EXÉCUTION DES JUGEMENTS
ENFORCEMENT OF JUDGMENTS

Doc. prél. No 22
Prel. Doc. No 22

juin / June 2003

HccH
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ
1893|2003

RAPPORT SUR LE TRAVAIL DU GROUPE DE TRAVAIL INFORMEL SUR LE PROJET DES JUGEMENTS, NOTAMMENT SUR LE TEXTE PRÉLIMINAIRE ISSU DE SA TROISIÈME RÉUNION – 25 AU 28 MARS 2003

préparé par Andrea Schulz, Premier secrétaire

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REPORT ON THE WORK OF THE INFORMAL WORKING GROUP ON THE JUDGMENTS PROJECT, IN PARTICULAR ON THE PRELIMINARY TEXT ACHIEVED AT ITS THIRD MEETING – 25-28 MARCH 2003

prepared by Andrea Schulz, First Secretary

Document préliminaire No 22 de juin 2003

Preliminary Document No 22 of June 2003

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I. INTRODUCTION

From 25-28 March 2003 the informal working group on the Judgments Project held its third meeting of 3 days.[1] All three meetings were 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), Alegría Borrás (Spain), Andreas Bucher (Switzerland), Masato Dogauchi (Japan), Antonio Gidi (Brazil), David Goddard (New Zealand), Jeffrey Kovar (United States of America), Nagla Nassar (Egypt), Gugu Gwen Ncongwane (South Africa), Tatyana Neshataeva (Russian Federation), Fausto Pocar (Italy), Peter Trooboff (United States of America; exceptionally replaced by Ronald Brand at the third meeting), José Luis Siqueiros (Mexico), Sun Jin (China), and Rolf Wagner (Germany). They are participating in their personal capacity and are therefore neither in a position nor willing to commit or bind any government.

The third meeting took place immediately before the meeting of Commission I on General Affairs and Policy of the Hague Conference which met from 1-3 April. Commission I had before it the Reports of the first two meetings of the informal group, and a draft text of a Convention on choice of court clauses, as it appears in Preliminary Document No 8 (General Affairs) and in the Annex to this Report. This text, when presented to Commission I, was introduced by the following –

> "**Note by the Permanent Bureau**
>
> In accordance with the Decision of Commission I of the Nineteenth Session of the Conference of 24 April 2002, the Permanent Bureau set up an informal working group to prepare a text on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters to be submitted to a Special Commission. Among the core areas identified by Commission I,[2] the informal group chose to start working on choice of court agreements for commercial transactions. The group held three meetings, each of a duration of three days. The group drafted a text focussed on choice of forum and the recognition and enforcement of judgments in civil and commercial matters, which it considers, as such, to be sufficiently advanced to be submitted to a Special Commission now, or at least after one further meeting of the group.
>
> The group discussed other issues among those identified by Commission I, such as defendant's forum, counterclaims, and submission to the jurisdiction of the court. The group was not able to go deeply enough into these subjects within the time

[1] See Prel. Doc. No 20 at < ftp://ftp.hcch.net/doc/jdgm_pd20e.doc > for a Report of the first meeting held from 22-25 October 2002, Prel. Doc. No 21 at < ftp://ftp.hcch.net/doc/jdgm_pd21e.doc > for a Report of the second meeting held from 6-9 January 2003 and Prel. Doc. No 8 for the attention of the Special Commission of April 2003 on General Affairs and Policy of the Conference at < ftp://ftp.hcch.net/doc/genaff_pd08e.pdf > for the text resulting from the third meeting.

[2] Commission I identified as core areas choice of court agreements in B2B cases, submission, defendant's forum, counterclaims, trusts, and physical torts (see Prel. Doc. No 19 at < ftp://ftp.hcch.net/doc/jdgm_pd19e.doc >, p. 6).

> available to permit any final conclusions with respect to the possibility of drafting convention texts on these issues."[3]

Commission I briefly examined the draft and adopted the following Conclusion:

> "The Special Commission on General Affairs and Policy requests the Secretary General to communicate to the Member States the draft text on choice of court agreements elaborated by the informal working group on the Judgments Project. He should at the same time ask them to inform him, before the end of July 2003, whether they would agree that this text should be put as the basis for work before a Special Commission to be convened in December 2003, with a view, in due course, to be forwarded to a Diplomatic Conference. On the basis of the reaction by Governments to such letter, the Secretary General shall determine whether there is sufficient support for the reference of the draft to a Special Commission and, if so, convoke it.
>
> The Special Commission on General Affairs and Policy affirms that any decision to convene a Special Commission in December 2003 concerning the draft text on choice of court agreements shall not preclude any subsequent work on the remaining issues, with regard to jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters."

In order to facilitate consultation within Member States, the following Report reflects the discussions leading to the results achieved under the heading of the provisions concerned. Unless stated otherwise, it is based on the discussions and not on additional research subsequently carried out by the Permanent Bureau.

In addition to the Report on the draft text, two further issues deserve to be mentioned.

During the discussions, it was suggested that a Model Law could be drafted at a later stage in order to preserve all the valuable thinking that had been spent on this project in the past on some or all issues beyond choice of court clauses. This idea has not been discussed in Commission I.

Moreover, the Informal working group took note of work carried out by the International Chamber of Commerce (ICC). In response to the general invitation of the Permanent Bureau for outside comment[4] and the need for some empirical research on the use of choice of court clauses in practice, which had been felt at the second meeting,[5] the ICC Secretariat had conducted a survey among businesses about business practices with regard to choice of court agreements, both as to quantity and content. The results of this survey were presented to the group by Michael Hancock, one of the two Co-chairmen of

[3] The informal group only had time to discuss some bases of jurisdiction identified by the Commission on General Affairs in April 2002: It did not discuss trusts, branch jurisdiction and physical torts.
When discussing defendant's forum, counter-claims and submission, it was stressed that the addition of any one of them to the Convention would require a rule on how to deal with parallel proceedings because more than one court could lawfully be seized under the Convention. Moreover, some of the possible additional fora, in particular the defendant's forum, raise difficult issues surrounding tort jurisdiction in Internet and intellectual property cases. With regard to counter-claims, it was felt that these would in many cases already be covered by the choice of court clause, thus not requiring any additional rule in the Convention. Where this was not the case, it could be due to the fact that the situation giving rise to the counter-claim had its own choice of court clause which should be respected. Therefore the benefit of having a rule on counter-claims in the Convention, *i.e.* the possibility to consolidate proceedings, would in practice often not be very big. See, for further details of the discussion on these additional bases of jurisdiction, Prel. Doc. No 21 (*supra* note 1), p. 12 *et seqq.*

[4] See Prel. Docs. Nos 19 (*supra* note 2), p. 28, and No 21 (*supra* note 1), p. 20.

[5] See Prel. Doc. No 21 (*supra* note 1), p. 6.

ICC's Task Force on Jurisdiction and Applicable Law (also partner at Salans Hertzfeld & Heilbronn in Paris / France).[6]

II. COMMENTS ON THE PROVISIONS OF THE DRAFT TEXT

The Convention has three aims, namely to establish the obligation –

(1) for the chosen court to hear the case;
(2) for any other court to decline jurisdiction; and
(3) to recognize and enforce a judgment rendered by the chosen court under the Convention.

While the first two aspects concern the jurisdiction stage, the third relates to recognition and enforcement. For the sake of clarity, the group drafted separate provisions for each of these policy goals, and defined their territorial scope of application individually for each rule. Therefore the former Article 2 on territorial scope has been deleted.

Preamble

The Preamble was discussed for the first time during the third meeting of the group. Some drafting amendments were made in the last paragraph in order to bring the language in line with the language commonly used in Hague Conventions.

Moreover, in the third paragraph of the Preamble, the group decided to delete the word [business] and opt for [commercial] when describing the transactions covered. "Business" was considered too narrow because governments would in some cases also act commercially without being a business. Such commercial transactions by governments should, however, in principle be covered by the Convention, as long as no issue relating to privileges and immunities (see Article 1(7)) arose.

CHAPTER I PRELIMINARY PROVISIONS

Article 1 Scope

The title of Article 1 was changed from "Substantive scope" to "Scope" after the group had decided to delete the former Article 2 on the territorial scope of the Convention and instead include the relevant rules into the articles concerned.

Article 1(1)

It was not considered necessary to use the expression "civil and commercial" in the Preamble which addresses in a factual way the transactions covered by the Convention. However, the legal term "civil or commercial" was deliberately kept in Article 1(1) which contains the legal description of matters covered by the Convention. "Commercial" alone has, at least in some jurisdictions, a very narrow meaning, sometimes linked to the definition of jurisdiction of certain specialized courts such as, *e.g.*, the Tribunaux de commerce in France, and the intention is not to reduce the Convention to these

[6] They are available at the ICC's website at < http://www.iccwbo.org/law/jurisdiction/ >, together with a further breakdown of the data according to business sectors and / or geographical regions, as suggested during the discussion of the group.
The Permanent Bureau wishes to thank also the other Co-chairman of the Task Force, Stefan Bernhard (Linklaters Lagerlöf, Stockholm / Sweden) and Jonas Astrup from the ICC Secretariat for their support lent to the work of the Informal group.

situations alone. Therefore the group decided to keep the reference to "civil or commercial matters which has a long-standing tradition in Hague Conventions[7] and should for this reason also be understood in jurisdictions which, as such, would find the term "commercial" sufficient to cover Business to Business (B2B) transactions.

The reference to "exclusive" choice of court agreements was deleted from Article 1(1) because the group suggests to extend at least the chapter on recognition and enforcement to non-exclusive clauses.

Article 1(2)

At the previous meeting, Article 1(2) had tentatively been copied from the 2001 Interim Text into footnote 2 of the Annex containing the draft text, as a reminder for the possible exclusions from the scope of the Convention to be discussed. At its third meeting, the group decided to divide the provision into two paragraphs in order to reach a clearer language. The new paragraph 2 excludes certain *contracts* from the scope of the Convention while the new paragraph 3 lists a number of *proceedings* to which the Convention does not apply. Consequently, the provision on the exclusion of consumer contracts was redrafted without changing the meaning.

To the exclusion of individual contracts of employment in Article 1(2)(b), collective employment agreements were added for the sake of clarity, assuming that the intention had always been not to cover them, even under the previous wording.

Article 1(3)

Paragraph 3 contains a number of exclusions from scope. In some of these areas, party autonomy is typically limited while others are often subject to exclusive jurisdiction under national law, or governed by special conventions.

Social security

"Social security" was deleted from the list of exclusions. The group considered this to be a mere drafting matter because the limitation of the Convention to commercial transactions in civil or commercial matters in B2B cases already seems to exclude those areas of social security not supposed to fall within the scope of the Convention.

Article 1(3)(a) and (j)

For the sake of clarity, proceedings relating to the status and legal capacity of natural persons (Article 1(3)(a)) as well as to the validity, nullity, or dissolution of a legal person and decisions related thereto (Article 1(3)(j)) were explicitly excluded from scope after the group's decision to reorganise the rules on jurisdiction and on the validity of choice of court agreements. The reorganisation involved the deletion of what was Article 5 (Substantive validity) in the Annex to the second meeting report.[8] In former Article 5(1), it had been stated explicitly that the Convention did not determine the law applicable to the capacity of the parties. After the deletion of that provision, it

[7] See, *e.g.*, Article 1(1) of the *Hague Convention of 1 March 1954 relating to Civil Procedure*; the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*; Article 2(1) of the *Hague Convention of 25 November 1965 on the Choice of Court*; the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*; the *Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*; and Article 1(1) of the *Hague Convention of 25 October 1980 on International Access to Justice* (the latter two using "and", though).

[8] The number of alternatives for that Article shows that consensus on a rule on substantive validity in a plenary meeting would be very difficult to achieve.

was considered useful to state elsewhere that the capacity of natural and legal persons was not governed by the Convention. It has to be pointed out, however, that these two exclusions from scope go further than the previous Article 5(1).

Article 1(3)(b), (c) and (d)

The reference to "civil or commercial matters" in Article 1(1) made it desirable, for the sake of clarity, to maintain the explicit exclusion of certain areas of family law which might otherwise fall within the scope of the Convention (see Article 1(3)(b), (c), (d)), although one might think that the mere limitation to B2B cases as such could be sufficient to exclude them.

Article 1(3)(f)

The group felt that the possible exclusion of admiralty and maritime matters from scope (Article 1(3)(f)) required further consultation. On the reasons for the exclusion in the 1999[9] and 2001[10] texts, the NYGH / POCAR REPORT[11] states: "Because of the highly specialised nature of the subject and the fact that not all States have adopted the relevant international conventions, the Commission decided to exclude the subject from the scope of the Convention. The effect is that the Convention will not apply to claims arising in relation to ships, cargoes and the employment of seamen, including claims arising out of the defective condition or operation of a ship or arising out of a contract for the hire of a ship, or for the carriage of goods or passengers on a ship."

In the light of the possible limitation of the Convention to choice of court clauses in B2B cases, some members of the informal working group now felt that it might be sufficient to exclude "contracts for the carriage of goods by sea" because in that area, many States had mandatory legislation restricting party autonomy and overruling jurisdiction clauses included in bills of lading. Others felt that it would be better to exclude all admiralty and maritime matters from scope. They stressed that the special conventions had not been universally adopted, and that the whole area was in flux. In this context, reference was made to the UNCITRAL project on multimodal transport which was likely to include rules on jurisdiction, and to the decision of the U.S. Supreme Court in the *Sky Reefer*[12] case, which in practice overturned the rules of the Carriage of Goods by Sea Act (COGSA), thereby holding parties to their (arbitration) agreement.

Article 1(3)(g)

As far as the possible exclusion of proceedings relating to "antitrust or competition claims" in Article 1(3)(g) is concerned, the group equally felt that further consultation was needed. There were divergent opinions both as to the desirability of such an exclusion and to the possible wording.[13]

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[9] Prel. Doc. No 11, available at < ftp://ftp.hcch.net/doc/jdgmpd11.doc >.
[10] Available at < ftp://ftp.hcch.net/doc/jdgm2001draft_e.doc >.
[11] See *supra* note 9.
[12] *Vimar Seguros y Reaseguros, S.A. v. M / V Sky Reefer, Her engines, etc., et al.*, 515 U.S. 528.
[13] See, for an illustration of the discussions held in 2001 on this issue, footnote 6 to Article 1(2)(i) of the 2001 Interim Text which reads as follows:
"There was general agreement towards the proposal's approach, subject to further study, that certain aspects of what is covered in the United States (including the Sherman Act, the Clayton Act and the antitrust portions of the Federal Trade Commission Act) by the term 'anti-trust claims' such as actions against cartels, monopolisation, abuse of market dominance, horizontal or vertical restraints, mergers and acquisitions, price fixing or price discrimination be excluded from the Convention. On the other hand, it was acknowledged that words such as 'unfair competition' (*concurrence déloyale*) went too far since in certain systems it might include matters such as misleading or deceptive practices, passing off and infringement of marks, copyrights and patents. The problem remains of finding the appropriate terminology to define the area to be excluded and which can be understood at the international level."

Participants in particular from civil law countries familiar with a traditional distinction between public (administrative) and private law felt that a great number of antitrust cases would never fall under the Convention because they were not "civil or commercial". This concerns mainly administrative action (regulatory measures) by cartel supervision authorities against actors on the market. These participants were of the opinion that the remaining issues which were indeed "civil or commercial" would relate to suits filed by one competitor against a co-competitor. Such an application for an injunction or damages, however, could be based on antitrust law, unfair competition law or generic clauses of the civil code in many States. In a legal system where the plaintiff only has to plead facts, and it is for the court to find the appropriate legal basis, antitrust law could arise very late in the proceedings, or be dropped at a later stage. If this were to decide whether a suit based on a choice of court agreement fell within the scope of the Convention, participants from legal systems having these features feared that foreseeability for the parties would suffer. Therefore they tentatively favoured not to mention this exclusion explicitly. They felt that the common aim had always been only to exclude State action, and not suits brought by one competitor against another.

Others disagreed with the last statement and mentioned in addition that in their legal systems, even the cartel supervisory authorities had to bring claims before a civil court if an actor on the market seemed to violate cartel (or antitrust, as the terminology may be in that State) law. This applies, *e.g.*, to the Federal Trade Commission (FTC) in the United States. There were doubts, however, whether it was conceivable that a claim brought by the FTC against an actor on the market in antitrust matters would ever be based on a choice of court clause.

As regards suits between private competitors, there was consensus that "unfair competition" should not be excluded from the scope of the Convention. It was admitted that the terminology "antitrust or competition", which had been inspired by the use of the word "antitrust" in U.S. law and the term "competition" used in Title VI Chapter I of the EC Treaty covering a similar concept but not including "unfair competition" was misleading. Therefore, one suggestion was to use "antitrust and competition claims other than unfair competition".

There was agreement that the concept and the wording would have to be revisited in a wider audience. Moreover, it was mentioned that the "incidental question" provision could already solve a number of problems in this area if antitrust matters were raised as a defence.

Article 1(3)(i)

The group decided to retain the explicit exclusion of proceedings relating to rights *in rem* in immovable property in Article 1(3)(i), *inter alia* with a view to reducing possible conflicts with exclusive jurisdiction rules which exist in many national laws as well as under the European instruments. Under the Conventions of Brussels and Lugano as well as under the Brussels Regulation,[14] rights *in rem* in immovable property are subject to exclusive jurisdiction which trumps a forum choice. By excluding these cases from this Convention, no conflict with the exclusive jurisdiction rule could therefore arise.

[14] Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of Brussels (27 September 1968) and Lugano (16 September 1988); Regulation (EC) No 44 / 2001 converting the Brussels Convention into a Community instrument applicable to all 14 EU Member States with the exception of Denmark. The Brussels Convention, however, is still applicable between the 14 EU Member States to which the Regulation applies, and Denmark.

Article 1(3)(j)

For the same reason, in addition to the reason mentioned above concerning capacity, Article 1(3)(j) which excludes proceedings relating to the validity, nullity, or dissolution of a legal person and decisions related thereto from the scope of the Convention, was kept.

Trusts

The group felt that the question whether trusts should be excluded from the scope of the Convention required further consultation. It was pointed out, however, that the limitation of the Convention to choice of court clauses, and thereby to litigation between the contracting parties, would in all likelihood already limit the possible application of the Convention to litigation concerning trusts, even if they were not as such excluded from scope.

Article 1(3)(k)

Article 1(3)(k) excludes proceedings relating to the validity of patents, trademarks and [other intellectual property rights – to be defined] from the scope of the Convention. This provision has to be read in close connection with Article 1(4), the provision which clarifies that the exclusions in Article 1(3) apply only if the matters stated there are the principal issue of the claim and do not merely arise as incidental questions.

There was consensus that claims directly aiming at a determination of the validity of a patent or registered trademark with effect *erga omnes* (and therefore also affecting the entry in the register concerned) should be excluded from the scope of the Convention. This consensus seems to extend also to unregistered trademarks and other registered industrial property rights.

Reasons given were that the grant of a registered industrial property right is an act of State, and that the invalidation of such an act should not be subject to party autonomy but limited to the authorities of the State the authorities of which had granted the right. In many national laws as well as international instruments and instruments of the European Community, this is subject to exclusive jurisdiction. An exclusion from the scope of this Convention would avoid the difficult disconnection issue and preserve the *status quo* in this respect.

Questions remained, however, as to which other intellectual property (IP) rights should be covered by this exclusion from scope. Some participants felt in particular that for the sake of clarity, explicit reference should be made to the fact that copyright was *not* covered by the exclusion. Others objected that this was not necessary because the exclusion only applied to proceedings having validity as their principal issue, and in copyright, proceedings seeking a determination of invalidity were practically never brought.

In general, some preferred to mention some intellectual property rights explicitly because they felt that the stakeholders concerned would find this easier to read. Others objected that, if one mentioned some IP rights existing today, and not others, this involved a policy choice. However, such a choice would be difficult to make, and moreover, nowadays new IP rights and rights *sui generis* were emerging rapidly. Some years ago, semiconductors and integrated circuits had not been protected by IP rights in any country, and the same was true for databases. Now several States granted IP protection while others did not. Moreover, within WIPO, currently the possible IP protection of traditional knowledge, genetic resources and folklore is under discussion,

although these issues lack many features of traditional IP rights. For these reasons, even if it were

possible to agree on which IP rights to exclude from scope and which not, explicit reference to some existing IP rights would necessarily create gaps in the very near future.

The option of referring to certain *categories* of rights (*e.g.* "registered intellectual property rights") instead of individual rights was equally discussed. The problem of this solution, however, is that some rights may be – or even have to be - registered in some countries while in other States, they are unregistered. In addition, some rights exist in a registered and an unregistered form within the same State. The latter applies, *e.g.*, to designs, copyright and trademarks. Furthermore, new registration duties are sometimes created for some rights. Making the exclusion from scope dependent on registration would therefore lead to somewhat arbitrary results, depending on the choice of a national legislator whether to require registration or not. Moreover, one would have to find a solution for those rights which did not have to be, but may be registered.

Therefore, two options seem to emerge: either a general catch-all phrase excluding proceedings having the validity of any intellectual property right as their principal issue,[15] or an exclusion limited to the obvious and undisputed area of proceedings having the validity of patents and (registered or unregistered) trademarks as their principal issue.

While the drafting policy of these two solutions seems to be fundamentally different, the results might not differ very much, assuming that a satisfactory "incidental question rule" can be found. The reasons are the following:

The Convention as it is drafted now is limited to choice of court agreements in B2B cases. This means that it will cover litigation concerning IP rights only where the parties to the proceedings have entered into some kind of contract, which contains *inter alia* a choice of court clause. Such a contract could either be a licensing agreement, an agreement that one party should not make use of a certain IP right, or other. Where a dispute then arises between the parties, it will have to be decided whether it arose "in connection with (this) particular legal relationship" (see Article 2(1)(a)) in order for the Convention to apply. So far, reports from practitioners seem to suggest that validity as a principal issue arises in particular with regard to patents, to a lesser extent with regard to trademarks and other (registered) industrial property rights, and almost never with regard to copyright and (other) unregistered rights. Therefore, even if one chose to exclude "proceedings relating to the validity of intellectual property rights" while at the same time making clear that this applied only to claims where this was the principal issue, the exclusion would in practice not cover very many cases beyond patents and trademarks. And where it did, those cases would be subject to exclusive jurisdiction in most States concerned anyway, which means that *not* excluding them would involve difficult disconnection issues.

Article 1(4)

The comments on Article 1(3)(k) in particular demonstrate that, for the sake of clarity, a rule stating that the exclusions from scope only apply if the subject matter listed there is the principal issue of the claim, would be helpful. Article 1(4) is an attempt to draft such a rule. While there was in principle agreement on the issue, there are some minor differences of opinion as to the effect which a finding on an incidental question may

[15] One suggestion in this context was to exclude "proceedings relating to the registration and validity of intellectual property rights, but not to licensing". Others felt that the last part should be better covered by a general "incidental question" rule which was also required for the other exclusions mentioned in Article 1(3).

produce in the future. Moreover, legal concepts and terminology differ strongly among Contracting States, and this has to be taken into account when drafting language for this provision.

By way of example, the kind of IP litigation excluded from scope in Article 1(3)(k) is used below in order to explain the need for, and the operation of, a rule along the lines of Article 1(4). However, the rule would apply to all the exclusions from the scope of the Convention listed in Article 1(3).

The group noted that in patent and (to a lesser extent) trademark cases, the defendant often objects to a claim by alleging the invalidity of the IP right. This also applies to the sort of cases that would be covered by this Convention, *i.e.* where there is an agreement between the parties which contains a choice of court clause for disputes arising between them in connection with the particular legal relationship. It has to be stressed in this context that the Convention would not apply to the so-called "sheer piracy" cases, *i.e.* infringement cases between two parties not related by any contract. While the latter is probably the biggest group of cases where the standard defence would be invalidity, it can also arise in cases where the licensor sues for royalties which have not been paid, or for damages arising from an alleged exploitation of the IP right beyond the limits covered by the license.[16]

It was mentioned that in some legal systems, an invalidity defence had to be brought by a counter-claim. These cases would, however, in many jurisdictions not be considered as "incidental question cases" because the *principal* issue of the counter-claim is validity, and consequently the exclusion in Article 1(3)(k) applies to the counter-claim. Jurisdiction for the counter-claim on validity is then governed by national law, and so are the effects of the judgment. It appears that in other jurisdictions, though, this is less clear.

In other countries, invalidity can be raised as a defence in proceedings brought, *e.g.* for the payment of royalties. While the principal finding of the judgment is whether royalties are due or not, on its way to this decision the court has to deal with the invalidity defence. The group felt that a court seized on the basis of a choice of court clause should be enabled to decide the principal issue falling under the Convention even where, in this situation, an incidental finding on the validity might be required.

The effect of such an implicit or incidental finding on validity is different in different legal systems – (a) sometimes the finding acquires the effect of *res judicata*, but only *inter partes*; (b) in other legal systems there may be broader collateral estoppel effects, and (c) in a third group of States, the implicit finding does not create any binding effect for subsequent proceedings even between the same parties. (d) The only consequence which does not seem to exist in any system is an effect *erga omnes* of an incidental finding of invalidity.

The problem which has to be tackled is that validity judgments creating effect *erga omnes* are excluded from party autonomy because the State that grants the protection of the IP right concerned also wants to reserve the decision on the existence of the right to

[16] This last example shows that it would be wise to move away from the opposition of "infringement" versus "contract". In some jurisdictions, this would be considered a contract case, while in others it would be a tort case or both. Again, it has to be recalled that in many countries the plaintiff only has to plead the facts, and it is for the court to find the legal basis. There are countries where the court would apply tort and contract rules cumulatively or alternatively, and the application of this Convention should not depend on such differences of national procedural law. Decisive for the application of this Convention should be the fact that the two parties had entered into a contract beforehand, which contains a choice of court clause. The court seized would then have to determine whether the case "arose in connection with" the particular legal relationship. This concept has been applied for long in arbitration.

the authorities it deems fit. This is however not the case if the principal issue is contractual litigation between private parties. Therefore, it was suggested that it would suffice to state in the Convention that the incidental finding on validity which was reached in litigation between private parties linked by a contract would create subsequent effects only between the parties to these proceedings. Thereby it is clear that neither third persons nor, in particular, the registering institution will be bound by the finding on the incidental validity issue under this Convention. This approach is reflected in the draft paragraph 4.

Other members of the group felt that this did not go far enough and wanted to make sure that the finding on the incidental question of validity by a court that would not have jurisdiction to decide on it as a principal issue should not create any subsequent effect, not even between the same parties. This approach is reflected in Article 12(6) of the 2001 Interim Text that was drafted by the IP working group.[17]

Article 1(5)

Article 1(2)(g) of the 2001 Interim Text ("arbitration and proceedings related thereto") was moved to Article 1(5) and phrased more clearly. Now the text explicitly states that the Convention does not require a Contracting State to recognise and enforce a judgment if the exercise of jurisdiction by the court of origin was contrary to an arbitration agreement.

Article 1(6)

The group did not feel any need to reopen the discussion on this paragraph (previously Article 1(3) of the 1999 Draft and Article 1(4) of the 2001 Interim Text), a necessary and uncontroversial provision.

Article 1(7)

The group did not feel any need to reopen the discussion on this paragraph (previously Article 1(4) of the 1999 Draft and Article 1(5) of the 2001 Interim Text), a necessary and uncontroversial provision.

Article 2 Definitions

As compared to the text elaborated at the second meeting of the working group, the drafting of the definitions article was slightly amended for the sake of clarity. The provision now defines choice of court clauses in general and exclusive choice of court clauses in particular. Out of the six different types of choice of court clauses identified on page 5 of Preliminary Document No 21,[18] only those designating either a single specific court or, alternatively, the courts of a single State (without identifying the individual court[19]) are "exclusive" for the purposes of this Convention. This means that

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[17] Article 12(6) of the 2001 Interim Text:
[6. Paragraphs 4 and 5 shall not apply where one of the above matters arises as an incidental question in proceedings before a court not having exclusive jurisdiction under those paragraphs. However, the ruling in that matter shall have no binding effect in subsequent proceedings, even if they are between the same parties. A matter arises as an incidental question if the court is not requested to give a judgment on that matter, even if a ruling on it is necessary in arriving at a decision.]
Note by the Permanent Bureau: First consultations carried out on Article 1(4) showed that important parts of the IP community still strongly prefer a rule excluding any – even *inter partes* – effect of the incidental validity finding in subsequent proceedings.

[18] *Supra* note 1.

[19] It has not been discussed whether a clause exclusively designating several alternative courts within the same State would be treated the same way as a clause designating "the courts of State X", or whether such a clause would be considered one of "multiple exclusivity" as described in the text, *supra*, following this footnote (*e.g.* "the courts of London or Yokohama"). See also *infra* note 21.

the cases of so-called "multiple exclusivity" (*e.g.* "the courts of Tokyo or London shall have exclusive

jurisdiction") are not considered as exclusive, and neither are the so-called asymmetric clauses[20] where one party is limited to one specific court whereas the other party retains a certain freedom. The reason is that the group wanted to avoid the further complication of having to add rules on parallel proceedings to the jurisdiction chapter, and this would be necessary as soon as more than one court was chosen, albeit "exclusively".[21]

It is very important to note that Article 2(1)(b), 2nd sentence, contains a presumption: "A choice of court agreement which designates the courts of one State or one specific court shall be deemed to be exclusive unless the parties have provided otherwise." During the group's discussions, it was mentioned that the words "explicitly" or "expressly" should be understood as implied in this rule before "provided otherwise".

The group also examined the question of adding a specific rule on submission. In this respect, it was pointed out that Article 3 as such already covered post-filing agreements between the parties because it did not contain any reference to time. This included cases where the parties had initially agreed to a different court than the one eventually seized, as well as cases where there had been no choice of court agreement between the parties prior to filing.

For this reason, some participants did not wish to add any further rule on submission which, strictly speaking, is some kind of agreement between the defendant and the court, and not between the defendant and the plaintiff. Therefore, Article 9 as contained in Preliminary Document No 21[22] was deleted,[23] and it was considered unnecessary to substitute it by an Article 3(e) adding an additional form requirement as follows: "e) in the course of proceedings before a court in the form and the manner required by that court".

Others felt, however, that a submission rule in the traditional sense (*i.e.* looking at the relationship court-defendant only, because the plaintiff had already expressed his agreement by seizing this court) would add a lot to the Convention and still remain within the ambit of strengthening party autonomy. It was nevertheless admitted that the addition of such a rule would probably require consideration of autonomous Convention standards as to the form of such (tacit or explicit?) submission and the timelines for possible objections.

The definition of "judgment" in Article 2(1)(c) was taken from Article 23 of the 2001 Interim Text. The words "on the merits" were added in order to make clear that provisional and protective measures (measures granting interim relief) are no "judgments" under the Convention. Articles 6 and 7 take this up. It was not felt necessary to limit the definition to judgments rendered *by the chosen court* because Article 7 on recognition and enforcement makes clear that only judgments rendered by the chosen court (independent of whether the choice of court clause was exclusive or not) are covered by Chapter III of the Convention.

In the same vein, the group decided not to deal with the question of finality or *res judicata* in the provision defining a "judgment". These requirements will be dealt with in the appropriate provision of the Convention (*i.e.* Article 7).

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[20] One important result of the survey carried out by the ICC was that the use of the so-called asymmetrical clauses is very limited in practice (see Question 10 of the survey, *supra* note 6).

[21] Theoretically, the situation of parallel proceedings could also arise where the parties had designated "the courts of State X" if one party seized court A in that State and the other party seized court B in the same State. Since all legal systems have developed solutions to deal with such internal situations, however, no rule in the Convention would be required for these cases, and it is therefore possible to treat them the same way as the designation of one single court.

[22] *Supra* note 1.

[23] The provision reads: "[Where a court of a Contracting State has been seized with a claim and where and to the extent that the defendant expressly and in the form required by the procedural law of the court seized accepts the jurisdiction of that court, that court shall have jurisdiction.]".

The definition of the equivalent for "habitual residence" for entities or persons other than natural persons was moved to Article 2(3) without any changes.

Article 3 Formal validity

Few changes were made at the third meeting with regard to the provisions on formal validity. In Article 3(b), "confirmed in writing" was replaced by "evidenced in writing" for drafting reasons. The word "only" remained in square brackets because the group considered that there was a policy decision to be made which went beyond the mandate of the group and required wider participation. The question to be decided is whether less rigid form standards under national law may continue to apply, thereby creating a "grey area jurisdiction" under national law and leading to judgments not entitled to recognition and enforcement under the Convention. During the discussion it became clear that there was consensus that the Convention form should be compulsory in two cases:

- for other courts than the chosen court, and
- for courts being asked to recognise a judgment based on a choice of court clause.

This means that:

- a court other than the chosen court only has to defer under the Convention if certain standards are met.
- This is also the case for recognition and enforcement which is only compulsory under the Convention if its standards are met.

The only issue on which there may be different views is the validity issue before the chosen court, *i.e.* whether the chosen court will be allowed to accept a clause valid only under its national law. Some participants remarked that such a case was unlikely to arise in practice because the form standards established by the Convention were already very generous. And even if a clause was valid under national law but not under the Convention they doubted that Contracting States, as a matter of policy, would indeed wish to see these clauses enforced.[24]

CHAPTER II JURISDICTION

For the sake of clarity, the text contains two different rules on giving effect to a choice of court agreement in Chapter II. Article 4 is addressed to the court exclusively chosen (and seized) and establishes the obligation to respect the choice court clause and hear the case, subject to the other conditions set out in the Convention.[25] Article 5, on the other hand, is addressed to the court seized but not chosen and obliges it to defer to the chosen court, subject to the further provisions of that Article.

[24] In contrast, it was mentioned that Article VII of the New York Convention explicitly allows national law to continue to apply if it is more favourable to the validity of an arbitration agreement.

[25] Note by the Permanent Bureau: Article 4(1) does not explicitly exclude a discretion of the court validly chosen to decline jurisdiction. The words in square brackets at the end of Article 4(3) even seem to suggest that any discretion available under national law shall continue to exist. However, negotiations were so far based on the tacit assumption that no such discretion should exist for a court designated in a choice of court agreement, at least not as far as declining jurisdiction in favour of a *foreign* court was concerned. The presence of Article 4(2), a provision defining a carve-out from an *obligation* of the court (and not merely a *right)* to take the case established under Article 4(1), seems to confirm this latter interpretation.

The group decided not to extend the Chapter on jurisdiction to cover non-exclusive clauses because, where a clause was not exclusive or designated more than one specific court, albeit to the exclusion of any other courts, there would in fact be more than one basis of jurisdiction lawfully available under the Convention even in the presence of a valid clause. This would require the Convention to establish a rule on how courts should deal with parallel proceedings. While the provisions drafted in 1999 and 2001 on *lis pendens* and *forum non conveniens*[26] were still considered to represent a valuable compromise between different legal systems, their insertion was considered disproportionate in a Convention only dealing with choice of court clauses.

Article 4 Jurisdiction of the chosen court

Article 4(1)

Article 4(1) is addressed to the court (exclusively) chosen and makes clear that the court has to take the case if the exclusive choice of court clause is valid under the Convention and the other conditions set out in the Convention are fulfilled. It has to be noted that Article 15 allows States to exclude this obligation by declaration for cases where there is, except for the choice of court agreement, no connection between that State and the parties or the dispute.

The draft text which resulted from the second meeting of the group had attempted to achieve a Convention standard for (some aspects of) substantive validity, either by suggesting an autonomous substantive rule or at least a conflict of laws rule. As the six Alternatives for Article 5(1) and (2) in Preliminary Document No 21[27] show, however, no consensus could be reached as to the desirability and feasibility of such a harmonisation.[28] Therefore, the group now addressed the issue differently: No separate Article on substantive validity is included in the draft text, but both the rule addressed to the court chosen (and seized) in Article 4 and the rule addressed to the court seized but not chosen impose the obligations contained in those Articles only "unless the court finds that the agreement is null and void, inoperative or incapable of being performed".

This wording was taken up in order to have a minimum rule on substantive validity and enable courts in Contracting States to take advantage of the vast case-law that was developed with regard to the identical words in the New York Convention. It was mentioned that the words "incapable of being performed" are being interpreted narrowly in arbitration and should therefore be used here. The hope was expressed that this would influence the courts when interpreting this new Convention.

In the French text, however, the group discussed whether to deviate slightly from the New York Convention wording. It was felt that the word "caduc" did not have the same meaning as "null and void" but seemed to suggest that something had been there in the past. A better word would be "nul". However, by introducing this change, the group did not want to risk losing the benefit of having the case-law concerning the interpretation of the words "null and void / caduc" in the New York Convention in French as a body of reference. Consequently, both words were kept in square brackets as alternatives. This question therefore requires further consideration.

Article 4(2)

According to paragraph 2, which is addressed to the court (exclusively) chosen and seized, the obligation to accept the case based on the choice of court clause does not

[26] See Articles 21 and 22 of the 1999 and 2001 texts.
[27] *Supra* note 1.
[28] Some participants stressed that they would still prefer to strive for common standards concerning substantive validity by at least harmonising the rules on the applicable law governing some or all aspects of substantive validity.

exist where all parties are habitually resident in the State of the chosen court. This is considered to be an internal matter of the State concerned which would in all likelihood assume jurisdiction under its national law.[29] Even where the subject matter of the case has an international element or is purely foreign or international, Article 4(1) would thus not apply.[30] From the records of the meeting, it is not clear whether this result was intentional. It has to be admitted, however, that it was also produced by previous drafts such as Article 2(1) of the 2001 Interim Text and Article 2(1) of the text drafted at the second meeting of the group,[31] and never called into question. Nevertheless, the discussion rather seems to reflect that at least some participants assumed such a case to be covered by Article 4(1).

Article 4(3)

There was agreement that the parties could not, by a choice of court clause, impose a case on a court which lacks subject matter jurisdiction. This is stated in the first part of Article 4(3).

The last part of this provision stands in square brackets because some participants raised the concern that such a rule might render Article 4(1) devoid of its content. Courts might feel free to transfer cases to another court within the same Contracting State in a manner not foreseen by the parties. Moreover, a contradiction to the freedom of the parties to choose also "a specific court" which is mentioned in Article 2(1)(b) was identified.

During the discussion, however, it became clearer why some participants felt the need for at least some rule of this kind: There was agreement on the first part of paragraph 3 relating to subject matter jurisdiction. But it appeared that at least some of those who consider this part to be sufficient have a wider understanding of the concept of subject matter jurisdiction. An example given was the allocation of jurisdiction to different courts within a State according to the value of the case. While this would be considered as subject matter jurisdiction in some States, it is not in others. Venue was another example where doubts arose.

Moreover, it was mentioned that in some States, there are rules for a more efficient administration of justice within a State which permit or require the transfer of cases from one court to another, even where the court chosen and seized may have subject matter jurisdiction, and all other requirements (venue etc) are fulfilled.[32]

The doctrine of *forum non conveniens* might also apply within a State in this respect. While there seemed to be agreement so far that in the presence of an exclusive choice of court clause, the chosen court should be no longer allowed to apply this doctrine in order to decline jurisdiction in favour of a *foreign* court, the question whether it should be permitted to decline jurisdiction in favour of another court in the *same* Contracting State has never been discussed. To admit such discretion may indeed at first sight seem

[29] Recognition and enforcement of the resulting judgment in another Contracting State would again be covered by the Convention, at least under the present wording of Article 7(1). See comments on Article 7(1) below.
[30] In one of the previous meetings, the following case was given as an example: Two persons habitually resident in Italy enter into a contract concerning the sales of a production plant located in Argentina and agree that the Italian courts shall have jurisdiction. If the Italian court is then actually seized on the basis of that agreement, it will not be under a *Convention* duty established by Article 4 to take the case.
[31] See p. ii of the Annex to Prel. Doc. No 21 (*supra* note 1).
[32] This is true in particular for federal States having a common law system. Transfers between state and federal courts, among federal courts, or among courts of different states, provinces or territories are possible. The Permanent Bureau is preparing a research paper on this topic.

to be a contradiction to the freedom of the parties, as stated in Article 2(1)(a) to choose "a

specific court". On the other hand, in the past the negotiations had always been based on the common understanding that the Convention would only deal with the *international*, and not with the *internal* allocation of jurisdiction.[33]

During the discussions on Article 4(3), one participant asked what would happen if the parties had chosen "the courts of State X", and State X did not have a rule on venue for such cases. The answer given by the group was that the plaintiff would exercise a choice by filing suit with a specific court, and whether that particular court could hear the case would then be decided by the internal law of the State. If suit was filed in any other State, it would be sufficient for the court seized to note that the parties had agreed on the courts of a different State, even if the individual court was not yet identified at that time. The court seized but not chosen would have to decline jurisdiction.

Article 5 Priority of the chosen court

The title of Article 5 (Priority) relates to the following:

Article 5 states the obligation for any court in a Contracting State other than the State of the chosen court to defer to the chosen court, if the parties had designated the latter in an exclusive choice of court agreement. This obligation is independent of whether the chosen court is located in a Contracting or a non-Contracting State. It does however not apply if both the court chosen and the court seized are located within the same Contracting State. Where, *e.g.*, parties choose a court at The Hague and then seize a court in Amsterdam, it would not be for the Convention to decide what the Amsterdam court should do. This would be an internal matter for the State concerned. More analysis and consideration of this policy issue may be necessary, in particular in connection with the issues raised in Article 4(3) above.[34]

Article 5(a)-(c) contain three exceptions to the rule on deference. The most obvious one is contained in (c). Where the chosen court had actually been seized before, and had declined jurisdiction, an obligation imposed on the court second seized by this Convention because of the respect for the choice of court agreement would amount to a denial of justice.

Where, on the other hand, the court seized but not chosen finds the choice of court agreement to be null and void, inoperative or incapable of being performed, Article 5(a) allows the court seized to continue hearing the case. It was felt that no additional public policy exception was required here.

Article 5(b) is of a different quality: This rule was included in order to meet the concerns of some participants who do not want parties to contract an otherwise purely domestic case out of the jurisdiction. It reflects the part of the provision on territorial scope which was contained in Article 2 of the 1999 and 2001 Texts as well as in Article 2(1) of the text resulting from the second meeting of the working group,[35] as far as it defines the

[33] As an example, it may be mentioned that there had been attempts to refer, in Article 10 of the 1999 Text, to the *place* where the injury arose, in order to establish tort jurisdiction, and not only to the *State* where the injury arose. These attempts failed, however.

[34] It may seem surprising that Article 5 requires deference to a chosen court located in a non-Contracting State while it does not oblige to defer to a court located in the same Contracting State as the court seized. Moreover, any policy choice made here (with regard to the party's autonomy to disregard a choice of court clause while suing within the same Contracting State) will have to be brought in line with the policy choice made under Article 4(3) (with regard to a State's possibility to disregard the choice of court clause by transferring the case to another court within the same Contracting State for the purposes of an efficient administration of justice).

[35] See p. ii of the Annex to Prel. Doc. No 21 (*supra* note 1).

scope with regard to the court seized but not chosen. Where this court[36] finds itself seized with a case that is purely domestic, with the sole exception of the choice of court agreement pointing to another State, the court seized but not chosen is entitled to disregard the clause and hear the case.

Any additional foreign element, however, will make Article 5(b) inapplicable, *e.g.* a choice of law clause in addition to the choice of court clause. But where, under national law, both the choice of a foreign court and the choice of a foreign law are prohibited where all other elements of the case are connected with that forum, the opinion was stated that in this case, the choice of law clause would not count as an additional foreign element because it was invalid. The natural forum seized but not chosen would therefore be allowed to disregard the choice of court clause.

The burden of proof for all three exceptions to the obligation to defer is on the party who tries to have the choice of court clause set aside.

In the case of a non-exclusive choice of court clause, there is no obligation under the Convention for any court other than the chosen court to decline jurisdiction and defer to the chosen court. It was however suggested to extend, if not the jurisdiction rule in Article 4 in order to avoid the need for a rule on parallel proceedings, but at least the obligation to defer in Article 5 to cases of so-called multiple exclusivity. Where, *e.g.*, the parties have agreed that the courts of Tokyo or London shall have exclusive jurisdiction, and then one party files suit in Paris, it was suggested that the Paris court should also be obliged to defer. While the point was well received, it was not possible to find appropriate language at this meeting due to a lack of time.

Article 6 Interim measures of protection

The group noted that in 1999 and 2001, it had proved very difficult to achieve consensus on interim measures of protection, in particular with regard to their transfrontier recognition and enforcement under the Convention. While it had been a valid attempt to achieve the latter, in particular for measures rendered by the court having jurisdiction under a Convention containing a large number of jurisdiction rules, it was considered to be far less important under a Convention on choice of court clauses only. Therefore, Articles 2(1)(c) and 7 make clear that a judgment entitled to recognition and enforcement under the Convention has to be a judgment on the merits, not an interim measure.

While this Convention does not provide for recognition and enforcement of interim measures (even where they were ordered by the court chosen by the parties), the group wished to make clear that it did not want the jurisdiction rules to be interpreted in such a way that only the chosen court was entitled to issue interim measures of protection. Therefore Article 6 states that the Convention does not contain any such prohibition. Parties remain free to seize other courts than the chosen court for interim relief which any court may grant, provided that it has jurisdiction under its national law. This was made explicit in order to avoid divergent interpretations, as they do exist under the New York Convention where courts sometimes refuse to grant interim measures because the case on the merits is referred to arbitration by agreement.

The group then discussed whether the words "unless explicitly agreed otherwise by the parties" should be added. Some felt that, where the agreement between the parties itself

[36] It has to be noted that the privilege under Article 5(b) is only given to the court of the State that considers itself to be the natural forum because of the case being a domestic one for this State. No other State may disregard a choice of court clause based on Article 5(b).

stated that the exclusive choice of court should also apply to interim measures of protection, such decision should be respected – and protected by the Convention. Others considered it wiser, in the light of previous discussions on interim relief and the sensitivity of the issue, for the Convention not to regulate the question. During the discussions, however, it was stressed that where a choice of court agreement includes interim relief and one party seizes another court, this is a breach of contract. The consequences of such a breach should not be governed by the Convention but by national law. Therefore, it was decided not to add the words mentioned above.

In addition, the group changed the English wording from "provisional and protective measures" by adding the words "on an interim basis" because consultation carried out on previous drafts containing the expression "provisional and protective measures" had demonstrated that this term was not universally understood outside countries which either had a civil law system or were bound by the Conventions of Brussels or Lugano or the Brussels Regulation.[37] In other countries these measures were often referred to as "interim relief".[38] The combination of the two was used in order to make clear that the measure has to be temporary and may not amount to a relief on the merits, as may be the case with interim payment ordered to the creditor.

In French, this addition was not required because "provisoires et conservatoires" is a terminology which will be understood in the States concerned as having the said meaning.

CHAPTER III RECOGNITION AND ENFORCEMENT

Article 7 Recognition and enforcement

Article 7(1)

It was agreed to use the expression "recognised or enforced, as the case may be" in the chapeau of Article 7(1) in order to simplify further drafting. This means that the provisions of this Article shall apply, as far as their content lends itself to such application, to requests for recognition, or for enforcement, or both, of a foreign judgment. The rule is that a judgment on the merits rendered by the chosen court, be it on the basis of an exclusive or non-exclusive choice of court clause, is recognised or enforced under the Convention. The way Article 7(1) is drafted, it also covers judgments rendered by a court of another Contracting State where all the parties were habitually resident in that other Contracting State and had chosen a court of that State. In that case, the court that rendered the judgment did not apply the Convention at the jurisdiction stage because of Article 4(2). Recognition and enforcement, however, would be covered by the Convention. This was not discussed extensively and may require further consideration.

Article 7(1), 2nd sentence, contains an exhaustive[39] list of grounds for refusal in case the judgment was based on an exclusive choice of court clause. For judgments based on a non-exclusive clause, Article 7(2) adds two more grounds for refusal (see below).

While the group shared the view that no further grounds for refusal of recognition or enforcement existing under national law could be applied to a judgment rendered by the chosen court beyond the grounds listed in Article 7, it was less clear during the

[37] *Supra* note 11.
[38] Article 17 of the 1985 UNCITRAL Model Law on International Commercial Arbitration, *e.g.*, speaks of "interim measures of protection / mesures provisoires ou conservatoires".
[39] In order to make clear that the list is exhaustive and no further grounds which might be contained in national law may be invoked, the wording initially suggested during the meeting "shall be recognised or enforced unless ..." was replaced by "Recognition or enforcement may be refused only if ...".

discussions whether the court addressed would be *obliged* to refuse recognition or enforcement if one of the grounds of Article 7 was fulfilled. Some felt that all grounds should be mandatory, others saw them as discretionary and referred to the introductory phrase "may be refused", and yet another group wished to make only some grounds mandatory (*e.g*. public policy and fraud) while other grounds should remain discretionary. It was felt that this might to some extent be a mere theoretical problem because, where a choice of court agreement did not in all respects comply with the Convention requirements, the court addressed would probably refuse recognition under the Convention. On the other hand, it was pointed out that even in such a case, national law might be more generous as to recognition and enforcement and would continue to apply.

In this context, it has to be mentioned that with regard to Article 28(1) of the 1999 and 2001 Texts, the NYGH / POCAR REPORT states explicitly that the grounds – which are equally introduced by "may" – are not mandatory.

Article 7(1)(a)

In Article 7(1)(a), it was decided to repeat the reference to the requirement of substantive validity as contained in Articles 4(1) and 5(1)(a) which was taken from the New York Convention ("null and void"). Since Article 7(1)(a) is located in the Chapter on recognition and enforcement, however, the words "inoperable or incapable of being performed" were not repeated here – again in parallel with the New York Convention. They relate to clauses that may be legally valid but can not be put into effect for factual circumstances, *e.g.* a natural disaster in the State designated, or a war. At the recognition stage and in the presence of a judgment rendered by the chosen court, however, it is obvious that the clause had proven to be operable and capable of being performed.

Some fears were expressed that this provision would incite the court addressed to review the validity of the clause in too much detail. In particular because the Convention does not contain any rules on the law applicable to the substantive validity of the choice of court agreement at the jurisdiction stage, the court of origin would probably apply its own conflict of laws rules in order to determine the validity. Some participants therefore expressed the strong desire to include language along the lines of Article V(1)(a) of the New York Convention[40] in order to avoid a double standard. Under this view, the recognising or enforcing court should not use its own law. Others disagreed with this, and therefore the addition was not included for the time being. The provision as it now stands reflects the middle ground for compromise between no rule at all and a conflict of laws rule as stated in Alternative 3 for Article 5 in Preliminary Document No 21.[41] The hope was expressed that the case-law developed under the New York Convention would nevertheless lead to a certain harmonisation.

Article 7(1)(b)

Like in the texts drawn up in 1999 and 2001, it was considered preferable not to use the expression "duly served" because this seemed too formalistic an approach. The factual aspect that the defendant had received the document and had been able to arrange for his defence was considered sufficient. Practice in particular under Article 27 No 2 of the

[40] Article V
1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or ....

[41] *Supra* note 1.

Conventions of Brussels and Lugano, which uses the concept of "duly served", has shown that this often led to the refusal of recognition or enforcement because of even minor formal mistakes that had been committed during service.

Moreover, the words "including the essential elements of the claim" were added, as they had been in Article 28(1)(d) of the 1999 and 2001 Texts in order to ensure that the defendant had the opportunity to become aware of them.[42]

Like in the 1999 and 2001 versions, the provision applies to all judgments, including default judgments. A distinction remains by virtue of Article 8(1)(b): if the judgment was rendered by default, the party seeking to have it recognised or enforced carries the burden of proving that the document instituting proceedings was notified to the other party. Otherwise, the burden of establishing that either or both of the conditions of sub-paragraph d were not fulfilled rests with the party opposing recognition or enforcement.

Article 7(1)(c), (d) and (e)

The question was raised whether both the rule on fraud in connection with a matter of procedure in Article 7(1)(c) and the rule on proceedings incompatible with fundamental principles of procedure in the State addressed (Article 7(1)(d)) were required. Some participants thought that fraud in connection with a matter of procedure was a sub-category of either the rule in Article 7(1)(d) or of the general public policy clause in Article 7(1)(e). Participants from States party to the European Convention on Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950 stressed that for them, Article 7(1)(e) embodied the requirements established by Article 6 ECHR[43] and would therefore also include both the fraud provision and the rule on fundamental principles of procedure. Because this might not be the case in all legal systems, and some States might have a narrower concept of public policy than others, however, it was decided to include Article 7(1)(c), (d) and (e) for the time being. In this context, it was also mentioned that the notification requirement in (b) only applies to the beginning of the proceedings and not to later steps. Therefore, an additional rule dealing with errors committed at the later stages might be necessary. Nevertheless, (d) was placed in square brackets in order to express the doubts raised.

The group decided not to add a ground for refusal of recognition or enforcement for those cases where the judgment has already been satisfied. This was considered to be a matter for national enforcement law.

Article 7(2)

Article 7(2) lists further grounds for refusal of recognition or enforcement which relate only to judgments based on a non-exclusive choice of court agreement. While the Chapter on jurisdiction is limited to exclusive clauses in order to avoid the need for a rule on parallel proceedings, the problems raised by the inclusion of judgments based on a non-exclusive choice of court clause seem to be less difficult to resolve. Article 7(2)(a) therefore provides that recognition or enforcement of a judgment rendered by a

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[42] In this context, a recent decision by the European Court of Human Rights was mentioned where the court had found a violation of Article 6 ECHR because the documents instituting the proceedings had not contained any reference to the subject matter of the proceedings (*Pellegrini v. Italy*, EurCtHR, 20 July 2001, Application No 30882 / 96; available at < http://hudoc.echr.coe.int/hudoc/ >).

[43] The relevant part of Article 6 ECHR reads as follows: (1) In the determination of his civil rights and obligations (…), everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
In this respect, reference was made to the case of *Krombach v. Bamberski* which was dealt with both by the European Court of Justice of the European Communities (Case C-7 / 98, 28 March 2000, *O.J.* 2000, I-1935, available at < http://www.curia.eu.int >) and by the European Court of Human Rights established under the ECHR within the framework of the Council of Europe (*Krombach v. France*, EurCtHR, 13 February 2001, Application No 29731 / 96, available at < http://hudoc.echr.coe.int/hudoc/ >).

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designated in a non-exclusive clause may be refused if either prior proceedings are pending in the State addressed or in another State, provided that in the latter case they are likely to lead to a judgment capable of being recognised or enforced in the State addressed. Article 7(2)(b) deals with the situation where such a judgment has already been rendered. The justification for the latter proceedings or judgment to prevail over the judgment given by the chosen court is that the choice was not exclusive, and that therefore the seizure of a different court was permitted by both the clause and the Convention. Where the parties in fact use the freedom agreed upon between them by seizing different courts, it is not for the Convention any more to interfere with this by privileging the judgment rendered by the chosen court. Where, however, the parties have first entered into a non-exclusive choice of court agreement and then litigated before the chosen court without any other court having been involved, there was no reason why such a judgment should not benefit from the Convention rules on recognition and enforcement in the same way as if the clause had been exclusive. The behaviour of the parties under the clause in the case described amounts to "promoting" the non-exclusive clause to an exclusive one at the recognition and enforcement stage.

Article 7(3)

The group did not feel any need to reopen the discussion on this paragraph (previously Article 28(2) of the 1999 Draft and of the 2001 Interim Text), a necessary and uncontroversial provision.

Article 7(4) and (5)

The group discussed at length whether Article 7 should contain a requirement for the judgment submitted for recognition or enforcement to be "final", to have the effect of *res judicata* or to be enforceable in the country of origin.

While in the 1999 Draft, in order to be recognised under the Convention, a judgment had to have the effect of *res judicata* in the State of origin, it was noted in 2001 that technical terms such as '*res judicata*' or '*autorité de la chose jugée*' might not have a uniform meaning in all legal systems. Therefore the group preferred to avoid such terms by not specifying any further requirement in the definition contained in Article 2(1)(c) and, as a first step, opening the provision on recognition and enforcement in Article 7 to all judgments. However, in order to protect the defendant and to achieve the results aimed at by the various different drafting proposals submitted in 2001 for Article 25(2)-(4), the following safeguards were added:

Article 7(4) addresses the issue of finality and *res judicata* for the purposes of both recognition and enforcement without using any of these terms. It clarifies that a judgment cannot have any greater effect in the State addressed than it has in the State of origin. Thus, where in the State of origin a judgment which is still subject to review does not yet create any (albeit temporarily) binding effects on the parties, such effects cannot derive from it in the State addressed either.

Where, however, a judgment which is still subject to review is enforceable in the State of origin, it would in principle be enforceable in the State addressed under Article 7(4). At this stage, Article 7(5) introduces a further protection for the judgment debtor. Where the judgment is still subject to review in the State of origin, or the time limit for seeking ordinary review has not yet expired, proceedings for recognition or enforcement in the State addressed may be suspended or dismissed without prejudice.

The words "suspended or dismissed without prejudice" were used in the light of existing differences in national procedure. In some countries, a refusal to recognise or enforce a foreign judgment which is only based on the fact that the judgment is still subject to review, or the period for ordinary review has not yet expired in the State of origin,

would be

given in the form of a judgment. In these countries, such a judgment would however not preclude the applicant from renewing its application once the obstacle has been removed (= dismissal without prejudice). In other countries, the initial application is merely suspended until the removal of the obstacle. The words chosen shall therefore ensure that an applicant whose application for recognition or enforcement of a foreign judgment is merely rejected because the judgment submitted is still subject to review, or the period for ordinary review has not yet expired in the State of origin, may not be precluded from applying again for recognition or enforcement at a later time, even where national procedures provide that the first application be dismissed by a judgment or order.

Where the judgment is actually under review in the State of origin, this is sufficient to trigger the application of Article 7(5). Where no appeal has been lodged, however, Article 7(5) requires that a time limit for seeking *ordinary* review has not yet expired. The word "ordinary" was added here because in some legal systems, some (extraordinary) forms of review may always be sought, without any time lines. These unlimited forms of possible review would not trigger the application of Article 7(5).

Article 8 Documents to be produced

Article 29 of the 2001 Interim Text, which defines the documents to be produced by an applicant seeking recognition or enforcement served as a point of departure for the discussions of the group.

Article 8(1)(a)

With regard to Article 8(1)(a), which requires the applicant to produce "a complete and certified copy of the judgment", a discussion arose as to whether "the judgment" meant only "the order" as understood in some common law countries, or whether it referred to the full decision including the facts (where given) and the legal reasoning, as this would be read in civil law countries. This had never been discussed in detail, and neither the NYGH / POCAR REPORT on the 1999 Draft nor the notes to the 2001 Interim Text contain any comment on this issue.

Article 8(1)(b)

The NYGH / POCAR REPORT states on the identical provision in Article 29(1)(b) of the 1999 Draft:

"*b)* The second document in the list is the one establishing that the summons, or an equivalent document, was served upon the defendant. It only has to be produced in the case of recognition or enforcement of a default judgment. This restriction may seem to conflict with the provision in Article 28, paragraph 1 (d),[44] whereby failure to serve the summons on the defendant is a ground for refusing to recognise or enforce the judgment, even in a case where the decision was handed down following a hearing of both parties. However, the contradiction is no more than apparent, since it may be presumed, when it is not a default judgment, that the defendant has received the summons. It will be for the defendant to raise the question of service of the document, or for the court seised, where appropriate, to call for the document to be produced, in accordance with paragraph 3."

Article 8(1)(c)

[44] Note by the Permanent Bureau: the part of Article 28(1)(d) of the 2001 Interim Text on which there was consensus is identical with Article 7(1)(b) of the 2003 draft attached as an Annex to this Report.

A change made to this Article is reflected in Article 8(1)(c): While Article 29(1)(c) of the 2001 Interim Text reads: "all documents required to establish that the judgment is *res*

judicata in the State of origin or, as the case may be, is enforceable in that State", the reference to *res judicata* was now replaced by the words "has effect" following the changes made to Article 7 in this respect (see explanations under Article 7).

Article 8(1)(d) and (2)

In Article 8(1)(d) and (2) it was decided not to include the word "legally" before "qualified", as it had been suggested in 2001, because this institution was unknown in many countries.

The drafting of Article 8(4), which permits the court addressed to require the production of evidence of the choice of court agreement, and any other necessary documents if the terms of the judgment do not enable this court to verify whether the conditions of this Chapter have been complied with, was amended in order to focus more on the precise requirements of assessing the existence of a valid choice of court agreement. This is supposed to assist the court addressed in cases where it is not stated explicitly in the judgment that the court of origin based its jurisdiction on a choice of court agreement. However, it may be assumed that this provision will have little application where the judgment is accompanied by the (non-mandatory[45]) form provided for in Article 8(2) and contained in the Annex. Under No 1 of this form, the court of origin has to state explicitly that it based its jurisdiction on a choice of court agreement, and has to indicate factual elements to support the existence of such agreement.

Article 9 Procedure

Article 9 was taken over from Article 30 of the 1999 Draft. It was decided not to take on board the suggested amendments considered in 2001 because they made the text more difficult to understand without adding anything in substance.

Article 10 Costs of proceedings

The group took Article 31 of the 2001 Interim Text as a starting point.[46] It was felt that paragraph 1 was already covered by the non-discrimination provision in Article 14 of the present text.

Paragraph 2 was retained for the reasons already given in 2001 where the co-reporters stated in note 171 to the Interim Text: "The proposal for this paragraph is based on Article 15 of the Hague Convention of 1980 on International Access to Justice and Article 18 of the Hague Convention of 1954 on Civil Procedure. Its purpose is to secure enforcement of an order made by the requested court for the payment of the costs and expenses borne by the judgment debtor in a case where the requested court has rejected enforcement of the judgment on a ground such as the fraud of the judgment creditor upon the court of origin." The drafting was amended in order to render the objective of this provision more evident. However, the requirement that a declaration of enforceability or registration for enforcement, as the case may be, be granted free of charge was dropped. While it was justified in the context of the two Conventions which served as a

[45] Note by the Permanent Bureau: As long as the form is not mandatory, it may be considered to include it into a non-binding recommendation rather than into the Convention itself, in order to facilitate subsequent adaptations.

[46] This provision reads: *Article 31 Costs of proceedings*

1. No security, bond or deposit, however described, to guarantee the payment of costs or expenses [for the procedure of Article 30] shall be required by reason only that the applicant is a national of, or has its habitual residence in, another Contracting State.

[2. An order for payment of costs and expenses of proceedings, made in one of the Contracting States against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 shall, on the application of the person entitled to the benefit of the order, be rendered enforceable without charge in any other Contracting State.]

model and have as their aim to assist parties in need in their access to justice, the parties targeted by this Convention in a B2B context do not generally require this particular aspect of protection.

Article 11 Damages

As a starting point, the group examined Article 33 of the 2001 Interim Text which under certain circumstances allows for a reduction of a judgment awarding damages.

Some participants felt that in a Convention limited to choice of court clauses in B2B cases, such a provision was neither necessary nor desirable because it was targeted at U.S. punitive damages which were not generally relevant in contractual cases. Under a choice of court Convention, it could however be conceived that the chosen court might also hear a non-contractual case, *e.g.* a tort case, provided that this was covered by the "arising out of a specific legal relationship"-language in Article 2. It was stated, however, that in most cases where a tort claim was related to a contractual claim, the tort part would not be between the parties to the contract. Others had strong feelings about retaining Article 11 as a whole.

Eventually, a compromise was reached by deleting former Article 33(2) (relating to compensatory damages) and keeping paragraphs 1 and 3 which related to non-compensatory damages. Thereby, it is intended to cover situations where punitive or exemplary (*i.e.* non-compensatory) damages might be awarded (even in contractual cases), and not to suggest there would be room for reducing compensatory damage awards.[47] The main argument was that, where parties had validly agreed on a certain court, there was no reason to interfere with the substance of the decision of that court. Some participants stated that, without this provision, recognition and enforcement would be refused completely in their State because no mechanism for reduction existed if the amount as such was considered exorbitant.

A question which was not discussed, but which becomes apparent from the NYGH / POCAR REPORT on Articles 28(1)(f) and 33 of the 1999 Draft is whether in addition to this rule or as an alternative, courts of Contracting States may apply the public policy rule in Article 7(1)(e) in order to refuse recognition and enforcement (in whole or in part) of a foreign judgment awarding damages which seem excessive as compared to the internal legal system of the requested State. In 1999, the rule on damages was seen as a *lex specialis* which precluded the application of the general public policy rule.

Article 12 Severability

Article 34 of the 2001 Interim Text had contained two different options[48] to provide for recognition or enforcement of only a part of the judgment which could arise for various

[47] One of the U.S. participants stated that, although there was a jury in contract cases, it would have to be instructed on damages and could not change the contractual or market price.

[48] 2001 Interim Text: *Article 34 Severability*

[Alternative A

If the judgment contains elements which are severable, one or more of them may be separately recognised, declared enforceable, registered for enforcement, or enforced.]

[Alternative B

Partial recognition or enforcement

Partial recognition or enforcement of a judgment shall be granted where:

a) partial recognition or enforcement is applied for; or

b) only part of the judgment is capable of being recognised or enforced under this Convention; or

c) the judgment has been satisfied in part.]

reasons: (1) because the judgment had already been satisfied in part, (2) because only partial recognition and enforcement was applied for, or (3) because only part of the judgment was capable of being recognised or enforced under the Convention. Keeping in mind these three situations, the group redrafted the Article in order to find a simpler wording that would cover them. It was felt that no explicit reference to situation (1) was required, this being a matter of national enforcement law. Moreover, it was considered preferable not to refer to "partial" recognition or enforcement because by such a rule, courts in some countries might feel invited to reduce a judgment that seemed excessive in amount to them. This is, however, not the purpose of Article 12. As far as damages are concerned, Article 11 provides a rule for these cases.

Article 13 Settlements

The group took Article 36 of the 2001 Interim Text as a starting point in order to extend the Convention to court-approved settlements. The drafting was amended in order to make the provision appear "lighter" without changing the meaning. It was thought that, where the court chosen by the parties had approved a settlement entered into by the parties or given its authority to it in any other way provided for in national law, this settlement should be treated the same way as if the chosen court had rendered a judgment after contentious proceedings.

Moreover, an explicit reference to "the chosen court" was inserted, thereby linking the provision more visibly to the choice of court agreements which are the object of this Convention. In this respect, it has to be recalled that the definition of a choice of court agreement in Article 2(1) contains no time requirement. Therefore, where two parties not having a prior choice of court agreement enter into a settlement and take it to a specific court for approval, it is implied that they have thereby also agreed on the choice of this court.

The aim of Article 13 is to bridge gaps between legal systems which could be detrimental to parties in some States: In many countries, in particular in those following the common law traditions, this rule will not have a wide scope of application because, where the parties merely settle among themselves, the case is struck out of the court's register, and the purely private settlement between the parties would not be covered by Article 13. Where, on the other hand, they take it to the court and have it entered into a consent order, or agree to a dismissal with prejudice, both would result in a "judgment" under the Convention, and Article 13 would not be necessary. Many civil law systems, however, will need Article 13 because they do not know the system of consent orders. In those States, parties conclude an agreement, and if they take it before the court for approval, such approval gives the settlement more or less the same procedural effects as a judgment, in particular as regards the formal termination of the court proceedings and enforcement.[49]

Article 14 No discrimination in procedural matters

This provision was placed in Chapter IV – General clauses because it applies at both stages: jurisdiction as well as recognition and enforcement, and for the security of costs.

The group discussed whether a rule like, *e.g.*, the rule existing in the state of New York which requires that, in order for the courts to accept jurisdiction under a choice of court clause concluded by two out-of-state parties, (1) a case must have a certain value and (2) the parties must have chosen New York law in addition to a New York court, was discriminatory in the sense addressed by Article 14. This was found not to be the case because the Convention should only establish rules regarding non-discrimination in

[49] Differences between judgments and settlements may exist with regard to the effect of *res judicata*.

relation with other Contracting States. The New York rule, on the other hand, also applied to cases within the U.S., *i.e.* to any two parties from states other than New York within the United States. Therefore it was not discriminatory within the scope of what this Convention could reasonably regulate.

Others retained a fear, however, that the Convention might thereby easily be circumvented, and wondered whether the application of the discrimination rule should not depend on whether a requirement established by national law was specifically targeted at choice of court clauses, or whether it constituted a general requirement for the courts to assume jurisdiction.

Article 15 Limitation of jurisdiction

Article 15 allows a State to limit the application of the duty arising under Article 4 of the Convention by making a declaration to the effect that its courts may refuse to determine disputes covered by a choice of court agreement if, except for the choice of court agreement, there is no connection between that State and the parties or the dispute. This rule is important for some because their national law requires some connection between the dispute or the parties and the forum. In order to limit the effects of this rule, it was agreed that the declaration could only be made upon ratification of the Convention and not at a later time. It may however be withdrawn at any moment.

Article 16 Limitation of recognition and enforcement

Article 5(b) allows a court seized but not chosen to hear a case in spite of a choice of court agreement designating the courts of another State if the case is a purely domestic one for the court seized, with the choice of court agreement as the only international element. So if one party disregards the choice of court agreement at the jurisdiction stage and seizes the natural forum, the latter may take the case. Where, however, the parties respect their choice of court agreement, and a judgment is rendered in the chosen (but otherwise unconnected) forum, such a judgment may have to be enforced in the State which would have been the natural forum. Article 16 allows those States that do not want their parties to contract purely domestic cases out of the forum (and who had therefore already required the rule in Article 5(b)) to make a declaration that they would not recognise the judgment rendered abroad. Article 16 thereby complements the restriction of party autonomy contained in Article 5(b). Like in Article 15, the declaration may only be made at the time of ratification and not later.

Article 17 Uniform interpretation

This is a standard provision in Hague and other Conventions.

Article 18 Non-unified legal system

This is equally a standard clause in Hague Conventions (see, *e.g.*, Article 47(9) and (10) of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*).[50] Some participants mentioned that for them, this was more a matter for implementing legislation.

[50] Initially, a second rule of this kind, also a standard clause in Hague Conventions (see, *e.g.*, Article 47(1) of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*) had been proposed which read: " In relation to a State in which two or more systems of law with regard to any matter dealt with in this convention apply in different territorial units, any reference to habitual residence in that State shall be construed as referring to habitual residence in the relevant territorial unit." However, during the discussions of the group it became clear that wherever a reference to "habitual residence" was made in the current draft (*i.e.*

Article 19 Relationship with other international instruments

No draft was produced yet for this provision. However, during the discussion, the following aspects were mentioned:

It was felt that the issues which will have to be dealt with under this Article have already been considerably reduced by the scope provisions in Article 1(2) and (3). This applies in particular to the possible conflict between national[51] rules of exclusive jurisdiction and party autonomy as protected by this Convention.

With regard to the instruments to be disconnected here, European participants mentioned the Conventions of Brussels and Lugano as well as the Brussels Regulation, and referred to the chart in Annex II to Preliminary Document No 20[52] which was drawn up by M. Dogauchi, as well as to page 16 of that document. It identifies that there can be an overlap in the area of jurisdiction only in one single case, namely where a court in a State in which the European instruments apply was chosen and one of the parties is resident in any State where the European instruments apply, but the other is resident outside that area in a State party to the Hague Convention. While it was noted that the European Community and its Member States had not yet reached an official position on it, the general feeling in the group seemed to be that in such a case, the Hague jurisdiction rules should apply. It was also mentioned in this context that at the recognition stage, even litigants from non-E.U. States might prefer the Brussels / Lugano regime to apply because it simplified recognition and enforcement even more than this Convention. Others objected that from the point of view of the defendant, this might be less desirable.

While the Conventions of Brussels and Lugano as well as the Brussels Regulation are general instruments governing jurisdiction, recognition and enforcement in civil and commercial matters, there are also specific areas where, in addition to substantive rules, the existing international instruments contain rules on jurisdiction and / or recognition and enforcement for disputes arising in that area. This is true for insurance matters, transport, intellectual property, and environmental liability.

III. FUTURE WORK

As mentioned above, Member States are invited to inform the Secretary General before 31 July 2003 whether they would agree that the text in the Annex should be put as the basis for work before a Special Commission to be convened in December 2003, with a view, in due course, to be forwarded to a Diplomatic Conference. On the basis of the reaction by Governments to such letter, the Secretary General will determine whether there is sufficient support for the reference of the draft to a Special Commission and, if so, convoke it.

In addition to this policy issue to be decided by the Member States of the Hague Conference, comments on the substance of the draft text in the Annex, by Member States, non-Member States, international organisations and other interested parties, are welcome and may be sent to the Permanent Bureau at secretariat@hcch.net or as@hcch.nl at any time. The Permanent Bureau will make them available to delegates unless requested otherwise.

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in Articles 2(2), 4(2), 5(b), 14 and 16), it did actually refer to the Contracting State as a whole and not to the territorial unit concerned, because in all these provisions, habitual residence was used in order to distinguish internal situations from international situations. Therefore the provision was not included here.

[51] The same problem arises with regard to exclusive jurisdiction rules contained in international and supranational instruments.

[52] *Supra* note 1.

Furthermore, in order to facilitate future work, the Permanent Bureau is preparing a number of research papers on issues yet to be discussed, *e.g.* a paper on the transfer of cases within one Contracting State and a paper on the relationship with other international instruments – covering both general and specific aspects.

ANNEX

WORKING GROUP
DRAFT TEXT ON CHOICE OF COURT AGREEMENTS

The States signatory to the present Convention,

Desiring to promote international trade and investment through enhanced judicial cooperation,

Believing that such enhanced cooperation requires a secure international legal regime that ensures the effectiveness of choice of court agreements by parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements,

Have resolved to conclude the following *Convention on Choice of Court Agreements* and have agreed upon the following provisions:

CHAPTER I PRELIMINARY PROVISIONS

Article 1 Scope

1. This Convention shall apply to agreements on the choice of court concluded in civil or commercial matters.

2. This Convention shall not apply to –

   a) agreements 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 consumers;

   b) individual or collective contracts of employment.

3. This Convention shall not apply to proceedings relating to **-**

   a) the status and legal capacity of natural persons;

   b) maintenance obligations;

   c) matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships;

   d) wills and succession;

   e) insolvency, composition or analogous matters;

   f) [admiralty or maritime matters] [contracts for the carriage of goods by sea];

   g) [anti-trust or competition claims];

   h) nuclear liability;

   i) rights *in rem* in immovable property;

   j) validity, nullity, or dissolution of a legal person and decisions related thereto;

   k) validity of patents, trademarks and [other intellectual property rights – to be defined].

[4. Proceedings are not excluded from the scope of the Convention if a matter referred to in paragraph 3 arises merely as an incidental question. However, a judgment resulting from such proceedings shall have effect under this Convention only as between the parties.]

5. This Convention shall not apply to arbitration and proceedings related thereto, nor shall it require a Contracting State to recognise and enforce a judgment if the exercise of jurisdiction by the court of origin was contrary to an arbitration agreement.

6. Proceedings are not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any person acting for a State is a party thereto.

7. Nothing in this Convention affects the privileges and immunities of sovereign States or of entities of sovereign States, or of international organisations.

Article 2 Definitions

1. In this Convention -

   a) "choice of court agreement" means an agreement whereby two or more parties designate, for the purpose of deciding disputes which have arisen or may arise between them in connection with a particular legal relationship, the courts of one or more States or one or more specific courts;

   b) "exclusive choice of court agreement" means a choice of court agreement which designates the courts of one State or one specific court to the exclusion of the jurisdiction of any other courts. A choice of court agreement which designates the courts of one State or one specific court shall be deemed to be exclusive unless the parties have provided otherwise;

   c) "judgment" means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court or an officer of the court, provided that such determination relates to a judgment which may be recognised or enforced under this Convention.

2. For the purposes of this Convention, an entity or person other than a natural person shall be considered to be habitually resident in the State –

   a) where it has its statutory seat;

   b) under whose law it was incorporated or formed;

   c) where it has its central administration; or

   d) where it has its principal place of business.

Article 3 Formal validity

A choice of court agreement shall be valid as to form [only][1] if it was entered into –

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

[1] The word "only" was placed in square brackets because there is no consensus yet as to whether the form standard under the Convention shall preclude less rigid national form standards from creating a "grey area jurisdiction" under national law outside the Convention.

b) orally and evidenced in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference;

c) in accordance with a usage which is regularly observed by the parties to the choice of court agreement; or

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

CHAPTER II JURISDICTION

Article 4 Jurisdiction of the chosen court

1. If the parties have agreed in an exclusive choice of court agreement that a court or the courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or the courts of that Contracting State shall have jurisdiction, unless the court finds that the agreement is null and void, inoperative or incapable of being performed.

2. Paragraph 1 shall not apply in the courts of a Contracting State if all the parties are habitually resident in that State and have agreed that a court or courts of that same Contracting State shall have jurisdiction to determine the dispute.

3 Nothing in this Convention shall affect subject matter jurisdiction [or the internal allocation of jurisdiction among the courts in a Contracting State].

Article 5 Priority of the chosen court

If the parties have entered into an exclusive choice of court agreement, a court in a Contracting State other than the State of the chosen court shall decline jurisdiction or suspend proceedings unless -

a) that court finds that the agreement is null and void, inoperative or incapable of being performed;

b) the parties are habitually resident in that Contracting State and all other elements relevant to the dispute and the relationship of the parties, other than the choice of court agreement, are connected with that Contracting State; or

c) the chosen court has declined jurisdiction.

Article 6 Interim measures of protection

Nothing in this Convention shall prevent a party from requesting provisional and protective measures on an interim basis from any court or prevent any court from granting such measures.

CHAPTER III RECOGNITION AND ENFORCEMENT

Article 7 Recognition and enforcement

1. A judgment given by a court of a Contracting State designated in a choice of court agreement shall be recognised or enforced, as the case may be, in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only if –

   a) the court addressed finds that the choice of court agreement was null and void;

   b) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence;

   c) the judgment was obtained by fraud in connection with a matter of procedure;

   [d) the judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed;] or

   e) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.

2. In addition, recognition or enforcement of a judgment given by a court of a Contracting State designated in a choice of court agreement other than an exclusive choice of court agreement may be refused if –

   a) proceedings between the same parties and having the same subject matter are pending before a court that was seised prior to the court of origin, either in the State addressed or in another State, provided that in the latter case the court is expected to render a judgment capable of being recognised or enforced in the State addressed; or

   b) the judgment is inconsistent with a judgment rendered, either in the State addressed or in another State, provided that in the latter case the judgment is capable of being recognised or enforced in the State addressed.

3. Without prejudice to such review as is necessary for the purpose of the application of the provisions of this Chapter, there shall be no review of the merits of the judgment rendered by the court of origin.

4. The court addressed shall not give greater effect to a judgment than it has in the State of origin.

5. Proceedings for recognition or enforcement may be suspended, or dismissed without prejudice, if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired.

Article 8 Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce –

   a) a complete and certified copy of the judgment;

   b) if the judgment was rendered by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;

   c) all documents required to establish that the judgment has effect in the State of origin;

d) if the court addressed so requires, a translation of the documents referred to above, made by a person qualified to do so.

2. An application for recognition or enforcement may be accompanied by the form annexed to this Convention and, if the court addressed so requires, a translation of the form made by a person qualified to do so.

3. No legalisation or other formality may be required.

4. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require the production of evidence of the choice of court agreement, and any other necessary documents.

Article 9 Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the State addressed so far as this Convention does not provide otherwise. The court addressed shall act expeditiously.

Article 10 Costs of proceedings

Where a party seeks recognition or enforcement of a judgment in a Contracting State under this Convention, and recognition or enforcement is refused, an order for payment of costs and expenses of the proceedings before the court addressed shall, on the application of the person entitled to the benefit of the order, be enforceable under this Convention in any other Contracting State.

Article 11 Damages

1. A judgment which awards non-compensatory damages, including exemplary or punitive damages, shall be recognised and enforced to the extent that a court in the State addressed could have awarded similar or comparable damages. Nothing in this paragraph shall preclude the court addressed from recognising and enforcing the judgment under its law for an amount up to the full amount of the damages awarded by the court of origin.

2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 12 Severability

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.

Article 13 Settlements

Settlements to which a court designated in a choice of court agreement has given its authority shall be recognised or enforced, as the case may be, under this Convention in the same manner as a judgment.

CHAPTER IV GENERAL CLAUSES

Article 14 No discrimination in procedural matters

Procedural rules of a Contracting State shall not be applied in a manner that discriminates against parties that are nationals of, or habitually resident in, other Contracting States when applying this Convention.

Article 15 Limitation of jurisdiction

Upon ratification of this Convention, a State may declare that its courts may refuse to determine disputes covered by a choice of court agreement if, except for the choice of court agreement, there is no connection between that State and the parties or the dispute.

Article 16 Limitation of recognition and enforcement

Upon ratification of this Convention, a State may declare that its courts may refuse to recognise or enforce, as the case may be, a judgment of a court in another Contracting State if all parties are habitually resident in the State addressed, and all other elements relevant to the dispute and the relationship of the parties, other than the choice of court agreement, are connected with the State addressed.

Article 17 Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 18 Non-unified legal system

In relation to a State in which two or more systems of law with regard to any matter dealt with in this Convention apply in different territorial units, any reference to the law or procedure of a State shall be construed as referring to the law or procedure in force in the relevant territorial unit.

Article 19 Relationship with other international instruments

This matter has not yet been discussed.

CHAPTER V FINAL CLAUSES

Article 20 Signature, ratification, acceptance, approval or accession

Article 21 Non-unified legal system

1. If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3. If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 22 Regional Economic Integration Organisations

Article 23 Entry into force

Annex to the Convention

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 Choice of Court Agreements (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), 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 parties on their choice of court agreement found in or evidenced by the following documents or indicia of agreement:

2. This Court awarded the following payment of money *(Please indicate any relevant categories of damages included):*

3. This Court awarded interest as follows (*Please specify the rate of interest, the portion(s) of the award to which interest applies, and the date from which interest is computed*):

4. This Court included within the judgment the following court costs and expenses (including lawyers' fees) related to the proceedings *(Please specify the amounts of any such awards, including where applicable, any amount(s) within a monetary award intended to cover costs and expenses relating to the proceedings)*:

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

6. 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.)

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

YES_____ NO_____

8. This judgment (or some part thereof) is enforceable in (STATE OF THE COURT OF ORIGIN):

YES_____ NO_____

List of documents:

Dated this _____ day of _____, 20__.

Signature and / or stamp by an officer of the Court