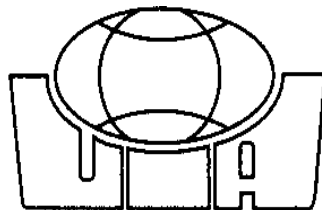


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LA "DISCONNECTING CLAUSE"

DISCONNECTION CLAUSE

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The Disconnexion clause

The relationship between the future Hague Judgments Convention and the european instruments¹

I) GENERAL INTRODUCTION (Terms of the issue)

The subject of this report is to try to give an answer to the question of how to deal in the future Hague Convention with its relationship to other regional arrangements, in particular the European instruments. It is a difficult task because very few works have been done on this topic.

The European Community must respect the international law and the conventionnal or customary rules of international law are part of the community legal order (CJEC : Court of Justice of the European Community - 16/6/98 - Racke). But today nobody contests the fact that the European Community has its « own legal order » according to the decision Costa/ENEL (1964), which is autonomous both towards the international law and the national laws of the member States.

It is obvious that the regional law can always go beyond the universal law by adopting solutions which grant more extensive or restricting rights for the members. Indeed there is between them a community of interests which is more marked, a closer network of interdependence, which is, obviously aiming at making them adopt stricter rules of behaviour. Such a situation is frequent insofar as the restricted number of members favours, obviously, the adoption of common solutions. It must be noticed that, if it deals with universal treaties which grant rights to individuals, the possibility of obtaining an even more favourable treatment by particular conventions affords undoubted advantages for private persons.

The treaties concluded with non-member States.

For the treaties concluded before the coming into force of the Treaty of Rome, the principle which has been established by the Treaty is that of the full validity of previous commitments (ex. art. 234 EECT, paragraph 1 (art.307 ECT)) because of the mandatory nature of treaties. But, as regards the agreements concluded after the coming into force of the Community treaties or the acts of community derived law, it is a theoretically impossible assumption. However, if things had to go this way, such agreements concluded by member countries, which affects the Community law or implies a Community competence exercise, couldn't be binding upon the Community which wouldn't be binding by them at all. But as regards the agreements to be concluded, there are, moreover, precautions, « safeguards », to avoid such situations of conflict, especially the so-called « disconnexion clauses ».

¹ Hereinafter the expression "european instruments" will mean the Brussels Convention of 27 september 1968 on jurisdiction and the enforcement of judgements in Civil and Commercial matters, the Lugano convention of 16 September 1988 on the same subject, concluded between the Member States of the European Communities and most of the EFTA member States (Norway, Switzerland, Iceland) to which Poland recently became a Party and the Council Regulation (EC) N° 44/2001 adopted by the Council on 22 december 2000 (Official Journal L 012, 16/01/2001 P. 1-23 that will replace the Brussels convention between Member States concerned and will enter into force the 1st of March 2002. The Lugano convention, which generally contains the same provisions as the Brussels convention, with a few exceptions, has also being revised with the Brussels convention in 1999. The new text is identical to the regulation except for provisions peculiar to this Community instrument.

The lack of adaptation of the rules of public international law to the specificity of community law

In order to settle a potential conflict between successive treaties binding different groups of States, the Convention of Vienna on the Treaties of 23 May 1969 lays down the general principle of the absence of effect of the treaties towards third parties (art.34CV). The priority order between treaties dealing with the same matter has form the subject of the article 30 of this Convention, while other provisions work indirectly towards the settlement of the problem of conflict between contractual standards, especially the article 41.

- When all the parties to the earlier treaty include the parties to the latter one, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty (art.30-3).
- The paragraph 4 of the article 30 of the Convention of Vienna relates to the priority order between two successive treaties **in the absence of identity between the party States to the so-called treaties**².

- As between States parties to both treaties, it lays down the rule of the priority of application of the previous treaty, as in the case of successive treaties with identity of parties (see above article 30 paragraph 3CV), as the international jurisprudence asserts that the particular standard can depart from the general standard³.

But, we have wonder if the priority of the particular standard could apply in all cases, especially when this particular standard directly comes into conflict with the general standard, since the article 30 paragraph 4 a) of the Convention of Vienna doesn't refer to this case. The solution to this problem would be in the paragraph 5 of this article which refers to the article 41 of the Convention, which recognizes, on the other hand the primacy of the general treaty.

Subject to this problem, in the relationships between member States of the European Union or States parties to the Lugano agreement, there would be a priority of application of the latter treaty, pursuant to the principle *lex posterior derogat priori*. The previous international instruments thus would only continue to be applied insofar as their provisions remain compatible with the new instrument (Hague Convention). But it has been noticed that the assessment of this compatibility can, in principle, give rise to problems of interpretation which will come in the jurisdiction of each of the parties. This situation will necessarily give rise to the inclusion of so called "compatibility clauses" in the latter treaty otherwise the parties to the previous agreement would not be in a position to ratify the more recent instrument. They are many types of these clauses and it is not the purpose of this report to give a review of all them⁴.

² According to this article : 4- When the parties to the later treaty do not include all the parties to the earlier one :

- a) As between States parties to both treaties the same rule applies as in paragraph 3 ;
- b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

³ CJIJ, Case Mavrommatis, compétence, arrêt du 30/8/1924, série A, n°2, p.30 et affaire de la compétence de la Commission européenne du Danube, série B, n° 14, p. 23

⁴ See on this topic, only in french, the excellent thesis of Ms Carine BRIERE, "Les conflits de conventions internationales en droit privé", LGDJ, Paris, 2001.

- As between a State party to both treaties and a State party to only one of the treaties, This second situation relates to the links between a previous multilateral treaty (or general standard) and a subsequent inter-se treaty (particular standard) only concluded between some party States to the previous treaty. Thus, in the relationships of the second group of States stipulated by the paragraph b) of the article 30-4, the principle of the relative effect of the treaties is fully applied. Thus they are governed by the treaty to which the two States are a party. In our situation, this rule is not quite adapted. The Hague convention could not be considered as the particular standard regarding the European instruments. It is uncertain whether in this particular case, and in any case inappropriate, the international convention would regulate « the mutual rights and duties » of a member State which is a party to the European instruments and of a non-member country. The situation between the negotiation of the disconnexion clause in the Hague convention of 1996 on jurisdiction for the protection of children for the purpose of the “Brussels II” convention which covers partially the same subject and for the purpose of the preservation of the system created by the Brussels convention of 1968.

Indeed, the rule set forth in the article 30 paragraph 4 is based upon the assumption that we can dissociate and operate separately two orders of legal relationships; that between the States party to the two treaties and that between a party State to the two treaties and a State party to one of these treaties only. But such a splitting up in several contractual relationships is not always possible provided that the multilateral treaty in question doesn't lose its grounds for existence. Indeed, some so-called « interdependent » multilateral treaties withstand the splitting up of commitments they establish into several bilateral commitments. In such treaties, the persistence of a commitment is only conceived with the persistence of the commitment of all the other members.

The possibility for regional entities (not the Community in this case), to define a legal system which would be more favourable for its citizens than that one resulting from a previous multilateral agreement, without recognizing the commitments resulting for the member States from the international law, must be mainly assessed in the light of the provisions of the article 41 of the convention of Vienna on the law of treaties⁵. This provision, which relates to the agreements bringing a modification of multilateral treaties in the relationships between some parties only, also allows to precise this notion of separation in a contractual system, relationships in two groups of parties (see above).

This article, relating to the so-called *inter-se* agreements, which is not adequate here for the relations with the European instruments, because the Hague convention could not be regarded as the special treaty modifying them, may be useful to assess whether we need special rules in the Hague draft to take into account future regional instruments.

⁵ In accordance of this article which reflects on this point the customary law : Article 41 - Agreements to modify multilateral treaties between certain of the parties only

1 - Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if ;

a) The possibility of such a modification is provided for by the treaty ; or

b) The modification in question is not prohibited by the treaty and ;

(i) Does not affect the enjoyment by the other parties of their rights under the treaty or performance of their obligations ;

(ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

Indeed, one has to be aware of the fact that according to this limited provision a multilateral treaty can only be modified by an inter-se treaty if this modification is authorized by one of its clauses or if, without this authorization, this modification is not incompatible with its purpose and its goal.

On the other hand, article 30-2 of the Vienna convention, which would allow the negotiators to subordinate the rules of the Hague convention to the earlier or latter treaties dealing with the same subject matter, could be considered as not appropriate and not preserving enough the functioning of the Hague convention. The first proposal of article 37 of the current draft is indeed based on this principle and means that the other international instruments, including those adopted within a community of States, will generally take priority over the Hague Convention, excepted where the latter instruments provide for prohibited fora under article 18.

To sum up, the Convention of Vienna on the Treaties lays down too strict or inappropriate conditions to the current situations to prevent the conflicts between the universal convention of The Hague and the instruments of the European Union (or even vis a vis bilateral or regional level agreements).

Therefore, it appears that the introduction of disconnexion clauses (and also clauses of “compatibility”) in the multilateral conventions to which European member States are to become a party, constitutes a surer means to guarantee the interests of the Community (and of the parties to special instruments) than resorting to the article 30 of the Convention of Vienna.

However, it’s difficult to give a precise definition of a disconnexion clause, which has not been codified and the content of which depends both on the nature of the instrument in which it takes place and above all on the context. It seems better to first try to define progressively its outlines.

The disconnexion clause mustn’t be confused with the so-called « REIO » clause (Regional economic integration organisation clause) the purpose of which is to allow the Community to join that type of international instrument binding member States to non-member States. It is a clause allowing the Community to become a party to the Convention in some cases. If member States fail to obtain that the Hague convention includes such a clause, they will only be able to become parties to the convention in accordance with the Treaty (art. 10 and “avis” 1/94 of the CJEC).

The disconnexion clause mustn’t be confused with a classical clause of conflicts of conventions which only deal with previous agreements on the same matter. For example, in the first and third paragraphs of article 52 of the Convention of The Hague of 1996 on the protection of minors, appear usual clauses of compatibility that you can find in numerous Hague conventions⁶.

Generally speaking, we can say that it is a final clause of an international instrument dedicated to allow regional state entities integrated on the legal level and binding by inter-se international instruments or by supraleislative rules of derived law, either to exclude the application in their mutual relationships, of the multilateral convention which binds them with non-member States, in favour of the provisions of previous regional agreements relating totally or partly to the same

⁶ e.g : article 20 of the Hague convention of 14 march 1978 on the Law applicable to matrimonial property regimes (general compatibility clause) ; art. 18-2 of the convention of 5 october 1961, sur la compétence et la loi applicable en matière de protection des mineurs and article 7-1 of the 1958 New York convention on arbitral awards, Hague convention of 5 october 1961 abolishing the requirement of legalisation, art. 23 of the Hague cv of 2 october 1973 on the recognition and enforcement of decisions relating to maintenance obligations (safety clause of earlier conventions or more favourable ones).

matters than the ones of the agreement which binds them with non-member States, or to allow them to conclude subsequently regional agreements of the same kind.

The rapporteurs, wisely stated that : « The Brussels Convention is part of a regional integration process; this has the result of altering its structure and turning it into a European Community regulation. This implies that the problem cannot be approached from the traditional angle of the classic relationship between conventions; it calls for a new approach, to take account of the particular situation prevailing in the network of simple and double conventions governing the recognition and enforcement of judgments », (Prel.Doc. No 11, page 117).

The inclusion of a disconnection clause in the Hague convention on jurisdiction and foreign judgments in civil and commercial matter is necessary. The agreements concluded after the coming into force of the community treaties or the acts of community derived law, couldn't be binding upon the Community which wouldn't be binding by them at all if they would contain provisions incompatible with community commitments⁷.

It seems to me that the purpose of the so-called disconnexion clauses in the Hague convention, is neither to settle a potential conflict of conventions between two existing international instruments, but precisely to overcome the lack of adaptation of classical rules of settlement of the conflicts of conventions to apprehend the specificity of the community construction, conceived as an integrated regional entity on the legal plan.

But, in my opinion, there are really different kinds of disconnexion clauses the content of which can only, at this level, be apprehended by the review of the respective scope of the instruments at stake.

The definition of a disconnection clause with regard to the Brussels convention and in fact, to the Regulation which will replace it soon, is a complex matter, since the geographical area and persons covered by the two instruments are different.

This difficult issue increased because of the choices made at the Hague regarding the scope of application of the worldwide draft convention. Besides, the NIGH/POCAR report indicates that in defining the rules laid down concerning the territorial scope, « *the Special Commission has taken special care to ensure that the definition adopted does not result in treaty conflicts with existing international instruments, without pre-empting the decision on whether a disconnection clause is needed to safeguard the operation of such instruments.* ».

II) THE RESPECTIVE TERRITORIAL APPLICABILITY OF THE HAGUE DRAFT CONVENTION AND OF THE BRUSSELS INSTRUMENTS, ACCORDING TO THE TERRITORIAL SCOPE RULES OF EACH INSTRUMENT.

Jurisdiction : Territorial and personal scope

In brief, the general criteria for the territorial applicability of the european instruments is, subject to some exceptions (exclusive jurisdiction and prorogation of forum), the domicile of the defendant within the Community whereas the future Hague Convention would apply only if the court seized is a court of a Contracting State.

⁷ See ECCJ march the 31st, 1971, AETR, case 22/70, Rec. p. 263

According indeed to article 2 which defines the geographical scope of the Hague Convention, direct jurisdiction rules of Chapter II are declared applicable only when the court seized is situated in a Contracting State⁸ and therefore replace the direct jurisdiction rules of the law of the court seized, whenever the location of the parties to the dispute and even if the defendant is not habitually resident in a contracting State (and situated in a third State).

With such a rule, the special Commission was nevertheless obliged to provide for a provision stating that the prohibition against the use of exorbitant jurisdiction in national law is restricted only to cases where the defendant is habitually resident in a Contracting State (Article 18). As regards all the rules of direct jurisdiction (except for *lis pendens*) the only proposed criterion for geographical application of the Hague Convention is that the court seized is situated on the territory of a Contracting State

The Hague Convention would also apply even if the litigation is purely internal (see art. 2-1), if the dispute affects its rules on the choice of court, or on exclusive jurisdiction, or the application of *lis pendens*, or other circumstances in which a court may decline jurisdiction.

Therefore, the chosen criterion differs basically from the one for the applicability of the european instruments (including the Lugano Convention), which is, except for exclusive jurisdiction and prorogation, the domicile of the defendant in the Community.⁹

It is indeed essential in this regard to recall that as stated recently by the Court of justice of the european communities “ ...that the system of common rules on conferment of jurisdiction established in Title II of the (Brussels) Convention is based on the general rule, set out in the first paragraph of Article 2, that persons domiciled in a Contracting State are to be sued in the courts of that State, irrespective of the nationality of the parties.”¹⁰

It is also important to remind that in all european instruments, in order for the special and optional fora provided to be applicable depends on the applicability of the rule based on the domicile of

⁸ **Article 2 Territorial scope**

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

- a) Article 4 shall apply if they have agreed that a court or courts of another Contracting State have jurisdiction to determine the dispute;
- b) b) Article 12, regarding exclusive jurisdiction, shall apply;
- c) Articles 21 and 22 shall apply where the court is required to determine whether to decline jurisdiction or suspend its proceedings on the grounds that the dispute ought to be determined in the courts of another Contracting State.

⁹ The rules of jurisdiction laid down by the Brussels regulation are to be found in chapter II. Article 2 of this regulation states : “subject to this regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.”

Article 3 states : “Persons domiciled in a Contracting State may be sued in the Courts of another Contracting state only by virtue of the rules set out in Sections 2 to 7 of this chapter. In particular the rules of national jurisdiction set out in annex I shall not be applicable against them.” (exorbitant fora).

¹⁰ CJEC, 13 July 2000, Group Josi/UGIC, Case C-412/98, n° 34.

the defendant¹¹. In the Hague convention, by contrast, the special fora available are irrespective of the habitual residence of the parties.

The regulation contains exceptions which depart from the general principle of the criterion of the domicile of the defendant in a Member State and that are applicable regardless of domicile, even if the defendant is located in a third State or give an influence to the place of the plaintiff's domicile in the Community.

Article 4 of the regulation constitutes a confirmation of the fundamental principle set out in the first paragraph of Article 2 of the Convention, in so far as it provides, subject to the provisions of articles 22 and 23 on exclusive jurisdiction and prorogation of jurisdiction, that the rules of jurisdiction laid down by the instrument are not applicable where the defendant is not domiciled in a Contracting State¹².

Exclusive jurisdiction

The article 22 of the regulation lays down rules of exclusive jurisdiction that are applicable regardless of domicile because of a particularly close connexion between the dispute and the Member State¹³.

For instance, even if the defendant is domiciled in a third State, the court of the Member State in which the property is situated shall have exclusive jurisdiction in proceedings having their object rights in rem in immovable property or tenancies. Another example could be taken from the rules stating that in proceedings concerned with the registration or validity of patents, trade marks, designs or other similar rights required to be deposited or registered, the court of the Member State in which the deposit or registration has been applied for or has taken place, shall have exclusive jurisdiction.

If the Hague draft convention (art. 12) provides for certain similar grounds of exclusive jurisdiction, like these mentioned above, which nevertheless remains different from those provided for in the European instruments. The most important discrepancies could be the following : For example, in proceedings which have as their object tenancies (of immovable

¹¹ Under Article 5, "A person domiciled in a Member State may, in another Member State, be sued: 1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; ... Article 9 of the regulation provides: 'An insurer domiciled in a member State may be sued... Article 16, states: 'A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts of the Member State in which he is himself domiciled..

¹² Article 4 states : « If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to articles 22 and 23 (exclusive jurisdiction and prorogation of jurisdiction), be determined by the law of that Member State.

¹³ The different grounds of jurisdiction under Article 22 of the regulation instruments are based on the following connecting factors: the place where property is situated for proceedings in rem in respect of immovable property and tenancies in immovable property under certain conditions ; the place where they have their seat for proceedings in relation to the validity of the constitution, the nullity or the dissolution of companies or legal persons or associations, or of the decisions of their organs ; the place where public registers are kept in relation to the validity of entries in such registers ; the place in which deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place, for proceedings in respect of the registration or validity of patents, trademarks, designs and other similar rights required to be deposited or registered ; the place of enforcement for proceedings concerning the enforcement of judgments.

property), if the tenant is habitually resident in a different State than the place of the situation of the property, the Hague draft takes out the exclusive (and incidentally not exclusive) jurisdiction of the State where the immovable property is situated¹⁴. It implies that the other grounds of the Hague convention may be applied in tenancies of immovables (defendant's fora, special fora, prorogation of jurisdiction). For instance, if the property is situated in France and the tenant has habitual residence/domicile in Japan, in case of a tenancy concluded for more than six months, according to the European instruments the French courts have exclusive jurisdiction which is denied by the Hague draft convention which may give jurisdiction to the other courts (e.g. domicile of the defendant if it is the tenant). If the immovable property is situated in the United States, but the defendant is domiciled in Italy, and the plaintiff, domiciled in France, wishes to bring an action in rem concerning this property, according to the European instruments, the French courts may have jurisdiction by virtue of Article 2 of the regulation because in that circumstance the convention does not grant the US court of the situation of the property exclusive jurisdiction. There is no so-called "reflex effect" which could give reciprocity to the third States as a mirror reflecting the exclusive grounds provided for in the regulation¹⁵. So, if there is no exclusive basis of jurisdiction in the Hague draft, it will be much more difficult to implement this "reflex effect" even if anyway, it remains possible to state in a disconnection clause that the European instrument has priority when its provisions on exclusive jurisdiction are applicable.

Prorogation of jurisdiction

As regards the choice of court, even if both parties are habitually resident in the same Contracting State or regardless of the domicile of the parties in a Contracting State, article 4 of the Hague convention applies before a court or courts of another Contracting State agreed by the parties and seized.

In the European regulation, there is another condition: article 23 on prorogation of jurisdiction is applicable only if at least one or more of the parties are domiciled in a Member State (it could be only the plaintiff and not the defendant). In the Brussels system, also, if none of the parties to the agreement are domiciled in a Member State, the regulation is applicable only to the extent that the chosen court or courts of the Member State has declined jurisdiction (art.23-3). Therefore, the scope of the choice of court rule is wider in the Hague convention.

A difficulty may arise because the European instruments do not forecast to give priority to the selected forum in a non Member State where none of the parties to the agreement are domiciled in a Member State. For instance, if the selected forum is situated in a third State but the defendant is domiciled in the Community, the regulation applies in principle.

But any solution to this problem should take into account that article 23 of the regulation is subject to the provisions of articles 13, 17 and 21 which prevent the application of choice of forum clauses in contracts against weak parties (insured person, consumers, workers). Indeed, if we are

¹⁴ See the report, p. 65, 4th paragraph, which notes that the "scope of this exception is much wider than in the Brussels convention..". It is even much more extensive than the text of the new regulation (art. 22-1) which has extended the scope of this exception only to tenancies concluded for temporary private use for a maximum period of six consecutive months provided that the tenant is a natural person and the landlord and the tenant are domiciled in the same Member State.

¹⁵ It is the purpose of article 37 (2nd proposal, 4-b) to give Hague States the benefit of this "reflex effect" to the extent that the convention contains exclusive fora.

to apply article 4 of the convention where the agreement designates the courts of a non Contracting State in any case, some difficulties may arise.

It also means in my mind that if articles 7-3 and 8-2 of the Hague convention are to be modified, the rules of article 4 of the convention may apply to some of those categories of litigants. Which means that for a purely domestic situation, a party (let say a professional) may select a forum in another State for the disputes with a consumer for instance.

More difficult indeed would be then the situation in which the selected forum is situated in a third State but both the defendant and the plaintiff which is a protected person (consumer..) are domiciled in the Community (for instance a dispute in contract between a british insurer and a finnish insured person and the agreement designates the courts of The Bermudes).

The application of article 4 of the Hague convention whenever the court chosen is not in a european instrument State in that situation would cause some major concern (see art.37, 2nd proposal, 4-a). It is already the case for insured person domiciled within the Community forgotten by the convention (see below).

Under the article 24 of the regulation, the voluntary appearance of the defendant establishes the jurisdiction of a court of a Member State before which the plaintiff has brought proceedings, without the place of the defendant's domicile or the plaintiff in such a State, being relevant.¹⁶

Protective jurisdiction

With the aim of protecting the party deemed to be weaker than the other party to the contract, the Brussels regulation (and the Lugano revised convention) provide for several provisions regarding respectively the insured persons, the consumers and the workers. These provisions of the regulation provide, respectively, that a holder the insured or a beneficiary of an insurance policy and a consumer have the right to bring proceedings against the other party to their contract in the courts of the Contracting State in which they are domiciled. They limits the possibility of selection of forum in contracts concluded with all these weaker parties to agreements entered into after the dispute has arisen.

The Hague Convention provides for almost similar rules in articles 7 and 8 in favour only of the consumer and workers but not insured persons.

Lis pendens and the refusal to exercise jurisdiction

The european instruments are applicable where the proceedings are brought or pending in the courts of different Member States. The Hague convention does not contain a rule on related actions and its rule on lis pendens applies where the parties are engaged in proceedings in courts of different Contracting States. In both situations, the application of the lis pendens provisions are regardless of the residence/domicile of the parties. But a difficulty may arise because article 2 of the convention states that its rules on lis pendens (and forum non conveniens) may apply even if all the parties are habitually resident in the same State where the court is required to determine

¹⁶ Article 18 states: 'A part from jurisdiction derived from other provisions of this regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered solely to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.

whether to decline jurisdiction or suspend its proceedings on the grounds that the dispute ought to be determined in the courts of another Contracting State.

The theory of “forum non conveniens” is not applicable to the internal connexions between the european instruments. If a french court has jurisdiction in accordance with article 2 of the regulation, it could not refuse to deal with the case by virtue of the best or more convenient position of another Member States court. This doctrine raises a controversial issue : it is not completely settled whether a court of a Member State which exercise jurisdiction on the basis of one or more european instruments could refuse to deal with the dispute in favour of a third State court.

Rules on recognition and enforcement

The european instruments are highly liberal regarding recognition and enforcement of judicial decisions. One of their principal purposes is to favour the free movement of decisions in the european judicial area. Concerning recognition and enforcement of judicial decisions, benefits given by the Chapter III of the regulation are granted only to decisions which are rendered in a Member State. These decisions have to fall within the material scope of the text whatever rules of jurisdiction have been applied (including those of the national law of the forum). The rule mentionned above have to be applied even for purely domestic cases or by application of an international convention on specific matters (and even if the parties are not domiciled in the european Community).

Subject to the provisions of articles 26 and 24 and 17, the provisions of Chapter III of the Hague convention apply to the recognition and enforcement in a Contracting State of judgments rendered in another Contracting State, in conformity with the grounds of jurisdiction provided for in articles 3 to 13¹⁷. Because of the existence of a “grey area” for jurisdiction in the Hague convention (white list, grey area and black list) the system of circulation of foreign decisions is restricted and lacks clarity compared with the european mecanism¹⁸.

The scope of Chapter III is limited in so far as judgments based on a ground of jurisdiction not conforming to the provisions concerning choice of court, the protective rules, or jurisdiction which is exclusive or in breach of the prohibited grounds of jurisdiction cannot be recognised or

¹⁷ Article 25 Judgments to be recognised or enforced

1. A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, **or which is consistent with any such ground**, shall be recognised or enforced under this Chapter.

¹⁸ Article 24 -Judgments excluded from Chapter III : This Chapter shall not apply to judgments based on a ground of jurisdiction provided for by national law in accordance with Article 17 (grey area).

enforced¹⁹ (under the convention only as far as prohibited fora are concerned when the defendant is domiciled in a non Contracting State²⁰).

Therefore should be included within the scope of european instruments :

- judgments given in the exercise of jurisdiction which is prohibited by article 18 against a defendant habitually resident in a non Contracting State (art. 4 of the regulation).

- judgments given under the basis of national law which would not conflicts with the provisions of the convention on exclusive jurisdiction, prorogation of forum and protection of the weaker party.

III) OUTLINE OF SOLUTIONS

Several proposals for a disconnection clause are included in the preliminary draft Hague Convention. The Member States of the European Union will have together to establish their position on important issues of the draft Hague Convention, including particularly the disconnection clause. I hope that you will be convinced after this report that this question could not be solved until the negociators agreed on the list of grounds of jurisdiction of the Hague Convention (the so called “white list”). It appears obvious that the more the rules on jurisdiction of the convention will depart from the european instruments, the more it will difficult to prevent the risk of overlapping and to disconnect the instruments.

I would like at this stage to contribute to the debate by suggesting only general principles that ought to be observed in drafting a suitable clause and on which it would be desirable to reach a consensus.

The purpose of the disconnection clause in the context of the future Hague Convention is to preserve the operation of regional instruments, that is to say not only the Brussels I Regulation which will replace the Brussels Convention, but also to some extent Community acts containing rules of jurisdiction (such as the Directive on the posting of workers), where the criteria for the application of those European instruments are fulfilled. It appears to me that the Member States and the Community could not accede to a global Convention which would significantly supplant Community instruments.

But the convention negotiated at The Hague should make it possible to cease suing defendants domiciled on the territory of Contracting States of The Hague, in accordance with Article 4 of the Brussels and Lugano Conventions. It would oblige Member States to the european instruments not to apply Article 4 of those instruments to defendants domiciled in States parties to the Hague Convention, in so far as those States grant them the reciprocity which is provided for in current article 18.

¹⁹ Article 26 - Judgments not to be recognised or enforced : A judgment based on a ground of jurisdiction which conflicts with Articles 4, 5, 7, 8 or 12, or whose application is prohibited by virtue of Article 18, shall not be recognised or enforced.

²⁰ See article 18-1 which prevents the application of exorbitant fora only where the defendant is habitually resident in a Contracting State. The system is rather complex and probably as a matter of clarity article 26 should be amended to add that the refusal of recognition and enforcement of such decisions applies only “under this chapter”.

The provision to be adopted must regulate the relationship between the Convention and European instruments from the viewpoint both of direct international jurisdiction and of the recognition and enforcement of judgments.

In my opinion, the Member States should be able to resort in the first instance to the provisions of any European instruments applicable, rather than the future Hague Convention, at least in their mutual relations.

To this regard, a recent case law of the Court of Justice of the European Communities should be mentioned. In a judgment of 13 July 2000 (*Group Josi/UGIC, Case C-412/98*) the Court recalled that the Brussels Convention enshrines the fundamental principle that the courts of the Contracting State in which the defendant is domiciled or established are to have jurisdiction and that "*Title II of the Convention is in principle applicable where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country.*" (No. 61 and operative part of the judgment).

This is why I personally think that the future disconnection clause should enable the European instruments to apply where the defendant is domiciled in a Member State.

Furthermore, one will have to decide even when the defendant is domiciled in a non-member country, whether a provision should be made to preserve the application of the European instruments in exceptional cases, especially where the court of a State subject to the European instruments has protective jurisdiction with regard to an insured person, a consumer or a worker.

In addition, in order to safeguard the most important European instruments, one will have to decide whether it is necessary to provide for such an instrument to apply in three other particular cases, in order to diminish the risk of overlappings :

- where the court subject to the Community instruments has exclusive jurisdiction (e.g. litigation between a Canadian and an American over immovable property located in France: the French court will apply a Community instrument);
- where a choice-of-forum clause designates a court in a European Member State and where the jurisdiction of that court has been extended by virtue of the appearance of the defendant, even when domiciled in a non-member country;
- in the event of *lis pendens* and related actions between two courts in States subject to the same European instrument.

Vice versa, one will have to see whether the courts of the European Member States would apply certain rules of direct jurisdiction in the Hague Convention when the defendant is domiciled in a State other than the State subject to European instruments.

Nevertheless, even if the defendant is domiciled in a State subject to European instruments, it will be necessary to decide whether certain provisions of the future Hague Convention will apply : in particular, where the court chosen by the parties does not belong to a European instrument State,

or the court to which the future Hague Convention gives exclusive jurisdiction does not belong to a European instrument State (if for example the dispute relates to immovable property located in the United States and the defendant is domiciled in France).

On the other hand, in the case of *forum non conveniens*, the clause should state whether the jurisdiction of a EU Member State's court to be declined in favour of that of a non-member country, since the European instruments do not allow the use of *forum non conveniens*. In my mind, a dispute of this kind, where the plaintiff or the defendant are domiciled in a EU Member State, is integrated to the Community and it would therefore be contrary to the aims of the regulation and of the Treaty to direct an applicant who wishes to benefit from the Community system of free movement of judgments to a court in a non-member country. The same line of thought may hold for a plaintiff not domiciled in the Community but who wish to benefit from the regulation's rules on enforcement. Since the recent case law Group Josi (see above) clearly convinced me that when the defendant is domiciled in a Member State, by analogy, there is no room for the doctrine of "forum non conveniens".

With regard to the effect of foreign judgments, one will have to decide whether the principle should be that only decisions given in the territory of a Member State may benefit from the virtually automatic system for recognition and enforcement in the other Contracting States set up by Chapter III of the Community Regulation, which would be logical. But, one will have to clarify whether the Chapter III of the convention applies to judgments given in a Member State if they are "consistent" with the grounds of jurisdiction provided for in article 3 to 13 (article 25-1).

Regarding the method, I would finally recommend to argue from an axis laying on the domicile/residence of the defendant because precisely that it is the keystone of the European system. So the clause would be articulated around two mainprings from which the principles and exceptions could be further developed : When the defendant is domiciled in the territory of a State bound by one of the European instruments and when the defendant is domiciled in the territory of a contracting State other than a State subject to the European instruments, despite of the fact that it is not the main criteria for the application of the Hague text.

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