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**Note d'information sur les travaux des réunions informelles
tenues depuis octobre 1999 afin d'examiner et de préparer
des projets de texte portant sur des questions en suspens**

établi par le Bureau Permanent

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**Informational note on the work of the informal meetings
held since October 1999 to consider and develop
drafts on outstanding items**

drawn up by the Permanent Bureau

*Document préliminaire No 15 de mai 2001
à l'intention de la Dix-neuvième session de juin 2001*

*Preliminary Document No 15 of May 2001
for the attention of the Nineteenth Session of June 2001*

**Informational note on the work of the informal meetings
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INTRODUCTION

1. The Special Commission on general affairs and policy of the Hague Conference on Private International Law which met at The Hague from 8-12 May 2000 for the purpose of examining the status of the work in progress, in particular concerning the preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, made the following recommendations in respect of the timing and organisation of the Nineteenth Session of the Hague Conference on private international law:

~~///~~ "that the Session, which had been planned for October 2000, be postponed and be divided into two sessions, the first to be held in June 2001 and the second at the end of 2001 or the beginning of 2002;

1. The first session should last one or two weeks for the purpose of discussing any proposals which have been made, but without decisions being made at that session, unless consensus or a near consensus is reached on certain proposals;
2. The second session of two or three weeks duration should proceed in the normal way for Diplomatic Conferences;

~~///~~ that, prior to the Diplomatic Conference, meetings on an informal basis be held, open to all States, either to be arranged for that purpose or in connection with such other meetings that may be held between the Governments participating in the Hague Conference with a view to advancing the consideration and drafting of proposals for resolving important substantive and technical issues."

2. The National Organs of the Member States were informed of the meetings to be held for such purposes (as they were then known) by circular letter L.c. ON No 44(00).

3. Since the Special Commission of May 2000, the following meetings have been held in order to further prepare the first part of the Diplomatic Conference:

- Washington, DC, from 30 October to 1 November 2000, on the invitation of the United States of America (see also Note to the participants of the Special Commission on jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters of 28 September 2000, a copy of which was sent to the National Organs).
- The Hague, 11-12 December 2000, joint conference of the Organisation for Economic Co-operation Development (OECD), the International Chamber of Commerce (ICC) and the Hague Conference on Private International Law on alternative means of dispute resolution (ADR) (see circular letter L.c. ON No 62(00)).
- Basle, 13-15 December 2000, on the invitation of the Swiss Government (see circular letter L.c. ON No 44(00) and letter of invitation by the Swiss Government dated 26 October 2000).

- Geneva, 1 February 2001, Experts meeting on the intellectual property aspects of the future Convention organised in connection with the Forum on Private International Law and Intellectual Property convened by the World Intellectual Property Organisation (WIPO), held in Geneva on 30 and 31 January 2001 (see circular letter L.c. ON No 67(00)).
- Ottawa, 26 February to 2 March 2001, Experts meeting on the specific requirements of electronic commerce (see circular letter L.c. ON No 2(01)).
- Edinburgh, 23-26 April 2001, on the invitation of the Government of the United Kingdom and of the Scottish Executive Commission (see letter of invitation by the Scottish Executive dated 12 March 2001 and circular letter L.c. ON No 25(01)).

4. As far as The Hague joint OECD/ICC/Hague Conference on private international law meeting on ADR (held at The Hague 11-12 December 2000) is concerned, a report dated 19 April 2001 was prepared by the OECD, in English only, entitled: "Building trust in the on-line environment: Business to consumer dispute resolution" which is accessible on the OECD website at <http://www.oecd.org/dsti/sti/it/secur/act> (87 pages).

5. A full report on the Experts meeting on the intellectual property aspects of the future Convention (held in Geneva, 1 February 2001) was drawn up in English and French, by the Permanent Bureau, see Enforcement of Judgments – Preliminary Document No 13.

6. Although no reports were prepared of the informal meetings in Washington, Basle, Ottawa and Geneva, the work of these meetings culminated in a series of proposals which were put forward at the Edinburgh meeting. A report on the proceedings of the Edinburgh meeting with working documents attached, was prepared by the Scottish Executive and may be obtained with the Civil Justice & International Division of the Justice Department¹ (in English only).

7. The reader will find attached the documents resulting from the working groups in Edinburgh and several other documents distributed at that meeting, with a translation into French drawn up by the Permanent Bureau, as follows:

Annex I Synthesis document on Contract Jurisdiction, prepared by the working group on contracts;

Annex II Synthesis document on Jurisdiction for Torts or Delicts, prepared by the working group on torts;

Annex III-A Synthesis document on consumer and employment contracts, prepared by the working group on consumer contracts;

Annex III-B Proposal French delegation for consumers;

Annex IV Report of the working group on intellectual property;

Annex V Note in relation to provisional and protective measures;

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- Annex VI-A** Prohibited grounds of jurisdiction - Proposal from Japan
- Annex VI-B** Prohibited grounds of jurisdiction - Proposal from the United Kingdom
- Annex VI-C** Prohibited grounds of jurisdiction - Proposal from Germany;
- Annex VII** Formal structure of the Convention - possible approaches, joint note and three proposals from R. Brand, D. Goddard and A. Bucher;
- Annex VIII** Form A - Confirmation of judgment, proposal from the United States.

Contract Jurisdiction

1. A plaintiff may bring an action in contract in the courts of a State in which -
 - a) in matters relating to the supply of goods, the goods were supplied in whole or in part;
 - b) in matters relating to the provision of services, the services were provided in whole or in part;
 - c) in matters relating both to the supply of goods and the provision of services, performance of the principal obligation took place in whole or in part.
2. A plaintiff may bring an action in contract in the courts of the State in which the defendant has engaged in frequent or significant activity, or has [intentionally] directed such activity into that State, for the purpose of promoting [the conclusion of contracts] [, or negotiating] or performing a contract, provided that the claim is based on a contract directly related to that activity.
3. The preceding paragraphs do not apply to situations where the defendant has taken reasonable steps to avoid entering into or performing an obligation in that State.
- [4. The preceding paragraphs do not apply to situations where the sole relevant activity is the payment of money provided that this exclusion shall not apply where the performance required on both sides consists of the payment of money (such as a loan or a contract for the purchase and sale of currency).]

Article 10 Jurisdiction for Torts or Delicts

- 1 A plaintiff may bring an action in tort or delict in the courts of the State -
 - a) in which the act or omission that caused injury occurred, or
 - b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.
- [2 A plaintiff may bring an action in tort or delict in the courts of the State in which the defendant has engaged in frequent or significant activity, or has [intentionally] directed such activity into that State, provided that the claim arises out of that activity.]¹
- [3 The preceding paragraphs do not apply to situations where the defendant has taken reasonable steps to avoid acting in or directing activity into that State.]
- [4 A plaintiff may also bring an action in accordance with paragraph 1 [or 2] when the act or omission, or the injury may occur.]
- 5 If an action is brought in the courts of a State only on the basis that the injury arose [or may occur] there, those courts shall have jurisdiction only in respect of the injury that occurred [or may occur] in that State, unless the injured person has his or her habitual residence in that State.

¹ When considering this provision, the scope of paragraph 1 will have equally to be examined.

Consumer contracts and employment contracts

Version 0.6 (presented to Plenary Session in Edinburgh)

NOTE: The use of square brackets in this text indicates matters which require further consideration.

Article 7 *Contracts concluded by consumers*

1. This Article applies to contracts concluded between a natural person who concludes a contract primarily for personal, family or household purposes, (the consumer), and a person who concludes a contract for the purposes of its trade or profession (the business) [, unless the business demonstrates that it neither knew nor had reason to know that the consumer was concluding the contract primarily for personal, family or household purposes and would not have entered into the contract if it had known otherwise].
2. A consumer may bring proceedings in the courts of the State in which the consumer is habitually resident if the conclusion of the contract to which the claim relates arises out of activities which the business engaged in in that State, or directed to that State[, unless:
 - a. the consumer took the steps necessary for the conclusion of the contract in another State; and
 - b. {the goods or services were supplied to the consumer while the consumer was present in that other State}].
3. For the purposes of paragraph (2) activity by the business:
 - a. includes the promotion, solicitation or negotiation of contracts; and
 - b. [shall not be regarded as being directed to a State if the business demonstrates that it took reasonable steps to avoid concluding contracts with consumers habitually resident in that State.]
4. A business may bring proceedings against a consumer under this Convention only:
 - a. in the courts of the State in which the consumer is habitually resident; or
 - b. if the business and the consumer have entered into an agreement to which paragraph 5(a) or (c) or (d) applies, in the court designated in that agreement.
5. Article 4 applies to an agreement between a business and a consumer only:
 - a. if the agreement is entered into after the dispute has arisen; or
 - b. to the extent that it allows the consumer to bring proceedings in the courts of a State other than the State in which the consumer is habitually resident; or
 - c. [if at the time the agreement is entered into, both the consumer and the business are habitually resident in the same State, and the agreement

confers jurisdiction on the courts of that State, provided that the agreement is not contrary to the law of that State¹; or]

- d. to the extent that the agreement is binding on the consumer under the law of the State in which the consumer is habitually resident at the time the agreement is entered into.

Article 8 Individual contracts of employment

1. This Article applies in matters relating to individual contracts of employment.
2. An employee may bring a claim against the employer
 - a. In the courts of the State in which the employee habitually carries out or carried out his work, [unless it was not reasonably foreseeable by the employer that the employee would habitually carry out his work in that State]; or
 - b. If the employee does not or did not habitually carry out his work in any one State, in the courts of the State in which the establishment that engaged the employee is or was situated.
3. An employer may bring a claim against the employee under this Convention only –
 - a. in the courts of the State:
 - (i) in which the employee is habitually resident; or
 - (ii) in which the employee habitually carries out his work; or
 - b. if the employee and the employer have entered into an agreement to which paragraph 4(b) or (c) applies, in the court designated in that agreement.
4. Article 4 applies to an agreement between an employee and an employer only:
 - a. to the extent that it allows the employee to bring proceedings in the courts of a State other than the State referred to in paragraph 2; or
 - b. if the agreement is entered into after the dispute has arisen; or
 - c. to the extent that the agreement is binding on the employee under the law of the State in which the employee is resident at the time the agreement is entered into.

Article 25

“Subject to Article 25 bis ...”

[Article 25 bis

1. [A Contracting State may make a declaration that it will not recognise or enforce a judgment under this Chapter, or a declaration specifying the conditions under

¹ Cf. text of Brussels Regulation Article 17(3).

which it will recognise or enforce a judgment under this Chapter, where:

- a. the judgment was rendered by the court of origin under Article 7(2) or Article 8(2); and
- b. the parties had entered into an agreement which conforms with the requirements of Article 4 designating a court other than the court of origin.

[A declaration under this Article may not deny recognition and enforcement of a judgment given under Article 7(2) or Article 8(2) if the Contracting State making the declaration would exercise jurisdiction under the relevant Article in a corresponding case.]

2. Recognition or enforcement of a judgment may be refused by a Contracting State that has made a declaration contemplated by paragraph 1 in accordance with the terms of that declaration.]

ARTICLE X

Each Contracting State shall declare, when ratifying this Convention or acceding to it, or at any later moment, whether decisions taken on the basis of Article 7 in the other Contracting States are recognised or enforced on its territory in accordance with Chapter III of this Convention. Such a declaration shall have effect exclusively in the relationship with other Contracting States, which have declared that they accept to recognise or enforce such decisions.

ARTICLE 25 BIS

A judgment taken in accordance with Article 7 where the business and the consumer had entered into an agreement of choice of forum which conforms with the requirements of Article 4 entered into before the dispute arose and designating a court other than the court of origin, shall duly be recognised and enforced in accordance with this chapter only between the Contracting States which have made the declaration in accordance with Article X.

REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY

2nd Revised version after Plenary discussion on April 26, 2001

The Working Group on Intellectual Property, which met in Edinburgh on April 25-26, 2001, decided not to take the present language of Article 12 (4)-(6) as a basis for its discussion. Instead, with a view to facilitating the discussion (in the group as well as later in the Plenary and during future national consultation), it was felt helpful to deal with each IP right separately. They might require different treatment, in particular as regards possible exclusive jurisdiction, and the separation for the time being could help to identify the needs and interests with regard to each specific IP right more clearly. If, at some later stage, it should turn out that similar or even identical rules for different IP rights seem appropriate, the separate draft provisions could easily be merged.¹

The group therefore discussed the following draft Articles in Treaty language concerning patents and trademarks (both registered and unregistered). It then had a general discussion about the possible treatment of copyright and other IP rights. This discussion, which, due to the limited time available, could not be concluded, is reported below under 3.

Further information, in particular about the policy behind the words "in which, or for which", in line 2 of subsection (1) of the proposals concerning patents and trademarks, and the subsequent part of this subsection, may be obtained from the UK document "IP – The way forward" which provided the basis for the discussion.

In addition to the latter document and this report, it is recalled that some of the "Observations on the Preliminary Draft Convention" which were submitted to the Permanent Bureau by Member States and observers, equally take a position on IP issues.

1. PATENTS

1. In proceedings concerning the grant, revocation, validity², invalidity, enforceability, unenforceability,³ or infringement⁴ of a patent⁵, the courts⁶ of the Contracting State in which,

¹ If at some further stage this or similar language were to be adopted into a draft of the Convention, the present language of 12(4), 12(5) & 12(6) would have to be deleted. It was suggested that 12(3) might then have to be revised in an effort to clearly exclude Intellectual Property from the language of that provision.

² There was complete consensus among the working group members on maintaining exclusive jurisdiction for the validity of patents, assuming that patents are within the scope of the convention.

³ Unenforceability concerns acts of a patent owner that create a misuse of the patent, such as antitrust patent tying, collecting double royalties or illegal pooling or inequitable conduct before the patent office in prosecuting a patent application, such as filing false affidavits or omitting known prior art which materially affects the patentability of claim(s). Some participants felt that this was an issue of unfair competition that should not be dealt with in this article.

⁴ The prevailing view was that exclusive jurisdiction should exist for the infringement of a patent; however, one member of the group noted its opposition. The concern in creating exclusive jurisdiction in the case of infringement is that at present, claims for infringement of parallel patents registered for several States parties to the European Patent Convention may, under the jurisdiction rules provided by the Conventions of Brussels and Lugano, be consolidated in one single forum, e.g. at the defendant's domicile. If exclusivity under the future Hague Convention also applied to these cases, this would no longer be possible. Other European Union countries thought this should be dealt with in Article 37 of the Convention, which could solve this problem by allowing EU Member States and other States party to the European Patent Convention to maintain existing possibilities for consolidating infringement actions through the disconnection clause.

⁵ There was some discussion as to whether or not abandonment should be included in paragraph 1, as it has been in the provision on trademarks.

⁶ The reason for the use of a number of related terms is to cover concepts as they are described in different jurisdictions. It was suggested that it might be better if one generic term were to be used to describe these related concepts, while making it clear in the explanatory report that this one term is intended to reflect related concepts as

Annex IV

or for which, the patent was granted shall have exclusive jurisdiction; provided that, where, under an international instrument in force in the Contracting State in question, some other court or courts replace the national courts with regard to some or all of the above matters, that court or those courts shall have exclusive jurisdiction to the extent to which they replace the national courts. In this paragraph, "court" includes any organ, administrative agency or entity empowered to give binding decisions on legal controversies; and "international instrument" means an international convention or a binding measure adopted by an organization established by treaty.

2. Paragraph 1 shall not apply where one of the above matters arises as an incidental question. For the purposes of this article, an incidental question is a question that arises in an action which is not itself a claim or counterclaim for patent infringement, for a grant or revocation, or for a declaratory judgment of validity, invalidity, enforceability or unenforceability of a patent.⁷

2. TRADEMARKS⁸

1. In proceedings concerning the infringement,⁹ validity, abandonment, nullity, cancellation, or revocation of a registered trademark or a mark for which an application for registration has been filed, the courts of the Contracting State in which, or for which, the trademark was registered, or the application has been filed, shall have exclusive jurisdiction; provided that, where, under an international instrument in force in the Contracting State in question, some other court or courts replace the national courts with regard to some or all of the above matters, that court or those courts shall have exclusive jurisdiction to the extent to which they replace the national courts. In this paragraph, "court" includes any organ, administrative agency, or entity empowered to give binding decisions on legal controversies; and "international instrument" means an international convention or a binding measure adopted by an organization established by treaty.

2. In proceedings concerning the infringement, registration, validity, nullity, abandonment, cancellation, or revocation of an unregistered trademark, the courts of the Contracting State in which rights in the trademark arose shall have exclusive jurisdiction; provided that where,

expressed by different countries in their national law. The concern was that by making a list it might be considered by courts to be exhaustive when we are unlikely to have included all possible and desirable terms.

⁷ Concerns were expressed about this paragraph, in particular there was concern about a possible "inter partes" effect of the judgment made on the incidental question. It was also noted that even if the effect of the judgment concerning the incidental question is limited to the parties, the judgment may have a preclusionary effect in other cases in other States, when produced by one of the parties. In other words, there may be some collateral estoppel issues that must be considered when looking at this provision.

⁸ There was complete consensus among the working group members on maintaining exclusive jurisdiction for the validity of trademarks, assuming that trademarks are within the scope of the convention.

⁹ Certain members of the working group do not want to include infringement as a ground for exclusive jurisdiction, and there were other comments made with regard to whether or not including infringement of either registered or unregistered trademarks was sensible, because the need for consolidation may be greater in the context of trademarks as opposed to patents, and the link between validity and infringement is not as obvious (i.e. unlike in patent infringement cases, where invalidity is raised as a defense very frequently, this does not seem to be the case for trademarks in as many legal systems).

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under an international instrument in force in the Contracting State in question, some other court or courts replace the national courts with regard to some or all of the above matters, that court or those courts shall have exclusive jurisdiction to the extent to which they replace the national courts. In this paragraph, "court" includes any organ, administrative agency, or entity empowered to give binding decisions on legal controversies; and "international instrument" means an international convention or a measure adopted by an organization established by treaty.

[3. Paragraph 1 and 2 shall not apply where one of the above matters arises as an incidental question. For the purposes of this article, an incidental question is a question that arises in an action which is not itself a claim or counterclaim for trademark infringement, nullity or abandonment, or for a declaratory judgment of validity, invalidity, nullity or abandonment of a trademark.]^{10, 11}

3. COPYRIGHT**A. Possible Inclusion into Article 12:**

1. Assuming that copyrights are within the scope of the Convention, no one in the working group was in favor of exclusive jurisdiction over copyrights.

2. The last sentence of Article 12 (4) reads: "[t]his shall not apply to copyright or any neighboring rights, even though registration or deposit of such rights is possible." Many members of the working group felt that this could be deleted if Article 12 were redrafted to explicitly and exhaustively identify which IP rights be covered by any exclusive jurisdiction under the Convention.

Given that the group agreed that Article 12 should not apply to copyrights, the other bases for jurisdiction in copyright cases would, in particular, be Articles 3 and 10 (furthermore, Article 6, where applicable, given its limited scope concerning contracts on goods and services, and Articles 4, 5, and 14 to 16). Due to the limited time available, the group only addressed Article 10.

B. Article 10 Concerns:

1. It was pointed out that some products and/or inventions might be protected by different IP rights. For example, software can be covered under both patent and copyright law. Other works may be protected by (unregistered) copyright and (registered) design protection. The group discussed whether it would be a problem if one of these rights fell under an exclusive jurisdiction while the other did not. The prevailing opinion, however, in particular among litigators, seemed to be that this was merely increasing the number of fora available to the plaintiff and therefore rather an advantage than a problem.

¹⁰ The representative from the International Trademark Association objected to the inclusion of this provision in the context of trademarks. This requires further discussion.

¹¹ Concerns were expressed about this paragraph, in particular there was concern about a possible "inter partes" effect of the judgment made on the incidental question. It was also noted that even if the effect of the judgment concerning the incidental question is limited to the parties, the judgment may have a preclusionary effect in other cases in other States, when produced by one of the parties. In other words, there may be some collateral estoppel issues that must be considered when looking at this provision.

2. One concern raised was that plaintiffs could potentially use Article 10 to shop for a forum that would apply a local law with regard to copyrights that was particularly advantageous for them. Several participants noted that both the conflict of law rules and the substantive laws on, for example, initial ownership and transfer of rights, are very different from State to State. Other members of the group felt that copyright law was sufficiently harmonious throughout the world so that this would not be a serious problem, and mentioned such international instruments as the Berne Convention and TRIPs under the WTO. One member of the group responded that TRIPs are not universal and there are real concerns to be addressed here.

The following options to handle the possible problem of insufficiently harmonized conflict of law rules and substantive copyright laws were identified:

- A. to exclude copyright from the scope of the Convention
- B. to include copyright in the scope of the Convention without creating specific rules for this area (i.e. not to do anything about the problem of possible forum shopping)
- C. to address the issue in the section on refusal of recognition by allowing the court addressed to refuse to recognize and enforce a judgment from the court of origin if they disagreed with the court of origin's choice of law
- D. to create a system of declarations/reservations limiting recognition and enforcement to TRIPs members only or to other countries with sufficiently harmonized copyright laws.

3. It was agreed that internet issues are a concern which need to be looked at further. ISPs were particularly worried that they would be subject to liability in other States. The same was true for consumer representatives who feared that consumers might be exposed to liability claims abroad for alleged infringement of foreign IP rights, and, under the present Article 10 para. 4, even for worldwide damages in the State of the plaintiffs habitual residence, if part of the injury occurred there.

4. The group also discussed other industrial property rights, for example, models and designs, plant breeders rights, integrated circuits and semiconductors. Although the group did not have much time to discuss this topic at length, it was suggested that, at least as far as the registered rights were concerned, these rights might be treated the same way as the group suggested patents should be treated.

**NOTE IN RELATION TO PROVISIONAL AND PROTECTIVE MEASURES –
EDINBURGH MEETING 25 APRIL 2001¹**

1. Delete the existing Article 13.
2. Delete the reference to Article 13 in Article 17.
3. Insert a new Article 22 bis:

Article 22 bis Provisional and protective measures

1. The courts of a Contracting State may, even where they do not have jurisdiction to determine the merits of a claim, order provisional or protective measures –

[(a) in respect of property in that State; or]

[(b) the enforcement of which is limited to the territory of that State,]

to protect on an interim basis a claim on the merits which is pending or to be brought by the requesting party in a Contracting State [which has jurisdiction to determine that claim under Articles [3 to 12]].
 2. Nothing in this Convention shall prevent a court in a Contracting State from ordering provisional or protective measures for the purpose of protecting on an interim basis a claim on the merits which is pending or to be brought by the requesting party in another State.
4. Exclude provisional and protective measures from the definition of “judgment” in Article 23 as follows:

Article 23 Definition of “judgment”

For the purposes of this Chapter “judgment” means any decision on the merits given by a court, whatever it may be called, including a decree or order, as well as the determination of costs or expenses by an officer of the court, provided it relates to a decision which may be recognised or enforced under the Convention.

¹ The basic approach is that:

- 🏛️🏛️ there should be no recognition and enforcement of provisional and protective measures under the Convention;
- 🏛️🏛️ the Convention should not limit the grant of provisional and protective measures under national law;
- 🏛️🏛️ the Convention should empower the courts of one Contracting State to grant provisional and protective measures in support of proceedings in another Contracting State.

A - A draft submitted by Japan on 25 April 2001 in Edinburgh

Article 18 *Prohibited grounds of jurisdiction*

1. Where the defendant is habitually resident in a Contracting State, the application of a rule of jurisdiction provided for under the national law of a Contracting State is prohibited if there is no substantial connection between that State and the dispute.
2. In particular, jurisdiction shall not be exercised by the courts of a Contracting State on the basis solely of one or more of the following –
 - a) the presence or the seizure in that State of property belonging to the defendant, except where the dispute is directly related to that property;
 - b) the nationality of the plaintiff;
 - c) the nationality of the defendant;
 - d) the domicile, habitual or temporary residence, or presence of the plaintiff in that State;
 - e) the carrying on of commercial or other activities by the defendant in that State, except where the dispute is directly related to those activities;
 - f) the service of a writ upon the defendant in that State;
 - g) the unilateral designation of the forum by the plaintiff;
 - h) proceedings in that State for declaration of enforceability or registration or for the enforcement of a judgment, except where the dispute is directly related to such proceedings;
 - i) the temporary residence or presence of the defendant in that State;
 - j) the signing in that State of the contract from which the dispute arises;
 - k) the location of a subsidiary or other related entity of the defendant in that State.**

2a. Preceding paragraphs shall not apply where in exceptional circumstances application thereof would result in denial of justice.*

1. ...

*** Note: Denial of justice is a violation of the Constitution. The plaintiffs who filed a lawsuit in country A shall be given a chance to have his dispute resolved. In case where a resulting judgment in the court B whose jurisdiction is admitted does not comply with the requirements for recognition or enforcement of country A, his right to have his dispute resolved in country A would be denied at all. Article 21(2) seems to be based upon the same consideration as above. Also, we will have to consider the same situation that might happen under Article 4.**

B - Proposal from the United Kingdom

Article 18(2)(K)

Any other ground of jurisdiction where the connection between a defendant and a Contracting State is not such as to justify a reasonable assumption of jurisdiction by the courts of that State.

C - Proposal from Germany

Article 18(2)(K)

Any other comparably unsubstantial connection between that State and either the dispute or the defendant.

FORMAL STRUCTURE OF THE CONVENTION – POSSIBLE APPROACHES

Three proposals were put to the Edinburgh meeting in relation to the formal structure of the proposed Convention. Although they differ in some respects, they are motivated by similar concerns, and their authors agree on the following fundamental issues:

- ~~///~~ the *formal* structure of the Convention needs to be designed to assist readers to understand the *conceptual* structure of the Convention;
- ~~///~~ this could be achieved by various techniques, including a road map provision at the beginning of the Convention, use of appropriate headings and subheadings, and the order in which the provisions are set out;
- ~~///~~ the formal structures suggested in the attached proposals were all intended by their authors to make it clear that the Convention is a mixed Convention, and to shed light on what this means in practice for users of the Convention;
- ~~///~~ in particular, each of the proposals was intended by its author to distinguish clearly between (and to shed some light on the nature of):
 - ?? the “white list” grounds of jurisdiction, which each Contracting State will make available, and which are the basis for recognition and enforcement of judgments in other Contracting States;
 - ?? the “black list” grounds of jurisdiction, which must not be exercised by Contracting States against defendants from other Contracting States;
 - ?? the grey zone, where Contracting States may exercise jurisdiction under national law: judgments founded on grey zone heads of jurisdiction are not entitled to recognition and enforcement under the Convention, but may be recognised and enforced under national law.

An appropriate formal structure for the Convention will need to be determined at the Diplomatic Conference in June.

Ron Brand
Andreas Bucher
David Goddard

Possible Structure of the Hague Convention¹

CHAPTER I SCOPE OF THE CONVENTION

Article 1 Substantive scope

Article 2 Territorial scope

CHAPTER II RECOGNITION OF FOREIGN JUDGMENTS

Article 3 Judgments based on required bases of jurisdiction to be recognised and enforced

Article 4 Judgments based on prohibited bases of jurisdiction not to be recognised or enforced

Article 5 Judgments based on permitted bases of jurisdiction to be subject to national law rules on recognition and enforcement

Article 6 Definition of "judgment"

Article 7 Verification of jurisdiction

Article 8 Grounds for refusal of recognition or enforcement

Article 9 Damages

Article 10 Documents to be produced

Article 11 Procedure

Article 12 Costs of proceedings

Article 13 Severability

Article 14 Settlements

CHAPTER III JURISDICTION

Article 15 Jurisdiction based on choice of court

Article 16 Jurisdiction based on defendant's habitual residence

Article 17 Jurisdiction based on appearance without contest

Article 18 Jurisdiction based on defendant's branch, agency or establishment

Article 19 Jurisdiction for counter-claims

Article 20 Contracts

Article 21 Jurisdiction for torts or delicts

Article 22 Prohibited grounds of jurisdiction

Article 23 Permitted grounds of jurisdiction based on national law

Article 24 Authority of the court seised

Article 25 Stay of proceedings pending notification to the defendant

CHAPTER IV GENERAL PROVISIONS

¹ Ron Brand, 25.4.2001

**DRAFT CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS
IN CIVIL AND COMMERCIAL MATTERS**

outline of structure for discussion purposes – April 2001¹

PREAMBLE

CHAPTER I - SCOPE OF THE CONVENTION

Substantive scope

Article 1bis

This Convention –

1. sets out [in Chapter IIA] certain grounds of jurisdiction which must be exercised by the courts of Contracting States in cases falling within the scope of the Convention;
2. provides [in Chapter III] for judgments given on the basis of those grounds of jurisdiction to be recognised and enforced in other Contracting States;
3. provides [in Chapter IIB] for Contracting States to refrain from exercising jurisdiction:
 - (a) in cases where another Contracting State has exclusive jurisdiction under [Articles [4, 11(1) 12]]; and
 - (b) against a defendant habitually resident in a Contracting State, on the basis of certain prohibited grounds of jurisdiction;
4. provides [in Article [26]] that a judgment given on a ground of jurisdiction prohibited by Chapter IIB shall not be recognised or enforced;
5. does not prevent the application by Contracting States of rules of jurisdiction provided for under national law, subject only to the restrictions in paragraph 3. Judgments based upon such grounds are not entitled to recognition and enforcement under the Convention, but may be recognised and enforced in another Contracting State in accordance with the national law of that State.

CHAPTER II - JURISDICTION AND RELATED MATTERS

Application of Chapter II

The courts of a Contracting State shall apply Articles [3-22 quater] unless all the parties are habitually resident in that State [or are not habitually resident in any other Contracting State]. Articles 21, 22 and 22 bis shall also apply where a court of a Contracting State is required to determine whether to decline jurisdiction or suspend its proceedings on the grounds

¹ David Goddard, New Zealand.

that the dispute ought to be determined in the courts of another Contracting State.

SUBCHAPTER IIA – GROUNDS OF JURISDICTION

Defendant's forum

Choice of court

Appearance by the defendant

Contracts

Contracts concluded by consumers

Article 1 Individual contracts of employment

Branches

Torts or delicts

Trusts

Exclusive jurisdiction

[Omitted – see Arts 18, 22 ter]

Multiple defendants

Counter-claims

Third party claims

[Omitted – see Art 1 bis]

SUBCHAPTER IIB – PROHIBITED JURISDICTIONS

Prohibited grounds of jurisdiction

Article 18 bis Effect of exclusive jurisdictions

The courts of a Contracting State may not exercise jurisdiction to hear a claim, whether under the Convention or under national law, if the courts of another Contracting State have exclusive jurisdiction to hear that claim under Articles [4, 11(1) and 12].

SUBCHAPTER IIC – PROCEDURAL MATTERS

Authority of the court seised

Article 20 Notification of proceedings

Article 21 Lis pendens

Article 22 Exceptional circumstances for declining jurisdiction

Article 22 bis Consolidation of related actions

Article 22 ter Provisional and protective measures

Article 22 quater Judicial co-operation

CHAPTER III - RECOGNITION AND ENFORCEMENT

Article 23 Definition of "judgment"

Article 24 Application of Chapter III

The provisions of this Chapter apply to the recognition and enforcement in a Contracting State of a judgment rendered in another Contracting State.

Article 25 Judgments must be enforceable in State of origin

Article 26 Judgments that must not be enforced or recognised

A judgment given by a court of a Contracting State inconsistently with [Article 18 or Article 18 bis] shall not be recognised or enforced in a Contracting State under the Convention or under national law.

Article 1 Verification of jurisdiction

Article 28 Grounds for refusal of recognition or enforcement

Article 28 bis Declaration that certain judgments may not be recognised or enforced

Article 29 Documents to be produced

Article 2 Procedure

Costs of proceedings

Article 32 Legal aid

Article 33 Damages

Article 34 Severability

Article 35 Authentic instruments

Article 36 Settlements

CHAPTER IV - GENERAL PROVISIONS

Articles 37 -46

Structure of the Convention¹

Article 1 a Object of the Convention

- 1 The rules of Chapter II determine the grounds of jurisdiction on the basis of which courts of Contracting States may render judgments entitled to recognition or enforcement in the other Contracting States, and ancillary procedural questions.
- 2 The rules of Chapter III determine the scope left to national law of Contracting States to determine jurisdiction of the courts, provided the judgments rendered by such courts are not entitled to recognition or enforcement in Contracting States under this Convention.
- 3 The rules of Chapter IV determine the grounds of jurisdiction which are prohibited under the Convention and which, in case a judgment is rendered on such a ground, will prohibit recognition and enforcement in another Contracting State.
- 4 The rules of Chapter V and VI contain, respectively, general and final provisions related to the application of this Convention.

Chapter II Jurisdiction, Recognition and Enforcement under the Convention

- Section 1: Required Basis of Jurisdiction
[Articles 3-16]
- Section 2: Recognition and Enforcement
[Articles 23, 25-36]
- Section 3: Ancillary and Procedural Provisions
[Articles 19-22]

Chapter III Jurisdiction, Recognition and Enforcement under the national law of Contracting States

[Articles 17, 24]

Chapter IV Prohibition of Jurisdiction, Recognition and Enforcement under the Convention

- Section 1: Prohibited Grounds of Jurisdiction
[Article 18]
- Section 2: Prohibition of Recognition and Enforcement
[Article 26]

Chapter V General Provisions

Chapter VI Final Provisions

¹ A. Bucher, 24.4.2001

U.S. DRAFT – April 13, 2001

Annex to the Convention
Forms

FORM A

CONFIRMATION OF JUDGMENT

(Sample form confirming the issuance of a judgment by the Court of Origin for the purposes of recognition and enforcement under the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (the “Convention”))

(THE COURT OF ORIGIN)

(ADDRESS OF THE COURT OF ORIGIN)

(CONTACT PERSON AT THE COURT OF ORIGIN)

(TEL./FAX/EMAIL OF THE COURT OF ORIGIN)

(PLAINTIFF)

Case / Docket Number:

v.

(DEFENDANT)

(THE COURT OF ORIGIN) hereby confirms that it rendered a judgment in the above captioned matter on (DATE) in (CITY, STATE, COUNTRY), which is a Contracting State to the Convention. Attached to this form is a complete and certified copy of the judgment rendered by (THE COURT OF ORIGIN).¹

This Court based its jurisdiction over the defendant(s) on the following article, or articles of the Convention, as implemented under the law governing the proceedings of this Court:²

.....
.....

¹ Article 29(1)(a).

² revised.

This Court based its jurisdiction over the defendant(s) on the following findings of fact (*If the findings of fact are stated in the judgment or accompanying decision, indicate the relevant passages of the judgment and the decision*):

.....
.....
.....
.....

This Court awarded the following amount of money damages.....

.....

This Court included within the total award of damages the following court costs, expenses related to the proceedings or attorneys fees (*Please specify the amounts of such awards*):.....

.....
.....
.....
.....

This Court awarded, in whole or in part, the following non-monetary remedy (*Please describe the nature of the remedy*):.....

.....
.....
.....
.....
.....
.....

This judgment was rendered by default:

YES _____ NO _____

(If this judgment was rendered by default, please attach the original or a certified copy of the document verifying notice to the defendant of the proceedings.)³⁴

This judgment (or some part thereof) is currently the subject of review in (COUNTRY OF THE COURT OF ORIGIN):⁵

YES _____ NO _____

³ Article 27(2) – If the judgment was by default, then the Court being addressed by this form is not bound by the findings of fact on which the court of origin based its jurisdiction.

⁴ Article 29(1)(b).

⁵ Article 25(4).

This judgment (or some part thereof) is presently enforceable in (COUNTRY OF THE COURT OF ORIGIN):⁶

YES _____ NO _____

List of documents:

.....
.....
.....
.....
.....
.....
.....
.....

Dated this day of, 20.....

.....
Signature and/or stamp

⁶ Article 25(3).