano (Argentina), Alegría Borrás (Spain), Andreas Bucher (Switzerland), Masato Dogauchi (Japan), Antonio Gidi (Brazil; apologized for this meeting), David Goddard (New Zealand; apologized for this meeting), Jeffrey Kovar (United States of America), Nagla Nassar (Egypt; apologized for this meeting), Gugu Gwen Ncongwane (South Africa), Tatyana Neshataeva (Russian Federation; apologized for this meeting), Fausto Pocar (Italy), Peter Trooboff (United States of America), José Luis Siqueiros (Mexico; apologized for this meeting), Sun Jin (China), and Rolf Wagner (Germany). They are participating in their personal capacity and are therefore neither in a position nor willing to commit or bind any government.

As decided by the Commission on General Affairs and Policy of the Hague Conference at its meeting from 22-24 April 2002, the informal group shall explore whether a text could be presented to a Special Commission, to be held, if possible, in mid-2003, with a sufficient prospect of reaching agreement. The group therefore continued its efforts to achieve a text for referral to a Special Commission, with the belief that endorsement from the group would provide the most effective guidance for government delegations.

The meeting was divided in two parts. Discussions during the first part were based on Preliminary Document No 19, which had been prepared by the Permanent Bureau in order to facilitate the work of the group, and represented a continuation of the discussions at the previous meeting. While the first meeting had focused on exclusive choice of court clauses in business-to-business (B2B) cases, the second meeting first looked at a definition of "exclusivity" before turning to non-exclusive choice of court clauses. It looked at some areas where these might require a different treatment than exclusive clauses (in particular interim relief). Subsequently, the group revisited questions that had remained open during the first meeting, thereby mainly focussing on exclusive choice of court clauses, but also briefly examining some of these questions with regard to non-exclusive choice of court clauses. The discussion concentrated on whether a case involving a choice of court clause, in order to be covered by the scope of the convention, should be required to have some international element, whether there must be an objective link with the chosen forum, and whether there should be a general standard for courts to determine substantive validity (so-called general escape clause which might include public policy, manifest injustice or other). The question whether or not to include some or all intellectual property rights was equally revisited. Still on the basis of Preliminary Document No 19, the group then moved on to discuss possible further bases of jurisdiction to be added, as identified by the Commission on General Affairs: consent / waiver / submission, counter-claims, and defendant's forum.

Based on these discussions, the Chair then presented a proposal for a draft Convention on Exclusive Choice of Court Clauses in order to facilitate further discussion.

In order to comply with the mandate conferred on the group by the Commission on General Affairs in April 2002 and to ensure transparency in informing the Member States of the Hague Conference as well as interested parties, this Report describes the outcome of discussions and includes the draft submitted by the Chair, as refined by the group, in its latest version in the Annex. Section headings in the Report will identify the relevant

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<sup>1</sup> See Prel. Doc. No 20 at < [ftp://ftp.hcch.net/doc/jdgm\\_pd20e.doc](ftp://ftp.hcch.net/doc/jdgm_pd20e.doc) > for a Report of the first meeting.

provision of the draft in the Annex. The group left it to the discretion of the Permanent Bureau to make the necessary drafting amendments in the English text, should the preparation of a French version require this.

The informal group has not yet discussed other bases of jurisdiction identified by the Commission on General Affairs in April 2002 such as trusts, branch jurisdiction and physical torts.

The group agreed to hold its third meeting from 25-28 March 2003 in The Hague, immediately before the meeting of Commission I on General Affairs and Policy of the Hague Conference which will meet from 1-3 April. Commission I will have before it the Reports of the first two meetings of the informal group, and at least an oral report of the third meeting will be presented to it by the Chair of the informal group and the Permanent Bureau.

## **II. CHOICE OF COURT CLAUSES**

### **A. DEFINING EXCLUSIVITY OF CHOICE OF COURT CLAUSES (ANNEX ARTICLE 3)**

The first meeting of the informal group had focused on exclusive choice of court clauses. Before moving on to examining further issues – either non-exclusive choice of court clauses or the addition of other bases of jurisdiction –, the need was felt to define more clearly what was to be understood, for the purposes of this Convention, by “exclusive” and “non-exclusive” choice of court clauses.

It became clear that there seemed to be at least three different basic types of choice of court clauses:

- (1) clauses choosing one court (or the courts of one State) only (*i.e.* pure exclusivity),
- (2) clauses allowing several courts identified in the agreement while excluding all others (*i.e.* multiple exclusivity)<sup>2</sup>, and
- (3) non-exclusive choices of courts indicating an agreed court without preventing parties from seizing a different one.

Moreover, it occurred that there existed variants and combinations of these three types.

- (4) Participants gave examples where the choice was exclusive for one party, while the other party had the right to seize any one court out of a list of several agreed courts,
- (5) or a completely different one outside the agreement.

The so-called asymmetrical clauses described under (4) and (5) seem to arise in particular where there is an imbalance in bargaining powers between the parties.

- (6) Under yet another type of (symmetrical) clause, each party has to seize the other party exclusively in his or her home forum.<sup>3</sup>

There were doubts as to whether the cases (2)-(6) were frequent in practice. Since all of them except for type (1) allow for more than one court lawfully to be seized, they would require a rule on how to deal with parallel proceedings, thereby entailing further risks for the acceptance of this Convention. Whether there was a reasonable balance between the

<sup>2</sup> It was pointed out during the discussion that such clauses designating more than one court are widely used in some industries and some countries, *e.g.*, in the banking sector in Japan, but are void under some national laws, *e.g.* under Chinese law.

<sup>3</sup> As an example from arbitration, reference was made to an Arbitration Agreement between the American Arbitration Association and the Japanese Commercial Arbitration Association, dated 16 September 1952, under which the forum is chosen based on various factors.

advantages and disadvantages of including a rule on parallel proceedings depended, according to the group, also on whether other grounds of jurisdiction would eventually be added that would equally raise the issue of parallel proceedings.

A suggestion was made to avoid the need for a rule on parallel proceedings by applying the Convention only to the symmetrical part of the agreement. However, only type (4) clauses can be divided into a symmetrical and an asymmetrical part. Another suggestion was to have two different parts of the Convention for the truly exclusive clauses (type (1)) and the other clauses (types (2)-(6)). Neither suggestion was pursued any further.

The group clarified that everything that had been discussed or agreed during the first meeting related only to type (1) clauses. It was decided to concentrate<sup>4</sup> the discussion on this type for the time being and to obtain further information on whether types (2)-(6) were so frequent in B2B cases as to deserve being included as well, in particular in the light of the fact that Article 4(1) of the 2001 Interim Text contained a presumption of exclusivity. The Permanent Bureau offered to liaise with the International Chamber of Commerce (ICC) in this respect. One participant mentioned that the bar of Washington D.C. would also be ready to assist.

## **B. NON-EXCLUSIVE CHOICE OF COURT CLAUSES AND INTERIM RELIEF**

During its first meeting, the group had listed a number of principles with regard to interim relief in the presence of an exclusive choice of court clauses.<sup>5</sup> Among those principles, only one was identified which might require modification if the choice of court clause was non-exclusive, namely the principle with regard to anti-suit injunctions. In that first meeting it was considered that in the case where one court was exclusively chosen, the convention should allow (but not oblige) any other court concurrently to grant provisional and protective measures not amounting to relief on the merits in support of the chosen court's proceedings. At the time it was stressed, however, that such a rule should not permit these other courts to issue an anti-suit injunction to the detriment of proceedings before the court exclusively chosen. Research carried out by the Permanent Bureau indicates that a provision may not be necessary to this extent because no such cases could be identified in practice.

However, even under the assumption that this could be different with regard to non-exclusive choice of court clauses (*e.g.* courts in one Contracting State issuing an anti-suit injunction against a person who has brought proceedings abroad before the chosen court in another Contracting State), opinions within the informal group were divided as to if and how to deal with this in the Convention. While some participants would have liked to prohibit anti-suit injunctions completely, most saw no need to protect proceedings before a court chosen, but not on an exclusive basis, against interference by anti-suit injunctions issued in other Contracting States. It was suggested to limit the convention to exclusive choice of court clauses (in that case, no rule on anti-suit injunctions would be required). If it were decided to include non-exclusive clauses, it was suggested by most not to have a rule on anti-suit injunctions, either, because the cases would be very rare and would not justify the additional complication.

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<sup>4</sup> This did not exclude, however, that the group sometimes during the ensuing discussion also considered how a certain rule would work with regard to choice of court clauses other than the type (1) clauses

<sup>5</sup> See p. 14 of Prel. Doc. No 20 under VI.

### **C. FORMAL VALIDITY (ANNEX ARTICLE 4)**

During the first meeting, the question was raised whether a reference to “data message” as contained in Articles 2 and 6 of the 1996 UNCITRAL Model Law on Electronic Commerce, was necessary in order to adequately cover electronic and other forms of contracts. Following consultation carried out in the meantime, the group was now in a position to delete this reference again, which had tentatively been added during the last meeting.<sup>6</sup> The question of whether less rigid national form requirements should be prohibited, which was not resolved at the first meeting, was only discussed in the context of agreements to submit to jurisdiction after a dispute has arisen.<sup>7</sup>

### **D. SUBSTANTIVE VALIDITY**

#### **1. INTERNATIONAL ELEMENT REQUIRED? (ANNEX ARTICLE 2)**

##### **a) GENERAL INTERNATIONAL ELEMENT**

Starting from the provision on territorial scope in Article 2(1), and the extension for choice of court clauses in Article 2(1)(a), of the 2001 Interim Text, the group, during its first meeting, had tentatively suggested to keep something along those lines (including (a)) and, where necessary, amend it in order to make sure that two parties cannot take an otherwise entirely domestic case abroad just by choosing a foreign court. However, the group had not been able to find language for this.<sup>8</sup>

During its second meeting, the group revisited the issue. A redrafted version of the above-mentioned provision on territorial scope in general, as adapted for the purposes of a Choice of Court Convention, can be found in Article 2(1) of the Annex.

Concerning the requirement of a further international element in addition to the location of the chosen court, the difficulty as well as the need to find a clear definition were once again stressed because this would eventually determine the scope of a Choice of Court Convention. It was pointed out that such a requirement should not limit the scope of the Convention too much and thereby prevent it from being an equal alternative to arbitration. It was mentioned that, in some countries, foreign companies, in order to be allowed to do business in that country, had to create a local subsidiary or joint venture. If this then made their litigation with local businesses purely domestic, it could seem arbitrary in some cases to exclude these situations from the scope of the convention.

The two alternatives for Article 2(2) of the draft in the Annex suggest language in order to express the requirement of a general international element. While Alternative 1 focuses on the international nature of the dispute only, Alternative 2 looks at the international character of the relationship of the parties or the subject matter of the dispute. It was pointed out that the burden of proof might also play a role: As drafted in the Annex, where a plaintiff sues in the chosen forum, Alternative 1 would establish a presumption for giving effect to the choice of court agreement, and in many legal systems, the defendant would have to rebut it. Alternative 2, on the other hand, is phrased as a positive requirement for giving effect to the choice of court agreement and would, in many legal systems, have to be pleaded by the plaintiff or examined by the court *ex officio*. Consequently, a negative requirement may favour giving effect to choice of court agreements under the Convention slightly more than a positive requirement. Whatever option was chosen, the drafting would therefore have to be examined from the point of view of burden of proof.

<sup>6</sup> See p. 5 of Prel. Doc. No 20 as well as the parts printed in italics in Annex 1 No 2 to that document.

<sup>7</sup> See p. 12 *et seq.* (section III.A) and footnote 7 to the Annex.

<sup>8</sup> See p. 7 *et seq.* of Prel. Doc. No 20.

**b) SPECIFIC CONNECTION WITH FORUM STATE (ANNEX ARTICLE 13)**

At the first meeting, opinions had been divided as to whether, in addition to the requirement of internationality as such, some more specific international element should be required, namely a connection to the chosen forum. Some did not deem it prudent for all national legislatures and courts to accept an open-ended obligation to host lawsuits from any parties even where there is no objective link to the forum. Options discussed<sup>9</sup> were to leave it to national law whether the courts of a Contracting State would take these cases, or, more specifically, to allow for the use of national *forum non conveniens*, or to soften the obligation of a Contracting State to accept cases without a link to that State by a general escape clause to be discussed later,<sup>10</sup> or a declaration / reservation system. However, each of the options raised significant opposition.

Based on the assumption that without the requirement of a link with the chosen forum, the convention would not be acceptable for some, the group examined more closely the narrowest of the options which would have the smallest impact on the scope of the convention, *i.e.* the declaration / reservation solution. It was pointed out that this could be used by those States which had made the policy choice not to attract litigation unconnected to that State, but would not otherwise narrow the scope of the Convention in a general and mandatory way in this respect. Article 13 of the draft in the Annex suggests language for this.

Some participants still questioned the need for such a link. They recalled that the requirement of an international element would already exclude purely domestic cases, and regretted the possible lack of foreseeability the declaration system would bring about, as well as a lack of reciprocity. Although bilateralisation was generally considered undesirable, it was suggested by some that, in order to restore reciprocity, bilateralisation could be considered in this case. Moreover, for some it was important that the declaration could only be made once, *i.e.* at the time of ratification or accession, and not at any later time. Withdrawal, however, should be possible at any moment.

During the discussion about the details of a possible declaration rule, a number of examples were given as to how some national legal systems at present restrict foreign parties in choosing that State as a forum: the requirement of a minimum amount of the claim to be litigated, the requirement that the parties had also chosen the law of the chosen forum, or the requirement for a foreign plaintiff company who had been doing business in that State to register as a foreign company there (which would oblige that company to pay fees and may make it subject to being sued there on any ground, albeit unconnected to the business it carried out in that State). It was pointed out that these rules in U.S. states apply to corporations from other states of the U.S. as well as from foreign countries. There was uncertainty whether, under the regime of the Convention, it would still be permitted to apply some or all of these (and possible other) restrictions. Some of them might be seen as relating to subject matter jurisdiction or procedure (which are not affected by the Convention – see Annex, Articles 10 and 11). Where these restrictions did not relate to personal jurisdiction (which was the only issue governed by the Convention) and could therefore continue to apply, some suggested that States having established such limitations should not have a need for a declaration system. However, concerns were expressed about the risk of States creating such additional requirements in their national law and thereby undermining the scope of the

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<sup>9</sup> See p. 8 of Prel. Doc. No 20 under b.

<sup>10</sup> It was stated already at the first meeting, though, that the general public policy clause would be too narrow to satisfy those asking for a connection with the chosen forum. Therefore, according to this view, if it were decided to deal with the “unconnected” cases through a general escape clause, something more than just public policy, *e.g.* a clause on manifest injustice, would be required.



Convention. An option to avoid this would be a rule in the Convention prohibiting the application of national rules of procedure aimed at restricting the effect of choice of court clauses.

The group had discussed whether the declaration clause should list **required** connecting factors, as mentioned on page 8 of Preliminary Document No 20, or rather describe cases which might **not** be accepted (be it by again mentioning specific connecting factors the absence of which would give rise to non-acceptance, or by referring to “unconnected cases” in general). It was considered important to be as precise as possible, because the declaration would define the scope of the Convention. Some even wished to oblige a State making the declaration to state the requirements in the declaration. This was however found to be impractical, in particular with regard to States having more than one system of law,<sup>11</sup> and in the light of the need for other Contracting States to translate and publish these declarations internally.

## **2. LACK OF CONSENT AND GENERAL GROUNDS FOR INVALIDITY (GENERAL ESCAPE CLAUSE – ANNEX ARTICLES 5 AND 7)**

During its first meeting, the group had discussed whether a general clause establishing at least a partial convention standard of substantive validity should be included. Such a rule would enable courts to hold a choice of court clause invalid for reasons of substance. In the absence of a convention rule, this would be left to national law, unless the latter were expressly prohibited by the Convention. The options identified for a Convention standard were to have a general public policy rule only, or to add a further clause (*e.g.* on manifest injustice). While, at the first meeting, it was felt that a general public policy clause,<sup>12</sup> to be interpreted narrowly and applicable to all jurisdiction rules that might be included into the convention, could be inserted, there had been strong disagreement whether a further, slightly broader rule on substantive invalidity was desirable or even required,<sup>13</sup> and/or whether national rules on substantive validity should continue to apply.

This discussion repeated itself at the second meeting. Moreover, it emerged that it would be very difficult, if not impossible, to agree (in addition to the public policy clause) on language for a general escape clause creating an autonomous convention standard of substantive validity (in particular lawfulness), already in the informal group but all the more in a plenary meeting of the 62 Member States of the Hague Conference.

The examples given to illustrate the need for such a general escape clause (or, alternatively, for the possibility to apply national law), related to non-negotiated contract clauses, in particular in the area of electronic contracting (click-wrap agreements), but also outside that area (shrink-wrap agreements<sup>14</sup>). During the discussion it seemed that many legal systems would conduct a very close examination as to whether there had been valid consent in these cases. Other legal systems, however, might not label a similar situation as a lack of consent but might hold such an agreement invalid in an appropriate case under some general rule (for injustice, unreasonableness, public policy or other). Whether this was a part of consent or a separate concept was not always clear,

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<sup>11</sup> The U.S. participants, for instance, explained that in the U.S., Federal Courts lacked subject matter jurisdiction in contract cases unless there is present diversity of citizenship and the requisite jurisdictional amount (75,000 USD) is met, or there is a federal question, 28 USC 1331 - 1332, and that therefore implementation of a Choice of Court Convention would likely occur mainly through state courts.

<sup>12</sup> This would always be the public policy of the forum actually seized.

<sup>13</sup> See p. 8 *et seqq.* of Prel. Doc. No 20.

<sup>14</sup> This means that the standard terms are printed on the outside of the package containing the goods under a transparent plastic wrapping. They contain a clause to the effect that, by removing the plastic wrapping, the user agrees to these standard terms.

and it might be seen differently in different legal systems. Therefore, some now suggested that all States should have the same flexibility to hold a choice of court clause invalid, regardless of how this question was labelled in their national laws.

In this context, it was recalled that during its first meeting, in an attempt to enhance foreseeability, the group had suggested to make consent subject to the law chosen by the parties or, in the absence of a choice of law, to the internal law of the chosen court. It had not been possible at the first meeting to agree on a common proposal for the law applicable to other aspects of substantive validity, in particular to lawfulness (Convention standard, law of the court chosen or law of the court seized).<sup>15</sup> In the light of the discussion mentioned above, which had illustrated that different legal systems might use different legal categories in order to come to similar results as regards the flexibility they considered necessary, it was suggested by some not to subject consent and other substantive validity requirements to different laws because it would be difficult to draw the line. Instead, the law of the court seized<sup>16</sup> should determine all aspects of substantive validity of the choice of court clause.<sup>17</sup>

Those who had initially requested an additional rule beyond public policy stated that a solution which left the issue of substantive validity completely to national law would have two advantages. Firstly, one would not have to draw the line between consent and other aspects of substantive validity. Secondly, if this solution to apply the law of the court seized, in combination with a general public policy clause, were adopted, they would not need an escape clause allowing the court seized but not chosen to hold a choice of court agreement invalid (e.g. a "manifest injustice clause"). If, on the other hand, the rule which subjected consent to the law chosen by the parties, or, in the absence of a choice of law, to the internal law of the chosen court, were kept,<sup>18</sup> they required an additional escape clause, and public policy alone would not suffice.<sup>19</sup>

Others felt that it would not constitute any improvement of legal certainty as compared to the present situation to leave all aspects of substantive validity to the law of the court seized. This would reduce the convention to an instrument on the formal validity of choice of court clauses. They therefore preferred to maintain the solution found at the first meeting, *i.e.* to subject consent to the law chosen by the parties and, in the absence of a choice of law, to the internal law of the chosen court.<sup>20</sup>

Those advocating this position stated that they might be ready to compromise and subject consent and capacity to the law of the court seized if this would avoid including a "manifest injustice clause". However, some of them insisted that lawfulness should

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<sup>15</sup> See No 1, second proposal, of Annex I to Prel. Doc. No 20 (p. 17).

<sup>16</sup> This would include its public policy, its conflict of laws rules on the conclusion of contracts, and the substantive law designated by the latter.

<sup>17</sup> See Article 5(2), Alternative 1, Alternative 2, second sentence, and Alternative 5 in the draft annexed to this Report. With regard to Alternative 2, second sentence, and to Alternative 5, it was pointed out that such an explicit rule stating that some or all aspects of substantive validity were subject to the law of the court seized would mean that the applicable law – and therefore the validity of the clause – could not be determined as long as no court was seized. Therefore Alternative 1 was deemed preferable by some participants in this respect. In the same context, it was asked whether a rule like Article 27(1) of the 2001 Interim Text ("The court addressed shall verify the jurisdiction of the court of origin") would be kept in a convention limited to choice of court clauses. If this was the case, which law would that court then apply when examining the validity of the choice of court clause? The need (and possible shape) of such a provision will have to be revisited during the discussion of the provisions on recognition and enforcement.

<sup>18</sup> It seems more likely that parties comply with the requirements of a law they have chosen (either directly or indirectly by choosing a court) than with the requirements of a law the applicability of which to their agreement is not foreseeable at the time of the conclusion of the agreement but only established at the moment where a court (other than the chosen court) is being seized. So to leave (all or parts of) substantive validity to the law of the court seized (including its private international law rules) could lead to a higher number of clauses being held invalid by courts seized but not chosen, and these courts would then hear the cases themselves if they had jurisdiction under national law. By seizing a court under the law of which the clause is invalid, a plaintiff can thereby avoid having to comply with a choice of court clause.

<sup>19</sup> See Article 5(2), Alternative 3 in the draft annexed to this Report, and its footnote No 13.

<sup>20</sup> See Article 5(2), Alternative 3 in the draft annexed to this Report.

depend on the law of the chosen court only (or on the law chosen by the parties), and not on the law of the court seized. Moreover, they wanted to make it clear in the convention that parties had a right to choose a law applicable to the substantive validity of a choice of court clause.<sup>21</sup>

The different alternatives in Article 5 of the draft in the Annex reflect the variety of opinions expressed. In addition to the report on the discussion, the following may be mentioned:

Alternatives 2, 3 and 4 state, in addition to other rules, the right of the parties to choose a law applicable to the (substantive) validity of their choice of court agreement.

Of all five alternatives, only Alternative 3 subjects validity – in the absence of a choice of law by the parties – to the internal law of the court **chosen**. All other alternatives eventually lead to the law (including the private international law) of the court seized. While there is no policy difference between Alternative 2, second sentence, Alternative 4, second sentence and Alternative 5 in this respect, their wording differs. Alternatives 4 and 5 follow the example of Article II(3) of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards while Alternative 2 uses terminology common to Hague Conventions.

#### **E. INTELLECTUAL PROPERTY (IP)**

At its first meeting, the group had tentatively suggested to include copyright but to exclude patents, trademarks (both registered and unregistered) and other registered industrial property rights from a possible rule on choice of court clauses, and to consult stakeholders on this.<sup>22</sup> During the second meeting, a report was received from one Member State on the result of consultations carried out on this issue. In that State, the wish was expressed that not only copyright, but all IP rights should be included into the scope of a convention limited to choice of court clauses. It was stressed that, where there was a choice of court agreement between the parties, it would be normally included in a licensing agreement. Such decisions made by commercial parties should be respected and strengthened by an international convention, as they already are when the parties choose arbitration, and the result should apply only *inter partes*. “Sheer piracy cases” (*i.e.* an infringer infringing an IP right of a right-holder with whom he does not have any contractual relationship, in the area of pure tort or delict) would be excluded from the scope of a rule on choice of court clauses. The problem identified during the 2001 negotiations with regard to the torts provision (*i.e.* that, in most of the infringement cases, invalidity was raised as a defence or, if national procedural law so required, as a counter-claim, while validity was subject to exclusive jurisdiction under the convention) was considered to be rather unlikely to arise in contract (license) litigation. If deemed necessary in order to meet some concerns, it could be made clear that any judgment rendered on the basis of a choice of court clause would not have any effect on registration authorities or, in the case of an unregistered trademark, on the validity of the mark as such.

Other participants, in their preliminary comments, stated that the latter would indeed have to be made explicit in the convention (and not only in the Report), if it were decided to include all IP license litigation. Moreover, to the extent that validity claims would be outside the scope of the convention, it remained unclear what would happen if the validity issue was raised in license litigation. It was feared that defendants could seek to avoid a judgment on the merits rendered in the chosen forum **under the Convention** by raising an invalidity defence, unless this were clarified.

<sup>21</sup> See Article 5(2), Alternatives 2-4 (first sentence) in the draft annexed to this Report.

<sup>22</sup> See p. 12 of Prel. Doc. No 20.

Participants agreed to consult further on this issue.

### **III. POSSIBLE OTHER BASES OF JURISDICTION TO BE INCLUDED INTO THE CONVENTION**

Consistent with the mandate conferred on the informal working group by the Commission on General Affairs in April 2002, the group discussed during its second meeting some possible further bases of jurisdiction to be added to a Convention, as identified by the Commission on General Affairs. On the basis of Preliminary Document No 19, the group examined possible rules on consent / waiver / submission, counter-claims, and defendant's forum.

#### **A. CONSENT / WAIVER / SUBMISSION (ARTICLE 9)**

The 1999 draft had contained the following rule:

"Article 5 Appearance by the defendant

1. Subject to Article 12, a court has jurisdiction if the defendant proceeds on the merits without contesting jurisdiction.
2. The defendant has the right to contest jurisdiction no later than at the time of the first defence on the merits."

Subsequently, concerns were expressed that, in a mixed convention, such a rule would increase litigation. In cases where there was jurisdiction under national law but not under other rules of the Convention, a defendant who had assets to satisfy a judgment only in other Contracting States but not in the State of the court seized would be obliged to plead lack of jurisdiction because otherwise, jurisdiction under the Convention would be established by way of Article 5, thereby enabling the judgment to be recognised and enforced under the Convention in other Contracting States.<sup>23</sup> This had led to the deletion of former Article 5 and to the inclusion of draft Article 4(3) in the 2001 Text:

"Article 4

[...]

- (3) Where a defendant expressly accepts jurisdiction before a court of a Contracting State, and that acceptance is [in writing or evidenced in writing], that court shall have jurisdiction."

The purpose had been to retain a rule avoiding the problems which might be linked to the previous solution while maintaining some of its advantages (in particular to protect party autonomy in case of a post-filing choice of court agreement).

While a few members of the informal group would have preferred a true submission rule like Article 5 (1999), some others were strictly against it, and some suggested to delete even Article 4(3) (2001). They thought that it did not add anything to the general rule in Article 4(1) of the 2001 Text.

Those in favour of retaining Article 5 (1999) argued that this would not increase litigation. The defendant simply had to state his opposition in a motion to the court. Then jurisdiction would be based on national law, and the judgment would not be enforceable under the Convention. Most participants, however, objected that their courts would not state in the judgment what had been the basis of jurisdiction, and even if a basis of national law were mentioned, then most likely the defendant's opposition to Convention jurisdiction would not be recorded in the judgment. The suggestion to oblige the courts to state the basis of jurisdiction was dismissed as too far-reaching and bureaucratic.

Eventually, however, most members of the group seemed to see the "post-filing choice of court" embodied in Article 4(3) (2001) as a workable starting point, but the

<sup>23</sup> See Prel. Doc. No 11, p. 46; footnote 152 to the 2001 Interim Text.

discussion which followed raised another issue regarding submission, namely the form requirement.

Initially only seen as a drafting matter, it was recalled that, if Article 4(3) (2001) were kept, the reference to “in writing” should be aligned with Article 4(2),<sup>24</sup> thereby creating an autonomous convention form standard also for submission in the appearance of a post-filing agreement. Others thought this was superfluous at least in the English version because the requirement for the submission to occur “before the court”, as Article 4(3) of the 2001 Interim Text was phrased in English, seemed to be enough of a form requirement, as long as the submission was expressed in accordance with the procedural law of that State. As concerns the French text of Article 4(3) (2001), an amendment would be required in any case in order to reflect these ideas.

This suggests that, if the reference to “writing” were deleted, a “post-filing agreement before the court” as provided in Article 4(3) of the 2001 Interim Text in its English version be no more and no less than a further option for the form of such an agreement in addition to Article 4(2). If the court is not involved in the conclusion of the agreement, one of the form requirements in Article 4(2) has to be fulfilled, and if it occurred “before the court”, the agreement falls under Article 4(3) and has to comply with the requirements of national law. The proposed Article 9 in the Annex suggests wording in order to make clear that the latter requires some involvement of the court.

Given the rather opposed views expressed previously within the group as to whether the Convention should prohibit not only higher, but also lower national form requirements for choice of court agreements, the question remains whether this reference to national law and its form standards is acceptable in this particular situation of a choice of court agreement entered before the court. If this were undesired and an autonomous convention form standard preferred also for these submission cases, the reference to “in writing” would have to be kept and aligned with the requirements in Article 4(2).

Whether, in addition to allowing national form requirements to re-enter the scene, this limited submission rule would add anything else to the jurisdiction rule now embodied in Article 6(1) of the Annex, however, will depend on whether all the limitations which might be agreed for choice of court clauses (e.g. international element, link requirement) should also apply to submission. Opinions on this question were divided.

## **B. COUNTER-CLAIMS**

Following the request by the Commission on General Affairs, the group examined whether a rule on counter-claims, possibly along the lines of Article 15 of the Interim Text, could be added to the Convention.

### **1. POSSIBLE ADDED VALUE OF A RULE ON COUNTER-CLAIMS IN THE PRESENCE OF A CHOICE OF COURT CLAUSE**

A dispute is covered by a choice of court clause under Article 4(1) of the 2001 Interim Text if it “has arisen or may arise in connection with a particular legal relationship” which the parties have agreed to submit to the chosen court. The same formulation is used in Article 6(1) in the Annex.

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<sup>24</sup> See already footnote 26 to the 2001 Interim Text.



Article 15 of the 2001 Interim Text<sup>25</sup> provides that a court which has jurisdiction to determine a claim under the provisions of the Convention, shall also have jurisdiction to determine a counter-claim “arising out of the transaction or occurrence on which the original claim is based”.

The group noted that both rules required a connection. If the parties had submitted a claim “arising out of or in connection with a particular legal relationship” to a chosen court, and a counter-claim arose “out of the transaction or occurrence on which the original claim” was based, this connection seemed to suggest that the counter-claim as such would already be covered by the rule on choice of court clauses. Therefore, an additional rule on counter-claims along the lines of Article 15 of the 2001 Interim Text would, in a Convention limited to choice of court clauses, not add anything.

During the discussion, however, some situations were identified where a rule on counter-claims would add something. Opinions were divided about whether this was desirable.

Even a limited rule on counter-claims like Article 15 of the 2001 Interim Text, which required a connection, would add something if choice of court clauses of types (4), (5) and (6) as described above<sup>26</sup> were included into the Convention. Where one party had seized a forum that was only open to this party and not to the other, only a rule on counter-claims would enable the other party to bring a counter-claim under the Convention in that forum. While some participants thought that this should be possible, others disagreed because such a rule would lead to the circumvention of the choice of court clause which had deliberately not offered this forum to the party concerned.

## **2. RELATION TO SET-OFF AND POSSIBILITY OF EXTENDING A RULE ON COUNTER-CLAIMS TO CLAIMS NOT CONNECTED TO THE PRINCIPAL CLAIM**

A further question was whether it was desirable to extend the rule on counter-claims to unconnected claims.

A discussion developed about set-off and counter-claims. This was based on the understanding that, notwithstanding existing differences between national laws in this respect, a set-off generally meant that the defendant against whom a claim (in most cases a money claim) was brought defended himself with a claim of the same kind (*e.g.* equally money) he allegedly had against the plaintiff. If the defence was successful, the amount was deducted from the amount claimed by the plaintiff. In other words, a set-off enabled a defendant to defend himself against a money claim with another money claim up to the amount claimed by the plaintiff in the principal claim. If the amount raised as a set-off defence exceeded the amount claimed by the plaintiff, the judgment would simply dismiss the plaintiff’s claim without giving the defendant a title to collect the  
exceeding

<sup>25</sup> Article 15 of the 2001 Interim Text reads as follows:

“Article 15 – Counter-claims

[Subject to Article 12,] a court which has jurisdiction to determine a claim under the provisions of this Convention shall also have jurisdiction to determine a counter-claim arising out of the transaction or occurrence on which the original claim is based [unless the court would be unable to adjudicate such a counter-claim against a local plaintiff under national law].” It has to be noted that there is a difference between the English and French version of the bracketed part at the end of Article 15: While the French text refers to a lack of subject matter jurisdiction which is missing in the English text, the English text lacks the references to a local plaintiff and to national law which appear in the French text.

<sup>26</sup> See p. 5 of this Report.

amount from the plaintiff. A stand-alone title can, in most legal systems, only be obtained by the defendant to the principal claim by filing a counter-claim.<sup>27</sup>

A few participants voiced concerns even about the possibility of a set-off defence because this might widen the substantive scope of the Convention. Where national legal systems did not require any connection between the principal claim and the claim raised as a set-off defence, the latter could be based on any facts, even on facts completely unrelated to the facts on which the principal claim was based (e.g. on a tort unrelated to the contract which included the choice of court clause).<sup>28</sup> Some thought that this was undesirable and wished to limit the right to a set-off to the same legal relationship, while most participants felt that a set-off defence should always be possible.

Among those adhering to the last-mentioned view, some thought that even an unlimited possibility for a set-off defence was not sufficient if the claim raised as a set-off defence exceeded the principal claim. They stated that in these cases – even if there was no connection between the two claims and the set-off claim therefore not covered by the choice of court clause, the defendant should be enabled to bring a counter-claim which would permit him to enforce the exceeding amount against the plaintiff under the Convention.

Others objected again that this would widen the scope too much. Another problem was that an unconnected counter-claim might have its own choice of court clause which should be respected. These participants recalled that, even if no rule on unconnected counter-claims were included into the Convention, national law would probably provide counter-claim jurisdiction in some circumstances. This would not be prohibited under the Convention. Recognition and enforcement of the judgment on the counter-claim would then depend on national law.

### **C. DEFENDANT'S FORUM**

The informal working group discussed the possibility to add a rule on a general defendant's forum to the Convention, and a few participants expressed a strong desire to do so. As a starting point, Article 3 of the 2001 Interim Text was examined.

It was pointed out that, in 2001, there had been no specific objections to including a general defendant's forum. However, no consensus had been reached on the details.<sup>29</sup> The group discussed the issue in detail in order to comply with its mandate and report to Member States and to Commission I on the possibility of adding further bases of jurisdiction.

The difficulties identified, even if the Convention as a whole were limited to B2B cases, were in particular the following:

- (1) The addition of any further basis of jurisdiction beyond exclusive choice of court clauses would make the structure more complicated and require a rule on how to deal with parallel proceedings (*lis pendens/forum non conveniens* problem), and while those present still considered Articles 21 and 22 of the 1999/2001 drafts to be major consensus-building achievements, they wondered whether the additional complication of including such a rule would not outweigh the benefit of

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<sup>27</sup> National laws also contain further rules as to when a certain defence may be raised incidentally in the principal proceedings, and in which cases it has to be brought as a counter-claim. The latter is the case, for instance, in patent cases in some countries where an invalidity defence has to be brought by a counter-claim. The question was raised which would be the effect of a rule on counter-claims in the Convention if patents and trademarks were included.

<sup>28</sup> Another question which arises in the context of a set-off is whether a claim covered by an exclusive choice of court clause may be raised as a set-off defence before a court other than the chosen court.

<sup>29</sup> See footnote 16 as well as the bracketed parts of Article 3 of the 2001 Interim Text.

a further basis of jurisdiction. The need for a rule on parallel proceedings seemed to be particularly urgent in B2B cases where, under the Convention rule in Article 3(3) of the 2001 Interim Text, the equivalent to "habitual residence" for natural persons could amount to as many as four different general defendant's fora for an entity or a person other than a natural person.

- (2) If a rule on the defendant's forum were included, the Convention would no longer be limited to cases of party autonomy. This would mean that the conflicts between national rules on exclusive jurisdiction and the Convention grounds, which would have to be resolved by the Convention, would become more numerous.
- (3) The addition of a general defendant's forum would probably give rise to certain States requesting a black list of prohibited grounds of jurisdiction,<sup>30</sup> and consensus on such a list did not seem achievable. The same was true for bilateralisation which would enable Contracting States to pick and choose their partners from among other Contracting States.
- (4) The problem of tort claims, in particular, brought in the general defendant's forum, would cause additional problems.

It was agreed that these problems would have to be resolved independent of the concept chosen for a general defendant's forum. While some support was expressed for "habitual residence" and nobody spoke explicitly in favour of "domicile" or "residence", the arguments raised against "habitual residence" were however manifold.

- (1) If the choice were for "habitual residence", the definition problem would arise. The time required for the establishment of a habitual residence was mainly defined by case-law in the area of family law, and, in particular, child abduction. While there, according to the *1980 Hague Convention on the Civil Aspects of International Child Abduction*, the time required to establish a new habitual residence after a wrongful removal or retention should be as long as possible, some participants were of the opinion that for the purposes of this Convention, a general defendant's forum (enabling plaintiffs to sue the defendant on any ground, albeit unconnected to the establishment of the general defendant's forum) should be acquired as quickly as possible.
- (2) Moreover, a choice for "habitual residence" would entail problems to disconnect this rule (or the Convention as a whole) from the European instruments<sup>31</sup> because there, the general defendant's forum was domicile.

In order to find a way out of this dilemma, a suggestion was made to combine a double convention on choice of court with a simple convention on defendant's forum and perhaps other grounds. While for the former, jurisdiction as well as recognition and enforcement flowing from jurisdiction under the Convention would be regulated in a closed system, there would be no jurisdiction rules for decisions based on other grounds (of national law) but, to a limited extent, a possibility for recognition and enforcement under the Convention if the judgment was double-checked by a black list of indirectly prohibited grounds at the enforcement stage. While some thought that this would at least avoid the problem of parallel proceedings, others disagreed and mentioned that most of the simple conventions operating before the advent of the Conventions of Brussels and Lugano had a rule on *lis pendens*.

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<sup>30</sup> This was raised in particular in case of a choice for "residence" which, according to some participants, had to be distinguished from the mere presence which should be a prohibited ground.

<sup>31</sup> This expression stands for the Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of Brussels (27 September 1968) and Lugano (16 September 1988) as well Regulation (EC) No 44/2001 which had converted the Brussels Convention into a Community instrument applicable to all 14 EU Member States with the exception of Denmark. The Brussels Convention, however, is still applicable between the 14 EU Member States to which the Regulation applies, and Denmark.

When balancing the possible benefits of adding a "simple convention chapter" against the complications and ensuing delays this would probably entail, a preference was expressed within the group to limit the present project to choice of court clauses in B2B cases, and to perhaps examine at a later stage, once this project was concluded, whether any further project could follow this up.

#### **IV. FUTURE WORK**

The group will hold its next meeting from 25-28 March 2003 in The Hague. Comments on this Report and the issues raised therein, as well as on Preliminary Documents Nos 19 and 20,<sup>32</sup> are welcome and may be submitted to [secretariat@hcch.net](mailto:secretariat@hcch.net) and/or to [as@hcch.nl](mailto:as@hcch.nl). Moreover, a number of questions raised in those documents have been addressed directly to the Member States of the Hague Conference by Circular letter L.c. ON No 75(02) of 19 December 2002 which can be consulted on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) >.

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<sup>32</sup> Available at < <http://www.hcch.net/e/workprog/jdgm.html> >.

## **A N N E X**

*[The States signatory to the present Convention,*

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

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

...

*Have resolved to conclude the following Hague Convention on Choice of Court Agreements for [Business] [Commercial] Transactions (the "Hague B2B Convention") and have agreed upon the following provisions - ]<sup>1</sup>*

## **CHAPTER I**

### **Article 1 – Substantive scope**

1 This Convention shall apply to –

- a) agreements on the choice of court concluded in civil or commercial matters;
- b) ....
- c) .....

(...)

2 The Convention shall not apply to –<sup>2</sup>

- a) consumer contracts. A consumer contract is an agreement between a natural person acting primarily for personal, family or household purposes (the consumer) and another party acting for the purposes of its trade or profession, or between two consumers.
- b) individual contracts of employment.

<sup>1</sup> The preamble, and in particular its third paragraph, is drafted for the purposes of a Choice of Court Convention. It is placed in square brackets both because it has not yet been discussed and because it is not within the mandate of the informal group to decide about the ultimate scope of this Convention.

<sup>2</sup> The group considered it premature to make suggestions on the exclusions from scope. It however decided to add the list of relevant exclusions from scope as contained in Article 1(2) of the 2001 Interim Text in a footnote in square brackets as a reminder of the items to be discussed. While the square brackets contained in the 2001 draft are reproduced here, the footnotes attached to the individual provisions in the Interim Text are not.

[“2. The Convention does not apply to –

- a) the status and legal capacity of natural persons;
- b) maintenance obligations;
- c) matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships;
- d) wills and succession;
- e) insolvency, composition or analogous proceedings;
- f) social security;
- g) (...);
- h) admiralty or maritime matters;
- [i) anti-trust or competition claims;]
- [j) nuclear liability;]
- k) (...);
- [l) rights *in rem* in immovable property;]
- [m) validity, nullity, or dissolution of a legal person and decisions related thereto]”].

- c) .....
- d) .....

3 This Convention shall not apply to arbitration and proceedings related thereto, nor shall it require a Contracting State to recognise and enforce a judgment if the exercise of jurisdiction by the court of origin was contrary to an arbitration agreement.

4 A dispute is not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any person acting for the State is a party thereto.

5 Nothing in this Convention affects the privileges and immunities of sovereign States or of entities of sovereign States, or of international organisations.

### *Article 2 – Territorial scope*<sup>3</sup>

1 The provisions of Article[s] 6[, ...]<sup>4</sup> shall apply in the courts of a Contracting State unless all the parties are habitually resident in that State and have agreed that a court or courts of that same Contracting State have jurisdiction to determine the dispute.

2 A choice of court agreement shall be given effect under this Convention<sup>5</sup>

Alternative 1 unless all elements relevant to the dispute other than the choice of court agreement are connected with the State in which all the parties are habitually resident.

Alternative 2 only if the relationship of the parties or the subject matter of the dispute has a connection with another State or is otherwise of an international character.

3 For the purposes of this Convention, an entity or person other than a natural person shall be considered to be habitually resident in the State –

- a) where it has its statutory seat;
- b) under whose law it was incorporated or formed;
- c) where it has its central administration; or
- d) where it has its principal place of business.

### *Article 3 - Definition*

1 For the purposes of this Convention, a choice of court agreement is an agreement whereby two or more parties designate, for the purpose of deciding disputes which have arisen or may arise between them in connection with a particular legal relationship,

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<sup>3</sup> See, for further details, the discussion on p. 7 of this Report.

<sup>4</sup> Possible Articles to be added depend on the question whether, eventually, there will be other bases of jurisdiction in the Convention.

<sup>5</sup> See the discussion of the international element on p. 7 of this Report.

- the courts of one country or one specific court to the exclusion of the jurisdiction of any other courts[, or

- the courts of a certain number of countries or certain specific courts to the exclusion of the jurisdiction of any other courts].<sup>6</sup>

2 An agreement whereby parties have designated a court to decide disputes between them as provided in paragraph 1 shall be deemed to exclude the jurisdiction of any other courts unless the parties have otherwise agreed.

#### **Article 4 – Formal validity**

A choice of court agreement shall be valid as to form [only]<sup>7</sup> if it was entered into –

a) in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference;

b) orally and confirmed in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference;

c) in accordance with a usage which is regularly observed by the parties to the choice of court agreement<sup>8</sup>; or

d) in accordance with a usage which the parties to the choice of court agreement<sup>9</sup> knew or ought to have known and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.

#### **Article 5 – Substantive validity**

1 The Convention does not determine the law applicable to the capacity [or consent] of the parties.

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<sup>6</sup> Although Article 3 is at present limited to exclusive choice of court clauses, it still has to be decided whether the (exclusive) types (2) and (6) listed on p. 5 of this Report shall also be covered by the Convention. If it were moreover decided to cover even non-exclusive choice of court clauses, further amendments would be necessary. A rule on parallel proceedings (*lis pendens*) would probably be required for anything going beyond type (1) of the clauses listed on p. 5 of this Report. Another suggestion was to include at least type (2) (multiple exclusivity) but to leave it to national law how to deal with parallel proceedings.

<sup>7</sup> The word “only” was placed in square brackets because there is no consensus yet as to whether the form standard under the Convention shall preclude less rigid national form standards from creating a grey jurisdiction under national law outside the Convention.

<sup>8</sup> The drafting change as compared to the last meeting (from “these parties” to “the parties to the choice of court agreement”) was made in order to make it even clearer that this requirement had to be fulfilled by the parties concerned in the individual case.

<sup>9</sup> The drafting change as compared to the last meeting from “the parties” to “the parties to the choice of court agreement” was made in order to make it even clearer that this requirement had to be fulfilled by the parties concerned in the individual case. The change from “the parties to contracts of the same nature” to “parties to contracts of the same nature”, on the other hand, was made in order to express the opposite, namely that this did not relate to the parties in question.



2 Subject to<sup>10</sup> the provisions of Article 4,<sup>11</sup>

Alternative 1 this Convention does not determine the validity of the choice of court agreement.<sup>12</sup>

Alternative 2 the parties may determine the law applicable to the choice of court agreement, including the question of the validity of the choice of court agreement. In the absence of a choice of law by the parties, the law of the court **seized, including its rules of private international law**, shall determine the validity of the choice of court agreement.

Alternative 3 the parties may determine the law applicable to the choice of court agreement, including the question of the validity of the choice of court agreement. In the absence of a choice of law by the parties, the **internal** law of the court **chosen** shall determine the validity of the choice of court agreement.<sup>13</sup>

Alternative 4 the parties may determine the law applicable to the choice of court agreement. In the absence of a choice of law by the parties, the law of the court seized shall determine whether the said agreement is null and void, inoperative or incapable of being performed.

Alternative 5 the law of the court seized shall determine whether the said Agreement is null and void, inoperative or incapable of being performed.

## CHAPTER II

### Article 6 – *Jurisdiction rule*

1 If the parties have agreed in a choice of court agreement that a court or the courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or the courts of that Contracting State shall have jurisdiction.

<sup>10</sup> Depending on which Alternative is chosen for paragraph 2, it will have to be examined whether a reference to paragraph 1 has to be included into the “subject to” phrase.

<sup>11</sup> In their present form, **Alternatives 1-3** relate to all aspects of substantive validity, *i.e.* including capacity, consent and lawfulness. A possible **Alternative 6** would be to replace in **Alternatives 1-3** “validity of the choice of court agreement” by “whether a party has consented to the choice of court agreement”. This would have the following effect on the alternatives as listed above:

The present **Alternative 1** would become identical to paragraph 1 as mentioned above with the addition relating to consent in square brackets. It would only clarify that the Convention does not deal with the law applicable to capacity and consent.

If **Alternative 2**, second sentence, were reduced from “validity” to “consent”, capacity would be treated in paragraph 1, and nothing would be said explicitly about the last element of substantive validity, namely lawfulness. This will most likely have the effect that the law of the court seized, including its rules of private international law, will be applied. Therefore, with or without the substitution suggested in **Alternative 6**, the result would be the same. The law of the court seized, including its private international law rules, would govern all aspects of substantive validity, *i.e.* consent, capacity and lawfulness.

**Alternative 3**, second sentence, is the only one where it would make a difference in substance if the text were reduced from “validity” to “consent”. At present, it provides that all aspects of substantive validity (except capacity, see paragraph 1) are governed by the internal law of the court chosen. Therefore it **does** deal with the law applicable to consent (thereby excluding the addition of the words “to consent” in paragraph 1). Moreover, it subjects lawfulness to the internal law of the court chosen. To replace “validity” by “consent” would mean that nothing would be said explicitly about the last element of substantive validity, namely lawfulness. This will, again, most likely have the effect that the law of the court seized, including its rules of private international law, will be applied.

<sup>12</sup> The acceptance of **Alternative 1** would make paragraph 1 redundant.

<sup>13</sup> This proposal made by some participants would, upon request of some other participants, have to include as well a manifest injustice clause.

2 Where an agreement having exclusive effect designates [a court or] [the] courts of a Contracting State, courts in other Contracting States shall decline jurisdiction or suspend proceedings unless the [court or] courts chosen have themselves declined jurisdiction.

[3 Where an agreement having exclusive effect designates [a court or] [the] courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the [court or] courts chosen have themselves declined jurisdiction.]<sup>14</sup>

*Article 7*<sup>15</sup>

[The parties cannot be deprived of the right to enter into choice of court agreements neither generally nor in the individual case except for reasons of public policy.]

[*Article 8 – Parallel proceedings in two chosen courts*]<sup>16</sup>

*Article 9 – Submission*<sup>17</sup>

[Where a court of a Contracting State has been seized with a claim and where and to the extent that the defendant expressly and in the form required by the procedural law of the court seized accepts the jurisdiction of that court, that court shall have jurisdiction.]

*Article 10 – Subject matter jurisdiction*

Alternative 1

1 Nothing in this Convention shall affect subject matter jurisdiction [or the internal allocation of jurisdiction among the courts in a Contracting State].<sup>18</sup>

Alternative 2

1 Parties may by a choice of court agreement designate either –

a) the courts of one of the Contracting States, the particular competent court being then determined (if at all) by the internal legal system or systems of that State, or

<sup>14</sup> Although there had been consensus on this rule in 2001, doubts were expressed within the group as to whether it was politically reasonable for Contracting States to assume this obligation vis-à-vis third States. If a decision to the contrary were taken, this would require an amendment of Article 2(1) which currently covers these cases. If the paragraph were retained, it could be merged with paragraph 2.

<sup>15</sup> This Article (and its relation to a possible public policy clause) has not yet been discussed. It was suggested, however, to redraft it in order to focus on “giving effect to the choice of court agreement” instead of focusing on the right of the parties to enter into such agreements.

<sup>16</sup> A rule on parallel proceedings would (only) be required in a Convention limited to choice of court agreements if it were decided to include not only choice of court agreements exclusively indicating one single court (or the courts of one single Contracting State) (type (1) described on p. 5 of this Report) but also some or all of the types (2)-(6) described there.

<sup>17</sup> There was no agreement as to whether this rule should (1) only apply to cases where there was no pre-dispute choice of court agreement, or (2) where there was a pre-dispute choice of court agreement which would then be overruled by submission, or (3) to both situations.

<sup>18</sup> This wording was preferred to the positive requirement “provided that the court has subject matter jurisdiction” (or similar language as included in Alternative 2 under 1(b)) because it would allow to “save” a clause pointing to a court lacking subject matter jurisdiction by interpretation, thereby directing the parties to the “right” court in the Contracting State they had chosen.

b) a court expressly named of one of the Contracting States, provided that this court is competent according to the internal legal system or systems of that State.

*Article 11*

Rules of a procedural nature are not regulated by this Convention. However, States may not apply such rules in a discriminatory way when applying this Convention.

**CHAPTER III**

*Article 12 – Recognition and enforcement*

**CHAPTER IV FINAL CLAUSES**

*Article 13 – Limitation of jurisdiction*

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

*Article 14 – Relationship with other international instruments*