

**Avant-projet de Convention sur la compétence et les jugements étrangers en matière civile et commerciale, adopté par la Commission spéciale le 30 octobre 1999, et Rapport de Peter Nygh et Fausto Pocar**

**OBSERVATIONS DU GOUVERNEMENT SUISSE**

**Remarques générales**

La Convention mondiale envisagée en matière de compétence et d'exécution de jugements vise à renforcer la sécurité juridique et à promouvoir le commerce international. A une époque marquée par une intégration et une globalisation toujours plus poussées au niveau planétaire, l'on ne peut que saluer sans réserve un tel projet. L'interprétation du présent instrument incombera toutefois essentiellement aux tribunaux nationaux, qui, à l'échelle mondiale, offrent toute une palette de conceptions juridiques différentes les unes des autres. Pour éviter que la jurisprudence des Etats parties à la future Convention ne soit pas partout la même, il faudra avant tout s'efforcer d'adopter des règles claires et simples. En outre, il conviendra de s'entendre sur des mécanismes qui, dans la mesure du possible, garantissent ou favorisent une interprétation uniforme.

Le présent projet est le résultat de nombreuses années de négociations à La Conférence de La Haye et il est d'une très grande qualité. C'est sur cette base qu'il y a lieu de comprendre les remarques suivantes, qui se limitent d'ailleurs à certains aspects paraissant essentiels. La position de la Suisse sur l'ensemble du projet et sur ses différentes dispositions sera présentée par la délégation suisse lors de la Conférence diplomatique qui débutera en juin 2001.

**Article premier** Champ d'application matériel

Les actions anti-trust devraient être entièrement exclues du champ d'application matériel de la Convention. En effet, il s'agit là de domaines trop délicats sur le plan politique et qui risqueraient en fin de compte de diminuer sensiblement l'acceptation du projet par certains Etats.

**Article 6** Contrats

Les compétences en matière contractuelle et délictuelle, de même que le for du lieu de l'activité et de l'établissement, devraient former un tout et pourront peut-être faire l'objet d'une réglementation globale par la suite. Il faudra toutefois poursuivre énergiquement les dernières discussions très prometteuses sur le sujet. C'est la raison pour laquelle nous nous prononcerons séparément ci-après sur les différentes dispositions.

Le point de départ du projet consistant à n'attribuer qu'un champ d'application restreint au for en matière contractuelle rencontre en principe l'approbation, et cela aussi compte tenu du fait qu'il y aura en tout état de cause des chevauchements avec le for du lieu d'établissement et de l'activité prévu à l'article 9. La différence entre une livraison partielle insignifiante et l'absence de livraison présente toutefois

un caractère quelque peu arbitraire. C'est pourquoi il faudrait au moins exiger une livraison partielle d'une certaine importance: " fournis en tout ou en grande partie".

On pourrait se demander si l'al. 1, let. c, devrait être biffé sans être remplacé par une autre disposition; en tout cas, ce qu'il faut entendre par l'expression "obligation principale" n'est pas évident.

On ne devrait pas exclure le domaine du commerce électronique du champ d'application de la compétence en matière contractuelle, car cela entraînerait une inégalité de traitement entre le commerce traditionnel et le commerce électronique. Des problèmes pratiques pourraient se poser lors de l'exécution électronique d'un contrat "on line" (téléchargement ou action de rendre visibles des données). Dans ce cas, une règle prévoyant que le lieu d'exécution est présumé se trouver là où le destinataire a sa résidence habituelle pourrait contribuer à résoudre le problème.

### **Article 7 (Contrats conclus par les consommateurs)**

Une des questions essentielles est celle de savoir si des clauses d'élection de for en défaveur du consommateur sont admissibles. Il semble particulièrement difficile de parvenir à un accord sur ce point. La solution en vertu de laquelle il appartient au droit du lieu de résidence habituelle du consommateur d'établir s'il est admissible d'introduire action (dans le sens d'une compétence permise, relevant de la zone dite grise) constitue, il est vrai, un expédient. C'est par conséquent le droit de l'Etat requis qui détermine si l'exécution est possible.

Dans le domaine du commerce électronique, la détermination de la résidence habituelle des parties est un problème qui se pose de manière générale. L'offrant court le risque de conclure des contrats avec des consommateurs établis dans un pays qu'il cherche normalement à éviter, que ce soit par crainte de restrictions commerciales, de la violation de droits exclusifs, ou, d'une manière toute générale, parce qu'il se méfie de la pratique juridique du pays en question. Pour tenter de résoudre la question, on pourrait introduire un système en vertu duquel le consommateur serait tenu par les indications qu'il a faites au sujet de sa résidence habituelle lors de la conclusion du contrat.

Quant à l'activité publicitaire de l'offrant dans Internet (al. 1, let. a), il semble approprié de distinguer selon qu'il s'agit d'un site "actif" ou d'un site "passif". La Convention devrait contenir une précision dans ce sens; il suffira guère de préciser ce point dans le futur Rapport explicatif.

### **Article 9 For de l'établissement et de l'activité**

En ce qui concerne le for de l'activité commerciale, une discussion dont on ne devrait pas préjuger de l'issue se déroule actuellement. Dans ce contexte, notons toutefois qu'il nous semble nécessaire de définir d'une manière beaucoup plus fouillée et avec plus de clarté que dans le projet le rapport que le défendeur entretient avec le for, d'une part, et avec le litige, d'autre part; sinon, la prévisibilité des solutions, indispensable pour faire régner la sécurité du droit, ne serait pas garantie.

## **Article 12** Compétences exclusives, propriété intellectuelle

Les actions portant sur la violation de droits de propriété intellectuelle ne devraient pas être érigées en compétences exclusives. Il est vrai que le souci de parvenir à des décisions conciliables entre elles plaiderait en faveur d'un for unique au lieu d'enregistrement. Toutefois, il serait sensiblement plus difficile de devoir introduire, aux fins d'exercer un droit internationalement protégé, une nouvelle action dans chaque Etat concerné. Une action reconventionnelle du défendeur dans un procès portant sur la violation d'un tel droit et dans lequel la question principale a trait à la nullité ou à la résiliation de ce droit, ne devrait toutefois pouvoir être engagée qu'au lieu de l'enregistrement. Il conviendrait d'introduire une telle restriction à l'article 15.

## **Article 15** Action reconventionnelle

Voir ce qui précède

## **Article 18** Compétences interdites

L'article 18 est une disposition extrêmement importante, qui devrait être formulée de manière encore plus claire en vue d'en faciliter l'application uniforme. L'interdiction statuée à l'art. 18, let. e, devrait être notablement renforcée.

Nous accordons une importance particulière à l'exception figurant à l'al. 3 (Droits de l'homme). La Convention ne doit pas empêcher les victimes de crimes sanctionnés par le droit humanitaire international ou les victimes de violations graves des droits de l'homme de faire valoir leurs droits. Ces fors constituent des exceptions aux règles de compétence normalement applicables et qui ont précisément été adoptées parce qu'elles apparaissent en soi comme étant les plus appropriées. En outre, la Convention vise à faciliter l'exécution des jugements. C'est pour ces motifs qu'une règle additionnelle devrait être adoptée: elle ne permettrait d'engager une procédure à un for interdit ou, en d'autres termes, à un for figurant sur la liste noire, que s'il était impossible d'introduire une telle action au for normalement prévu, soit à un for dans la zone blanche, ou que l'on ne puisse pas raisonnablement l'exiger.

## **Art. 21 et 22** (lis pendens et refus exceptionnel d'exercer la compétence)

Ces deux dispositions réunissent de façon méritoire le concept de la litispendance et celui du déclinatoire de compétence. En raison de l'interaction réciproque des deux concepts, il ne devrait toutefois être possible de refuser d'exercer la compétence sur le fondement de l'article 22 qu'en faveur d'un for de la zone blanche, par analogie avec l'article 21. Il conviendra de préciser également qu'en dehors du cadre tracé par l'article 22, il n'y aura plus de place pour l'application de la doctrine du "forum non conveniens".

## **Art. 37** Rapport avec d'autres conventions

L'article 37 aurait un rôle important à jouer: la présente Convention ne devrait pas faire obstacle à ce que les instruments régionaux puissent continuer en principe à fonctionner sans encombre dans le champ d'application qui leur a été imparti jusqu'ici. Il faut en particulier éviter, dans la mesure du possible, que des règles spéciales soient prévues pour des instruments déterminés, mais au contraire veiller à ce que tous les instruments régionaux existants et futurs soient mis sur pied d'égalité.

Par ailleurs, il s'agit d'éviter que le consensus existant au sujet des fors interdits ne puisse être rendu inopérant. C'est pourquoi il y a lieu de statuer que dans ce domaine la Convention a la primauté.

La solution concernant les conventions régionales ne devrait pas être différente de la réglementation relative aux conventions spéciales ou du moins ne pas s'en distinguer trop fortement. En effet, il sera parfois difficile de délimiter clairement ces deux catégories.

#### 6.2.01

**ASSOCIATION INTERNATIONALE  
POUR LA PROTECTION DE LA PROPRIÉTÉ INDUSTRIELLE**

**INTERNATIONAL REPORT**

**SPECIAL COMMITTEE Q 153  
ON THE ENVISAGED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS IN  
CIVIL AND COMMERCIAL MATTERS**

**Introduction**

The Hague Conference on Private International Law (the "**Hague Conference**") prepares a global Convention on jurisdiction and the recognition and enforcement of foreign judgments in civil and commercial matters (the "**draft-Convention**"). The draft-Convention contains an Article 12 on *inter alia* industrial property rights required to be deposited or registered.

AIPPI has set itself the task of advising on especially this Article 12. On 12 October 1999 AIPPI instituted Special Committee Q 153 to take this matter at hand.<sup>1</sup> The committee presented its preliminary findings on 12 April 2000 during the Executive Committee meeting in Sorrento, Italy. Recognising the importance of the issue for future industrial property litigation, the Bureau requested the committee to draft a questionnaire in order to chart the course of AIPPI. On 15 November 2000 the committee submitted the attached Questionnaire, with a detailed Explanatory Memorandum, to the Groups. In alphabetical order the following eighteen Groups responded: Argentina, Belgium, Brazil, Canada, Egypt, Finland, Greece, Italy, Mexico, the Netherlands, New Zealand, Paraguay, Spain, Sweden, Switzerland, Ukraine, the United Kingdom and the United States.<sup>2</sup>

This international summary report provides for a question-by-question general overview of the answers to the Questionnaire. In the general conclusion on page 10, the committee's main conclusions as well as its view on a proposed resolution are described.

Reference is made to the aforementioned Explanatory Memorandum for extensive information on the background and the details of the draft-Convention. The terminology in this report follows the Explanatory Memorandum.

---

<sup>1</sup> Special Committee Q 153 consists of Prof. Constant van Nispen (chairman), Dr. Annette Kur (co-chairman), Pierre Véron, Yoshio Kumakura, Prof. Marianne Levin, Andrew Rich, Prof. Samuel Ricketson and Ferdinand de Visscher. The committee expresses its gratitude to Sierd J. Schaafsma who drafted the Questionnaire and the Explanatory Memorandum as well as this International Report and the resolution.

<sup>2</sup> All these countries are Member-States of the Hague Conference, except for New Zealand, Paraguay and Ukraine (situation 15 March 2001).

## CONTENTS

Introduction .....	p. 1
Question 1 The scope of the draft-Convention .....	p. 3
Question 2 Lis pendens and anti-torpedo (Article 21) .....	p. 3
Question 3 National rules of jurisdiction in respect of validity .....	p. 4
Question 4 The opinion on jurisdiction in respect of validity .....	p. 4
Question 5 The interpretation of Article 12(4) .....	p. 5
Question 6 The effect of invalidity .....	p. 6
Question 7 Raising the validity issue .....	p. 7
Question 8 National rules on jurisdiction in respect of infringement ..	p. 7
Question 9 The opinion on jurisdiction in respect of infringement .....	p. 8
Question 10 Suggestions .....	p. 9
General conclusion .....	p. 10
Proposed Resolution .....	schedule

### **Question 1: The scope of the draft-Convention**

*Should industrial property disputes fall within the realm of the draft-Convention?*

The draft-Convention applies to civil and commercial matters, with some exceptions. Hence, industrial property disputes will fall within the realm of the draft-Convention. The first question asks for the opinion of the Groups in this respect.

A majority of the responding Groups favours the inclusion of a regulation on industrial property matters in the draft-Convention. The Belgian Group made an extensive substantiation of this point of view. A minority rejects such inclusion, usually referring to the lack of harmonisation in this field of law.<sup>3</sup> Other Groups link their answer to the contents and the quality of the regulation in the draft-Convention and prefer exclusion to the current text of Article 12(4).

The Paraguayan Group made an interesting proposal. It proposes to exclude intellectual property matters in the current draft-Convention and suggests that the Hague Conference elaborates a specific protocol on intellectual property to be added to the Convention in due time.

### **Question 2: Lis pendens and anti-torpedo**

*What is the opinion of your Group about the lis pendens rule in Article 21(1) and (6) of the draft-Convention, especially in view of “torpedo’s”?*

Article 21 concerns the rule of *lis pendens*. This *lis pendens* rule implies the obligation of the court second seized to suspend proceedings if proceedings between the same parties based on the same causes of action have been installed before a competent court in another Contracting state. The *lis pendens* rule does not apply if the court second seized has exclusive jurisdiction under, inter alia, Article 12. In addition, according to Article 21(6) the *lis pendens* rule does not apply if the action before the court first seized concerns a claim for non-infringement. This provision is an attempt to take the sting out of the so-called “torpedo’s”.

A majority of the responding Groups supports the solution in Article 21(6) against torpedo's aiming at a declaration of non-infringement. The Belgian Group stresses the desirability of this solution in view of legal security and predictability. The Netherlands Group, although in favour of Article 21(6), noticed that this solution nonetheless causes some inequality as -in the end- it is the proprietor of the industrial property rights who decides which courts will be adjudicated. The alleged infringer may therefore be delayed in seeking certainty about a continuation of his challenged activities. For a single Group -the United Kingdom Group- this is a reason not to accept Article 21(6).

It is noticed that if the exclusive jurisdiction of Article 12(4) would be extended to infringement proceedings –see Question 9–, the anti-torpedo provision in Article 21(6) loses its importance for industrial property cases. For proceedings on other civil and commercial matters, Article 21(6) may of course retain its importance.

---

<sup>3</sup> For example the United Kingdom and the United States Groups.

**Question 3: The rules on international jurisdiction in respect of validity<sup>4</sup>**

- (a) *What is the current legal situation in your country regarding the international jurisdiction in respect of the validity of industrial property rights? More specifically:*
- (b) *Has a court in your country jurisdiction to judge -as an incidental question- on the validity, the registration or the nullity of an industrial property right which is deposited or registered in another country?*
- (c) *If the courts in your country have jurisdiction to judge on the validity of a foreign industrial property right, what is the effect of such incidental decision: erga omnes or inter partes?*

Question 3 inquires about the current legal situation in the countries concerning international jurisdiction in respect of the validity of industrial property rights. It concentrates on the question whether national courts have jurisdiction to judge, as an incidental question, on the validity of industrial property rights deposited or registered abroad.

Under the national laws of a rather large majority of the responding Groups, the national courts do not have jurisdiction to judge on the validity of industrial property rights deposited or registered abroad. In this context it makes no difference whether the registration or validity issue is the principal question of the proceedings or an 'incidental' question.

Under the laws of a minority of the responding Groups, however, such jurisdiction is possible. For example, Swiss national courts have jurisdiction to deal -as an incidental question- with the validity of foreign industrial property rights. Under the national laws of this minority, such incidental findings of invalidity only have an *inter partes* effect.

Article 12(4) of the draft-Convention, permitting jurisdiction to try incidentally on the validity of foreign industrial property rights, therefore seems to contravene legal practice in the countries of a majority of the responding Groups.

**Question 4: Opinion on international jurisdiction in respect of validity**

- (a) *Should courts have international jurisdiction to try -as an incidental question- the validity, the registration or the nullity of industrial property rights deposited or registered in other countries? If yes, under which conditions and to which extent? Or:*
- (b) *Should the courts of the country where the right is deposited or registered have always exclusive jurisdiction to try its validity, registration or nullity?*
- (c) *Does your Group propose another solution?*

A wide majority of the responding Groups is of the opinion that the court of registration should always have exclusive jurisdiction to try the validity of an industrial property right, whether the validity is the principal issue of the proceedings or an incidental issue. In this respect the Belgian Group proposes to

---

<sup>4</sup> With the "validity" the issues of registration, validity, and nullity are collectively meant (see the Explanatory Memorandum, paragraph 25). In addition, the "courts of the Contracting State in which the deposit or registration has been applied for, has taken place or, under the terms of an international convention, is deemed to have taken place", mentioned in Article 12(4), will be called the "court of registration" in this report.

add, for the sake of clarity, to the provision on counterclaims, Article 15, that it shall not apply to counterclaims covered by Article 12(4).<sup>5</sup>

The Netherlands Group points out that in a large majority of cases the validity issue is raised in infringement proceedings, either as a defence or by way of a counterclaim. To that extent, infringement and validity can be considered Siamese twins, the validity issue being triggered in a large majority of cases within the infringement context. Providing the infringement court with jurisdiction over the incidental issue of the validity therefore boils down to an unjustified –and perhaps unforeseen– erosion of the exclusive jurisdiction of the court of registration.

The United Kingdom Group rebuts, inter alia, the argument that Article 12(4) would be a cost and time saving solution. It stresses that, conversely, additional costs and time are inevitable because the court must bury itself in complex foreign industrial property laws, which in addition increases the risk of errors and, by consequence, the necessity to lodge appeals.

Some Groups, such as the Belgian and the Netherlands Group, refine their position by not excluding in advance incidental validity jurisdiction within the context of a family of States harmonising their industrial property laws such as the European Union. The latter Group adds, however, that even within the European Union the Article 12(4)-solution has not been adopted in the recent EC Regulation that will replace the Brussels Convention.<sup>6</sup>

Only a few Groups, for example the Swiss and Brazilian Groups, argue that national courts should have jurisdiction to judge, as an incidental question, on the validity of foreign industrial property rights. The Swiss Group appeals to the efficiency of the Article 12(4)-solution. The Ukrainian Group proposes a primary role for choice of jurisdiction.

In conclusion, Article 12(4) clashes with the wish of a wide majority of the responding Groups to provide for complete exclusive validity jurisdiction for the court of registration.

#### **Question 5: The interpretation of Article 12(4)**

*Which interpretation of the words “proceedings which have as their object” in Article 12(4) would your Group prefer?*

It is noted that Article 12(4) uses other vocabulary than Articles 16(4) Brussels and Lugano Conventions. Article 12(4) is about “proceedings which have as their object”, whereas said Articles 16(4) are about “proceedings concerned with“. AIPPI was given to understand that these wordings have a different meaning. Unfortunately, it is not very clear how the “proceedings which have as their object” in Article 12(4) -and in its slipstream Article 12(6)- should be interpreted exactly.

---

<sup>5</sup> Article 15 of the draft-Convention reads as follows: "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."

<sup>6</sup> See Article 22(4) Regulation EC 44/2001 of 22 December 2000 concerning the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ EC of 16 January 2001, L12/1 et sqq.

Two interpretations have been suggested. On the one part, it has been suggested that proceedings *which have as their object* the validity of an industrial property right are proceedings in which the validity is the “principal issue” or the “main issue”. This is what the Nygh/Pocar-Report to the draft-Convention says.<sup>7</sup> On the other part, it may be argued that proceedings *which have as their object* the validity of an industrial property right are proceedings in which the claim deals with the validity of the industrial property rights.<sup>8</sup> The claim formulates the object of the proceedings.

Question 5 asks which of these two interpretations the Groups would prefer, under the hypothesis that the current text of Article 12(4) were adopted (hence, apart from the question whether the underlying principle would be acceptable for the Groups, see Question 4).

Practically all responding Groups preferred the claim-oriented interpretation, saying that proceedings "which have as their object" the validity of an industrial property right are proceedings in which the claim deals with the validity of the industrial property right. The suggested alternative interpretation focussing on the “principal issue” is considered to be too vague a criterion causing uncertainty. It will probably be interpreted differently by different courts in different countries. In addition, it seems impossible to discern a principal issue in proceedings in which both the infringement and the validity are at stake.

In conclusion almost all Groups reject the interpretation of Article 12(4) proposed in the Nygh/Pocar report.

#### **Question 6: The effect of invalidity**

- (a) *Is it possible under your national law that an industrial property right is declared invalid between the litigating parties only?*
- (b) *Is it possible under your national law that an industrial property right is found invalid between the litigating parties only?*
- (c) *Can a foreign judgment, in which it is *inter partes* decided that an industrial property right registered in your country is invalid, be recognised and enforced in your country (e.g. is it accepted by courts and/or the national industrial property offices)?*

The answers to this question provide for an unclear picture, showing widely differing approaches. A complete overview would exceed the limits of this report. The committee therefore refers to the national reports and confines itself to the observation on Question 6 a that an *inter partes* declaration of invalidity seems unusual.

---

<sup>7</sup> Nygh/Pocar-Report (at [www.hcch.net](http://www.hcch.net)), p. 67-68; Article 12(6) was designed to confirm this interpretation.

<sup>8</sup> The French text seems to confirm this interpretation, saying: “Si l'action porte sur l'inscription, la validité ou la nullité ...”.

### **Question 7: Raising the validity issue**

- (a) *Can the invalidity of an industrial property right only be invoked by the defendant by way of a counterclaim or also as a defence, in your country?*
- (b) *How should this rule be qualified: as a rule of substantive patent law or as a rule of procedural law?*

The national rules on how the defendant should raise the validity issue also have effect on the present issue. May the validity issue be raised only by way of defence? Or only as a counterclaim? Or does the defendant have both possibilities? Question 7 inquires about the legal situation in this respect in the countries. The answers of the Groups show a varied kaleidoscope of different approaches. It seems that in a bare majority of countries of the responding Groups both an invalidity defence and an invalidity counterclaim are possible. However, in other countries such as Finland, Greece and Mexico, the defendant may only invoke the invalidity by way of a counterclaim.

It seems that in a bare majority of countries of the responding Groups these rules are qualified as procedural law rules whereas in other countries they are considered to be substantive law rules. In a few countries their qualification is not clear. This qualification touches upon a specific problem. As explained above, in some countries invalidity of an industrial property right may only be invoked by the defendant by way of a counterclaim and not as a mere defence. This brings about the following conflict of law problem. Suppose the court in country A has jurisdiction as to proceedings concerning the infringement of a patent registered in country B. The defendant raises the invalidity of the patent as a defence. According to the law of country B, it is possible to do so, but in country A it is not possible to invoke the invalidity merely as a defence; it should be invoked in a counterclaim. The problem arises whether this is a question of procedural law or a question of substantive patent law. If it is a question of substantive patent law under the private international law of country A, a court in that country may have to deal with the defence.<sup>9</sup> However, should it be qualified as a question of procedural law, then the court will probably apply its own (procedural) law, denying the possibility to raise this defence. In that event, the defendant will have to start separate invalidation proceedings in country B. The laws of different countries apparently provide for different solutions for this problem.

### **Question 8: The present rules on infringement jurisdiction**

*Under your national law, can a court be competent to try the infringement of an industrial property right which is deposited or registered in another country?*

The Brussels and Lugano Conventions make it possible that a court has jurisdiction to try the infringement of an industrial property right which is deposited or registered in another country. For example, if the defendant has his habitual residence in a Member-State, Articles 2 of these conventions provide for jurisdiction in this Member-State to try the infringement in another country.<sup>10</sup> A number of the

---

<sup>9</sup> Assuming that the rules of private international law of country A point at the law of country B to be applied on the patent issue.

<sup>10</sup> In this context the Netherlands Group explains the cross-border injunction practice in the Netherlands in European patent cases, which practice attracted international attention. This cross-border practice rested in the essence on a broad interpretation of the *forum connexitatis* jurisdiction in Articles 6(1) Brussels and Lugano Conventions. In its judgment of 23 April 1998, the Court of Appeal in The Hague limited the *forum connexitatis* jurisdiction by introducing the so-called spider-in-the-web doctrine in respect of Article 6(1) (EGP v. Boston Scientific, published in IER 1998/30). Shortly, this doctrine applies in cases where defendants, domiciled in several countries and belonging

Member-States to the Brussels and Lugano Conventions seems to work with a similar rule in cases to which these conventions do not apply.

As far as non-Member-States to the Brussels and Lugano Conventions are concerned, it seems that in many countries of the responding Groups the rule is adopted that the court of registration has exclusive jurisdiction, not only as to the validity issue, but also as to the infringement of the industrial property right. This is for example the case in the Argentina, Canada, Mexico, Paraguay and the United States.

In conclusion, there is no univocal international legal practice as to the question whether a national court is competent to try the infringement of an industrial property right which is deposited or registered in another country.

### **Question 9: Opinion on infringement jurisdiction**

- (a) *Should, according to the opinion of your Group, the exclusive jurisdiction of Article 12(4) of the draft-Convention also apply to the infringement of industrial property rights?*
- (b) *If yes, should a distinction be made between patents and other industrial property rights, to the extent that this exclusive jurisdiction does not apply to patent infringements (proposal of Article 12(5))?*

Question 9 asks for the opinions of the Groups about the proposal to extend the exclusive jurisdiction ground in Article 12(4) to infringement issues. In this view, only the court of registration has jurisdiction to try the infringement of an industrial property right deposited or registered in that country; a court is not competent to try the infringement of a foreign industrial property right. This issue seems to be a key problem: opinions are strongly divided, thus creating a deadlock.

A majority of the responding Groups supports the concept of exclusive infringement jurisdiction, i.e. the rule that the court of registration is exclusively competent to deal with the infringement of industrial property rights, which are deposited or registered in that country. Some of these Groups support this concept without any reservation. Other Groups, such as the Belgian Group, are of the opinion that exclusive infringement jurisdiction would be appropriate in a global context, but is not necessarily the right approach in a regional context (for example within the European Union).

A minority of the responding Groups favours non-exclusive infringement jurisdiction. These Groups generally appeal to the possibilities for the proprietor of industrial property rights to effectively attack a multi-state infringement before one court, a weighty question in an age of increasing internationalisation.

---

to the same group of companies, allegedly infringe several parallel European patents by marketing the same product. In such a case, the Netherlands court is competent to hear the *infringement* claims against all defendants if the headquarters ("the spider") are located in the Netherlands. By the way, as soon as the *validity* issue is raised the basic rule applies, stipulating that infringement proceedings must be suspended awaiting the validity decision of the foreign court. However, if the invalidity defence is immediately considered not to be serious at all, the court may – with caution– proceed with the infringement issue.

The responding Groups were unanimous on this: they all rejected the distinction between patents and other industrial property rights in the proposed Article 12(5). This provision is considered unfounded and inappropriate.

#### **Question 10: Suggestions**

*Please feel free to propose other solutions to the problems at hand. For example, what does your Group think about the suggestion in paragraph 49?*

Reference is made to the suggestion made in the various national reports.<sup>11</sup>

Question 10 specifically inquires about the suggestion in paragraph 49 in the Explanatory Memorandum, which suggestion might offer a solution of the fundamental problems on the scope of the exclusive jurisdiction.

If a competent infringement court in a country other than the country of registration is confronted with an invalidity defence, it might - possibly upon request by the plaintiff - order that the defendant, within a given time, has to install invalidation proceedings in the country of registration, in which case the proceedings are suspended. If no invalidation proceedings are installed, the court may treat the defence as unfounded, although this would amount, strictly speaking, to an incidental finding on the validity issue.<sup>12</sup> In this way, the danger that the invalidity defence may be misused in order to deprive the plaintiff of the possibility to have the case decided in one lawsuit before a single court could be contravened, while on the other hand, the possibly adverse effects of an incidental ruling on validity could also be avoided.

Not all Groups considered this suggestion. Some Groups, such as the United States and the Netherlands Groups, were not unsympathetic towards this solution. Other groups, such as the Swiss and the United Kingdom Groups expressed –for very different reasons- their objections.

---

<sup>11</sup> Suggestions were made by the Groups of Argentina, Belgium, Brazil, Egypt, Mexico, the Netherlands, New Zealand, Paraguay, Switzerland, Ukraine, the United Kingdom and the United States.

<sup>12</sup> Such 'incidental invalidity finding' could be avoided by adopting the suggestion of the Netherlands Group to consider the failure to initiate invalidity proceedings timely as a waiver of the invalidity defence. Article 5(1) of the draft Convention should then be modified.

## General conclusion

- I. On the basis of the preceding Special Committee Q 153 concludes that a clear picture has been obtained on a number of issues:
  - a. The Groups unanimously reject the proposed Article 12(5) (Question 9 b).
  - b. Almost all Groups reject the interpretation of Article 12(4) in the Nygh/Pocar-Report, that says that proceedings which have as their object the validity of an industrial property right are proceedings in which the principal issue is said validity. The claim-oriented interpretation is preferred (Question 5).
  - c. The anti-torpedo provision in Article 21(6) is supported by a majority of the responding Groups (Question 2).
- II. However, on the fundamental question concerning the scope of the exclusive jurisdiction of the court of registration in Article 12(4), opinions differ within AIPPI. And not only opinions differ - also national laws provide for very different solutions.<sup>13</sup>
- III. On the one side of the spectrum, it is proposed to restrict the exclusive jurisdiction to proceedings in which the registration, validity or nullity of an industrial property right is the principal issue. Such restricted exclusive jurisdiction, however, is rejected by a large majority of the responding Groups. This majority supports exclusive jurisdiction in respect of the validity issue, whether the validity is the principal question of the proceedings or an incidental question (Question 4)
- IV. On the other side of the spectrum, it is proposed to extend the exclusive jurisdiction to infringement proceedings. The reactions to this proposal show a more diverse picture, although a majority seems to support such exclusive jurisdiction (Question 9). At the same time, it is recognised that in an age of increasing internationalisation such approach might cause problems.
- V. Special Committee Q 153 concludes that at this moment there is no consensus within AIPPI on the fundamental issue concerning the scope of the exclusive jurisdiction. The committee observes that not only within AIPPI opinions differ on this issue. During the Experts Meeting of the Hague Conference, convened in Geneva on 1 February 2001, the same controversy came up.<sup>14</sup>
- VI. On short term -for example before the final Diplomatic Conference of the Hague Conference in spring 2002- consensus on a well thought out regulation on intellectual property is highly unlikely. The committee concludes that in view of the present lack of consensus, intellectual property matters should be excluded from the substantive scope of the draft-Convention.<sup>15</sup>

---

<sup>13</sup> See Questions 3 (validity) and 8 (infringement); see also Questions 6 and 7 on side issues in this respect.

<sup>14</sup> AIPPI was represented at the Experts Meeting by Mr S.J. Schaafsma.

<sup>15</sup> The exclusion should be implemented in Article 1(2) of the draft-Convention. Deletion of Article 12(4), (5) and (6) is of course not enough, as such deletion leaves the infringement rules intact (and one should not provide for infringement rules without taking care for rules on the validity jurisdiction). It is submitted that, although AIPPI

- VII. However, the committee recognises the growing importance -and complexity- of the private international law aspects of intellectual property matters. It realises that it is desirable to set an international regulation in this respect and that the draft-Convention is the most appropriate vehicle for such regulation. It recalls that a majority of the responding Groups favours an intellectual property regulation in the draft-Convention.
- VIII. The committee therefore suggests that the Hague Conference elaborates a specific protocol on intellectual property to be added to the Convention in due time.<sup>16</sup> This approach gives time to study this complex matter and to examine whether consensus can be reached. In this context the committee remarks that it is of the opinion that the approach outlined under Question 10 deserves further study.
- IX. Consequently, Special Committee Q 153 advises the General Assembly of the AIPPI, convened in Melbourne on 30 March 2001, to adopt the attached resolution, in which AIPPI recommends to exclude intellectual property matters from the current draft-Convention and calls on the Hague Conference to elaborate a specific additional protocol on intellectual property.

The Hague,  
15 March 2001

---

restricted its quest to industrial property matters, it would seem logical to exclude all intellectual property matters and not just industrial property matters. The committee recognises that it is difficult to define 'intellectual property matters'. In drafting such definition Article 1(2) of the 1994 Agreement on trade-related aspects of intellectual property rights (TRIPs, Annex 1C to the Agreement establishing the World Trade Organisation, Marrakech, 15 April 1994) could serve as a starting point, although it should be realised that said article does not seem to cover all intellectual property rights. The committee is prepared, if requested, to render assistance to the Hague Conference in drafting a definition.

<sup>16</sup> The committee adopts the suggestion from the Paraguayan Group (see Question 1)

CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ  
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

Doc. pré1. No 14

Prel. Doc. No 14

avril / April 2001

**Japon / Japan**

**Comments of the Governments and of the International  
Organisations  
on the preliminary draft Convention on jurisdiction and foreign  
judgments  
in civil and commercial matters  
adopted by the Special Commission on 30 October 1999  
and on the Explanatory Report by Peter Nygh and Fausto Pocar**

**JAPAN**

(received 5 June 2001)

*Document préliminaire No 14 d'avril 2001  
à l'intention de la Dix-neuvième session de juin 2001*

*Preliminary Document No 14 of April 2001  
for the attention of the Nineteenth Session of June 2001*

Comments by the Japanese Government on Preliminary Draft  
Convention on Jurisdiction and Foreign Judgments in Civil and  
Commercial Matters

I General Remarks

The Japanese Government presents its compliments to all the members of the Hague Conference on Private International Law for their active involvement in the preparation of a new Convention on the question of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters.

We fully recognize the importance of this project, which, if successfully concluded, will have far-reaching effects on the lives of the people throughout the world. With the irreversible trend of ever expanding international commerce, the question of predictability in the field of international jurisdiction has become more important than ever. Thus, it is essential for the new Convention to establish a legal structure practically acceptable to as many countries as possible.

We believe that the preliminary draft Convention, with the structure of the so-called "mixed Convention", is pointing to the right direction in this regard and that the rules of jurisdiction, consisting of "white list", "black list" and "gray area", are, in general, well-balanced and acceptable.

However, we are of the opinion that there still remain some problems to be solved with respect to certain articles. We are ready to cooperate with other participating states at the Diplomatic Conference in searching for common solutions to these problems without damaging each state's interest. It may turn out, however, that no solution is found during the Diplomatic Conference on these issues. If that is the case, efforts should be made to draft a smaller Convention with limited scope of application that covers only those areas on which there is agreement rather than to have a grand Convention that covers everything but has little prospect of attracting Contracting States. To this end, we feel that it might become necessary at some stage of the Diplomatic Conference to remove controversial bases of jurisdiction from the white list, leaving them to the gray area, while maintaining the basic policy of restricting the exercise of excessive national

jurisdiction by way of the black list.

The following comments are offered without prejudice to our final position at the Diplomatic Conference.

## II Specific comments

### Article 1

Claims related to nuclear damages should be excluded from the scope of application of the Convention. This matter had better be left to other international instruments.

In case that paragraph 2 of Article 10 is deleted, claims for damages caused by anti-trust violations should be excluded as well.

### Article 3

For the purpose of this Convention, the notion of "habitual residence" should be clarified further. We observe that this notion as used in other conventions has resulted in different interpretations by different Contracting States. In addition, should this notion be used in this Convention, it would be inevitably affected by the interpretation taken in respect of the same words in other conventions, most of which are on family matters. It is therefore advisable to avoid such a situation in this Convention. If a different concept is to be adopted instead of "habitual residence" in this article, it would become necessary to examine whether or not "habitual residence" as used in other articles should be maintained in light of a specific purpose of each article.

### Article 6

It is our understanding that the place where the performance of payment obligation took place does not constitute the basis for jurisdiction under this Article, although the present text of Article 6 is not clear on this point. According to the report of the Special Commission, however, the jurisdiction under this article is granted only to the place where the main obligation of the contract was performed, and not to any place where each and every contractual obligation took place. It follows that, for

example, in case of a claim for the performance of payment obligation arising from a contract of sale of goods, the jurisdiction under article 6 is available only to the place where the goods were supplied, and not to the place where the payment was made.

On the other hand, it might be argued that the place of payment could become the basis for Article 6 jurisdiction in such instances as a loan contract on the ground that the supply of money itself is considered as the supply of services within the meaning of Article 6. This argument must be addressed in an unequivocal way in the text of this article so that there shall be no doubt about the interpretation that under no circumstances the place of payment alone will constitute the basis for jurisdiction under Article 6.

#### Article 7

With respect to the words "directed to" in sub-paragraph 1(a) of Article 7, it might be appropriate to make it clear that, in such cases where a company engaged in consumer trade via the Internet has taken certain measures to limit the consumers to contract with by posting the disclaimer clause on its web site indicating that the web site is only for those consumers in specified countries as well as by taking such technologically reasonable steps as appropriate to avoid entering into a contract with consumers in the countries not specified in the disclaimer clause, the company should not be considered to conduct the activity directed to such countries as not specified in the disclaimer clause.

As regards the interpretation of sub-paragraph 3(b) of this article, it is not clear from the text whether a choice of court agreement in consumer trade entered before the dispute has arisen shall be valid only when the agreement provides for additional jurisdiction for the consumer, or, it can be valid, even where the agreement itself provides for exclusive jurisdiction of the court of choice, to the extent that it enables the consumer to bring proceedings in a court specified in the agreement. Also, the meaning of "another court" in this paragraph should be clarified in comparison with the words "courts other than those indicated in this Article or in Article 3 of this Convention" in paragraph 2 of Article 8.

It has been suggested that an agreement on exclusive jurisdiction should be given some legal effect under such conditions that the law of habitual residence of the consumer permits such agreement and that the disclaimer clause is validly employed. However, we consider this approach inappropriate because, in consideration of the fact that this issue has not been definitely settled under some domestic laws, it would create the problem of unpredictability on the part of parties to such agreement as well as the problem of difficulty on the part of the court in ascertaining the legal status of such agreement under foreign domestic laws.

The definition of "consumers" in paragraph 1 should be understood that only natural persons are considered as consumers under this Convention.

#### Article 8

As mentioned above with respect to sub-paragraph 3(b) of Article 7, sub-paragraph 2(b) of this article needs to be clarified as to whether a choice of court agreement between an employee and an employer shall be valid only when the agreement provides for additional jurisdiction for an employee, or, it can be valid, even when the agreement itself provides for exclusive jurisdiction of the court of choice, to the extent that it enables the employee to bring proceedings in a court specified in the agreement.

#### Article 9

The words contained in square brackets should be deleted. In case that they were retained, the notion of "regular commercial activity" must be defined as clearly as possible. In particular, it should be drafted in such a way that such passive activities as the mere establishment of a web site do not fall within the scope of the definition of "regular commercial activity." At the same time, if some elements of activity based jurisdiction are introduced in Articles 6 and 10, the relationship between this article and Articles 6 and 10 must be reconsidered.

Irrespective of the retention of the words in square brackets, it is more appropriate to use the words more restrictive than "relates directly to" as in the present text. As regards "branch, agency or any other establishment," it

must be clarified that subsidiaries or affiliated companies are not considered as branch, agency nor establishment under this article. In other words, apart from a branch itself, this article should apply only to those agencies or other establishments that can be equated with a branch of the defendant.

#### Article 10

The word "injury" in sub-paragraph 1(b) needs careful examination from the viewpoint of whether or not this word is sufficiently clear to indicate that the place of injury does not include the place where only economic loss or consequential damages such as the loss of profit arose. As regards the foreseeability test in the proviso of the same sub-paragraph, it would be necessary to have a common understanding as to the circumstances under which it is considered that there is a reasonable foreseeability on the part of the person claimed to be responsible.

As regards paragraph 3, we fear that the jurisdictional basis under this paragraph might be too broad, because this paragraph enables the plaintiff to bring an action in the courts of the State even in the cases where there is only a possibility that the act or omission, or the injury may occur in that State. Therefore we are of the view that this paragraph should either be deleted or be redrafted so that it would require more than the mere possibility of the occurrence of such act or omission, or injury in that State as a pre-requisite for the plaintiff to take an action in that State.

According to paragraph 4, the State of habitual residence of the injured party will have the jurisdiction of adjudicating all the damages suffered in every part of the world on account of the "unless" clause in this paragraph, which might be considered too broad as well.

#### Article 12

Given the fact that the question of governing law of a legal person is not settled uniformly among national legal systems, the jurisdictional rule contained in paragraph 2 of this article might create a problem of more than one state exercising "exclusive jurisdiction."

Square brackets in paragraph 4 should be removed so that the exclusive jurisdiction of the courts of the State in which registration has taken place is extended to proceedings for infringement of patents or other similar rights required to be registered. Exceptions to this exclusive jurisdiction, if any, should be limited to those based upon Articles 3, 4 and 5.

#### Article 13

The rule of jurisdiction in paragraph 3 of this article, which does not entail the obligatory recognition and enforcement of provisional measures, would be of some legal significance in a mix convention only if it were understood that there is a "black list" hidden under this paragraph, whereby all the grounds for jurisdiction for provisional measures other than as contained in this article are prohibited under this Convention. However, this interpretation clearly runs counter to our reading of this paragraph. Also, we do not believe that there has been a consensus to that effect reached by the Special Commission.

As mentioned below with reference to Article 23, we consider that it would not be appropriate for this convention, which is global in terms of its geographical scope of application and is general in terms of its material scope of application, to provide for the recognition and enforcement of provisional measures, because such measures could be of various kinds and there would be no way of committing ourselves to the assumption that all such measures categorized as provisional measures in other jurisdictions are enforceable under our national legal system.

Therefore, sub-paragraph 1 (b) of Article 23 should be deleted and, consequently, there would be no reason to retain paragraph 1 of Article 13 as " a white list jurisdiction" because Article 13 would no longer have any connection with the treaty obligation of recognition and enforcement. By the same token, there would be no need to retain paragraph 2, as this paragraph is not linked to the recognition or enforcement of provisional measures in any way.

For the reasons mentioned above, we consider that this article be deleted in its entirety and, consequently, the reference to this article in Article 17 should also be deleted.

On the other hand, if the deletion of Article 13 is not accepted, paragraph 3 should be deleted and paragraphs 1 and 2 be included in a new independent Chapter which contains only new Article 13, on the understanding that the new article provides only for a rule of direct jurisdiction without preventing a Contracting State from exercising its domestic jurisdiction for provisional measures and there is no treaty obligation being imposed on a Contracting State to recognize or enforce such provisional measures as based upon the new article.

#### Article 14

This article should be deleted. In the context of deciding on international jurisdiction, it is not appropriate to deprive the defendant, by virtue of this article, of his legitimate interest in jurisdiction which otherwise would have been granted to him under this Convention. The rationale behind this article, as cited in the Report, is to avoid inconsistent judgments. However, the benefit of avoiding inconsistent judgments should not prevail over the interests of the defendant unless the subject matter in dispute is such issues as family relations, organizational aspects of corporations, or co-ownership. As these issues could be dealt with under this Convention by the exclusion of certain types of litigation from the scope of application of this Convention (Paragraph 2 of Article 1) or provisions on exclusive jurisdiction (Paragraphs 1 and 2 of Article 12), there would be no need for this Convention to have a special rule for jurisdiction such as Article 14 where multiple defendants are involved.

#### Article 16

This article should be deleted. Japan is one of those States whose domestic laws do not permit the type of jurisdictional basis as stipulated in this article. This type of jurisdiction would be detrimental to the interests of the third party involved and, from the viewpoint of procedural fairness, could not always be justified. Therefore, the situation addressed by this article should not be on the "white list" but be left to a "gray area".

#### Article 18

We are of the view that sub-paragraph 2(e) of this article needs to be retained in order for Japan to consider becoming a party to this Convention. Moreover, we consider that mere existence of a subsidiary or other affiliated entity of the defendant in the territory of a State should not constitute a jurisdictional basis for that State to exercise jurisdiction over a claim against the defendant unless there is substantial connection between that State and the claim. Accordingly, the following new sub-paragraph should be added to paragraph 2: "k) the location of a subsidiary or other related entity of the defendant in that State."

With respect to paragraph 3, such exceptions to the black list as contained in this paragraph should be permitted only to those cases where the plaintiff has its habitual residence in a Contracting State.

#### Article 21

We are fully aware that, as this article was adopted as a compromise solution after an intensive discussion in the Special Commission, further elaboration of this article would be difficult. However, for the purpose of effective application of the rules of this article, it would be worth undertaking for the Diplomatic Conference to explore common understandings on such matters as the level of expectation required for the application of paragraph 1 of this article, or the meaning of "a reasonable time" (ex. a few months, one year or a few years etc.) in paragraph 4 of this article.

With respect to paragraph 2, there might be instances where the court second seized should render a judgment according to the effect of *res judicata* of a judgment rendered by the court first seized instead of declining jurisdiction as stipulated in the present text. Such instances would occur when claims before the respective courts are not identical but related to each other.

There is an ambiguity as to what kinds of measures the court first seized should take when the court second seized has proceeded with the case under paragraph 3 and has rendered a judgment that complies with the requirements for recognition or enforcement under the Convention.

#### Article 22

Although we understand the necessity of retaining this article, it might be argued that this article could be abused in certain cases for the purpose of prolonging litigation by allowing one of the parties to a dispute to apply for the suspension of the proceedings that have been instituted in the court of the State which has a legitimate jurisdictional basis under this Convention.

#### Article 23

Sub-paragraph 1 (b) of Article 23 should be deleted so that provisional measures are excluded from the scope of the provisions on recognition and enforcement in this Convention. Given the diversity of such measures that might exist in various domestic laws of different states, it would be premature for this Convention to treat these measures as foreign judgments capable of being recognized and enforced among Contracting States. Also, there seem to be few benefits to be gained by such treatment, because, even if provisional measures as such are to be enforced in another state, their enforcement would normally require the commencement of the enforcement proceedings in that state, the procedural burden of which would not be so different from applying for provisional measures in that state from the outset. Moreover, there is always a possibility that provisional measures are overturned by the subsequent order, which creates another problem as to the treatment of such measures that have once been provisionally enforced.

#### Article 25

The treatment of a foreign judgment which has not become final in the State of origin would differ from one jurisdiction to another. We are against the approach in this article of obliging contracting states to recognize or enforce a foreign judgment which is still the subject of review in the State of origin, as we doubt that this approach is viable in an international situation to which this convention is expected to apply. As in the case of provisional measures, a foreign

judgment pending appeal can be overturned subsequently by the appeal court and, if that happens, difficult legal issues would arise concerning the legal effect of the foreign judgment that has already been recognized and enforced in that state.

Accordingly, we believe that only those foreign judgments that are no longer the subject of ordinary review in the State of origin should be the subject of obligatory enforcement and recognition provisions under this convention, without prohibiting those States that have no difficulty in recognizing or enforcing such judgments to do so. Postponement of recognition or enforcement in such circumstances, as the present text provides, would not be appropriate, because a literal interpretation of the word "postponement" suggests that it does not allow the State addressed to refuse the recognition or enforcement of such foreign judgments. In order to make this point clear, the following amendment to paragraph 4 is suggested: "Notwithstanding preceding paragraphs 2 and 3, recognition or enforcement may be refused if the judgment is the subject of review in the State of origin or the time limit for seeking a review has not expired"

#### Article 28

It is not clear from sub-paragraphs c), d) and f) of paragraph 1 whether or not the court of the State addressed is entitled to refuse the recognition or enforcement of a foreign judgment where the document which instituted the proceedings was served on the defendant in such a way that it gave the defendant a sufficient time to arrange for his defense but the service itself was in violation of either rules of international law or the law of the State where such service took place. It is our view that any service of documents that infringes the sovereignty of a State should not be given legal effects in the context of recognition or enforcement of judgments deriving from such service, regardless of whether or not the defendant was in fact given an opportunity to prepare for his defense. This article should be re-drafted so as to make it clear that, should such infringement of the sovereignty occur, the court of the State addressed may refuse the recognition or enforcement of the foreign judgment.

As regards other grounds for refusal of recognition or

enforcement, it might be worth considering whether or not a judgment rendered by a court of a Contracting State that should have suspended the proceedings in accordance with Article 21 should also be covered by this Article.

We understand that the word "notified" in sub-paragraph 1(d) should be construed as a factual concept. In other words, when the notification of the document to the defendant took place by way of notice by publication in such cases as where the defendant's whereabouts was unknown to the plaintiff, it should not be considered that the defendant was notified within the meaning of this sub-paragraph, even if such notification is authorized under the law of the state where it took place. We believe that the text of this sub-paragraph should more clearly address this point.

#### Article 31

We believe that this article should be drafted so as to make it clear that the "costs or expenses" in this article refers only to those of the proceedings for recognition or enforcement. Apart from that, it might be worth considering to add some provisions similar to those contained in articles 17 and 18 of the Civil Procedure Convention or articles 14 and 15 of the Access to Justice Convention to this article.

#### Article 33

Since sub-paragraph 2(a) makes an exception of the rule that there shall be no review of the merits of the judgment rendered by the court of origin, "the circumstances" in light of which damages awarded are considered "grossly excessive" must be more clearly defined. Also, as we understand that sub-paragraphs 2 (a) and (b) should apply not only to recognition but also to enforcement, the text should reflect more precisely the substance in this respect.

#### Article 36

The meaning of the words "a court has given its authority" needs further clarification. In particular, the required degree of involvement of the court in the settlement process must be made clear.

Articles 38 to 40

We fully understand the importance of ensuring the uniform application of this Convention among Contracting States. However, we are not in favor of the approach currently contained in these articles. In particular, it is difficult to go along with the idea of establishing a committee of experts to make recommendations on a request of the parties to a dispute under Article 40, because it would not only conflict with the basic structure of the Japanese civil procedure but also cause a serious problem of unconstitutionality with respect to the notion of judicial independence under the Constitution of Japan.

Therefore, the question of what kinds of mechanisms should be employed to achieve the uniformity of interpretation of this Convention needs more careful deliberation at the Diplomatic Conference, taking account of differences of legal systems among participating States and, if necessary, exploring the possibility of making this part of the Convention optional.

# **THE REPUBLIC OF KOREA**

## **Comments on** **the Preliminary Draft of the Convention on Jurisdiction and Foreign** **Judgments in Civil and Commercial Matters**<sup>1</sup>

### **1. INTRODUCTION**

We are pleased to comment on the Preliminary Draft of the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted by the Special Commission on 30 October 1999 (the “Draft”) from the viewpoint of Korean law.

Before commenting on the Draft, we would like to take this opportunity to express our profound gratitude to all the people who contributed to its preparation for their efforts in preparing an excellent preliminary draft after overcoming the difficulties resulting from the differences of approach and concept between common law and civil law jurisdictions. We would also like to express our deep respect to Professor Nygh and Professor Pocar for preparing such an excellent report on the Draft (the “Report”). We believe that key members of several countries who played an important role in preparing the Draft and leading the discussion at the informal meetings and at the meetings of the Special Commission deserve special thanks and recognition for their outstanding work on, and dedication to, this project.

Preparing a convention on international jurisdiction and foreign judgments in civil and commercial matters is a very important step toward worldwide judicial cooperation by ensuring the free circulation of judgments at a worldwide level. At present, Korea is not a party to any treaties or international agreements, concerning international jurisdiction or the recognition and enforcement of foreign judgements.<sup>2</sup> Therefore, most questions of international jurisdiction and the recognition and enforcement of foreign judgments are governed by Korean law. Given the absence of written law on international jurisdiction in Korea, Korean courts have tried to establish rules on international jurisdiction which can ensure the appropriate allocation of international jurisdiction among countries, based upon the venue provisions of the Korean Code of Civil Procedure with some consideration of the “special circumstances” of each case.

---

<sup>1</sup> The Ministry of Foreign Affairs and Trade, Republic of Korea, has written these Comments, following consultation with the relevant authorities, including the Supreme Court and the Ministry of Justice. The following people participated in the drafting of the Comments:

*Mr. Park, Dong-sil, Director, Treaties Division II, Ministry of Foreign Affairs and Trade*

*Mr. Liew, Young Hill, Judge, Korean Patent Court*

*Mr. Han, Chan Sik, Prosecutor, Ministry of Justice*

*Mr. Lee, Jae-wan, Deputy Director, Treaties Division II, Ministry of Foreign Affairs and Trade*

*Mr. Suk, Kwang Hyun, Professor, Hanyang University*

<sup>2</sup> With respect to the recognition and enforcement of foreign arbitral awards, Korea acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards(1958) in 1973.

Korean Courts have tended to be flexible in order to reach the appropriate conclusion in each case. The Draft as such is of great value to Korean courts as a reference in forming rules on international jurisdiction.

The recognition and enforcement of foreign judgments is expressly governed by the Korean Code of Civil Procedure. While Korean courts dealt with the issue in accordance with the principle of reciprocity, they have recently begun to take a more forward-looking attitude. A recent judgment of a lower court, which recognized the judgment of a Chinese court, could be viewed as clear evidence of this tendency. The Convention is one of the many important projects of the Hague Conference on Private International Law in which Korea is interested. In 2000 Korea also acceded to the Convention on the Service Abroad of Judicial or Extra Judicial Documents in Civil or Commercial Matters. Prompted by these recent changes, many Korean scholars and lawyers have begun to show a great deal of interest in the activities and achievements of the Hague Conference on Private International Law.

Against this background, we would like to make some comments on the Draft from the viewpoint of Korean law. However, we would like to make clear that our comments below are not conclusive in nature and do not necessarily bind Korea's future position with respect to the Draft.

## **2. GENERAL FRAMEWORK OF THE DRAFT**

We believe that the approach of the Draft is both timely and relevant, and is superior to that of the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (the "1971 Hague Convention") in that the Draft regulates matters relating to international jurisdiction as well as the recognition and enforcement of foreign judgments. In addition, although it has not yet been finally settled, the attempt to make the Draft a "mixed Convention" rather than a "double Convention" is considered to be a pragmatic one, in order for the convention to be accepted more widely.

The Draft attempts to set limits on the "grey zone" either by setting out the qualifier of "substantial connection" as a basic criterion with respect to jurisdictional issues for distinguishing between prohibited jurisdictions and permitted jurisdictions or by compiling an illustrative list of prohibited grounds of jurisdiction. Recognizing this could compensate for the expected diminution in normativity which such "mixed convention" approach could entail, Korea would like to suggest, for better clarity of the term "substantial connection", inserting the words "or the defendant" at the end of Article 18, paragraph 1.

A further point related to a mixed convention which requires careful consideration is whether there is consistency between the provisions that refer to "national law" as a ground for exercising permitted jurisdictions. For example, third party claims appear to be matters falling within the permitted jurisdiction of the courts of a Contracting State in accordance with Article 16 (1). However, Article 24 (Judgments excluded from

Chapter III) does not include such claims in the list of judgments excluded from recognition and enforcement under the Convention, with the unreasonable result that they could be matters falling within the required jurisdiction of a State.<sup>3</sup> Additionally, Article 12(5) is not clear as to whether the proceedings on the infringement of patents fall within a permitted jurisdiction or a prohibited jurisdiction because the relevant provision simply refers to “the national law.” In this regard, for the sake of clarity, Korea would like to add to the end of Article 12, paragraph 5 the words “in accordance with Article 17.”

Obviously, there are various provisions that are in conflict with current Korean statutes, legal precedents and scholarly opinions. However, we believe that if outstanding issues on the Draft are resolved in a satisfactory way, most of the provisions of the Draft would be acceptable to Korea.

We now turn to individual provisions of the Draft.

### **3. ARTICLE 4 (CHOICE OF COURT)**

Article 4 of the Draft does not include a requirement that the forum chosen should have any connection with the subject matter of the dispute or the parties in dispute. Recently, in a case in which a foreign forum had been chosen by the parties, the Supreme Court of the Republic of Korea rendered a decision to the effect that “a reasonable connection” should exist in order to validate such choice of forum.

There has been, thus far, only one case in Korea, which required “a reasonable connection” as a precondition for exercising its jurisdiction. However, the Supreme Court has never dealt with a case in which a domestic forum was chosen by foreign parties. Consequently, it is not clear as to whether the decision mentioned above represents general jurisprudence on this issue. We feel it is in line with the intentions of the Drafters to have a Convention of universal application to allow the parties in dispute the autonomy to choose the forum they wish. In this regard, the position of the Republic of Korea on the choice of forum is flexible.

### **4. ARTICLE 6 (CONTRACTS), ARTICLE 7 (CONTRACTS CONCLUDED BY CONSUMERS), ARTICLE 8 (INDIVIDUAL CONTRACTS OF EMPLOYMENT) AND E-COMMERCE**

We note that these provisions will need to be modified in order to appropriately regulate e-commerce-related jurisdictional issues as well as ordinary offline jurisdictional issues. In particular, we note that, in making the necessary modifications, the reasonable expectations of the e-businessperson should be fully considered and protected so long as he or she has made an express disclaimer and taken the necessary

---

<sup>3</sup> See a detailed account of it in paragraph 7 of this Comments.

measures in a reasonable way to ensure that transactions in violation of the disclaimer are not effected with him or her.

According to Business-to-Consumer e-Commerce Statistics published by the OECD in August 2000, although the Korean e-commerce industry is still in its infancy, total on-line sales amounted to USD 203 million for 1999, ranking 10th among OECD member states. With the rapid increase in e-commerce transactions, this total rose significantly in 2000, to about USD 950 million. As a result, Korea has begun to pay more attention to consumer protection and plans to take relevant legislative measures, including amending the current e-commerce-related statutes.

#### **5. ARTICLE 7 (CONTRACTS CONCLUDED BY CONSUMERS) AND ARTICLE 8 (INDIVIDUAL CONTRACTS OF EMPLOYMENT)**

We note that some member states are strongly opposed to the current draft provisions. Although these articles are in principle acceptable to Korea, we would be pleased to allow more flexibility to these articles in order to accommodate the concerns of those countries.

#### **6. ARTICLE 9 (BRANCHES [AND REGULAR COMMERCIAL ACTIVITY]) AND ACTIVITY BASED JURISDICTION IN GENERAL**

According to the phrase in the bracket of Article 9, a plaintiff may bring an action in the courts of a State where the defendant has carried on regular commercial activity, provided that the dispute relates directly to that regular commercial activity.

Since the informal meeting in Washington, however, members have been discussing the possibility of inserting in the white list the concept of “activity based jurisdiction” as an independent ground of jurisdiction.

Current Korean law does not recognize international jurisdiction over a foreign entity based upon its regular commercial activity or any other activity in Korea unless such commercial activity is carried on by a branch, agency or other establishment of such entity in Korea. However, this does not mean that Korea is strongly opposed to providing in the Convention for an activity based jurisdiction. It would be sensible to subject a defendant to jurisdiction if he or she does business without having a branch, agency or other establishment in Korea but the cause of action arises from or is related to the defendant’s activity in Korea. However, this position presupposes that the idea of “activity based jurisdiction” is clearly defined in the Draft so that it can be clearly distinguished from the concept of “doing business.” It further supposes that parties are able to predict with reasonable certainty whether they may be subject to the jurisdiction of the state where they have engaged in an activity in question. To this end, instead of the abstract concept of “reasonableness” in American jurisprudence, a more real and definite criterion is required for such jurisdiction to be invoked.

In this regard, if the convention is to contain a provision on an activity based jurisdiction, the Republic of Korea proposes that the grounds for exercising jurisdiction should be based on the substantial connection, not between the forum and the parties in dispute, but between the forum and the subject matter of the dispute. Otherwise, no one will be able to judge with certainty whether the nature, frequency or magnitude of his or her activity could constitute an activity subjecting him or her to the jurisdiction of a certain country. In particular, we are concerned that if not only “activity within the forum state” but also “out-of-state activity with foreseeable effects in the forum” could trigger the “activity based jurisdiction,” then the “activity based jurisdiction” could be too broad. If member states successfully come up with the “activity based jurisdiction” as a comprehensive independent ground of jurisdiction, the relationship between the “activity based jurisdiction,” contract jurisdiction (Article 5) and tort jurisdiction (Article 10), respectively, should also be clarified to avoid unnecessary confusion as to the scope of application of each provision.

In any case, we hope that the members will be able to reach a consensus on the specific language of the “activity based jurisdiction” through the informal meetings which are currently scheduled. We will also do our best to work with other members in order to come up with language which is acceptable to as many countries as possible.

## **7. ARTICLE 12 (EXCLUSIVE JURISDICTION) – INTELLECTUAL PROPERTY -**

We note that further discussion will be made in due course with respect to jurisdictional issues related to intellectual property.

The Republic of Korea is a country where the infringement of patents and other registered intellectual property (other than copyright) is subject to the jurisdiction of ordinary courts, whereas their validity is subject to the exclusive jurisdiction of the Intellectual Property Office under the Government and the Patent Court. In addition, the validity of a patent and any other registered intellectual property (other than copyright) is understood to fall within the scope of public law rather than private law. Accordingly, the allocation of international jurisdiction of intellectual property law matters is a very complex issue under Korean law. We are studying these issues and still need to closely monitor the further discussions on these issues.

At present we would merely like to note that whether the court which has jurisdiction on the infringement of a patent also has jurisdiction on the validity of the patent, being an incidental question, is also related to the recognition of foreign judgments set forth in Chapter III of the Draft. Before we take any position on these issues, we should consider what effect the court’s judgment on this incidental question will have in the State addressed.

## 8. ARTICLE 16 (THIRD PARTY CLAIMS)

Under Article 16(1), a court which has jurisdiction to determine a claim under the Convention shall also have jurisdiction to determine a claim by a defendant against a third party for indemnity in respect of the claim against that defendant, to the extent that such an action is permitted by national law, and provided that there is a substantial connection between that State and the dispute involving the third party. The Draft does not provide in the white list for direct international jurisdiction in an action on a warranty or guaranty against third party and leaves it to the national law of a Contracting State. Thus the Draft differs from the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "Brussels Convention"), which *does* provide for direct jurisdiction in an action on a warranty or guaranty against a third party (Article 6 (2)). Although allowing an action on a warranty or guaranty against a third party has the advantage of resolving related disputes at once, such an action is not permitted under current Korean law, and we understand this is the case in many other countries. In this regard two questions arise.

First, an action on a warranty or guarantee is based upon the national law of a Contracting State rather than upon the Convention. Therefore, it appears to be reasonable for the state addressed to have the right to verify the international jurisdiction according to its own national laws. In other words, jurisdiction for an action on a warranty or guarantee against a third party should be a "permitted basis of jurisdiction" rather than a "required basis of jurisdiction." However, Article 24 of the Draft provides that "This Chapter shall not apply to judgments based on a ground of jurisdiction provided for by national law in accordance with Article 17," and does not refer to Article 16 (Third party claims). This appears to suggest that the ground of jurisdiction under national law, which approves jurisdiction for an action on a warranty or guarantee against a third party based upon the jurisdiction for the original proceedings against the defendant, is elevated to the ground of jurisdiction under the Convention.<sup>4</sup> We believe that this cannot be justified, as it is against the basic principle of the Convention that direct and the indirect jurisdiction should be determined by the same rules.

The second issue is related to the first issue. Under Article 16(1), in order for a Contracting State to have jurisdiction over an action on a warranty or guarantee against a third party, the Contracting State should have jurisdiction for the original proceedings *under the provisions of the Convention* [emphasis added]. Accordingly, for example, if a French consumer filed suit in France against a Korean distributor of Japanese products for product liability incurred in France, the Korean distributor would be able to file suit in France against the Japanese manufacturer. However, if the distributor were French rather than Korean, Article 16(1) would not apply. In such a case, however, French

---

<sup>4</sup> In this regard, the question whether such an interpretation is correct has to be clarified first, since Article 25(1) which provides for the required bases of jurisdiction refers to the jurisdiction under "Articles 3 to 13" only and does not refer to Articles 14 to 16. However, since the grounds of jurisdiction of Articles 14 to 16 are the same as those under Articles 3 to 13, jurisdiction under Articles 14 to 16 could be viewed in an indirect way as a required basis of jurisdiction.

courts would also have jurisdiction based upon the French New Code of Civil Procedure. If the distributor, either Korean or French, were to seek enforcement of the French judgment in Japan, a Japanese court would be obligated, under the Draft, to approve the jurisdiction of the French court in case of a Korean distributor, whereas it would not be so obligated where a French distributor was involved. We wonder whether there are reasonable grounds for treating these two cases differently.

In sum, we believe that Article 16 should be deleted in its entirety, and that jurisdiction on third party claims should remain in a grey area for the time being.

## **9. ARTICLE 17 (JURISDICTION BASED ON NATIONAL LAW)**

Article 17 attempts to allow each Contracting State to assume and exercise jurisdiction based upon its national law unless Article 18 prohibits such ground of jurisdiction. This has the effect of making the Convention a “mixed convention” and therefore, as we mentioned above, it is a very practical approach to create a convention of worldwide application. However, article 17 refers only to the rules of jurisdiction under national law. As a result, it may be misinterpreted to allow each Contracting State to apply its rules of jurisdiction that are not rules of *grounds* of jurisdiction (e.g. rules of *forum non conveniens*) even where the ground of jurisdiction in a specific case is one under the Convention. Accordingly, although this is a rather technical point, for better clarity, we suggest inserting the words “grounds of” in this article so that it reads as follows:

“Subject to Articles 4, 5, 7, 8, 12 and 13, the Convention does not prevent the application by Contracting States of rules of *grounds of* [emphasis added] jurisdiction under national law, provided that this is not prohibited under Article 18.”

## **10. ARTICLE 18 (PROHIBITED GROUNDS OF JURISDICTION)**

Article 18(2) provides that jurisdiction shall not be exercised by the courts of a Contracting State on the basis solely of one or more of the grounds listed therein. The term “solely” could be a source of disputes in the future, as is the case under the 1971 Hague Convention which adopted a similar approach (Article 2 of the Supplementary Protocol). For example, a court of a Contracting State may assume jurisdiction based upon a combination of one or more of the grounds listed therein and a ground that is not listed therein. More specifically, under Paragraph 2 (e), the courts of a Contracting State are not allowed to exercise jurisdiction solely on the basis of the carrying on of commercial or other activities by the defendant in that State, except where the dispute is directly related to those activities. This provision is appropriate in the sense that it appears to set forth doing business as a prohibited ground of jurisdiction.

In this regard, we would like to draw your attention to letter of credit transactions that are quite popular in international trade. Suppose, for example, a Korean exporter exports goods to an importer in Country A under a letter of credit issued by a bank in

Country A (“Bank A”). The Korean exporter then submits the necessary documents to Bank A in accordance with the letter of credit. However, Bank A refuses, without any justifiable grounds, to make payment. The Korean exporter files suit in Korea against Bank A requesting payment under the letter of credit. Suppose Bank A has a branch in Korea, which was not involved in the letter of credit transaction at all. In such a case, Korean courts have repeatedly held that they had jurisdiction over the dispute. Technically, the basis of such decision would have been a provision of the Korean Code of Civil Procedure. However, in substance, the ground of jurisdiction would have been that Bank A was doing business in Korea through its Korean branch.

We believe that, under the Draft, Korean courts will no longer be allowed to assume international jurisdiction in the above case. This is also the position taken by the Report<sup>5</sup>. However, Korean lawyers might argue that the Korean court's jurisdiction is based upon the presence of the Korean branch of Bank A as well as its carrying on of commercial activities in Korea. If the Draft's current position of treating doing business as one of the prohibited grounds of jurisdiction is finally adopted, we suggest inserting the italicized phrase as shown below:

“e) the carrying on of commercial or other activities by the defendant in that State *whether or not through a branch, agency or any other establishment of the defendant* (emphasis added), except where the dispute is directly related to those activities;”

At present we cannot offer a good suggestion for replacing the word “solely” with a better expression or for otherwise improving this provision. We would like to note that there is a possibility that a substantial portion of this provision will turn out to be of no practical value even though most of the delegations believe that the Draft has succeeded in putting various grounds of jurisdiction on the black list.

With respect to Article 18(3), we feel the basic idea of excluding actions seeking civil remedies for human rights violations from the grounds of prohibited jurisdictions under paragraph 2 is appropriate and reasonable, to the extent that it aims to maintain the *status quo* in respect of the exercise of the Contracting State's jurisdiction over such cases in accordance with its domestic laws. Considering that the concept of human rights has not yet been agreed upon at the global level, the Republic of Korea, though supporting Variant one for the time being, believes that the matter requires further consideration in order to more clearly elaborate and categorize the cases which will be exempted from the prohibited jurisdictions under the Convention.

## 11. ARTICLE 20

Paragraph 2 in brackets seeks to authorize an exception to paragraph 1 which provides that the forum state shall consider the lawfulness and timeliness of notification to the defendant of the document instituting the proceedings, and shall, if such conditions are not met, stay the proceedings.

---

<sup>5</sup> p. 57.

The Republic of Korea has recently acceded to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the Hague Service Convention) with the reservation that a Korean court may give judgment even if no certificate of service or delivery has been received. In this context, the Republic of Korea supports the deletion of the brackets placed around in paragraph 2. Alternatively, Korea proposes that Article 37 (disconnection clause) include a provision recognizing that bilateral or multilateral treaty on service abroad of documents in force for the Contracting States, including the Hague Service Convention, shall prevail over the relevant provisions of the Convention.

## **12. ARTICLE 22 (EXCEPTIONAL CIRCUMSTANCES FOR DECLINING JURISDICTION)**

Considering the sharp contrast of the positions in common law countries and civil law countries on the tricky issue of the doctrine of *forum non conveniens*, we are quite pleased to see in Article 22 of the Draft that the Special Commission has succeeded in overcoming difficulties and coming up with a compromise solution.

Article 22 provides that the court seized may suspend its proceedings in exceptional circumstances where “double standards” exist. This occurs when it is clearly inappropriate for that court to exercise jurisdiction, and a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute.

In this regard we note that, under Article 22, the court may decide to suspend the proceedings and, at the same time, set a time period within which, and specify the State where, the plaintiff shall bring the proceedings. However, it appears that the court would not be able to dismiss the case, either outright or on certain conditions, as the courts of some countries presently do.

Unlike Article 22, under Korean law the court seized may only dismiss the case by stating that it has no jurisdiction under the “doctrine of special circumstances.”<sup>6</sup> Logically, therefore, Korea cannot deny that it has currently reservations about this Article. However, this does not necessarily mean that Korea is entirely opposed to the current Article 22. Korea would like to carefully follow the discussions at the informal meetings and the Diplomatic Conference, before commenting further.

## **13. ARTICLE 23 (DEFINITION OF “JUDGMENT”) AND ARTICLE 25 (JUDGMENTS TO BE RECOGNIZED OR ENFORCED)**

Under this article, decisions ordering provisional or protective measures in accordance with Article 13(1) fall under the concept of a “judgment” which may be

---

<sup>6</sup> This happens when Korean courts have jurisdiction under the venue provisions of the Korean Code of Civil Procedure, but it is not appropriate for the Korean courts to exercise jurisdiction considering the totality of the circumstances of the case.

recognized or enforced under the Draft. The majority view under Korean law is that a foreign country's decision ordering provisional or protective measures is not entitled to recognition or enforcement in Korea.

Under Article 25(2), in order to be recognized, a judgment must have the effect of *res judicata* in the State of origin. That is, the existence of the *res judicata* effect is a precondition to the recognition of foreign judgments. However, under Article 25(4), a foreign judgment which is, or may be, subject to ordinary appeal in the State of origin could be recognized under the Draft. In this respect, the Draft is different both from Korean law and from the 1971 Hague Convention mentioned above. A few questions may be raised in this regard.

First, we wonder whether there is a uniform concept of *res judicata* throughout the world. We are not sure whether *l'autorité chose jugé* in France, *die materielle Rechtskraft* in Germany, and *kipanryuk* in Korea have the same meaning.<sup>7</sup> Do “claim preclusion” and “issue preclusion,” in the sense they are used under the laws of the United States, fall within the concept of *res judicata*?

Second, does this article mean that the scope of the effect of *res judicata* of a foreign judgment is a matter to be left to the national law of each Contracting State, or that it is a matter to be governed by the laws of the State of origin? One may argue that a judgment of a Contracting State may be recognized in another Contracting State so long as it has the effect of *res judicata* in the State of origin, while the scope of the effect of *res judicata* is a matter to be governed by the national law of the State of origin or the State addressed.

In this regard, the Report states, in the words of Professor Fragistas referring to the 1971 Hague Convention, that “a decision cannot acquire a greater effect abroad than it has in its country of origin.”<sup>8</sup> This appears to follow the theory of “effect extension.” However, it does not clarify whether the effect of the judgment of the State of origin extends to the State addressed without any limitation; or whether the effect of the judgment in the State of origin is reduced to that in the State addressed if the former is broader than the latter in its substantive scope. For example, we wonder whether the “issue preclusion” and “collateral estoppel” of a judgment of a court of the United States should be given effect in Korea under the Convention.

Therefore it would be advisable that the Draft expressly address this issue. If not, the Draft, or at least the Report, should make it clear that it is a matter to be left to the national law of the State addressed.

#### **14. ARTICLE 28 (GROUNDS FOR REFUSAL OF RECOGNITION OR ENFORCEMENT)**

Unlike the Brussels Convention and the Lugano Convention, Article 28(1)(d) does

---

<sup>7</sup> Under Korean law, a judgment which is subject to ordinary appeal cannot have the effect of *res judicata*.

<sup>8</sup> pp. 96-98.

not require due notice of the proceedings to be given to the defendant. However, there is a Korean Supreme Court precedent refusing recognition of a foreign judgment on the ground that the service of process to the Korean defendant was effected in violation of the International Civil Judicial Assistance Law of Korea. Accordingly, a Korean defendant who receives service of process from a foreign court in a manner not consistent with Korean law may elect not to appear in court because the resulting judgment would not be recognized in Korea, provided that the Korean defendant does not have assets in the foreign state. Under the Draft, however, the State addressed cannot refuse to recognize a foreign judgment, even if the service of process was effected in an undue manner, so long as the document instituting the proceedings was actually notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defense.

Although the Republic of Korea understands the rationale behind Article 28(1)(d) of the Draft that the service of process requirement should protect the rights of the defendant to present his case rather than the sovereignty of the state addressed, it remains to be seen whether such approach is the correct one. Under the Draft, a judgment of a Contracting State would be recognized in another Contracting State, even if the judgment were based upon grossly undue service of process (for example, under the Hague Service Convention).<sup>9</sup> In this regard, Korea proposes that the following *proviso* should be added:

“This paragraph shall not apply where the notification was given in such a manner as to constitute a contravention of the public policy of the State addressed, as provided in paragraph (1)(f) of Article 28.”

## **15. ARTICLE 33 (DAMAGES)**

In relation to Paragraph 2, we would like to note a court precedent involving the recognition and enforcement of a judgment rendered by the court of the State of Minnesota against a Korean defendant, ordering payment of US\$500,000 as reasonable compensation for damages (including mental anguish, physical injury, consequent medical expenses, loss of earnings, etc.) arising out of the assault and rape of the plaintiff. The Korean court of first instance held that the amount of award was much higher than would be acceptable under Korean law for such damages, and thus reduced the amount of compensation that could be enforced to US\$250,000, i.e., 50% of the original amount awarded by the Minnesota court. In making the judgment, the court primarily took into account the probability that ordering the payment of US\$500,000 might lead to the bankruptcy of the defendant who was living in Korea. Nevertheless, the court did not neglect to take note of the fact that the plaintiff should continue to live in the State of Minnesota and receive medical treatment there. The rationale behind the court’s judgment was that recognition and enforcement of the portion in excess of US\$250,000 would be against the substantive public policy of Korea. The Supreme

---

<sup>9</sup> A case similar to *Volkswagenwerk Aktiengesellschaft v. Schlunk* of 1988 of the Supreme Court of the United States could be an example, assuming that the service of process in that case was against the Hague Service Convention.

Court of Korea upheld this judgment in 1997.

Having said that, several questions arise in relation to Paragraph 2. What are the guidelines which the State addressed should apply in determining the amount to be recognized? It is not clear whether guidelines other than those mentioned in this article are left to the national law of each Contracting State or whether the determination of the amount to be recognized is left to the discretion of the State addressed. In this regard, the Report states that as a general principle, “grossly excessive” is likely to mean, “grossly excessive according to the standards usually applied by the courts of the State of origin.”<sup>10</sup> The Report goes on to state “evidence that the sum awarded greatly exceeds what is the norm in similar cases in the State addressed should not by itself suffice.”<sup>11</sup>

However, we believe that the norms of the State addressed as well as of the State of origin should be taken into consideration in determining the amount to be recognized. This means that the criteria to determine whether the amount awarded in the State of origin is grossly excessive should be not only those of the State of origin but also those of the State addressed. It follows from this that the ultimate determination of the amount to be recognized and enforced should be within the discretion of the State addressed, subject to the minimum requirement that the amount to be recognized and enforced should not be less than that which would have been awarded in the State addressed in the same circumstances.

If this interpretation of Article 33 of the Draft is correct, we submit that the Report could be slightly misleading. Accordingly, we believe that further discussion will be necessary to clarify this point.

## **16. ARTICLE 37 (RELATIONSHIP WITH OTHER CONVENTIONS)**

Considering that the Draft intends to create a global convention acceptable to all states around the world, the Republic of Korea supports proposal 1 in that it endeavours to accommodate not only the Brussels Convention and the Lugano Convention, but also other international instruments concerned with this subject. Therefore, if it is necessary to specify the relationship of these Conventions with the Draft Convention, it would be desirable for a relevant provision to be included at the end of paragraph 3 of proposal 1. In addition, further research needs to be conducted with respect to other regional conventions or bilateral instruments which deal with international jurisdiction and whose relationships with the Draft Convention should also be expected to be specified in the Draft.

---

<sup>10</sup> p. 114.

<sup>11</sup> P. 114.

## **17. CONCLUSION**

Thus far, we have made several comments on the Draft from the viewpoint of Korean law. Although the Draft is in conflict with current Korean statutes, court precedents and legal commentators' opinions in a number of areas, we do not believe that such conflicts necessarily render the Draft unacceptable to Korea. We will closely monitor the further discussion on the Draft and we would be happy to see the Draft improved in many respects, including the provisions addressing issues of intellectual property, electronic commerce and human rights. Of course, we will do our best to ensure that Special Commission on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters of the Hague Conference on Private International Law will be able to succeed in preparing a final version of the Draft acceptable to as many countries as possible.