

**AVANT-PROJET DE CONVENTION  
SUR LES ACCORDS EXCLUSIFS D'ELECTION DE FOR**

**PROJET DE RAPPORT**

*établi par Masato Dogauchi et Trevor C. Hartley*

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**PRELIMINARY DRAFT CONVENTION ON  
EXCLUSIVE CHOICE OF COURT AGREEMENTS**

**DRAFT REPORT**

*drawn up by Masato Dogauchi and Trevor C. Hartley*

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en matière civile et commerciale*

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on Jurisdiction, Recognition and Enforcement of Foreign Judgments  
in Civil and Commercial Matters*

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## PREFACE

### *References to other documents*

The following documents are referred to in the abbreviated form set out below:

**"Brussels Convention"** = *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*. It was opened for signature in Brussels on 27 September 1968. The original Parties were the six original Member States of what was then the EEC. As new States have joined the EU, as it is now called, they have become Parties to the Brussels Convention. The text has been amended on a number of occasions. An amended text may be found in the *Official Journal of the European Communities* ("O.J."), 1998, Volume 27 of the "C" series, p. 1. Today, it has been largely superseded by the "Brussels Regulation" (below). It now applies only between Denmark and the other 14 old EU Member States.

**"Jenard Report"** = Report by Paul Jenard on the original Brussels Convention, published in *O.J.* 1979 C 59, p. 1.

**"Schlosser Report"** = Report by Professor Peter Schlosser on the Accession Convention of 9 October 1978, under which Denmark, Ireland and the United Kingdom acceded to the Brussels Convention, published in *O.J.* 1979 C 59, p. 71.<sup>1</sup>

**"Lugano Convention"** = *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*. It was originally opened for signature in Lugano, Switzerland on 16 September 1988. It contains similar provisions to the Brussels Convention, but the two Conventions are not identical. The Contracting States to the Lugano Convention are the 15 "old" EU Member States and certain other States in Europe. At the time of writing, these are Iceland, Norway, Poland and Switzerland. The demarcation between the Brussels and Lugano Conventions is laid down in Article 54B of the Lugano Convention. It is based on the principle that the Lugano Convention will not apply to relations among the EU Member States, but will apply where one of the other countries mentioned above is involved. The text may be found in *O.J.* 1988 L 319, p. 9.

**"Jenard / Möller Report"** = Report by Paul Jenard and Gustaf Möller on the Lugano Convention, published in *O.J.* 1990 C 189, p. 57.

**"Brussels Regulation"** = *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, *O.J.* 2001 L 12, p. 1. It applies among all the EU Member States except Denmark and replaces the Brussels Convention in the mutual relations between those States to which it applies.

**"Preliminary draft Convention 1999"** = Preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters of 1999. This was an earlier, much larger version of the present preliminary draft Convention drawn up within the Hague Conference on Private International Law in 1999. It covered much the same ground as the Brussels and Lugano Conventions. Work on it was put on hold when it became apparent that it would be difficult to obtain agreement at that time. Its text, together with a draft Report by the late Professor Peter Nygh and Professor Fausto Pocar, was published by the Permanent Bureau of the Hague Conference in August 2000.<sup>2</sup>

**"Nygh / Pocar Report"** = Report on the preliminary draft Convention 1999 (see footnote 2).

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<sup>1</sup> There are also reports on the Accession Convention for Greece (D.I. Evrigenis & K.D. Kerameus), *O.J.* 1986 C 298, p. 1; and on the Accession Convention for Spain and Portugal (M. de Almeida Cruz, M. Desantes Real & P. Jenard), *O.J.* 1990 C 189, p. 35.

<sup>2</sup> "Preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, adopted by the Special Commission and Report" by P. Nygh & F. Pocar, Preliminary Document No 11 of August 2000, available at < [www.hcch.net](http://www.hcch.net) >.

**“Interim Text 2001”** = Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001.<sup>3</sup> The large number of square brackets in the text indicates that the delegates were unable to agree on many points.

**“Schulz Report”** = Report by Dr Andrea Schulz on the work of the informal working group on the Judgments Project, published by the Permanent Bureau of the Hague Conference in June 2003.<sup>4</sup>

**“2003 Draft”** = Draft text of the Convention, drawn up by the Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters in December 2003 (Work. Doc. No 49). This was the forerunner of the text discussed in this Report.<sup>5</sup>

**“The Convention”** = This refers to the current text of the preliminary draft Convention, officially known as the Draft on Exclusive Choice of Court Agreements. It was drawn up in April 2004 and published as Working Document No 110 (Revised).<sup>6</sup> This is the text discussed in this Report. The full text is set out below in the Annex II to this Report.

### *Acknowledgements*

The authors of the present Report would like to acknowledge their debt to the authors of these earlier reports, especially to the authors of the Nygh / Pocar Report, the late Professor Nygh and Professor Pocar. They would also like to acknowledge the assistance given by Dr Andrea Schulz of the Permanent Bureau and Dr Gottfried Musger, Chairman of the Drafting Committee.

### *Terminology*

The following terminology is used in the Convention:

**“Court of origin”** = the court which granted the judgment.

**“State of origin”** = the State in which the court of origin is situated.

**“Court addressed”** = the court which is asked to recognise or enforce the judgment.

**“Requested State”** = the State in which the court addressed is situated.<sup>7</sup>

In this Report:

**“State”** (upper-case “S”) = a State in the international sense.

**“state”** (lower-case “s”) = a territorial unit of a federal State (for example, a state in the United States)

Note: Passages in italics are intended to identify open issues and propose possible solutions in order to facilitate further work during the consultation period and at the Diplomatic Conference.

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<sup>3</sup> Available at < [www.hcch.net](http://www.hcch.net) >.

<sup>4</sup> A. Schulz, “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”, Preliminary Document No 22 of June 2003, available at < [www.hcch.net](http://www.hcch.net) >.

<sup>5</sup> Available at < [www.hcch.net](http://www.hcch.net) >.

<sup>6</sup> Available at < [www.hcch.net](http://www.hcch.net) >.

<sup>7</sup> The preliminary draft Convention 1999 uses “State addressed” in the English version instead of “requested State” as used in this Report.

## INTRODUCTION

1 **Objective of the Convention.** The objective of the Convention is to make exclusive choice of court agreements as effective as possible in the context of international business. The hope is that the Convention will do for choice of court agreements what the New York Convention of 1958<sup>8</sup> has done for arbitration agreements.

2 **Three key obligations.** In order to achieve this objective, it is necessary to impose three obligations on the courts of Contracting States: the chosen court must be obliged to hear the dispute; all other courts must be obliged to decline jurisdiction; and the judgment given by the chosen court must be recognised and enforced by courts in other Contracting States.

3 **Three key provisions.** These obligations are laid down by three key provisions in the Convention, Articles 5, 7 and 9. Article 5, which is addressed to the chosen court, provides that the court designated in an exclusive choice of court agreement has jurisdiction and must exercise it; Article 7, which is addressed to all courts in other Contracting States, provides that those courts must suspend or dismiss the proceedings before them; and Article 9, which is addressed to the court in which recognition is sought, provides that a judgment given by the court of a Contracting State designated in an exclusive choice of court agreement must be recognised and enforced.

4 **The original project: a “mixed” convention.** The original project (the preliminary draft Convention 1999) was intended to be a “mixed” convention. This is a convention in which jurisdictional grounds are divided into three categories. There is a “white list”, which contains a number of specified grounds of jurisdiction; there is a “black list”, which contains other specified grounds of jurisdiction; and there is the so-called “grey area”, which consists of all other grounds of jurisdiction under the national law of Contracting States. The idea is that where the court has jurisdiction on a “white” ground, it can hear the case, and the resulting judgment will be recognised and enforced in other Contracting States under the Convention (provided certain other requirements are satisfied). “Black list” grounds are prohibited: a court of a Contracting State cannot take jurisdiction on these grounds. Courts are permitted to take jurisdiction on the “grey area” grounds, but the resulting judgment will not be recognised under the Convention.<sup>9</sup>

5 As work proceeded on drafting, however, it became apparent that it would not be possible to draw up a satisfactory text for a “mixed” convention within a reasonable period of time. The reasons for this included the wide differences in the existing rules of jurisdiction in different States and the unforeseeable effects of technological developments, including the Internet, on the jurisdictional rules that might be laid down in the Convention. At the end of the First Part of the Nineteenth Session, held in June 2001, it was decided to postpone a decision on whether further work should be undertaken on the preliminary draft Convention. In order to find a way forward, the Commission on General Affairs and Policy of the Hague Conference, meeting in April 2002, decided that the Permanent Bureau, assisted by an informal working group, should prepare a text to be submitted to a Special Commission. It was decided that the starting point for this process would be such core areas as jurisdiction based on choice of court agreements in business-to-business cases, submission, defendant’s forum, counterclaims, trusts, physical torts and certain other possible grounds.

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<sup>8</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958.*

<sup>9</sup> The European instruments in this area (the Brussels Regulation, the Brussels Convention and the Lugano Convention) are based on a slightly different idea. Where the defendant is domiciled in another State to which the instrument applies, there is no grey area: jurisdiction may be exercised only on the grounds laid down in the instrument. Where the defendant is not domiciled in such a State, however, jurisdiction may, subject to certain exceptions, be exercised on any ground permitted by national law; the resulting judgment must nevertheless be recognised and enforced in the other States.

6 After three meetings, the informal working group proposed that the objective should be scaled down to a convention on choice of court agreements in business-to-business cases. After positive reactions from the Member States were received, a meeting of the Special Commission was held in December 2003 to discuss the draft that had been prepared by the informal working group. This meeting of the Special Commission produced a draft text that was published as Working Document No 49. The draft Explanatory Report on Working Document No 49 is contained in Preliminary Document No 25 of March 2004. A further meeting was held in April 2004, which reconsidered this document and dealt with the remaining issues. The April 2004 meeting produced the draft considered in this Report.<sup>10</sup>

7 **The relationship between the original project and the present draft.** If we apply the terminology explained in paragraph 4, we can say that the present draft provides for only one jurisdictional ground in the “white” list – an exclusive choice of court agreement. A court of a Contracting State selected in such an agreement must exercise jurisdiction, and other Contracting States must recognise and enforce the resulting judgment in accordance with the Convention. There is no “black” list in the sense previously explained, though courts of Contracting States other than that selected are not permitted to exercise jurisdiction in a case covered by the agreement. The “grey” area is accordingly very wide. It consists of all cases not covered by an exclusive choice of court agreement. Moreover, a “grey” area exists even where there *is* an exclusive choice of court agreement: since exclusive choice of court agreements concerning consumer contracts and employment contracts as well as some other subject matters are excluded from the scope of the Convention (Article 2), Contracting States are free to exercise, or not to exercise, jurisdiction in such cases. The courts of other Contracting States are free to recognise, or not to recognise, such judgments.

## ARTICLE-BY-ARTICLE COMMENTARY

### *Article 1 Scope*

8 Article 1 defines the scope of the Convention in a positive way by stating that it applies in international cases; Article 2 defines it in a negative way by laying down a number of specific exceptions. Moreover, “international” is defined in two different ways in Article 1(2) and 1(3): the former defines it for jurisdictional purposes; the latter defines it for the purpose of recognising and enforcing foreign judgments.

9 **Three limitations.** The first paragraph of Article 1 makes clear that the scope of the Convention is limited in three ways: it applies only in international cases; it applies only to exclusive choice of court agreements; and it applies only in civil or commercial matters.

10 **International cases.** The Convention is limited to international cases because the national law of the State in question should apply without restriction in domestic cases: other States have no legitimate interest in the outcome of such cases. However, in determining what constitutes an international case, one has to consider the meaning of “State” in the Convention. This is discussed further below.<sup>11</sup> At this point, it should simply be said that for some purposes “State” can refer to a territorial unit such as a US state or a Canadian province; for other purposes it can refer to a State in the international sense (the United States or Canada);<sup>12</sup> and for yet other purposes it can even refer to an international entity such as the European Community.<sup>13</sup> What constitutes an international case is, therefore, a matter of some complexity.

<sup>10</sup> The draft on Exclusive Choice of Court Agreements, Working Document No 110. It is set out in Annex II to this Report.

<sup>11</sup> See paragraphs 73–75 and 216–221 *infra*.

<sup>12</sup> See Article 22.

<sup>13</sup> See Article 26(5).



**11 Definition of “international” with regard to jurisdiction.** Article 1(2) defines “international” for the purposes of the rules on jurisdiction (found in Chapter II of the Convention). It states that a case is international unless both the following conditions are satisfied: first, the parties must be resident<sup>14</sup> in the Contracting State of the court seised (whether or not it is the chosen court); and, secondly, the relationship of the parties and all other elements relevant to the dispute (regardless of the location of the chosen court) must be connected only with that State.<sup>15</sup> This means that the rules of the Convention on jurisdiction will apply either if one or more of the parties is not resident in the State of the court seised, or if some other element relevant to the dispute (other than the location of the chosen court) has a connection with some other State.

**12** This might be clearer if we give an example. Assume that two parties resident in Germany enter into a contract to be performed only in Germany, and agree that a Japanese court will have exclusive jurisdiction. If one of them brings proceedings before a German court, that court will not have to apply Article 7 (assuming that all other relevant elements are connected only with Germany). However, if proceedings were brought before the Japanese court, the position would be different. From its perspective, the case would be international because “the parties would not be resident in the Contracting State of the court seised” in terms of Article 1(2). As the Convention stands at present, therefore, the Japanese court would be bound under Article 5 to hear the case. This could result in the Japanese court acting inconsistently with the German court. At the Diplomatic Conference, delegates will have to consider whether this is the result they want.<sup>16</sup>

**13 Definition of “international” with regard to recognition and enforcement.** Article 1(3) defines “international” for the purposes of recognition and enforcement (Chapter III of the Convention). It states simply that a case is international for such purposes if the judgment to be recognised or enforced is foreign. This means that a case that was not international when the original judgment was granted becomes international if it is to be recognised or enforced in another Contracting State.

**14 Exclusive choice of court agreement.** The main reason for limiting the Convention to exclusive choice of court agreements was to simplify its structure. Article 5 (which requires the chosen court to hear the case) could not apply as it stands to non-exclusive choice of court agreements, since a court other than the chosen court might have been seised first, and it would be entitled to hear the case if the choice of court agreement was not exclusive. This would raise issues of *lis pendens* that would have been difficult to resolve in an acceptable way. Moreover, Article 7 (which prohibits courts other than that chosen from hearing the case) could not apply if the choice of court agreement was not exclusive.

**15 Civil or commercial matters.** The limitation to civil or commercial matters is standard in international conventions of this kind. It is clearly necessary to exclude public law and criminal law. The reason for using the word “commercial” as well as “civil” is that in some legal systems “civil” and “commercial” are regarded as separate and mutually exclusive categories. The use of both terms is necessary for those legal systems.<sup>17</sup> It

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<sup>14</sup> The rules for determining the residence of an entity or person other than a natural person are set out in Article 4(2).

<sup>15</sup> The relevant date for the application of this test has not yet been settled: should it be applied to the facts as they stand when the agreement is concluded or when proceedings are commenced? Or should a case be regarded as international unless the conditions are satisfied at both times?

<sup>16</sup> *It might be one idea to replace the words “resident in the Contracting State of the court seised” in Article 1(2) by “resident in the same Contracting State”. But this new wording would create another problem: When two Germans chose a German court in their agreement, the Japanese court which is seised in spite of the agreement would not be bound by Article 7 to dismiss the case since the case is not international. Accordingly, the meeting would have to reconsider the appropriate definition of an “international case” in light of the respective provisions.*

<sup>17</sup> It would not be possible to use “commercial” alone because in some systems it is too vague and in others it is too narrowly defined.

does no harm with regard to systems in which commercial proceedings are a sub-category of civil proceedings.<sup>18</sup> However, certain matters that clearly fall within the class of civil or commercial matters are nevertheless outside the scope of the Convention. These include: status and legal capacity of natural persons, family law matters, wills and succession, carriage of passengers or goods by sea, nuclear liability, rights *in rem* in immovable property, certain questions relating to legal persons (corporations) and some issues concerning certain intellectual property rights.

16 Article 1(1) of the preliminary draft Convention 1999 contained a further provision expressly stating that the Convention would not apply to revenue, customs or administrative matters. This provision was not included in the current draft because it was thought to be unnecessary: it was considered obvious that such matters could not be civil or commercial. The precise borderline between public-law and private-law matters is mainly a problem when a State or other public-law entity is a party to the contract. It is considered further below.<sup>19</sup>

## *Article 2 Exclusions from scope*

17 **Consumer contracts.** Article 2(1)(a) provides that the Convention does not apply to choice of court agreements to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party. Many legal systems have mandatory rules to protect consumers (including rules on exclusive jurisdiction), and these systems would not give effect to a choice of court agreement that required proceedings under a consumer contract to be brought in a foreign State. This exclusion would cover an agreement between a consumer and a non-consumer, as well as one between two consumers.

18 **Employment contracts.** Article 2(1)(b) excludes from the scope of the Convention choice of court agreements relating to individual or collective contracts of employment. The exclusion also applies to actions in tort arising out of the employment relationship – for example, if the employee suffers personal injury while at work.<sup>20</sup> Employment contracts are excluded for the same reason as consumer contracts. An individual contract of employment is one between an employer and an individual employee; a collective contract of employment is one between an employer or a group of employers and a group of employees or an organisation such as a trade union (labour union) representing them.

19 **Other excluded matters.** Article 2(2) states that the Convention does not apply to the matters listed in sub-paragraphs a) to l).<sup>21</sup> However, as is made clear by Article 2(3), this exclusion applies only where one of the matters referred to in paragraph 2 is an “object” (the subject or one of the subjects)<sup>22</sup> of the proceedings. This means that proceedings are not excluded from the scope of the Convention if one of these matters arises incidentally in proceedings that have some other matter as their object / subject.

<sup>18</sup> For further discussion of “civil or commercial matters”, see pp. 29–31 of the Nygh / Pocar Report (*supra* footnote 2).

<sup>19</sup> See paragraphs 58 *et seq.*

<sup>20</sup> In some States, the law permits an employee to bring a direct action against the employer’s insurer with regard to personal injury claims where the employer is insolvent. In this case, the Convention would also not apply to the employee’s direct claim against the employer’s insurer even if there was an exclusive choice of court agreement between the employer and the employee.

<sup>21</sup> This list is partly derived from Article 1(2), combined with Article 22, of the Brussels Regulation, and equivalent provisions in the Brussels and Lugano Conventions.

<sup>22</sup> The text uses the word “object”, the word traditionally used in conventions of this kind (*cf.* Article 16 of the Brussels Convention), but it might just as well have said “subject”. It is intended to mean a matter with which the proceedings are directly concerned. In French, there is a well understood distinction between proceedings that deal with a given matter *à titre principal* and those that deal with it *à titre incident*. This distinction cannot be expressed so clearly in English. In the English text of Article 2(3), the phrase “as an incidental question” is meant to convey the same idea as “*à titre incident*” in the French text, while the phrase “an object of the proceedings” in the English text is meant to convey the same idea as “*à titre principal*” in the French text.

20 There are various reasons why the matters referred to in Article 2(2) are excluded. In some cases, the public interest, or the interests of third parties, is involved, so that the parties have no right to dispose of the matter between themselves. In such cases, a particular court will often have exclusive jurisdiction that cannot be ousted by means of a choice of court agreement.

21 **Status and capacity.** Sub-paragraph *a)* concerns the status and capacity of natural persons.

22 **Family law and succession.** Sub-paragraphs *b)* to *d)* concern family law and succession.<sup>23</sup> In sub-paragraph *b)*, “maintenance” includes child support. In sub-paragraph *c)*, “matrimonial property” includes the special rights that a spouse has to the matrimonial home in some jurisdictions; while “similar relationships” covers a relationship between unmarried couples (including those of the same sex), to the extent that it is given legal recognition.<sup>24</sup>

23 **Insolvency.** Sub-paragraph *e)* excludes insolvency, composition and analogous matters. The term “insolvency” covers the bankruptcy of individuals as well as the winding-up or liquidation of corporations that are insolvent, but does not cover the winding-up or liquidation of corporations for reasons other than insolvency, which is dealt with by sub-paragraph *j)*. The term “composition” refers to procedures whereby the debtor may enter into agreements with creditors in respect of a moratorium on the payment of debts or on the discharge of those debts. The term “analogous matters” covers a broad range of other methods whereby insolvent persons or entities can be assisted to regain solvency while continuing to trade, such as Chapter 11 of the US Federal Bankruptcy Code.<sup>25</sup>

24 Only proceedings directly concerning insolvency are excluded from the scope of the Convention. Assume, for example, that A and B enter into a contract, under which B owes A a sum of money. The contract contains a choice of court agreement in favour of the courts of State X. B then becomes insolvent. The Convention would apply to any proceedings concerning the question whether B did in fact owe A the money, but it would not apply to proceedings concerned with the question where A ranks among B’s creditors, even if the choice of court agreement was interpreted as covering them.

25 **Carriage of passengers or goods by sea.** Sub-paragraph *f)* excludes contracts for the carriage of passengers or goods<sup>26</sup> by sea. Contracts for the carriage of goods by sea were excluded because States that are parties to the Hague Rules on Bills of Lading<sup>27</sup> might be unwilling to accept a choice of court clause in a bill of lading if it granted jurisdiction to the courts of a State that was not a party to the Rules, since this could allow the ship owner to evade the mandatory provisions laid down in the Rules.<sup>28</sup> A second reason is that this matter forms the subject of a new project by UNCITRAL and the Conference did not want to interfere with that.<sup>29</sup> *The question of other maritime*

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<sup>23</sup> Some of these matters are dealt with in other Hague Conventions.

<sup>24</sup> These provisions are largely taken from sub-paragraphs *a)* to *d)* of Article 1(2) of the preliminary draft Convention 1999, and their scope is further examined at pp. 32–34 of the Nygh / Pocar Report.

<sup>25</sup> There is an identical provision in Article 1(2)(e) of the preliminary draft Convention 1999, and its scope is further examined at pp. 34–35 of the Nygh / Pocar Report.

<sup>26</sup> Here “goods” includes passengers’ luggage.

<sup>27</sup> They were adopted in 1924 and were amended by the Brussels Protocol of 1968. They are sometimes called the “Hague–Visby Rules”.

<sup>28</sup> An alternative way of dealing with this problem would be to provide that, in proceedings concerning carriage of goods by sea, a Contracting State that was a Party to the Hague Rules (or any future agreement replacing them) would not be required to give effect to a choice of court agreement in favour of the courts of a State that was not a Party to those Rules.

<sup>29</sup> This could also be dealt with under Article 23.

*matters is still to be resolved. Proceedings, such as the limitation of ship owners' liability or general average, that affect the interests of third parties raise special issues.*

**26 Anti-trust / competition.** Anti-trust / competition matters are excluded by subparagraph *g*). This refers to proceedings of the kind that may be brought under the Sherman and Clayton Acts in the United States, under Articles 81 and 82 (formerly Articles 85 and 86) of the EC Treaty, and under equivalent provisions in other countries. The standard term in the United States is "anti-trust law"; in Europe it is "competition law". It does not cover what Continental lawyers sometimes call "unfair competition" (*concurrence déloyale*).

**27** Criminal anti-trust / competition proceedings are not civil or commercial matters; therefore, they are outside the scope of the Convention by virtue of Article 1(1).<sup>30</sup>

**28** However, anti-trust / competition matters can form the subject of private-law proceedings. An action in tort for damages for breach of anti-trust / competition law, possible both in the United States and in the European Union, is a prime example. These actions are excluded by Article 2(2) *g*) because, though they are between private parties, they nevertheless affect the public interest, since they discourage anti-competitive behaviour.

**29** Another example is the rule laid down by the European Court of Justice in *Courage Ltd v. Crehan*,<sup>31</sup> under which an economically weak party, who is forced to accept terms in a contract that infringe EC competition law, can claim damages from the other party. The purpose of this rule is twofold: to do justice to the economically weak party and to benefit the public interest. It would be wrong to allow the economically strong party to avoid it by means of a choice of court agreement in favour of the court of a non-EU State, coupled with a choice-of-law clause in favour of the law of that State.

**30** On the other hand, if a person sues someone under a contract, and the defendant claims that the contract is void because it infringes anti-trust / competition law, the proceedings are *not* outside the scope of the Convention, since anti-trust / competition matters are not the object / subject of the proceedings, but arise merely as an incidental question.<sup>32</sup> The object / subject of the proceedings is the claim under the contract: the principal issue before the court is whether judgment should be given against the defendant because he or she has committed a breach of contract.

**31 Nuclear liability.** This is the subject of various international conventions, which provide that the State where the nuclear accident takes place has exclusive jurisdiction over actions for damages for liability resulting from the accident.<sup>33</sup> Article 23 gives those conventions priority over this Convention. However, there are some States with nuclear power plants that are not parties to any of the nuclear-liability conventions.<sup>34</sup> Such States would be reluctant to allow legal proceedings to be brought in another State by virtue of a choice of court agreement, since, where the operators of the nuclear power plants benefit from limited liability under the law of the State in question, or where compensation for damage is paid out of public funds, a single collective procedure in that State under its internal law would be necessary in order to have a uniform solution in respect of liability and an equitable distribution of a limited fund among the victims.

<sup>30</sup> This applies both to criminal proceedings under US anti-trust law and to the quasi-criminal proceedings under Articles 81 and 82 of the EC Treaty.

<sup>31</sup> Case C-453/99, [2001] ECR I-6297; [2001] 3 WLR 1643.

<sup>32</sup> See Article 2(3).

<sup>33</sup> The *Paris Convention on Third-Party Liability in the Field of Nuclear Energy* 1960; the *Convention Supplementary to the Paris Convention* 1963; the *Vienna Convention* 1963; the *Joint Protocol relating to the Application of the Vienna Convention and the Paris Convention* 1988.

<sup>34</sup> For example, Canada, China, Japan, Korea and the United States.

32 **Exclusive jurisdiction.** In the preliminary draft Convention 1999, there was a special provision on exclusive jurisdiction. It was contained in Article 12, and covered four matters: rights *in rem* in immovable property, legal persons, public registers, and the validity of certain intellectual property rights. Since the current preliminary draft Convention deals only with jurisdiction based on exclusive choice of court agreements, it was decided to exclude these matters from the scope of the Convention since choice of court agreements are not normally allowed with respect to them.

33 **Immovable property.** Sub-paragraph *i)* excludes rights *in rem* in immovable property. This concept should be interpreted as relating only to proceedings concerning ownership or possession of, or other rights *in rem* in, the immovable, not proceedings about immovables which do not have as their object / subject a right *in rem*.<sup>35</sup> It is said that one of the explanations for exclusive jurisdiction in this respect is the territorial sovereignty of the State where the immovable is situated. Thus, State A cannot allow the courts of State B to decide who is the owner of an immovable within State A's territory. Accordingly, it might be regarded as natural for the State in which the immovable is situated to have exclusive jurisdiction over proceedings which have as their object / subject rights *in rem* in immovable property; consequently, the Convention does not apply to choice of court agreements in such proceedings.

34 **Tenancies.** It has been proposed that tenancies in immovable property should also be covered by sub-paragraph *i)*.<sup>36</sup> This is because, in some countries, they are subject to special legislation designed to protect the tenant. To the extent that this legislation applies to private homes, the tenant would constitute a consumer under Article 2(1)(a) and the agreement would be excluded under that provision. However, the legislation may apply in other situations as well.

35 **Legal persons.** Sub-paragraph *j)* excludes the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs.<sup>37</sup> The reason for this exclusion is similar to that stated above with regard to immovable property. As legal persons are created by the sovereign power of the State, it might be regarded as natural for the courts of the State where they were established to have exclusive jurisdiction over proceedings which have as their object / subject the matters mentioned above. Accordingly, the Convention does not apply to choice of court agreements in such proceedings.

36 **Intellectual property.** The provisions on intellectual property in the 2003 Draft have been substantially reformulated, but no significant policy change was intended. They now constitute sub-paragraph *k)* to Article 2(2),<sup>38</sup> which draws a distinction between copyright and related rights, on the one hand, and all other intellectual property rights, on the other hand. These will be discussed separately.

37 **Copyright and related rights.** Copyright and related rights are fully covered by the Convention.

38 Examples of related rights include: rights of performers (such as actors and musicians) in their performances, rights of producers of sound recordings (for example, cassette recordings and CDs) in their recordings, and rights of broadcasting organisations in their radio and television programmes. Copyright as such is based on the creation of a new work (for example, the composition of a song or the writing of a book), while related

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<sup>35</sup> For the meaning of a similar provision in Article 16(1)(a) of the Brussels Convention, see *Webb v. Webb*, C-294/92, [1994] ECR I-1717; *Reichert v. Dresdner Bank*, Case C-115/88, [1990] ECR I-27; *Lieber v. Göbel*, Case C-292/93, [1994] ECR I-2535; see further A. Dicey & J. Morris, *The Conflict of Laws* (13<sup>th</sup> ed., 2000 by L. Collins & specialist editors, Sweet and Maxwell, London), paragraphs 23-010 to 23-015 (pp. 941-943); H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (3<sup>rd</sup> ed., 2002, LGDJ, Paris) paragraph 102 (p. 74).

<sup>36</sup> This provision is in square brackets because it has not yet been agreed.

<sup>37</sup> This same phrase appears (with purely verbal differences) in Article 12(2) of the preliminary draft Convention 1999. The commentary on it in the Nygh / Pocar Report is at pp. 65-66.

<sup>38</sup> This sub-paragraph is in square brackets to indicate that it has not yet been agreed. One delegation raised the question whether there should be special consideration given to folklore and traditional knowledge as intellectual property rights. This has not yet been fully discussed.

rights protect a specific use of an existing work (for example, by performing, broadcasting or recording it) by someone other than the author of the work. They protect the additional contribution of the broadcaster, actor or record producer.

**39 Other intellectual property rights.**<sup>39</sup> Intellectual property rights other than copyright and related rights are excluded from the Convention, except in proceedings pursuant to a contract. This statement might, however, give a false impression. Since the Convention applies only to jurisdiction based on exclusive choice of court clauses, the normal run of piracy cases would not be covered in any event: pirates do not agree to choice of court clauses. Such clauses normally appear only in contracts that deal with intellectual property rights. Consequently, it is not very significant that the Convention covers intellectual property rights other than copyright and related rights only in proceedings pursuant to a contract: it is only in such proceedings that the possibility of applying the Convention is likely to arise.

**40** "Proceedings pursuant to a contract" means proceedings to enforce substantive rights<sup>40</sup> under a contract (for example, by injunction)<sup>41</sup>, to obtain damages for the breach of such rights, to obtain payment of royalties under a contract, to interpret a contract, to set it aside, to declare that it never existed, or to obtain a declaration of non-liability under it.

**41 Contracts covered.** The Convention is intended to cover a broad range of contracts dealing with intellectual property. Licence agreements and agreements to assign an intellectual property right are the most obvious examples, but distribution contracts, joint venture agreements and agency agreements are all intended to be covered in so far as they involve intellectual property. *Questions were raised in the plenary session whether the phrase "a contract which licenses or assigns such intellectual property rights" is wide enough to cover what was intended. A phrase considered earlier by the Intellectual Property Working Group, "a contract for the transfer or use of such intellectual property rights", might be better. Another possibility is "except in proceedings concerning a substantive right under a contract". This question will have to be reconsidered at the Diplomatic Conference.*

**42 Infringement proceedings.** It was intended that the Convention should apply to litigation concerning the scope of an intellectual property licence. Such proceedings may be brought either in contract or in tort. In some countries, the parties are required only to plead the facts: it is for the court to determine the appropriate legal characterization. Whether the court chooses contract or tort may depend on which is easier to prove. In other countries, the parties themselves decide whether to sue in contract or tort. They may have good reasons (such as the opportunity to obtain higher damages) for choosing one or the other. Most delegates felt that it should not depend on these accidental considerations whether or not a case was covered by the Convention. Some delegates thought that the wording of sub-paragraph k) was sufficient to cover proceedings in both contract and tort without the additional words in square brackets; others thought that the additional words were necessary to avoid misunderstanding.

**43 Validity as an incidental question.** Proceedings to revoke an intellectual property right are not "proceedings pursuant to a contract"; so they are not covered by

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<sup>39</sup> The following paragraphs of this Report deal only with intellectual property rights other than copyright and related rights.

<sup>40</sup> A "substantive right" is a right other than a procedural right. The mere fact that the parties have concluded a choice of court agreement does not mean that any proceedings brought under that agreement are proceedings pursuant to a contract.

<sup>41</sup> By this is meant a final injunction. The Convention does not preclude the grant of interim injunctions, but this would not be covered by the Convention: see Article 8.

the Convention, even if brought as a counterclaim to contractual proceedings.<sup>42</sup> If the defendant raises invalidity as a defence to a claim covered by the Convention, the court can deal with that defence as a necessary step towards giving judgment on the claim. In the terminology of the Convention, it will be an “incidental question”. This has two consequences: the first is that the proceedings are not taken outside the scope of the Convention by reason of the fact that the court deals with the invalidity defence;<sup>43</sup> the second is that the ruling on the validity of the intellectual property right is not enforceable as such under the Convention.<sup>44</sup>

44 An example will make this clearer. Assume that a licensor brings proceedings to enforce an intellectual property licensing agreement. The defendant claims that the intellectual property right is invalid. The court gives a ruling on this defence, holding the intellectual property right valid, and then gives judgment for the plaintiff, granting him an injunction plus damages. The judgment will be enforceable under the Convention, despite the fact that the court could give it only after deciding the incidental question of validity.<sup>45</sup> However, the ruling on validity will not itself be subject to recognition under the Convention,<sup>46</sup> nor will it create an estoppel or operate as issue preclusion under the Convention<sup>47</sup> in other Contracting States.

45 *The preceding paragraphs of this Report<sup>48</sup> set out the intention of the Conference. Doubts have, however, been raised as to whether the drafting of Article 2(2)(k) adequately expresses that intention, especially with regard to rulings on the validity of intellectual property rights other than copyright or related rights. These problems could be solved by deleting Article 2(2)(k) and inserting a new provision, Article 2(2 bis), to read as follows:*

*2 bis.*

*a) The Convention shall not apply to intellectual property rights other than copyright or related rights, except —*

- i) in proceedings pursuant to a contract for the transfer or use of such intellectual property rights; or*
- ii) in proceedings for infringement, provided that the infringement could have formed the basis of proceedings between the parties under sub-paragraph i) above.*

*b) The Convention shall not apply to judgments or rulings on the validity of intellectual property rights other than copyright or related rights, even if given in proceedings to which sub-paragraph a)(i) or (ii) applies.*

*Paragraph 2(3) would then have to be amended to read “Notwithstanding paragraphs 2 and 2 bis, proceedings are not excluded from the scope of the Convention where a matter referred to in **those paragraphs** arises merely as an incidental question and not as the object of the proceedings.”<sup>49</sup>*

46 **Public registers.** Sub-paragraph 1) excludes the validity of entries in public registers.<sup>50</sup> Some people might not regard this as a civil or commercial matter. However,

<sup>42</sup> Article 2(2)(k), footnote 1. This does not of course mean that the court cannot hear them.

<sup>43</sup> Article 2(3).

<sup>44</sup> See Article 10(1).

<sup>45</sup> This is subject to Article 10(2).

<sup>46</sup> Article 10(1). It might be recognised on some other basis.

<sup>47</sup> See also *infra* paragraph 56.

<sup>48</sup> Paragraphs 36-44.

<sup>49</sup> Article 10(1) would also have to be amended: see paragraph 167 *infra*.

<sup>50</sup> This same phrase appears (with purely verbal differences) in Article 12(3) of the preliminary draft Convention 1999. The commentary on it in the Nygh / Pocar Report is at p. 66.

as some international instruments<sup>51</sup> provide for exclusive jurisdiction over proceedings that have the validity of such entries as their object, it was thought better to exclude them explicitly in order to avoid any doubts.

**47 Insurance.** Contracts of insurance (or reinsurance) are not excluded from the scope of the Convention just because they relate to one of the matters referred to in paragraph 2. The fact that the risk covered is outside the scope of the Convention does not mean that the contract of insurance is outside the scope of the Convention. Thus, insurance of cargo carried by sea is not excluded by virtue of Article 2(2)(f) and insurance against liability for nuclear damage is not excluded by virtue of Article 2(2)(h). *In view of the importance of this question, it might be desirable, for the sake of clarity, to have an express provision to this effect. This could be added at the end of paragraph 3 and might read, "In particular, insurance (or reinsurance) is not excluded from the scope of this Convention merely because it relates to one of the matters referred to in paragraph 2 of this Article."*

**48 Procedural law.** It was not intended that the Convention would affect the procedural law of Contracting States, except in those areas expressly covered by it (jurisdiction, and recognition and enforcement of foreign judgments). Outside these areas, internal procedural law applies as before, even in proceedings under the Convention.<sup>52</sup> Examples are given in the following paragraphs, though these are far from exhaustive.

**49** The Convention does not interfere with the rules of Contracting States on the service of documents (including writs) within their own territory or abroad. However, if the requirements of Article 9(1)(c) are not satisfied, other Contracting States may refuse to recognise the judgment.

**50** The Convention does not require a Contracting State to grant a remedy that is not available under its law, even when called upon to enforce a foreign judgment in which such a remedy was granted. Contracting States do not have to create new kinds of remedies for the purpose of the Convention. However, they should apply the enforcement measures available under their internal law in order to give as much effect as possible to the foreign judgment.

**51** Time limits within which proceedings must be brought or other steps taken under internal law remain unaffected by the Convention. Proceedings under a choice of court agreement, or proceedings to enforce a judgment under such an agreement, must be brought within the time limits laid down by internal law.

**52** National rules regarding capacity to bring or defend legal proceedings are not affected by the Convention. Thus, if under the law of the requested State an entity with no legal personality lacks capacity to engage in litigation, it cannot bring proceedings under the Convention to enforce a judgment, even if the court that granted the judgment considered that it could bring such proceedings.

**53** National law decides whether, and in what circumstances, appeals and similar remedies exist. Examples include: appeals to a higher court in the same State; references to the European Court of Justice to interpret provisions of Community law, including conventions to which the Community is a party; references to a special court to decide constitutional issues; and references to a patent office or other authority to decide the validity of a patent.

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<sup>51</sup> For instance, Article 22(3) of the Brussels Regulation.

<sup>52</sup> In the case of recognition and enforcement, this is made clear by Article 14 of the preliminary draft Convention, which provides that the procedure for the recognition and enforcement of the judgment is governed by the law of the requested State.



54 National rules of evidence apply, even for proving the existence of a choice of court agreement.

55 **Incidental questions.** Article 2(3) provides that proceedings are not excluded from the scope of the Convention if a matter referred to in paragraph 2 arises merely as an incidental question. An incidental question is a question that is not the object (subject) of the proceedings but is a question that the court has to decide in order to give judgment.<sup>53</sup> For example, the plaintiff may claim a sum of money due under a patent-licensing agreement. The defendant may argue that the sum is not due because the patent is invalid. Then the validity of the patent would be an incidental question: the court would have to decide it in order to be able to decide the main question (whether the money is due). Another example is an action for breach of contract in which the defendant (who is a natural person, not a corporation) claims that he lacked capacity to enter into the contract: the main question would be whether he was liable for breach of contract; the incidental question would be whether he had capacity.

56 In some countries, parties are precluded in certain circumstances from re-litigating matters previously decided as incidental questions. In the United States, this is known as “issue preclusion” or “collateral estoppel”; in England it is called “issue estoppel”. In other countries, such matters can be re-litigated. It is suggested below, however, that a ruling on an incidental question does not have to be recognised or enforced under the Convention: recognition is limited to the ruling on the principal question.<sup>54</sup> However, the Convention does not prevent a court from recognising or giving effect to such a ruling on the basis of internal law.<sup>55</sup>

57 **Arbitration.** Paragraph 4 excludes arbitration and proceedings relating thereto.<sup>56</sup> The purpose of this provision is to ensure that the present Convention does not interfere with existing instruments on arbitration.

58 **Governments.** Article 2(5) provides that 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.<sup>57</sup> The proceedings will, however, be excluded if they do not concern a civil or commercial matter. As a general rule of thumb, one can say that if a public authority is doing something that an ordinary citizen could do, the case probably involves a civil or commercial matter.<sup>58</sup>

59 Where a government or other public authority is involved, this can raise difficult questions, especially in the case of contracts. A contract does not cease to be civil or commercial just because a public authority is a party to it; nevertheless, it will not be civil or commercial if the public authority is exercising powers that a private person could not exercise. Thus, where a public authority uses its governmental powers to force a party to enter into a contract, the contract is probably not civil or commercial. For

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<sup>53</sup> See paragraph 19 *supra*.

<sup>54</sup> See paragraphs 164 *et seq.*

<sup>55</sup> See paragraph 165 *infra*.

<sup>56</sup> An identical provision is found in Article 1(2)(g) of the preliminary draft Convention 1999: the relevant passage in the Nygh / Pocar Report is at p. 35.

<sup>57</sup> This provision is taken (with only verbal differences) from Article 1(3) of the preliminary draft Convention 1999. The commentary on it in the Nygh / Pocar Report is at pp. 35–36.

<sup>58</sup> For the interpretation by the Court of Justice of the European Communities of a similar provision in Article 1 of the Brussels Convention, see *LTU v. Eurocontrol*, Case 29/76, [1976] ECR 1541; [1977] 1 CMLR 88; *Netherlands v. Rüffer*, Case 814/79, [1980] ECR 3807; *Sonntag v. Waidmann*, Case C-172/91, [1993] ECR I-1963. See further A. Dicey & J. Morris, *The Conflict of Laws* (13<sup>th</sup> ed., 2000 by L. Collins & specialist editors, Sweet and Maxwell, London), paragraphs 11–013 to 11–016 (pp. 267–269); H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (3<sup>rd</sup> ed., 2002, LGDJ, Paris) paragraph 39 (pp. 26–28). The decisions of the Court of Justice of the European Communities on this issue would not necessarily apply to the Convention. Some courts might have a wider concept of what constitutes a civil or commercial matter: compare, for example, *United States of America v. Ivey* (1996) 130 DLR (4<sup>th</sup>) 674 (Ontario High Court, Canada), affirmed (1998) 139 DLR (4<sup>th</sup>) 570 (Ontario Court of Appeal) with *Netherlands v. Rüffer*, *supra*.

example, if a government authority offers to release an arrested person on condition that he enters into a contract under which he will pay a large sum of money if he does not appear for trial, the contract is probably too closely related to the criminal proceedings to come within the scope of the Convention.<sup>59</sup>

**60 Immunities of sovereign States.** Article 2(6) provides that nothing in the Convention affects the privileges and immunities of sovereign States or of entities of sovereign States, or of international organisations.<sup>60</sup>

### *Article 3 Exclusive choice of court agreements*

**61 Definition: five requirements.** As mentioned above,<sup>61</sup> the Convention applies only to exclusive choice of court agreements. Article 3 *a)* gives a definition of such an agreement. The definition contains the following requirements: first, there must be an agreement between two or more parties; secondly, the formal requirements of paragraph *c)* must be satisfied; thirdly, the agreement must designate the courts of one State, or one or more specific courts in one State, to the exclusion of all other courts; fourthly, the designated court or courts must be in a Contracting State; and finally, the designation must be for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship.

**62 The first requirement.** A choice of court agreement cannot be established unilaterally: there must be agreement.<sup>62</sup> In interpreting a similar provision in the Brussels Convention,<sup>63</sup> the European Court of Justice has laid down autonomous, Community-law rules as to what constitutes consent for this purpose.<sup>64</sup> The application of autonomous rules may have been correct in the context of the Brussels Convention, but it is not correct with regard to the Hague Convention, under which the law of the State in question must decide whether there is consent: the explicit references in various Articles to State law clearly indicate this.<sup>65</sup>

**63** Provided the original parties consent to the choice of court agreement, the agreement may bind third parties who did not expressly consent to it, if their standing to bring the proceedings depends on their taking over the rights and obligations of one of the original parties.<sup>66</sup> In some States, a "direct action" statute allows the victim of a tort to sue the tortfeasor's insurer without first proceeding against the tortfeasor. In such a case, the victim would be bound by any choice of court agreement contained in the insurance policy, if, under the relevant legislation, his or her right to bring the action is based on the fact that (s)he is regarded as having succeeded to the rights and obligations of the tortfeasor under the latter's contract with the insurer.<sup>67</sup>

<sup>59</sup> See *United States of America v. Inkley* [1989] QB 255; [1988] 3 WLR 304; [1988] 3 All ER 144 (Court of Appeal, England). See also *Attorney General for the United Kingdom v. Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 (High Court of Australia) (where a claim by the British Government, partly based on breach of contract, to compel the defendant not to reveal intelligence secrets was not enforced in Australia).

<sup>60</sup> This provision is taken from Article 1(4) of the preliminary draft Convention 1999. The commentary on it in the Nygh / Pocar Report is at p. 36.

<sup>61</sup> Paragraph 9.

<sup>62</sup> For this reason, the Convention does not apply to a choice of court made by a settlor in a trust instrument.

<sup>63</sup> Article 17.

<sup>64</sup> For example, in *Estasis Salotti and Colzani v. RÜWA*, Case 24/76, [1976] ECR 1831; [1977] 1 CMLR 345, it held that where a person signs a contract written on one side of a sheet of paper, he or she does not consent to a choice of court agreement on the other side, unless there is an explicit reference to it on the side that he signed. This decision was based on Community law, not on the law of any of the Contracting States.

<sup>65</sup> In Articles 5(1), 7 *a)* and 9(1)(*a*), there is a reference to the law of the State of the chosen court; in Article 7 *b)* to the law of the State of the court seised, and in Article 9(1)(*b*) to the law of the requested State.

<sup>66</sup> For an example in an area outside the scope of the Convention (carriage of goods by sea), see *Russ v. Nova (The Tilly Russ)*, Case 71/83, [1984] ECR 2417 (Court of Justice of the European Communities).

<sup>67</sup> See *Youell v. Kara Mara Shipping* [2000] 2 Lloyd's Rep. 102 (High Court, Queen's Bench Division, England).

64 **The second requirement.** This concerns the form of the choice of court agreement. The relevant rules are laid down in paragraph *c*), discussed below.

65 **The third requirement.** This requires the choice to be exclusive: the choice of court agreement must designate<sup>68</sup> the courts of one State or one or more specific courts in one State as having *exclusive* jurisdiction. This will be discussed below in connection with paragraph *b*).

66 **The fourth requirement.** This requires reciprocity. The Convention applies only to choice of court agreements in favour of the courts of a Contracting State: agreements designating the courts (or one or more specific courts) of a non-Contracting State are not covered.

67 **The fifth requirement.** This is that the designation must be for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship. This makes clear that the choice of court agreement can be restricted to, or include, disputes that have already arisen. It can also cover future disputes, provided they relate to a particular legal relationship. It is not limited to claims in contract, but could, for example, cover claims in tort arising out of a particular relationship. Thus, a choice of court clause in a contract for the carriage of goods by road could cover a tort action for damage to the goods. Whether this would be so in any particular case would depend on the terms of the agreement.

68 **Agreements deemed exclusive.** Article 3 *b*) lays down the important rule (foreshadowed by the third requirement in paragraph *a*)) that a choice of court agreement which designates the courts of one Contracting State or one or more specific courts in one Contracting State will be deemed to be exclusive unless the parties have expressly provided otherwise.

69 The first element of this is that the choice of court agreement may refer either to the courts of a Contracting State in general, or to one or more specific courts in one Contracting State. Thus an agreement designating "the courts of France" is regarded as exclusive for the purposes of the Convention, even though it does not specify *which* court in France will hear the proceedings. In such a case, French law will be entitled to decide in which court or courts the action may be brought.<sup>69</sup> Subject to any such rule, the plaintiff can choose the court (in France) in which he brings the action.

70 An agreement referring to a particular court in France – for example, the Commercial Court of Paris – would also be exclusive.<sup>70</sup> The same is true of an agreement that designates two or more specific courts in the same Contracting State – for example, "either the Commercial Court of Paris or the Commercial Court of Lyons". This too would be an exclusive choice of court agreement.<sup>71</sup>

71 **One-sided (asymmetric) agreements.** Sometimes a choice of court agreement is drafted to be exclusive as regards proceedings brought by one party but not as regards proceedings brought by the other party. International loan agreements are often drafted in this way. A choice of court clause in such an agreement may provide, "Proceedings by the borrower against the lender may be brought exclusively in the courts of State X; proceedings by the lender against the borrower may be brought in the courts of State X or in the courts of any other State having jurisdiction under its law."

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<sup>68</sup> Merely defending a case on the merits without objecting to jurisdiction would not itself give the court jurisdiction under the Convention, since this would not *designate* that court in terms of Article 3.

<sup>69</sup> See Article 5(3)(*b*).

<sup>70</sup> The problems that arise where the court designated cannot hear the case under internal law are discussed *infra*: see paragraphs 101 *et seq.*

<sup>71</sup> An agreement stating that A may sue B only in the Commercial Court of Paris, and that B may sue A only in the Commercial Court of Lyons, would also be an exclusive choice of court agreement under the Convention. This would not be the case, however, if the two courts were in two different States.

72 Many lawyers would consider that, under Article 3 *a*), the question whether an agreement is exclusive must be determined at the time of its conclusion. In other words, it must be exclusive irrespective of the party bringing the proceedings. On the other hand, however, the question will arise for decision only when proceedings are brought. Consequently, it would be possible to wait until that occurs before answering it. If this latter approach were taken, the answer might depend on which party brought the proceedings. If they were brought by the borrower, the agreement would not be covered by the Convention, since the lender would remain free to bring proceedings elsewhere. If he did so, the Convention would not preclude the court from hearing them. The Convention would also not apply if the lender brought proceedings in a court other than that designated in the agreement. If, on the other hand, the lender brought proceedings in the designated court, the agreement would, from that moment onwards, become exclusive, since the borrower would not be entitled to bring them in any other court.

73 **Meaning of "State" in the case of a non-unified legal system.** It will be remembered that the word "State" can have different meanings in relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to a matter dealt with by the Convention – for example, Canada, China, the United Kingdom or the United States. According to Article 22 (discussed below at paragraphs 215 *et seq.*) it can refer, as appropriate, either to the State as a whole – for example, Canada, China, the United Kingdom or the United States – or to a territorial unit within that State – for example, Ontario, Hong Kong, Scotland or New Jersey. Consequently, both a clause designating "the courts of the United States" and a clause designating "the courts of New Jersey" are exclusive choice of court agreements under the Convention.<sup>72</sup>

74 Although the Convention is restricted to exclusive choice of court agreements, Article 3 *b*) provides that an agreement which designates the courts of one Contracting State or one or more specific courts in one Contracting State is deemed to be exclusive unless the parties expressly provide otherwise. As a result, the following must be regarded as exclusive choice of court agreements:

- "The courts of State X shall have jurisdiction to hear proceedings under this contract."
- "Proceedings under this contract shall be brought before the courts of State X."

75 The following would not be exclusive:

- "The courts of State X shall have non-exclusive jurisdiction to hear proceedings under this contract."
- "Proceedings under this contract may be brought before the courts of State X, but this shall not preclude proceedings before the courts of any other State having jurisdiction under its law."

76 **Formal requirements.** Paragraph *c*) deals with formal requirements. These are both necessary and sufficient under the Convention: a choice of court agreement is not covered by the Convention<sup>73</sup> if it does not comply with them, but, if it does, no further requirements of a formal nature may be imposed under national law. Thus, for example, a court of a Contracting State cannot refuse to give effect to a choice of court agreement because:

- it is written in a foreign language;
- it is not in special bold type;

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<sup>72</sup> A clause designating "the state courts of the state of New Jersey or the federal courts located in that state" would also be an exclusive choice of court agreement.

<sup>73</sup> If it is valid under the law of the State of the chosen court, that court may hear the case, but the courts of other States would not be obliged to apply the Convention with regard to the agreement (Article 7) or the resulting judgment (Article 9).

- it is in small type; or
- it is not signed by the parties separately from the main agreement.<sup>74</sup>

77 Paragraph *c*) provides that the choice of court agreement must be entered into or evidenced either (i) “in writing” or (ii) “by any other means of communication which renders information accessible so as to be usable for subsequent reference”.

78 Where the agreement is in writing, its formal validity is not dependent on its being signed, though the lack of a signature might make it more difficult to prove the existence of the agreement. The other possible form is intended to cover electronic means of data transmission or storage. This includes all normal possibilities, provided that the data is retrievable so that it can be referred to on future occasions. It covers, for example, e-mail and fax.<sup>75</sup>

79 The agreement must either be concluded in one or other of these forms or it must be *evidenced* in them. The “evidenced in writing” requirement would be satisfied if the following facts were proved:

- there is an oral choice of court agreement;
- the agreement is confirmed in writing by one of the parties;
- the confirmation is received by the other party; and
- the latter raises no objection.<sup>76</sup>

80 It is not necessary for the party who received the confirmation expressly to accept it: if he or she did, that would constitute a new agreement in writing. It does not matter if the party who put the oral agreement into writing was the one who benefited from it – for example, because the chosen court was in his State.<sup>77</sup> In all cases, however, there must have been consent by both parties to the original oral agreement.

81 Article 3 *d*) provides that an exclusive choice of court agreement that forms part of a contract must be treated as an agreement independent of the other terms of the contract for the purpose of determining its validity: the validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract of which it forms part is not valid: the validity of the choice of court agreement must be determined independently, according to the criteria set out in the Convention.<sup>78</sup> Thus, it is possible for the designated court to hold the contract invalid without depriving the choice of court agreement of validity. On the other hand, of course, it is also possible for the ground on which the contract is invalid to apply equally to the choice of court agreement: it all depends on the circumstances. This approach is in accordance with that normally adopted with regard to the validity of arbitration agreements.

82 **Doctrine of consideration.** Under the common law, contracts are not valid unless there is consideration.<sup>79</sup> This means that each party must obtain something (however little) in return for what he promises the other party. If the choice of court agreement is treated as an independent contract, the question arises whether there is consideration. Normally, there would be. If A and B enter into a contract giving exclusive jurisdiction to the courts of State X, B’s promise not to sue elsewhere would constitute consideration for A’s promise not to do so either (and *vice versa*). However, there could be cases in which this would not be so. Assume that, if there had been no choice of court agreement, A could have sued B in the courts of State X or in those of State Y; B, on the other hand, could have sued A only in the courts of State X. If the parties were to agree that the courts of State X had exclusive jurisdiction, A would have given up the right to sue B in

<sup>74</sup> In some legal systems, these might be requirements of internal law: see, for example, *Trasporti Castelletti v. Hugo Trumphy*, Case C-159/97, [1999] ECR I-1597.

<sup>75</sup> The wording of this provision was inspired by Article 6(1) of the *UNCITRAL Model Law on Electronic Commerce* 1996.

<sup>76</sup> Cf. *Berghoefer v. ASA*, Case 221/84, [1985] ECR 2699; [1986] 1 CMLR 13.

<sup>77</sup> *Ibid.*

<sup>78</sup> See Articles 5(1), 7 and 9(1).

<sup>79</sup> This does not apply to contracts contained in a deed.

the courts of State Y, but he would have gained nothing in return, since, in any event, B could have sued him only in those courts. If such a choice of court agreement was part of the wider contract, consideration could be found in the other terms of the contract. However, if it was treated as a separate contract, it would be invalid for lack of consideration. *To solve this problem, the words "Where it would otherwise be invalid", could be inserted at the beginning of paragraph d). This would make clear that paragraph d) does not apply if its effect would be to make the contract invalid.*

#### Article 4      Other definitions

83    **"Judgment"**. Article 4 contains two further definitions. The first, in Article 4(1), is of "judgment". This is widely defined so as to cover any decision on the merits, regardless of what it is called.<sup>80</sup> It excludes a procedural ruling, but covers an order as to costs or expenses (even if given by an officer of the court, rather than by a judge) provided it relates to a judgment that may be recognised or enforced under the Convention. It does not cover a decision to grant interim relief (provisional and protective measures), as this is not a decision on the merits.<sup>81</sup>

84    **"Residence"**. Article 4(2) defines "residence" with regard to an entity or person other than a natural person. The definition is primarily intended to apply to corporations and will be explained on this basis.<sup>82</sup>

85    The concept of residence plays a role in Article 1 (definition of an "international" case for the purpose of jurisdiction), Article 19 (certain exceptions to recognition and enforcement) and Article 23 (relationship with other international instruments).

86    The problem faced by the Special Commission in defining the residence of entities other than natural persons was to reconcile the different conceptions of the common law and civil law countries, as well as those within the civil law countries.<sup>83</sup>

87    In the common law, the law of the place of incorporation is traditionally regarded as important for deciding issues relating to the internal affairs of the corporation.<sup>84</sup> It is the legal system that gives birth to it and endows it with legal personality. For jurisdictional purposes, however, the principal place of business and the place of its central management are also important.<sup>85</sup> The latter is the administrative centre of the corporation, the place where the most important decisions are taken. The principal place of business is the centre of its economic activities. Though normally in the same place, these two could be different. For example, a mining company with its headquarters in London (central administration) might carry on its mining activity in Namibia (principal place of business). Since all three concepts are important in the common law, the Convention provides that a corporation is resident in all three places.

88    Although some civil law systems also look to the law of the place of incorporation as the personal law of the company,<sup>86</sup> the dominant view favours the law of the "corporate seat" (*siège social*). The place of the corporate seat is also regarded as the domicile of

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<sup>80</sup> It would cover a decision by a patent office exercising quasi-judicial functions.

<sup>81</sup> On interim relief, see Article 8.

<sup>82</sup> A State or a public authority of a State would be resident only in the territory of that State.

<sup>83</sup> For a comparative discussion of these matters, see S. Rammeloo, *Corporations in Private International Law* (Oxford University Press, Oxford, England, 2001), Chapters 4 and 5.

<sup>84</sup> For England, see A. Dicey & J. Morris, *The Conflict of Laws* (13<sup>th</sup> ed., 2000 by L. Collins & specialist editors, Sweet and Maxwell, London), Rules 152(1) and 153 (pp. 1101–1109); for the United States of America, see *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 US 611, 621; 103 S Ct 2591; 77 L Ed. 2d. 46 (1983).

<sup>85</sup> For English law, see A. Dicey & J. Morris, *The Conflict of Laws* (13<sup>th</sup> ed., 2000 by L. Collins & specialist editors, Sweet and Maxwell, London), Rule 152(2) (p. 1101). For the purpose of diversity jurisdiction in the United States (discussed *infra* at paragraphs 102 *et seq.*), a corporation is a citizen both of the state where it was incorporated and of that in which it has its principal place of business: 28 US Code § 1332(c).

<sup>86</sup> For example, Japan and the Netherlands.

the corporation. However, there are two views as to how the corporate seat is to be determined. According to the first view, one looks to the legal document under which the corporation was constituted (the *statut* of the corporation). This will state where the corporate seat is, and should be regarded as decisive. The corporate seat thus determined is called the *siège statutaire*.

89 The *siège statutaire* may not, however, be the actual corporate headquarters. The second view is that one should look to the place where the company in fact has its central administration, sometimes called the *siège réel*. This corresponds to the common-law concept of the place of central administration.

90 To cover all points of view, it was thus necessary to include the *siège statutaire*, which is translated into English as “statutory seat”. However, this term does not refer to the corporation’s seat as laid down by some statute (legislation)<sup>87</sup> but as laid down by the *statut*, the document containing the constitution of the company – for example, the articles of association. In United Kingdom law, the nearest equivalent is “registered office”.<sup>88</sup> In practice, the State where the corporation has its statutory seat will almost always be the State under whose law it was incorporated or formed; while the State where it has its central administration will usually be that in which it has its principal place of business. On the other hand, it is not uncommon for a company to be incorporated in one State – for example, Panama – and to have its central administration and principal place of business in another.

#### *Article 5 Jurisdiction of the chosen court*

91 Article 5 is one of the “key provisions” of the Convention. A choice of court agreement would be of little value if the chosen court did not hear the case when proceedings were brought before it. For this reason, Article 5(1) provides that a court designated by an exclusive choice of court agreement has jurisdiction to decide a dispute to which the choice of court agreement applies, unless the agreement is null and void under the law of the State of the court designated. Article 5(2) provides that it must not decline to exercise jurisdiction on the ground that the dispute should be decided by a court in another State.

92 **Null and void.** The “null and void” provision is the only generally applicable exception to the rule that the chosen court must hear the case.<sup>89</sup> The question whether the agreement is null and void is decided according to the law of the State of the chosen court. The phrase “law of the State” includes the choice-of-law rules of that State as well as its rules of internal law.<sup>90</sup> Thus, if the chosen court considers that the law of another State should be applied under its choice-of-law rules, it will apply that law.

93 The “null and void” provision is intended to refer primarily to generally recognised grounds of invalidity like fraud, mistake, misrepresentation, duress and lack of capacity.<sup>91</sup>

94 **Declining jurisdiction.** Article 5(2) provides that the chosen court must not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State. This provision reinforces the obligation laid down in Article 5(1). However, it applies only with regard to a court in another State, not to a court in the same State.<sup>92</sup>

95 **Meaning of “State”.** What is meant by “State” in this context? In the case of a State containing a single law-district, there is no problem. Where the State contains a

<sup>87</sup> The French for “statute” is “*loi*”.

<sup>88</sup> See the Brussels Regulation, Article 60(2).

<sup>89</sup> For another exception that applies in special cases, see Article 18.

<sup>90</sup> If this had not been the intention, the text would have used the phrase “internal law of the State”.

<sup>91</sup> In Articles 7 *b*) and 9(1) *b*), lack of capacity is dealt with separately because it is determined by a different system of law from other grounds of invalidity – that of the court seised, rather than that of the chosen court. In Article 5, on the other hand, the court seised *is* the chosen court; so there is no need to deal separately with it.

<sup>92</sup> On the transfer of cases between courts in the same State, see Article 5(3) *b*).

number of territories subject to different systems of law, such as the United States, Canada or the United Kingdom, the question is more difficult. Under Article 22(1)(c) of the Convention, a reference to “the court or courts of a State” means, where appropriate, the court or courts of the relevant territorial unit.<sup>93</sup> From this it follows, that the reference in Article 5(2) to “a court of another State” must be understood as referring to a court of another territorial unit where this is appropriate.

96 When is it appropriate to refer to a territorial unit within a State? This could depend on the terms of the choice of court agreement. If it referred to “the courts of England”, England would be the relevant territorial unit, and Article 5(2) would preclude a transfer to a court in Scotland: Scotland would be another “State” for this purpose. If, on the other hand, the choice of court agreement referred to “the courts of the United Kingdom”, “State” would mean the United Kingdom, and a court in England would not be precluded by Article 5(2) from transferring the case to a court in Scotland.<sup>94</sup>

97 In the case of the United States of America, the position could depend on whether the chosen court was a state<sup>95</sup> court or a federal court. If the choice of court agreement referred to “the courts of the state of New York”, a transfer to a court in New Jersey would be precluded. Here, “State” would refer to the state of New York, not to the United States of America.<sup>96</sup> However, if the reference was to “the courts of the United States”, Article 5(2) would not preclude a transfer to a federal court in a different state of the United States of America, since “State” would mean the United States of America.<sup>97</sup> The same would apply if the reference was to a specific federal court – for example, “the Federal District Court for the Southern District of New York”. Here too, “State” would mean the United States of America; consequently, Article 5(2) would not preclude a transfer to a federal court in a different state of the United States of America.<sup>98</sup>

98 **Forum non conveniens.** There are two legal doctrines on the basis of which a court might consider that the dispute should be decided in a court of another State. The first is *forum non conveniens*.<sup>99</sup> This is a doctrine mainly applied by common law countries.<sup>100</sup> Its precise formulation varies from country to country, but in general one can say that it permits a court having jurisdiction to stay (suspend) or dismiss the proceedings if it considers that another court would be a more appropriate forum.<sup>101</sup> The granting of a stay or dismissal is discretionary and involves weighing up all relevant factors in the particular case. It applies irrespective of whether or not proceedings have

<sup>93</sup> For the position with regard to Regional Economic Integration Organisations, such as the European Community, see Article 26(5).

<sup>94</sup> In this case, the Scottish judgment would be entitled to be recognised and enforced under the Convention, since the Scottish court would be “a court of a Contracting State designated in an exclusive choice of court agreement”.

<sup>95</sup> It should be remembered that “state” with a lower-case “s” refers to a territorial unit of a federal State (for example, a state in the United States of America); “State” with an upper-case “S” refers to a State in the international sense.

<sup>96</sup> The same would be true if the agreement referred to “the state courts of New York or the federal courts located in that state”.

<sup>97</sup> The resulting judgment would be entitled to recognition and enforcement under the Convention.

<sup>98</sup> Whether Article 5(3)(b) would have this effect is considered below.

<sup>99</sup> See J. Fawcett, (ed.), *Declining Jurisdiction in Private International Law* (Clarendon Press, Oxford, 1995).

<sup>100</sup> It actually originated in Scotland, a mixed common / civil-law country. It still applies in Scotland today and has also been adopted in civil-law jurisdictions such as Quebec. For the application of this doctrine and other statutory substitutes in the context of choice of court clauses, see A. Schulz, “Mechanisms for the Transfer of Cases within Federal Systems”, Preliminary Document No 23 of October 2003.

<sup>101</sup> For the formulation in English law, see A. Dicey & J. Morris, *The Conflict of Laws* (13<sup>th</sup> ed., 2000 by L. Collins & specialist editors, Sweet and Maxwell, London), Rule 31(2) (p. 385); for the formulation in the United States of America, see The American Law Institute, *Second Restatement on Conflict of Laws* (The American Law Institute Publishers, St Paul, Minn., 1971), § 84. For further discussion of *forum non conveniens*, with special reference to its effect on choice of court agreements, see R. Brand, “Forum Selection and Forum Rejection in US Courts: One Rationale for a Global Choice of Court Convention”, in J. Fawcett (ed.), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Oxford University Press, Oxford, 2002), p. 51.



been commenced in the other court (though this is a factor that may be taken into account).

99 ***Lis pendens***. The second doctrine is that of *lis pendens*. This is applied mainly by civil law countries. It requires a court to stay (suspend) or dismiss proceedings if another court has been seised first in proceedings involving the same cause of action between the same parties.<sup>102</sup> It is not discretionary, does not involve the weighing up of relevant factors to determine the more appropriate court and applies only when proceedings have already been commenced in the other court.

100 Article 5(2) precludes resort to either of these doctrines if the court in whose favour the proceedings would be stayed or dismissed is in another State, since under either doctrine the court would decline to exercise jurisdiction "on the ground that the dispute should be decided in a court of another State."

101 **Subject-matter jurisdiction**. Article 5(3) (a) provides that Article 5 does not affect internal rules on subject-matter jurisdiction or jurisdictional rules based on the value of the claim. The phrase "subject-matter jurisdiction" can have a variety of meanings. Here it refers to the division of jurisdiction among different courts in the same State on the basis of the subject matter of the dispute. It is not concerned with determining which State's courts will hear the case but with the question what kind of court *within* a State will hear it. For example, specialised courts may exist for matters such as divorce, tax or patents. Thus, a specialised tax court would lack subject-matter jurisdiction to hear an action for breach of contract. So even if the parties concluded an exclusive choice of court agreement designating such a court, it would not be obliged under the Convention to hear the case.

102 In the United States, subject-matter jurisdiction can also refer to the allocation of jurisdiction between state and federal courts.<sup>103</sup> As a general rule, one can say that state courts have subject-matter jurisdiction in all cases unless there is a specific rule depriving them of jurisdiction. Federal courts, on the other hand, have jurisdiction only if a specific rule grants them jurisdiction. The basic rules on federal jurisdiction are laid down in Article III, section 2 of the United States Constitution. The two most important cases in which federal courts have jurisdiction are cases arising under federal law<sup>104</sup> and cases in which there is diversity of citizenship. Diversity of citizenship arises if one party is a citizen of a different state from another party, or if one party is a citizen of a State of the United States of America and the other party is a foreign national.<sup>105</sup>

103 The parties cannot waive these rules. If subject-matter jurisdiction does not exist, a federal court cannot hear the case, even if the parties submit to its jurisdiction. Thus, if a Japanese citizen and a German citizen, both resident in their respective countries, enter into a contract for the sale of goods, and the contract contains a choice of court agreement designating "the Federal District Court for the Southern District of New York" as having exclusive jurisdiction to hear disputes arising out of the contract, the chosen court will not be able to hear the case. It will lack subject-matter jurisdiction because

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<sup>102</sup> See, for example, Article 27 of the Brussels Regulation.

<sup>103</sup> For a detailed discussion of federal and state jurisdiction in Australia, Canada and the United States of America, see A. Schulz, "Mechanisms for the Transfer of Cases within Federal Systems", Preliminary Document No 23 of October 2003.

<sup>104</sup> Federal law covers the United States Constitution, federal statutes and international treaties concluded by the United States of America.

<sup>105</sup> There must be complete diversity: no party on one side can be a citizen of the same state as any party on the other side. To be a citizen of a state, a person must be a citizen of the United States of America (or an alien admitted for permanent residence) and must be resident in a state of the United States of America. In addition, the value of the claim must be above a specified minimum, at present \$75,000. See 28 US Code § 1332. For the citizenship of a corporation, see footnote 85 *supra*.

federal law will not govern the case<sup>106</sup> and there will be no diversity of citizenship.<sup>107</sup> The Convention will not affect this outcome. The result is that the choice of court agreement will be void: there would be no justification for treating it as referring to the *state* courts of New York. If, on the other hand, the parties designated “the courts of New York” and the plaintiff brought proceedings in a federal court in New York, he could recommence them in the state courts of New York if the federal courts held that they had no subject-matter jurisdiction.

104 In some countries, certain courts have jurisdiction only if the value of the claim is greater, or less, than a specified amount. Since this concerns the internal allocation of jurisdiction within a single State, it is a question of subject-matter jurisdiction as defined above. However, some States do not use this terminology; so Article 5(3)(a) refers specifically to jurisdiction based on the value of the claim. The comments in the previous paragraph on subject-matter jurisdiction apply here as well.

105 **Internal procedural rules.** As was said above,<sup>108</sup> it was not intended that the Convention should affect rules of internal procedure that are not related to international jurisdiction or the recognition of foreign judgments. Some of these rules may preclude a court from hearing cases in certain circumstances. Rules on subject-matter jurisdiction are just one example. Other examples are: rules precluding certain parties (such as enemy aliens in time of war) from bringing proceedings; rules precluding proceedings being brought against certain parties (for example, rules on State / sovereign immunity); rules precluding courts from hearing certain disputes (for example, the act of state doctrine, as applied in the United States of America); rules precluding the application of foreign law in certain cases (for example, those based on public policy); rules requiring cases to be brought within a given period of time; and rules on capacity to sue or be sued (for example, rules that an entity lacking legal personality cannot bring legal proceedings). Some of these matters are expressly mentioned in the Convention;<sup>109</sup> others are not. However, even if they are not expressly mentioned – it is impossible to cover everything – it was not intended that they should be affected by Article 5.

106 **Internal allocation of jurisdiction.** Article 5(3)(b) provides that paragraphs 1 and 2 of Article 5 do not “affect the internal allocation of jurisdiction among the courts of a Contracting State [unless the parties designated a specific court].” The last seven words are in square brackets because they have not been agreed. If no specific court is designated by the parties – if, for example, the choice of court agreement refers merely to “the courts of the Netherlands” or “the courts of the state of New Jersey” – there is no reason why the normal rules on the internal allocation of jurisdiction question should not apply.

107 **A specific court.** What if the parties designate a specific court – for example, the Federal District Court for the Southern District of New York<sup>110</sup> or the Tokyo District Court? Should it still be possible to transfer the case to another court in the same Contracting State?<sup>111</sup> A number of States have rules permitting the transfer of cases between different courts in the same State, usually because a transfer would be in the interests of the parties or the good administration of justice. For example, if a hundred people were killed in the same air crash, and ninety-five of them had agreed to an exclusive choice of

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<sup>106</sup> In general, state law governs most areas of commercial law, such as sale of goods and contracts.

<sup>107</sup> For diversity to exist, the parties must be citizens of different States of the United States of America; alternatively, one can be a citizen of a State of the United States of America and one a citizen of a foreign State. If both parties are citizens of foreign States, there is no diversity.

<sup>108</sup> Paragraphs 48-54.

<sup>109</sup> See, for example, Article 2(6).

<sup>110</sup> See *supra* paragraph 103.

<sup>111</sup> In the above example, “State” would refer to the United States of America as a whole: see paragraph 97 *supra*.

court clause specifying court X in State Z, while the remaining five had agreed that court Y, also in State Z, would have exclusive jurisdiction, it would make sense for the cases brought by the families of the five to be transferred to court X.<sup>112</sup>

108 If transfer or removal were permitted even where the parties designated a specific court, the question would arise whether the proceedings in the new court should still be covered by the Convention.<sup>113</sup> If it was decided that they should, further changes would have to be made to Article 7 (obligation of other courts not to hear the case) and Article 9 (recognition and enforcement of the resulting judgment).<sup>114</sup> These are indicated by words in square brackets in those provisions.<sup>115</sup>

109 *The Diplomatic Conference will have to decide whether local rules on transfer should remain unaffected by the Convention and, if so, whether Articles 7 and 9 should be altered so that the proceedings remain within the scope of the Convention.*

#### *Article 6 Stay of proceedings in the chosen court*

110 Article 6 states that nothing in the Convention prevents the chosen court from suspending the proceedings before it, in particular to allow the courts of the State under the law of which an intellectual property right arose to give judgment on its validity. It also permits the proceedings to be dismissed, provided that such dismissal does not prevent the proceedings from being recommenced. (This latter provision was included because it is said that, in some countries, it is difficult, if not impossible, to suspend proceedings.)

111 Article 6 does not *give* the courts of Contracting States the power to stay or dismiss proceedings. It merely *preserves* such powers as already exist under internal procedural law by making clear that they are not restricted by the Convention. It is not intended to restrict national powers in any way.

112 This Article is intended to apply in a number of situations,<sup>116</sup> the most important being where, in an intellectual-property licensing agreement, there is a choice of court clause giving jurisdiction to a court of a State other than that under the law of which the right arose. If proceedings were brought under the choice of court clause to enforce the licensing agreement and the defendant challenged the validity of the intellectual property right, the chosen court might want to stay the proceedings before it to allow the question of validity to be decided by the appropriate court of the State under the law of which the intellectual property right arose (in the case of a registered right, the State of registration). In some situations, this might be desirable in the interests of justice.

113 It is not easy to imagine circumstances in which a stay would be granted outside the intellectual property area,<sup>117</sup> but the following might constitute an example. A agrees to sell land in State X to B, and the contract contains a choice of court clause in favour of the courts of State Y. B fails to pay the price and A sues him in State Y. B defends the

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<sup>112</sup> On the effect that such a transfer may have on the applicable substantive and procedural law, see A. Schulz, "Mechanisms for the Transfer of Cases within Federal Systems", Preliminary Document No 23 of October 2003, pp. 14 *et seq.*, 21, 26.

<sup>113</sup> Article 5(3)(b), footnote 2.

<sup>114</sup> This is because the chosen court would have "decided not to hear the case" in terms of Article 7 e), and a judgment given by the court to which the proceedings were transferred would not constitute a judgment given by a court "designated in an exclusive choice of court agreement" in terms of Article 9(1).

<sup>115</sup> See Article 7 e) and Article 9(1 *bis*).

<sup>116</sup> The words "in particular" indicate that the provision is not confined to intellectual property cases.

<sup>117</sup> References to another court or body (such as a patent office) in the *same* State could be made without the need for a special provision in the Convention: they would be matters of internal procedure (see paragraph 53 *supra*). The same would apply to references to a court of a Regional Economic Integration Organisation, such as the European Community (*ibid.*): it would be regarded as a State for this purpose (see Article 26(5)).

action by asserting that A does not have title to the land and cannot, therefore, transfer it to him. In this situation, the court might want to stay the proceedings to enable the courts of State X to decide the question of title.<sup>118</sup>

114 *Article 6 is in square brackets because it has not yet been agreed. Opponents of the provision argue that it might encourage dishonest parties to ask for proceedings to be suspended simply as a time-wasting tactic. It could also be regarded as negating, or at least weakening, the obligation in Article 5(2). It could even be argued that, in its present form, it might be understood as permitting a court to stay proceedings on the ground that another court would be more appropriate to decide the whole case (doctrine of forum non conveniens).<sup>119</sup> Furthermore, it might be misread as implying that the powers of national courts are restricted to the extent that they are not covered by Article 6.*

115 *The Diplomatic Conference will have to decide whether Article 6 should be retained and, if so, whether it should be amended.*

#### *Article 7      Obligations of a court not chosen*

116 Article 7 is the second “key provision” of the Convention. Like other provisions, it applies only if the choice of court agreement is exclusive and only if the chosen court is in a Contracting State.<sup>120</sup> It is addressed to courts other than that chosen, and requires them to refrain from hearing the case, even if they have jurisdiction under their national law. This is essential if the exclusive character of the choice of court agreement is to be respected.

117 Article 7 applies only if the parties to the proceedings are bound by the choice of court agreement. Normally they must be parties to the agreement, though, as we saw above,<sup>121</sup> there are circumstances in which someone who is not a party to the agreement will nevertheless be bound by it.

118 Problems can arise in multi-party cases. Assume that A, who is resident in State X, sells goods to B, who is resident in State Y. The contract contains a choice of court clause in favour of the courts of State X. The goods are delivered in State Y and B sells them to C, who is also resident in State Y. If C claims that the goods are defective, he can sue B in State Y. He could also sue A (in tort), since the choice of court agreement would not be binding between A and C. However, if he sues only B, and B wishes to join A as a third party, he will be unable to do so: the choice of court agreement is binding between A and B and the court will have to suspend or dismiss the proceedings against A.<sup>122</sup>

119 Article 7 requires the court to suspend or dismiss the “proceedings”. It is not stated expressly what proceedings this refers to. However, it is clear from the context that it covers all proceedings inconsistent with the choice of court agreement. To determine what these are, the court must interpret the agreement. Under Article 3 a) of the Convention, the agreement applies to disputes “which have arisen or may arise in connection with a particular legal relationship”. In interpreting the agreement, the court must decide what that relationship is, and which disputes the agreement applies to. It must decide, for example, whether a choice of court clause in a loan agreement covers a

<sup>118</sup> A contract for the sale of land (as distinct from a conveyance (transfer) of land) is not excluded from the scope of the Convention by Article 2(2)(i): cf. Schlosser Report, paragraphs 169–172 (on the equivalent provision in the Brussels Convention).

<sup>119</sup> The words “in particular” indicate that proceedings may be suspended for purposes other than that referred to in the text.

<sup>120</sup> This follows from the definition of “exclusive choice of court agreement” in Article 3 a).

<sup>121</sup> Paragraph 63.

<sup>122</sup> This could result in the proceedings being split in an undesirable way. Some courts, therefore, refuse to enforce choice of court agreements in such cases: see *Grecon Dimter Inc. v. Normand Inc.*, Quebec Court of Appeal, 12 January 2004 (available on < [www.jugements.qc.ca](http://www.jugements.qc.ca) >); cf. *Donohue v. Armco Inc.* [2001] UKHL 64; [2002] 1 All ER 749; [2001] 1 Lloyd’s Rep. 425 (House of Lords, England).

tort action by the borrower against the lender for enforcing the agreement in an allegedly abusive manner.<sup>123</sup>

120 The most common situation in which Article 7 would apply is where a party brings an action covered by the choice of court agreement in a court other than that designated.<sup>124</sup>

121 Proceedings for an antisuit injunction to prevent one of the parties from suing in the chosen court would be inconsistent with the choice of court agreement. They too would be covered by Article 7.

122 If the proceedings are covered by Article 7, the court must either suspend or dismiss them, unless one of the exceptions applies. It would be appropriate to suspend the proceedings, if possible,<sup>125</sup> where further developments might occur that would change the situation – for example, if the chosen court has not yet heard the case and it is uncertain whether it will do so.

123 **Five exceptions.** Article 7 lays down five exceptions to the rule that the proceedings must be suspended or dismissed. The first two<sup>126</sup> are fairly standard, but the third and fourth<sup>127</sup> are intended to apply only in the most exceptional circumstances. If they were applied too widely, the whole purpose of the Convention would be undermined.

124 **The first exception: null and void.** The first exception is where the agreement is null and void under the law of the State of the chosen court.<sup>128</sup> This is the counterpart of the provision in Article 5(1).<sup>129</sup> However, while under Article 5(1) the court seised will be the chosen court, this will not be the case under Article 7 *a*). In the latter case, therefore, the court seised will not be applying its own law.<sup>130</sup> Consequently, it becomes important to know whether incapacity is covered by Article 7 *a*) as well as by Article 7 *b*). This is discussed below.

125 **The second exception: incapacity.** The second exception is where a party lacked capacity to enter into the agreement under the law of the State of the court seised. Here again “law” includes the choice-of-law rules of that State.<sup>131</sup> In deciding whether the choice of court agreement is null and void, the law of the chosen court must be applied by courts in all the Contracting States. In the case of capacity, however, it was considered too ambitious to lay down a uniform choice-of-law rule for all the Contracting States; accordingly, under Article 7 *b*) the court seised will apply the law designated by its own choice-of-law rules.<sup>132</sup> Since lack of capacity would also make the agreement null and void in terms of Article 7 *a*), this could mean that capacity is determined *both* by the law of the chosen court *and* by the law of the court seised.<sup>133</sup> *There seems to be no objection to this view; however, it has been proposed that the situation should be clarified by adding the words “on any ground, including incapacity” to Article 7 a).*<sup>134</sup>

<sup>123</sup> See *Continental Bank v. Aeakos Compania Naviera* [1994] 1 WLR 588; [1994] 2 All ER 540; [1994] 1 Lloyd's Rep. 505 (Court of Appeal, England).

<sup>124</sup> Article 11 provides that Article 7 also precludes recognition or enforcement of a judgment rendered in contravention of an exclusive choice of court agreement. This is discussed below.

<sup>125</sup> In some countries, the court has only limited powers to stay the proceedings. For example, under the Japanese Code of Civil Procedure, a court can stay the proceedings only where the court is unable to function because of a natural disaster or similar emergency (Article 130), or where a party is, for an indefinite period of time, not in a position to continue the proceedings (Article 131).

<sup>126</sup> In sub-paragraphs *a*) and *b*).

<sup>127</sup> In sub-paragraphs *c*) and *d*).

<sup>128</sup> It has been proposed that the words “under the law of the State of the chosen court” be deleted. The policy issues involved are discussed in Annex I to this Report.

<sup>129</sup> Discussed above at paragraphs 92 *et seq.*

<sup>130</sup> See footnote 91 *supra*.

<sup>131</sup> See paragraph 92 *supra*.

<sup>132</sup> In recognition or enforcement proceedings, the court addressed will also apply its own choice-of-law rules when deciding questions of capacity under Article 9(1) *b*).

<sup>133</sup> See footnote 91 *supra*.

<sup>134</sup> Article 7 *a*), footnote 3.

**126 The third exception (first limb): injustice.**<sup>135</sup> The third exception is where giving effect to the agreement would lead to a “very serious injustice” or would be “manifestly contrary to fundamental principles of public policy of the State of the court seised”. In some legal systems, the first phrase would be regarded as covered by the second. Lawyers from those systems would consider it axiomatic that an agreement leading to a very serious injustice would necessarily be contrary to public policy. In the case of such legal systems, the first phrase might be redundant.<sup>136</sup> In other legal systems, however, the concept of public policy refers to general interests – the interests of the public at large – rather than the interests of any particular individual, including a party. It is for this reason that both phrases are necessary.

**127** The phrase “very serious injustice” would cover the case where one of the parties would not get a fair trial in the foreign State, perhaps because of bias or corruption, or where there were other reasons specific to that party that would preclude him or her from bringing or defending proceedings in the chosen court. It might also relate to the circumstances in which the agreement was concluded – for example, if it was the result of fraud.

**128 The third exception (second limb): public policy.** The phrase “manifestly contrary to fundamental principles of public policy of the State of the court seised” would cover situations where the chosen court would not apply some rule or principle that was regarded in the State of the court seised as being manifestly part of its fundamental public policy.<sup>137</sup>

**129 The fourth exception: incapable of performance.**<sup>138</sup> The fourth exception is where for exceptional reasons the agreement cannot reasonably be performed. This is intended to apply to cases where it would not be possible to bring proceedings before the chosen court. It need not be absolutely impossible, but the situation must be exceptional. One example would be where there is a war in the State concerned and its courts are not functioning. Another example would be where the chosen court no longer exists, or has changed to such a fundamental degree that it could no longer be regarded as the same court.<sup>139</sup> This exception could be regarded as an application of the doctrine of frustration (or similar doctrines), under which a contract is discharged if, due to a change of circumstances after its conclusion, it is no longer possible to carry it out.<sup>140</sup>

**130 The fifth exception: case not heard.** The fifth exception is where the chosen court has decided not to hear the case. This could be regarded as covered by the fourth exception, but it is sufficiently different to deserve separate treatment.<sup>141</sup>

## *Article 8 Interim measures of protection*

**131** Article 8 states that interim measures of protection are not governed by the Convention. It neither requires nor precludes the grant of such measures by a court of a Contracting State, nor does it affect the right of a party to request such measures. This refers primarily to interim (temporary) measures to protect the position of one of the parties, pending judgment by the chosen court,<sup>142</sup> though it could also cover measures

<sup>135</sup> The policy behind Article 7 c) needs further consideration: see footnote 4 to Article 7 c) of the preliminary draft Convention.

<sup>136</sup> For lawyers from these legal systems, it would seem natural to insert the word “otherwise” before “be manifestly contrary”: see footnote 4 to the present text of the preliminary draft Convention.

<sup>137</sup> Here “public policy” includes the international public policy of the State concerned.

<sup>138</sup> It has been proposed that this provision should be deleted.

<sup>139</sup> See *Carvalho v. Hull Blyth* [1979] 1 WLR 1228; [1979] 3 All ER 280; [1980] 1 Lloyd's Rep. 172 (Court of Appeal, England).

<sup>140</sup> Under German law, for example, it could be covered by the doctrine of *Wegfall der Geschäftsgrundlage*.

<sup>141</sup> With regard to the exception in square brackets, see paragraphs 107-109.

<sup>142</sup> The measure might be granted either before, or after, proceedings are commenced in the chosen court.

granted after judgment that are intended to facilitate its enforcement. An order freezing the defendant's assets is an obvious example. Another example is an interim injunction preventing the defendant from doing something that is alleged to be an infringement of the plaintiff's rights. A third example is an antisuit injunction precluding a party from bringing proceedings in a court other than that chosen. A fourth example would be an order for the production of evidence for use in proceedings before the chosen court. All these measures are intended to support the choice of court agreement by making it more effective. They thus help to achieve the objective of the Convention.

132 Once the chosen court has given judgment, an interim measure that is inconsistent with the judgment must be rescinded. To allow it to continue in force would conflict with the requirement to recognise the judgment laid down in Article 9. For example, if a court other than that chosen grants an interim injunction to protect a right claimed by the plaintiff, it must lift the injunction if the chosen court rules that the plaintiff has no such right (unless that judgment is not subject to recognition under the Convention). Likewise, an asset-freezing order should be lifted if the chosen court gives judgment for the defendant (unless that judgment is not subject to recognition under the Convention).

133 A court that grants a measure of this kind does so under its own law. The Convention does not require the measure to be granted but it does not preclude the court from granting it. Courts in other Contracting States are not required to recognise or enforce it; however, they are not precluded from doing so. It all depends on national law.

134 It goes without saying that the court designated in the choice of court agreement can grant any interim measure it thinks appropriate. If an interim measure – for example, an injunction – granted by that court is subsequently made permanent, it will be enforceable under the Convention in other Contracting States.<sup>143</sup> If it is merely temporary, it will not constitute a “judgment” as defined by Article 4(1).<sup>144</sup> In such a case, courts in other Contracting States could enforce it under their national law, but would not be obliged to do so under the Convention.

#### *Article 9 Recognition and enforcement*

135 Article 9(1) is the third “key provision” in the Convention. It states that a judgment given by a court in a Contracting State designated in an exclusive choice of court agreement must be recognised and enforced in other Contracting States.<sup>145</sup> The first and most important condition for recognition and enforcement is, therefore, the existence of an exclusive choice of court agreement designating the court of origin.

136 **Six exceptions.** In addition to laying down the principle of recognition, Article 9(1) also sets out six exceptions to it in sub-paragraphs *a)* to *f)*.<sup>146</sup> Where these exceptions apply, the Convention does not require the court addressed to recognise or enforce the judgment, though it does not preclude it from doing so.<sup>147</sup>

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<sup>143</sup> Article 9(1).

<sup>144</sup> See paragraph 83 *supra*.

<sup>145</sup> However, it was understood by the Conference that a Contracting State is not obliged to enforce a judgment for a non-monetary remedy if this is not possible under its legal system. Nevertheless, it should give the foreign judgment the maximum effect that is possible under its internal law. See paragraph 50 *supra*.

<sup>146</sup> Footnote 7 to the text of the preliminary draft Convention states that further consideration needs to be given to whether the matters covered in Articles 7 *c)* and *d)* are adequately reflected in Article 9(1).

<sup>147</sup> This is indicated by the use of “may”, rather than “shall”, in the second sentence of the “*chapeau*” to Article 9(1). The result is that each Contracting State may adopt legislation laying down rules as to whether and, if so, in what circumstances such judgments are to be recognised and enforced. In the absence of such rules (or if the rules themselves so provide) the court addressed may decide this matter for itself. In the discussion on Article 9, it should be remembered that this Report is concerned only with recognition and enforcement under the Convention, not with recognition or enforcement under internal law.

**137 The first exception: null and void.** The first two exceptions mirror those in Article 7. Sub-paragraph *a)* states that recognition or enforcement may be refused if the agreement was null and void under the law of the State of the chosen court.<sup>148</sup> However, it adds, “unless the chosen court has determined that the agreement is valid”, thus indicating that the court addressed may not substitute its judgment for that of the chosen court.<sup>149</sup> The purpose of this is to avoid conflicting rulings on the validity of the agreement among different Contracting States: they are all required to apply the law of the State of the chosen court, and they must respect any ruling on the point by that court.

**138 The second exception: capacity.** The second exception, set out in sub-paragraph *b)*, follows the wording of Article 7 *b)*. In both Article 9(1)(*b*) and Article 7 *b)*, capacity is determined by the law of the forum (including its choice-of-law rules). However, the forum is different in the two cases: in Article 7 *b)* it is a court before which proceedings inconsistent with the agreement are brought; in Article 9(1)(*b*) it is the court asked to recognise or enforce the judgment of the chosen court. As mentioned previously, it was thought too ambitious to attempt to unify choice-of-law rules on capacity. The point made in paragraph 125, above, applies here too: since lack of capacity would also make the agreement null and void in terms of Article 9(1)(*a*), there seems to be no objection to the view that capacity is determined both by the law of the chosen court and by the law of the court seised. It has been proposed that the matter should be clarified by adding the words “on any ground, including incapacity” to Article 9(1)(*a*).

**139 The third exception: notification.** The third exception, set out in sub-paragraph *c)*, permits non-recognition if the defendant was not properly notified. Two rules are involved: the first, laid down in sub-paragraph *c)(i)*, is concerned with the interests of the defendant; the second, laid down in sub-paragraph *c)(ii)*, is concerned with the interests of the State of notification.<sup>150</sup>

**140 Protection of the defendant.** Sub-paragraph *c)(i)* lays down a purely factual test to ensure that the defendant was properly notified. It states that the court addressed may refuse to recognise or enforce the judgment if 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. This rule does not apply, however, if the defendant entered an appearance and presented his or her case without contesting notification. This is to stop the defendant raising issues at the enforcement stage that he or she could have raised in the original proceedings. It would apply only where the defendant knew about the proceedings and entered an appearance, even though he or she might have had insufficient time to prepare his case properly. In such a situation, the obvious remedy would be for him or her to seek an adjournment. If he or she fails to do this, he or she should not be entitled to put forward the lack of proper notification as a ground for non-recognition of the judgment.<sup>151</sup>

**141 Protection of the State of notification.** Many States, including the major common-law countries, have no objection to the service of a foreign writ on their territory without any participation of their authorities. They see it simply as a matter of conveying information. Thus if a Japanese lawyer wants to serve a Japanese writ in England, he can fly to London, take a taxi to the defendant's home, knock on the door

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<sup>148</sup> The law of the State of the chosen court includes the choice-of-law rules of that State: see paragraph 92 *supra*.

<sup>149</sup> The fact that the court of origin gave judgment does not necessarily mean that it considered the choice of court agreement to be valid: it may have taken jurisdiction on some other ground permitted by its internal law.

<sup>150</sup> Article 9 is addressed to the court called upon to recognise or enforce the judgment, not the court which gives it. The latter court has to apply its own procedural law. This law may provide for the application of the rules on service of the State in which notification takes place.

<sup>151</sup> This rule does not apply if it was not possible to contest notification in the court of origin.



and give it to him. He will have done nothing wrong. Other countries (in particular, those in which the civil law applies) take a different view. They consider the service of a writ to be a sovereign act (official act) and they consider that it infringes their sovereignty for a foreign writ to be served on their territory without their permission. Permission would normally be given through an international agreement laying down the procedure to be followed.<sup>152</sup> Such States would be unwilling to recognise a foreign judgment if the writ was served in a way that they regarded as an infringement of their sovereignty.<sup>153</sup> Sub-paragraph c)(ii) takes account of this point of view by providing that the court addressed may refuse to recognise or enforce the judgment if the writ was notified to the defendant in the requested State in a manner that violated the public policy of that State. Unlike the other grounds of non-recognition, sub-paragraph c)(ii) applies only to recognition or enforcement in the State in which service took place.

**142 The fourth exception: fraud.** The fourth exception, set out in sub-paragraph d), is that the judgment was obtained by fraud in connection with a matter of procedure. Fraud is deliberate dishonesty or deliberate wrongdoing. Examples would be where the plaintiff deliberately serves the writ, or causes it to be served, on the wrong address; where the plaintiff deliberately gives the defendant wrong information as to the time and place of the hearing; or where either party seeks to corrupt a judge, juror or witness, or conceals evidence. The fraud might also relate to the choice of court agreement itself – for example, if the plaintiff forged the defendant's signature on a false document. For the purpose of sub-paragraph d), fraud may be committed by either party or by the court.

**143 The fifth exception: public policy.** The fifth exception, set out in sub-paragraph e), is that recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State. The first part of this provision simply repeats the public-policy exception normally found in conventions of this kind. The second part is intended to focus attention on serious procedural failings in the particular case at hand, thus discouraging an attack on the general procedural standards of the State that granted the judgment.<sup>154</sup>

144 It will be seen that there is considerable overlap among the last three exceptions, since they all relate, partly or wholly, to procedural fairness. Thus, for example, if, owing to the plaintiff's fraud, the writ was not served on the defendant and (s)he was unaware of the proceedings, the exceptions set out in sub-paragraphs c), d) and e) could all be invoked. The reason for this emphasis on procedural fairness is that in some countries procedural fairness (also known as due process of law, natural justice or the right to a fair trial) is constitutionally mandated. In such countries, it might be unconstitutional to recognise a foreign judgment obtained in proceedings in which a fundamental breach of this principle occurred.

145 In Europe, some 46 States are parties to the European Convention on Human Rights,<sup>155</sup> Article 6 of which grants the right to a fair trial. The European Court of Human

<sup>152</sup> The *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* is the most important example. See also *Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters*, O.J. L 160, p. 37.

<sup>153</sup> In the judgment of the Japanese Supreme Court of 28 April 1998, *Minshu*, Vol. 52, No 3, p. 853 (English translation in the *Japanese Annual of International Law*, No 42, p. 155), it was held that the direct delivery of process by a Japanese lawyer, who was asked to do so by a Hong Kong lawyer, did not comply with the rules provided for in the Hague Service Convention, and did not satisfy the requirement of Article 118(ii) of the Japanese Code of Civil Procedure. Article 118(ii) provides as follows: "A final and conclusive judgment rendered by a foreign court shall have effect insofar as it satisfies the following conditions: ... (ii) The unsuccessful defendant was served with a summons or an order necessary for the commencement of the procedure other than by service by publication, or has voluntarily appeared without being so served. ..."

<sup>154</sup> The second part is not, however, intended to limit the first part: public policy can also be invoked where the foreign judgment conflicts with a provision of the substantive law of the requested State.

<sup>155</sup> An up-to-date list of States parties is available at < <http://conventions.coe.int> >.

Rights has held that this precludes a court in a Contracting State to the ECHR from recognising a judgment from a non-Contracting State if the proceedings that resulted in the judgment infringed the standard laid down in Article 6.<sup>156</sup> This means that none of these 46 States could recognise a judgment where the court that granted it infringed the right to a fair trial. Similar rights are laid down by the Fifth and Fourteenth Amendments to the United States Constitution and by the constitutions of many other countries. For these reasons, the Convention should be drafted in such a way that it does not oblige Contracting States to do something that they are not constitutionally able to do.

**146 The sixth exception: inconsistent judgments.** Sub-paragraph *f*) deals with the situation in which there is a conflict between the judgment for which recognition and enforcement are sought under the Convention and another judgment given between the same parties. It applies where the two judgments are “inconsistent”. There are two views as to what this means. According to one view, sub-paragraph *f*) applies only if there is a conflict between the order (*dispositif*) in the two judgments: it is not concerned with a conflict between the reasoning on which they are based, nor is it concerned with rulings on incidental questions, a matter which is dealt with by Article 10. According to the other view, however, a conflict of this latter kind might also be covered. If the second view is correct, Article 10(2) would be unnecessary. The second view would considerably enlarge the scope of sub-paragraph *f*) and would widen the range of judgments that could be refused recognition or enforcement under it.

**147** Sub-paragraph *f*) lays down two rules. The first is concerned with the case where the inconsistent judgment was granted by a court in the requested State. In such a situation, that judgment prevails, irrespective of whether it was given first: the court addressed is permitted to give preference to a judgment from its own State, even if that judgment was given after the judgment under the choice of court agreement. It is not necessary for the cause of action to be the same.

**148** A conflict of judgments to which the first rule applies would normally arise only if the court that gave the judgment conflicting with the judgment under the choice of court agreement thought that one of the exceptions laid down in Article 7 applied. If this was not the case, it would have infringed the Convention by hearing the proceedings. However, if one of the exceptions did apply, the court addressed could refuse to recognise the judgment under the choice of court agreement on the basis of Article 9, paragraph 1, sub-paragraph *a*), sub-paragraph *b*) or sub-paragraph *e*), since all the exceptions under Article 7 are mirrored in these sub-paragraphs. Consequently, the most likely situation in which the application of sub-paragraph *f*) will be necessary is where the court which granted the conflicting judgment was mistaken in thinking that it was entitled to hear the case under Article 7.<sup>157</sup> In such a case, the court addressed is permitted to refuse recognition to the judgment under the choice of court agreement in order to avoid inconsistency between different judgments in the same State.

**149** The second rule is concerned with the situation in which both judgments were given by foreign courts. Here, the judgment given under the choice of court agreement may be refused recognition and enforcement only if the following requirements are satisfied: first, the judgment under the choice of court agreement must have been given after the

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<sup>156</sup> *Pellegrini v. Italy*, judgment of 20 July 2001, (2001) 35 EHRR 44 (available at < [www.echr.coe.int](http://www.echr.coe.int) >); but see the earlier cases of *Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A, No 240; (1992) 14 EHRR 745 (paragraph 110); and *Soering v. United Kingdom*, judgment of 7 July 1989, Series A, No 161; (1989) 11 EHRR 439 (paragraph 113), in which the (old) European Court of Human Rights, sitting in plenary session, held that recognition had to be refused only if there was a flagrant breach of the standards laid down in Article 6. See also *Lindberg v. Sweden*, admissibility decision of 15 January 2004 (available at < [www.echr.coe.int](http://www.echr.coe.int) >), which, however, concerned a slightly different question; and the judgment of the House of Lords (United Kingdom) in *United States Government v. Montgomery (No 2)*, [2004] UKHL 37; [2004] 1 WLR 2241, where the House of Lords held that the *Pellegrini* case applies only where proceedings are brought in Italy to recognise a judgment by a Vatican court.

<sup>157</sup> There might be cases in which the application of Article 7 by court A is different from the application of Article 9 by court B, or in which the situation at the time of the application of Article 7 is different from that at the time of the application of Article 9.

conflicting judgment; secondly, the parties must be the same;<sup>158</sup> thirdly, the cause of action must be the same; fourthly, the conflicting judgment must fulfil the conditions necessary for its recognition in the requested State [under an international agreement]; and fifthly, the conflicting judgment must not have been given in contravention of the Convention.

150 These requirements raise two issues. The first concerns the words “under an international agreement”<sup>159</sup> in the fourth requirement. The words are in square brackets because they have not been agreed. The problem is that the consequences of their inclusion would be different for different States. Some States<sup>160</sup> recognise and enforce foreign judgments only under an international agreement. For such States, it would make no difference at all whether the words were included or excluded. Other States<sup>161</sup> recognise and enforce foreign judgments under their own law, but they are also parties to international agreements. In the case of such States, the inclusion of the words in square brackets would limit the situations in which the rule would be applied, but it would still be applied in some cases. Yet other States<sup>162</sup> are parties to no international agreements on recognition and enforcement of foreign judgments. In such States, foreign judgments are recognised and enforced only on the basis of their own law. If the words in square brackets were included, the rule would never be applied by such States. In view of these differences, some delegates felt that it would be unfair to include in the Convention the words in square brackets; others felt that the words were justified because the main purpose of the provision is to avoid conflicting international obligations on the part of the requested State, not to protect its internal law.

151 The second point concerns the requirement that the judgment must not have been given in contravention of the Convention. This is an entirely reasonable requirement: it would be wrong if recognition and enforcement were refused to a judgment given under the Convention because it conflicted with a judgment that was given in contravention of the Convention.<sup>163</sup> However, the present wording gives an unjustifiable advantage to non-Contracting States, since their judgments can never be in contravention of the Convention: if they are not parties to the Convention, nothing they do will be a contravention of it. There is no reason why non-Contracting States should be given such an advantage. As it stands at present, sub-paragraph *f*) gives States an incentive not to become parties to the Convention.

152 *To avoid this, the second part of sub-paragraph f) could be modified to put non-Contracting States in the same position as Contracting States. The best way to do this would be to link sub-paragraph f) to Article 11. This latter Article precludes recognition or enforcement of judgments given in contravention of an exclusive choice of court agreement, unless a court in the requested State could itself have heard the case under one of the exceptions laid down in Article 7. If this link were made, sub-paragraph f) would read as follows:*

Recognition or enforcement may be refused only on the following grounds -

...

f) the judgment is inconsistent with a judgment given in a dispute between the same parties in the requested State, or it is inconsistent with an earlier judgment given in another State between the same parties and involving the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State **and its recognition is not contrary to Article 11.**

<sup>158</sup> This also applies under the first rule.

<sup>159</sup> Unlike “international instrument” in Article 23(1), “international agreement” does not include rules made by an international organisation.

<sup>160</sup> For example, Austria, China and Sweden (subject to certain exceptions).

<sup>161</sup> For example, Germany and the United Kingdom.

<sup>162</sup> For example, Japan and the United States (subject to certain exceptions).

<sup>163</sup> Admittedly, the first rule laid down by sub-paragraph *f*) could be regarded as doing just that. However, a conflict between two courts in the same State as to the correct interpretation of a legal provision raises rather delicate issues.

153 **Transfer or removal.** If it is decided that a judgment given after the case has been transferred or removed from the chosen court to another court in the same Contracting State is to be recognised and enforced under the Convention even if the parties chose a specific court,<sup>164</sup> adjustments will have to be made to Article 9. Article 9(1 *bis*) indicates what those adjustments will have to be.<sup>165</sup>

154 **Révision au fond.** Article 9(2) prohibits review as to the merits of the judgment (though it permits such review as is necessary to apply the provisions of Chapter III of the Convention). This is a standard provision in conventions of this kind. Without it, foreign judgments might in some countries be reviewed by the court addressed as if it were an appellate court hearing an appeal from the court of origin.

155 **Findings of fact.** The second sentence of Article 9(2) provides that the court addressed is bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default. In this provision, “jurisdiction” means jurisdiction under the Convention. Since this will be based on the choice of court agreement, the provision applies to findings of fact that relate to the formal or substantive validity of the agreement, including the capacity of the parties to conclude it. It also applies to any findings of fact relevant to determining the scope of the agreement. Thus, when the court addressed is applying Article 9(1)(a) or 9(1)(b), it will have to accept findings of fact made by the court of origin. However, the court addressed will not be bound by the legal evaluation made by the court of origin of the facts it has found. For example, if the court of origin found that the choice of court agreement was entered into by electronic means that satisfy the requirements of Article 3 c)(ii), the court addressed may, nevertheless, decide that Article 3 c)(ii) was not satisfied because the degree of accessibility was not sufficient to meet the requirements of Article 3 c)(ii).

156 The position is different with regard to the grounds of non-recognition laid down in sub-paragraphs c), d) and e) of Article 9(1). These are not concerned with jurisdiction under the Convention, but with public policy and procedural fairness. Thus, the court addressed must be able to decide for itself whether the defendant was notified; whether there was fraud; or whether there was a fair trial: a finding by the judge of origin that he did not take a bribe, for example, cannot be binding on the court addressed.<sup>166</sup>

157 The same is true with regard to procedural fairness under sub-paragraph e). Assume that the defendant resists recognition and enforcement on the ground that the proceedings were incompatible with the fundamental principles of procedural fairness of the requested State. He claims that he was not able to go to the State of origin to defend the case because he would have been in danger of imprisonment on political grounds. A finding by the court of origin that this was not true cannot be binding on the court addressed. Where matters of procedural fairness are concerned, the court addressed must be able to decide for itself.<sup>167</sup>

158 The result is as follows: rulings by the court of origin on the merits of the case cannot be reviewed by the court addressed, irrespective of whether they relate to questions of fact or law; rulings by the court of origin on the validity and scope of the choice of court agreement cannot be reviewed in so far as they relate to questions of fact; rulings by the court of origin on the grounds of non-recognition under sub-paragraphs c), d) and e) are not binding on the court addressed, irrespective of whether they relate to fact or law.

<sup>164</sup> See paragraphs 107 *et seq. supra*.

<sup>165</sup> If the parties designated a specific court and the case was nevertheless transferred to another court in the same State, the resulting judgment would not have been given by the court “designated” in the choice of agreement, as required by the opening words of Article 9(1).

<sup>166</sup> The same applies to a finding by an appeal court that the first instance judge was not guilty of corruption.

<sup>167</sup> The international and constitutional provisions on the right to a fair trial mentioned above probably require this. In paragraph 40 of its judgment in the *Pellegrini* case (footnote 156 *supra*), the European Court of Human Rights held that the court addressed must “duly satisf[y] [itself] that the relevant proceedings fulfilled the guarantees of Article 6 [of the European Convention on Human Rights].” This would seem to preclude reliance on a finding by the court of origin, at least where the court of origin is in a State that is not a party to the European Convention on Human Rights.

159 **“Recognition” and “enforcement”.** Article 9(3) provides that a judgment will be recognised only if it has effect in the State of origin, and will be enforced only if it is enforceable in the State of origin. This raises the distinction between recognition and enforcement. Recognition means that the court addressed accepts the determination of the legal rights and obligations made by the court of origin. If the court of origin held that the plaintiff had, or did not have, a given right, the court addressed accepts that this is the case. Enforcement means the application of the legal procedures of the court addressed to ensure that the defendant obeys the judgment given by the court of origin. Thus, if the court of origin rules that the defendant must pay the plaintiff €1000, the court addressed will ensure that the money is handed over to the plaintiff. Since this would be legally indefensible if the defendant did not owe €1000 to the plaintiff, a decision to enforce the judgment must logically be preceded or accompanied by the recognition of the judgment. However, recognition need not be accompanied or followed by enforcement. For example, if the court of origin held that the defendant did not owe any money to the plaintiff, the court addressed may simply recognise this finding. Therefore, if the plaintiff sues the defendant again on the same claim before the court addressed, the recognition of the foreign judgment will be enough to dispose of the case.

160 In the light of this distinction, it is easy to see why Article 9(3) says that a judgment will be recognised only if it has effect in the State of origin. Having effect means that it is legally valid or operative. If it does not have effect, it will not constitute a valid determination of the parties’ rights and obligations. Thus, if it does not have effect in the State of origin, it should not be recognised under the Convention in any other Contracting State. Moreover, if it ceases to have effect in the State of origin, the judgment should not thereafter be recognised under the Convention in other Contracting States.<sup>168</sup>

161 Likewise, if the judgment is not enforceable in the State of origin, it should not be enforced elsewhere under the Convention. It is of course possible that the judgment will be effective in the State of origin without being enforceable there. Enforceability may be suspended pending an appeal (either automatically or because the court so ordered). In such a case, enforcement will not be possible in other Contracting States until the matter is resolved in the State of origin. Moreover, if the judgment ceases to be enforceable in the State of origin, it should not thereafter be enforced in another Contracting State under the Convention.<sup>169</sup>

162 **Judgments subject to review.** Article 9(4) provides that recognition or enforcement may be postponed or refused 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.<sup>170</sup> This means that the court addressed may delay recognition or enforcement if the judgment might be set aside or amended by another court in the State of origin. It is not, however, obliged to do this.<sup>171</sup> Some courts might prefer to enforce the judgment. If it is subsequently set aside in the State of origin, the court addressed will rescind the enforcement. The judgment-creditor may be required to provide security to ensure that the judgment-debtor is not prejudiced.

163 If the court addressed does not want to enforce the judgment straight away, Article 9(4) gives it the option of either suspending the enforcement process or refusing

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<sup>168</sup> At the Diplomatic Conference held in June 2001, the following text was inserted, in square brackets, into Article 25 of the preliminary draft Convention 1999: “A judgment referred to in paragraph 1 shall be recognised from the time, and for as long as, it produces its effects in the State of origin.” The current text was intended by the Conference to have the same meaning.

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<sup>170</sup> In enforcement cases, this rule will be applied only if enforcement of the judgment has not been suspended in the State of origin by reason of the appeal. If it has been suspended, the rule in Article 9(3) will be applicable: see paragraph 161 *supra*. On recognition see paragraph 160 *supra*.

<sup>171</sup> This assumes that the judgment is still enforceable in the State of origin.

to enforce the judgment.<sup>172</sup> It goes on to provide, however, that if the court addressed chooses the latter option, that will not prevent a new application for enforcement once the situation in the State of origin is clarified. Here, therefore, refusal means dismissal without prejudice.

#### *Article 10      Incidental questions*

**164 Estoppel and foreign judgments.** Often a court has to rule on various questions of fact or law as preliminary matters before it can rule on the plaintiff's claim. For example, in a patent infringement case, it might have to rule on whether the patent is valid. This is a preliminary ruling on an incidental question. It paves the way for the final judgment, which will be that the defendant is, or is not, liable to pay damages to the plaintiff. Clearly, the court addressed has to recognise this final judgment and, if damages are awarded, to enforce it (in so far as it was rendered under a choice of court agreement covered by the Convention); but is it required by the Convention to recognise the ruling on the incidental question?

**165** In civil-law States, a judgment normally has effect only as regards the final ruling – for example, the *Tenor* or *Spruch* in Germany and Austria, and the *dispositif* in France. In the common-law world, however, the doctrine known variously as issue estoppel,<sup>173</sup> collateral estoppel or issue preclusion<sup>174</sup> requires a court in certain circumstances to recognise rulings on incidental questions given in an earlier judgment.<sup>175</sup> This can apply both where the original judgment was given by a court in the same State and where it was given by a court in another State.<sup>176</sup> It is suggested that the Convention never requires the recognition or enforcement of such rulings,<sup>177</sup> though it does not preclude Contracting States from recognising or enforcing them under their own law.<sup>178</sup>

<sup>172</sup> As stated in footnote 125 *supra*, in some civil law countries the judge has only limited powers to stay the proceedings.

<sup>173</sup> British terminology.

<sup>174</sup> These latter two expressions are both US terminology.

<sup>175</sup> These paragraphs are an attempt to explain the common law in terms that are easily understandable by a civil lawyer. In fact, however, this results in some distortion, since the common law uses different terminology and a different conceptual framework. For example, common lawyers do not talk in terms of "incidental questions", but rather of "issues".

<sup>176</sup> On the latter, see P. Barnett, *Res Judicata, Estoppel and Foreign Judgments* (Oxford University Press, Oxford, England, 2001).

<sup>177</sup> If a court was required to apply such doctrines as issue estoppel, etc., under the Convention, it would be faced with a difficult question: what law decides whether, in a given case, an incidental ruling by a foreign court is to be recognised? Should it be the law of the State of origin or that of the requested State? The only country where significant case law exists on this point is probably the United States, where there is authority for both views: see R. Casad, "Issue Preclusion and Foreign Country Judgments: Whose Law?" (1984) 70 *Iowa Law Rev.* 53; see also the Canadian decision of *Jacobs v. Beaver* (1908) 17 OLR 496 (Court of Appeal, Ontario), where there is a *dictum* by Garrow J.A. that supports the application of the law of the requested State. Since the Convention lays down no rule on this question, it is fair to assume that the Convention was not intended to apply to these various forms of estoppel or preclusion.

<sup>178</sup> It might be thought that these forms of estoppel or preclusion apply because the court of origin intended that its judgment should have this effect. This is not the way common lawyers look at it. These forms of estoppel are a small (and recent) addition to a large array of situations in which estoppel can apply. Estoppel is a doctrine originating in Equity and has no analogue in the civil law. Originally it was a rule of evidence. If a person made an assertion (either expressly or by implication), he was precluded (estopped) from denying it in subsequent legal proceedings (estoppel by representation). The idea is that a person should not be able to say different things at different times as it suits him, especially if another person acts in reliance on his representation. For example, if X tells Y that Z is his agent, and Y deals with Z, X cannot later deny liability on the ground that Z was not his agent. He is estopped from doing so. Estoppel resulting from a decision by a court is a development from this early form. Issue / collateral estoppel does not apply automatically, but depends on what the later court thinks just. For example, it may not apply if further evidence becomes available which the party could not have discovered with reasonable diligence at the time of the original case. The importance of these doctrines in private international law should not be exaggerated. They arise only if the same two parties engage in subsequent litigation in the requested State, and an issue arises that was decided in the previous case. This will not happen often. In the United States of America, collateral estoppel can also operate in favour of a third party, but even this will not arise very often.

**166 Rulings on incidental questions.** Article 10 is concerned with matters decided as incidental questions.<sup>179</sup> The first paragraph states that where a matter referred to in Article 2(2) arose as an incidental question, the ruling on that question will not be recognised or enforced under the Convention. If the suggestion in the previous paragraph is correct, this provision may be unnecessary. However, in the case of rulings on matters outside the scope of the Convention – in particular, the validity of certain intellectual property rights – the question is so important that it was thought desirable to have an express provision. This is why Article 10(1) is included in the Convention. It complements Article 2(3), which provides that proceedings are not excluded from the Convention just because the court gives a ruling on an excluded matter which arose as an incidental question.

*167 If, as was suggested in paragraph 45 above, Article 2(2)(k) is deleted and replaced by Article 2(2 bis), Article 10(1) would have to be redrafted to read: “Where a matter referred to in Article 2, paragraphs 2 **and 2 bis**, arose as an incidental question, the ruling on that question shall not be recognised and enforced under this Convention.”*

**168 Judgments based on an incidental question.** Article 10(2) is not concerned with the non-recognition of rulings on incidental questions, but with the non-recognition of judgments based on such rulings. What it does is to lay down another ground of non-recognition, in addition to those set out in Article 9(1). Like Article 9(1)(f), it deals with inconsistent judgments. However, it is concerned with a different kind of inconsistency – at least, if the first view as to the meaning of “inconsistency” is correct.<sup>180</sup> Article 9(1)(f) is concerned with inconsistency between two judgments, one under the Convention and one that was rendered in the requested State or is subject to recognition in that State. Article 10(2), on the other hand, is concerned with the case where the latter judgment is inconsistent, not with the judgment under the Convention, but with a ruling on an incidental question on which that judgment was based.

**169** This is easier to understand if we take an example. Assume that A sues B in State X, claiming royalties under a patent-licensing agreement that contains an exclusive choice of court clause granting jurisdiction to the courts of State X. B responds by arguing that the patent is invalid. If we assume that A is entitled to claim the royalties only if the patent is valid, B’s assertion would be a good defence if he could substantiate it; so the court must decide the validity of the patent as an incidental question. Let us assume it does so, and holds it valid. It gives judgment in favour of A for \$1 million. A then brings proceedings under the Convention to enforce this judgment in State Y, another Contracting State. Now, if there was a judgment from the State of registration of the patent (which may be either State Y or a third State, State Z), holding it invalid, this judgment would conflict not with the actual judgment in the case under the Convention – this merely says that B must pay A \$1 million – but with the incidental ruling that the patent was valid. However, since this incidental ruling provides the logical premise on which the judgment was based, there would be an inconsistency between the two judgments, though an inconsistency of a secondary nature. The purpose of Article 10(2) is to permit (but not oblige) the courts of State Y to refuse to recognise or enforce the judgment under the Convention in these circumstances.

**170** Article 10(2) is concerned only with the case where the incidental ruling is on the validity of an intellectual property right other than copyright or related rights. The reason why it was proposed – it is in square brackets to show that it has not yet been accepted – is that some delegations attach special importance to the idea that the courts<sup>181</sup> of the State under the law of which the intellectual property right arose must have exclusive jurisdiction to give binding rulings on its validity.<sup>182</sup>

<sup>179</sup> On what is meant by an incidental question, see paragraphs 164–165 *supra*; see also footnote 22 *supra*.

<sup>180</sup> See paragraph 146 *supra*.

<sup>181</sup> It must be remembered that “court” includes a patent office. The definition of “judgment” in Article 4(1) includes a decision of a patent office or other authority exercising the functions of a court: see footnote 11 to Article 10(2) of the preliminary draft Convention.

<sup>182</sup> It has, however, been proposed to extend it to cover incidental rulings on all the matters excluded from the scope of the Convention under Article 2(2), provided that the judgment with which the incidental ruling conflicts

171 **Staying enforcement proceedings.** Article 10(3) takes the approach of Article 10(2) one step further by providing that if, when the enforcement proceedings are commenced, there are proceedings pending before the appropriate court (in the State under the law of which the intellectual property right arose) which could result in a ruling that the intellectual property right was invalid, the court hearing the enforcement proceedings is permitted (but not obliged) to suspend the proceedings before it until a judgment has been given on the question of validity.<sup>183</sup> This provision is in square brackets to indicate that it has not yet been agreed. Its opponents argue that it might encourage defendants to bring spurious revocation proceedings simply to delay enforcement.

*Article 11 Judgments in contravention of exclusive choice of court agreements*

172 Article 11 is intended to complement (or extend) Article 7. It was explained above that the objectives of the Convention would be prejudiced if a court other than the chosen court could hear proceedings to which the exclusive choice of court agreement applied.<sup>184</sup> For this reason, Article 7 requires any court in a Contracting State other than that of the chosen court to suspend or dismiss the proceedings in such a situation, unless the exceptions set out in Article 7 apply. However, the objectives of the Convention would also be prejudiced if that court recognised or enforced a judgment given in contravention of the exclusive choice of court agreement, irrespective of whether it was rendered in a Contracting or non-Contracting State. Apart from any other considerations, such recognition or enforcement might bar the recognition and enforcement of the judgment of the chosen court. For these reasons, Article 11 provides that the provisions of Article 7 also apply to proceedings for recognition or enforcement of a judgment rendered in contravention of an exclusive choice of court agreement. It is in square brackets because it has not yet been agreed.

173 Although the objective of Article 11 is eminently reasonable, the present drafting raises two problems. The first is that Article 7 applies only to a court in a Contracting State other than that of the chosen court. Consequently, Article 11, as at present drafted, also applies only when the court asked to recognise the judgment is not in the State of the chosen court. It does not, therefore, cover the case where proceedings are brought to recognise the judgment in such a court.

174 The second problem is that the requested State may be under a treaty obligation to recognise the judgment. If that treaty was concluded prior to the Convention and if the other party was not a Contracting State to the Convention, it would be unreasonable to prohibit the recognition or enforcement of the judgment. Article 23(5) covers this point; however, it goes further by giving priority to prior judgment-recognition treaties even between two Contracting States to the Convention.<sup>185</sup> This means that parties to the Convention are permitted to maintain in force between themselves a treaty provision that requires the recognition and enforcement of judgments that were given in contravention of the Convention.<sup>186</sup>

175 *One way of solving these problems, and making the provision clearer, would be to revise the text as follows:*

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has effect not only as between the parties, but also as regards all other parties (*erga omnes*). On this, see the example given in paragraph 113 *supra*.

<sup>183</sup> This provision has something in common with Article 6. The comments made in connection with that provision in paragraph 114 *supra*, are also relevant here.

<sup>184</sup> Paragraph 116.

<sup>185</sup> See paragraphs 232-238 *infra*.

<sup>186</sup> On the position under international law, see A. Schulz, "The Relationship between the Judgments Project and other International Instruments", Preliminary Document No 24 of December 2003, available at < [www.hcch.net](http://www.hcch.net) >.



## Article 11 *Judgments in contravention of exclusive choice of court agreements*

### Variant 1

1. If the parties have entered into an exclusive choice of court agreement, a court in a Contracting State other than that of the chosen court shall not recognize or enforce a judgment rendered in contravention of that agreement unless the judgment was granted consistently with Article 7 or, if the State of origin was a non-Contracting State, if it would have been so granted if that State had been a Contracting State.
2. Paragraph 1 shall not apply if the court addressed is obliged to recognize or enforce the judgment under an international agreement concluded prior to this Convention and the State of origin is not a party to this Convention.

### Variant 2

1. If the parties have entered into an exclusive choice of court agreement, a court in a Contracting State other than that of the chosen court shall not recognize or enforce a judgment rendered in contravention of that agreement unless it could itself have heard the case consistently with Article 7.
2. If the parties have entered into an exclusive choice of court agreement, a court of the State of the chosen court shall not recognize or enforce a judgment rendered in contravention of that agreement unless [the chosen court refused, or could refuse, to hear the case consistently with Article 5] [the agreement is null and void under its law or the chosen court lacks subject-matter jurisdiction].
3. Paragraphs 1 and 2 shall not apply if the court addressed is obliged to recognize or enforce the judgment under an international agreement concluded prior to this Convention and the State of origin is not a party to this Convention.

176 *Variant 1 might seem more logical; however, it requires the court addressed to decide whether the choice of court agreement was contrary to the public policy of the State of origin, something that it would be ill equipped to do.*<sup>187</sup> *Variant 2 is based on the idea that recognizing a judgment contrary to an exclusive choice of court clause has the same effect as granting such a judgment.*

177 *Article 23(5) would have to be amended so that it did not affect this provision.*<sup>188</sup>

## Article 12 *Settlements*

178 Article 12 provides that settlements which, in the course of proceedings, are approved by, or concluded before, a court of a Contracting State designated in an exclusive choice of court agreement, and which are enforceable in the same manner as a judgment in that State, must be enforced in other Contracting States in the same manner as a judgment.<sup>189</sup>

<sup>187</sup> The difference between the two Variants is that under Variant 1 the court has to apply the law of the State of origin under Article 7 b) and the public policy of that State under Article 7 c); under Variant 2, it applies its own law and public policy.

<sup>188</sup> See paragraph 232-238 *infra*.

<sup>189</sup> The equivalent provision in the preliminary draft Convention 1999 is Article 36. The commentary in the Nygh / Pocar Report is at pp. 118–119.

179 Such a settlement is sometimes called a “judicial settlement”, a translation of the French “*transaction judiciaire*”.<sup>190</sup> In the sense in which the term is used here, judicial settlements are unknown in the common-law world. In France and other civil law countries, they are contracts concluded before a judge by which the parties put an end to litigation, usually by making mutual concessions. A judicial settlement is different from a consent order in the common law sense (an order made by the court with the consent of both parties), since a consent order is a judgment and may be recognised and enforced as such under Article 9 of the Convention. On the other hand, a judicial settlement is different from an out-of-court settlement, since it is made before a judge and puts an end to the proceedings. For these reasons, a special provision is devoted to it in the Convention.

180 Article 12 does not provide for the recognition of judicial settlements, but only for their enforcement.<sup>191</sup> The significance of this is best explained by an example.

Assume that A and B conclude a contract with an exclusive choice of court clause in favour of the courts of State X. Subsequently, A sues B before a court in that State for €1000, a sum which he claims is due under the contract. The parties then enter into a judicial settlement under which B agrees to pay A €800, State X being a State where this may be done.

181 If B fails to pay, A may bring proceedings to enforce the settlement in State Y, another Contracting State. Such proceedings will be covered by Article 12 of the Convention. Assume, however, that B pays the money in compliance with the settlement without any need for enforcement proceedings. If A nevertheless brings a new action for the remaining €200 before the courts of State Y, B cannot ask the court to recognise the settlement under the Convention as a defence to the claim. The Convention does not provide for this, mainly because the effects of settlements are so different in different legal systems. However, the Convention does not preclude a court from treating the settlement as a contractual defence to the claim, and this is what most courts would do.

#### *Article 13 Documents to be produced*

182 Article 13(1) lists the documents to be produced by the party seeking recognition or enforcement of a judgment under the Convention.<sup>192</sup> The fact that recognition is mentioned in the “*chapeau*” to Article 13 does not mean that there has to be any special procedure.<sup>193</sup> However, if the other party disputes it, the party requesting recognition must produce the documents required by Article 13.

183 Article 13(1)(a) requires the production of a complete and certified copy of the judgment. This refers to the whole judgment (including, where applicable, the court’s reasoning) and not just to the final order (*dispositif*). The words “or evidence of its existence” in Article 13(1)(b) were inserted to provide for agreements concluded electronically. In the case of such agreements, it is not possible to produce “the agreement” itself. Article 13(1)(c) requires documentary evidence that the defendant was notified, but this applies only in the case of a default judgment. In other cases, it is assumed that the defendant was notified unless he or she produces evidence to the contrary. The law of the requested State determines the consequences of failure to

<sup>190</sup> On an analogous provision in the Brussels Regulation, see H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (3<sup>rd</sup> ed., 2002, LGDJ, Paris), Chapter 4 (pp. 387 *et seq.*).

<sup>191</sup> On the distinction between recognition and enforcement, see paragraph 159 *supra*.

<sup>192</sup> This provision is similar to sub-paragraphs a) to c) of Article 29(1) in the preliminary draft Convention 1999. The commentary on the latter in the Nygh / Pocar Report is at pp. 109–110.

<sup>193</sup> See paragraph 188 *infra*.

produce the required documents. Excessive formalism should, however, be avoided: if the judgment-debtor was not prejudiced, the judgment-creditor should be allowed to rectify omissions.

184 Article 13(2) provides that the court addressed may require the production of further documents to the extent that it is necessary to verify that the requirements of Chapter III of the Convention have been satisfied. This makes clear that the list in paragraph 1 is not exhaustive. Unnecessary burdens on the parties should, however, be avoided.

185 Article 13(3) provides for the Hague Conference on Private International Law to recommend and publish a form which may be used by a person seeking recognition or enforcement of a judgment under the Convention. The use of such a form will not be obligatory. Information contained in it may be relied on by the court addressed in the absence of challenge. Even if there is no challenge, however, the information is not conclusive: the court addressed can decide the matter in the light of all the evidence before it. The Special Commission expressed the desire that the form should be published in the *Collection of Conventions*, though it also wanted to make it possible to amend it without undue difficulty, to meet new needs or to overcome problems that were not originally foreseen. For this reason, it was decided that the form should not constitute an Annex to the Convention.

186 *However, another option might be to follow the example of the 1980 Hague Convention on Access to Justice, which provides in Article 30, "The model forms annexed to this Convention may be amended by a decision of a Special Commission convoked by the Secretary General of the Hague Conference to which all Contracting States and all Member States shall be invited. Notice of the proposal to amend the forms shall be included in the agenda for the meeting."*

187 Article 13(4) provides that the court addressed may require a translation of any document referred to in Article 13. This depends on the rules of procedure of the requested State.

#### *Article 14 Procedure*<sup>194</sup>

188 Article 14 provides that the procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment are governed by the law of the requested State unless the Convention provides otherwise.<sup>195</sup> Where the law of the requested State makes no provision for any special procedure for the recognition (as distinct from enforcement) of a foreign judgment, a judgment will be recognised automatically by operation of law, based solely on Article 9 of the Convention. Where, on the other hand, the law requires a mandatory procedure for the recognition of foreign judgments, such procedure will have to be followed in the case of foreign judgments covered by the Convention. *Delegates may want to consider whether the Convention should go further and expressly prohibit Contracting States from making any such procedure mandatory. This would not prevent them, for the purposes of legal certainty, from offering such a special procedure on a voluntary basis.*

*If it were decided that the Convention should go this way, the text could be amended as follows:*

*No special procedure may be required for the recognition of a judgment under this Convention. The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.*

<sup>194</sup> With regard to other procedural matters, see paragraphs 48 to 54 and 105.

<sup>195</sup> Except for purely verbal alterations, this is the same as Article 30 of the preliminary draft Convention 1999. The commentary on this Article is at p. 100 of the Nygh / Pocar Report.

189 In all proceedings covered by Article 14, the court addressed must act expeditiously, though there is no explicit sanction against delay. This means that the court must use the most expeditious procedure available to it. Contracting States should consider ways in which provision can be made to ensure that unnecessary delays are avoided.

#### *Article 15 Damages*

190 Article 15 deals with two issues: non-compensatory damages and excessive damages. The latter may be either compensatory or non-compensatory. The first paragraph applies only to non-compensatory damages. The second (which is concerned with excessive damages) appears to cover both, though the Nygh / Pocar Report states that it applies only to compensatory damages.<sup>196</sup> The third applies to both.

191 Compensatory damages are intended to compensate the plaintiff for loss suffered as a result of the wrongful act of the defendant. Non-compensatory damages are intended to serve a different purpose, usually to punish the defendant for his wrongdoing, or to deter others from doing something similar. They are sometimes called “exemplary” or “punitive” damages. However, Article 15(1) is not limited to damages so called: it applies to all damages that are not compensatory.

192 **Non-compensatory damages.** The first sentence of Article 15(1) requires a court in a Contracting State to recognise and enforce a judgment awarding non-compensatory damages if, and to the extent that, it could have awarded similar or comparable damages itself.<sup>197</sup> The test is whether it could have done so if the action had originally been brought before it. “Similar” damages are damages of the same kind; “comparable” damages are non-compensatory damages of a different kind that nevertheless fulfil a comparable function. Article 15 does not expressly say that a court is not obliged to recognise or enforce a judgment for non-compensatory damages if it could not itself have awarded similar or comparable damages, but this is what was intended.

193 If non-compensatory damages cannot be awarded in any circumstances in the State addressed,<sup>198</sup> the part of the foreign judgment awarding non-compensatory damages will never be recognised or enforced.<sup>199</sup> If non-compensatory damages could have been awarded only in special circumstances – for example, if the defendant deliberately commits the tort in the belief that the profit he or she will derive will outweigh any compensatory damages that could be awarded – the court would not be obliged to recognise or enforce the judgment if those circumstances did not pertain. Moreover, if it could have awarded non-compensatory damages in the circumstances of the case, but only for a small sum, it would not be obliged to recognise or enforce a judgment for a significantly greater sum. In all cases, however, it is permitted to recognise and enforce the judgment to the full amount.

194 **Excessive damages.** Article 15(2) deals with excessive damages. Even if it also applies to non-compensatory damages, its main importance derives from its application to compensatory damages. The purpose of Article 15(2)(a) is to allow the court

<sup>196</sup> See p. 111. In practice, at least, it will be applied only to compensatory damages, since non-compensatory damages are adequately dealt with by the first paragraph.

<sup>197</sup> It cannot, therefore, invoke the public policy exception in Article 9(1)(e) as a ground for refusing to recognise an award solely because the damages are non-compensatory.

<sup>198</sup> Generally speaking, this is the position in civil-law countries, where punishment is regarded as the business only of the criminal law.

<sup>199</sup> For judgments to this effect, see BGH 4 June 1992, BGHZ 118, 312 (*Bundesgerichtshof*, Germany); Supreme Court of Japan, judgment of 11 July 1997, *Minshu*, Vol. 51, No 6, p. 2578 (English translation in the *Japanese Annual of International Law*, No 41, p. 104). In both cases, the public policy exception was invoked to deny enforcement to the part of the award in an American judgment that represented punitive damages.

addressed to cut down an award of damages – even if they are purely compensatory – if it considers them to be grossly excessive. It may do this, however, only after proceedings have taken place in which the judgment-creditor has had the opportunity to be heard and only if the judgment-debtor satisfies the court – the onus is on him – that in all the circumstances, including those existing in the State of origin, the damages are grossly excessive. However, as is provided by Article 15(2)(b), the court must in no event recognise or enforce the judgment in an amount less than that which could have been awarded in the requested State in the same circumstances, including those existing in the State of origin. This is to prevent the abuse of Article 15(2)(a).

195 In applying Article 15(2), the court addressed cannot reduce the amount simply because things cost more in the State of origin. The cost of medical treatment is much greater in some States than in others. To the extent that the award reflects this, it cannot be deemed excessive. The same is true with regard to salaries. If the award is based on lost earnings, it will naturally reflect what the victim would have earned if the tort had not occurred. By the standards of the requested State, this might seem a great deal of money; nevertheless, the award cannot normally be reduced for this reason.

196 Article 15(2) will apply most often with regard to damages for matters that cannot be objectively assessed – for example, pain and suffering; loss of an arm, a leg or an eye; loss of reputation; hurt feelings; or similar matters. Here the court of origin will normally make an award guided solely by the level of past awards. If this level is grossly excessive, the court addressed will reduce the award.

197 The Nygh / Pocar Report states that, as a general principle, “grossly excessive” is likely to mean “grossly excessive according to the standards usually applied by the courts of the State of origin”;<sup>200</sup> however, this view was strongly criticised by several delegations. If the court addressed had to apply the standards of the State of origin, Article 15(2) would be almost totally deprived of effect: if an award was “grossly excessive” by the standards of the State in which it was made, it would almost certainly be set aside on appeal, in which case the question of its enforcement would not arise.

198 It might be best not to use the word “standard”, since it could suggest the application of rules, though if “standards” are to be applied, they must be those of the requested State. This does not, however, mean that the court addressed can refuse to enforce an award simply because it would itself have made a smaller one, or even none at all. The test is not one of rules but of judgment.

199 The test under Article 15(2) is similar to that of public policy. The question of damages could have been left to the public policy exception in Article 9(1)(e), but it was decided to devote a special provision to it, partly to introduce greater certainty, and partly to reassure those States that might have been unwilling to sign the Convention if they had had to enforce awards they regarded as excessive.<sup>201</sup> Thus, though public policy is expressly mentioned only in Article 9(1)(e) as a ground for non-recognition of a judgment, the essential question that the court must ask when applying Article 15(2) is whether the award is so grossly excessive that its recognition or enforcement would be contrary to public policy.

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<sup>200</sup> At p. 114.

<sup>201</sup> It was also intended to ensure that States would not use the public policy exception of the Convention to refuse to enforce an award of punitive damages if they could have awarded similar or comparable damages themselves.

200 This test must be applied to the total award: it should not be applied separately to each head of damages. It may well be that the court of origin awarded very large damages under one head, but this might have been to compensate for the fact that it could not, or did not, award damages under another head. For example, take the case of a wrongful-death action brought by the widow of the victim. One legal system might compensate her on the basis of the financial support she lost as a result of her husband's death. Another might compensate her for the emotional devastation she suffered. The final award might be much the same in both cases. It would be wrong, therefore, for the court addressed to apply the "grossly excessive" test individually to each item of compensation, since this might result in her receiving far less than she would have if the action had originally been brought before the court addressed.

201 The test is one of damages, not liability; therefore, the court addressed cannot refuse to enforce the judgment simply because it would not have regarded the defendant as liable, or because it could not have awarded damages for what he did. For example, in some legal systems defamation is a criminal offence but not a tort; in others, it is a tort but not a crime. If a court in a State where the latter system prevails grants an award of damages for libel, a court in a State that applies the former system cannot refuse to enforce it on the basis of Article 15(2)(a) simply because it could not have awarded damages in similar circumstances. However, if it feels that, in all the circumstances (including those in the State of origin), the sum awarded is grossly excessive in proportion to the wrong done, it will be entitled to reduce the award.<sup>202</sup>

202 The same would apply to actions in tort for inducing a breach of contract. Assume that A and B enter into a contract, and C induces B to break the contract. In these circumstances, most common law systems would consider that A can sue C in tort. In some other legal systems, this may not be possible. However, if a common law court were to award damages in such an action, another court ought not to refuse to enforce the judgment on the basis of Article 15(2)(a) simply because it would not have granted any damages if the action had originally been brought before it. However, it may cut the award down if it thinks that the amount of the award is so grossly excessive as to be out of all proportion to the harm inflicted on A.

203 **Legal costs and expenses.** The third paragraph of Article 15 applies to proceedings under both the first paragraph and the second paragraph. It provides that the court addressed must take into account whether, and to what extent, the award – whether stated to be compensatory or non-compensatory – is intended to cover costs and expenses relating to the proceedings. This provision was included because the rules regarding legal costs differ in different legal systems. In most countries, the successful plaintiff is entitled to "costs". This is a sum of money added to the damages to cover the costs and expenses of the legal proceedings. However, the rules for assessing costs can differ widely. In many countries, they cover lawyers' fees.<sup>203</sup> In the United States, they do not.<sup>204</sup> To compensate for this, juries in the United States often grant higher damages, sometimes designated as punitive damages. The court addressed is obliged by Article 15(3) to take this into account in deciding whether the award is grossly excessive:

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<sup>202</sup> If the court addressed considers, on grounds other than the size of the award or the fact that it is non-compensatory, that it would be manifestly contrary to its public policy to recognise or enforce the judgment, it can invoke the public policy exception in Article 9(1)(e). This might occur, for example, if it considered that a judgment for libel constituted an infringement of the right of free speech.

<sup>203</sup> There may, however, be considerable differences in the way in which these are assessed: they may cover more or less all that the successful party has had to pay his lawyer; or they may fall far short of this.

<sup>204</sup> There are a small number of exceptions.

it must take the amount of the judgment and compare it with the total amount it would have awarded, including costs. In doing this, it must also take into account the prevailing level of lawyers' fees in the State of origin.

**204 Insurance.** The effect of Article 15 on contracts of insurance (or reinsurance) needs explanation. Article 15 is concerned solely with the recognition or enforcement of a judgment for non-compensatory damages or excessive compensatory damages. The fact that an award of damages would not be recognised (in whole or in part) because the damages are non-compensatory or excessive does not mean that a judgment under a contract of insurance (or reinsurance) would not be recognised or enforced merely because the policy indemnified the insured against payment to a third party of such damages.

**205** This distinction is made clearer by an example. Assume that a person enters into a contract of insurance under which the insurer agrees to indemnify him against an award of damages, including punitive or excessive damages.<sup>205</sup> Then a judgment awarding punitive damages is made against him. Article 15 would apply in proceedings to enforce that judgment in other Contracting States in so far as it was rendered under a choice of court agreement covered by the Convention (which rarely occurs). In some Contracting States, it might not be enforced. However, this would not affect the enforcement of a judgment against the insurer under the policy. Article 15 does not permit a Contracting State to refuse to enforce a judgment under an insurance contract just because the risk insured against is the payment of punitive damages. A judgment against an insurer requiring him to indemnify an insured against an award of punitive damages is not itself an award of punitive damages. Nor would it be an award of excessive damages, just because the loss against which the insurer agreed to indemnify the insured was an award of excessive damages. Therefore, Article 15 does not apply to the recognition and enforcement of the judgment against the insurer, if it was rendered under a choice of court agreement covered by the Convention.

*206 Although this may already be clear, it might be desirable, for the sake of certainty, to add a new paragraph to Article 15. This might read, "This Article does not permit a court of a Contracting State to limit recognition or enforcement of a judgment under a contract of insurance (or reinsurance) merely because the judgment requires the insurer to indemnify the insured against payment of non-compensatory damages or excessive compensatory damages."*

**207 Statutory and contractual (liquidated) damages.** Sometimes a statute lays down a formula for calculating damages, or specifies the sum to be paid. Sometimes a contract does so. This may be done to avoid lengthy disputes as to the correct amount. If this is a genuine attempt to estimate a fair level of compensation in advance, damages awarded on this basis would constitute compensatory damages, even if, in a given case, the resulting sum did not exactly reflect the amount of the plaintiff's loss. If, on the other hand, there was no genuine intention to estimate a fair level of compensation, but the intention was rather to punish the defendant, the damages would be non-compensatory.<sup>206</sup>

#### *Article 16 Severability*

**208** Article 16 provides for the recognition and enforcement of a severable part of a judgment where this is applied for, or where only part of the judgment is capable of being recognised or enforced under the Convention.<sup>207</sup> For example, if an award of

<sup>205</sup> Whether the policy covers such damages would depend on its terms, as interpreted by the law governing it.

<sup>206</sup> See Interim Text 2001, p. 27, footnote 176.

<sup>207</sup> The equivalent provision in the preliminary draft Convention 1999 is Article 34. The commentary on this provision is at p. 115 of the Nygh / Pocar Report.

punitive damages is not enforced by reason of Article 15(1), the remainder of the award must be enforced if it satisfies the requirements of Article 9.<sup>208</sup> In order to be severable, the part in question must be capable of standing alone, and it must be reasonable and appropriate to recognise or enforce it independently of the rest of the judgment.<sup>209</sup> In so far as this depends on a rule of law, the law of the court addressed must be applied.

#### *Article 17 No legalisation*

209 Article 17 provides that all documents forwarded or delivered under the Convention must be exempt from legalisation or any analogous formality.<sup>210</sup> The latter would include, for example, an *apostille*.

#### *Article 18 Limitation of jurisdiction*

210 It was said above that it is the policy of the Convention to exclude wholly domestic situations from its scope.<sup>211</sup> Effect is given to this policy by Article 1. Article 18 pursues the opposite policy: it permits a State to make a declaration that its courts will not apply Article 5 of the Convention to cases that are wholly *foreign*. It states that upon ratification, acceptance, approval or accession, a State may declare that its courts may refuse to determine disputes covered by an exclusive choice of court agreement if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.<sup>212</sup>

211 In practice, parties sometimes choose the courts of a State with which neither they nor the facts of the case have any connection. The reason is that neither party wants to go before the courts of the other party's State; so they agree to choose the courts of a neutral State. Some countries welcome this.<sup>213</sup> Others feel that it imposes an undue burden on their judicial systems. The purpose of Article 18 is to accommodate States in the latter category.

#### *Article 19 Limitation of recognition and enforcement*

212 Article 19 provides that upon ratification, acceptance, approval or accession, a State may declare that its courts may refuse to recognise or enforce a judgment of a court in another Contracting State if the parties are resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, are, at the time the agreement is concluded,<sup>214</sup> connected only with the requested State.<sup>215</sup> This provision pursues the policy, discussed above, of excluding wholly domestic situations from the scope of the Convention.

<sup>208</sup> See footnote 199 for cases in Germany and Japan where this occurred.

<sup>209</sup> This would normally depend on whether enforcing only one part of the judgment would significantly change the obligations of the parties: see the *Nygh / Pocar Report*, p. 115. If any questions of law arose, they would have to be decided by the law of the requested State: *ibid*.

<sup>210</sup> This is equivalent to Article 29(2) of the preliminary draft Convention 1999. The commentary on that provision in the *Nygh / Pocar Report* is at p. 110, where it is stated that this is a practice that is well established in the context of the Hague Conventions.

<sup>211</sup> Paragraph 10.

<sup>212</sup> Since the Convention uses the words "may refuse", the courts of a State that made such a declaration would have a discretion whether or not to exercise jurisdiction. Implementing legislation could introduce an obligation not to exercise jurisdiction in such cases.

<sup>213</sup> For example, English courts have for many years been willing to hear such cases, and in 1984 New York adopted special provisions to facilitate them: see New York Civil Practice Law and Rules, Rule 327(b) and New York General Obligations Law § 5-1402.

<sup>214</sup> The phrase "at the time the agreement is concluded" seems to apply to the residence of the parties, as well as to their relationship and to the other elements relevant to the dispute. However, further discussion may be necessary to clarify whether this is correct.

<sup>215</sup> Since the Convention uses the words "may refuse", the courts of a State that made such a declaration would have a discretion whether or not to recognise and enforce such judgments under the Convention. However, implementing legislation could introduce an obligation not to recognise or enforce foreign judgments in such circumstances.



213 To understand the purpose of Article 19, one must remember that the Convention applies only in international cases.<sup>216</sup> However, the definition of “international” for this purpose varies, depending on whether one is considering jurisdiction,<sup>217</sup> or the recognition and enforcement of a judgment.<sup>218</sup> For the purpose of jurisdiction, a case is not international if the parties are resident in the State of the court seised, and if all other elements relevant to the dispute (regardless of the location of the chosen court) are connected only with that State. However, for the purpose of recognition and enforcement, a case is always international if the judgment was given by a court in a State other than that in which recognition or enforcement is sought. That means that a case that is domestic when it is heard becomes international if proceedings are brought to enforce the judgment in another State. The purpose of Article 19 is to permit a Contracting State to declare that it will not recognise or enforce such a judgment if the case would have been wholly domestic to it, if the original proceedings had been brought in its courts. For example, assume that the parties are resident in State A and all other relevant elements are connected only with that State. They agree that a court in State B will have exclusive jurisdiction. If one of them brings proceedings before a court in State A, that court would not be obliged to decline jurisdiction under Article 7: the Convention would not be applicable because the case would not be international under Article 1(2). However, if proceedings were brought in State B, State A would be required by Article 9 to recognise the resulting judgment: the case would have become international in terms of Article 1(3). What Article 19 does is to make it possible for States to change this by entering an appropriate declaration. If it did that, State A would not be required to recognise the judgment.

#### *Article 20      Limitation with respect to asbestos related matters*

214 Article 20 provides that upon ratification, acceptance, approval or accession, a State may declare that it will not apply the provisions of the Convention to exclusive choice of court agreements in asbestos related matters.<sup>219</sup> This is because personal-injury and wrongful-death claims for asbestosis have caused serious problems in one particular State. This provision is intended to allow that State to opt out. It applies to actions concerning liability for injury, illness or death caused by exposure to asbestos.

#### *Article 21      Uniform interpretation*

215 Article 21 states that in the interpretation of the Convention regard must be had to its international character and to the need to promote uniformity in its application. This provision is addressed to courts applying the Convention. It requires them to interpret it in an international spirit so as to promote uniformity of application. Where reasonably possible, therefore, foreign decisions and writings should be taken into account. It should also be kept in mind that concepts and principles that are regarded as axiomatic in one legal system may be unknown or rejected in another. The objectives of the Convention can be attained only if all courts apply it in an open-minded way.<sup>220</sup>

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<sup>216</sup> Article 1(1).

<sup>217</sup> Article 1(2).

<sup>218</sup> Article 1(3).

<sup>219</sup> Some delegations have proposed that further specific subject matters should be referred to in this provision, such as natural resources and joint ventures. These proposals are linked to issues that arise in relation to Articles 7 and 9.

<sup>220</sup> The equivalent provision in the preliminary draft Convention 1999 is Article 38(1). The commentary on this in the Nygh / Pocar Report is at pp. 118–119.

## *Article 22 Non-unified legal system*

216 Article 22 is concerned with the problems that result from the fact that some States are composed of two or more territorial units, each with its own judicial system. It occurs most often in the case of federations – for example, Canada or the United States – but can also occur in other States as well – for example, China or the United Kingdom. This can create a problem because one has to decide in any particular case whether the appropriate unit is the State as a whole (“State” in the international sense) or whether it is a particular territorial unit within that State.

217 Article 22(1) solves this problem by providing that, where different systems of law apply in the territorial units with regard to any matter dealt with in the Convention,<sup>221</sup> the Convention is to be construed as applying either to the State in the international sense or to the relevant territorial unit, whichever is appropriate.<sup>222</sup> This might seem unsatisfactory, but in fact it is usually obvious what the answer is.

218 The most important situation in which the question arises is in connection with the definition of an exclusive choice of court agreement in Article 3. The way in which Article 22 applies in this situation has already been discussed.<sup>223</sup> Another situation is the determination of the residence of an individual or company.

219 Article 22(2) gives further effect to the policy of not applying the Convention to wholly domestic situations. It states that, notwithstanding the provisions of Article 22(1), a Contracting State with two or more territorial units in which different systems of law are applied is not bound to apply the Convention to situations involving solely such different territorial units. For this provision to apply, the chosen court must also be located in the State in question; if it is located in another Contracting State, Article 19 would apply.

220 Article 22(2) means that if, for example, the chosen court is in England and the situation is entirely internal to the United Kingdom, the United Kingdom is not required to apply the Convention by virtue of the fact that one of the parties is resident in Scotland. If, however, the chosen court were in Canada, United Kingdom courts would have to recognise and enforce any judgment given by that court, unless the United Kingdom had made a declaration under Article 19.

221 Article 22(3) provides that a court in a territorial unit of a Contracting State is not bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced under the Convention by a court in another territorial unit of the first Contracting State. This means, for example, that a court in New York is not bound to recognise a judgment from Japan solely because a court in New Jersey has done so. The New York court must decide for itself whether the conditions for recognition or enforcement under the Convention are fulfilled.

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<sup>221</sup> The fact that some or all of the relevant territorial units in a Contracting State apply the common law does not necessarily mean that they do not apply different systems of law. They will do so if they have different legislation – for example, in the case of Australian states or the common law Canadian provinces.

<sup>222</sup> It was agreed that each Contracting State can provide in the legislation putting the Convention into effect how “appropriate” is to be understood.

<sup>223</sup> Paragraph 73.

### *Article 23 Relationship with other international instruments*

222 Article 23 is concerned with the relationship between the Convention and other international instruments that relate to jurisdiction, recognition and enforcement. The most important such instruments are the Brussels Convention, the Lugano Convention and the Brussels Regulation. The following discussion will be based mainly on those instruments, but Article 23 is not limited to them: it is general in application.<sup>224</sup>

223 The first paragraph of Article 23 defines an “international instrument”. It means an international treaty, or rules made by an international organisation under an international treaty. It thus covers the Brussels Regulation (EU legislation) as well as the Brussels and Lugano Conventions.

224 The second and third paragraphs lay down two fairly non-controversial rules. Article 23(2) states that the Convention does not affect any *existing* international instruments to which Contracting States are parties, unless a declaration to the contrary is made by the States bound by such instrument. This rule is, however, subject to the provisions of paragraphs 4 and 5 (explained below).

225 Article 23(3) provides that the Convention does not affect the ability of one or more Contracting States to enter into future international instruments on jurisdiction and the recognition and enforcement of judgments, provided that those instruments do not affect the Convention in the relations between such States and other Contracting States. This permits a group of Contracting States (“special” Contracting States) to adopt among themselves a new international instrument that covers the same area as the Convention and even conflicts with it, provided that the new instrument does not affect relations between the special Contracting States and other Contracting States (“general” Contracting States).

226 This is a reasonable rule, and is in accordance with international law,<sup>225</sup> but it might not always be clear when relations with general Contracting States are involved. For example, if two special Contracting States enter into a treaty under which they agree to recognise each other’s judgments, it might seem that this would not affect general Contracting States. However, if such a judgment was given in contravention of an exclusive choice of court agreement, it *would* affect them if the chosen court was located, or a party was resident, in a general Contracting State – at least, if Article 11 becomes part of the Convention.

227 Paragraph 4 is the most important provision in Article 23. As was said above, paragraph 2 provides that prior instruments are not affected by the Convention unless there is a contrary declaration. Paragraph 4, however, contains an exception to that rule, which applies in so far as jurisdiction is concerned. It is based on the principle, mentioned above, that the Convention should prevail when there is a significant contact with a “general” Contracting State.<sup>226</sup> For the purpose of this provision, a significant contact exists if either the chosen court is situated, or a party is resident, in the State in question. Consequently, the prior instrument prevails if both (a) the chosen court is situated in a “special” Contracting State or a non-Contracting State in which the

<sup>224</sup> Other conventions include the *Minsk Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases* 1993 (English translation available at < [http://www.coe.int/T/E/Legal\\_Affairs/Legal\\_cooperation/Transnational\\_criminal\\_justice/Information/OC\\_INF\\_44E.asp](http://www.coe.int/T/E/Legal_Affairs/Legal_cooperation/Transnational_criminal_justice/Information/OC_INF_44E.asp) >) and various Latin American instruments.

<sup>225</sup> See Article 30(4) of the *Vienna Convention on the Law of Treaties* 1969. See also A. Schulz, “The Relationship between the Judgments Project and other International Instruments”, Preliminary Document No 24 of December 2003.

<sup>226</sup> A “general” Contracting State, it will be remembered, is a State that is a Party to the Convention but not to the prior instrument.

instrument applies and (b) all the parties are resident [only]<sup>227</sup> in a “special” Contracting State or in a non-Contracting State.<sup>228</sup> On the other hand, the Convention applies if *either* the chosen court is situated,<sup>229</sup> *or* a party is resident, in a “general” Contracting State.<sup>230</sup> Thus, for example, if a French party<sup>231</sup> and a Dutch party choose the courts of China, then as far as jurisdiction is concerned, the Convention will apply, not the Brussels Regulation. Likewise, if a French party and a Canadian party choose the courts of England, the Convention will prevail over the Brussels Regulation as far as jurisdiction is concerned.

228 Paragraph 4 works well with regard to the Brussels Convention and the Brussels Regulation.<sup>232</sup> This is because, as Member States of the European Community, all the States parties to those instruments will become parties to the Convention at one and the same time. However, this may not be the case with regard to other Conventions. Where some States that are parties to the prior instrument are also parties to the Convention, but others are not, a problem arises. We shall take the Lugano Convention as an example. If there is a State that is a party to the Lugano Convention but not to the<sup>233</sup> Convention, it would be entitled to expect that the other parties to the Lugano Convention would apply the Lugano Convention whenever there was a significant contact with it, even if there was also a significant contact with a “general” Contracting State. Article 23(4) does not, however, make provision for this. As a result, a State that was a party to both the Convention and the Lugano Convention could find itself in an impossible situation, since it would be required to apply the Lugano Convention with regard to States that were parties to the Lugano Convention but not the Convention, but it would be required to apply the Convention with regard to States that were parties to it. The following example shows some of the practical difficulties that could result.

229 The chosen court is in a State that is a party to both the Convention and to the Lugano Convention (say, Switzerland). One party is resident in a Contracting State to the Convention that is not a party to the Lugano Convention (say, New Zealand). The other party is resident in a State that is a party to the Lugano Convention but not to the Convention (we shall call it “Ruritania”). One party brings proceedings in a court in Ruritania, which hears the proceedings, despite the choice of court agreement;<sup>234</sup> subsequently, the other party brings proceedings in the designated court in Switzerland. In this situation, the Swiss court would be forbidden to hear the case by Article 21 of the Lugano Convention,<sup>235</sup> but would be required to hear it by Article 5 of the Convention.<sup>236</sup>

<sup>227</sup> It has not yet been settled what happens if a party is resident *both* in a general Contracting State *and* in a special Contracting State or non-Contracting State.

<sup>228</sup> The text actually says that the parties must be resident either in a State in which the instrument is applicable (which might be either a special Contracting State or a non-Contracting State) or in a non-Contracting State. However, this is the same as saying that the parties must be resident in either a special Contracting State or in a non-Contracting State.

<sup>229</sup> If the chosen court is in a non-Contracting State in which the instrument applies, the Convention will not in any event be applicable: under Article 1(1) combined with Article 3 *a*), the Convention applies only if the chosen court is in a Contracting State.

<sup>230</sup> This is on the assumption that the word “only” is accepted in Article 23(4). If it is not, the Convention will not apply if every party is resident in a State other than a general Contracting State (even if also resident in a general Contracting State).

<sup>231</sup> By “French party”, “Dutch party”, etc. is meant a party resident [only] in France, the Netherlands, etc.

<sup>232</sup> It involves a limitation of these instruments, since, according to their terms, their provisions on choice of court agreements apply (in general) whenever one of the parties is domiciled in an EC State. However, if all the States to which these instruments apply become Parties to the Convention, it would be normal for prior treaty obligations among themselves to be affected: a State cannot conclude a law-making convention and expect its law on the same matter to remain unaffected.

<sup>233</sup> It should be remembered that references to “the” Convention are always references to the Hague Convention.

<sup>234</sup> In many cases, this would be contrary to Article 17 of the Lugano Convention; nevertheless, it could happen. The Ruritanian court might mistakenly think the choice of court agreement was invalid or did not cover the case; it might even decide to ignore Article 17. There might also be cases (if the agreement was drawn up or evidenced by electronic means) where a choice of court agreement meets the form requirements of the Hague Convention but not those of the Lugano Convention. In this case, the Ruritanian court would be entitled under the Lugano Convention to disregard the choice of court agreement.

<sup>235</sup> The Ruritanian court would have been seised first. It would make no difference if the Ruritanian court had taken jurisdiction contrary to Article 17(1) of the Lugano Convention. The rule in Article 21 of the Lugano

230 Admittedly, conflicts between the Convention and the Lugano Convention would be relatively rare. This is because the Convention is fairly similar to the Lugano Convention, having been partly modelled on it. However, the possibility of conflicts could be greater with other conventions.

231 *One possible solution would be to add a new paragraph (paragraph 4 bis) to Article 23. Such a paragraph might read as follows:*

#### **Variant 1**

4. Where a Contracting State is also a party to an international instrument which contains provisions on matters governed by this Convention, this Convention shall prevail in matters relating to jurisdiction except where -

a) the chosen court is situated in a State in which the instrument is applicable; and

b) all the parties are resident[ only] either in a State in which the instrument is applicable or in a non-Contracting State.

*4 bis.* Notwithstanding paragraph 4 of this Article, a State that is a party to both the Convention and to the instrument shall not be required to apply the Convention if the chosen court is situated, or a party is resident, in a State that is a party to the instrument but not to the Convention.

*Another solution would be:*

#### **Variant 2**

4. Where a Contracting State is also a party to an international instrument which contains provisions on matters governed by this Convention, this Convention shall prevail in matters relating to jurisdiction **if there is a relevant connection with a Contracting State in which the instrument is not applicable; provided that a State that is a party to both the Convention and to the instrument shall not be required to apply the Convention if there is a relevant connection with a State that is a party to the instrument but not to the Convention.**

***4 bis.* In this Article, a relevant connection exists with a State if either the chosen court is situated, or a party is resident, in that State.**

*A simpler solution is that proposed in the footnote to Article 23(4).<sup>237</sup> If this were adopted, the result would be as follows:*

#### **Variant 3**

4. Where a Contracting State is also a party to an international instrument which contains provisions on matters governed by this Convention, this Convention shall prevail in matters relating to jurisdiction except where –

a) the chosen court is situated in a State in which the instrument is applicable; and

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Convention would apply even if the Swiss court thought that the Ruritanian court had violated the Lugano Convention by hearing the case: *Gasser v. MISRAT*, Case C-116/02, judgment of 9 December 2003 (available at < [www.curia.eu.int](http://www.curia.eu.int) >) (Court of Justice of the European Communities). This case was on the equivalent provision in the Brussels Convention, but would almost certainly be applicable to Article 17 of the Lugano Convention as well.

<sup>236</sup> Under Article 23(4) of the Convention, the Convention would prevail over the Lugano Convention because one party would be resident in a “general” Contracting State (New Zealand).

<sup>237</sup> Footnote 17 to the text of the preliminary draft Convention.

**b) a party is resident in a non-Contracting State in which the instrument is applicable, or there is some other relevant connection between the parties or the dispute and such a State.**

232 Article 23(5) is concerned with the recognition and enforcement of judgments. It states that if the international instrument is in force both in the State of origin and in the requested State, it will not be affected by the Convention. There is a proviso to this – which is in square brackets to indicate that it has not yet been agreed – that a judgment must not be recognised or enforced to a lesser extent than it would be under the Convention. If this proviso were not accepted, however, the Convention would be seriously undermined, since it would be possible for two Contracting States to apply an instrument that would block enforcement of a judgment under the Convention (for example, if it conflicted with a prior judgment given in contravention of an exclusive choice of court agreement), even if the judgment-creditor was resident in a Contracting State that was not a party to the instrument.

233 Article 23(5) applies only to international instruments “in force” between the State of origin and the requested State. It is not clear, though, at what time these instruments have to be in force in order not to be affected by the Convention. Article 30 of the *Vienna Convention on the Law of Treaties*, which contains a default rule on the relationship between successive treaties relating to the same subject matter, looks at the moment of adoption of the respective treaties in order to determine which is the earlier and which the later treaty.<sup>238</sup> States are free, however, to agree on different rules. In Hague Conventions, with the exception of four conventions (including the *Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*), the standard language does not normally refer to “earlier” and “later” treaties or to treaties “in force”, but to “conventions to which Contracting States are parties”. The point of reference is the moment when the convention containing the clause enters into force for the State concerned. Only conventions to which the State concerned is already a party when the new convention containing the clause enters into force would remain unaffected by it (unless the clause refers to “conventions to which Contracting States are or may become parties”).

234 Article 21(1) of the *Convention on Celebration and Recognition of the Validity of Marriages* uses the “in force” language and makes it explicit which is the relevant point in time. The provision reads: “The Convention shall not affect the application of any convention on the celebration or recognition of the validity of marriages to which a Contracting State is a Party at the time this Convention enters into force for that State.”

235 A. Malmström, in his Explanatory Report<sup>239</sup> on this provision, writes: “The first paragraph of Article 21 lays down a rule which is generally followed in previous Hague Conventions, namely that the Convention shall not affect the application of any convention containing provisions in the same field to which a Contracting State is a party at the time this new Convention enters into force for that State.”

236 *If this is what delegates intended, the language could be made more explicit by adopting a wording similar to Article 21 of the Convention on Celebration and Recognition of the Validity of Marriages.*

237 *The reference to “international instruments to which Contracting States are parties” in Article 23(2) and (4) may also require a similar clarification.*

238 Article 23(5) is based on the assumption that the recognition and enforcement of foreign judgments are always to be encouraged. In general this is true. However, there is an exception in the case of a judgment given in contravention of an exclusive choice of

<sup>238</sup> According to I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2<sup>nd</sup> ed. 1984, p. 98; M. Zuleeg, “Vertragskonkurrenz im Völkerrecht, Teil I: Verträge zwischen souveränen Staaten”, *German Yearbook of International Law* (GYIL) 20 (1977), p. 246 (256), it is the date of the adoption of the text and not that of its entry into force which is decisive.

<sup>239</sup> *Acts and Documents of the Thirteenth Session*, Tome III, *Marriage*, p. 312.

court agreement. *If Article 11 were to be adopted, the Conference would have to ensure that it was not undermined by Article 23(5).*<sup>240</sup> *This could be done by limiting Article 23(5) to judgments under an exclusive choice of court agreement.*

239 Article 23(6) is concerned with both past and future international instruments (instruments concluded or adopted before or after the Convention). It provides that the Convention does not affect the ability of a Contracting State to continue to apply, or to enter into, international instruments which govern jurisdiction and the recognition and enforcement of foreign judgments in relation to specific subject matters. It applies even if all the parties to the instrument are also parties to the Convention. It was intended to apply to matters similar to those excluded from the scope of the Convention under Article 2(2). Carriage of goods by road might be an example. There is no agreement so far, however, as to whether or not paragraph 6 should be subject to the rules in paragraphs 4 and 5. This disagreement is expressed by the square brackets at the beginning of the paragraph: if paragraph 6 were "subject to" paragraphs 4 and 5, those rules (and therefore in many cases the Convention) would prevail. If paragraph 6 could be applied "notwithstanding" paragraphs 4 and 5, an international instrument on specific subject matters would take precedence in every case. Since European Community legislation counts as an "international instrument", Article 23(6) would allow the European Community to opt out of the Convention in any area, if it wanted to lay down different provisions. Other parties to the Convention could not do this, however, without entering into an international agreement.

#### *Article 24 Signature, ratification, acceptance, approval or accession*

240 Article 24 is concerned with the ways in which a State may become a party to the Convention. Any State may become a party to it either by signature followed by ratification, acceptance or approval, or by accession. The relevant instruments are deposited with the Dutch Ministry of Foreign Affairs, the depositary of the Convention.

#### *Article 25 Non-unified legal system*<sup>241</sup>

241 Article 25 is concerned with States that consist of two or more territorial units. It permits such a State to declare that the Convention will extend only to some of its territorial units. Such a declaration may be modified at any time. This provision is particularly important for States in which the legislation necessary to give effect to the Convention would have to be passed by the legislatures of the units (for example, by provincial legislatures in Canada), though it could also be of use to other States. Thus, the United Kingdom could ratify for England only, and China for Hong Kong only.

#### *Article 26 Regional Economic Integration Organisations*

242 Article 26 is concerned with Regional Economic Integration Organisations. The European Community is an example of such an organisation. The purpose of Article 26 is to allow Regional Economic Integration Organisations to become parties to the Convention if they possess external competence over some or all of the matters covered by it. To the extent that it has such external competence, the Regional Economic Integration Organisation has the same rights and obligations as a Contracting State. Where this is the case, it must notify the depositary of the matters for which it has external competence, and of any changes in this regard.<sup>242</sup>

243 **Paragraphs 1–3.** Article 26 envisages two possible situations. The first is where both the Regional Economic Integration Organisation and its Member States become parties to the Convention. This might occur if they enjoy concurrent external competence

<sup>240</sup> See the comments in paragraphs 174 *et seq. supra*.

<sup>241</sup> *Since this title has already been used for Article 22, it might be better to choose another title.*

<sup>242</sup> Article 26(2).

over the subject matter of the Convention (joint competence), or if some matters fall within the external competence of the Regional Economic Integration Organisation and others within that of the Member States (which would result in shared or mixed competence for the Convention as a whole). In this situation, any instrument deposited by the Regional Economic Integration Organisation does not count in addition to those deposited by its Member States for the purpose of determining when the Convention enters into force.<sup>243</sup>

**244 Paragraph 4.** The second situation is where the Regional Economic Integration Organisation alone becomes a party. This will occur where it has exclusive external competence over the subject matter of the Convention. In such a case, the Member States would be bound by the Convention by virtue of the agreement of the Regional Economic Integration Organisation. The Regional Economic Integration Organisation may then declare that its Member States are bound by the Convention.<sup>244</sup> In such a case, a reference in the Convention to a Contracting State will include, where appropriate, a reference to the Member States of the Regional Economic Integration Organisation.

**245 Paragraph 5.** In any case in which a Regional Economic Integration Organisation is a party to the Convention, a reference to a Contracting State includes, where appropriate, a reference to the Regional Economic Integration Organisation (with all necessary modifications).<sup>245</sup> In particular, references to a Contracting State in Articles 1(2), 18 and 19 must be read as references to the Regional Economic Integration Organisation.

**246 Paragraph 6.** Article 26(6) provides that Article 9 does not apply to the recognition and enforcement of judgments in cases where the State of origin and the requested State are Member States of a Regional Economic Integration Organisation that is a party to the Convention and has made a declaration under Article 26(4). There is, however, a proviso to this provision that the judgment must not be recognised or enforced to a lesser extent than under the Convention. The proviso is in square brackets to indicate that it has not yet been agreed. If the proviso were not accepted, however, it would mean that a judgment given under the Convention in one Member State could not be enforced under the Convention in another. Indeed, it might not be enforced at all. For example, if a Japanese party agrees with an English party that a German court would have exclusive jurisdiction, a judgment given by the German court might not be enforceable in England,<sup>246</sup> though it would be enforceable in States outside the European Union. *Since Article 23(5) would apply to a Regional Economic Integration Organisation that was a party to the Convention and this covers all the ground covered by Article 26(6), the best solution would be to delete Article 26(6).*

#### *Article 27 Entry into force*

**247** Article 27 specifies when the Convention will enter into force. This will be on the first day of the month following the expiration of three months after the deposit of the [third]<sup>247</sup> instrument of ratification, acceptance, approval or accession. Further rules are laid down for when it comes into force for a given State, Regional Economic Integration Organisation or territorial unit.

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<sup>243</sup> Article 26(3).

<sup>244</sup> Article 26(4). This would be the case, for example, under Article 300(7) of the EC Treaty.

<sup>245</sup> Article 26(5).

<sup>246</sup> This would occur if a court in another EC State had given a prior judgment that was irreconcilable with the German judgment: Article 34(4) of the Brussels Regulation. The fact that such a judgment was contrary to both the Convention (Article 7) and to the Brussels Regulation (Article 23) would make no difference: the Brussels Regulation contains no provision prohibiting the recognition (or even permitting the non-recognition) of judgments given in contravention of an exclusive choice of court agreement.

<sup>247</sup> The required number of instruments deposited remains to be discussed, in particular with regard to Regional Economic Integration Organisations and their Member States.



*Article 28 Reservations*

248 This Article has not yet been adopted.

*Article 29 Declarations*

249 This Article has not yet been adopted.

*Article 30 Denunciation*

250 Article 30 provides that a Contracting State may denounce the Convention by a notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which the Convention applies. The denunciation takes effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

*Article 31 Notifications by the depositary*

251 Article 31 requires the depositary to notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded to the Convention, of various matters relevant to the Convention, such as signatures, ratifications, entry into force, declarations and denunciations.

## **A N N E X I**

### *The problem of flexibility*

Some delegates have suggested that an element of flexibility should be introduced into the Convention to allow States to deal with special problems. The purpose of this Annex I is to examine possible ways of doing this and to explore their consequences.

(a) **Validity: choice of law.** One suggestion was to delete the words “under the law of the State of the chosen court” in Article 7 *a*).<sup>1</sup> A similar deletion would have to be made in Article 9(1)(*a*). Contracting States would then apply their own law (possibly including their choice-of-law rules) to determine whether a choice of court agreement was valid. Since all the provisions of the Convention are dependent on the existence of a valid choice of court agreement, this would mean that the application of the Convention in a given State would be entirely dependent on the law of that State. A Contracting State could opt out of the Convention with regard to any matter by passing a law providing that choice of court agreements with regard to that matter were invalid. Thus, if it felt that the Convention should not apply to choice of court agreements concerning carriage of goods by road, it could pass a law saying that choice of court agreements were invalid in so far as they applied to carriage of goods by road.

Such a provision would make it possible to delete Article 20 (asbestos), since States wishing to exclude the application of the Convention to asbestos-related matters could adopt a law on the lines suggested above. Moreover, there are other States that wish to exclude the application of the Convention to other matters, such as natural resources and joint ventures.<sup>2</sup> They too could adopt legislation.

The proposal would also avoid the problem of Article 23(6). This provision could be deleted from the Convention, and the Contracting States in question could instead adopt legislation declaring choice of court agreements invalid with regard to the subject matter in question.

These features might make the proposal seem attractive. However, the proposal would have other consequences. Contracting States could also introduce (or retain) provisions making choice of court agreements valid only if reasonable.<sup>3</sup> They could even declare all choice of court agreements invalid if the chosen court was in a foreign State. Not only would this not constitute any advance on the present situation, it would even make things worse, since businessmen might be given a false sense of security.

Another feature of the proposal is that it could lead to an imbalance between the rights and obligations of different Contracting States. Let us take the example of two imaginary States that both become parties to the Convention. One, “Negatonia”, retains or adopts legislation making all choice of court agreements in favour of foreign courts invalid. It will never apply Article 7 or Article 9. The other State, “Positonia”, accepts choice of court agreements as valid except in the case of generally recognised grounds of invalidity such as fraud and duress. If the parties choose the courts of Positonia, the courts of Negatonia will nevertheless be entitled, consistently with the Convention, to hear the case: they will not be bound by Article 7, since the choice of court agreement will be invalid under their law. If a court in Positonia gives a judgment, Negatonia will not be obliged to recognise it: the choice of court agreement will be invalid under its law. On the other hand, if the

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<sup>1</sup> See footnote 3 to Article 7.

<sup>2</sup> See footnote 15 to Article 20.

<sup>3</sup> If the validity of a choice of court agreement was dependent on the general law of contract (as distinct from special rules applicable only to choice of court agreements), concepts such as fairness, justice or unequal bargaining power might also become relevant. Admittedly, this might also be the case under the law of the chosen court, but this would presumably be known to the parties when they chose that court.

parties choose the courts of Negatonia, and one of the parties brings proceedings before a court in Positonia, the latter would be required by Article 7 to decline jurisdiction: it would be bound by Article 7, since, under its law, the choice of court agreement would be valid. Moreover, if a court in Negatonia gave judgment, that judgment would have to be recognised in Positonia. In other words, if the proposal were accepted, Negatonia could gain all the advantages of the Convention without undertaking any obligations at all.

(b) **Declarations.** Another possibility would be to adopt a provision in the Convention permitting any Contracting State to make a declaration that it will not apply the Convention to a specific subject matter. In many ways, this would have the same effect.

It would also make it possible to delete Article 20, since a Contracting State could make a declaration that it will not apply the Convention to asbestos-related matters. Other Contracting States could make declarations regarding natural resources and joint ventures. This proposal would also make Article 23(6) unnecessary.

On the other hand, a system of declarations would make it possible to introduce an element of transparency. The Convention could provide that declarations would have to be made to the depositary who could be required to notify the Permanent Bureau and the States that are parties to the Convention. If suitable publicity were given to such declarations (for example, on the Permanent Bureau's website), it would be clear which States would not respect choice of court clauses with regard to any particular matter. The Convention could also provide that declarations would not take effect for 90 days after they were received by the depositary, and that they would not apply to choice of court agreements concluded before they took effect.<sup>4</sup>

The Convention could also provide that a Contracting State that made a declaration with regard to a given matter would be treated as a non-Contracting State with regard to that matter. This would eliminate the problem of non-reciprocity that could apply under the first proposal. Then, if one State made a declaration that it would not apply the Convention with regard to asbestos-related matters, other States would not be obliged to recognise that State's judgments in such cases, nor would their courts be obliged to decline jurisdiction if there was a choice of court agreement in favour of the courts of that State with regard to the matter covered by the declaration. This would discourage States from making declarations without good reason.

Such a system would not, however, be without drawbacks. For example, the declaration might be carefully worded to give the State making it almost all the benefits of the Convention without incurring many burdens. Other Contracting States might then be at a disadvantage. For example, the State of Ruritania might make a declaration covering "all contracts concerning widgets where the chosen court is outside Ruritania". If such a declaration were permitted, Ruritania would be entitled to refuse to recognise foreign judgments concerning widgets, but could still expect other States to recognise *its* judgments. In such a case, it might be reasonable to allow other States to treat Ruritania as a non-Contracting State with regard to *all* contracts concerning widgets, even those where the chosen court was in Ruritania.

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<sup>4</sup> This rule might not apply to declarations made when the State in question signs or ratifies the Convention.

(c) **Other possibilities.** Further suggestions are put forward in footnote 4 to Article 7 of the text of the preliminary draft Convention. This lists three possibilities. These are:

- i) giving effect to the agreement would lead to a very [~~delete:~~ **very**] serious injustice or would [**otherwise**] be manifestly contrary to fundamental principles of public policy of the State of the court seised;
- ii) under the mandatory rules on jurisdiction of the State of the court seised, the parties were unable to agree to exclude the jurisdiction of the courts of this State;
- iii) giving effect to the agreement would be manifestly contrary to public policy of the State of the court seised.

The proposals listed under sub-paragraphs (i) and (iii) do little more than tinker with the existing provisions. The proposal under sub-paragraph (ii), on the other hand, is much broader. It would have some of the same consequences as the first proposal discussed in this Annex (deleting the words “under the law of the State of the chosen court”), since a State could pass legislation precluding the parties from choosing a foreign court in a wide range of situations. However, it would be narrower in some respects since it would not necessarily bring in general grounds such as fairness.

## **ANNEX II**

**Commission spéciale sur la compétence,  
la reconnaissance et l'exécution des jugements  
étrangers en matière civile et commerciale  
(du 21 au 27 avril 2004)**

**Special Commission on Jurisdiction,  
Recognition and Enforcement of Foreign Judgments  
in Civil and Commercial Matters  
(21 to 27 April 2004)**

**Distribution:** May 2004

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**Proposal by the Drafting Committee**

**DRAFT ON EXCLUSIVE 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 exclusive 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 Exclusive Choice of Court Agreements* and have agreed upon the following provisions -

**CHAPTER I                      SCOPE AND DEFINITIONS**

*Article 1                      Scope*

1. The present Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters.
2. For the purposes of Chapter II, a case is international unless[ at the time the agreement is concluded][ and][ at the time of commencement of the proceedings] the parties are resident in the Contracting State of the court seised and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.
3. For the purposes of Chapter III, a case is international where recognition or enforcement of a foreign judgment is sought.

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\* This document reflects the changes made by the Drafting Committee at its meeting on 27 April 2004. Moreover, upon request of the Special Commission, the Permanent Bureau has aligned the English and French versions of this Document with the terminology traditionally used in Hague Conventions. Changes were made in agreement with the Chairman of the Drafting Committee.

## *Article 2 Exclusions from scope*

1. The Convention shall not apply to exclusive choice of court agreements -
  - a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party; or
  - b) relating to contracts of employment, including collective agreements.
2. The Convention shall not apply to the following matters -
  - a) the status and legal capacity of natural persons;
  - b) maintenance obligations;
  - c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
  - d) wills and succession;
  - e) insolvency, composition and analogous matters;
  - f) contracts for the carriage of passengers or goods by sea[, and other admiralty or maritime matters];
  - g) anti-trust (competition) matters;
  - h) liability for nuclear damage;
  - i) rights *in rem* in immovable property[ and tenancies of immovable property];
  - j) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
  - k) [intellectual property rights other than copyright or related rights, except in proceedings pursuant to a contract which licenses or assigns such intellectual property rights[ including proceedings for infringement of the right to which the contract relates]];<sup>1</sup> or
  - l) the validity of entries in public registers.
3. Notwithstanding paragraph 2, proceedings are not excluded from the scope of the Convention where a matter referred to in that paragraph arises merely as an incidental question and not as an object of the proceedings.
4. The Convention shall not apply to arbitration and related proceedings.
5. 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.
6. Nothing in this Convention affects the privileges and immunities of sovereign States or of entities of sovereign States, or of international organisations.

## *Article 3 Exclusive choice of court agreements*

For the purposes of this Convention,

- a) "exclusive choice of court agreement" means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts in one Contracting State to the exclusion of the jurisdiction of any other courts;

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<sup>1</sup> According to this draft, validity as a principal issue is excluded from the scope of the Convention.



- b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts in one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;
- c) an exclusive choice of court agreement must be entered into or evidenced –
  - i) in writing; or
  - ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;
- d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

#### *Article 4 Other definitions*

1. In this Convention “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 (including an officer of the court), provided that such determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

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

## **CHAPTER II JURISDICTION**

#### *Article 5 Jurisdiction of the chosen court*

1. The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.

2. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.

3. The preceding paragraphs shall not affect rules -

- a) on jurisdiction related to subject matter or to the value of the claim; or
- b) on the internal allocation of jurisdiction among the courts of a Contracting State[ unless the parties designated a specific court].<sup>2</sup>

#### *[Article 6 Stay of proceedings in the chosen court]*

Nothing in this Convention shall prevent the chosen court from suspending or dismissing the proceedings before it, in particular in order to allow the courts of the State under the law of which an intellectual property right arose, to give a judgment on its validity, provided that such dismissal does not prevent the proceedings from being recommenced.]

<sup>2</sup> If the bracketed language in Article 5, paragraph 3 b) is not retained, the question of whether Articles 7 and 9 should apply where a case has been transferred by the chosen court to another court in the same Contracting State remains to be considered. See the bracketed language in Articles 7 e) and 9, paragraph 1 *bis*.

## *Article 7                      Obligations of a court not chosen*

If the parties have entered into an exclusive choice of court agreement, any court in a Contracting State other than that of the chosen court shall suspend or dismiss the proceedings unless –

- a) the agreement is null and void under the law of the State of the chosen court;<sup>3</sup>
- b) a party lacked the capacity to enter into the agreement under the law of the State of the court seised;
- c) giving effect to the agreement would lead to a very serious injustice or would be manifestly contrary to fundamental principles of public policy of the State of the court seised;<sup>4</sup>
- d) for exceptional reasons, the agreement cannot reasonably be performed;<sup>5</sup> or
- e) the chosen court has decided not to hear the case[, except where it has transferred the case to another court of the same State as permitted by Article 5, paragraph 3 b)]<sup>6</sup>.

## *Article 8                      Interim measures of protection*

Interim measures of protection are not governed by this Convention. This Convention neither requires nor precludes the grant of interim measures of protection by a Court of a Contracting State and does not affect whether or not a party may request or a court should grant such measures.

## **CHAPTER III                      RECOGNITION AND ENFORCEMENT**

### *Article 9                      Recognition and enforcement*

1. A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the following grounds<sup>7</sup> -

- a) the agreement was null and void under the law of the State of the chosen court<sup>8</sup>, unless the chosen court has determined that the agreement is valid;
- b) a party lacked the capacity to enter into the agreement under the law of the requested State;
- c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,

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<sup>3</sup> The policy issues related to this matter need further consideration. It has been proposed to delete the words "under the law of the State of the chosen court". It has also been proposed to add the words "on any ground, including incapacity".

<sup>4</sup> The policy issues related to this matter need further consideration. The various options proposed are reflected in the following proposals:

- i) giving effect to the agreement would lead to a very [delete: very] serious injustice or would[ otherwise] be manifestly contrary to fundamental principles of public policy of the State of the court seised;
- ii) under the mandatory rules on jurisdiction of the State of the court seised, the parties were unable to agree to exclude the jurisdiction of the courts of this State;
- iii) giving effect to the agreement would be manifestly contrary to public policy of the State of the court seised.

<sup>5</sup> It has been proposed to delete this provision; a decision on this proposal is linked to the final wording of paragraph c).

<sup>6</sup> This provision is linked to the policy decision to be taken on the bracketed part of Article 5, paragraph 3 and to the language in square brackets in Article 9, paragraph 1 *bis*.

<sup>7</sup> Further consideration is required as to whether the matters covered by Article 7 c) and d) are adequately reflected in this paragraph.

<sup>8</sup> It has been proposed to add the words "on any ground, including incapacity".

- i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested, or
  - ii) was notified to the defendant in the requested State in a manner that violated the public policy of that State;
- d) the judgment was obtained by fraud in connection with a matter of procedure;
- e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State; or
- f) the judgment is inconsistent with a judgment given in a dispute between the same parties in the requested State, or it is inconsistent with an earlier judgment given in another State between the same parties and involving the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State[ under an international agreement], and provided that the inconsistent judgment was not given in contravention of this Convention.

[1 *bis*. Paragraph 1 shall also apply to a judgment given by a court of a Contracting State pursuant to a transfer of the case from the chosen court in that Contracting State as permitted by Article 5, paragraph 3 *b*).]<sup>9</sup>

2. Without prejudice to such review as is necessary for 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. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.

3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

4. Recognition or enforcement may be postponed or refused 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. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.

#### *Article 10 Incidental questions*<sup>10</sup>

1. Where a matter referred to in Article 2, paragraph 2, arose as an incidental question, the ruling on that question shall not be recognised and enforced under this Convention.

[2. Where an incidental ruling on the validity of an intellectual property right other than copyright or related rights was necessary for the judgment of the court of origin, recognition or enforcement of the judgment may be refused to the extent that it is inconsistent with a judgment<sup>11</sup> on the validity of the intellectual property right rendered in the State under the law of which the intellectual property right arose.<sup>12</sup>]

<sup>9</sup> This provision is linked to the policy decision to be taken on the bracketed part of Article 5, paragraph 3 and to the language in square brackets in Article 7 e).

<sup>10</sup> It was proposed to add a new paragraph 4 as follows: "The preceding paragraphs 2 and 3 shall apply *mutatis mutandis* to the matters provided for in Article 2, paragraph 2 to the extent that a judgment on such matters has effect not only as between the parties but also as regards all other persons."

<sup>11</sup> It is recalled that the definition of "judgment" in Article 4, paragraph 1 includes a decision of a patent office or other authority exercising functions of a court.

<sup>12</sup> The relationship of this provision with Article 9, paragraph 1 *f*) requires further consideration.

[3. Where an incidental ruling on the validity of an intellectual property right other than copyright or related rights was necessary for the judgment of the court of origin, recognition or enforcement of the judgment may be postponed or refused at the request of one of the parties if proceedings on validity are pending in the State under the law of which the intellectual property right arose. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.]

*[Article 11 Judgments in contravention of exclusive choice of court agreements]*

The provisions of Article 7 shall also apply to proceedings for recognition or enforcement of a judgment rendered in contravention of an exclusive choice of court agreement.<sup>13]</sup>

*Article 12 Settlements*

Settlements which a court of a Contracting State designated in an exclusive choice of court agreement has approved, or which have been concluded before that court in the course of proceedings, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment.

*Article 13 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) the exclusive choice of court agreement, or evidence of its existence;
  - c) 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;
  - d) all documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;
  - e) in the case referred to in Article 12, a certificate of the court of origin that the settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.
2. 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 any necessary documents.
3. An application for recognition or enforcement may be accompanied by a form recommended and published by the Hague Conference on Private International Law.
4. The court addressed may require a translation of any document referred to in this Article.

*Article 14 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 requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.

*Article 15 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 requested State 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.

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<sup>13</sup> The intention of this provision is to prevent recognition or enforcement of judgments given in either Contracting or non-Contracting States in contravention of an exclusive choice of court agreement, save where the exceptions in Article 7 apply. The policy and the drafting require further consideration.

2. a) Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, recognition and enforcement may be limited to a lesser amount.
  - b) In no event shall the court addressed recognise or enforce the judgment for an amount less than that which could have been awarded in the requested State in the same circumstances, including those existing in the State of origin.<sup>14</sup>
3. In applying the preceding paragraphs, 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 16 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.

### **CHAPTER IV GENERAL CLAUSES**

#### *Article 17 No legalisation*

All documents forwarded or delivered under this Convention shall be exempt from legalisation[ or *apostille*][ or any analogous formality].

#### *Article 18 Limitation of jurisdiction*

Upon ratification, acceptance, approval or accession, a State may declare that its courts may refuse to determine disputes covered by an exclusive choice of court agreement if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.

#### *Article 19 Limitation of recognition and enforcement*

Upon ratification, acceptance, approval or accession, a State may declare that its courts may refuse to recognise or enforce a judgment of a court in another Contracting State if the parties are resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, are connected only with the requested State, at the time the agreement is concluded.

#### *Article 20 Limitation with respect to asbestos related matters*

Upon ratification, acceptance, approval or accession, a State may declare that it will not apply the provisions of the Convention to exclusive choice of court agreements in asbestos related matters.<sup>15</sup>

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<sup>14</sup> It was proposed that paragraph 2 be deleted.

<sup>15</sup> Some delegations have proposed that further specific subject matters should be referred to in this provision, such as natural resources and joint ventures. These proposals are linked to issues that arise in relation to Articles 7 and 9.

*Article 21 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 22 Non-unified legal system*

1. In relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to any matter dealt with in this Convention –

- a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;
- b) any reference to residence in a State shall be construed as referring, where appropriate, to residence in the relevant territorial unit;
- c) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;
- d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.

2. Notwithstanding the preceding paragraph, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which, including the location of the chosen court,<sup>16</sup> involve solely such different territorial units.

3. A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced by a court in another territorial unit of the same Contracting State under this Convention.

*Article 23 Relationship with other international instruments*

1. For the purposes of this Article, "international instrument" means an international treaty or rules made by an international organisation under an international treaty.

2. Subject to paragraphs 4 and 5, this Convention does not affect any international instrument to which Contracting States are parties and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the Contracting States bound by such instrument.

3. This Convention does not affect the ability of one or more Contracting States to enter into international instruments which contain provisions on matters governed by this Convention, provided that these instruments do not affect, in the relationship of such Contracting States with other Contracting States, the application of the provisions of this Convention.

4. Where a Contracting State is also a party to an international instrument which contains provisions on matters governed by this Convention, this Convention shall prevail in matters relating to jurisdiction except where –

- a) the chosen court is situated in a State in which the instrument is applicable; and
- b) all the parties are resident[ only] either in a State in which the instrument is applicable or in a non-Contracting State.<sup>17</sup>

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<sup>16</sup> Where the chosen court is located in another Contracting State, Article 19 applies.

<sup>17</sup> The policy and drafting of this paragraph requires further discussion. One result of the present draft is that the Convention prevails where the chosen court is in a Contracting State in which the instrument is applicable, one party is resident in a Contracting State in which the instrument is not applicable, and the other party is resident in a non-Contracting State in which the instrument is applicable. It was proposed that the Convention should not seek to prevail over other instruments binding a Contracting State in its relations with non-Contracting States. An alternative approach would be to replace paragraph 4 b) with the following: "b) a party

5. This Convention shall not restrict the application of an international instrument in force between the State of origin and the requested State for the purposes of obtaining recognition or enforcement of a judgment. [However the judgment shall not be recognised or enforced to a lesser extent than under this Convention.]

6. [Notwithstanding] [Subject to] paragraphs 4 and 5, this Convention does not affect the ability of one or more Contracting States to continue to apply or to enter into international instruments which, in relation to specific subject matters, govern jurisdiction or the recognition or enforcement of judgments, even if all States concerned are parties to this Convention.

## **CHAPTER V                      FINAL CLAUSES**

### *Article 24                      Signature, ratification, acceptance, approval or accession*

1. The Convention is open for signature by all States.
2. The Convention is subject to ratification, acceptance or approval by the signatory States.
3. The Convention is open for accession by all States which are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

### *Article 25                      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 26                      Regional Economic Integration Organisations*

1. A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over some or all of the matters governed by this Convention may equally sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.
2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

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is resident in a non-Contracting State in which the instrument is applicable, or there is some other relevant connection between the parties or the dispute and such a State."

3. For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted as additional to any instruments deposited by its Member States.

4. At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that its Member States, by virtue of the law of the Organisation, are bound by this Convention. In this case, a reference to a Contracting State includes, where appropriate, a reference to the Member States of the Organisation[ in accordance with Article 22].

5. A reference to a Contracting State in this Convention includes, where appropriate, a reference to a Regional Economic Integration Organisation that is a party to this Convention, with all necessary modifications. In particular, references to a Contracting State in Articles 1, paragraph 2, 18 and 19 shall be read as references to the Regional Economic Integration Organisation.

6. Article 9 shall not apply to the recognition and enforcement of judgments in cases where the State of origin and the requested State are Member States of a Regional Economic Integration Organisation that is a party to this Convention and has made a declaration under paragraph 4. [However the judgment shall not be recognised or enforced to a lesser extent than under this Convention.]

#### *Article 27 Entry into force*

1. This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the [third]<sup>18</sup> instrument of ratification, acceptance, approval or accession referred to in Article 24.

2. Thereafter this Convention shall enter into force –

- a) for each State or Regional Economic Integration Organisation referred to in Article 26 subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
- b) for a territorial unit to which this Convention has been extended in accordance with Article 25, paragraph 1, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

#### *Article 28 Reservations*

#### *Article 29 Declarations*

#### *Article 30 Denunciation*

1. A Contracting State may denounce this Convention by a notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

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<sup>18</sup> The required number of instruments deposited remains to be discussed, in particular with regard to Regional Economic Integration Organisations and their Member States.



*Article 31            Notifications by the depositary*

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 24 and 26, of the following –

- a) the signatures and ratifications, acceptances, approvals and accessions referred to in Articles 24 and 26;
- b) the date on which this Convention enters into force in accordance with Article 27;
- c) the notifications, declarations and withdrawals of declarations referred to in Articles 18, 19, 20, 23, paragraph 2, 25, paragraph 1, and 26, paragraphs 2 and 4;
- d) the denunciations referred to in Article 30.

## RECOMMENDED FORM

(Sample form confirming the issuance and content of a judgment by the Court of Origin for the purposes of recognition and enforcement under the Convention on Exclusive 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) .....

CASE / DOCKET NUMBER: .....

\_\_\_\_\_(PLAINTIFF)

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 on an exclusive choice of court agreement:

YES\_\_\_\_\_ NO\_\_\_\_\_

If so, the agreement was found in or evidenced by the following document(s):

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 a part thereof) is currently the subject of review in (STATE OF THE COURT OF ORIGIN):

YES\_\_\_\_\_ NO\_\_\_\_\_

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

YES\_\_\_\_\_ NO\_\_\_\_\_

*List of documents annexed:*

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Signature and/or stamp by an officer of the Court