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RAPPORT DE SYNTHÈSE DES TRAVAUX DE LA COMMISSION SPÉCIALE DE JUIN 1997 SUR LA COMPÉTENCE JURIDICTIONNELLE INTERNATIONALE ET LES EFFETS DES JUGEMENTS ÉTRANGERS EN MATIÈRE CIVILE ET COMMERCIALE

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SYNTHESIS OF THE WORK OF THE SPECIAL COMMISSION OF JUNE 1997 ON INTERNATIONAL JURISDICTION AND THE EFFECTS OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

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Preliminary Document No 8 of November 1997 for the attention of the Special Commission of March 1998 on the question of jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters

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INTRODUCTION

1 In accordance with the terms of reference assigned to him by the Eighteenth Session, the Secretary General of the Hague Conference on Private International Law convened a Special Commission which met from 17 to 27 June 1997 at The Hague in the Netherlands.

2 Thirty-five Member States and nine non-Member States were represented. Among the latter, it should be noted that the Republic of Korea became a Member on 21 August 1997, that is, a few weeks after the end of the Special Commission. In addition, five intergovernmental organisations and six international non-governmental organisations participated in the work. A complete list of the delegations is provided at the beginning of this Report.

3 The Special Commission which met in June 1997 is the first of a series of four Special Commission meetings whose purpose is to prepare a preliminary draft Convention on international jurisdiction and the effects of foreign judgments for submission to the Nineteenth Diplomatic Session of the Conference to be convened in the year 2000. The June 1997 meeting opened with Professor A.V.M. Struycken, President of the Netherlands Standing Government Committee for the Codification of Private International Law, in the chair. After welcoming the experts, and in particular those participating in the work of the Conference for the first time, the Chairman proposed that Mr T.B. Smith, QC, Representative of Canada, be elected Chairman of the Special Commission. That proposal was unanimously adopted. The proceedings then continued with Mr T.B. Smith in the chair, who proposed the election of the Bureau of the Special Commission. As Vice-Chairmen, he proposed Mr A. Bucher (Switzerland), Mr P. Pfund (United States of America), Mr M. Dogauchi (Japan) and Mr J.-L. Siqueiros (Mexico). That proposal was unanimously adopted. Were then proposed as Co-Reporters: Mr P. Nygh (Australia), Mr F. Pocar (Italy) and, as Chairman of the Drafting Committee, Mr G. Möller (Finland). That proposal was unanimously adopted.

4 The work commenced with the Chairman inviting the delegations to express their views on what the objectives of the future Convention should be and, in particular, on the citizens' needs that the future Convention should meet. The objectives thus identified would serve as pointers for the work of the Commission until the adoption of the draft Convention. This survey of the delegations' views showed that they were in agreement with the following objectives:

a The future Convention must be adapted to the technical, economic, sociological and legal developments of the twenty-first century.

b The Convention must be drafted pragmatically and contain simple, effective provisions, understandable to subjects of law and as easy as possible to apply for lawyers and judges.

c The Convention must bring about an increase in the foreseeability and certainty of the solutions found to the questions raised by international litigation and thus prevent the duplication of procedures.

d As to the structure of the future Convention, although some delegations stressed that the proceedings would probably result in a mixed convention, most of the delegations which expressed a position preferred to negotiate a double convention, which should be the premise underlying the reasoning and the negotiations conducted by the Special Commission.[1]

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[1] A simple convention deals only with the recognition and enforcement of foreign judgments and is therefore not concerned with matters of direct jurisdiction. In other words, it does not respond to the question as to when courts have jurisdiction in proceedings instituted for the first time. If a simple convention contains rules on jurisdiction, they are only rules on indirect jurisdiction. These are rules which, only *a posteriori*, at the stage of the recognition and enforcement of the judgment, serve to verify the jurisdiction of the court of origin in order to ascertain whether its decision may or may not be recognised or enforced in the State addressed.
A double convention deals with both the question of direct jurisdiction and the recognition and enforcement of foreign judgments. It thus responds to the question as to which court has jurisdiction to entertain proceedings

e The Convention must be global, that is, it must take into consideration all legal and judicial systems and lead to a consensus acceptable for all those systems.

f Lastly, the Convention must respect the balance between plaintiff and defendant.

5 Pursuant to the consensus reached regarding the agenda of the Special Commission, the discussions[2] focused essentially on the rules of direct jurisdiction,[3] apart from one session

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and to that as to the effect of the judgment thus delivered. Within the large category of double conventions there are essentially two types of conventions:

(1) the double convention *stricto sensu*, which includes an exhaustive list of grounds of jurisdiction, whether authorised or unauthorised, leaving no room for manoeuvre whatsoever to national law or to grounds of jurisdiction not regulated by the convention in its scope;

(2) what might be termed the "mixed" convention, which specifies the authorised grounds of jurisdiction, the prohibited ones and in which all the other grounds, *i.e.* those falling neither within the category of authorised grounds nor within that of the prohibited grounds, are left as a matter for national law to decide freely.

There are two essential differences between the double convention *stricto sensu* and the mixed convention: (1) With a double convention *stricto sensu*, States no longer have any room for manoeuvre. When the Convention enters into force in a particular State, that State must make the authorised grounds of jurisdiction, and only these, available to litigants. With a mixed convention on the other hand, States must always make the authorised grounds of jurisdiction available to the litigants, but they may retain other grounds of jurisdiction. (2) At the stage of recognition and enforcement of the judgments, the mixed convention contemplates three categories of judgment, depending on whether the jurisdiction used by the court of origin is authorised, prohibited or not covered by the convention. If the judgment has been rendered on the basis of an authorised grounds of jurisdiction, the resulting judgment will be given effect in the other Contracting States more or less automatically and providing it meets the verification criteria provided for in the Convention. If the judgment has been rendered by a court which, notwithstanding the text of the Convention, has accepted its jurisdiction although it is prohibited, the resulting judgment cannot be given effect under the Convention. Other Contracting States will be prohibited from recognising or enforcing that judgment. Lastly, as regards all judgments rendered on the basis of grounds of jurisdiction not covered by the Convention or otherwise left for national law to decide, the resulting judgment will not receive any favourable treatment and the other Contracting States will remain at liberty to grant or not to grant effect to that judgment, the Convention neither prohibiting them from doing so nor compelling them to do so.

In reality, some delegations feel it is clearer to say that the mixed convention is more akin to a simple than to a double convention. Moreover, it is also conceivable that, within the framework of a mixed convention, providing the exorbitant fora have been eliminated, the effects of judgments rendered under a jurisdiction not covered by the convention might form the subject of provisions in the Convention rather than leaving the matter for national law to decide.

[2] The basis of all the discussions was Preliminary Document No 7, of April 1997, prepared by Catherine Kessedjian for the attention of the Special Commission and entitled "International Jurisdiction and Foreign Judgments in Civil and Commercial Matters".

[3] Not all the rules of jurisdiction were discussed. The rules concerning counter-claims, third-party proceedings or claims formulated against a plurality of defendants were postponed to a subsequent meeting. Furthermore, although on many occasions experts referred to the possibility for a court to decline jurisdiction, this matter was deliberately postponed for subsequent discussion since whether it is admitted or rejected will depend primarily on the jurisdictional rules admitted.

partly devoted to discussing methods which might be used for the autonomous and uniform interpretation of the future Convention.[4]

In view of the fact that every rule of direct jurisdiction discussed was dealt with twice during the meeting, first in general terms and then on the basis of the working documents produced by the delegations, this Report will not follow the strict order of the discussions as they took place but will set out the results obtained dealing first with the general rules, then focusing on more specific ones.[5]

GENERAL JURISDICTION AND SPECIAL OR SPECIFIC JURISDICTION

6 The term "general jurisdiction" may be understood in two ways. According to one meaning, general jurisdiction denotes the jurisdiction of all the courts in a country designated by the rule of conflict of jurisdictions. It contrasts with what is usually termed "special jurisdiction" that determines which particular court has jurisdiction in the judicial system of a particular country.[6] The Special Commission decided it would be preferable to postpone the discussion of this concept of general jurisdiction to a forthcoming meeting. However, one delegation systematically submitted working documents formulated in terms of special rather than general jurisdiction, using the singular for the word "court" and formulating the geographical criterion in terms of "place" rather than "country". In addition, the delegations of Canada, Spain, Switzerland and the United States of America submitted a working document entitled: Preliminary Considerations on Clauses for States Without a Unified System of Law (so-called "federal" State Clauses), which reveals that:

a Formulating jurisdictional rules in terms of general rather than special jurisdiction raises particular difficulties for States without a unified legal system.

b One solution proposed would be to draft the jurisdictional rules in the Convention so as to regulate both general and special jurisdiction at the same time, that is, opting for a wording such as the one referred to above.[7]

c If such a solution were not adopted, it would be possible to use the method favoured by the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* in its Article 47, whose approach, however, was considered complex and perhaps not suitable for the future Convention.[8]

7 According to a second meaning, the concept of general jurisdiction is linked to the substantive scope of the powers conferred on the court designated by the jurisdictional rule. This rule is based on the fact that the criterion chosen for the rule of general jurisdiction establishes a sufficiently strong link between the court and the defendant to grant that court the widest jurisdiction, covering all litigation concerning that defendant. In this respect, general jurisdiction forms a contrast with the specific grounds of jurisdiction which only grant the court jurisdiction for one category of proceedings in particular, clearly defined by the rule. The work of the Special Commission focused on this second meaning of the concept of "general jurisdiction".

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4 There was thus no discussion of certain matters presented in Preliminary Document No 7, referred to in footnote 2 above, in particular those associated with the geographical scope of the future Convention. Hence, the discussions did not cover the issue of whether the Convention must concern solely defendants situated within the territory of the States Parties.

5 The Special Commission once again followed the tradition of the Hague Conference, according to which none of the positions expressed by the delegations is binding on their author during the first *travaux préparatoires*.

6 This concept is expanded upon in Nos 76 to 78 of the Report, Prel. Doc. No 7 cited *supra* note 2.

7 *Cf. supra* No 6, first paragraph.

8 This document also contains some suggestions on the recognition and enforcement of decisions in countries without a unified system, a matter not discussed by the Special Commission.

8 This general jurisdiction must always be available. There were no objections to this proposal. However, the question was not fully discussed as to whether this jurisdiction is still available when the litigation relates to proceedings for which the Convention provides for exclusive jurisdiction[9] or even in cases of choice of forum.[10] As regards the criterion of jurisdiction which might be adopted in the future Convention, the discussions fairly soon revealed a consensus for natural persons. On the other hand, for the time being, no such consensus has been achieved regarding legal persons.[11]

9 As regards ***natural persons***, most delegations expressed a clear preference for adopting the defendant's habitual residence rather than his domicile. Many delegations actually preferred factual concepts to be used in the Convention, which is the case of the concept of "habitual residence" as compared with that of "domicile". However, the fact remains that this concept, even though it is more factual than that of domicile, remains delicate to apply and does not prevent divergent interpretations depending on the court which is to adjudicate this matter. This is why it was suggested that the Convention should include a definition of habitual residence. However, a majority eventually emerged in favour of the tradition of the Hague Conference and not providing a definition of the concept of habitual residence in the Convention currently being negotiated. However, it would probably be helpful for the Explanatory Report to provide a list of factors making it possible to verify the existence of a habitual residence and perhaps even a list of factors which, on the contrary, do not make it possible to satisfy the conditions necessary for such existence. In this respect, reference was made, as a very useful guide for the concept of habitual residence, to the article published by Mr Eric Clive, entitled "The Concept of Habitual Residence".[12]

10 As regards ***companies and legal persons***,[13] it was first pointed out that the concept of habitual residence is probably not appropriate and that the concept of domicile ought perhaps to be adopted. However, some delegations stressed that it is not necessary to characterise the criterion or criteria which would be provided for in the Convention. If that approach were pursued, the use, for legal persons, of either concept, *i.e.* habitual residence or domicile, could be dispensed with. Before examining which connecting factors might be selected, it needs to be ascertained whether the rule comprises a number of possible options available to the plaintiff, without any order of priority, or, on the contrary, whether the list of options should be drawn up in hierarchical order. No expert suggested that the rule should entail only a single criterion.
Even if a number of delegations favoured a rule including several options without any order of priority. It is hard to say whether a true consensus emerged in this respect, since the question has never been raised in very precise terms. However, it should be noted that the 1971 Hague Convention provides, in its Article 10, No 1, three criteria of equal value: the seat, the place of incorporation and the principal place of business. The principal place of business is the sole criterion adopted by the *Inter-American Convention on jurisdiction in the international sphere for the extraterritorial validity of foreign judgments*,[14] the Convention between France and Canada[15] and the Convention between Germany and the United Kingdom.[16] It should be noted that these three Conventions include rules of indirect jurisdiction and not of direct jurisdiction such as those to be included in the future Convention. As regards the draft Convention between the United Kingdom and the United States,[17] a list of several criteria of equal value was also opted for. These are the principal place of business, the place of incorporation or, in the absence of incorporation, the headquarters.

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9 On exclusive jurisdiction, see *infra* Nos 35 *et seq*.

10 On choice of forum see *infra* Nos 13 *et seq*.

11 The Commission did not decide what definition should be assigned to the expression "legal person", particularly since it could apply both to registered and unregistered legal persons.

12 Dr E.M. Clive, "The Concept of Habitual Residence", *The Juridical Review*, 1997, pp. 137 to 147.

13 Hereinafter and to avoid overburdening the text, we will simply use the term "legal person" to denote both companies and legal persons.

14 Article 1 A.

15 Article 5 (a).

16 Article IV (1) (a) (*iv*).

17 Article 10 (b).

11 All the discussions on these various criteria have shown that the list of those which may be admitted in the future Convention rule would be limited to four, namely, headquarters, principal place of business, place of incorporation, or place of central management and control.

a ***Headquarters*** – The concept of headquarters does not exist in all legal systems. In this respect, it should be noted that in its legislation to implement the Brussels and Lugano Conventions, the United Kingdom defined it as being the place where the company has its centre of management and control or the place where it was created or registered. One delegation proposed that, if the concept of headquarters were adopted as a ground of jurisdiction, clarification is needed as to the meaning of "headquarters" *i.e.* those designated in the by-laws or articles of association and their additional clauses, or the place where the company is in fact managed.

b ***Principal place of business*** – The concept of principal place of business refers to the place where the company conducts the bulk of its activities. Usually, the company's headquarters and principal place of business will be one and the same. However, they may not coincide. In such a case, a number of delegations suggested it is not necessary to limit the plaintiff's choice, for he could always bring an action either in the court of the company's headquarters or its principal place of business.

c ***Place of incorporation*** – The concept of incorporation (for which the translation in French is "*enregistrement*") is the essential criterion used in private international law for legal persons or corporate entities in *common law* systems and in certain so-called "civil law" countries, such as the Netherlands and Denmark. The reluctance some delegations expressed regarding this criterion betrayed a concern that the defendant might choose to register in a legislative haven, notably a tax haven, thus preventing any genuine access to justice (in the classical sense of the term) for the plaintiff. This is why some delegations consider that, of itself, this criterion is certainly not acceptable but does become acceptable in a list of options open to the plaintiff.[18] The delegations which proposed the adoption of the criterion of the place of incorporation also suggested that it might be adopted on condition that an additional criterion, such as that of a registered office or of an official address, be located in the same place.

d ***Place of central management and control*** – It must first be clarified that the concept of control used here has nothing in common with the control over the company's capital but refers to the management and decision-making centre in the organisational chart and the activity of the legal person or corporate entity. In many respects, this criterion is akin to that of the principal place of business, but diverges from it in that it would be the place where management decisions are taken (meetings of the executive board or supervisory board) rather than the company's commercial activities, which lie at the heart of the criterion of the principal place of business. In practice, therefore, these two criteria do not overlap completely. This is why it would still be useful to include both of them in the list of options. However, it should be noted that the criterion of the place of central management is becoming ever harder to apply in view of modern techniques of remote company management. Indeed, many companies no longer choose to physically convene meetings of their executive or supervisory boards as decisions are taken "on-line", or by video conference, each member of the board remaining in the country of his or her habitual residence. In such cases, might it be said that the place of central management or control of the legal person is fragmented over several countries and that it must therefore expect to be served writs in each of these countries, more precisely at the place of habitual residence of the administrative board member present there? This question was not discussed by the Special Commission in any detail. Moreover, the reply might differ depending on whether the law of the countries concerned still requires the minutes of the executive or supervisory board in question to include reference to the physical place where the meeting is held (which in our case would be a legal fiction) or, on the contrary, agree that the minutes should no longer mention this physical place.

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[18] Steps would then have to be taken to ensure that such a forum is not available in the event of preventive action instituted by the company. It should be noted that some experts underlined the importance of providing for one or more grounds of jurisdiction relating to preventive actions, although the matter was not discussed in detail. *Cf. infra* note 51.

12 In any event, many delegations felt that if the company chose such a complex structure, setting up its place of incorporation, its actual headquarters or its place of central management in several countries, it should expect to be sued in the courts of each of those countries, depending on the plaintiff's interest, essentially in relation to the future enforcement of the judgment rendered.

CHOICE OF COURT / PARTY AUTONOMY

13 From the very outset of the meeting of the Special Commission and constantly throughout, the question of party autonomy and choice of court with jurisdiction by the litigants was discussed by the experts. A number of them underlined the fact that, subject to the decision to be taken on the substantive scope of the Convention, it might cover litigation for money judgments in civil and commercial matters, thus making it possible to give a wide application to party autonomy. Hence, while many delegations said they were ready to adopt a more liberal attitude than that admitted in the Brussels and Lugano Conventions, others voiced doubts about the possibility, in a worldwide convention, of going further than regional conventions. It should be noted at this juncture that the most recent case law of the European Court of Justice, interpreting Article 17 of the Brussels Convention, seeks to broaden the range of cases in which the validity of the choice of court clause is upheld.[19]

14 The Convention must essentially address the validity of the choice of court clause, that is cases where States are prepared to accept that private parties elect or derogate from the jurisdiction of their courts. In fact, this validity issue covers three separate problems, namely:

a formal validity of the clause,

b material validity, and

c lawfulness.

Each of these matters reflects a different objective:

a The essential aim of formal validity is to ensure proof of consent to the clause by the party against which it is invoked. This condition serves an evidentiary purpose.

b Material validity makes it possible only to validate the clause in cases where it has been freely and knowingly consented to by the party against which it is being invoked. Such verification thus performs a preventive function.

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19 ECJ 20 February 1997, Case C-106/95, *Mainschiffahrts-Genossenschaft Eg* (MSG) v. *Les Gravières Rhénanes SARL*. For the first time, the Court recognises the possibility of turning to the usage of international trade as a basis for validating the choice of court clause. The Court ruled that:
"*The third hypothesis in the second sentence of the first paragraph of Article 17 of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ... must be interpreted as meaning that, under a contract concluded orally in international trade or commerce, an agreement conferring jurisdiction will be deemed to have been validly concluded under that provision by virtue of the fact that one party to the contract did not react to a commercial letter of confirmation sent to it by the other party to the contract or repeatedly paid invoices without objection where those documents contained a pre-printed reference to the courts having jurisdiction, provided that such conduct is consistent with a practice in force in the field of international trade or commerce in which the parties in question operate and the latter are aware or ought to have been aware of the practice in question. It is for the national court to determine whether such a practice exists and whether the parties to the contract were aware of it. A practice exists in a branch of international trade or commerce in particular where a particular course of conduct is generally followed by contracting parties operating in that branch when they conclude contracts of a particular type. The fact that the contracting parties were aware of that practice is made out in particular where they had previously had trade or commercial relations between themselves or with other parties operating in the branch of trade or commerce in question or where, in that branch, a particular course of conduct is generally and regularly followed when concluding a certain type of contract, with the result that it may be regarded as being a consolidated practice.*"

c Lawfulness makes it possible only to validate a choice of court clause for litigation which does not involve exclusive or protective grounds of jurisdiction (for instance against workers or consumers). This condition therefore also performs a preventive function.

15 ***Formal validity*** – Although the experts agreed that the "in writing" requirement simplifies proof of consent, this requirement must be adapted to current techniques of exchanging consent in the light of the major developments already seen and still occurring in transnational telecommunications. In this respect, due account will need to be taken of the principles laid down by the UNCITRAL Model Law on Electronic Commerce and the Guide to Enactment.[20] In its Article 6.1, the Model Law states: "*Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference*". In addition, Article 7 deals with the signature requirement and provides:

"*(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:*

(a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and

(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement".

Article 8, concerning the concept of "original", provides:

"*(1) Where the law requires information to be presented or retained in its original form, that requirement is met by a data message if:*

(a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and

(b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented".[21]

This is why some experts suggested that the court seised should accept any means of proof capable of convincing it that consent has been exchanged between the parties. These experts would thus be ready to accept a very liberal provision on this matter.

16 ***Material validity***[22] – The Special Commission did not really discuss the question of material validity. One delegation proposed that this issue should not be dealt with by the Convention, whereas another proposed a clause, which still requires refinement, and under which the court would have to verify whether the effect of the choice of court clause is not to "abusively" deprive one party from access to the courts with jurisdiction by virtue of the other provisions in the Convention as a result, in particular, of "excessive pressures" experienced by that party when concluding the choice of court clause. This proposal was not really discussed, though it was recognised that the proof would be difficult to provide. Obviously, it should be compared with Article 4, third indent, of the *Hague Convention of 25 November 1965 on the Choice of Court*, which states: "*The agreement on the choice of court*

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[20] This Model Law was adopted by a United Nations General Assembly Resolution on the Report of the Sixth Committee (A/51/628), Official Records of the General Assembly, 40th session, Supplement No 17 (A/40/17), Chapter VI, Section B, of 16 December 1996.

[21] All these texts are explained by the Guide for Enactment of the Model Law. What this actually means is that proof of consent essentially depends on the techniques used which, bearing in mind the advances in identification methods and reliability, could be done to the satisfaction of the court seised, depending on the circumstances of the case.

[22] It should be noted that the Brussels and Lugano Conventions do not specifically include a provision on material validity. However, scholars agree that this silence is to be interpreted as validating all clauses, provided they are in conformity with the provisions of the Conventions.

shall be void or voidable if it has been obtained by an abuse of economic power or by other unfair means".[23]

17 As regards ***lawfulness***, a consensus emerged to the effect that the choice of court clause should not make it possible to derogate from the exclusive grounds of jurisdiction which may perhaps be included in the Convention. Similarly, it may be envisaged that the choice of court clause will not be valid if it is concluded in matters or for litigation regarding which the Convention includes protective grounds of jurisdiction (consumers or workers for example).

18 The question was also discussed as to whether, in matters relating to legal persons, the choice of court could have a role to play. It seems that a possibility of this kind might be admitted if the litigation arises between shareholders or if it arises between the company on the one hand and its shareholders or associates on the other. Thus, the clause probably ought to be included, either in the articles of association of the legal person or corporate entity or in the additional clauses.[24]

19 In matters of trusts, the question of the validity of the choice of court arose and no objection was raised to admitting choice of court for relations internal to the trust[25].

20 As regards the value of the jurisdiction conferred by the choice of court clause, a number of delegations proposed a presumptive evidence that the jurisdiction thus chosen be exclusive, except where the parties decide otherwise and state this in the clause. These proposals apparently went unopposed.

21 Are the parties free to choose any court or must the court chosen have a reasonable link with the case? Some experts expressed a preference for the latter of the two alternatives but a greater number still favoured giving the parties the widest possible choice. Indeed, the importance was stressed of permitting the choice of a "neutral forum", or of a forum with technical skills particularly useful for the litigation concerned. Similarly, the possibility of not authorising the chosen court to decline jurisdiction might also be contemplated. However, not all aspects of this question were discussed by the experts of the Special Commission.

22 The question whether the choice of court clause can be implemented, even though a case concerns the nullity or non-existence of the contract which contains it, was not discussed. However, during the discussions many experts expressed the idea that the drafting of the treaty provisions relating to choice of court might be similar to that admitted in arbitration. It should therefore be noted here that a number of legal systems admit the autonomy of the arbitration clause in relation to the basic contract. It can therefore be deduced from this autonomy that, provided there is proof of consent to the arbitration clause, the fate of the basic contract on the occasion of which that clause was concluded is of scant importance. Whether this contract is alleged to be null and void or its existence disputed, the arbitration clause must have effect and the question of the nullity or inexistence of the contract must be heard by the arbitrators designated by the arbitration clause. A similar system might be admitted in the future Convention, subject perhaps to adapting it to the particular features of the choice of court clauses.

23 Lastly, the effect of the choice of court clause, where one of the parties to this clause wishes to sue the other in proceedings initiated by a third party, was another matter not discussed. This is the case, for instance, when the end user of a product serves a writ on the distributor of these products who, in turn, wants to bring interlocutory warranty proceedings against the manufacturer of the product. There are two possible solutions here:

a One presumption could be that the choice of court clause has taken effect with respect to all litigation involving the parties to the clause, even if proceedings are initiated by a third party. Thus, unless otherwise specifically agreed to the contrary, the clause would prevent action on a warranty or guarantees or other similar mechanisms in a court not chosen in the clause.

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[23] However, it should be noted that this Convention is not in force. It has been signed by one country only, Israel.

[24] On the other grounds of jurisdiction in matters relating to legal persons, see *supra* Nos 10 *et seq*; *infra* Nos 28 *et seq*.

[25] On the other grounds of jurisdiction in matters of trust, see *infra* Nos 56 *et seq*.

b The opposite presumption could say that the parties only have contemplated direct litigation among themselves and, unless otherwise specifically agreed to the contrary, the clause would not prevent action on a warranty or guarantees or in third party proceedings.

In both cases, the parties should clearly express their wish in the clause, if that wish runs counter to the presumption adopted by the Convention.

TACIT CHOICE OF COURT

24 The Special Commission briefly discussed whether the Convention should include a provision making it possible to extend the jurisdiction of a court tacitly by means of the defendant's mere appearance without his or her challenging the jurisdiction of the court seised. Notwithstanding opposition from one delegation, it would appear that the majority of experts were in favour of such a proposal. However, two problems were particularly highlighted requiring further discussion and, perhaps, a provision in the Convention. These were the protection of the defendant and the concept of appearance.

25 ***Protection of the defendant*** – A number of delegations suggested that the defendant deserved special protection inasmuch as he might not be aware that it is possible for him to challenge the jurisdiction of the court. This particularly applies to natural persons, which is why these experts favoured very strict regulation, in the Convention itself, of the conditions in which tacit choice of court is admissible.

26 ***The concept of appearance*** – It was suggested that the Convention should include a uniform definition of the concept of appearance, although no actual text was drafted. Some delegations felt that the concept of appearance and all related procedural aspects, especially the order in which the arguments (on jurisdiction and on the merits) should be put by the defendant, fall within procedural law and should not form the subject of provisions in the Convention. However, one should not forget legal systems in which any appearance, of whatever kind, whether aimed solely at challenging jurisdiction, at requesting the court to decline jurisdiction, at ordering the initiation of arbitration procedure or at releasing secured assets, can never confer jurisdiction on the court in which such an appearance takes place.

27 Lastly, it was explained that, at the recognition and enforcement stage, the court addressed should make a point of focusing on the protection of the defendant when the court of origin has declared that it has jurisdiction by tacit choice. Here too no text was actually proposed and the matter was not discussed in any detail as the recognition and enforcement of judgments part was not dealt with by the Special Commission.

JURISDICTION IN MATTERS REGARDING LEGAL PERSONS

28 It is perhaps useful to recall, as was the case throughout the discussions, that three categories of action may be envisaged with respect to legal persons or corporate entities:

a actions relating to their existence, validity or liquidation;[26]

b actions brought on the occasion of disputes arising among shareholders; or disputes arising between shareholders and the legal person or corporate entity;

c actions initiated by a third party against the legal persons or corporate entity, essentially as a result of its activities.[27]

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[26] Where liquidation is concerned, due account should be taken of the work of UNCITRAL with respect to international insolvency and of the European Convention of 23 November 1995.

[27] A fourth category could be added consisting of actions initiated on behalf of the legal person against its directors (derivative actions under common law systems, for instance). However, these actions were not addressed by the Special Commission.

29 It transpired from the discussion that the possible exclusivity of the jurisdiction conferred by the Convention provision would only be contemplated for the first type of action, *i.e*. actions relating to the existence, validity or liquidation of the legal persons or corporate entity.[28] On the other hand, this possible exclusivity might not include actions relating to decisions of the legal officers of the legal person or, in more general terms, relating to its management. In reality these actions could mostly be expected to be actions between shareholders or between a category of shareholders and the legal person itself. This proposal appears to have attracted a good deal of support.

30 As indicated above,[29] actions among shareholders or between shareholders and the legal person may be brought in the forum chosen in the by-laws of the legal person or in the documents amending them. In the absence of such a provision in the by-laws, it would seem that only the general jurisdiction of the forum of the defendant may be admissible. As for the exact definition of this forum in matters relating to legal persons, reference should be made to the comments above.[30]

31 Actions instituted by third parties might relate to the validity, existence or liquidation of the legal person or to a dispute arising from its activities. Detailed discussion was given to the admissible ground of jurisdiction and here too, as in matters relating to general jurisdiction, there seemed to be support for an option between the court of the place of incorporation and that of the place where it has its central management.

32 Lastly, as regards actions brought in connection with litigation arising from the activities of a company, a consensus emerged in favour of admitting the jurisdiction of the ***forum of the branch*** where the dispute has arisen from the activity of that branch. On this *sine qua non* condition for the operation of jurisdiction with respect to branches as it is known in Europe for instance, the Special Commission devoted a great deal of thought to whether it is comparable with the concept of "doing business" in the United States of America. It clearly transpired from the discussions that the jurisdiction arising from "doing business" is of a general nature,[31] while the branch jurisdiction which might be concerned here is a specific jurisdiction limited to certain types of disputes.

33 Traditionally, the rule as thus conceived is limited to the case of an activity undertaken by a branch, place of business or any other operation with no legal personality separate from the legal person which is the defendant. However, the question arises of a case where the activity is undertaken through a subsidiary with a distinct legal personality, though the veil of the corporate entity could be pierced in order to reach the parent company. Indeed, a number of experts were in favour of not using the expression "fictitious company" as used in the questionnaire sent to the experts from the Member States.[32] The fact nevertheless remains that this case requires careful study to ascertain whether, in certain circumstances still to be decided, the Convention should or should not allow the veil of the subsidiary to be pierced in order to reach the parent company or whether no reference at all should be made to this point. In this connection, it should be noted that many delegations have not yet replied to the above-mentioned questionnaire. A proper study can only be made if detailed replies to the questionnaire are returned. Also, some experts expressed the view that a study be conducted as to the possibility of piercing the corporate veil of a subsidiary (or, in this respect, of one company in a group) in order to reach the parent company (or another company in the same group) so that ju-

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[28] Even in this respect, however, exclusivity was disputed by some experts, who argued that preliminary or incidental questions relating to the validity of the legal person might be put to the courts seised with the validity of a contract or of any other action involving this legal person. They stressed that it would then be very cumbersome to require a suspension of the proceedings until such time as the court with exclusive jurisdiction to adjudicate on the validity of the legal person had given a verdict. In this connection, it would be interesting to obtain from legal practitioners and corporate lawyers an idea of the frequency of such preliminary or incidental questions in proceedings involving legal persons.

[29] Cf. *supra* No 18.

[30] *Cf. supra* Nos 10 *et seq*.

[31] The term "general jurisdiction" is used here in the sense explained above in No 7.

[32] *Cf*. Annex IV to Prel. Doc. No 7, quoted *supra* in footnote 2.

risdiction be conferred on the court against them, even if the method of piercing the corporate veil is not employed.[33]

34 Lastly, it should be noted that some experts referred to UNCITRAL's efforts relating to international insolvency. They suggested that the terminology adopted by UNCITRAL should serve as model for that used in the future Convention. However, two precautions need to be taken before doing so, namely:

a Insolvency has always been a very unique matter, whose terminology, now internationally recognised, might not be adaptable to the scope of application of the new Convention currently being prepared by the Hague Conference.

b UNCITRAL's work took the form of a Model Law. Thus, the resulting terminology may be different from that which should be adopted in the text of a convention.

That being said, it may be recalled that both the UNCITRAL Model Law (Article 2(f)) and the European Union Convention of 23 November 1995 relating to insolvency proceedings (Article 2(h)) define the term "place of business" as follows: "*Any place of operations where the debtor carries out a non-transitory economic activity with human means and goods*".[34] The only difference between the two texts is that the UNCITRAL Model Law adds the word "services" at the end of the definition.

JURISDICTION IN MATTERS OF IMMOVABLE PROPERTY

35 A general view very soon emerged to the effect that it must be possible for all actions relating to immovable property rights (challenging the title of property, for example) to be brought before the court of the place where the immovable property is situated. This is in fact a universally recognised jurisdiction and, *a priori*, it does not raise any fundamental difficulty.

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[33] This is an appropriate point to remind ourselves of the content of the Judgment of the European Court of Justice of 9 December 1987 (case 218/86) SARL *Schotte* v. *C. Parfums Rothschild, Reports*, p. 4905). In this case, the Company Parfums Rothschild proved to be a wholly owned subsidiary of Rothschild Germany. The Court allowed the plaintiff to bring the French subsidiary before the court of the headquarters of its parent company in Germany. The Court thus permits a very broad interpretation of the word "place of business" ("*établissement*") under Article 5.5 of the Brussels Convention, admitting as it does that the parent company may serve as the place of business of its subsidiary. As one writer acknowledges, this decision cannot be reconciled with the other decisions rendered by the Court of Justice interpreting the same text.

[34] Moreover, the European Convention also includes a rule of international jurisdiction which is reproduced here for information:

"*Article 3. International jurisdiction*

1. The courts of the Contracting State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor's main interests is situated within the territory of a Contracting State, the courts of another Contracting State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Contracting State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Contracting State.

3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.

4. Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only:

(a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Contracting State within the territory of which the centre of the debtor's main interests is situated, or

(b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Contracting State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment".

36 On the other hand, once we reach the point to define what precisely is meant by "action relating to an immovable property right", the problems begin. The exact terminology which might be used by the Convention provision has not definitively been decided upon. The concept of actions *in rem* has been considered as too imprecise in a number of legal systems. Should the disparities which may exist as to the precise content of the category of actions relating to immovable property be regulated by the Convention? On this matter, the Commission has not yet reached final agreement, although it did recall the tradition of the Hague Conference whereby no legal characterisation is included in the conventions themselves.

37 There were long discussions on immovable property leases. A number of delegations drew the Commission's attention to the fact that many public policy rules may exist in the countries where the immovable property is situated for the leases concluded on these immovable properties. To confer jurisdiction on a court other than the court where the immovable property is situated can result in an evasion of these public policy rules. Other delegations countered this argument by remarking that linking jurisdiction to the application of public policy rules (all real property lease provisions are not in the nature of public policy rules) is perhaps an outmoded approach inasmuch as courts increasingly agree to apply, or at least take into account, foreign public policy rules. Also, if the court seised has not applied the foreign public policy rules that may be applicable, this would make it impossible to recognise or enforce the judgment in the country where the immovable property is situated. However, to avoid all these difficulties, it might be proposed that, with respect to certain leases, residential leases in particular, the forum of the place where the immovable property is situated be given jurisdiction provided the lessor or lessee themselves have their habitual residence in that country.[35] In fact, it must be acknowledged that most public policy rules relating to leases do not concern the immovable property itself but the person of the lessor and/or the lessee.

38 Where other contracts are concerned, mention was made of a particular difficulty where a warranty is given in the form of real property situated in a country other than the one in which the warranty is given, or covered by another law than that under which the warranty is given. Which court should hear a case concerning a warranty on real property? The Commission did not fully discuss this case, but the initial exchanges of views showed that if jurisdiction was conferred on the court where the immovable property is situated, that jurisdiction should not be exclusive. Further, one expert stated a preference for contractual jurisdiction to be used in such a case.

39 The question of the exclusivity of jurisdiction in matters relating to immovable property was discussed at length. The following two major trends emerged from the discussion:

a Jurisdiction of the place where the immovable property is situated might be exclusive as regards actions concerning a dispute regarding a property right and a property lease in certain circumstances.

b Exceptions to this exclusivity should be envisaged at least for the following cases:

(i) actions concerning immovable property where the property is part of a larger economic operation (security on a commercial loan for example);

(ii) for leases other than those reserved exclusively for the principal abode of the tenant who is himself a party to the lawsuit.

40 The question was also discussed as to whether this jurisdiction under the Convention applies where the immovable property is held in trust. Reference was made to the decision rendered by the European Court of Justice in the *Webb* case,[36] in which the Court ruled that the interpretation of the

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35 The habitual residence would not necessarily have to be located precisely within the judicial area of the court on which jurisdiction is conferred, but it would be enough for it to be situated in the country in which the court is situated.

36 ECJ, 17 May 1994, Case No C-294/92, *Reports* I-1717.

rights conferred by a "constructive trust" relating to property situated in France fell within the jurisdiction of the English courts and not within that of the courts of the place where the property was situated, that is France. However, the delegations were divided on whether that decision should be approved or condemned. The Commission has not yet resolved this difficulty.

JURISDICTION IN MATTERS OF INTELLECTUAL PROPERTY

41 The first difficulty with which the Special Commission was confronted concerned the traditionally territorial nature of intellectual property rights. However, some experts stated that this territorial nature formed no obstacle, in certain cases, to conferring jurisdiction on a court other than the one in the place where the property rights concerned have been registered. A distinction should therefore be made between actions relating to the validity of the registration itself and actions relating to the violation of intellectual property rights (infringements and other similar violations).[37]

42 With respect to actions concerning the ***validity of registration***, two views may be highlighted which are not necessarily mutually exclusive:

a Exclusive jurisdiction may be conferred on the court of the place of registration, since the judgment to be rendered may result in a positive or negative injunction on the person responsible for the registration, which only the court in whose jurisdiction the register in question is situated has the power to issue. The judgment thus rendered under this exclusive jurisdiction will be valid *erga omnes*.

b The action for a declaration of validity may be brought in a court foreign from that of the place of registration. In such cases, the judgment to be rendered will only have effect *inter partes*, there being no possibility of an injunction of any kind on the person responsible for the registration. As regards the court with jurisdiction in this second hypothetical, it is likely that no specific rule be necessary but that this jurisdiction will be one related to a tortious or contractual action or one brought before the court with general jurisdiction with respect to the defendant to the action.

43 Some delegations wondered whether jurisdictional rules could not be found in the numerous international texts which exist on the subject. In this connection, the Protocol on jurisdiction and the recognition of decisions in respect of the right to the grant of a European Patent, which is an annex to the Munich Convention of 5 October 1973 on the grant of European patents is reproduced in case it may be useful.[38] Also significant, in the context of the negotiations for the future Convention, is Article 131 of the Munich Convention of 1973 containing provisions on administrative and judicial cooperation. This text reads as follows:

(1) Unless otherwise provided in this Convention or in national laws, the European Patent Office and the courts or authorities of Contracting States shall on request give assistance to each other by communicating information or opening files for inspection. Where the European Patent Office lays files open to inspection by courts, Public Prosecutors' Offices or central industrial property offices, the inspection shall not be subject to the restrictions laid down in Article 128.[39]

(2) Upon receipt of letters rogatory from the European Patent Office, the courts or other competent authorities of Contracting States shall undertake, on behalf of that Office and within the limits of their jurisdiction, any necessary enquiries or other legal measures.

Also, the Agreement concerning community patents, done at Luxembourg on 15 December 1989,[40] includes a sixth part entitled "Jurisdiction and Procedure in Actions Relating to Community Patents Other than those Governed by the Protocol on Litigation". This part of the Convention, as well as the

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[37] It should be noted here that Article 16.4 of the Brussels and Lugano Conventions confers exclusive jurisdiction on "*the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or is under the terms of an international convention deemed to have taken place*". This jurisdiction, however, only applies "*in proceedings concerned with the* registration *or* validity *of patents, trade marks, designs, or other similar rights required to be deposited or registered*" (emphasis added).

[38] *Cf*. Annex No I.

[39] Article 128 covers public inspection.

[40] *Official Journal of the European Communities* No L 401 of 30 December 1989, p. 1.

Protocol on the Settlement of Litigation concerning the Infringement and Validity of Community Patents are reproduced in Annex II to this Report.

44 Mention should also be made of Part III of the Agreement relating to the Trade-Related Aspects of Intellectual Property Rights, an Annex to the Marrakesh Agreements establishing the World Trade Organization. This Part III entitled "Enforcement of Intellectual Property Rights" lays great emphasis on procedures and corrective measures as well as on the provisional measures which every State pledges to set in place on its territory. For information, this text is reproduced in Annex III below.

JURISDICTION IN MATTERS REGARDING THE ENFORCEMENT OF JUDGMENTS

45 This jurisdiction was briefly discussed by the Special Commission and several experts expressed the view that the jurisdiction as set forth in Article 16.5 of the Brussels and Lugano Conventions (exclusive jurisdiction given to the courts of the place where the decision has been or is to be enforced) is superfluous. A number of experts stressed in fact that this jurisdiction is self-evident and does not need to be included. Furthermore, its exclusivity is certainly harmful in that the judgment may be enforced within a number of territories simultaneously if the assets situated on each of them are not adequate, in themselves, to comply with the judgment concerned. Also, several experts said that if a rule were to be inserted into the future Convention, it ought ideally to be included in the part devoted to the recognition and enforcement of decisions. However, it should be noted that the rule in Article 16.5 of the Brussels and Lugano Conventions, quite apart from its exclusive character, may perhaps be helpful for making it clear that the enforcement of a judgment should not be restricted solely to the forum of the defendant. In the absence of such a specific rule it would, in fact, be possible to interpret the Convention in this way.

PROTECTIVE JURISDICTION

46 Although it was suggested that the expression "protective jurisdiction" was not appropriate, since it could be confusing and, in particular, give the impression that the rules under discussion were straying from the principle of proximity, the Special Commission nevertheless agreed to use this expression for the purposes of the discussion, yet without taking any decision as to whether the expression would be used in one form or another in the future Convention.

47 The understanding which emerged from the work of the Special Commission as to the meaning of the expression "protective jurisdiction" can therefore be summed up in the form of a question: should certain litigants, by virtue of the fact that they are usually regarded as the weaker party, enjoy the benefit of one or more "more favourable" alternative fora, perhaps to the detriment of the other party to the dispute? One of the difficulties of this issue stems from the fact that the very concept of a "more favourable" forum is confusing since all that is concerned here is favour with respect to international jurisdiction, without there being any question of considering the substance of the law which will be applied by the court having jurisdiction. Hence, paradoxically, the outcome of the litigation may prove to be unfavourable to the party which the provision tried to protect. It has to be admitted that this pitfall, noted by a number of experts, will be extremely difficult to avoid in the future Convention.

48 Among the categories of litigants who might benefit from this protective jurisdiction, it was suggested, with the endorsement of many delegations, that they be limited to two. Within the concept of consumers would have to be included all persons acquiring goods or contracting a service, including a service in matters relating to insurance or banking, for family or personal reasons. This would mean that no separate provisions would be required for insurance matters. The second category would be workers, regarding which it was not decided whether to consider introducing sub-categories, such as workers on secondment or expatriates. However, some experts noted that the more detailed the categories were, the harder it was to determine the dividing lines between them; as litigation proliferates on this point, the longer the settlement of such litigation is delayed.

49 ***Consumers*** – The rule ought to be limited to natural persons entering into an obligation (the purchase of goods, a contract for the performance of services including in insurance and banking) for their personal, domestic or family use. Further, all the draft provisions proposed envisage the jurisdiction of the court of the plaintiff, that is, of his or her habitual residence, without necessarily requiring

any other conditions to be met. However, one proposal at least added to the plaintiff's habitual residence the condition that the defendant should have acted positively towards the plaintiff and that the consequence of this activity should be that an offer to contract should have reached the plaintiff on his territory by one of the possible means of communication (advertisement sent by post, advertisement on TV, teleshopping, offer to contract and advertisement via the Internet or any other means of communication making it possible to reach the consumer at his or her place of habitual residence). Were the Special Commission to confirm this view, the rule would not apply where the consumer travels from the country of his or her habitual residence to another country in order to contract or purchase goods or himself or herself makes the offer to contract in a foreign country without the offer being preceded by an action of the defendant received in the country of the consumer's habitual residence.

50 All the delegations which expressed a position agreed that, if protective jurisdiction were envisaged with respect to consumers, the validity of the choice of court clauses which could be inserted in contracts concluded by such persons would have to be limited.

51 Where ***workers*** are concerned, one alternative forum proposed for the worker could be that of the worker's centre of professional activity. This rule means that jurisdiction could be conferred upon the court of the place where the work is performed, when the worker performs his or her work in a fixed place. Where the worker performs his or her work within the territory of several States, he or she always has a centre of activity, be this merely the place to which he or she periodically returns in order to prepare his reports, look after his accounts or keep his files and records. This place will often be that of his or her habitual residence but might also be another place.[41] No delegation opposed this jurisdictional ground in principle, though it will obviously require further refinement.

52 What was much more controversial on the other hand was whether to accept, in addition to the jurisdictional ground expounded above, the jurisdiction of the court of the employee's habitual residence. Some delegations explained that such jurisdiction would be too favourable to the worker, especially if his or her habitual residence is that where the worker resides after the contract has expired. Admittedly, the worker can return to what had been his habitual residence when he commenced his working relationship. However, this is not always the case and it may seem unfair to require the employer to defend himself or herself in the court of any new habitual residence the worker may decide to take up. This is why it was suggested that if the jurisdiction of the worker's habitual residence were adopted, this would be the habitual residence of the worker when the contract was performed, even if the dispute arose on the expiry of the work contract and the worker has changed his or her habitual residence. In fact, the worker's habitual residence during the performance of the work contract is foreseeable for the employer and thus limits any “surprises” the employer might otherwise have to face. Notwithstanding this clarification, the jurisdiction derived from the worker's habitual residence presents a further difficulty where cross-border workers are concerned. In this connection, it was suggested that it would be inequitable to compel the employer to call the employee before a court of the country in which the worker has his habitual residence whereas he performs his work on the territory just over the border. This very special difficulty might give rise to an exception if the jurisdiction of the worker's habitual residence was adopted nevertheless.

53 As for consumers, it was explained that the choice of court clauses ought to be subjected to a stricter validity system so as to afford the employee better protection. However, the precise content of this provision was not discussed.

GROUP ACTIONS

54 During the discussion concerning protective jurisdiction, the delicate question of group actions was raised several times. In fact, while group actions are not specific to the categories of litigants re-

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[41] For example, it might be the place where the employer to whom the employee is connected has his or her place of business.

quiring protection, such as consumers and workers, it is certain they have developed in these fields above all. The Special Commission considered that it did not have sufficient information on group actions and therefore reserved its position until a comparative law study has been made. That study will be launched in early 1998 by the Permanent Bureau of the Conference and, hopefully, will be distributed to delegations before the Special Commission to be held in November 1998. Only then will the question regarding group actions be discussed again by the experts of the Special Commission.

55 At all events, a number of experts expressed doubt about the possibility of dispensing with the rules of protective jurisdiction where the action is brought by a group of litigants. It was also the view of the experts that, were the Convention to contain provisions relating to group actions, it ought not to rule on matters of applicable law, on interest in bringing an action or any other matter which must remain within the ambit of domestic law in this respect.

JURISDICTION IN MATTERS OF TRUSTS

56 The Special Commission discussed the desirability of creating a special jurisdictional rule for trusts. Despite some initial reluctance, the discussion showed that it would be preferable to include jurisdiction in matters of trusts, even if it was restricted to certain actions, in particular relating to certain trusts specifically mentioned.

57 Where the actions themselves were concerned, it appeared that the jurisdictional rule to be included would be limited to actions internal to the trust relationship. Hence, the Convention would not include a specific rule when the action was instituted by a third party or against a third party. These actions would follow the system provided for the other jurisdictional rules in the Convention.

58 As regards trusts to which the jurisdictional rule would apply, a majority of experts agreed that, despite the major increase in disputes arising out of trusts created by operation of law (such as resulting trusts or constructive trusts), it is preferable for all special rules of the Convention to be limited to trusts created voluntarily in writing as provided by the 1985 Hague Convention. However, one delegation drew the attention of the Special Commission to Article 20 of the Hague Convention authorising any Contracting State to "*declare that the provisions of the Convention will be extended to trusts declared by judicial decisions*". Some States which have ratified the Hague Convention have used this declaration. It is conceivable, therefore, that the future Convention might likewise allow a declaration for the extension of the jurisdictional rule to trusts other than those created voluntarily. There was no opposition to this proposal.

59 Although there was a consensus to the effect that a jurisdictional rule for trust cases ought to be included in the Convention, the jurisdictional criterion to be chosen was the subject of more heated debate. Indeed, a trust is not a legal entity and therefore does not have legal personality. Thus the trust as such cannot be plaintiff or defendant in an action. Once it has been noted that the concept of "domicile" has no meaning for a trust, in the absence of any definition in the Convention, the choice seems to be limited to four possible grounds of jurisdiction. To begin with, no objection was raised to the choice of forum. If no choice of forum exists, there are three possible grounds of jurisdiction:

a the domicile of the trustee;

b the centre of gravity of the trust;

c the domicile of the settlor.

60 It was also stated that a recent trend was emerging in favour of designating "protectors of trusts", so that the text of the rule in the Convention ought to take into account this new trend. Further, a number of delegations from common law countries stated that where the litigation relates to a property held in trust, the jurisdiction of the place where the property is situated yields to the jurisdiction laid down for trust cases. Subject to these clarifications, possibly entailing amendments to the pro-

posed text distributed to the experts, this proposal remains the starting point for further discussion on this topic by the Special Commission in March 1998 or November 1998.[42]

JURISDICTION IN MATTERS REGARDING MAINTENANCE OBLIGATIONS

61 This jurisdiction was given very brief attention as some delegations noted that it might perhaps be preferable to exclude maintenance obligations from the scope of application of the future Convention. In any event, if there were to be no such exclusion, the difficulty of admitting the forum of the maintenance creditor has been remarked upon, especially when it is a public authority responsible for recovering this maintenance, having itself paid the maintenance to the creditor.

PROVISIONAL AND PROTECTIVE MEASURES

62 Having acknowledged that modern international litigation affords an ever greater place to provisional and protective measures,[43] the Special Commission did not reject the possibility of including one or more provisions on this subject in the future Convention. However, this decision is not without problems since it is clear that the very concept of "provisional and protective measures" is difficult to define, not uniform, and depending on the type of measures considered, they may be granted or declined an extraterritorial effect. For all these reasons, at the express request of the Special Commission, an explanatory note will be prepared describing the various measures available in various legal systems, their potential extra-territorial effects and the litigation these measures have generated, going beyond the general principles in the Helsinki Resolution of the *International Law Association*.[44] Indeed, all experts agreed that this Resolution is very helpful but not precise enough to serve as the basis for the wording of rules of direct jurisdiction.

63 Three proposed texts were presented to the experts of the Special Commission. Although two of these proposed texts were the subject of relatively detailed discussion, no conclusion could be drawn therefrom, since all further discussion was postponed until after experts have seen the Note referred to above. However, for future discussions on this matter, it is preferable to reproduce here each of these proposals, bearing in mind that they are provisional only.[45]

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[42] The proposal reads as follows:

"*Jurisdiction in matters of trusts*

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

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

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

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

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

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

a the place or places where the trust is administered;

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

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

[43] *Cf. supra* No 44 and Annex III for an example relating to intellectual property.

[44] *Cf*. Annex I to Prel. Doc. No 7, quoted *supra* in footnote 2.

[45] The text of the proposals relating to provisional and protective measures:

Proposal No 1:

"Provisional and protective measures may be requested before

a the authorities of the Contracting State which have jurisdiction to rule on the merits of the dispute under the provisions of the present Convention;

64 The Special Commission did not discuss the question as to whether the provisional and protective measures for which jurisdictional rules would be inserted into the Convention would include measures relating to evidence or "anti-suit injunctions".

JURISDICTION IN MATTERS RELATING TO CONTRACT[46]

65 It should first be explained that the contract jurisdiction at issue here concerns all contracts, except those concluded by consumers, in the new sense the Special Commission seems to wish to give this term,[47] or those concluded by workers. A rather lengthy discussion on the desirability of a specific rule in contractual matters resulted in the conclusion that such a rule may be useful provided it reflects a genuine need and is not the result of a systematic *forum actoris*. Indeed, it was shown that 90% of the cases subject to the application of Article 5.1 of the Brussels and Lugano Conventions[48] simply entailed the jurisdiction of the plaintiff's court. In this connection, many experts, though not all,

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b *the authorities of the Contracting State on the territory of which such measures are envisaged to be recognised and executed".*

Proposal No 2:

"Provisional and protective measures may be requested before

a *the courts of the Contracting State which have jurisdiction to rule on the merits of the dispute under the provisions of the present Convention,*

b *the courts of the Contracting State where the debtor has assets out of which the ultimate judgment may be satisfied. In this case the jurisdiction shall be restricted to assets located within the jurisdiction.*

The procedure in domestic law under which the court may order an interim payment is not a provisional and protective measure for the purposes of this Convention".

Proposal No 3:

"Provisional and protective measures

1 *A party to a dispute pending in a Contracting State is free to seek provisional or protective measures in any jurisdiction.*

2 *The jurisdiction of a Contracting State to grant provisional or protective measures is limited to assets located on its territory. Subject to paragraph 4, the procedure to be followed and the location of the assets is determined by the law of the forum.*

3 *The granting of provisional or protective measures does not in itself create jurisdiction to decide the substance of the dispute.*

4 *When granting provisional or protective measures in a Contracting State other than that where the dispute is pending, regard shall be had to all relevant circumstances, including –*

a *any similar measures taken in other Contracting States,*

b *the likely outcome of the dispute,*

c *the extent to which a judgment is likely to be enforced in the Contracting State where measures are requested,*

d *the extent to which damage may be caused to the business or financial position of the respondent, and*

e *the extent to which the plaintiff gives security to indemnify the respondent for such loss or damage should the applicant's claim be unsuccessful.*

5 *Contracting States may, but are not obliged to recognise and enforce provisional and protective measures granted in other Contracting States".*

[46] It was suggested that the inherent difficulties in characterising matters relating to "contract" or "tort" could be avoided by adopting an "activity by activity" approach. However, to date, no concrete proposal has been submitted for discussion by the Special Commission.

[47] *Cf. supra* No 49.

[48] Let us recall that Article 5.1 (work contracts apart) of the Brussels and Lugano Conventions states that: "*A person domiciled in a Contracting State may, in another Contracting State, be sued:*
1. in matters relating to a contract, in the courts for the place of performance of the obligation in question;...".

wished to depart from the wording of Article 5.1 of the above-mentioned Conventions, it being too complex, especially in the light of the interpretation given by the European Court of Justice, to the effect that the determination of the place of performance of the obligation which serves as the basis of the claim must be sought in the law applicable to that obligation. The effect of this case law has been a fragmentation of litigation and a proliferation of fora which many people agree should be avoided. Further, when the obligation concerned is one of payment, the jurisdiction will be one of two diametrically opposed extremes depending on whether the applicable law determines that the payment is deemed to have been made at the creditor's domicile or at the debtor's domicile.

66 Since most delegations recognised that it was desirable to insert a specific rule, the discussion turned to the choice of criterion. It was pointed out that the cases in which the jurisdictional criteria selected by the future Convention in matters relating to contracts would be applied would in all likelihood be somewhat residual as many contracts include a choice of forum clause. The jurisdictional rules in the Convention will thus apply in the absence of a choice of forum or when that choice is invalidated by a court.

67 As regards which criterion to select, a lengthy discussion developed around the concept of ***characteristic performance***. A large majority of experts who spoke criticised this ground of jurisdiction not only because in many contracts it is impossible to determine the characteristic performance, but also because this determination is often artificial and does not necessarily correspond to the concrete realities of the contract concerned.

68 This is why the idea was endorsed by a number of experts that, of all the contracts which practice can come up with,[49] a decision might be taken to choose just a few, although no list was drawn up. However, it was suggested that, among the most frequent contracts, those that might be chosen were, for example, the contract for sale and the contract for the performance of services. With respect to the former, it was acknowledged that the court of the place where the actual delivery of the goods occurred, or should have occurred, is the most appropriate court. As regards the performance of services, the most appropriate court seems to be the one where the performance should (or should have) actually be (or been) performed.

69 A document summarising all the various proposals prepared by the experts and which the Special Commission did not have time to discuss in detail, is annexed to this Report.[50]

70 The scope of the jurisdiction to be chosen was not discussed. Will the court of the contract have jurisdiction to rule on a dispute arising out of pre-contractual negotiations and, in more general terms, from the formation of the contract? Will this jurisdiction apply where there is a chain of contracts? Will the jurisdictional rule be applicable to the recovery of payment which is not owed? Will it also be applicable to declaratory judgments?[51] All of these are questions which the Special Commission to be convened in March 1998 will have to address. On the other hand, it was stated, unopposed, that the court with jurisdiction by virtue of the contractual jurisdiction will have jurisdiction even where the action concerns the validity of the contract.

JURISDICTION IN MATTERS OF TORT

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[49] A non-exhaustive list might contain the following contracts: sale between professionals, performance of services, *contrat d'entreprise* (including engineering, transport, construction and information), agency, franchise, distribution (general distribution, selective distribution, concession, commission), brokerage, intellectual property licence, sub-contract, joint ventures, data processing, tenancy (financial tenancy, leasing, factoring), loan agreement, bond agreement (personal security, security other than personal, positive or negative security), those relating to disputes (settlement, arbitration agreement).

[50] *Cf*. Annex No IV.

[51] The special problem of declaratory or preventive judgments was raised several times. For example, this problem was referred to during the discussion on jurisdiction in tort. However, a consensus emerged to the effect that there ought to be a general discussion on declaratory judgments to ascertain whether, as appeared to be the case, a special rule is required in this respect.

71 After somewhat lengthy discussions on tort in general, from which it emerged notably that the Special Commission has accepted the necessity of including one or more provisions relating to tort, the Commission discussed certain specific torts such as road traffic accidents, products liability, libel, environmental torts and torts in competition matters.

72 ***Traffic accidents*** – For all torts which reveal that the harmful event and the direct damage are situated within the same territory, jurisdiction would be conferred upon the court of the place of the accident without any other condition or additional criterion. This proposal does not appear to have been opposed. The application of this rule would lead to the following results:

a A traffic accident occurs in Mauritania involving a coach occupied by passengers of various nationalities, some residing in Japan, others in the United States of America and yet others in Argentina.[52] As the victims all reside in different countries and, depending on the seriousness of their condition, return to the country of their habitual residence sooner or later after the accident, they will nevertheless have to sue the person or persons responsible for the accident in the courts of Mauritania.

b In the same traffic accident, a passenger dies whose habitual residence was in Japan. He is survived by a widow and three young children. The harm suffered by this widow and her three children can be characterised as "indirect" and should not give rise to a special jurisdiction. These victims will therefore also have to sue in Mauritania.

73 Another question which was raised was the fate of the criminal proceedings often initiated in traffic accident cases. This was not discussed in any detail by the Special Commission, but it is conceivable that it may have to be addressed, together with the question of determining the type of decisions falling within the scope of the Convention. A possible solution is that, regardless of the designation of the court (including a criminal court) and regardless of their denomination, all decisions rendered in civil and commercial proceedings may fall within the scope of the Convention. Hence, when the law of a Contracting State authorises the victim to choose to sue either in a civil court or by bringing a civil action in a criminal court, there is no reason *a priori* to prohibit recognition and enforcement of the judgment to be delivered in this civil action.

74 ***Products liability*** – The first difficulty which the experts encountered concerns the definition of the concept of "harmful event", which may be understood as referring to the manufacture, marketing or consumption of the product. If one chooses to define the harmful event as the product's manufacture, it is the court of the defendant which will have jurisdiction, be it the court with general jurisdiction, or that of the subsidiary or branch already discussed.[53] If, on the other hand, it is decided to define the harmful event as the marketing of the product, there will be as many courts as there are countries in which the product has been marketed by the manufacturer. A number of delegations voiced their opposition to such a possibility as, in principle, they consider that the Convention must avoid a proliferation of competing fora. Lastly, it is possible that the product may be consumed in a country where it has not been marketed.[54] This is the case when a tourist purchases property in a country he is visiting, brings it back to the country of his habitual residence where this property is then used and causes the harm. Here too, a number of delegations expressed doubt about the relevance of such a ground of jurisdiction.

75 Quite a lengthy discussion then ensued focusing on the concepts of "foreseeability" and control of distribution networks. The Special Commission was divided on these issues but this perhaps stemmed more from a misunderstanding than from genuine disagreement. Indeed, where in Preliminary Document No 7[55] reference was made to the concept of foreseeability, it was not so that the word itself should appear in a proposed text but simply as a principle which might, together with others, be borne in mind as a guide to opting for one ground of jurisdiction rather than another. In fact, the whole discussion showed that when an attempt is made to insert the condition of foreseeability

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[52] We have deliberately chosen countries which are not parties to the Brussels and Lugano Conventions, in order to avoid the risk of indirectly discussing the geographical scope of the future Convention, which was not discussed by the Special Commission.

[53] *Cf*. *supra* No 32.

[54] Usually, in fact, the place where the product is marketed and the place where it is consumed are identical.

[55] No 122.

into a written provision, insurmountable problems of evidence may be encountered, which for no good reason might make litigation on jurisdiction more cumbersome and costly, a result contrary to the objectives set for this Convention. Article 7 of the *Hague Convention of 2 October 1973 on the Law Applicable to Products Liability*[56] was also discussed. It was noted, however, that although this text might be relevant for the applicable law, it is not necessarily so for jurisdiction. Also, a number of experts found the rule too complex and not sufficiently clear.

76 It was also during the discussion on products liability that the matter of "excessive" damages was raised. However, the discussion on this matter did not really fully develop since the Special Commission did not have time to deal with Chapter III of Preliminary Document No 7 devoted to foreign decisions. A working document was nevertheless submitted and remains to be discussed by the Special Commission in March 1998.[57]

77 ***Environmental tort*** – Although the question of the environment had been placed on the work programme of the Conference,[58] there was a consensus for not *a priori* excluding damage caused by an environmental tort which, moreover, could generally be equated with torts committed at a distance. In fact, a peculiarity of environmental torts is that their effects may harm a victim situated within a territory other than the one where the harmful event occurs, this other territory perhaps situated very far from the territory of the generating fact. In such a case, the jurisdictional rule might be deemed to be modelled on the one adopted by the European Court of Justice in the *Shevill* case.[59] The first alternative would simply be the general jurisdiction of the defendant's habitual residence. In this case, the victim could claim the totality of his damage, including the one suffered by him within a territory other than that of his habitual residence. The second alternative would be to allow the victim to sue the defendant in the courts of each of the places in which the victim suffers damage. However, the jurisdiction of each of these courts is then limited to the harm demonstrated on its territory. The victim must therefore initiate as many proceedings as there are territories on which he has suffered harm.

78 The Special Commission did not have time to discuss this matter in any further detail. However, on several occasions during the meeting, the impact of new means of communication, such as Internet, was referred to, in particular with regard to ***libel*** cases. Reference was particularly made to the fact that it is now especially easy for the defendant, if he so wishes, to site his habitual residence in a legislative haven, so that the general jurisdiction of the defendant's forum would then be purely illu-

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[56] The text of this article reads as follows: "*Neither the law of the State of the place of injury nor the law of the State of the habitual residence of the person directly suffering damage shall be applicable by virtue of Articles 4, 5 and 6 if the person claimed to be liable also establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels*".

[57] The working document referred to is entitled: "*Limitation on enforcement of awards for excessive damages" (Adapted from Article 8A of the draft bilateral Convention between the United Kingdom and the United States of America – Annex V)* [reproduced in Annex V to Prel. Doc. No 7]. The text reads as follows: "*The recognition and enforcement of a foreign judgment for the payment of money by way of compensation and damages shall be limited to the amount (including interest and costs) determined in accordance with the law of the place of the court addressed on the basis of the findings of law and fact established in the court of origin*".

[58] Final Act of the Eighteenth Session, 19 October 1996, Part B, § 3.

[59] ECJ 7 March 1995, *Fiona Shevill* and a. c. Presse Alliance S.A., case No C-68/93, Reports I.415. This case involved a French publication which had disseminated an article considered to be libellous by Mrs Shevill. The Court ruled that:
"*On a proper construction of the expression `place where the harmful event occurred' in Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, ... the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised*".

sory. The victim would have no alternative but to initiate a multiplicity of proceedings. This is why the Special Commission, to be convened in March 1998, focusing in greater detail on jurisdiction in tort, will have to decide whether the second alternative referred to above[60] should not also include general jurisdiction, which might be that of the victim's habitual residence. It might be argued in fact that a defendant, having placed libellous information on Internet, ran the risk that this tort might have effects in a multitude of jurisdictions, starting with that of the victim's habitual residence. The question which then arises is whether it is unfair to the defendant to confer general jurisdiction on the court of the victim's habitual residence.

79 ***Competition*** – The Special Commission briefly touched on the question of jurisdiction in competition. It recognised the value of the distinction to be drawn between actions concerning antitrust law *stricto sensu* and actions which, of a tortious or contractual nature, are the consequence of a breach of competition law. Actions concerning unfair competition also belong in the latter category.[61] A brief exchange of views showed that the Convention should not exclude actions concerning unfair competition or tortious or contractual actions arising from the breach of competition law. However, the question as to what criterion should be adopted was not discussed in detail. One expert wondered whether the criterion of the market proposed in Preliminary Document No 7 was appropriate or was not simply the updating of an old idea, that is, "the law of effects". Lastly, if a criterion such as that of the market were adopted, provision would also have to be made in this case for the foreseeability, for the defendant, of the effect on this market.

80 Lastly, the Special Commission did not have time to discuss in any detail a summary document which had been prepared by a Working Group, which is why this summary document is reproduced in Annex V to this Report.

EXORBITANT FORA

81 At the request of the Chairman, the Co-Reporters prepared a working document including a list of fora which use might be prohibited under the Convention. This document is reproduced in Annex VI to this Report. This working document was first discussed with regard to the nature of the Convention under negotiation. The experts agreed that, in the context of a double convention entailing a closed list of authorised fora, that is, a convention in which all the grounds of jurisdiction which may be used by litigants are exhaustively defined, a list of prohibited grounds of jurisdiction is not necessary from the standpoint of the creation of rules. On the other hand, this list continues to be of educational interest and to facilitate the task of the court addressed, faced as it is with the recognition and enforcement of a foreign judgment. If the negotiations fail to lead to the adoption of a double convention but rather lead to that of a mixed one, the list of prohibited fora redeems its essential value particularly because important consequences will occur with respect to the effects of the judgments.[62]

82 The discussions then quickly clarified a fundamental point in understanding prohibited fora. Most of these fora are only prohibited where their objective is to define a general jurisdiction with respect to the defendant. Some of them may also be prohibited even as regards defining a specific jurisdiction. Nevertheless, some of these fora may be acceptable for such jurisdiction. Also, the list prepared by the Co-Reporters and annexed to this Report is limitative, whereas some voiced the idea that it is preferable not to make the list limitative and to retain its exemplary character.

83 Several experts questioned whether an authorised jurisdiction could exist where a number of criteria drawn from prohibited jurisdictions were found within one territory. The majority view was rather that it was impossible to interpret the prohibited fora in this manner. However, it must be ac-

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60 *Cf. supra* No 76.

61 These various distinctions were discussed in greater detail in Prel. Doc. No 7 quoted *supra* footnote 2, in Nos 129 to 132.

62 *Cf*. *supra* No 4.

knowledged that no precise conclusion can be drawn, at this stage, from the discussions which will resume on this point during the Special Commission meeting in March 1998.[63]

84 Among the prohibited fora presented to the Special Commission, four were discussed more specifically: the presence of a property of the defendant within the territory of the court seised, the nationality of the parties, the domicile / residence of the defendant and "doing business".

85 ***Presence of property of the defendant*** – No expert argued for such a forum of general jurisdiction, which all agreed should be prohibited in the future Convention. All the experts also agreed that the presence of property of the defendant may serve as the basis of a specific jurisdiction, whose precise features still have to be determined. Such a specific jurisdiction will exist for provisional and protective measures[64] or, as is the case with the Convention on Stolen or Illegally Exported Cultural Objects,[65] the situation of cultural property whose restitution is sought serves as the basis for the jurisdiction of the court for actions for restitution. Similarly, an exception was proposed for action for payment of the remuneration claimed for salvage of a cargo or freight. Jurisdiction would be conferred on the court of the place where the cargo or freight were arrested to secure such payment. However, even in this case, the rule would carry an additional condition (the plaintiff would have to prove that the defendant had an interest in the cargo or freight) and an exception (choice of forum).

86 ***Nationality of the parties*** – The Special Commission remained divided as to whether only the jurisdiction based on the plaintiff's nationality should be prohibited or that based on the defendant's as well. Many experts were of the opinion that the forum of the defendant's nationality is inappropriate, yet perhaps not enough to make it exorbitant, especially since, in some legal systems, the court of the nationality of the defendant is regarded as the defendant's "natural" forum. However, it was pointed out that this view was perhaps outmoded, as the Italian lawmakers decided when reforming private international law in Italy, abolishing both the forum of the plaintiff's and the defendant's nationality. The Special Commission also questioned whether the forum based on the joint nationality of the parties should be excluded. However, no conclusion was reached on this matter. The possibility of implementing devices such as *forum non conveniens*, where the court is seised solely on the basis of the defendant's nationality, was also mentioned.

87 ***Domicile / habitual residence of the plaintiff*** – In this case, the *forum actoris* would be prohibited as a matter of principle even though, as many experts emphasised, such a prohibition may seem hypocritical in that certain grounds of jurisdiction laid down by the Convention would in reality amount to conferring jurisdiction on the court of the plaintiff's domicile or habitual residence. Nevertheless, it was observed that if the Convention set out certain cases in which the plaintiff's forum is acceptable, the prohibition in principle would permit a restrictive interpretation of the cases in which this forum is authorised.

88 ***Doing business*** – The discussion showed that it is not easy to understand the precise factual circumstances which, in the United States where this form of jurisdiction is familiar, permit jurisdiction to be conferred upon a particular court. To make this easier to understand, the United States delegation will undertake a study of the case law, which will be distributed to delegations in preparation for the Special Commission in 1998. As things stand, it is clear that jurisdiction based on the concept of *doing business* must be analysed together with that in contract, in tort and also in matters concerning branches as discussed above.[66] Any further discussion regarding a possible forum based on *doing business* will require an answer to the question as to the degree of "density of activity" necessary to validly found a general jurisdiction with respect to the defendant. The discussion on *doing business* will be resumed either by the Special Commission in March 1998 or November 1998.

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63 The Special Commission in 1998 will also need to consider whether exorbitant fora continue to be applicable to defendants residing within the territory of a non-Contracting State. This matter will have to be considered at the same time as the geographical scope of the future Convention.

64 *Cf. supra* Nos 62 et seq.

65 *Unidroit Convention on Stolen or Illegally Exported Cultural Objects*, adopted in Rome on 24 June 1995.

66 *Cf. supra* Nos 71 and 32 respectively.

INTERPRETATION OF THE CONVENTION

89 All delegations concurred that not only is an exchange of information on the application and implementation of the Convention essential, but also that a uniform interpretation of the future Convention might prove fundamental in that the objective of this Convention is the good international management of justice and improved efficiency for the parties in litigation. In this connection, it was observed that the undeniable success of the Brussels Convention is certainly in large measure due to the uniform interpretation given by the European Court of Justice. Although there was a rapid agreement on this, the experts were then divided on the device to be set up in order to attain this objective. While some said they favoured the creation of a true international court, many others voiced doubts, particularly in view of the financial burden such an operation would entail for the States Parties. As regards the panel of experts proposed by Preliminary Document No 7,[67] one delegation expressed doubts about the "democratic" nature of such a process, even though, as was pointed out, such device would certainly not be the first of its kind to be set up.[68] Lastly, the view was expressed that the Special Commissions for review of operation of the Convention might also be entrusted with interpretation tasks, though no particular view was expressed regarding the value of such interpretations for national courts.

WORK PROGRAMME

90 The Special Commission decided to commence its work in March 1998 with Chapter III of Preliminary Document No 7 devoted to the effects of foreign decisions. Matters bearing on jurisdiction relating to provisional and protective measures could then be discussed once more, in the light of the Note referred to above.[69] Lastly, matters relating to *lis pendens*, related actions and multiple defendants in the form of co-defence, and actions on a warranty or guarantees or in any other third party proceedings, will also be discussed. Devices such as *forum non conveniens* will also be discussed. As regards the Special Commission of November 1998, its task will be to prepare a first preliminary draft Convention, as complete as possible at that stage, to enable consultations of the widest possible scope to take place before the Special Commission in 1999, whose task will be to prepare the preliminary draft Convention to be proposed to the Diplomatic Session.

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67 Proposal made in Nos 200 and 201.

68 Similar devices exist in ICSID and WTO.

69 *Cf. supra* No 62