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RAPPORT DE LA PREMIÈRE RÉUNION DU GROUPE DE TRAVAIL INFORMEL SUR LE PROJET DES JUGEMENTS – 22 AU 25 OCTOBRE 2002

préparé par Andrea Schulz, Premier secrétaire

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REPORT ON THE FIRST MEETING OF THE INFORMAL WORKING GROUP ON THE JUDGMENTS PROJECT – OCTOBER 22-25, 2002

prepared by Andrea Schulz, First Secretary

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I. INTRODUCTION

From 22-25 October 2002 the informal working group on the Judgments Project held a first meeting of 3½ days. The meeting was chaired by Professor Allan Philip from Denmark and took place at the Permanent Bureau of the Hague Conference on Private International Law in The Hague. The members of the group, representing the global membership of the Hague Conference and a variety of legal systems, are Marie-Odile Baur (European Commission), Paul Beaumont (United Kingdom), Antonio Boggiano (Argentina; apologised for this meeting), Alegría Borrás (Spain), Andreas Bucher (Switzerland), Masato Dogauchi (Japan), Antonio Gidi (Brazil), David Goddard (New Zealand; apologised for this meeting), Jeffrey Kovar (United States of America), Nagla Nassar (Egypt), Gugu Gwen Ncongwane (South Africa), Tatyana Neshataeva (Russian Federation), Fausto Pocar (Italy), Kathryn Sabo (Canada), Peter Trooboff (United States of America), José Luis Siqueiros (Mexico), Sun Jin (China), and Rolf Wagner (Germany). They are participating in their personal capacity.

As decided by the Commission on General Affairs and Policy of the Hague Conference at its meeting from 22-24 April 2002, the informal group shall explore whether a text could be presented to a Special Commission, to be held in mid-2003, with a sufficient prospect of reaching agreement. The group therefore discussed the desirability of trying to achieve a single text for referral to a Special Commission, with the belief that a unified endorsement from the group would provide the most effective guidance for government delegations. The work of the group follows a "bottom-up" working method. The first meeting focused on exclusive choice of court clauses in business-to-business (B2B) cases. Possible convention requirements on formal and substantive validity of such clauses were discussed, as well as the possible scope of a rule on choice of court clauses, the relationship with other Conventions, bilateralisation and the applicability or non-applicability of national and/or Convention rules on *lis pendens* and *forum non conveniens,* the problem of personal versus subject matter jurisdiction and the question of interim relief.

The group agreed that two or three more meetings would probably be necessary, the next one to take place from 6-9 January 2003 in The Hague, stretching over three full working days. The January meeting will continue the discussion on choice of court clauses, including non-exclusive choice of court clauses which might require a different treatment in some respects than exclusive choice of court clauses. If time permits, or in future meetings, it is planned to then move on to discuss possible further bases of jurisdiction to be added. Such grounds as identified by the Commission on General Affairs could be consent/waiver/submission, counter-claims, defendant's forum. Subsequent meetings of the informal group could also cover other items explicitly mentioned in April 2002 such as trusts, branch jurisdiction and physical torts.

Preliminary Document No 19 which had been prepared by the Permanent Bureau in order to facilitate the work of the informal group served as a basis for the discussion. The paper suggests that many drafting issues will depend on the final scope and shape of the convention, in particular on whether there will be several white list grounds of jurisdiction. Therefore, the group focused first on principles rather than on drafting.

This report will therefore set out a description of the discussions of those principles. Where the group produced some tentative draft provisions, however, these are attached to this report, and comments on them are welcome. It has to be stressed that the participants took part in the discussions in their personal capacity and are therefore neither in a position nor willing to commit or bind any government.

Rather than retracing the sequence of discussions in chronological order, this report will treat the issues item by item.

II. FORMAL VALIDITY

As a starting point for its deliberations, the group took Article 4(2) of the Interim Text which had been accepted by agreement during the First Part of the Diplomatic Conference in June 2001.

For the sake of clarification, the group suggested to change the words "the parties" in Article 4(2)(c) to "the**se** parties". This amendment was expected to make it even clearer that (c) requires that the parties in question must have observed the usage in the past, while (d) requires the objective existence of a usage among parties to contracts of the same nature, but not necessarily a usage of the parties concerned in the individual case.

Moreover, in order to make clear that (a)–(d) contain alternatives and not cumulative requirements, the group suggested to add the word "or" at the end of (c).

A concern was voiced about (d) which could commit parties to a choice of court clause valid as to form although that party had in fact not known about a usage to this effect. The group suggested to replace the words to "were or ought to have been aware" by "knew or ought to have known",[1] thereby following the example of Article 2(a) of the United Nations Convention of 11 April 1980 on Contracts for the International Sale of Goods (CISG). It was stressed that the requirements in cases where a party "ought to have known" a usage are quite high, so the party should be sufficiently protected against being subject to a usage concerning the form of choice of court clauses without actually having known that usage.

A question was raised whether the draft form requirement in Article 4(2)(b) adequately covered electronic and other forms of contracts. It was pointed out that the form requirements in Article 4(2)(b) as drafted for the digitised world followed the example of the 1996 UNCITRAL Model Law on Electronic Commerce. It would therefore have to be checked whether the technological development which has taken place since 1996 required any amendments. From recent UNCITRAL texts currently under discussion, however, it became clear that the same words are still being used in order to define the functional equivalent to written form in an electronic environment. The words relating to "data message" and its definition contained in the 1996 UNCITRAL Model Law had not been incorporated into (a) and (b) in order to provide a more technology-neutral wording. Participants thought it would be helpful to consult with IT law experts in their respective countries on whether or not the additional wording related to "data message" or any other words were necessary. In order to facilitate consultation, a text indicating the possible additions relating to "data message" is attached in No 2 of Annexe I.

It was widely stated that the convention requirements on form should be maximum standards, and that stricter form requirements of national law should not be available to hold a clause invalid.

An extensive debate developed about the question whether the Conventional form requirement should also be a minimum standard to the extent that any existing national requirements which were less strict could no longer be applied.

Some participants were of the opinion that a clause that was invalid as to form under the convention but valid as to form under less strict national form requirements should fall outside the convention, as suggested in footnote 6 of Preliminary Document No 19.

Other participants, however, favoured full harmonisation of the formal validity aspect so that national law would not apply at all in this area. In their view, it was clear that this had been the approach followed so far in that Article 17 which defines the grey area is "subject to Article 4". This suggests that within the scope of Article 4, *i.e.* for choice of court clauses, there is no grey area.

[1] Note from the Permanent Bureau: This problem is limited to the English version because the French version was already drafted following the model of the text of the CISG.

The arguments presented in favour of the latter position were legal certainty, foreseeability and uniformity, the last point becoming all the more important if the convention were eventually limited to choice of court agreements only. If the scope were so limited, then at least within that limited scope some harmonisation should be achieved. To allow lower national form requirements to continue to apply would mean to draft a simple convention, not a mixed or double one. Parties would only avail themselves of convention standards where they envisaged a need for recognition and enforcement abroad in the future. Therefore in practice, the jurisdiction rule would not be harmonised. Moreover, it was feared that, if national choice of court form standards remained available, courts would generally look into them first (or even only) instead of applying the convention and thereby complicate matters if the judgment were to be presented for recognition or enforcement abroad. Even the need for a black list delineating the grey area was raised, would national form standards remain available.

One argument advanced against an exhaustive form standard established by the convention was that this would amount to writing a double convention by "black-listing" national form requirements for choice of court clauses while all other national grounds of jurisdiction would still be available, also in the presence of a choice of court clause which was held invalid as to form under the convention. Another argument was party autonomy: the proponents of this approach asked whether it would not pay more respect to the will of the parties who had concluded a choice of court agreement and eventually appeared before the chosen court, if that court would be allowed to uphold the clause under its national law where it did not comply with the convention standards. It was also pointed out that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the New York Convention) does not prohibit lower domestic form requirements from operating outside the Convention.

The latter example revealed that there is a connection between form requirements and submission to a court by a party, *e.g.* by filing proceedings or by accepting the jurisdiction of the court. The connection becomes visible if one compares the case of a choice of court agreement concluded after the conflict has emerged (*i.e.* form requirements of Article 4(2) would apply) with the case of submission where there was no choice of court agreement. A similar treatment of both situations seemed desirable. Therefore the group decided to revisit the issue of exhaustive Conventional form requirements after examining the Conventional form standards for submission and the possible application of lower form standards of national law to submission. It was stressed that, whichever solution was chosen eventually, it would have to be made explicit.

III. SUBSTANTIVE VALIDITY

1. Capacity

In Article 4 of the Interim Text (with or without the bracketed parts in Article 4(1) at the end and in Article 4(4), questions of capacity had been left to the law of the forum actually seized, with its conflict of laws rules. During the discussion, it was pointed out that in B2B cases, capacity would often be reduced to the question who can act in the name of a company, *i.e.* to substantive company law. The group recognised that it would not be workable to create a substantive rule harmonising capacity in this convention. It was also considered unwise to restrict the possibility to take a decision on this question to the chosen court only. While some members of the group favoured a conflict of laws rule instead of leaving the question fully to national law, there were shared opinions among them on whether such a conflict of laws rule should point to the law, including the private international law rules, of the court actually seized, or of the court chosen only. Moreover, it was expected that regardless of the solution chosen, the results would in most cases be the same. Therefore the group tentatively proposed the following rule for further consideration:

"The Convention does not determine the law applicable to the capacity of the parties."

2. Consent

With regard to consent, the starting point of the discussion was again Article 4 of the Interim Text which (with or without the bracketed parts in Article 4(1) at the end and Article 4(4) leaves this to national law. The options discussed by the group were (1) to keep this solution (*i.e.* to have no rule at all), or (2) to have a conflict of laws rule pointing to the law of (a) the court chosen or (b) the court seized, in both cases either with or without including the private international law rules of that State, or (3) to create a uniform substantive rule in the convention. Another solution considered was to leave the decision to the chosen court only.

While both full substantive harmonisation and an exclusive decision of the chosen court again seemed unworkable, it was considered desirable to achieve some uniformity, and, in particular, foreseeability. The group proposed the following text:

> *"In the absence of a choice of law by the parties, the internal law of the court chosen [by the parties] shall determine whether a party has consented to the agreement."*[2]

In the exceptional case that a choice of court clause was exclusive but designated more than one court, the group suggested that in such case, with regard to consent, the laws of all the courts chosen should be applied one after the other. If the clause is valid under either one of them, it is valid in general (*favor habilitatis*).

3. International element required?

a. General international element

The question of an international element is addressed in Article 2(1), both in the chapeau and in (a).[3] Those provisions define the territorial scope of Article 4. Therefore, without the bracketed part at the end of 2(a), Article 4 would apply in the following cases: According to the chapeau of Article 2, Article 4 would apply in the courts of a Contracting State unless all the parties are habitually resident in that State (*i.e.* in the State of the court seized). (a) then extends the application of Article 4 to cases where all the parties are habitually resident in the State of the court seized but have agreed that the courts of another Contracting State shall have jurisdiction. The bracketed requirement of an international character of the dispute subsequently seeks to limit this again.

One group of participants considered this to be satisfactory. It would mean that even where two persons habitually resident in the same Contracting State choose the courts of another Contracting State, the convention would apply. They also stressed that for cases of consent/waiver/submission, there had been no suggestion made that there must be an international element, and both rules should be in line.

A number of participants were not ready to accept that a clause, by which two parties habitually resident in the same State choose the court(s) of another Contracting State without the case having any further international element, shall fall within the scope of the convention. They did not want local parties to take an otherwise purely internal case abroad by choice and therefore would limit this possibility to cases containing some international element in addition to the location of the chosen court.

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[2] It was mentioned that, where this rule points to an EU Member State, in many cases the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations could apply. It has to be noted, however, that, according to Article 1 (2) (d) of that Convention, choice of court agreements are excluded from its scope.

[3] The Article reads as follows: "Article 2 – Territorial scope

(1) The provisions of Chapter II shall apply in the courts of a Contracting State unless all the parties are habitually resident in that State. However, even if all the parties are habitually resident in that State –

(a) Article 4 shall apply if they have agreed that a court or courts of another Contracting State have jurisdiction to determine the dispute [provided that dispute is of an international character];"

Even those in favour of an international element stressed, however, that the deletion of (a) which extends Article 4 to cases where two parties are habitually resident in the same State but choose courts of another Contracting State would go too far and limit the scope of the convention too much. If then two people habitually resident, *e.g.* in Italy, buy/sell a company situated in Argentina and choose the courts of Argentina, an Italian court seized would not have to observe the clause under the Convention while such a case should be covered. Therefore, it was suggested to keep (a) and, where necessary, amend it.

One emerging possibility which gained some support as a compromise was to revert the burden of proof and replace the words in brackets at the end of Article 2(1)(a) by something similar to "unless the dispute has a purely domestic character". The group also suggested to redraft this following the example of Article 3(3) of the Rome Convention.[4]

b. Specific connection with State of chosen forum

In the context of the discussion about the international element, a related but distinct question was raised: Should a specific connection with the State of the chosen forum be required?

While the concern of those in favour of an international element in the previous section had been that parties would take domestic cases abroad, the focus here is on the situation of the chosen courts. Some participants wanted to make sure that courts do not become overburdened with cases that are unconnected with the State of the chosen forum (except for the choice of court clause). Court congestion, taxpayers' money and a preference for arbitration in those "unconnected" cases were given as reasons.

While many participants thought that these cases would not be numerous and therefore did not require special treatment in the convention, others had strong feelings and required, more specifically, a connection between the case and the State of the chosen forum in addition to the clause. They suggested to either leave it to national law whether the courts of a Contracting State would take these cases, to allow for the use of national *forum non conveniens,* to cover this by a general "escape clause" to be discussed later, or to provide for a declaration/reservation that the State requires a connection to the chosen forum (which could be supplemented by an exhaustive or non-exhaustive list of required connections in the provision on that declaration/reservation). Possible connecting factors to be included were: habitual residence of one of the parties; place of performance of the contract; the law chosen by the parties; and the location of assets to satisfy any resulting judgments.

There was strong disagreement on the whole issue.

4. General escape clause

Some participants strongly called for a general "escape clause" which would enable courts to hold a choice of court clause invalid in exceptional cases. Others felt that this would undermine legal certainty and foreseeability.

When asked in which cases such an escape clause should apply, those asking for it mentioned unfairness, injustice, denial of justice and unreasonableness, in particular. Reference was made to existing clauses of a similar nature in other Conventions:

- Article 4(3) of the Hague Convention of 25 November 1965 on the Choice of Court: "The agreement on the choice of court shall be void or voidable if it has been obtained by an abuse of economic power or other unfair means."

[4] Article 3 (3) of the Rome Convention restricts the effect of a choice of law by the parties in cases where the parties have chosen a foreign law but "all the other elements relevant to the situation at the time of the choice are connected with one country only".

- Article 1(D) of the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments of 24 May 1984 (the La Paz Convention) states that the clause is valid, "provided that such jurisdiction was not established in an abusive manner …".

It was noted that both examples focus on the process of achieving agreement, and not on the result (*i.e.* the choice of court agreement) as such. Therefore a number of participants stressed that, in their legal systems, this related to the question whether there was a valid consent of the party which had been treated in an unfair or abusive manner. So no additional rule would be required. For them, the question whether non-negotiated standard contract clauses (whether on paper or in a click-wrap agreement) containing a choice of court clause had actually become part of the agreement between the parties was also a question of valid consent.

Others stated, however, that they needed an escape clause looking to the result. Where the agreement or its effects were unfair, unjust, unreasonable or similar, it should be possible to disregard it. To those opposed, this seemed to reintroduce some element of *forum non conveniens* they would not wish to accept. In this context, reference was made to footnote 12 in Preliminary Document No 18 where the criteria given by a U.S. court to hold a clause unreasonable were the same as those considered when applying the doctrine of *forum non conveniens* in many cases (location of the evidence and of the activities relating to the dispute). It was pointed out in response that this case was an anomaly, and that choice of court clauses are virtually never invalidated under the U.S. Supreme Court test in the Bremen case, according to which clauses are enforced unless unreasonable or unjust. Nevertheless, the concepts of unfairness, injustice and unreasonableness were considered by the opponents to be far too broad. Moreover, a comparison with arbitration was made in that Article II(3) of the New York Convention does not contain any such clause. According to it an arbitration clause cannot be considered invalid just because it was "unfair". Therefore it should not be easier to get out of a choice of court clause than out of an arbitration agreement. A contrary argument was advanced that the New York Convention leaves all questions of validity apart from form to national law, including questions of justice or fairness.

There was a general discussion of whether there should be an explicit provision permitting courts to deny enforcement of a choice of court clause based on public policy. Such an explicit provision does not appear in the 1999 or 2001 drafts of the Convention, and the Report by Peter Nygh and Fausto Pocar on the Preliminary Draft Convention on Jurisdiction and Foreign judgments in Civil and Commercial Matters (Preliminary Document No 11 of August 2000) on p.42 states that unlike for recognition and enforcement, a general public policy exception for the jurisdiction chapter should not be inferred. Nevertheless, most participants seemed to assume that in truly exceptional cases their courts would apply a public policy control in any case. Therefore the group suggested that it would not add any element of uncertainty or discretion if such a public policy exception were included explicitly in the convention. This was based on the commonly shared notion that such a public policy exception should not be limited to consent or even to choice of court clauses but should apply to the whole chapter on jurisdiction (provided that further bases were to be added during the discussions of the group). In general, it was pointed out that it would always be the public policy of the court actually seized.

However, although there seemed to be consensus that any escape clause (provided that it was agreed to include one) should be applied narrowly, a pure public policy clause was considered to be too narrow by some. Therefore the need for an additional specific clause was discussed. Although no consensus has been reached yet on that question, the group nevertheless discussed possible wording of such a clause in order to facilitate consultation.

The possibilities of either drawing up a catalogue like the one in footnote 56 on page 13 of Preliminary Document No 18 or a list of elements that did *not* make a clause unfair/unjust/unreasonable were mentioned without being pursued any further.

A suggestion referring to "abusive actions" was not pursued. The discussion then centred around manifest unfairness and a denial of justice. In addition, the proposal to explicitly limit the application of a possible clause to exceptional cases was supported. Some members of the group then suggested the following:

> *"In exceptional cases, a court may decline to give effect to a choice of court agreement if giving the agreement effect would result in a manifest injustice."*

As an initial reaction, others stressed that there should not be any discretion for the court when applying this provision.

5. Defining B2B

Since the discussion, during this first meeting, was limited to choice of court clauses in B2B cases, the group looked into a possible definition of B2B. When faced with the choice between focusing on the nature of the transaction or on the quality of the party/parties, preference was given to the transaction as decisive element.

The group noted that B2B could be described by either positively defining the transactions to be included, or by negatively defining the transactions to be excluded. In trying to combine the negative definition used in Article 2(a) CISG with elements of the draft Article 7(1) of the 2001 Interim Text, the group proposed the following text as a starting point:

> *"This Article shall not apply to choice of forum agreements with regard to consumer contracts or individual contracts of employment. A consumer contract is an agreement between a natural person acting primarily for personal, family or household purposes (the consumer) and another party acting for the purposes of its trade or profession, or between two consumers."*

It was stressed that transactions performed by a business in the area of social or charitable activities within the scope of its corporate charter were considered to be "for the purpose of its trade or profession", as well as purchases of non-charitable goods made by a charitable organisation pursuant to its activities.

By this definition, also transactions performed by governments would be covered where the government acts like a private business. Governmental privileges and immunities as referred to in Article 1(5) of the Interim Text were considered to be sufficient to exclude purely "governmental" action.

There was some uncertainty whether employment contracts would equally have to be defined. It was felt that high-profile management staff contracting with an employer should be covered by the scope of the Convention. While some participants reported that, in their country, "individual contracts of employment" would not cover these cases anyway but presupposed a subordinate, dependant working relationship, other legal systems seemed to take a different approach.

While some participants were of the opinion that small and medium enterprises (SMEs) required special protection, others stressed the difficulty of defining them in case of such a different treatment. Depending on the decision to be taken on a general "escape clause", the issue may have to be revisited at another meeting.

The group rejected the suggestion to include a presumption that a transaction was a B2B transaction.

6. Restrictions and limitations to concluding choice of forum clauses

a. General

The group went on to look into other limitations to the freedom to enter into choice of court clauses which may exist in national laws and the question how to deal with this in the Convention. Such limitations may exist for certain types of contracts (consumer or

employment contracts, agency or franchise agreements), as partly discussed under the previous item already, but also for certain subject matters covered by exclusive jurisdiction under national law.

b. Restrictions for certain types of contracts

The group decided to leave, for the time being, franchise agreements, agency and insurance contracts within the scope and consult on their possible exclusion and, where appropriate, the need for definitions.

There was a brief discussion on whether to re-insert maritime matters. While many participants felt that specific Conventions sufficiently covered the issue and saw no need to include it here, others suggested further consultations on this point. Moreover, it was pointed out that there were specific other areas to which the convention should eventually not apply because there already existed instruments which contained rules on choice of court clauses for them (*e.g.* transport of passengers, luggage and goods by road which is covered by two specific Conventions of the International Road Transport Union (IRU);[5] UNCITRAL's work on multi-modal transport rules;[6] EU insurance law). Instead of listing the respective subject matters as exclusions from scope, the group tended to prefer dealing with it through a clause on the relationship with other (special) conventions or instruments. It was pointed out, however, that there are very few parties to one of the road transport conventions. The issue will be revisited at a later stage (see also below, p.15 et seq.).

c. Exclusive jurisdiction under national law[7]

1. General

The group noted that probably all national laws know rules on exclusive jurisdiction for specific subject matters. In those areas, the freedom of parties to choose a court is thereby limited. The group assumed that most States would consider it desirable to maintain at least some of these limitations to party autonomy also within the scope of this convention. As long as the group was examining the choice of court provision only (*i.e.* as long as there was no rule harmonising exclusive jurisdiction rules within the convention), it would therefore be necessary to discuss further which areas subject to national rules of exclusive jurisdiction might be affected by this.

While litigation relating to rights *in rem* in immovable property seemed to be a common denominator, for the rest there were large variations. Areas mentioned as being covered by exclusive jurisdiction under national law were natural resources, foreign joint ventures, State property and State registers. Given these variations and the limited number of States present, the Permanent Bureau was requested to send out a questionnaire asking which rules on exclusive jurisdiction existed in the States concerned and which of these areas States would like to see excluded from the freedom to enter into choice of court agreements under the convention.

Although there was consensus that some exclusions of this kind would be required, there was no consensus as to how this should be achieved. Eventually, the group saw two possible ways to deal with the problem: either a large exclusion of many subject matters from scope (of the convention as a whole or of Article 4, depending on the number of jurisdiction rules to be included in the convention), or a small group of exclusions, to be complemented by a possible reservation/declaration by those States who wish to exclude an area which other States may prefer to include into the scope. The reservation/declaration system could be a closed one (*i.e.* the areas which may be reserved would be listed in the convention clause permitting such

[5] Convention on the contract for the international carriage of goods by road (CMR) of 19 May 1956; Convention on the contract for the international carriage of passengers and luggage by road (CVR) of 1 March 1973.

[6] Note by the Permanent Bureau: It has to be mentioned, though, that no final decision has been taken yet as to whether that instrument will contain rules on jurisdiction.

[7] Please note that Intellectual Property is being dealt with under a separate heading below.

reservation) or an open list, leaving it entirely to each State to determine the subject matters that State wants to see excluded. In case a declaration/reservation was chosen, many experts stated a preference for a closed list of permitted exclusions in order to enhance harmonisation and legal certainty.

2. Intellectual Property

The group recognised that under most national laws, the freedom of the parties to enter into choice of court agreements was limited as far as the question of validity of patents, trademarks (both registered and unregistered) and other registered industrial property rights was concerned. It is normally for the State of registration (or, in the case of unregistered trademarks, for the State for whose territory protection is requested) to decide on validity. For those rights, the question of validity is frequently raised as an incidental or preliminary question as a defence in infringement cases and, to a lesser extent, also in license litigation, and it is difficult to draw the line between validity and other issues which might be covered by a choice of court agreement. Therefore the group tended to excluding those rights in general from the scope of a rule on choice of court agreements.

Tentatively, the group felt that this should be different for copyright for several reasons. While for patents and registered trademarks it was understood that decisions on the validity of a right which had been created by an act of state should be taken by the authorities of that State only, validity is normally not an issue in copyright litigation, and moreover, registration, although sometimes possible, is generally not decisive for the coming into being of the right as such. Therefore there is generally no exclusive jurisdiction in national laws with regard to copyright.

Most important, however, is the argument that under a choice of court clause we are talking about litigation between two parties who have a contract with each other. Thus the fears voiced in particular by Internet Service Providers (ISPs) with regard to the tort jurisdiction under Article 10 of the 2001 text may not be relevant in this context. The ISPs feared that they could be sued world-wide in cases of alleged on-line IP infringement and, due to the differences in conflict of laws rules and substantive law, maybe held liable abroad while they were not liable in their home jurisdiction. Consumers had similar concerns because what would be covered by fair use, freedom of information, or statutory limitations to copyright in their home country, thus allowing them to make a certain use of a foreign IP right, may be unlawful in other countries. If jurisdiction exists in those countries and the judgment is enforceable under the convention, they would be in danger to be held liable for infringement.

In these cases, however, there is normally no contractual relationship between the right-holder and the alleged infringer. Where there is no contractual agreement between the parties, there is no choice of court clause, either. Therefore, litigation about infringement would only be covered by the scope of this Article in the context of a dispute about the terms of a license. Such litigation about copyright licensing contracts had not given rise to similar concerns like those of ISPs and consumers, as mentioned above, in 2001. Where a license agreement contains a choice of court clause, the group therefore felt that it might be desirable to strengthen such a clause by including it into the scope of the convention.

The group therefore proposed, on a preliminary basis, to include copyright but to exclude patents, trademarks (both registered and unregistered) and other registered industrial property rights from a possible rule on choice of court clauses, and to consult stakeholders on this.

IV. WHICH COURT SHALL DECIDE?

On a number of occasions the group discussed whether some or all of the issues raised in this report should be decided by any court actually seized, or whether some or all of them should be left to the chosen court only.

While a general limitation to the chosen court was rejected and, for the question of consent, a choice of law rule was suggested as a less far-reaching but more realistic harmonisation, the question was again raised briefly with regard to the public policy and/or manifest injustice clause. Here, as alternatives to "any court" and "the chosen court" the following were discussed: "a court with a real and substantial connection with the dispute", "a court of the residence of one of the parties" and "the court seized but not chosen". No result has been reached yet on this issue.

V. PERSONAL VERSUS SUBJECT MATTER JURISDICTION

In 2001, there were some concerns that the convention might force courts having jurisdiction under the convention based on a valid choice of court clause, to hear a case although, under the internal system of allocation of jurisdiction in the State concerned, they lacked subject matter jurisdiction. Therefore, in 2001 it was suggested to insert into Article 4(1), 1st sentence, the words "provided the court has subject matter jurisdiction" (see footnotes 19 and 21 of the Interim Text) or to refer to "the courts of a Contracting State" instead of "a court of a Contracting State". As expressed in footnote 19, while the idea was generally accepted that a choice of forum clause could only confer jurisdiction over the person of the defendant and not in respect of subject matter outside the jurisdiction of the chosen court, there were doubts whether the proposals were either necessary or appropriate.

For this reason, based upon a suggestion made by one participant of the 2001 Diplomatic Conference, the Permanent Bureau had suggested a general clause (see p.14 of Preliminary Document No 19) as follows: "Nothing in this Convention shall affect subject matter jurisdiction.", to be included either in Article 4 or, if there were to be more white list grounds of jurisdiction, as a general rule governing the whole chapter on jurisdiction.

Some participants stressed the difficulty to define what is subject matter and what is personal jurisdiction. While it had always been stated that the convention dealt with personal jurisdiction only, all of the former Article 12 on exclusive jurisdiction, for instance, to them related purely to subject matter. Therefore they suggested that the words "or the internal allocation of jurisdiction among the courts of a Contracting State" should be added to the proposal on p.14 of Preliminary Document No 19.

During the discussions, there were some doubts whether this would also allow a chosen court in a State which had two parallel systems of jurisdictions (*e.g.* state and federal courts) to remove a case to the other set of courts in a case where also the chosen court had subject matter jurisdiction. This was considered highly undesirable by most participants. To some of them it amounted to reintroducing *forum non conveniens* or a similar discretion not to exercise an existing jurisdiction. Therefore they want the rule only to apply where the chosen court lacks subject matter jurisdiction.

The Permanent Bureau, assisted by contributions from the participants, was asked to investigate further which mechanisms and liberties might exist under national law to remove a case from the court exclusively chosen to another one in relation to the internal allocation of jurisdiction.

VI. INTERIM RELIEF

Many participants of the informal working group spoke in favour of the following principles:

- Courts other than the court exclusively chosen should be allowed to grant interim relief where they have jurisdiction under national law.
- It was considered too ambitious to *oblige* States in the convention to create jurisdiction for interim relief in support of proceedings pending in other States (*i.e.* in order to overcome the limitation imposed by the Privy Council on appeal from Hong Kong in *Mercedes Benz AG v Leiduck* [1996] 1 AC 284 to the effect that jurisdiction to order provisional and protective measures cannot rest on the presence of the assets sought to be preserved alone; there must be jurisdiction in respect of the substantive matter). A mere *permission* was considered sufficient and realistic.
- Given the diverging practice under the New York Convention, this should be made explicit.
- Such relief should be provisional *and* protective in order not to amount to relief on the merits (*e.g.* direct payment to the creditor/plaintiff).
- It should however go further than a mere protection of the claim on the *merits*, in particular also allow to secure the payment of *costs.*
- The rule should however not allow to issue an anti-suit injunction to the detriment of proceedings before the court exclusively chosen.

As to drafting, one suggestion was to copy Article 13(1) and (2) of the 2001 Interim Text in order to make explicit that:

- a court having jurisdiction on the merits under the convention could also order interim relief,
- a court not having jurisdiction on the merits under the convention could order certain limited, protective types of interim relief to be harmonised by the convention where there was jurisdiction under national law.

Another, shorter draft, aiming at expressing similar principles, was suggested as follows:

> *"Nothing in this Convention shall prevent any court from ordering provisional and protective measures in support of adjudication of a dispute submitted or to be submitted to the chosen court."*[8]

While the first proposal explicitly gives the chosen court jurisdiction to order interim relief, the second suggestion leaves it to national law. So, in a way, a similar distinction as the one discussed for courts other than the chosen court (*i.e*. autonomous creation of jurisdiction in the convention or mere permission for national law to provide it) seems to exist here.

VII. EXCLUSIVE CHOICE OF COURT CLAUSE AND *FORUM NON CONVENIENS*

The group discussed whether there should be a discretion, *e.g.* as embodied in the doctrine of *forum non conveniens,* for the court exclusively chosen. While many participants strongly rejected this and stated that the agreement which had been reached on this in 1999 was the basis for any further negotiations, others felt that their will to give up discretion existing under national law would be linked to the requirement of an international element or, more precisely, a connection between the case and the State of the court chosen.

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[8] After the meeting it was mentioned that the second proposal should perhaps refer to "the court having jurisdiction under this Convention" instead of "the chosen court" in order to cover also the following case which was discussed in the section on personal versus subject matter jurisdiction: Parties have chosen a court X in State A, but under the rules on subject matter jurisdiction and/or venue of State A, it would be for court Y instead of court X (both located in State A) to hear the case.

The group decided to revisit the issue at its next meeting.

VIII. EXCLUSIVE CHOICE OF COURT CLAUSE AND *LIS PENDENS*

It was widely recognised on principle that a *lis pendens* situation, *i.e.* a competition of two courts seized with the same case *under the convention*, cannot arise as long as there only is one white list ground of jurisdiction relating to choice of court clauses, and in the case concerned the clause is exclusive. In that case only the courts of one single State may lawfully be seized under the convention.

The group therefore reconfirmed the principle embodied in Article 21(1), *in fine,* which says that where a court not chosen has been seized first, priority in time (the underlying principle to resolve *lis pendens* situations in civil law systems) is trumped by the exclusive jurisdiction of the chosen court. If, on the other hand, the chosen court is the one seized first, it shall continue to hear the case even if one of the parties then seizes another court.

Discussion of the question whether a full mechanism along the lines of (at least some parts of) Article 21 of the 2001 Interim Text would be necessary to deal with these situations was postponed to a next meeting until after the discussion of non-exclusive choice of court clauses.

It was mentioned, however, that, if no full mechanism of *lis pendens* were required eventually, it may be preferable to include at least a clause obliging the court not chosen to dismiss the case, using some elements of Article II(3) of the New York Convention as an example, also in cases where one party alleges invalidity of the clause. It was stressed that the clause should not state explicitly whether the court not chosen should only stay/suspend proceedings until the chosen court had assumed jurisdiction under the clause, or whether it should dismiss the case immediately. There was a feeling that this should be left to national law.

One participant suggested that in a case where the defendant defaults before the court first seized but not chosen, the existence of a choice of court clause pointing to another State should be ignored. Others disagreed on this. However, the group did not pursue a proposal to add the requirement of a request by one of the parties. Therefore it seems that it will be left to the national law of the court seized how to deal with these situations.

The group also considered the possibility, at a later stage, of drafting some model choice of court clauses which could be included in an Annexe to the Convention or in the report. Arbitration model clauses could serve as examples.

IX. RELATIONSHIP WITH SPECIAL CONVENTIONS

A traditional clause in international treaty law often lets those rules on jurisdiction or recognition and enforcement which are contained in specific conventions for certain subject matters (nuclear liability, transport etc.) prevail over rules in general conventions that govern jurisdiction, recognition and enforcement regardless of the subject matter. However, as long as the Hague convention were limited to choice of court clauses, some participants had doubts whether in this case existing Conventions on specific subject matters should necessarily prevail.

In order to assess whether there is room within existing conventions to deviate from the traditional preference rule for the purposes of a possible convention on choice of court clauses, the Permanent Bureau was asked to carry out some research on certain conventions (*e.g.* Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air of 12 October 1929, Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, as amended by the Additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982, UNIDROIT Convention on International Interests in Mobile Equipment of 16 November 2001 and its Protocol of the same day on Matters specific to Aircraft Equipment, as well as the transport instruments mentioned on p.11 of this Report and others).

X. DISCONNECTION

With regard to other general instruments on jurisdiction, recognition and enforcement, the group looked into the question whether, with a wording similar to the one in Article 2(1), 2(1)(a) and Article 4 of the Interim Text, there would be a potential overlap with European instruments applicable in EU Member States and beyond (the Conventions of Brussels and Lugano on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 and 16 September 1988 as well as Council Regulation (EC) No 44/2001 of 22 December 2000 on the same issues). One participant submitted a set of diagrams illustrating the different situations (see Annexe II). From that it became clear that there is only one situation (*i.e.* case No III) where, according to their terms, both the European instruments and the Hague convention would apply. For this case, a policy choice will have to be made as to which one should prevail, and a clause will have to be drafted accordingly.

The potential overlap arises in the following situation:

- The court chosen is in a State party to both the European instruments and the Hague Convention (HC).
- One of the parties is domiciled/habitually resident in a European instrument State and one in a HC State which is not a party to the European instruments.

There was no objection stated in the group that the HC should apply to those cases. However, participants from EU Member States stressed that they had spoken in their personal capacity, that there was an external competence of the European Community on this matter and that the EC as such had not yet reached a common position on it.

It was recalled that other regional instruments of a general character like, *inter alia,* the Inter-American ones (La Paz Convention, Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 8 May 1979 [Montevideo Convention], MERCOSUR instruments as well as instruments of the Arab League would have to be considered here. The view was expressed that Article 8 of the La Paz Convention which reads "The rules contained in this Convention shall not limit any broader provisions contained in bilateral or multilateral conventions among the States Parties regarding jurisdiction in the international sphere or more favourable practices in regard to the extraterritorial validity of foreign judgments" may not permit States Parties to give priority to a more limited convention dealing with jurisdiction based on choice of court clauses only.

The Permanent Bureau, with the assistance of participants of the group to provide some input, was asked to carry out further research on those general conventions to be disconnected.

XI. BILATERALISATION

No objection was raised to the proposition that there was no need for bilateralisation in order for a system based on choice of court clauses to operate among Contracting States.

XII. MEETING REPORT AND PUBLICITY OF DISCUSSIONS AND RESULTS

The participants requested the Permanent Bureau to establish a mailing list for members of the informal working group in order to facilitate their discussions. A draft meeting report would first be sent to participants for comments and then be published on the Hague Conference's website.

ANNEXE I

1. Language provisionally proposed by the group (subject to drafting amendments)

"The Convention does not determine the law applicable to the capacity of the parties."

"In the absence of a choice of law by the parties, the internal law of the court chosen [by the parties] shall determine whether a party has consented to the agreement."

"This Article shall not apply to choice of forum agreements with regard to consumer contracts or individual contracts of employment. A consumer contract is an agreement between a natural person acting primarily for personal, family or household purposes (the consumer) and another party acting for the purposes of its trade or profession, or between two consumers."

2. Tentative draft of the form requirements for choice of court clauses submitted by the Permanent Bureau during the meeting:

The draft is based on Article 4(2) of the 2001 Interim Text. Additions agreed by the group are in bold print. Elements to be found in the 1996 UNCITRAL Model Law on Electronic Commerce which, in 2001, had not been incorporated, are added in italics in square brackets in order to facilitate consultation as to whether they should be added.

"Article 4 Choice of court

(...)

2. An agreement within the meaning of paragraph 1 shall be valid as to form **only**, if it was entered into –

a) in writing or by any other means of communication which renders information accessible *[as a data message]* so as to be usable for subsequent reference;

b) orally and confirmed in writing or by any other means of communication which renders information accessible *[as a data message]* so as to be usable for subsequent reference;

c) in accordance with a usage which is regularly observed by the**se** parties; **or**

d) in accordance with a usage which the parties knew or ought to have known and which is regularly observed by the parties to contracts of the same nature in the particular trade or commerce concerned.

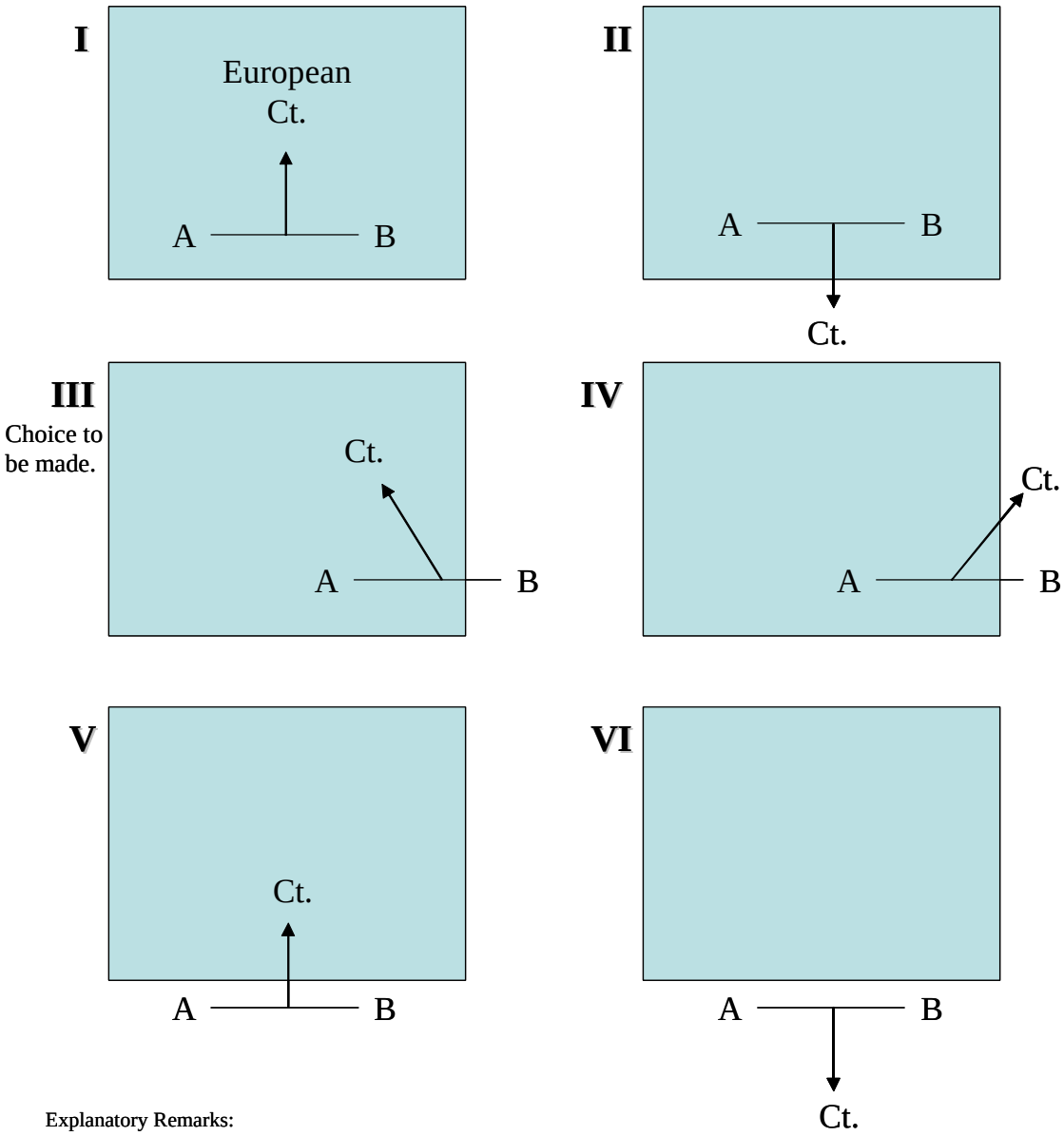
['Data message' means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.]"

3. Last version of a discussion paper on an escape clause, submitted by some participants

"In exceptional cases, a court may decline to give effect to a choice of court agreement if giving the agreement effect would result in a manifest injustice."

ANNEXE II

DISCONNECTION



Explanatory Remarks:

The square symbolises the territory to which the European instruments apply in general.

According to the terms of the choice of court rules in the European instruments and in the Hague draft:

- In case I, the European instruments only would apply;
- In cases II, IV, V and VI only the Hague rule would apply;
- In case III, according to their terms, both sets of rules would apply. Therefore a policy choice has to be made.