

February 2001

**Note on the relationship between the future Hague Judgments Convention  
and regional arrangements,  
in particular the Brussels and Lugano instruments**

*drawn up by the Permanent Bureau*

1 For the informal Basle meeting, the Permanent Bureau prepared an informal Memorandum, with examples "Territorial applicability of the future Hague Judgments Convention and Brussels/Lugano instruments, according to respective instruments (main issues only)", on the respective territorial applicability of the preliminary draft Convention (PDC) on the one hand, and the Brussels and Lugano instruments on the other hand, according to the territorial scope rules of each instrument. The Permanent Bureau was asked to provide further explanations to the examples, and to assist in drawing conclusions therefrom, with a view to facilitating a resolution of the outstanding question of how to deal in the future Hague Convention with its relationship to other regional arrangements, in particular the European instruments.

./ 2 A revised informal document on the territorial applicability of the future Hague Judgments Convention and the Brussels/Lugano instruments, according to the territorial scope rules of the respective instruments (version June 2001), is attached to this Note (the examples with further explanations, are, so far in English only, available upon request with the Permanent Bureau).

The purpose of the present Note is (1) to present some conclusions which may be drawn from these examples (A), and (2) to try and assist in advancing the resolution of the outstanding question of the relationship with other conventions (B). Reference is made to the PDC (Prel. Doc. No 4) and the Brussels and Lugano Conventions as revised by the Working Party on their Revision, Council EU Doc 7700/99 (Brussels, 30 April 1999). See also Prel. Doc. No 7, Nos 52-58.<sup>1</sup>

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<sup>1</sup> At the Basle meeting, the delegation of the United States of America made the following proposal as a starting point for the discussions:

**"Article 2 Territorial scope**

1. The provisions of Chapter II shall apply in the courts of a Contracting State unless all the parties are habitually resident in that State, or are habitually resident in member states of a regional economic integration organization. However, even if all the parties are habitually resident in that State –

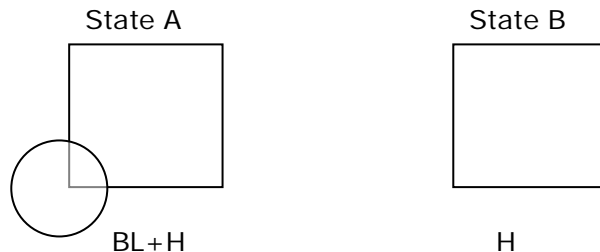
**Article 37 Relationship with other conventions**

1. In the case of a conflict between a provision of this Convention and a provision of another applicable international treaty, the provisions of this Convention shall apply unless all the parties are habitually resident in States Parties to the other treaty.

2. Notwithstanding the rule in paragraph 1, [add specific exceptions]."

## A Conclusions

**3** The typical hypothesis examined here is that where State A is a Party to the Brussels Convention, or the Regulation<sup>2</sup> and/or the Lugano Convention (hereinafter together: BL), *and* also to the Hague Convention (H), and State B is a Party only to H and not to BL (of course, State B might also be a Party to another regional treaty, may be a Federal State etc.):



**4** In the following cases *no overlap* would exist in that hypothesis between H and BL, *because only H applies*:

- (1) where the courts of State B are seized, because only H, not BL, applies in B;
- (2) where a choice of a court or the courts of A has been made, provided that *none of the parties has its domicile in any BL State (not necessarily A!)*, and *no other BL court has jurisdiction on the basis of either Article 16 BL (exclusive jurisdiction) or any of the protective regimes of BL (insurance, consumers, employees)*;
- (3) where the defendant *does not have its domicile in any BL State*, and
  - goods or services are supplied in A in accordance with Article 6 H
  - a branch-related activity occurs in A in accordance with Article 9 H
  - an act or omission occurred or may occur, or injury arose or may arise in A under Article 10 H
  - Article 11 H on trusts points to the courts of A
  - multiple defendant in A, Article 14 H
  - counterclaim party in A, Article 15 H
  - third party in A, Article 16 H;
- (4) where the defendant does not have a branch, agency or other establishment, and consequently does not have a fictitious (artificial) domicile *in any BL State* in cases covered by the protective regimes of BL (Articles 8, para. 2; 13, para. 2; 15a, para. 2);
- (5) where a judgment rendered in A is to be recognised or enforced in B, or *vice versa*;
- (6) in the case of *lis pendens* as between the courts of A and of B.

**5** In other cases, *both H and BL apply* with the following outcomes (main results only):

- (1) the defendant is sued in A: H and BL lead essentially to the same result (H uses *factual* concept of habitual residence, BL *legal* concept of domicile; where the defendant entity has a habitual residence in both A (statutory seat) and in B (principal place of business), Article 21/22 H should provide solution);

<sup>2</sup> Council 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; entry into force: 1 March 2002.

- (2) choice of a court or the courts of A and one of the parties is *domiciled in any BL State*. H and BL lead essentially to the same result, outside the sphere of protective regimes and exclusive jurisdiction. There is a potential conflict (but is it of great practical importance?) where the choice of court relates to insurance (only BL), consumers (BL and H; regimes are similar but not identical) and employment (*idem*), or concerns a matter of exclusive jurisdiction (*idem*);
- (3) the defendant appears before the courts of A without contesting A's jurisdiction. Harmony in most cases, but a conflict may arise in exceptional cases of exclusive jurisdiction;
- (4) the defendant has its habitual residence *in any BL State*, and
- goods or services are supplied in A: the solutions of H and BL are comparable although not identical
  - branch-related activity: essentially the same result. Where the defendant "has carried on regular activity by other means", article 9 H may (1) confer on courts of A jurisdiction which they would not have under BL (no conflict), or (2) coincide with another forum designated by BL (also no conflict), or (3) lead to a conflict with another court designated by BL
  - torts in A: regimes of H and BL are comparable but not identical. In case of transfrontier torts involving both State A and State B, no conflict if courts of A apply Article 21 H
  - trusts in A: essentially no conflict
  - multiple defendant in A, counterclaim party in A, third party in A (essentially same outcome).
- (5) exclusive jurisdiction: to the extent that the scope of Articles 12 H and 16 BL coincide, essentially no conflict. However, 16 BL has wider scope than 12 H. A conflict may arise, for example, where an exclusive jurisdiction exists in State B under H and another ground of jurisdiction exists in State A under BL;
- (6) protective regimes: where the insurer, or the other party to a consumer contract, or the employer *is deemed to be domiciled in any BL State*, a potential conflict may arise, in particular in the case of insurance contracts.

## **B Disconnection or connection?**

**6** It is important to note that the BL instruments – apart from their provisions on exclusive jurisdiction (Article 16) and fictitious domiciles of insurers, other party to consumer contract and employers (Articles 8(2), 13(2) and 15(a)(2)), voluntary appearance (Article 18) and *lis pendens* (Article 21) – base their jurisdiction regime essentially on the *real integration* of one of the parties (Article 17) or of a defendant (Articles 5-15d) *through its domicile in BL territory*. In so far, if the BL territory is considered as a whole, this regime has essentially *no extraterritorial consequences beyond BL territory*. In so far also, it creates for plaintiffs domiciled outside BL territory wanting to sue defendants domiciled within BL territory, a relatively "predictable" jurisdiction regime.

**7** This may be a justification for a disconnection clause. However, it may also be the starting point for another approach, which seeks to *combine*, to the extent possible, the advantages of the future Hague and Brussels/Lugano instruments. In a globalising world economy, litigants will be best off, if, in any litigation in BL territory, they have the benefit of *both H and BL*. The question arises whether this is possible.

**8** A prerequisite for such a “best of both worlds” approach should be that the integrity of both H and BL, according to the territorial scope rules of each instrument, be respected as much as possible. On the one hand, (potential) litigants located outside BL, but even those located within BL, (may) have a legitimate interest in seeing H applied, according to its own territorial scope of application, to all its Contracting States, with the effect that the resulting judgment will be recognised and enforced throughout all those Contracting States. On the other hand, they should be able to accept that once H leads them to a regional arrangement such as BL, BL would tell them to which national system of courts (or even particular court) to go *within* BL territory. To a certain extent, an analogy may be drawn here between BL, in particular the Brussels Regulation, and a federal State, which has its own internal rules on jurisdiction.

**9** One may wonder whether it would not be possible to establish a connection between H (hereinafter “the Convention”) and BL, if rules along the following lines were to be included in the Convention:

(i) When the defendant has its habitual residence in accordance with Article 3 of the Convention in any Contracting State which is also a State Party to BL, the competent court in any such State shall be designated by the rules of BL.

*Comment:* assume that France and Germany are both Parties to the Hague Convention and to BL. Assume further that according to Article 3 H, the defendant has its habitual residence in France, but that according to Articles 2 and 52/3 BL, the defendant has its domicile in Germany. In that case it makes sense to align the solution under H with that under BL, which would have the immense advantage of providing recognition and enforcement to the resulting judgment within Europe, perhaps under BL (see *infra*, vii), and world-wide under H. In the rare case, however, that Articles 2 and 52/3 of BL refer to Italy, not being a H Contracting State, or Japan (whether or not a H Contracting State), then the solution should probably be not to apply H at all, in order to avoid confusion.

(ii) In relation to Article 4 of the Convention, when [one of the parties] [the defendant] has its habitual residence, in accordance with rule (i), in any Contracting State which is also a State Party to BL, and if the parties have agreed that the court or courts of any such State shall have jurisdiction, then that agreement shall be valid under this Convention if valid according to Article 17 of BL.

*Comment:* it is advisable to avoid a conflict as to the validity of a choice of court clause between H and BL, when both are applicable according to their own rules. Other solutions than the one proposed, by way of example, are of course conceivable.

(iii) Pro memoria: similar rule in relation to Article 5 of the Convention?

(iv) In relation to Articles 6-11 of the Convention, where the defendant has its habitual residence, in accordance with rule (i), in any Contracting State which is also a State Party to BL and these articles confer jurisdiction upon a court of any such Contracting State, then the competent court in any such State shall be designated by the rules of BL.

*Comment:* once the rules of the Convention, be it on contracts, including those on consumers and employees, branches, torts or trusts, confer jurisdiction upon any Contracting State which is also a State Party to BL, then one could leave it to the BL regime to designate, within BL + H territory, the competent court.

(v) In relation to Article 12 of the Convention,<sup>3</sup> if the courts having exclusive jurisdiction are those of a Contracting State which is also a State Party to BL, those courts will be considered to have exclusive jurisdiction also under Article 16 BL.

*Comment: this rule may be superfluous: the scope of Article 12 H will probably be entirely included in that of Article 16 BL with its wider coverage.*

(vi) Whenever the court seized is that of a Contracting State which is also a State Party to BL, and the court in whose favour the proceedings are stayed or jurisdiction is declined is that of another such State, then the provisions on *lis pendens* of BL will exclusively apply.

*Comment: there is no point applying Articles H 21 and 22 to lis pendens situations as between Contracting States which are also BL States.*

(vii) In relation to Article 2, paragraph 2, and Chapter III of the Convention, judgments rendered in a Contracting State which is also a Party to BL, shall be recognised and enforced in any other such State according to Chapter III BL / the most favourable regime of any instrument. However, a judgment based on a ground of jurisdiction whose application is prohibited by virtue of Article 18, shall not be recognised or enforced.

*Comment: litigants outside and inside BL + H territory would as a rule benefit from automatic recognition and enforcement within that territory under BL. But, perhaps, the prohibited jurisdiction grounds under Article 18 H should be verified in all recognising BL + H States.*

**10** Further thought is needed, and the approach sketched here may or may not assist the experts in the negotiations. The Permanent Bureau offers these suggestions in an effort to assist the experts, not to prejudice the ultimate solution.

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<sup>3</sup> See Report on the Geneva experts meeting on intellectual property (1 February 2001).