

**ESQUISSE DE TEXTE POUR AIDER À LA PRÉPARATION D'UNE CONVENTION SUR
LA COMPÉTENCE JURIDICTIONNELLE INTERNATIONALE ET LES EFFETS
DES JUGEMENTS ÉTRANGERS EN MATIÈRE CIVILE ET COMMERCIALE**

préparée par le Bureau Permanent

* * *

**PRELIMINARY DRAFT OUT LINE TO ASSIST IN THE PREPARATION OF A CONVENTION
ON INTERNATIONAL JURISDICTION AND THE EFFECTS
OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS**

Prepared by the Permanent Bureau

*Document d'information No 2 de septembre 1998
à l'intention de la Commission spéciale de novembre 1998
sur la question de la compétence, de la reconnaissance
et de l'exécution des jugements étrangers en matière civile et commerciale*

*Information Document No 2 of September 1998
for the attention of the Special Commission of November 1998
on the question of jurisdiction, recognition
and enforcement of foreign judgments in civil and commercial matters*

INTRODUCTION

This document has been prepared with three principal objectives in mind -

- 1 to synthesise, as far as possible, the working documents proposed during the first two Special Commissions;
- 2 to present a framework to enable more detailed discussion on the future provisions of the Convention;
- 3 to facilitate the discussions of the Special Commission of November 1998.

This document cannot in any way replace the work of the experts who alone are the authors of proposed texts. Moreover, the fact that a working document is produced here does not bind its author(s).

The Special Commission will concentrate its discussions and will be led towards the taking of indicative votes on some of the following issues -

- 1 Direct jurisdiction
 - forum of the defendant
 - choice of court
 - appearance of the defendant without contesting jurisdiction
 - jurisdiction based on activities
 - jurisdiction in contract
 - jurisdiction in tort
 - jurisdiction concerning branches
 - prohibited grounds of jurisdiction
 - *lis pendens*
 - *forum non conveniens*.
- 2 Recognition and enforcement
 - recognition by operation of law
 - declaratory actions
 - grounds for refusing recognition or enforcement (general rule)
 - * jurisdiction of the court of origin
 - * irreconcilable decisions
 - * public policy
 - * fraud
 - * "excessive" damages
 - grounds for refusing recognition or enforcement (default judgments)
 - procedure.

In addition, one part of the session will be devoted to a first discussion of the question of provisional and protective measures.

A more detailed agenda will be sent to experts at the end of October 1998.

“ Les paroles de la loi doivent
se peser comme des diamants ”
attributed to Bentham in
Traité de législation civile et pénale

N.B. The only purpose of titles of sections and articles is to allow a better use of the document for discussion. It is proposed that the final text of the draft Convention should not include such titles but should be limited to chapter headings.

**CONVENTION ON JURISDICTION AND EFFECT OF DECISIONS
IN CIVIL AND COMMERCIAL MATTERS**

Preamble (Prel. Doc. 8, No 4)

The States signatory to the present Convention,

Considering to increase foreseeability and certainty in the management and resolution of international disputes in civil and commercial matters before national courts,

Wishing to avoid useless disputes and duplication of proceedings,

Wishing to ensure full access to justice and fair procedures for the parties to a dispute,

Considering that it is the interest of litigants that rules on jurisdiction be clearly defined and decisions rendered in one State be recognised and enforced with due speed in another State,

Wishing to ensure as much uniformity as is possible in the interpretation of the present Convention,

Have agreed on the following provisions -

CHAPTER I – SCOPE OF THE CONVENTION

Article 1 – Substantive scope (Prel. Doc. 7, Nos 31 to 51; Prel. Doc. 9, Nos 4 to 9; Work. Docs. 57, 58 and 59)

The Convention shall apply to decisions in civil or commercial matters with the exception of –

- a* civil status and legal capacity of natural persons;
- b* maintenance obligations;
- c* matrimonial property regimes;
- d* wills and succession;
- e* bankruptcy and other similar procedures;
- f* social security;
- g* arbitration and related issues (see also Chapter V, Article 37);
- h* administrative;
- i* taxation and customs;
- j* liability for nuclear activity if not dealt with in other Conventions (see Work. Doc. 93).

Variant 1 to be possibly added (Prel. Doc. 9, No 7)

N.B. See also Article 25.

The Convention shall apply to disputes within its scope of application, whether the parties to the dispute are public or private and whatever court or authority is asked to adjudicate the matter.

Article 2 – Geographical scope of the Convention

(Prel. Doc. 7, Nos 52 to 58; Prel. Doc. 9, Nos 10 to 15)

*N.B. See also Article 37 for relations with other conventions*Variant 1 (Work. Doc. 67)

[Subject to the provisions of Articles (choice of court and exclusive jurisdiction)] the provisions of this Convention regulating jurisdiction shall apply where the defendant is habitually resident in a Contracting State.

The provisions of this Convention on the recognition and enforcement of foreign judgments apply to judgments of courts in the Contracting States [and to authentic acts, etc. ...]

The Convention shall not affect the application of any convention on jurisdiction or the recognition and enforcement of foreign judgments, to which two or more of the Contracting States are parties, to the relationship between such States.

Variant 2 (Work. Doc. 72)

This Convention shall apply –

a in matters of jurisdiction,

(i) where the defendant has his habitual residence in the territory of a Contracting State which is not a Party to one or more of the Conventions mentioned in Article ___ hereunder, or

(ii) where according to the provisions of this Convention an exclusive jurisdiction is conferred on the courts of a Contracting State which is not a Party to one or more of the Conventions mentioned in Article ___ hereunder, or

(iii) where according to the provisions of this Convention a choice of forum is made for a court [or the courts] of a Contracting State which is not a Party to one or more of the Conventions mentioned in Article ___ hereunder;

b in relation to a *lis pendens* [as provided for in Article ___], when proceedings are instituted in a Contracting State which is a Party to this Convention and in a Contracting State which is a Party to one or more of the Conventions mentioned in Article ___ hereunder;

c in matters of recognition and enforcement, where either the State of origin or the State addressed is not a Party to one or more of the Conventions mentioned in Article ___ hereunder.

Variant 3 (adaptation of Work. Doc. 92)

The Convention shall apply -

1 in matters of jurisdiction

a when the court seised is located in a Contracting State and the defendant is domiciled (or has his habitual residence) in a Contracting State;

b notwithstanding paragraph *a* above, when the court seised is the court of a Contracting State with exclusive jurisdiction according to the Convention;

c when the court seised is the court of a Contracting State designated by the parties to a choice of court clause, or when, at the time the action is commenced, the defendant has not contested the court's jurisdiction. [Rule to be created for the case where the court chosen is not located on the territory of a Contracting State.]

2 In matters of *lis pendens* and related actions, when both courts seised are located on the territory of two different Contracting States.

3 In matters of recognition and enforcement, and subject to the transitional provisions of Article ___, when the State of origin and the State addressed are Contracting States.

Variant No 4 (proposed by the Permanent Bureau) (Prel.Doc. 7, No 55; Prel. Doc. 9, Nos 10 to 15)

Subject to the transitional provisions set out in Articles ___ to ___ the Convention shall apply -

1 in matters of jurisdiction, when the court seised of the action is located on the territory of a Contracting State;

2 notwithstanding paragraph 1, the court seised may apply its non-Convention rules including those excluded under Articles 19 and 20 of the Convention [prohibited jurisdiction] provided that the Convention does not confer jurisdiction on it or on any other court in a Contracting State;

N.B. The provision of paragraph 2 could perhaps not operate within the context of an open mixed convention.

3 in matters of *lis pendens* and related actions, when the courts concerned are located in the territories of several Contracting States;

4 in matters of recognition and enforcement, when the decision in question has been given by the court of a Contracting State and it is presented for recognition or enforcement in another Contracting State.

CHAPTER II – GROUNDS OF JURISDICTION

Section 1 – Compulsory grounds of jurisdiction

Article 3 – Defendant's forum (Prel. Doc. 7, No 133; Prel. Doc. 8, Nos 9 to 12) (adaptation of Work. Docs. 8, 15 and 21)

General jurisdiction in respect of a defendant is conferred on the court: [on the courts of the State]

N.B. The precise draft of this introductory clause will depend on the decision to be taken on Work. Doc. 38 (see Prel. Doc. 7, Nos 76 to 78, Prel. Doc. 8, No 6)

- a* of his habitual residence [his domicile], in the case of a natural person;
- b* of its statutory headquarters (place of incorporation) or real headquarters (principal place of business or place of central management), in the case of a legal person.

Article 4 – Choice of Court (Prel. Doc. 7, Nos 103 to 107, 111 to 114, 146; Prel. Doc. 8, Nos 13 to 23; Prel. Doc. 9, Nos 77 to 82)

N.B. See also Article 8 contracts with employees.

Variant 1 (Work. Doc. 78)

1 If the parties have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction, unless the parties agreed that such jurisdiction shall not be exclusive.

2 Such agreement may be entered into –

a in writing or by any other means of communication which can be evidenced by a text;

b verbally and confirmed in writing or by any other means of communication which can be evidenced by a text; or

c in a form which accords with a usage which is regularly observed by the parties or of which they are or ought to have been aware that it is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.

3 In matters relating to individual contracts of employment, consumer or insurance contracts, an agreement conferring jurisdiction shall have legal force only if it is entered into after the dispute has arisen.

4 Agreements conferring jurisdiction shall have no legal force if the court whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article X.

5 [The agreement conferring jurisdiction shall have no legal force if it results in abusively depriving a party from the access to the tribunals having jurisdiction by virtue of Articles ____, in particular in case excessive pressure has been suffered by such party when the agreement was made.]

Variant 2 (adaptation of Work. Docs. 5, 17, 33)

1 Subject to the following provisions, the parties to existing or future litigation are free to enter into a choice of court agreement.

2 No choice of court agreement may derogate from the jurisdictions provided for by Article 13 below (exclusive jurisdictions).

3 A choice of court agreement may derogate from the jurisdictions provided for by Articles 7 and 8 below (protective jurisdictions) provided that it is concluded after the commencement of litigation or that it offers to the [consumer][worker] a wider choice of potential fora.

4 In all other cases, a choice of court agreement, in whatever form it has been concluded, is *prima facie* valid unless the party who opposes its application shows –

a that he has not agreed to it; or

b that, if he has agreed to it, the agreement was imposed upon him by the other party, especially by reason of abuse of economic power.

5 A choice of court agreement which is valid under the Convention applies to all litigation arising between the parties and [but] prevents [does not prevent] third party actions or any similar proceedings to have effect as between the parties.

6 A valid choice of court agreement excludes all other jurisdictions provided that the parties have expressly so provided [unless the parties have otherwise provided].

N.B. Paragraph 6 is particularly important in view of Article 14 on Provisional and Protective Measures.

7 A valid choice of court agreement excludes all other jurisdictions and the procedure provided for by Article 24 below may not be applied, even if the proceedings involving the choice of court are related to other proceedings and it would be in the interests of the administration of justice to dispose of the two proceedings at the same time. [A valid choice of court agreement excludes all other jurisdictions. However, the procedure provided for by Article 24 below may be applied if the proceedings involving the choice of court are related to other proceedings and it would be of benefit to dispose of the two proceedings at the same time.]

Article 5 - Appearance of defendant without contesting jurisdiction (Prel. Doc. 7,
Nos 108 to 110; Prel. Doc. 8, Nos 24 to 27)

Variant 1 (Work. Doc. 78)

A court shall have jurisdiction if the defendant proceeds on the merits without reservation, unless another court has exclusive jurisdiction by virtue of Article ____.

Variant 2 (proposed by the Permanent Bureau)

Save in cases where there is a court with exclusive jurisdiction under the Convention, the court seised shall have jurisdiction when the defendant appears in person or is represented and defends the case on the merits without contesting jurisdiction. However, the defendant may subsequently, including in proceedings for the recognition and enforcement of the judgment, establish that he did not renounce to contest the jurisdiction of the forum because he proceeded through excusable ignorance or under constraint [for example, to protect a right or to prevent an irremediable situation from arising].

Article 6 – Contracts in general

(Prel. Doc. 7, Nos 118 to 120; Prel. Doc. 8, Nos 65 to 70;
Prel. Doc. 9, Nos 72 and 73)

Variant 1 (Work. Doc. 65)

A person domiciled in a Contracting State may, in another Contracting State, be sued –

1 if, in matters relating to a contract for paid acquisition of ownership of property or for paid transfer of property for use, the duty of the party under an obligation with respect to the property or the validity of the contract is the subject-matter of the proceedings, in the courts for the place –

- where the immovable property is situated;
- of the agreed location of the movable property;

2 if, in matters relating to a contract for paid work, except for a contract of employment, the duties to act or the validity of the contract is the subject-matter of the proceedings, in the courts for the agreed place where the work mainly has to be carried out;

3 if, in the contracts referred to under numbers 1 and 2 above, the pecuniary debtor's duty to pay is the subject-matter of the proceedings, in the courts at the pecuniary debtor's general venue at the time the contract was concluded;

4 in matters relating to loan contracts and to paid contracts for acquisition of claims, rights to intangible assets or shares in partnerships or companies, in the courts at such person's general venue at the time the contract was concluded.

Variant 2 (Work. Doc. 66)

1 The plaintiff can introduce his/her claim, in matters relating to a contract, at the place where the party having to perform the characteristic obligation is or should have been exercising the essential activity related to the performance of such obligation, in particular the delivery of goods or the supply of services.

2 The obligation of a party who has to proceed or should have proceeded essentially with the payment in compensation of a non-financial performance is not considered as a characteristic obligation within the meaning of the preceding paragraph.

3 In case the activity referred to in paragraph 1 is located in several States, only the predominant activity is taken into consideration.

Variant 3 (Work. Doc. 79)

A person domiciled in a Contracting State may, in another Contracting State, be sued –

In matters relating to a contract in the courts for the place of performance of the obligation in question.

For this purpose, subject to any express provision in the contract –

a the place of performance of an obligation to pay money shall be deemed to be the place where the payee is domiciled;

b the place of performance of an obligation to deliver goods shall be deemed to be the place where the recipient is domiciled;

c the place of performance of an obligation to perform a service shall be deemed to be the place where the person who is under the obligation is domiciled.

Variant 4 (proposed by the Permanent Bureau)

For contracts made and performed entirely by electronic means, the plaintiff may bring a claim in respect of all his losses in the court of his domicile [habitual residence] [provided that he has fulfilled all of his obligations].

Article 7 – Contracts with consumers

(Prel. Doc. 7, Nos 97 to 102; Prel. Doc. 8, Nos 49 and 50)

Variant 1 (Work. Doc. 80)

The plaintiff can introduce his/her claim in the State of its habitual residence if such claim arises out of a transaction not related to its business activity and if the defendant has engaged in the course of its business activity in that State.

Variant 2 (Work. Doc. 90)

1 An insurance company, bank, brokerage company, transport company or travel agency, which has its seat in a Contracting State can be sued in another Contracting State at the place of general jurisdiction of a customer if the company has offered its services in this State or has advertised for it and the customer has undertaken the necessary legal steps there in order for the contract to be concluded.

2 In respect of liability insurance, or insurance of immovable property, the insured party may also sue the insurer in the courts of the place where the harmful event occurred.

Variant 3 (Work. Doc. No 89, No 2)

A defendant shall be subject to jurisdiction of a State for claims arising out of activities elsewhere if the claim –

a relates to commercial activity of the defendant that is conducted within or related to the sale, purchase or use of goods or services in that State; and

b [(i) *Cf.* Article 10 – torts, Variant 2]

(ii) in the case of an alleged breach of contract, the contract was entered into by the plaintiff while habitually resident in that State,

provided that the claim does not arise from a business or profession of the plaintiff.

Article 8 – Contracts with employees

(Prel. Doc. 7, Nos 93 to 96; Prel. Doc. 8, Nos 51 to 53)

Variant 1 (Work. Doc. 83)

1 *a* In matters relating to individual contracts of employment, the defendant, having its habitual residence in a Contracting State, may be sued, in another Contracting State, in the court of the place where the work is habitually carried out.

b In addition, if the work is not habitually carried out in any one Contracting State, the employee may sue the employer, whose habitual residence is in one Contracting State, in another Contracting State before the court of the place where the business which hired the employee is or was situated.

N.B. Paragraph 2 hereunder can be added to Article 4.

2 In matters relating to individual contracts of employment, a choice of court clause entered into under Article___ (reference is hereby made to the conditions of validity of choice of court clauses), shall have legal force only if it is entered into after the dispute has arisen or if the employee invokes it to seize courts other than those of the Contracting State in which the defendant is habitually resident or the one specified under paragraph 1 above.

Article 9 – Jurisdiction for branches

(Prel. Doc. 7, No 123; Prel. Doc. 8, No 32; Prel. Doc. 9, Nos 85 to 87)

Variant 1 (Work. Doc. 85)

The plaintiff can introduce his/her claim, as regards a dispute arising out of the activities of a branch, agency, establishment or other place where the defendant carries out a regular economic activity with human means and goods or services, at the place where such branch, agency, establishment or activity is situated.

Article 10 – Jurisdiction in matters of tort

(Prel. Doc. 7, Nos 121 and 122, 129 to 132;
 Prel. Doc. 8, Nos 71 to 80; Prel. Doc. 9, Nos 74
 to 76)

Variant 1 (Work. Doc. 86)

The plaintiff can introduce his/her claim, in matters of tort –

- a* at the place where the event which caused the injury occurred; or
- b* at the place where the injury was initially sustained, provided that the defendant's conduct was aimed at producing effects in the State concerned.

If the injury was sustained on the territory of several States, the claim can be introduced at the place in a State where a significant part of the injury was sustained.

The plaintiff can bring an action to obtain an injunction to cease an activity which could cause him/her an injury either at the place of such activity or at the place where the injury could occur.

Variant 2 (Work. Doc. 89, No 2)

A defendant shall be subject to jurisdiction of a State for claims arising out of activities elsewhere if the claim –

- a* relates to commercial activity of the defendant that is conducted within or related to the sale, purchase or use of goods or services in that State; and
- b*
 - (i) in the case of an alleged tort, the injury occurred in that State; or
 - [(ii) ...]

provided that the claim does not arise from a business or profession of the plaintiff.

Article 11 – Specific jurisdiction based on business activity

Variant 1 (Work. Doc. 89, No 1 and Work. Doc. 91)

A defendant, whether acting directly or through a third party, shall be subject to the jurisdiction of a State for a claim arising out of activities regularly carried on within or directed to that State.

Article 12 – Trusts (Prel. Doc. 7, No 124; Prel. Doc. 8, Nos. 56 to 60)
(Work. Doc. 23)

1 In the case of proceedings whose object is to decide upon the validity, interpretation, variation or implementation of a trust instrument or upon any dispute under the terms thereof between or among trustees and beneficiaries, there shall be exclusive jurisdiction in the courts of the State –

a designated expressly for this purpose in terms of the trust instrument; or

b failing which, in which is situated the principal place of administration of the trust in question; or

c if such a place cannot be determined, in which is situated the place with which the trust has the closest and most substantial connection.

2 The provisions in paragraph 1 apply notwithstanding that the trust may be held to be invalid or non-existent.

3 In order to ascertain the place with which a trust has its closest and most substantial connection, weight shall be given in particular to –

a the place or places where the trust is administered;

b the places of residence or business of the trustees; and

c the place or places where the purposes of the trust are to be fulfilled.

Article 13 – Exclusive jurisdiction (Prel. Doc. 7, No 83 to 91; Prel. Doc. 8, No 28 to 45)

(Work. Docs. 1, 4, 14)

1 In proceedings which have as their object rights in immovable property or tenancies of immovable property, [only] the courts of the State in which the property is situated shall have jurisdiction. [These courts shall have exclusive jurisdiction, unless, in proceedings which have as their object tenancies of immovable property, the tenant is habitually resident in a State other than the State in which the immovable property is situated.]

(Work. Doc. 2, 3)

2 In proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons, or the validity or nullity of the decisions of their organs, the courts of the State whose internal law applies to the company or legal person shall have exclusive jurisdiction.

Article 14 – Provisional and protective measures

(Prel. Doc. 7, No 126; Prel. Doc. 8, Nos 62 to 64) (adaptation of Work. Docs. 25, 27 and 37)

1 A court having jurisdiction under the Convention to determine the merits of the case shall have jurisdiction to decide upon any provisional or protective measure, [*in personam* or *in rem*], even if property which is the object of such measure is not located on its territory.

2 A court of the place where property is located shall have jurisdiction to order a provisional or protective measure in respect only of that property.

3 A court of the place where the defendant has his habitual residence shall have jurisdiction to decide upon any provisional or protective measure [*in personam*], even if it is not seised with the merits of the case. However, before deciding upon any measure, such court must contact the court dealing with the merits of the case in order to establish what measures may have been ordered by that court in the same dispute.

4 A party who requests a provisional or protective measure from a judge having jurisdiction under paragraph 1, and from a judge having jurisdiction by virtue of paragraph 2 or 3, must inform such judges of applications made in the other jurisdictions and the results of such applications.

5 A judge seised simultaneously or successively under this Article may operate the procedures for judicial co-operation provided for by Article 35 [of Chapter IV].

6 Provisional and protective measures for the purposes of paragraph 2 above do not include an order for an interim payment.

Article 15 – Multiplicity of defendants

(Prel. Doc. 7, No 142; Prel. Doc. 9, Nos 89 and 90)

Article 16 – Counter claims (Prel. Doc. 7, No 143; Prel. Doc. 9, No 91)

Article 17 – Warranty and intervention (Prel. Doc. 7, No 144; Prel. Doc. 9, No 92)

N.B. See also Article 4 Choice of court.

Article 18 – Related actions (Prel. Doc. 7, No 125; Prel. Doc. 9, Nos 93 and 94)

Section 2 – Prohibited grounds of jurisdiction

(Prel. Doc. 7, Nos 135 to 140; Prel. Doc. 8, Nos 81 to 88; Prel. Doc. 9, Nos 65 to 67)

Article 19 – Notion of prohibited grounds of jurisdiction (Prel. Doc. 7, No 138)

According to the Convention, a ground of jurisdiction is prohibited when the court does not have a sufficiently close link with the parties, the circumstances of the case, the cause or object of the action.

Article 20 – Examples of prohibited grounds of jurisdiction (Work. Doc. 35)

1 General jurisdiction of a State over the defendant may not be based on the following points:

a the presence in the territory of the State of property belonging to the defendant, [or the seizure by the plaintiff of property situated there];

b the nationality of the plaintiff [or of the defendant];

c the domicile, habitual or temporary residence of the plaintiff within the territory of the State;

d the carrying on of commercial or other activities by the defendant within the territory of the State;

e the service of a writ upon the defendant within the territory of the State;

f [a unilateral specification of the forum by the plaintiff];

g [the enforcement or registration of a judgment].

2 Unless otherwise provided in the present Convention, the grounds under paragraph 1, sub-paragraphs *b*, *c*, *e* and *f* may not also serve as grounds to establish special jurisdiction.

Section 3 – Authorised grounds of jurisdiction (Prel. Doc. 7, Nos 134 and 151)

Article 21 – Margin of manoeuvre of States

Courts of Contracting States may [in addition] declare that they have jurisdiction in the following cases –

a

b

c denial of justice (Prel. Doc. 9, Nos 83 and 84)

....

provided, however, that their national law so permits.

N.B. For the effects of a decision given on the basis of Article 21, see Section 2 below.

Section 4 – Role of the court for direct jurisdiction*Article 22 – Authority of the court seized* (Work. Doc. 45)

If a claim is brought before a tribunal of a Contracting State and if the defendant does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Convention.

Article 23 – Lis pendens (Prel. Doc. 7, Nos 147 to 150; Prel. Doc. 9, Nos 96 to 100)

Variant 1 (Work. Doc. 60)

I 1 When an action having the same subject matter is already pending between the same parties before the court of another Contracting State, the court second seised shall stay the case if it is to be expected that the court first seised will, within a reasonable time, render a decision capable of being recognised by virtue of this Convention in the State of the court second seised.

2 The court second seised shall decline jurisdiction as soon as it is presented with a decision rendered by the court first seised which complies with the requirements for its recognition or enforcement by virtue of this Convention.

3 Within the meaning of the preceding paragraphs, a court is seised when an application has been made before it and the document instituting the proceedings or an equivalent document has been duly served to the defendant.

II 1 When the court first seised determines that the court second seised in another Contracting State has jurisdiction and is [manifestly] more appropriate to resolve the dispute, it may stay its proceedings and direct the concerned party to request the court second seised to exercise its jurisdiction in place of the court first seised.

2 In determining the appropriateness of a forum the courts concerned will consider all relevant factors and in particular –

a the distance between the habitual residence, respectively the seat of the parties and the concerned fora;

b the nature and location of the evidence capable to contribute to resolve the dispute and the procedure necessary to obtain such evidence.

3 The courts concerned may proceed to an exchange of views.

4 If the court second seised determines that it has jurisdiction and accepts to assume jurisdiction in place of the court first seised, the latter declines jurisdiction.

If the court second seised refuses to exercise jurisdiction, the court first seised does no longer stay the proceedings.

5 [Such procedure shall not have the effect of allowing a party to invoke a limitation period [time bar] with respect to a claim which was not subject to such limitation when it was pending before the court first seised.]

Variant No 2 (Work. Doc. 61)

The courts of each Contracting State shall dismiss or stay the action brought before them when the purpose of such action will be attained by the recognition and/or enforcement of the judgment to be resulted from the pending proceedings before the court of another Contracting State, provided that such pending proceedings were the first to be instituted and such judgment will fulfill the conditions for recognition and enforcement.

Article 24 – Forum non conveniens

(Prel. Doc. 7, Nos 67 to 75 and 112 to 114; Prel. Doc. 9, Nos 101 to 112)

Variant 1 (Work. Doc. 81)

1 Where on the application of any party a court seised of an action is satisfied that there is some other available forum having jurisdiction, which is clearly more appropriate for the trial of the action, it may stay the proceedings until the jurisdictional issue is resolved.

[2 In determining the appropriateness of a forum the court shall determine how real and substantial is its connection with the dispute. In doing so it shall consider all the relevant factors including but not limited to the following –

- a* the balance of convenience of the parties and witnesses, having regard to their respective places of abode or business and the language of the parties, the witnesses and the documents;
- b* the whereabouts of sources of evidence;
- c* whether one forum and not the other will be applying its own law;
- d* if an action is already pending in the other forum, how far it has progressed.]

3 Even if the court seised considers that there is a clearly more appropriate forum it shall proceed to exercise jurisdiction if there are circumstances by reason of which justice so requires.

A judgment may not be refused recognition or enforcement on the ground that the court addressed takes the view that the court of origin should have declined to exercise its jurisdiction under this Article.

Variant 2 (Work. Doc. 82)

1 By way of exception and at the request of the defendant at an early stage of the proceedings, a [court] [tribunal] of a Contracting State having jurisdiction under the rules of the Convention, if it considers that the [court] [tribunal] of another Contracting State would be better placed in the particular case to adjudicate the interests of the parties to a proceeding and to promote the ends of justice, may:

- a* request that other [court] [tribunal] to assume jurisdiction, or
- b* suspend consideration of the case and invite the parties to introduce such a request before the [court] [tribunal] of that other State.

- 2 In doing so, the [court] [tribunal] shall consider all the relevant factors, including:
- a* the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the original [court] [tribunal] or in the alternative [court] [tribunal];
 - b* the desirability of avoiding a multiplicity of legal proceedings;
 - c* the desirability of avoiding conflicting decisions in different jurisdictions;
 - d* the enforcement of an eventual judgment.
- 3 The [courts] [tribunals] concerned may proceed to an exchange of views.
- 4 The requested [court] [tribunal] may assume jurisdiction if it considers that this is in the interests of the parties and promotes the ends of justice. It shall decide on this question without undue delay.
- 5 In the event that the requested [court] [tribunal] does not assume jurisdiction, the original [court] [authority] shall proceed to consider the case.
- [6 The case is deemed to have been filed in the [court] [tribunal] at the time it was filed in the original [court] [tribunal]].

Variant 3 (Work. Doc. 87)

Nothing in this Convention precludes the exercise of discretion to decline jurisdiction, or stay a proceeding pending acceptance of jurisdiction by another court, where such discretion is recognized in the laws of a Contracting State.

Variant 4 possibly to be added to the above texts (proposed by the Permanent Bureau)

Where proceedings have been transferred to another court under this article, the action shall not be barred even if this would have been the case had the proceedings been instituted in the court to which they have been transferred, provided that the action is not barred in the State of the court which initiated the transfer.

CHAPTER III – RECOGNITION AND ENFORCEMENT (Prel. Doc. 7, Nos 158 and 159)

Section 1 – Rules for decisions based on compulsory grounds of jurisdiction

(see above Chapter II, Section 1)

Article 25 – The concept of decision (Prel. Doc. 7, Nos 160 to 168; Prel. Doc. 9, Nos 46 to 52)

(Adaptation of Work. Doc. 68) (see also Variant 1, Article 1)

According to the Convention a decision capable of being recognised or enforced is a decision rendered by [a court] a judicial authority of a Contracting State, regardless of its nature and of the name given to it in that State.

N.B. Cf. below Articles 33 and 34 concerning authentic instruments and settlements.

Article 26 – General rule of recognition (Prel. Doc. 9, Nos 16 to 20 and 53)

Variant 1 (Work. Doc 73)

N.B. This recognition by operation of law will be particularly important in relation to decisions given in declaratory actions.

A judgment given in a Contracting State shall be recognised in the other Contracting States without any procedure being required.

Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedure (to be provided for), apply for a decision that the judgment be, or shall not be, recognised according to the criteria set forth in Article 27 below.

Article 27 – General rule for enforcement

Recognition or enforcement of a decision may be refused –

(Work. Docs. 44, 45, 46, 47, 48, 49, 54, 62, 68, 76 and 84)

1 if the decision was given by a court [an authority] considered not to have jurisdiction within the meaning of this Convention, [whose jurisdiction was not based on a ground of jurisdiction provided by this Convention] [or otherwise authorised by this Convention];

2 in questions relating to the jurisdiction of the court of the State of origin, the authority of the State addressed shall be bound by the findings of fact on which that court based its jurisdiction [unless the decision was rendered by default];

3 [if proceedings between the same parties and having the same subject matter are pending before a court of the State addressed and those proceedings were the first to be instituted,] (*Cf.* Also Article 23 on *lis pendens*);

4 if the decision is irreconcilable with a decision given in a dispute between the same parties, either in the State addressed, or in another State, provided that in the latter case the decision is capable of recognition or enforcement in the State addressed;

5 [if the decision has been rendered in defiance of an arbitration agreement which is valid under the laws of the State addressed or if it is irreconcilable with an arbitral award rendered in the State addressed or capable of recognition or enforcement in that State.] (See also Article 37, Variant 1);

6 if the decision is subject to [ordinary] review in the State of origin and is not enforceable;

7 if the recognition or enforcement is manifestly contrary to the public policy of the State addressed (Prel. Doc. 7; Nos 183 to 187; Prel. Doc. 9, Nos 30 to 33);

8 (NB: This provision is probably better placed in Article 32) if and when the decision provides for damages the non-compensatory or punitive nature of which is predominant;

9 if the decision was the result of a fraud in the proceedings [of fraudulent actions proven after the decision was rendered] or if the court of origin lacked impartiality or independence (Prel. Doc. 7; Nos 189 to 191; Prel. Doc. 9, Nos 40 to 45);

10 if the court of origin did not apply the law which would have been applied by the court addressed, unless the result is substantially the same as that which would have been attained by the court addressed;

11 apart from what is necessary to apply the preceding paragraphs, the authority of the State addressed will not review the merits of the decision of the State of origin.

Variant possibly to be added (Work. Doc. 50)

12 An application for recognition or enforcement of a decision may not be refused on the ground that no reasons are given for the decision, nor that it is for that reason contrary to public policy in the State addressed to recognise or enforce it. (Prel. Doc. 7, No 182; Prel. Doc 9, Nos 27 to 29)

However, if the content of the decision [and of any other document submitted] does not allow the requested authority to verify whether the decision falls within the material scope of application of the Convention, this authority may require submission of any other document that may be useful.

Article 28 – Special case of decisions rendered by default

Variant 1 (Work. Docs. 46 and 77)

A decision rendered by default shall not be recognised nor enforced unless the defaulting party was duly served with the document which instituted the proceedings, including notice of the substance of the claim, or with an equivalent document in accordance with the law of the State of origin in sufficient time, under the circumstances, to enable him to defend the proceedings.

Variant 2 (Work. Doc. 55)

A judgment shall not be recognised where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence.

However, a judgment shall be recognised in spite of the fact that the document was not duly served, if the defendant was able to arrange for his defence.

(Variant 3 possibly to be added)

A “decision rendered by default” is a decision given when the defendant is neither present, nor represented in the proceedings.

Article 29 – General rules – documents to be filed (Work. Docs 46, 49, 53 and 68)

The party seeking recognition or applying for enforcement shall furnish –

- 1 a complete and authenticated copy of the decision;
- 2 if the decision was rendered by default, [any document] the originals or certified true copies of the documents required to establish that the document which instituted the proceeding or an equivalent document was duly served on the defaulting party;
- 3 [if need be,] all documents required to establish that the decision is no longer subject to ordinary forms of review [or to any other review preventing the decision to produce its effects] in the State of origin and, as the case may be, that the decision is enforceable in the State of origin;
- 4 unless the authority addressed otherwise requires, translations of the documents referred to above, certified as correct [either by a diplomatic or consular agent or by a sworn translator or] by a [any other] person so authorised in the State addressed;
- 5 if the terms of the decision do not permit the authority addressed to verify whether the conditions of this Convention have been complied with, that authority may require the production of any other necessary documents;
- 6 as the case may be, the document justifying that the claimant had legal aid in the State of origin;
- 7 the form provided for in Article 36 hereunder, duly prepared by the registrar of the court of origin;
- 8 no legalisation or other like formality may be required.

Article 30 – Procedure for enforcement

(Prel. Doc. 7, Nos 173 to 177; 195 to 199; Prel. Doc. 9, No 54 to 60)

Variant 1 (Work. Doc. 49)

The procedure shall be governed by the internal law of the State addressed.

Variant 2 (Work. Doc. 56)

The procedure for securing the enforcement of the judgment shall be governed by the most expeditious procedure of the requested State.

Variant 3 (Work. Doc. 62)

1 The decision on the request for enforcement of the judgments shall be given without permitting the party against whom enforcement is sought to make, at this stage of the proceedings, any submission. The request may be refused only if the foreign decision does not fulfil the conditions for recognition and enforcement provided for in the Convention. Under no circumstances may a foreign decision be reviewed on the merits.

2 The decision authorising or refusing the enforcement may be reviewed. This review shall be decided as an urgent matter in a contradictory procedure.

3 In order to be enforced, the foreign decision must be enforceable in the State of origin.

The proceedings on the request for enforcement may be stayed if an ordinary review has been lodged against the judgment in the State of origin or if the time for such a review has not yet expired; in the latter case, the time within which such a review is to be lodged may be specified. The enforcement may be made conditional on the provision of security.

During the time specified for an appeal under paragraph 2 and until any such review has been determined, no measures of enforcement may be taken other than protective measures taken against the property of the party against whom enforcement is sought.

The decision authorising enforcement shall carry with it the power to proceed to such protective measures.

Article 31 – Costs of proceedings – legal aid

Variant 1 (Work. Doc. 53)

A party granted legal aid in the State of origin shall be extended such aid under equivalent conditions [in the most extensive way in accordance with the law of the State addressed] in any proceedings for the recognition or for the enforcement of a foreign decision.

Variant 2 (Work. Doc. 68)

No security, bond or deposit, however described, shall be required by reason of nationality or habitual residence of the applicant to guarantee the payment of judicial costs or expenses.

Article 32 – Scope of effects in the requested State Prel. Doc. 7, Nos 169 to 171).
 On excessive damages (Prel. Doc. 7, Nos 192 to 194; Prel. Doc. 9, Nos 61 to 64)

N.B. The variants are not exclusive from each other

Variant 1 (adaptation of Work. Docs. 68 and 75)

The decision is given in the State addressed the effects it enjoys in the State of Origin according to that law. If one of these effects is unknown in the State addressed, the latter gives the judgment the most approximate effect as provided for in its domestic law. (adaptation of Work. Doc. 75)

Variant 2 (Work. Doc. 62)

Where the foreign decision has ruled on several heads of application and the enforcement of all cannot be permitted, enforcement may apply to one or more of them.

The applicant may seek partial enforcement.

Variant 3 relating specifically to damages

1 *Non-compensatory damages* (Work. Doc. 63, first part)

Alternatives, depending on Convention structure:

a In so far as a judgment awards non-compensatory damages, it shall be recognised at least to the extent and to the amount, if any, that similar or comparable damages could have been awarded in the State addressed.

OR

b In so far as a judgment awards non-compensatory damages, it need not be recognised beyond the extent, or the amount, if any, that similar or comparable damages could have been awarded in the State addressed.

2 *Excessive damages* (Work. Doc. 63, second part)

When the judgment debtor, after proceedings at which the judgment creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive compensation or damages have been awarded, recognition may be limited to a lesser amount, but in no event shall that amount be less than the amount of compensation or damages that, in the circumstances, could have been awarded by the court addressed.

Variant 4 Article 32 (Work. Doc. 68, II 9)

Where the original decision includes an award of damages, the judge in the requested State may reduce the damages if he is of the view that they are manifestly abusive having regard to the loss which has occurred.

Variant 5 (Work. Doc. 71)

When the judgment debtor satisfies the court addressed that in the relevant circumstances grossly excessive compensation or damages have been awarded, recognition may be limited to a lesser amount, but that amount shall not be less than the amount of compensation or damages that could have been awarded by the court addressed.

Section 2 – Rules for decisions based on authorised grounds of jurisdiction
(see also Chapter II, Section 3, Article 21)

N.B. Several methodologies may be followed here. The easiest would be simply to leave this matter to the domestic law of Contracting States.

Section 3 – Authentic instruments and settlements

Article 33 – Authentic instruments

Prel. Doc. 7, Nos 163 to 165, and Prel. Doc. 9, No 51

Variant 1 (Work. Doc. 22)

A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Contracting State shall, in another Contracting State, be declared enforceable there, on application made in accordance with the procedures provided for in Article X *et seq*. The application may be refused only if enforcement of the instrument is contrary to public policy in the State addressed.

The instrument produced must satisfy the conditions necessary to establish its authenticity in the State of origin.

The provisions concerning recognition and enforcement shall apply as appropriate.

Article 34 – Settlements (Prel. Doc. 7, Nos 166 to 168; Prel. Doc. 9, No 52)

(Work. Doc. 68, point V)

Settlements which [have been approved by a court and] are enforceable in the State of origin are enforceable in the requested State under the same conditions as judgments covered by this Convention inasmuch as these conditions apply to such settlements.

CHAPTER IV – JUDICIAL CO-OPERATION***Article 35 – Transfrontier communication between judges***

In the situations provided for by Articles 14, 23 and 24 above (provisional measures, *lis pendens* and *forum non conveniens*) judges of Contracting States may communicate by any means at their disposal for the purpose of determining which court should rule upon the case at issue. In doing so the judges concerned should respect strictly the principle *audi alteram partem* and invite the parties to state their case or, if necessary, to take part in the discussion.

Article 36 – Form

In order to facilitate the recognition and enforcement of decisions rendered by the courts of the Contracting States, the registrar of each court or any other entity or person designated by the head of the jurisdiction concerned, shall hand over to the requesting party a form drawn up in conformity with the model attached to the present Convention, properly filled in by him and bearing his stamp. This form shall have no value whatsoever unless accompanied by the full decision which has led to it. In the event of error or omission in the content of the form, the decision alone shall prevail. No appeal shall be possible if the issuing of the form is refused, or in the event of error or omission.

CHAPTER V – GENERAL PROVISIONS

*Article 37 – Relations with other conventions*Variant 1 (Work. Doc. 74 and Prel. Doc. 9, Nos 5 to 9)

This Convention shall not derogate from the laws of the Contracting States in matters of arbitration.

Variant 2 (Work. Doc. 92-IV)

This Convention does not affect any international instrument to which Contracting States are or will become Parties and which contains provisions on matters governed by the Convention.

Variant 3 (Work. Doc. 72)

This Convention shall not prejudice the application by Contracting States of –

- the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, done at Brussels on 27 September 1968, including its amendments and future amendments;
- the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, done at Lugano on 16 September 1988, including its future amendments.

Article 38 – Uniform interpretation (Prel. Doc. 7, Nos 200 to 203; Prel. Doc. 8, No 89; Prel. Doc. 9, No 118)

N.B. Cf Document prepared by the Co-Reporters (Work. Doc. 94) which will be sent to experts at a later date.

Article 39 – Minimum provided by the Convention

The Convention does not prevent Contracting States from applying rules which are more favourable to the recognition or enforcement of foreign judgments.

CHAPTER VI – TRANSITIONAL PROVISIONS

CHAPTER VII – FINAL CLAUSES

Article 40 – Acceptance of adherence

(Work. Doc. 88) and (Prel. Doc. 9, Nos 120 and 121)

1 This Convention shall become effective between any two Contracting States after the deposit with the depository of declarations by the two states confirming the entry into force between the two States of treaty relations under this Convention.

2 At the time of deposit of its instrument of ratification of or accession to this Convention, each State shall deposit with the depository copies of its declarations concerning all Contracting States with which the new State will enter into treaty relations under the Convention.

3 Upon the issuance of declarations concerning the entry into force of treaty relations between Contracting States, each State shall deposit with the depository copies of such declarations.

4 Notwithstanding any other provision of this Convention, its provisions referring to the rights, obligations and treatment of Contracting States, habitual residents thereof and legal entities organised under the law thereof shall apply only with respect to those States that have filed declarations under this Article X and only with respect to treaty relations between and among such States.

5 The Hague Conference on Private International Law shall regularly publish information reporting on the declarations that have been deposited pursuant to this Article.