

**AVANT-PROJET DE CONVENTION SUR LA COMPÉTENCE ET LES JUGEMENTS ÉTRANGERS
EN MATIÈRE CIVILE ET COMMERCIALE**

adopté par la Commission spéciale

et

RAPPORT DE PETER NYGH ET FAUSTO POCAR

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

adopted by the Special Commission

and

REPORT BY PETER NYGH AND FAUSTO POCAR

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**PRELIMINARY DRAFT CONVENTION ON JURISDICTION
AND FOREIGN JUDGMENTS
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**adopted by the Special Commission
on 30 October 1999**

amended version (new numbering of articles)

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CHAPTER I – SCOPE OF THE CONVENTION

Article 1 Substantive scope

1. The Convention applies to civil and commercial matters. It shall not extend in particular to revenue, customs or administrative matters.
2. The Convention does not apply to –
 - a) the status and legal capacity of natural persons;
 - b) maintenance obligations;
 - c) matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships;
 - d) wills and succession;
 - e) insolvency, composition or analogous proceedings;
 - f) social security;
 - g) arbitration and proceedings related thereto;
 - h) admiralty or maritime matters.
3. A dispute is not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any other person acting for the State is a party thereto.
4. Nothing in this Convention affects the privileges and immunities of sovereign States or of entities of sovereign States, or of international organisations.

Article 2 Territorial scope

1. The provisions of Chapter II shall apply in the courts of a Contracting State unless all the parties are habitually resident in that State. However, even if all the parties are habitually resident in that State –
 - a) Article 4 shall apply if they have agreed that a court or courts of another Contracting State have jurisdiction to determine the dispute;

¹ The Special Commission has considered whether the provisions of the preliminary draft Convention meet the needs of e-commerce. This matter will be further examined by a group of specialists in this field who will meet early in the year 2000.

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

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

CHAPTER II - JURISDICTION

Article 3 Defendant's forum

1. Subject to the provisions of the Convention, a defendant may be sued in the courts of the State where that defendant is habitually resident.

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

- a) where it has its statutory seat,
- b) under whose law it was incorporated or formed,
- c) where it has its central administration, or
- d) where it has its principal place of business.

Article 4 Choice of court

1. If the parties have agreed that a court or courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, and that jurisdiction shall be exclusive unless the parties have agreed otherwise. Where an agreement having exclusive effect designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction.

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

- a) in writing;
- b) by any other means of communication which renders information accessible so as to be usable for subsequent reference;
- c) in accordance with a usage which is regularly observed by the parties;
- d) in accordance with a usage of which the parties were or ought to have been aware and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.

3. Agreements conferring jurisdiction and similar clauses in trust instruments shall be without effect if they conflict with the provisions of Article 7, 8 or 12.

Article 5 Appearance by the defendant

1. Subject to Article 12, a court has jurisdiction if the defendant proceeds on the merits without contesting jurisdiction.
2. The defendant has the right to contest jurisdiction no later than at the time of the first defence on the merits.

Article 6 Contracts

A plaintiff may bring an action in contract in the courts of a State in which –

- a) in matters relating to the supply of goods, the goods were supplied in whole or in part;
- b) in matters relating to the provision of services, the services were provided in whole or in part;
- c) in matters relating both to the supply of goods and the provision of services, performance of the principal obligation took place in whole or in part.

Article 7 Contracts concluded by consumers

1. A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the courts of the State in which it is habitually resident, if
 - a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and
 - b) the consumer has taken the steps necessary for the conclusion of the contract in that State.
2. A claim against the consumer may only be brought by a person who entered into the contract in the course of its trade or profession before the courts of the State of the habitual residence of the consumer.
3. The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court –
 - a) if such agreement is entered into after the dispute has arisen, or
 - b) to the extent only that it allows the consumer to bring proceedings in another court.

Article 8 Individual contracts of employment

1. In matters relating to individual contracts of employment –
 - a) an employee may bring an action against the employer,
 - i) in the courts of the State in which the employee habitually carries out his work or in the courts of the last State in which he did so, or

- ii) if the employee does not or did not habitually carry out his work in any one State, in the courts of the State in which the business that engaged the employee is or was situated;
 - b) a claim against an employee may be brought by the employer only,
 - i) in the courts of the State where the employee is habitually resident, or
 - ii) in the courts of the State in which the employee habitually carries out his work.
2. The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court –
- a) if such agreement is entered into after the dispute has arisen, or
 - b) to the extent only that it allows the employee to bring proceedings in courts other than those indicated in this Article or in Article 3 of the Convention.

Article 9 Branches [and regular commercial activity]

A plaintiff may bring an action in the courts of a State in which a branch, agency or any other establishment of the defendant is situated, [or where the defendant has carried on regular commercial activity by other means,] provided that the dispute relates directly to the activity of that branch, agency or establishment [or to that regular commercial activity].

Article 10 Torts or delicts

1. A plaintiff may bring an action in tort or delict in the courts of the State –
 - a) in which the act or omission that caused injury occurred, or
 - b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.
2. Paragraph 1 b) shall not apply to injury caused by anti-trust violations, in particular price-fixing or monopolisation, or conspiracy to inflict economic loss.
3. A plaintiff may also bring an action in accordance with paragraph 1 when the act or omission, or the injury may occur.
4. If an action is brought in the courts of a State only on the basis that the injury arose or may occur there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the injured person has his or her habitual residence in that State.

Article 11 Trusts

1. In proceedings concerning the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, the courts of a Contracting State designated in the trust instrument for this purpose shall have exclusive jurisdiction. Where the trust instrument designates a court or courts of a

non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction.

2. In the absence of such designation, proceedings may be brought before the courts of a State –

- a) in which is situated the principal place of administration of the trust;
- b) whose law is applicable to the trust;
- c) with which the trust has the closest connection for the purpose of the proceedings.

Article 12 Exclusive jurisdiction

1. In proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated have exclusive jurisdiction, unless in proceedings which have as their object tenancies of immovable property, the tenant is habitually resident in a different State.

2. In proceedings which have as their object the validity, nullity, or dissolution of a legal person, or the validity or nullity of the decisions of its organs, the courts of a Contracting State whose law governs the legal person have exclusive jurisdiction.

3. In proceedings which have as their object the validity or nullity of entries in public registers, the courts of the Contracting State in which the register is kept have exclusive jurisdiction.

4. In proceedings which have as their object the registration, validity, [or] nullity[, or revocation or infringement,] of patents, trade marks, designs or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or, under the terms of an international convention, is deemed to have taken place, have exclusive jurisdiction. This shall not apply to copyright or any neighbouring rights, even though registration or deposit of such rights is possible.

[5. In relation to proceedings which have as their object the infringement of patents, the preceding paragraph does not exclude the jurisdiction of any other court under the Convention or under the national law of a Contracting State.]

[6. The previous paragraphs shall not apply when the matters referred to therein arise as incidental questions.]

Article 13 Provisional and protective measures

1. A court having jurisdiction under Articles 3 to 12 to determine the merits of the case has jurisdiction to order any provisional or protective measures.

2. The courts of a State in which property is located have jurisdiction to order any provisional or protective measures in respect of that property.

3. A court of a Contracting State not having jurisdiction under paragraphs 1 or 2 may order provisional or protective measures, provided that –

- a) their enforcement is limited to the territory of that State, and

- b) their purpose is to protect on an interim basis a claim on the merits which is pending or to be brought by the requesting party.

Article 14 Multiple defendants

1. A plaintiff bringing an action against a defendant in a court of the State in which that defendant is habitually resident may also proceed in that court against other defendants not habitually resident in that State if –

- a) the claims against the defendant habitually resident in that State and the other defendants are so closely connected that they should be adjudicated together to avoid a serious risk of inconsistent judgments, and
- b) as to each defendant not habitually resident in that State, there is a substantial connection between that State and the dispute involving that defendant.

2. Paragraph 1 shall not apply to a codefendant invoking an exclusive choice of court clause agreed with the plaintiff and conforming with Article 4.

Article 15 Counter-claims

A court which has jurisdiction to determine a claim under the provisions of the Convention shall also have jurisdiction to determine a counter-claim arising out of the transaction or occurrence on which the original claim is based.

Article 16 Third party claims

1. A court which has jurisdiction to determine a claim under the provisions of the Convention shall also have jurisdiction to determine a claim by a defendant against a third party for indemnity or contribution in respect of the claim against that defendant to the extent that such an action is permitted by national law, provided that there is a substantial connection between that State and the dispute involving that third party.

2. Paragraph 1 shall not apply to a third party invoking an exclusive choice of court clause agreed with the defendant and conforming with Article 4.

Article 17 Jurisdiction based on national law

Subject to Articles 4, 5, 7, 8, 12 and 13, the Convention does not prevent the application by Contracting States of rules of jurisdiction under national law, provided that this is not prohibited under Article 18.

Article 18 Prohibited grounds of jurisdiction

1. Where the defendant is habitually resident in a Contracting State, the application of a rule of jurisdiction provided for under the national law of a Contracting State is prohibited if there is no substantial connection between that State and the dispute.

2. In particular, jurisdiction shall not be exercised by the courts of a Contracting State on the basis solely of one or more of the following –

- a) the presence or the seizure in that State of property belonging to the defendant, except where the dispute is directly related to that property;

- b) the nationality of the plaintiff;
- c) the nationality of the defendant;
- d) the domicile, habitual or temporary residence, or presence of the plaintiff in that State;
- e) the carrying on of commercial or other activities by the defendant in that State, except where the dispute is directly related to those activities;
- f) the service of a writ upon the defendant in that State;
- g) the unilateral designation of the forum by the plaintiff;
- h) proceedings in that State for declaration of enforceability or registration or for the enforcement of a judgment, except where the dispute is directly related to such proceedings;
- i) the temporary residence or presence of the defendant in that State;
- j) the signing in that State of the contract from which the dispute arises.

3. Nothing in this Article shall prevent a court in a Contracting State from exercising jurisdiction under national law in an action [seeking relief] [claiming damages] in respect of conduct which constitutes –

Variant One:

- [a) genocide, a crime against humanity or a war crime[, as defined in the Statute of the International Criminal Court]; or]
- [b) a serious crime against a natural person under international law; or]
- [c) a grave violation against a natural person of non-derogable fundamental rights established under international law, such as torture, slavery, forced labour and disappeared persons].

[Sub-paragraphs [b) and] c) above apply only if the party seeking relief is exposed to a risk of a denial of justice because proceedings in another State are not possible or cannot reasonably be required.]

Variant Two:

a serious crime under international law, provided that this State has established its criminal jurisdiction over that crime in accordance with an international treaty to which it is a party and that the claim is for civil compensatory damages for death or serious bodily injury arising from that crime.]

Article 19 Authority of the court seised

Where the defendant does not enter an appearance, the court shall verify whether Article 18 prohibits it from exercising jurisdiction if –

- a) national law so requires; or
- b) the plaintiff so requests; or

- [c) the defendant so requests, even after judgment is entered in accordance with procedures established under national law; or]
 - [d) the document which instituted the proceedings or an equivalent document was served on the defendant in another Contracting State.]
- or
- [d) it appears from the documents filed by the plaintiff that the defendant's address is in another Contracting State.]

Article 20

1. The court shall stay the proceedings so long as it is not established that the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, or that all necessary steps have been taken to that effect.

[2. Paragraph 1 shall not affect the use of international instruments concerning the service abroad of judicial and extrajudicial documents in civil or commercial matters, in accordance with the law of the forum.]

[3. Paragraph 1 shall not apply, in case of urgency, to any provisional or protective measures.]

Article 21 Lis pendens

1. When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 or 12.

2. The court second seised shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention.

3. Upon application of a party, the court second seised may proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.

4. The provisions of the preceding paragraphs apply to the court second seised even in a case where the jurisdiction of that court is based on the national law of that State in accordance with Article 17.

5. For the purpose of this Article, a court shall be deemed to be seised –

- a) when the document instituting the proceedings or an equivalent document is lodged with the court, or
- b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant.

[As appropriate, universal time is applicable.]

6. If in the action before the court first seised the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court second seised –

- a) the provisions of paragraphs 1 to 5 above shall not apply to the court second seised, and
- b) the court first seised shall suspend the proceedings at the request of a party if the court second seised is expected to render a decision capable of being recognised under the Convention.

7. This Article shall not apply if the court first seised, on application by a party, determines that the court second seised is clearly more appropriate to resolve the dispute, under the conditions specified in Article 22.

Article 22 Exceptional circumstances for declining jurisdiction

1. In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 12, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defence on the merits.

2. The court shall take into account, in particular –

- a) any inconvenience to the parties in view of their habitual residence;
- b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;
- c) applicable limitation or prescription periods;
- d) the possibility of obtaining recognition and enforcement of any decision on the merits.

3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.

4. If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits. However, it shall make such an order if the other court has jurisdiction only under Article 17, unless the defendant establishes that sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced.

5. When the court has suspended its proceedings under paragraph 1,

- a) it shall decline to exercise jurisdiction if the court of the other State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court, or
- b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.

Article 23 Definition of "judgment"

For the purposes of this Chapter, "judgment" means –

- a) any decision given by a court, whatever it may be called, including a decree or order, as well as the determination of costs or expenses by an officer of the court, provided that it relates to a decision which may be recognised or enforced under the Convention;
- b) decisions ordering provisional or protective measures in accordance with Article 13, paragraph 1.

Article 24 Judgments excluded from Chapter III

This Chapter shall not apply to judgments based on a ground of jurisdiction provided for by national law in accordance with Article 17.

Article 25 Judgments to be recognised or enforced

1. A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognised or enforced under this Chapter.
2. In order to be recognised, a judgment referred to in paragraph 1 must have the effect of *res judicata* in the State of origin.
3. In order to be enforceable, a judgment referred to in paragraph 1 must be enforceable in the State of origin.
4. However, recognition or enforcement may be postponed if the judgment is the subject of review in the State of origin or if the time limit for seeking a review has not expired.

Article 26 Judgments not to be recognised or enforced

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

Article 27 Verification of jurisdiction

1. The court addressed shall verify the jurisdiction of the court of origin.
2. In verifying the jurisdiction of 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. Recognition or enforcement of a judgment may not be refused on the ground that the court addressed considers that the court of origin should have declined jurisdiction in accordance with Article 22.

Article 28 Grounds for refusal of recognition or enforcement

1. Recognition or enforcement of a judgment may be refused if –

- a) proceedings between the same parties and having the same subject matter are pending before a court of the State addressed, if first seised in accordance with Article 21;
- b) the judgment is inconsistent with a judgment rendered, either in the State addressed or in another State, provided that in the latter case the judgment is capable of being recognised or enforced in the State addressed;
- c) the judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed, including the right of each party to be heard by an impartial and independent court;
- d) 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;
- e) the judgment was obtained by fraud in connection with a matter of procedure;
- f) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.

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

Article 29 Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce –
 - a) a complete and certified copy of the judgment;
 - b) if the judgment was rendered by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
 - c) all documents required to establish that the judgment is *res judicata* in the State of origin or, as the case may be, is enforceable in that State;
 - d) if the court addressed so requires, a translation of the documents referred to above, made by a person qualified to do so.
2. No legalisation or similar formality may be required.
3. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require the production of any other necessary documents.

Article 30 Procedure

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

Article 31 Costs of proceedings

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

Article 32 Legal aid

Natural persons habitually resident in a Contracting State shall be entitled, in proceedings for recognition or enforcement, to legal aid under the same conditions as apply to persons habitually resident in the requested State.

Article 33 Damages

1. In so far as a judgment awards non-compensatory, including exemplary or punitive, damages, it shall be recognised at least to the extent that similar or comparable damages could have been awarded in the State addressed.

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 may be limited to a lesser amount.

b) In no event shall the court addressed recognise the judgment in an amount less than that which could have been awarded in the State addressed in the same circumstances, including those existing in the State of origin.

3. In applying paragraph 1 or 2, the court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 34 Severability

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

Article 35 Authentic instruments

1. Each Contracting State may declare that it will enforce, subject to reciprocity, authentic instruments formally drawn up or registered and enforceable in another Contracting State.

2. The authentic instrument must have been authenticated by a public authority or a delegate of a public authority and the authentication must relate to both the signature and the content of the document.

[3. The provisions concerning recognition and enforcement provided for in this Chapter shall apply as appropriate.]

Article 36 Settlements

Settlements to which a court has given its authority shall be recognised, declared enforceable or registered for enforcement in the State addressed under the same conditions as judgments falling within the Convention, so far as those conditions apply to settlements.

CHAPTER IV – GENERAL PROVISIONS

Article 37 Relationship with other conventions

[See annex]

Article 38 Uniform interpretation

1. In the interpretation of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application.
2. The courts of each Contracting State shall, when applying and interpreting the Convention, take due account of the case law of other Contracting States.

[Article 39

1. Each Contracting State shall, at the request of the Secretary General of the Hague Conference on Private International Law, send to the Permanent Bureau at regular intervals copies of any significant decisions taken in applying the Convention and, as appropriate, other relevant information.
2. The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission to review the operation of the Convention.
3. The Commission may make recommendations on the application or interpretation of the Convention and may propose modifications or revisions of the Convention or the addition of protocols.]

[Article 40

1. Upon a joint request of the parties to a dispute in which the interpretation of the Convention is at issue, or of a court of a Contracting State, the Permanent Bureau of the Hague Conference on Private International Law shall assist in the establishment of a committee of experts to make recommendations to such parties or such court.
- [2. The Secretary General of the Hague Conference on Private International Law shall, as soon as possible, convene a Special Commission to draw up an optional protocol setting out rules governing the composition and procedures of the committee of experts.]]

Article 41 Federal clause

ANNEX

Article 37 Relationship with other conventions

PROPOSAL 1

1. The Convention does not affect any international instrument to which Contracting States are or become Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.
2. However, the Convention prevails over such instruments to the extent that they provide for fora not authorized under the provisions of Article 18 of the Convention.
3. The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned and to instruments adopted by a community of States.

PROPOSAL 2

1.
 - a) In this Article, the Brussels Convention [as amended], Regulation [...] of the European Union, and the Lugano Convention [as amended] shall be collectively referred to as "the European instruments".
 - b) A State party to either of the above Conventions or a Member State of the European Union to which the above Regulation applies shall be collectively referred to as "European instrument States".
2. Subject to the following provisions [of this Article], a European instrument State shall apply the European instruments, and not the Convention, whenever the European instruments are applicable according to their terms.
3. Except where the provisions of the European instruments on –
 - a) exclusive jurisdiction;
 - b) prorogation of jurisdiction;
 - c) *lis pendens* and related actions;
 - d) protective jurisdiction for consumers or employees;
 are applicable, a European instrument State shall apply Articles 3, 5 to 11, 14 to 16 and 18 of the Convention whenever the defendant is not domiciled in a European instrument State.
4. Even if the defendant is domiciled in a European instrument State, a court of such a State shall apply –
 - a) Article 4 of the Convention whenever the court chosen is not in a European instrument State;
 - b) Article 12 of the Convention whenever the court with exclusive jurisdiction under that provision is not in a European instrument State; and
 - c) Articles 21 and 22 of this Convention whenever the court in whose favour the proceedings are stayed or jurisdiction is declined is not a court of a European instrument State.

Note: Another provision will be needed for other conventions and instruments.

PROPOSAL 3

5. Judgments of courts of a Contracting State to this Convention based on jurisdiction granted under the terms of a different international convention ("other Convention") shall be recognised and enforced in courts of Contracting States to this Convention which are also Contracting States to the other Convention. This provision shall not apply if, by reservation under Article ..., a Contracting State chooses –

- a)* not to be governed by this provision, or
- b)* not to be governed by this provision as to certain designated other conventions.

REPORT OF THE SPECIAL COMMISSION

drawn up by Peter Nygh and Fausto Pocar

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REPORT OF THE SPECIAL COMMISSION

drawn up by Peter Nygh and Fausto Pocar

INTRODUCTION

On 19 October 1996, the States represented at the Eighteenth Session of the Hague Conference on Private International Law decided:

"... to include in the Agenda of the Nineteenth Session the question of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters".²

This decision was preceded by work done in the Conference in previous years, subsequent to a Decision by its Seventeenth Session to request the Secretary General to convene a Special Commission to study the problems raised by the preparation of a new Convention on the recognition and enforcement of judgments in civil and commercial matters, to replace the Convention of 1 February 1971 which had not been entirely successful.³ The Special Commission held two meetings, on 20-24 June 1994 and 4-7 June 1996, at which it considered several aspects of the subject⁴ and proposed including it in the future programme of work of the Conference.

In accordance with the Decision of the Eighteenth Session of the Conference, the Permanent Bureau established a Special Commission which held five meetings: 17-27 June 1997, 3-13 March 1998, 10-20 November 1998, 7-18 June 1999 and 25-30 October 1999.

The Special Commission appointed as Chairman M.T. Bradbrooke Smith, Expert from Canada, as Vice-Chairmen Andreas Bucher, Expert from Switzerland, Masato Dogauchi, Expert from Japan, Jeffrey D. Kovar, Expert from the United States, José-Luis Siqueiros, Expert from Mexico; and as Co-Reporters Peter Nygh, Expert from Australia, and Fausto Pocar, Expert from Italy.

The work of the Special Commission was greatly facilitated by the following excellent Preliminary Documents, drawn up by Madame Catherine Kessedjian, Deputy Secretary General:

- International jurisdiction and foreign judgments in civil and commercial matters (*Prel. Doc. No 7 of April 1997*)
- Synthesis of the work of the Special Commission of June 1997 on international jurisdiction and the effects of foreign judgments in civil and commercial matters (*Prel. Doc. No 8 of November 1997*)

² *Final Act of the Eighteenth Session*, Part B, No 1.

³ The reasons are explained by KESSEDJIAN C., in *International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, *Prel. Doc. No 7*, April 1997.

⁴ Conclusions of the Special Commission of June 1994 on the question of the recognition and enforcement of foreign judgments in civil and commercial matters, drawn up by the Permanent Bureau, *Prel. Doc. No 1*, August 1994, *Proceedings of the Eighteenth Session (1996)*, Tome I, *Miscellaneous matters*, p. 62; Conclusions of the second meeting of the Special Commission on the question of the recognition and enforcement of foreign judgments in civil and commercial matters, drawn up by the Permanent Bureau, *Prel. Doc. No 12*, August 1996, *Proceedings of the Eighteenth Session (1996)*, Tome I, *Miscellaneous matters*, p. 184.

- Synthesis of the work of the Special Commission of March 1998 on international jurisdiction and the effects of foreign judgments in civil and commercial matters (*Prel. Doc. No 9 of July 1998*)
- Note on provisional and protective measures in private international law and comparative law (*Prel. Doc. No 10 of October 1998*).

This Report deals with the ***preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters***, which was adopted by the Special Commission at the end of its fifth meeting on 30 October 1999, and is to be submitted to the Diplomatic Conference (Nineteenth Session).

GENERAL FRAMEWORK AND NATURE OF THE CONVENTION

Traditionally, in drafting a Convention on the recognition and enforcement of judgments a decision has to be made whether the Convention should be framed as a "double Convention" or as a "single Convention". In a "double Convention" both the jurisdiction which the courts of Contracting States are permitted to exercise is regulated as well as the conditions upon which such judgments are to be recognised. If the list of required jurisdictions⁵ is "closed", that is to say, exhaustive, parties can be assured that not only will all judgments rendered in the exercise of the required list of jurisdictions be recognised, subject to reservations based on public policy, due process and inconsistency of judgments, but that the exercise of jurisdiction on any other basis will not be recognised in other Contracting States. Such a Convention has the advantage of predictability and relative simplicity, but it requires a high degree of consensus on what the required grounds of jurisdiction ought to be. It also requires Contracting States to change their national laws relating to international jurisdiction in accordance with the provisions of the Convention. The obligations facing Contracting States can therefore be substantial.

For that reason, most international agreements and Conventions in this area are framed as "single Conventions". In a "single Convention" the jurisdiction of Contracting States is only dealt with indirectly, that is to say, as a condition for the recognition of judgments. Contracting States remain free to exercise jurisdiction on other grounds in accordance with their national laws which do not require any change. Such a Convention is rightly described as "imperfect", because it does not prevent the exercise of exorbitant grounds of jurisdiction which are as much a hindrance to international commerce as the uncertainty about recognition and enforcement of judgments. The *Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (the "1971 Judgments Convention") is essentially a "single Convention", even if in the Protocol attached thereto, recognition of judgments based on the exercise of certain listed "exorbitant jurisdictions" is prohibited.⁶

As between the Member States of the European Union the *Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (the "Brussels Convention") is applicable. It is accompanied by the largely identical *Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (the "Lugano Convention") which applies to the relationship between Member States of the European Union and certain contiguous States. Both Conventions are "double

⁵ By "required jurisdiction", we mean jurisdictional grounds which Contracting States are obliged to provide to potential litigants.

⁶ See, Rapport explicatif de M. CH.N. FRAGISTAS, in *Acts and documents of the Extraordinary Session (1966)*, § 3 at p. 365.

Conventions" which are "closed", at least in relation to persons domiciled in Contracting States.⁷ Whatever jurisdiction is not on the required list is prohibited. The express prohibition of the exercise of certain jurisdictions in Article 3 of the Conventions serve an educational function only.

Another "double Convention", albeit one limited to a specialised area, is the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility. Since it defines exhaustively the jurisdiction which authorities of Contracting States can exercise even as regards children habitually resident in non-Contracting States, it can be seen as a "closed Convention", without any margin of manoeuvre for States Parties.

The Working Group which met in October 1992 acknowledged that a "single" Convention on the pattern of the 1971 Judgments Convention would fall short of present day needs. It expressed a preference for "an approach in the direction of a "double Convention" like the Brussels Convention of 1968". However, the Group felt that "a complete double Convention" of the Brussels type would be "overly ambitious". It therefore favoured a Convention "which would offer some of the advantages of a double Convention, while at the same time having a greater degree of flexibility than that available with a Convention of the Brussels/Lugano type".⁸

Thus, a third possibility was created: the so-called "mixed Convention". This type of Convention follows the pattern of a "double Convention" in regulating the jurisdiction of the courts of Contracting States directly and not merely for the purposes of recognition. Any basis of jurisdiction which is on the list of required jurisdictions will suffice for recognition. But, unlike the "double Convention" it does not do so exhaustively: it allows the use of jurisdictions based on national law within certain limits. Any judgment based on a jurisdiction within this "grey zone" will not be entitled to recognition under the Convention, although it may be recognised under the national law of the State addressed. The limits of the "grey zone" are defined by a list of prohibited jurisdictions which may not be exercised by the courts of a contracting State, except possibly against those who are habitually resident outside the Contracting States, and on no account may judgments based on the exercise of prohibited jurisdiction in a contracting State be recognised in another contracting State. The list of prohibited jurisdictions is therefore an important part of a "mixed Convention".

The Special Commission has accepted the Working Group's conclusion that a "single Convention" would not be useful. At first, the Special Commission proceeded on the basis that a closed "double Convention" should be its goal, if that were possible. However, at its session in June 1999 the Commission decided that there should be some degree of flexibility permitted in the use of national law within limits. In consequence, Article 17 of the preliminary draft Convention completed by the Special Commission on 30 October 1999 permits the application of rules of jurisdiction under national law, subject to the rules relating to choice of court, protective jurisdiction, exclusive jurisdiction and the restrictions imposed on the exercise of jurisdiction to order protective and provisional measures, and provided that the exercise of jurisdiction is not prohibited by Article 18. Article 18(1) prohibits the exercise of jurisdiction in respect of a defendant who is habitually resident in a Contracting State

⁷ Since under Article 4 of both Conventions jurisdiction under national law (including "exorbitant jurisdiction") can be exercised in respect of persons domiciled outside Contracting States, the Conventions are not totally "closed".

⁸ See, Conclusions of the Working Group meeting on enforcement of judgments, *Proceedings of the Seventeenth Session (1993)*, Tome I, *Miscellaneous matters – Centenary*, para. 4 at pp. 257-8.

if there is no substantial connection between that State and the dispute. Article 18(2) list in a non-exhaustive manner certain bases for jurisdiction the exercise of which is prohibited. Article 24 excludes from recognition under Chapter III of the preliminary draft Convention judgments based on a ground of jurisdiction within the area of permitted national law, but does not exclude the possibility of recognition of such judgments under national law. Article 26 prohibits the recognition of judgments based on a ground of jurisdiction whose application is prohibited by Article 18 both pursuant to Chapter III and under national law.

There are therefore three kinds of jurisdiction under the preliminary draft Convention:

- 1 a list of required jurisdictions whose judgments are entitled to recognition and enforcement in other Contracting States subject to conditions of due process, public policy and the need to avoid inconsistent judgments;
- 2 a list of prohibited jurisdictions which may not be exercised and, if by any ill chance, a judgment is based upon any of them, such judgment shall not be recognised; and
- 3 an undefined area, not falling within 1 and 2 above, where jurisdiction pursuant to national law may be exercised and where recognition likewise depends on the national law of the State addressed.

It will be obvious from a reading of the provisions that to some extent the preliminary draft Convention has borrowed from the Brussels and Lugano Conventions, including the recent amendments made to those Conventions. In its turn the preparation of the Brussels Convention was greatly influenced by the work of the Hague Conference on Private International Law in drafting the 1971 Judgments Convention which was completed in 1966. The use of a list of prohibited jurisdictions which first appeared in Article 4 of the Protocol to what later became the 1971 Judgments Convention is a very good example of this useful process of cross-fertilisation. In some instances the Special Commission was mindful of the jurisprudence of the European Court of Justice in the interpretation of the Brussels Convention, either as indicating what the Commission wished to achieve or as indicating what the Commission wished to avoid. In like manner, consideration was paid to the jurisprudence of national courts both within and outside the European Union.

However, the preliminary draft Convention differs in several fundamental aspects from the Brussels and Lugano Conventions:

In the first place, as indicated earlier, the preliminary draft Convention is not a "closed double Convention", but leaves room for the application of jurisdictions under national law, even as between Contracting States.

Secondly, and this flows logically from the first point, there is provision made in respect of prohibited jurisdictions which is not merely educational in purpose, but represents a real restraint on the exercise of jurisdiction under national law.

Thirdly, as more fully explained in relation to Article 3 below, jurisdiction under the preliminary draft Convention does not proceed on the assumption that there exists a fundamental jurisdiction based on the domicile of the defendant with the result that all other jurisdictions must be seen as exceptions which must be narrowly interpreted. Instead the preliminary draft Convention proceeds on the basis that there is no hierarchy of jurisdictions.

Fourthly, it should be remembered throughout that the preliminary draft Convention is not designed for a group of contiguous States sharing similar social, economic and political objectives. It is intended as a worldwide Convention. This is reflected in important differences such as the need for a greater control by the court addressed over the exercise of jurisdiction in the court of origin. But it permeates the preliminary draft Convention in a general sense leading to a difference not only in terminology, but also in a more flexible approach. This is, for instance, illustrated in the greater flexibility permitted in Article 21 relating to *lis pendens* and the existence of a provision for declining jurisdiction in Article 22 which is lacking in the Brussels Convention even after its revision.

Finally, the preliminary draft Convention will not have the benefit of a uniform interpretation by a common court. Although it will contain provisions encouraging a uniform application, in the ultimate the highest national courts will be the arbiters of the Convention. Nor will the jurisprudence of the European Court of Justice be necessarily relevant, even where the provisions are similar. Reference will from time to time be made in this Report to decisions by the European Court of Justice and of other courts in order to illustrate the issues and problems the Special Commission had in mind. In that respect only may it sometimes be helpful to refer to those decisions as a matter of historical development of the preliminary draft Convention.

ARTICLE BY ARTICLE COMMENTARY ON THE CONVENTION

Preamble

The Preamble will have to be determined at the Diplomatic Conference.

CHAPTER I - SCOPE OF THE CONVENTION

Article 1 - Substantive scope

Paragraph 1

The first paragraph defines the substantive scope of the Convention. As it states, the Convention applies to "civil and commercial matters". The term "civil or commercial matters" has a long history in Hague Conventions. The term appeared for the first time in Articles 1, 5 and 17 of the Convention on Civil Procedure (*relative à la procédure*) of 14 November 1896 and almost immediately attracted controversy when attempts were made during the Fourth Session in 1904 to delete it on the ground that it was too restrictive.⁹ Since then the term has been used in a number of other Hague Conventions, most notably, the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (the "Service Convention") and the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (the "Evidence Convention"). The term "civil and commercial" also is used in the *Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*. No substantive change should be implied from the use of the conjunctive "and" instead of the disjunctive "or". It certainly is not intended that the matter should

⁹ See, Conférence de La Haye de droit international privé, *Actes*, 4e session, at p. 84.

have both a civil and a commercial character. While commercial matters will always have a civil character, there are civil matters which are not commercial.

The Service and Evidence Conventions have received widespread acceptance both in common law and civil law countries. The United States and the United Kingdom are each parties to both Conventions. In accordance with the tradition of the Hague Conferences dating back to 1896 the term "civil or commercial" has not been defined in any of the earlier Conventions. Nor has "civil and commercial" been defined in the present preliminary draft Convention. In civil law countries the term "civil and commercial" would exclude matters of public law, although the exact definition may vary from country to country.¹⁰ As explained in the Schlosser Report with regard to the use of "civil and commercial" in Article 1 of the *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* signed at Brussels on 27 September 1968 (the "Brussels Convention"),¹¹ the expressions "civil matters" or "civil law" is not a technical term in common law countries such as England and the Republic of Ireland and can have more than one meaning. In its widest sense it excludes only criminal law. On that basis, constitutional law, administrative law and tax law are included in the description "civil matters".¹² This is clearly not the intention of the preliminary draft Convention which in the second sentence of paragraph 1 explains that matters of a revenue, customs or administrative nature are not to be regarded as falling within the scope of "civil and commercial matters". As indicated by the words "in particular", this enumeration is not exhaustive and includes other matters of public law such as constitutional matters. The scope of the term "administrative matters" is reduced to some extent by Article 1(3) which makes it clear that a matter is not necessarily of an administrative character because a government or governmental instrumentality is a party to the proceedings.

Because of this clarification, it should be possible to arrive at an autonomous and uniform interpretation of the term "civil and commercial" which is important since by definition at least two States will be involved: the State of original jurisdiction and the State which is addressed in seeking recognition or enforcement. If there is no autonomous definition, the alternatives are: (i) to accept the definition of the State of origin; (ii) to apply the definition of the State addressed; and (iii) to apply a cumulative test requiring the proceedings in question to meet the definitions of each State.¹³

The principles to be followed in interpreting the words "civil or commercial" in the Service and Evidence Conventions were considered by a Special Commission convened in 1989. It adopted the following Conclusions concerning the "scope of the two Conventions as to subject matter":

¹⁰ See, GEIMER/SCHÜTZE, *Internationale Urteilsanerkennung*, 1983, Band I, § 19, V and VI.

¹¹ Report on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, by Professor PETER SCHLOSSER, OJ C59, 5 March 1979, p. 83. See also, BORN, *International Civil Litigation in United States Courts*, 3rd ed. 1996, at p. 896.

¹² See, in relation to the Evidence Convention: *Re State of Norway's Application* [1990] 1 AC 723.

¹³ See, KROPHOLLER J., *Internationales Privatrecht*, 3rd ed., § 60 II.4. The cumulative test was applied by the House of Lords in *Re State of Norway's Application* [1990] 1 AC 723. See the similar comments in relation to the Evidence Convention made by the Netherlands *Hoge Raad* in HR, 21 February 1986, *NIPR* 1986 No 337; *NJ* 1987 149, abstracted in SUMAMPOUW (ed.), *Les nouvelles Conventions de La Haye*, Tome IV, p. 113.

- 1 The Commission considered it desirable that the words “civil or commercial” should be interpreted in an autonomous manner, without reference exclusively either to the law of the requesting State or to the law of the requested State, or to both cumulatively.
- 2 In the “grey area” between private and public law, the historical evolution would suggest the possibility of a more liberal interpretation of these words. In particular, it was accepted that matters such as bankruptcy, insurance and employment might fall within the scope of this concept.
- 3 In contrast, other matters considered by most of the States to fall within public law, for example tax matters, would not yet seem to be covered by the Conventions as a result of this evolution.
- 4 However, nothing prevents Contracting States from applying the Conventions in their mutual relations to matters of public law, though not necessarily in an identical manner for both Conventions.¹⁴

It is obvious that at least the first three of these Conclusions have a direct relevance to the interpretation of the term “civil and commercial matters” in the preliminary draft Convention.

It should be noted that the scope of the preliminary draft Convention is defined in terms of “matters” not “courts”. Consequently, the characterisation of the matter as civil and commercial should depend on the nature of the claim and not necessarily on the character of the court in which the action was brought, be it civil, commercial, penal or administrative. In particular, civil claims for compensation for victims of crime brought by them or on their behalf in conjunction with criminal proceedings should not for that reason be denied a civil character.¹⁵ Likewise, the fact that the damages awarded are exemplary or punitive does not deprive the proceedings of a civil or commercial character, as long as the benefit of those damages goes to the plaintiff and not to the State.¹⁶ Article 1(3), which will be discussed below, also indicates that the fact that a government or government instrumentality is a party to the dispute does not by itself deprive that dispute from a civil or commercial character, even though under the law of some States the participation of a governmental body may be sufficient to give the proceedings an administrative character.

There was a consensus in the Special Commission that the application of the Convention should be confined to proceedings in “courts”, that is to say, bodies exercising the judicial power of the State. This appears from the definition of the territorial scope in Article 2 and of “judgment” in Article 23. The Convention will apply to courts at all levels of jurisdiction.

¹⁴ Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Second edition, 1992, at p. 30.

¹⁵ For examples of relevant provisions in national laws, see JOLOWICZ J.A., *Procedural Questions, International Encyclopedia of Comparative Law*, XI Torts (1983), Ch. 13 s. 5. Even apart from the Convention common law courts have recognised such orders for compensation: *Raulin v. Fischer* [1911] 2 KB 93. The court awarding compensation, however, must have exercised jurisdiction in circumstances which entitle the judgment to recognition under Part III of the Convention. [Contrast Brussels Article 5.4]

¹⁶ See in relation to the Service Convention the decision of the German Constitutional Court of 7 December 1994 - 1 BvR 1249/94; NJW 1995, 649; RIW 1995, 320, abstracted in SUMAMPOUW (ed.) *Les nouvelles Conventions de La Haye*, Tome V at p. 359. See also: OLG München of 9 May 1989; 9VA 3/89; IPRax 1990, 175 note by R. STÜRNER, abstracted in *Les nouvelles Conventions de La Haye*, Tome V at p. 352. See further, Article 32.1 below.

Paragraph 2

The second paragraph excludes from the scope of the Convention certain other matters despite their civil or commercial nature. They are excluded either because they are dealt with by other Conventions be it those of the Hague Conference, such as most family law issues, or the United Nations, such as commercial arbitration. Other matters are excluded because they may be seen as very specialised, such as insolvency or maritime matters, and best dealt with by specific international arrangements, or as closely intertwined with issues of public law, such as social security.

Sub-paragraph a)

This sub-paragraph excludes the status and legal capacity of natural persons. It was the intention of the Special Commission that family law matters should be generally excluded from the scope of the Convention, particularly in view of the many Hague Conventions already operating in this area.¹⁷ In the light of this policy the words "status and legal capacity" should be interpreted broadly even if this has a wider effect than may be immediately obvious under some legal systems. There will be little doubt that actions for the validity, voidability and nullity of marriages and legal separations, the dissolution and annulment of marriages, concerning the beginning and end of legal personality, the declaration or presumption of the death of a person, paternity and affiliation, concerning the name of a person and the adoption of children all raise matters of status and are hence excluded.¹⁸ So too are proceedings affecting the status and capacity of minors and of mentally or physically incapable persons to enter into legal transactions such as contracts or the making of wills. Less obvious, at least in common law jurisdictions, is the exclusion of proceedings concerning the care, custody and control of , and access to, children whether as part of divorce or other proceedings. and whether or not the parents are married to each other.¹⁹ Nevertheless, it was the view of experts from civil law jurisdictions that these matters would be excluded under this heading and this will be in accordance with the general policy above referred to.

It should be stressed that the exclusion only applies to proceedings which have as their main object one of the excluded matters. It should not be possible to exclude the application of the Convention merely by raising the validity of a marriage or the capacity of a minor to enter into a contract as an incidental matter. Furthermore, the exclusion only relates to the status and capacity of individual persons. Issues

¹⁷ See, *Convention of 24 October 1956 on the law applicable to maintenance obligations towards children; Convention of 15 April 1958 on the recognition and enforcement of maintenance obligations towards children; Convention of 5 October 1961 on jurisdiction and applicable law for the protection of minors; Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions; Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations; Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations; Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations; Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes; Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages; Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption; Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; Convention of 13 January 2000 on the International Protection of Adults. All, except the two last-named, are in force.*

¹⁸ See, FRAGISTAS, *op. cit.* § 4 III.2(a) at p. 367.

¹⁹ Compare the discussion by SCHLOSSER, *op. cit.* at p. 89, of the similar formula in Article 1, paragraph 1 of the Brussels Convention.

affecting the status and validity of legal persons and the competence of their organs fall within the scope of the Convention.²⁰

Sub-paragraph b)

This sub-paragraph excludes maintenance obligations from the scope of the Convention. The topic has been the subject of several Hague Conventions and may be studied again in the next quadrennium. Because both maintenance obligations and matrimonial property claims are excluded from the scope of the Convention, the problems of drawing an exact boundary between them which has arisen in relation to other Conventions, will not be relevant here.²¹

Sub-paragraph c)

This sub-paragraph excludes matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships from the scope of the Convention. Although the term "matrimonial property regime" is commonly associated with the various forms of community property found in most civil law, and in some common law, systems, the description is equally applicable to the system of separate property of the spouses which is the norm in most common law countries.²² It refers to the rights in property which the spouses may have as a result of the matrimonial relationship, including rights in respect of the matrimonial residence provided for under the law of many countries. The addition of the words "and other rights and obligations arising out of marriage" makes it clear that claims for the adjustment of property rights between spouses as a result of their marital relationship which may arise either by virtue of the unwritten law or principles of equity, or by authority of a statute, are also excluded from the Convention.

In an increasing number of countries provision is made with respect of the property rights of cohabitantes (persons of the opposite sex who cohabit without marriage) and with respect to registered partnerships between persons of the same sex.²³ Often those rights approximate, or even assimilate, to those existing between married persons. The words "or similar relationships" have been added to make it clear that those rights and obligations are also excluded from the scope of the Convention.²⁴

Whatever view is taken, it must be clear that claims are not necessarily excluded merely because they arise between parties to a marriage or marriage-like relationship. A claim arising under the general law of contract, tort or delict, or property is not excluded because it is made in a dispute between husband and wife. Such a claim does not fall within the description of the sub-paragraph.

²⁰ See draft Convention, Article 12(2), below.

²¹ See, e.g., *De Cavel v. De Cavel* (No2) [1980] ECR 731 in relation to the Brussels Convention.

²² See, Report of the Special Commission by A.E. VON OVERBECK, *Acts and Documents of the Thirteenth Session (1976)*, Tome II, *Matrimonial property regimes*, at p. 138, § 1.

²³ For a thorough overview of cohabitation laws as at 1986, see, STRIEWE P., *Ausländisches und Internationales Privatrecht der nichtehelichen Lebensgemeinschaft*, 1986. For a recent review of registered partnership laws, see, FORDER C. and LOMBARDO S.H., *Civil Law Aspects of Emerging Forms of Registered Partnerships*, 1999, Ministry of Justice, The Hague. In some countries the cohabitation legislation has been extended to include same sex relationships, see, e.g., De Facto Relationships Amendment Act 1999 (NSW - Australia).

²⁴ Compare the addition of the words "or any similar relationship" in Article 4(1)(c) of the Child Protection Convention 1996.

Sub-paragraph d)

This sub-paragraph excludes wills and succession from the scope of the Convention. Again this is an area where the Hague Conference has been active in the past.²⁵ Although the use of the word “wills” may be seen by some as superfluous, its use clarifies that matters concerning the form and material validity of dispositions upon death are excluded from the Convention. For the purposes of the Succession Convention, its Reporter put forward a definition of the term “succession”, as follows:

“For the purposes of the Convention it would appear to include (1) a ‘disposition of property upon death’ ..., *i.e.*, a voluntary act of transfer whether in testamentary form or that of an agreement as to succession, and (2) the transfer of property upon death that occurs by provision of law, when *a*) there is no such voluntary act, or *b*) the voluntary act is wholly or partly invalid, or *c*) the law compels the distribution of assets belonging to the deceased to family members.”²⁶

This definition will be useful in indicating the core of the concept in the preliminary draft Convention. Other matters covered by the term are “provision by a court or other authority out of the estate of the deceased in favour of persons close to the deceased”²⁷ whether family members or not. In relation to trusts created by testamentary disposition, disputes concerning the validity and interpretation of the will creating the trust are excluded from the Convention. Subject to this, however, proceedings concerning the effects, administration or variation of the trust between trustees and beneficiaries,²⁸ or disputes between the administrators of the trust and third parties are included within the scope of the Convention. Not all dispositions which are conditioned upon the death of a person fall within the scope of succession rights. Examples are the common law institution of joint tenancy where the survivor of the joint tenants automatically has the entire interest vested in him or her, or the life tenancy or usufruct which terminates upon death of the beneficiary. Disputes concerning those rights are not excluded from the Convention.

Sub-paragraph e)

This sub-paragraph excludes insolvency, composition or analogous proceedings from the scope of the Convention. The term “insolvency” covers, of course, both the bankruptcy of individual persons as well as the winding-up or liquidation of corporate entities which are insolvent, in those countries which still distinguish between those processes. It does not matter whether the process is initiated or carried out by creditors or by the insolvent person or entity itself with or without the involvement of a court. The term “insolvency” does not cover the winding-up or liquidation of corporate entities for reasons other than insolvency.

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 proceedings” cover a broad range

²⁵ See, *Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions*; *Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons*; *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons* (not yet in force).

²⁶ Explanatory Report by D.W.M. WATERS, *Proceedings of the Sixteenth Session (1988)*, Tome II, *Succession to estates – applicable law*, at p. 537, paragraph 28.

²⁷ See, *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*, Article 7(2)(a).

²⁸ See, draft Convention, Article 11(1) below.

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 and Part II of the United Kingdom Insolvency Act 1986.

Sub-paragraph f)

In many countries the law relating to social security would normally be regarded as part of administrative law and for that reason alone as falling outside the scope of the Convention. But in so far as social security may be viewed as being of a private law nature, it is also excluded.

Sub-paragraph g)

This sub-paragraph excludes arbitration and proceedings related thereto from the scope of the Convention. There was general agreement in the Special Commission that the Convention should not interfere with the operation of international Conventions on the subject, the most important of which is the United Nations Convention on the Recognition and Enforcement of Arbitral Awards adopted in New York on 10 June 1958. There was some discussion in the Special Commission as to how the Convention should deal with the interaction between arbitration and judicial proceedings. However, the addition of the words "and proceedings related thereto" means that the exclusion of arbitral proceedings must be interpreted in the widest sense. Not only does the Convention not apply to the enforcement of arbitral awards but any proceedings relating to such matters as: the appointment of arbitrators, the validity of the arbitral clause, points of law referred to a court in the course of arbitration and any other proceedings whereby a court may give assistance to the arbitral process are also excluded.

Sub-paragraph h)

This sub-paragraph excludes admiralty or maritime matters from the scope of the Convention. Although no equivalent term to "admiralty" appears in the French text, it is understood that the words "*les matières maritimes*" include what in Anglo-American law is known as "admiralty". Because of the highly specialised nature of the subject and the fact that not all States have adopted the relevant international Conventions, the Commission decided to exclude the subject from the scope of the Convention. The effect is that the Convention will not apply to claims arising in relation to ships, cargoes and the employment of seamen, including claims arising out of the defective condition or operation of a ship or arising out of a contract for the hire of a ship, or for the carriage of goods or passengers on a ship.²⁹ These matters will be governed by national law of the State whose court is seised, including any international Convention to which that State is a party.

Paragraph 3

This paragraph further clarifies the meaning of "civil and commercial matters". The characterisation of the claim cannot be made to depend merely on whether a government, a governmental agency or any other person acting for the State is a party. One delegation in Working Document No 286 stated as its understanding that the Convention will apply to disputes involving government parties, if the dispute contains the following core criteria:

- the conduct upon which the claim is based is conduct in which a private person can engage;

²⁹ See, Supreme Court Act 1981 (UK) s. 20, and in the US: *Carnival Cruise Lines v. Shute* 499 US 585 (1991).

- the injury alleged is injury which can be sustained by a private person;
- the relief requested is of a type available to private persons seeking a remedy for the same injury as the result of the same conduct.

Although the exact limits can never be exhaustively defined, we agree that these are the core criteria for determining whether a dispute involving government parties falls within the scope of "civil and commercial matters". As indicated earlier, the quality of "civil and commercial" is not affected by the nature of the court in which the action is brought, be it a criminal or an administrative court.

Conversely, actions which are brought by or against governmental bodies which seek to enforce compliance or to prevent non-compliance with public regulations, as opposed to obligations arising from a contractual relationship or other obligations imposed by the general law of tort or delict, are obviously not within the scope of "civil and commercial matters". However, this does not exclude the possibility that a claim which is of a civil or commercial nature may arise in conjunction with a claim of an administrative nature, such as a claim for restitution sought for injured consumers in a governmental proceeding which also seeks an order prohibiting the wrongful conduct. This would be analogous to the joining of a civil claim in a criminal prosecution which has been discussed above.

Paragraph 4

Concerns were expressed in the Special Commission that paragraph 3 could be interpreted as affecting any claims to governmental immunities or privileges which might be asserted under national or international law. This was certainly not the intention behind paragraph 3 which only excludes the relevance of the governmental status of one of the parties for the purposes of characterisation of a claim as "civil and commercial". For additional assurance, paragraph 4 makes this explicit. Although not specifically referred to it is also obvious that entitlements to diplomatic and consular immunity under the relevant international Conventions are not affected by the preliminary draft Convention.

Article 2 - Geographic scope

This article defines the territorial, or geographical, scope of the Convention and the situations in which the Chapter I rules on direct jurisdiction and the Chapter III rules on recognition and enforcement will apply. In defining this territorial scope, the Special Commission has taken special care to ensure that the definition adopted does not result in treaty conflicts with existing international instruments, without pre-empting the decision on whether a disconnection clause is needed to safeguard the operation of such instruments.

Paragraph 1

This paragraph defines the scope of the direct jurisdiction rules of Chapter II, according to the principle that these rules apply whenever the court seised is a court of a Contracting State. Thus the chosen criterion differs from the one found in other Conventions such as the Brussels and Lugano Conventions, in which treaty-based jurisdiction, except for exclusive jurisdiction and prorogation, applies only where the

defendant is domiciled in a Contracting State.³⁰ Under this Convention, by contrast, the defendant need not be habitually resident in a Contracting State in order for the grounds of jurisdiction available under the Convention to apply. The only situation in which habitual residence plays a role is the prohibition against the use of exorbitant jurisdiction in national law, which is restricted by Article 18 to cases where the defendant is habitually resident in a Contracting State.³¹

There is however one restriction on the principle whereby treaty rules on direct jurisdiction apply irrespective of the defendant's residence: - when all the parties are habitually resident in the State of the court seised. The non-application of the Convention rules in this case is warranted by the fact that this is a purely internal situation, lacking any international dimension. However, the non-applicability is not total, and may in turn be restricted if the subjection of a dispute to national rules might undermine the workings of the Convention. Such situations may arise because of a choice of court, or as a result of exclusive jurisdiction, *lis pendens*, or other circumstances in which a court may decline jurisdiction.

a) - Choice of court

Even if all the parties are habitually resident in the same Contracting State, the court seised must apply Article 4 if the parties have agreed on a court or courts in another Contracting State to deal with the dispute. In such a case, disregarding the treaty rule on the choice of court would undermine the jurisdiction of another Contracting State, which would be unable to exercise a jurisdiction already conferred on it by the parties. This does not happen when the parties have chosen a court or courts in a third State, although it is uncertain whether application of Article 4 should properly be excluded in that case.³²

b) Exclusive jurisdiction

As with the choice of court, the existence in another Contracting State of a ground of jurisdiction defined by the Convention as exclusive will render the Convention applicable even if all the parties are habitually resident in the State of the court seised. It must be possible to apply the rule granting exclusive jurisdiction to the courts of a Contracting State regardless of the residence of the parties concerned. The rule cannot therefore be affected by the parties being resident either in the State of the court seised, or in a third country.

c) Lis pendens and the refusal to exercise jurisdiction

Nor does the fact of the parties being resident in the State of the court seised affect the application of the treaty provisions which govern concurrent actions in a number of different Contracting States. Since the grounds of jurisdiction laid down in the Convention do not depend on the residence of the parties, it may well be that the courts of two Contracting States are equally competent to deal with the same case, even if all the parties are habitually resident in the same State. The co-ordination established in Articles 21 and 22 among the courts of Contracting States must therefore be respected in all circumstances, in order to ensure the smooth working of the Convention.

³⁰ See Article 2 of both conventions, which must be applicable in order for the special and optional fora provided in the Convention to be used.

³¹ It follows that when the defendant is not habitually resident in a Contracting State, the exceptional connections in Article 18 may be used in a national law framework in accordance with Article 19 (see below the commentary on these articles).

³² It should be noted that Article 4 (see commentary below) also recognises the validity of choice of court agreements which appoint courts in non-Contracting States.

Paragraph 2

Under this paragraph, the scope of the Chapter III rules is defined by the fact that a judgment has been rendered in one Contracting State and the question of recognition and enforcement has arisen in another. The Special Commission has opted for recognition and enforcement under Chapter III of judgments rendered in the State of origin for purely internal cases when they become international by virtue of the fact that the judgment will take effect in another Contracting State. The provision in paragraph 2, which in principle covers any judgment rendered in a Contracting State, must also be read in conjunction with Article 24, whereby Chapter III does not apply to judgments based on a ground of jurisdiction provided for by national law in accordance with Article 17. Because of this conjunction of provisions, the scope of Chapter III is limited, on the one hand, to judgments based on or rendered in conformity with one of the grounds of jurisdiction provided for in Articles 3 to 13, which will be covered by the Convention's rules on recognition and enforcement, and on the other hand to judgments based on a ground of jurisdiction not conforming to the provisions concerning choice of court, the protective rules, or jurisdiction which is exclusive or in breach of the prohibited grounds of jurisdiction - judgments which cannot be either recognised or enforced.

CHAPTER II - JURISDICTION

Article 3 - Defendant's forum

This article contains the first of the Convention's rules on jurisdiction. It defines the general forum of the defendant, whether or not the defendant is a natural person. In so doing, the Convention follows a trend now firmly established in international Conventions on international jurisdiction, as well as in national systems when defining the direct jurisdiction of national courts, by making provision for a general forum based on the principle that the plaintiff may bring suit in the courts of the defendant. This principle, enshrined in the maxim "*actor sequitur forum rei*", tends to favour the defendant, and seems to be justified even more on the international level than in national law, since it is much more difficult to defend oneself in the courts of a foreign country than in a different court of one's own country ³³.

In most cases, both in treaty law and in national law, where a general forum is specified it is accompanied by other grounds of jurisdiction which are presented, except in the case of exclusive jurisdiction, as alternatives to the general forum. This is true, *inter alia*, of the Brussels Convention of 27 September 1968, which provides for a general forum in the State of the defendant's domicile.

Other instruments however, such as the Brussels Convention itself, establish a close connection between the general forum and alternative grounds of jurisdiction, so that the latter apply only if there is a general forum in one of the Contracting States. No such connection is laid down in this preliminary draft Convention. Thus the general character of the ground of jurisdiction provided in Article 3 does not derive from the fact that only where it exists in a particular case will the special grounds of jurisdiction of an alternative kind apply by way of derogation, but solely from the fact that it is not confined to any specific subject-matter and may be exercised for any court application regardless of its subject, being limited solely by choice of court

³³ FRAGISTAS, *Acts and Documents of the Extraordinary Session (1966)* and JENARD, Report on the Brussels Convention, *sub* Article 2.

(Article 4), or the rules on exclusive jurisdiction (Article 12), or protective grounds of jurisdiction (Articles 7 and 8).

Moreover, the absence of any clearly defined relationship between the general forum of the defendant and the grounds of jurisdiction provided in the Convention implies that the defendant's forum is on a footing of equality with the ones specified in subsequent articles. In other words, it is one of the fora available to the plaintiff, as an alternative to the other grounds of jurisdiction provided in the Convention (and also by the national law of each Contracting State, unless the Convention forbids it), but does not enjoy any priority over them.

Paragraph 1

The effect of paragraph 1 is to fix the defendant's forum at his place of habitual residence. The Special Commission finds this solution readily acceptable, having considered and discarded other criteria which would have linked the defendant with a given country, such as nationality and domicile.

In fact, in the civil and commercial matters covered by the Convention there is no meaningful link to be found in nationality, and indeed there is no place for it (see Article 18). As for domicile, there are well-known disadvantages in using it, because of its varying status in comparative law.³⁴ Although it is adopted as the primary connecting factor in other international Conventions, including the Brussels Convention, it has therefore been discarded in favour of habitual residence. Of course, even the notion of habitual residence is not purely factual and may be open to various interpretations.³⁵ However, it is undeniably more reliable in a factual sense, as it tends to denote a person's presence over a fairly prolonged period in a certain place, and to assign only an incidental and non-essential role to the intention of remaining there.³⁶ Nor should it be forgotten that the connecting factor of habitual residence has been consistently used in the Hague Conventions, and there has never been any real difficulty in applying it in practice. In the light of the foregoing, it was thought unnecessary to include in the Convention a definition of habitual residence.

There is no provision for circumstances in which habitual residence cannot be established in a particular case. However, it should be noted that such situations will be very rare. Moreover, it has already been pointed out that in this Convention the defendant's habitual residence is not the basic forum which must exist in order for special fora to apply, but merely one of the fora available to the plaintiff, on a footing of equality with the special fora, so that this becomes a distinctly minor issue.

Paragraph 2

Paragraph 2 defines the defendant's forum when the defendant is not a natural person. We note that the category of defendants which this comprises is defined in negative terms. The negative wording was preferred to a positive term in order to include not only corporations and legal persons, all of which have legal personality, but also any other association of natural or legal persons which lacks legal personality but which is capable under the law which governs it of appearing and pleading before a court.

³⁴ See RABEL E., *The Conflicts of Laws. A Comparative Study*, 2nd ed., I, p. 117 *et seq*; and POCAR F., Observations sur la notion de domicile dans les conventions internationales, *Annuaire AAA*, vol. 35 (1965), pp. 176-82.

³⁵ BAETGE D., *Der gewöhnliche Aufenthalt im internationalen Privatrecht*, 1994, pp. 44-85.

³⁶ CLIVE E., The Concept of Habitual Residence, *The Juridical Review*, 1997, pp. 137-147.

Moreover, the choice of habitual residence as a connecting factor for natural persons made it difficult to use the same connecting factor for legal persons³⁷ without defining the concept. However, given that such a definition would in any case have had to be expressed as a plurality of connecting factors, the provision makes reference to these without seeking to relate them to a unitary concept. The complexity and range of situations which arise in practice, and the advisability of making a court available to the plaintiff a court if a corporation has links with several countries, justify four connecting factors, listed *a)* to *d)*. The list does not stipulate any order of priority: the criteria are therefore alternatives, comprising a series of options available to the plaintiff, who may bring his action against the defendant before the courts of the State indicated by whichever he chooses. It should however be noted, and is clear from the analysis which follows of the connecting factors, that sub-paragraphs *a)* and *b)* do not offer the plaintiff any real choice, being in fact alternatives to each other.

a) Statutory seat

The concept of statutory seat is firmly established in civil law, albeit in definitions which may vary from one country to another, but is unknown in other legal systems, especially in common law countries. This explains why other international Conventions which refer to it have had to define it, either directly or indirectly,³⁸ or use it as an alternative connecting factor to others.³⁹ The Convention follows both approaches: on the one hand, in order to avoid divergent interpretations, it specifies that the seat is the one named in the statutes or deeds of incorporation of the company or other legal person; on the other, the statutory seat appears in the Convention as one of the alternative connecting factors for defining the defendant's forum. It should be explained that where the English law concept of a "registered office" is part of the statutory seat, only the main office is meant.

b) Law of incorporation

To fill the gap which occurs in some countries where it is not possible to rely on the statutory seat as a connecting factor, the Convention uses as an alternative the criterion of the State under whose law the legal person was formed. This criterion will normally signal the place in which the company is registered, in which it has a registered office, but the link can also extend to cases in which the company has no "registered office".⁴⁰ Finally, it may also apply both to companies and other entities with legal personality, and to associations not intended to acquire legal personality.

c) Central administration

This connecting factor relates to the place where decisions about the running of the company or other entity are made, *viz.* the place where, according to the statutes or in practice, the board of directors of a company meets or the persons authorised to take decisions about the organisation and activities of a legal person or an association without legal personality take such decisions. This criterion has often

³⁷ It would have been easier if the criterion chosen for natural persons had been domicile.

³⁸ For example, Article 53 of the Brussels Convention expressly left it to the private international law of the forum seised to define what it is, and in its revised text proposes a direct definition for countries which do not have it (see below under *b)*).

³⁹ This is the situation, for instance, in Article 10 of the 1971 Hague Convention.

⁴⁰ It is interesting to note that the revised Brussels Convention, in which the only connecting factor is the statutory seat, goes on to define this term, used in the United Kingdom and Ireland, as meaning "the 'registered office' or, if there is no 'registered office', the place where legal personality was acquired or, if there is no place where this happened, the place under whose law the company was incorporated."

been regarded as sufficient to link a legal person to a given country, but it is becoming increasingly difficult and unreliable to pin down, because of the new techniques which are now used in decision-making for companies which carry on business in several different countries. The possibility of making decisions through videoconferencing or other means of electronic communication, in the case of a collegiate body, or communicating a decision "on line" from the person with authority for that purpose, means that decisions may be taken in various places, and it will be impossible to identify where the decision was taken. For this reason there is some uncertainty involved when this criterion is used, so that it is not sufficient in itself and can only be one of a list of alternatives open to the plaintiff.

d) Principal place of business

Unlike the central administration, this connecting factor stands for the place where the main activity of the legal person is carried on. This therefore is a factual criterion which has to be identified on a case-by-case basis, by considering the activity of the legal person. Here again, there may be some uncertainty if a company is carrying on similar activities in several different countries. However, it should be noted that where business is carried on by means of subsidiaries or secondary establishments, this will often make it easier to ascertain the place where the company is carrying on its main business.

Article 4 - Choice of court

Paragraph 1 - Choice of forum clause

Scope of application

The territorial scope of Article 4 is defined in Article 2 which has been discussed above. The Special Commission did not accept a proposal that there be a requirement of an international connection in addition to any requirement set out in Article 2. In the case where parties habitually resident in the one Contracting State choose the forum of another Contracting State, there is no requirement of any further international connection, such as that the contract must envisage the supply of goods or services across borders or that it must be related to other transactions of an international character. There is no room for a "*teleologische Reduktion*".⁴¹

Agreement

There must be an agreement between the parties. A unilateral stipulation in an invoice or other document by one of the parties will not by itself suffice,⁴² unless the stipulation reflects a usage which is regularly observed by the parties or reflects a common practice in a particular trade of which the parties were or ought to have been aware.⁴³ The consent to the arrangement need not be given explicitly by each party or be signed by that party. It suffices when it appears from the general circumstances that each party has agreed or can be taken to have agreed. Thus a

⁴¹ See, KESSEDIAN C., *Prel. Doc. No 7*, para. 104. For a discussion of the different views expressed in relation to Article 17 of the Brussels and Lugano Conventions, see GAUDEMET-TALLON H., *Les Conventions de Bruxelles et de Lugano*, 2e ed., at pp. 82-4; KROPHOLLER J., *Europäisches Zivilprozessrecht*, 6e Auflage, at pp. 228-232; BERNASCONI C. and GERBER A., *Der räumlich-persönliche Anwendungsbereich des Lugano-Übereinkommens*, 1993, 3 SZIER/RSDIE 39, esp. at pp. 57-61. It must be remembered, however, that the provisions of the Brussels and Lugano Conventions are substantially different.

⁴² See, Article 18(2)(g) below.

⁴³ See, Article 4(2)(c) and (d).

party to a contract of adhesion containing a forum selection clause can be taken to have agreed unless he or she falls within one of the categories protected in Articles 7 or 8.⁴⁴ Similarly, a member of a corporation or association by virtue of that membership can be taken to have agreed to any forum selection clause contained in the constitution of that body whether he or she has specifically agreed to it or not. The agreement must be in the form prescribed by paragraph 2 and must be valid as to substance.

The lawfulness (licéité) of the agreement

A preliminary issue may arise as to whether the parties may submit a particular dispute to the jurisdiction of a foreign court. In some cases national law may explicitly prohibit such submission.⁴⁵ In other countries public policy has been invoked to invalidate choice of forum clauses.⁴⁶ In the light of the express provision made by the preliminary draft Convention in Article 4(3) for the invalidation of jurisdiction agreements in specified circumstances, the circumscribed scope given to national law in Article 17, and the absence of a public policy reservation in Chapter II, there is no room for national laws imposing conditions on the lawfulness of the choice of forum.⁴⁷

The substantive validity of the agreement

Paragraph 2 is restricted to validity as to form. There are no provisions in the Convention which address the question what conditions must be fulfilled for substantial validity, such as the conditions for a valid consent. This is in accordance with the view of the Special Commission that such issues should be left to national law. Thus, in so far as the issue of agreement raises questions of law as to the requirements of consent,⁴⁸ as opposed to the purely factual question of whether the parties actually agreed, the national law of the forum seised, including its rules of private international law, must determine those questions.

A court or courts of a State

The parties may select either a specific court, a number of specific courts or the courts of a Contracting or non-Contracting State generally. In the last case some uncertainties may arise if the parties select the courts generally of a multi-jurisdictional State such as the United Kingdom or Switzerland. In the absence of any express provision in the Convention on this aspect, it would appear that in such a case the plaintiff may choose to invoke the jurisdiction of any court within the selected State.⁴⁹ One matter, however, is very clear: the parties cannot by their

⁴⁴ Contrast the Convention on the Choice of Court concluded 25 November 1965 (not in force) Article 4 which sought to protect the weaker party. In the present convention this is done in Article 4(3).

⁴⁵ An example is seen in the Carriage of Goods by Sea Act 1991 (Australia) s. 11(2) which deprives of effect any provision in a bill of lading for the shipment of goods into or out of Australia which would "preclude or lessen" the jurisdiction of an Australian court.

⁴⁶ See the discussion in BORN G.B., *International Civil Litigation in United States Courts*, 3rd ed. at pp. 414-417.

⁴⁷ See, KESSEDIAN C., *Prel. Doc. No 7*, paras. 105 and 106 (as to lawfulness only).

⁴⁸ See the discussion of that issue and the sources cited in NYGH, *Autonomy in International Contracts*, OUP 1999, at pp. 93-94.

⁴⁹ Contrast the Convention on the Choice of Court, Article 1(a) which referred the issue to "the internal legal system or systems of that State". No such provision occurs in the present Convention. For a discussion of the situation in the UK, see BRIGGS A. and REES P., *op. cit.* at pp. 71-72. For Switzerland, see BERNASCONI C. and GERBER A., *op. cit.* at p. 57.

agreement confer jurisdiction on a court which lacks jurisdiction to hear the matter by reasons that its jurisdiction is limited as to subject matter or as to the quantum of the claims it can deal with (*ratione materiae*). The agreement of the parties can only confer jurisdiction as regards their persons (*ratione personae*).

Connection with the selected forum

There is no requirement in Article 4 that the forum chosen have any connection with either of the parties, the subject matter of the dispute or the applicable law.⁵⁰ The effect of paragraph 1 is to confer jurisdiction on the chosen court even if there is no such connection. In accordance with the principle of autonomy which underlies the provision, it is for the parties to determine whether their choice is reasonable. Any limitation on choice is to be found in Article 4(3). It follows that the court of a Contracting State chosen by the parties may not decline jurisdiction, except on a ground permitted under the Convention.⁵¹ In particular, it cannot decline jurisdiction under Article 21(7) or 22 (1) on the ground that another court is clearly more appropriate to resolve the dispute, if the court has been selected as an exclusive forum.

Any dispute which has arisen or may arise in connection with a particular legal relationship

The first part of this formula makes clear that the parties may agree on a choice of court both before and after the dispute has arisen. The agreement can be part of a larger contract or it may be ad hoc, such as an agreement to accept the service of a writ and not to contest the jurisdiction of the court. While the provision is most likely to be used in relation to disputes arising out of a contractual relationship, there is no reason why issues such as liability for a tort cannot be referred by agreement to a particular court.

There is an important limitation in the requirement that the dispute be "in connection with a particular legal relationship". An open ended reference to "any dispute which may arise between the parties out of any present or future legal relationship between them" will not suffice. On the other hand, the legal relationship may be any dispute arising out of the contract the parties have entered into. The legal relationship must be capable of being identified as at the time of the agreement, although the exact nature of the dispute may not be foreseeable at that time.

Exclusive jurisdiction unless the parties have agreed otherwise

Traditionally, in common law countries an agreement for the choice of a court was viewed as not excluding other possible competent fora, unless it was made clear explicitly or by necessary implication that the selection was to be exclusive. In relation to those countries, the Convention will reverse the presumption. If nothing more is apparent than that the parties have agreed that a court or courts of another Contracting State shall have jurisdiction, that jurisdiction will be exclusive of other jurisdictions (subject to the provisions of Articles 7, 8 or 12, see below) unless the contrary appears either explicitly or by necessary implication. Conversely, the formula makes it clear that it will remain possible to provide for non-exclusive alternatives to the fora required by the Convention. Furthermore, the words "unless the parties agree otherwise" recognises the autonomy of the parties which underlies

⁵⁰ Some national laws may require such a connection: see Swiss Private International Law Statute 1987 Art. 5(3); in the Netherlands, see the *Piscator* case, *Hoge Raad*, 1 February 1985 [1985] *NJ* 689 requiring "a reasonable connection" before a Dutch court can assume prorogated jurisdiction.

⁵¹ This conclusion is reinforced by the provisions in Article 22(1) of the preliminary draft Convention.

this provision. They may provide for different fora to have exclusive jurisdiction in respect of specific obligations or leave the choice of the forum to one of the parties.

The term “exclusive” in this connection means in derogation of fora which otherwise would have had jurisdiction under the Convention, including jurisdiction under national law preserved by Article 17. The fora which cannot be excluded are: a forum in which the defendant has subsequently appeared in accordance with Article 5, the protected fora provided for in Articles 7 and 8, and the exclusive fora provided for in Article 12. The derogated forum must decline jurisdiction in favour of the chosen forum if it is a court of a Contracting State: the exercise of a discretion to accept jurisdiction notwithstanding a choice of forum clause as exists under the common law, is inconsistent with the Convention. Under Article 26 a judgment based on a jurisdiction exercised in breach of a choice of court agreement, whether based on an required jurisdiction under Chapter II or a national jurisdiction permitted by Article 17, “shall not be recognised or enforced”.

Effect of choice of a court of a Contracting State

The court of a Contracting State which has been selected in a valid selection clause for either exclusive or non-exclusive competence thereby gains jurisdiction even though it might not otherwise have been able to exercise an required jurisdiction under Chapter II. However, since the Convention does not seek to alter internal rules of jurisdiction, the agreement cannot confer jurisdiction on a court whose jurisdiction under its national law is limited as to subject matter, e.g. to bankruptcy or matrimonial causes.

Choice of court or courts of a non-Contracting State

In the second sentence of paragraph 1 provision is made in respect of the choice of forum in a non-Contracting State. In principle the effect is the same: the agreement, provided it complies with the conditions above referred to, is exclusive of that of the fora of Contracting States which might otherwise have jurisdiction under the Convention, unless the parties have agreed otherwise. But the Convention cannot impose or confer jurisdiction on courts of non-Contracting States. For that reason the courts of Contracting States have the option of suspending proceedings to see whether or not the court or courts chosen will accept that jurisdiction. They can also decline jurisdiction without waiting for that determination provided the court chosen has not already declined jurisdiction. What they cannot do is to proceed with the exercise of jurisdiction before the court chosen has declined it itself.

Choice of court clauses and provisional and protective measures

The Special Commission did not make express provision in Article 4 concerning the jurisdiction of courts in other Contracting States to take provisional and protective measures where there exists a choice of court clause which is exclusive of those fora. From a reading of Article 13(1) it appears (assuming that Article 4(3) does not apply) that the derogated fora are not competent to exercise jurisdiction under Article 13(1) because they will lack jurisdiction to determine the merits of the case. But this restriction does not apply to the courts mentioned in Article 13(2) and (3). Hence protective and provisional measures can be taken in relation to property situated within the forum or, on an interim basis with effect only within the territory of the

forum State, notwithstanding an exclusive choice of court clause, in order to protect a pending claim on the merits.

Choice of court clauses in trust instruments

These are dealt with in Article 11 below which makes its own provisions as regards effect and form and applies both to choice of court clauses in trust agreements and unilateral stipulations made by deed or will. Apart from Article 4(3), the provisions of Article 4 therefore have no application to a choice of court clause contained in a trust instrument falling within Article 11.

Paragraph 2 - Formal validity

This paragraph sets out the conditions which must be met for the validity as to form of the agreement. They set out, in alternatives, conditions which are both minimum and maximum requirements and thus exclude the application of national law on the subject. A proposal that reference could also be made to any form accepted by the court seised was rejected by the Commission. Nor will it be open to a Contracting State to impose additional formal requirements such as that the agreement should be in a particular language or that it should be signed by each of the parties. The onus of proving that the conditions have been complied with rests upon the party seeking to rely on the agreement.

The words "entered into or confirmed" apply to each of the methods described in sub-paragraphs *a)* to *d)* inclusive.

Sub-paragraphs a) and b) - Recorded form

The major method of proving the existence of an agreement as to choice of court is by reference to a text which is either recorded in writing or in some other form, such as an electronic message, which can be preserved for future reference. The original agreement need not be in recorded form: it can be made by oral agreement. It is enough that the agreement was afterwards confirmed in recorded form.⁵² It follows that a signature by either party is not essential; acceptance or confirmation of the recorded agreement can be established by other means. An agreement as to choice of court may be incorporated or confirmed by reference to another document, such as international terms of trade. In that case the reference or confirmation should, in order to qualify pursuant to sub-paragraphs *a)* and *b)* be in recorded form. Obviously a formal recorded acceptance by the party to whom the proposal for a choice of court is made will serve as best evidence. But it is not essential: assent may be inferred from other acts or behaviour or even a failure to raise a timely protest. Nor does the confirmation in recorded form have to come from the party against whom the agreement is pleaded.

Sub-paragraph c) - regular usage by the parties

In this case no record of the agreement or its confirmation is required. The agreement may be entered into or confirmed orally, if that is the regular practice of the parties, or even tacitly. The most obvious example of the latter is that of parties

⁵² Compare Article 17(a) of the Brussels Convention which refers to "evidenced in writing". The use of the word "confirmed" would appear to require a more positive assent to the clause than a mere recording.

who originally had entered into a written contract for a particular transaction which contained a choice of court clause and thereafter continued to enter into similar transactions without entering into a new written contract. In that case the assumption may be made that the parties continued to deal on the same terms.⁵³

Sub-paragraph d) - usage in the particular trade

Here again no record of the agreement or its confirmation is required. The agreement or confirmation may be oral or even tacit as indicated by behaviour or a failure to object to the regular usage. It differs from the previous sub-paragraph in that the usage need not reflect previous practice between the parties. However, it must be a practice (i) of which the parties were actually aware or ought to have been aware and also be (ii) one which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.

Paragraph 3 - Invalidity of certain agreements

Paragraph 3 invalidates agreements for the choice of court which offend against the restrictions imposed by Articles 7 (consumer contracts) and 8 (employment contracts) or which are inconsistent with the exclusive jurisdictions defined in Article 12. It is apparent from the opening words of Article 5 that an agreement to confer non-exclusive jurisdiction on a court other than one invested with exclusive jurisdiction under Article 12 would also be ineffective.⁵⁴ Similar restraints are imposed in relation to choice of court provisions in trust instruments.

Article 5 - Appearance by the defendant

Paragraph 1 - Submission to the jurisdiction

Article 5 deals with jurisdiction based on the submission of the defendant. By its submission the defendant confers upon the court a required jurisdiction under the Convention which the court may not otherwise have possessed. A judgment based on such jurisdiction is entitled to recognition under Chapter III of the Convention whatever the jurisdiction may have been on which the plaintiff originally proceeded. This applies where the court has initially assumed jurisdiction on a basis provided by national law which is tolerated under Article 17. If the defendant proceeds on the merits without contesting the jurisdiction, the resulting judgment will then be based on the required ground of jurisdiction provided for in Article 5. By the failure to contest the jurisdiction, "grey zone" jurisdiction is converted into required jurisdiction. The jurisdiction, however, which the defendant should contest is jurisdiction under the Convention, that is to say, jurisdiction arising under Articles 3 to 16 inclusive of the Convention. The defendant in an action based solely on Article 17 jurisdiction should point out that the court lacks jurisdiction under those articles.

Required jurisdiction by submission under Article 5 can also arise in cases where the court has assumed jurisdiction on one of the grounds proscribed in Article 18. In that case, the jurisdiction of the court is based on the submission of, or tacit prorogation by, the defendant and not "on the basis solely of one or more" of the grounds set out in Article 18(2). By the same token the submission of the defendant displaces any previous agreement that another court shall have exclusive jurisdiction: the

⁵³ Such a situation occurred in *Iveco Fiat v. Van Hool* ECJ 11 November 1986, [1986] ECR 3337.

⁵⁴ See also Article 26 below.

submission can be seen as a tacit variation of that agreement. Nor is Article 5 subject to the restrictions imposed on the assumption of jurisdiction by Article 7 (consumer contracts) and Article 8 (employment contracts).

The only restriction on Article 5 is that imposed by Article 12. A defendant cannot confer jurisdiction on a court by submission if another court in a Contracting State has exclusive jurisdiction under Article 12. If the issue of exclusive jurisdiction is not raised by one of the parties, it will be the duty of the court to raise it on its own motion. A judgment which is based on a ground of jurisdiction which conflicts with Article 12 shall under Article 26 not be recognised or enforced. The failure of the parties to raise that issue cannot cure the defect.

Paragraph 2 - the right to contest jurisdiction

In many legal systems it is possible to raise the issue of lack of jurisdiction as a preliminary issue before the first defence is filed. Some systems may require that this be done. In other systems the defendant may be permitted or even required to enter a defence on the merits and raise an objection to the jurisdiction simultaneously. Whatever procedure should be followed is a matter for the national law of the court seised, but in either case the defendant has not submitted to the jurisdiction. Under most national legal systems the court may assume substantive jurisdiction over the defendant if it rejects the objections to the jurisdiction. Under Article 5 the fact that the defendant has contested the jurisdiction in timely fashion will prevent the court from having jurisdiction even if the defendant thereafter fully participates in the litigation on the merits. If the court originally seised finds in answer to the objection that it has jurisdiction on the basis of one or more of the required grounds set out in Articles 3 to 16 of the Convention, the resulting judgment may be entitled to recognition under Chapter III of the Convention. However, under Article 27, except in relation to the findings of fact on which the court of origin based its jurisdiction, the court addressed must itself verify the jurisdiction of the court of origin and may come to a different conclusion. If the court originally seised finds that it only has jurisdiction under national law pursuant to Article 17, the resulting judgment will not be entitled to recognition under Chapter III. If the defendant does not appear at all, Article 5 has no application.

When recognition and/or enforcement is sought under Chapter III the requested court will have to verify under Article 27 whether or not the original court had jurisdiction by reason of Article 5. This may lead to a finding that an action of the defendant which was accepted as an appearance without objection to its jurisdiction by the original court does not amount to such an appearance under the national law of the requested State. Because national procedures may differ and the Convention does not seek to regulate procedure, the requested court should make its determination in the light of the procedural law of the original court and not its own, provided the provisions of paragraph 2 have been respected.⁵⁵

Paragraph 2 gives the defendant the right to contest jurisdiction. Although the Convention does not seek to regulate procedure, a legal system that did not recognise that right would be in conflict with the Convention. As long as the first defence on the merits has not yet been filed, the defendant may contest the jurisdiction. This applies even if the defendant has already filed a preliminary document such as an acknowledgement of service, an address for service for further

⁵⁵ Such an approach was adopted by SCOTT J. in *Adams v. Cape Industries Plc* [1991] Ch. 433 at 461 where the court held that steps taken in a foreign jurisdiction and not regarded there as a submission to the jurisdiction of that court, should not be treated as a submission to that jurisdiction for the purposes of enforcement of the judgment in England.

documents or a formal entry of appearance⁵⁶ which did not raise the issue of lack of jurisdiction. The method of raising the objection to jurisdiction is a matter for national law.

It goes without saying that the decision by the defendant not to contest the jurisdiction must be made freely and on an informed basis. The Convention does not impose on the court any obligation to satisfy itself independently that this is the case. However, this does not prevent a court in an appropriate case, for instance, where there is a gross imbalance between the parties in resources and/or representation or other matters become apparent which give it concern, to make inquiries.⁵⁷

The objection to the jurisdiction must be raised not later than at the time of the first defence on the merits. This prescribes the maximum time in which the objection can be raised. Proposals to treat this as a minimum period which might be extended according to the national law of the court seised were rejected by the Special Commission. Thus, if a defendant fails to contest the jurisdiction before or at the time of the first defence on the merits, the original court will be seen as having jurisdiction under Article 5 even if under its national rules it could have entertained an objection to its jurisdiction at any later time. The Convention does not define what is meant by "the time of the first defence on the merits". The term refers to the time when the first defence on the merits is filed in fact, not to the time when under national rules it should have been filed. Although a defence filed outside the prescribed period will be void, most national systems permit an extension of those periods. What amounts to a first defence on the merits is a matter for the national law of the original court seised to determine.⁵⁸

Article 6 - Contracts

Article 6 defines jurisdiction arising from the contract, as an additional option to the defendant's forum under Article 3. The Special Commission had some difficulty in formulating this clause, aware that a challenge might be raised to the very existence of a contract forum. In the first place, it may be anticipated that in the subject-area to which the Convention relates, many contracts will contain a valid, exclusive choice of court clause, which renders a contract forum redundant. Moreover, the inclusion of a clause on jurisdiction in this area, as in tort, raises issues of definition - determining what comes under the respective headings - and these issues are not amenable to independent regulation, because of the range of solutions favoured by national legal systems.⁵⁹ As the text stands at present, this characterisation can only be made by a court seised either according to its own law or according to the law designated by its conflict of laws rules. And the same characterisation must then be endorsed by the court which has to deal with the recognition and enforcement stage, since that court is debarred by Article 27 from re-opening the issue, because the Special Commission did not adopt the suggestions made in this regard.

⁵⁶ The notion of "appearance" in some systems is more broadly defined, see The American Law Institute, *Restatement of the Law, Second, Conflict of Laws*, 1986 Revisions (draft), § 33, comment b.

⁵⁷ See, KESSEDJIAN C., *Prel. Doc. No 7*, paragraph 109.

⁵⁸ In *Kurz v. Stella Musical GmbH* [1992] Ch. 196 at 202 HOFFMANN J. defined "the time of the defendant's first defence" in the context of Article 18 of the Brussels Convention as "the time when according to national procedure the defendant first states what his defence is".

⁵⁹ Especially as regards questions of restitution or unjust enrichment in the event of nullity of a contract, or certain aspects of civil liability, which may be regarded as contractual or non-contractual. This is akin to the problems of defining the boundary line between contract and tort which have been encountered in applying the Brussels Convention (see the *Kalfelis* judgment), which would be much more serious if there were no Court to interpret the Convention.

An attempt might be made to overcome the problems associated with characterising matters of contract and tort by providing an activity based jurisdiction - which would render superfluous the clauses on contracts, torts or delicts and branch offices - but there is some difficulty in defining the nature and extent of activity which is necessary in order to establish a ground of jurisdiction. After lengthy discussion of this question and some attempt to draft a clause covering it, the Special Commission decided not to do so, and confined itself to inserting clarifications into Article 9 and into Article 18, paragraph 2 e).⁶⁰

As for the question whether it is preferable to have a number of special jurisdictional rules for each type of contract, or instead a single rule for all contracts, the Convention opts for a mixed solution. Without mentioning any specific contract, Article 6 identifies two categories of contracts which are frequently found in practice, each of which may include several different contracts, namely contracts for the supply of goods and for the provision of services, as well as contracts for both. The Convention provides special jurisdiction for each of these categories; no contract forum is provided for the other contracts.

This special jurisdiction is based on the place in which the contract is performed, which makes it necessary to ascertain which obligation is to be taken into account for this purpose. With a view to resolving the difficulties which arise in this area, which are evident from experience with other treaty texts which use the place of performance as a connecting factor for the contract forum, the Convention avoids using general terms to define the obligation to be taken into account, such as the obligation giving rise to the claim or the obligation which is characteristic of the contract, and designates instead, for the kinds of contract concerned covered, the obligation which is relevant for determining the contract forum.

a) *Supply of goods*

This category of contracts includes sales and, possibly, any contract which makes provision for the supply of goods, such as sub-contracting, lettings, leases, etc. It does not however include contracts for the supply of objects which cannot be described as goods, such as company shares or intellectual property rights. It should be noted, however, that the Convention does not define the term "goods", unlike other Conventions, such as the Hague Convention on sales of 15 June 1955. Whether the provision on the contract forum is applied will therefore depend, in some instances, on the definition given by the law of the court seised or that designated by its conflict of law rules.⁶¹

The plaintiff can bring suit before the courts of the State in which the goods were supplied, in whole or in part. It is therefore necessary, in order for the court seised to have jurisdiction, for a principal obligation to have been performed. If that is the case, any action relating to the contract will be admissible, even if it does not bear upon the supply itself, but instead, for instance, on the validity of the contract. The term "in whole or in part" refers both to cases in which the goods were supplied entirely within one country, and cases in which only part was supplied in one country or in different countries. It is therefore possible for the plaintiff to apply to the courts of any country in which part of the goods were supplied (even a tiny part in relation to the whole of the contract) and to ask the court to decide upon all the issues arising from the contract. It is equally possible that the plaintiff may have several courts available to him, if part of the goods were supplied in a number of different

⁶⁰ See below the commentary on these articles.

⁶¹ It should also be noted that the term "*objets mobiliers corporels*" in the French text appears in the English version as "goods", which is a closer equivalent of the French term "*marchandises*". It would perhaps be best to use this term in the French version, as is done in the Hague *Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*.

countries. Although the connecting factor will often be of a purely factual nature, the process of ascertaining it does not necessarily exclude recourse to the conflict rules of the forum in order to decide where the supply took place, especially where the dispute is about whether the supply was in whole or in part.

b) Provision of services

This category of contracts includes any contract for the provision of services. Here again, there is no definition of the term "services", and so the definition will depend to some extent on the court seised. Once more, the connection is with the State in which the services were performed, in whole or in part; the same considerations apply as to the supply of goods.

c) Combinations of goods and services

This category of contracts covers those which involve both a supply of goods and the provision of services. In this case, deciding which is the forum of the contract implies a decision from the outset on which is the principal element of the contract. The same principle will then apply to this element as to the other categories of contract. The forum of the contract will therefore be in the State in which the main element was furnished, in whole or in part. It should be observed that this clause does not cover contracts relating to several different supplies of goods or to several services; for these, there will be no attempt to establish which is the main element. Consequently, its effect will be that where a contract involves both goods and services, it will not be possible to base jurisdiction on the place where the obligation to supply the goods or provide the services can be enforced.

On reviewing the contracts for which a contract forum is provided, it is evident that the Convention does not govern each and every category of contracts. There are many contracts which lie outside the scope of Article 6. For these, there is no contract forum under the Convention. The court seised may base its jurisdiction for these, as appropriate, on the defendant's forum, the forum chosen by the parties or the forum of the branch office, or indeed on other grounds of jurisdiction provided for by national law and which are not prohibited under the Convention. The same applies to the categories of contracts to which Article 6 refers, when there has been no performance and no services have been provided. As Article 6 does not apply in these cases, the jurisdiction of the court seised may be established on the basis of the other fora available under the Convention, including those available under national law, unless they are caught by the prohibition in Article 18.

Article 7 - Contracts concluded by consumers

This article lays down special rules of jurisdiction for consumer contracts, in order to provide protection for a consumer who initiates court proceedings or has an action brought against him. In order to achieve their purpose, these grounds of jurisdiction take priority wherever they apply over the other grounds of jurisdiction laid down in the Convention, and also derogate from the national grounds of jurisdiction under Article 17.

The personal scope of Article 7 is defined by reference to the term "consumer". There are two standard options: one is to define the consumer as a person acting outside his trade or profession, and the other emphasises the specific purpose for

which the person is acting, regardless of the context⁶². The Convention takes the second option, defining the consumer as a person who has concluded a contract "for a purpose which is outside its trade or profession". This solution is the same as the one adopted in other international Conventions, such as the Vienna Convention of 11 April 1980 on international sales, which excludes sales of goods for personal, family or domestic use (Article 2 *a*)) and the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*, which has a similar provision (in Article 2 *c*)),⁶³ and the Brussels Convention, which covers contracts concluded by a person "for a purpose which can be regarded as being outside his trade or profession" (Article 13, paragraph 1).

As for the other party to the contract, the personal scope of the clause is delimited by the fact that in concluding the contract this person acted in the course of its trade or profession, as specified in paragraph 2 or, as the similar wording in paragraph 1 (a) has it, that the conclusion of the contract is related to trade or professional activities on its part.

Paragraph 1

By virtue of this paragraph, the consumer may bring suit before the courts of the State in which he is habitually resident. The protection therefore lies in enabling the consumer to use the weapons of a legal defence in his or her own environment, without having to go to a foreign country. The jurisdiction available to the plaintiff does not derogate from the other fora open to him under the Convention, but is additional to these. A consumer therefore remains free to use the defendant's forum (Article 3), the forum of the contract (Article 6) or even the forum of the branch (Article 9) where the latter are not the same as the protective forum.

However, the option given to the consumer-plaintiff of using the forum of his habitual residence is not unlimited. It exists only where the person who concluded the contract in the course of its trade or profession has actively sought to reach the consumer in the country of the latter's residence.

Two conditions are made here: *a*) that the defendant has engaged in trade or professional activities in the State of the consumer's residence, or directed such activities to that State, in particular by soliciting business through means of publicity, and that the contract is related to these activities; and *b*) that the consumer has taken the steps necessary for the conclusion of the contract in that State. From the former point of view, any means of publicity whereby the consumer can be reached at his place of residence is covered by the clause; alongside the traditional means of communication (such as the post, the press, the telephone or television), electronic means of communication may also be used, where for instance publicity or an offer to contract are posted on the Internet.⁶⁴ Regarding the second aspect, it is essential for the consumer to have performed the activity required to conclude the contract in the country in which he lives, by whatever method, including using his computer to respond to an Internet offer. It follows that the jurisdictional rule does not apply if

⁶² See PELICHET M., Memorandum on Consumer Sales, Hague Conference on Private International Law, *Acts and Documents of the Fourteenth Session (1980)*, Tome II, *Consumer sales*, p. 7.

⁶³ See also the draft articles on consumer sales adopted by the Fourteenth Session of the Hague Conference (Article 1).

⁶⁴ It should be remembered that the operation of the provisions in the preliminary draft Convention on electronic commerce, which has been considered by the Special Commission, will be reviewed by a group of experts which will meet early in 2000 (see the footnote on the title page of the preliminary draft adopted by the Special Commission on 30 October 1999).

the consumer has gone abroad in order to contract, or has himself sent the contract offer, without the defendant carrying on any activity in the State of the consumer or directing any publicity towards that State.⁶⁵

Paragraph 2

This paragraph establishes that a contract claim against the consumer by his co-contractor can only be brought before the courts of the State of habitual residence of the defendant, thus in the latter's general forum. Consequently, its effect will simply be to exclude in this case any other forum provided by the Convention, including the contract forum of Article 6. Here again, the protection consists of the advantage for the consumer of being able to defend a claim in one's own country and not being compelled to go abroad, if the contract forum is not the same as one's place of residence.

Paragraph 3

This paragraph aims to restrict the freedom normally enjoyed by the parties under Article 4 to choose the court with competence to deal with disputes which have arisen or may arise between them. It seeks to protect the weaker party to the contract and ensure that the stronger party cannot force him to submit such disputes to a court where he may find it difficult to defend himself. Because of the protective aim of this clause, the restriction on the freedom of choice of court is not absolute. In the first place, it does not affect all consumer contracts, only those described in the first paragraph and which have been concluded in the circumstances indicated in that paragraph. Moreover, a choice of court must always be allowed subject to two conditions. The first of these relates to the point in time when the agreement is made to confer jurisdiction. If the agreement is subsequent to the dispute, it will be admissible. The term "dispute" does not signify the submission of a case to a court, but rather, the disagreement between the parties on a particular matter, such that proceedings are imminent.⁶⁶ Secondly, the validity of the choice of court clause cannot be challenged if and to the extent that it enables the consumer to apply to another court, in addition to those specified in the Convention. As the clause offers the consumer extra choice, its actual effect is to bolster the protection available to him, and there is no reason to prevent this. The two conditions are not cumulative. Thus if one of them is satisfied, this will be enough to validate the choice of court. The other conditions for the validity of the agreement conferring jurisdiction are governed, under the express *renvoi* in paragraph 3, by the terms of Article 4.⁶⁷

The question arises whether these restrictions on the choice of court are sufficient for the purposes of electronic commerce. This question was discussed in the Special Commission, and the clause was retained unaltered. However, proposals were made with a view to enabling States which consider that consumers established on their territory might enter into less restrictive choice of court agreements to accept that these agreements are valid as far as these consumers are concerned. These aspects may be gone into in greater detail during the Diplomatic Conference.

⁶⁵ See *Prel. Doc. No 8*, pp. 42-43.

⁶⁶ See JENARD P., Report, *sub* Article 12 on the comparable rule in the Brussels Convention.

⁶⁷ For a similar approach, see SCHLOSSER P., Rapport sur la convention d'adhésion, No 161, in connection with the comparable provision in the Brussels Convention, which however does not contain any *renvoi* to Article 17.

Article 8 - Individual contracts of employment

Alongside the special rules on jurisdiction for contracts with consumers, the Convention provides special grounds of jurisdiction for individual contracts of employment. Here again, the aim is to take contracts in which, typically, there is an inequality of arms between the parties out of the reach of the ordinary rules of jurisdiction, and to furnish some protection for the weaker party at the stage when international jurisdiction has to be decided.

Although it was felt inadvisable to subject employment contracts to the rules of ordinary jurisdiction, the inclusion of specific rules on this topic in the preliminary draft Convention did not go unchallenged in the Special Commission. One argument for excluding employment contracts from the scope of the Convention was that practice in this field is changing: increasingly, workers are moving from place to place, so that it would be unwise to fence these phenomena about with the traditional criteria. Again, the resolution of disputes in this area is increasingly taking the form of alternative, non-judicial mechanisms such as mediation and conciliation. Finally, it was argued that employment questions are seen in a different light from one legal system to another, and that in many countries, especially in Latin America, these questions are dealt with by specialised courts of an administrative rather than a judicial nature. The Special Commission took due heed of these observations, but it felt that an explicit clause governing employment contracts would still be useful for the ordinary situations which continue to occur frequently in practice, and which call for a protective approach towards workers engaged in international activities.

As for the personal scope of Article 8, there is no definition of what is meant by an "employee". However, it is clear that the clause is essentially only intended to cover salaried workers⁶⁸ at any level,⁶⁹ and does not relate to people carrying on an independent professional activity. Contracts concluded by the latter may fall under Article 6.

Paragraph 1

This paragraph indicates which courts may be used by an employee in proceedings against an employer *a)* and by an employer against an employee *b)*.

a) - Actions by an employee against an employer

As regards actions brought by an employee, the connecting factor in this clause is the place where the employee habitually carries out his work. There are two reasons for preferring this place: proximity and protection. First, the place where the work is done will usually be the same as the plaintiff's habitual residence, and this will make it easier for him to prepare his case. Second, the kind of work done and the way it is done can more readily be ascertained and proved at the place where it is done. Finally, it must not be forgotten that employment issues are often subject to a variety of substantive rules, either of public policy or of immediate application, which

⁶⁸ Although there may be problems of definition in this respect, because of the tendency in some legal systems to treat a number of independent and salaried activities in the same way.

⁶⁹ The Convention will often be relevant to expatriation contracts for executive-level employees, often on short-term contracts, who do not have the same need for protection because their contracts are fully negotiated. Since the preliminary draft Convention does not allow for different treatment of these situations, this question can perhaps be discussed in greater detail at the Diplomatic Conference.

will have to be complied with by the court seised regardless of the law applicable to the employment relationship, so that the legislation of the place of employment will, to a large extent, apply to the dispute.

When an employee does not work or has not habitually worked in one and the same State, the connecting factor will be the place where the business that engaged him is or was situated. The choice of this connecting factor may be challenged, both from the viewpoint of the proximity of the employment relationship to the court designated as competent, when the place of recruitment is unconnected to the work done, and from the viewpoint of protecting the employee. However, it responds to a need for legal security and for procedural economy, by enabling the dispute to be focused on a single State. It should also be noted that this ground of jurisdiction will often lie in the defendant's general forum or the forum of one of its branches.

The grounds of jurisdiction which the Convention provides for an employee claimant are not presented as being to the exclusion of the other grounds which may be invoked under the Convention. Thus they are additional to the general jurisdiction of the State of the defendant's ordinary residence (Article 3), the forum of the contract (Article 6) and the forum of the branch (Article 9). However, although there is no problem with the defendant's ordinary forum, it may be asked how Article 8, paragraph 1 *a*) is supposed to operate in conjunction with Article 6. If the connection to the place where the work is done is normally only a feature of Article 6 when it refers to the place where services are performed, the connection to the place of the business which engaged the employee is in contradiction with the connection to the place where the services were provided in whole or in part, under Article 6(b), in the sense that the purpose of this connection is to exclude jurisdiction in each of the places where the work was done.⁷⁰ In view of the wording of the preliminary draft Convention, it remains to be seen whether and how far the Article 8 fora will be additional to those in Article 6.

b) - Claims by an employer against an employee

In parallel to the provision for consumer contracts in Article 7, paragraph 2, the Convention lays down certain restrictions on the employer's freedom to bring an action against an employee, by limiting the fora open to him by comparison with those open to the employee. In this light, the first of the connecting factors indicated, as in Article 7, is the habitual residence of the employee, namely the general forum provided in Article 3. Thus the protection lies in the advantage for the employee of being able to prepare his defence in his own country, without having to travel for the purpose.

With the distinction that for consumers, this forum is not the only permissible ground of jurisdiction, the Convention provides an additional one for the courts of the State in which the employee habitually carries out his work.⁷¹ It should be noted that sub-paragraph *b*) does not refer, as does sub-paragraph *a*), to the place where the work has habitually been done in the past, but uses only the present tense to indicate the place of work. It follows that this forum is open to the employer only during the employment relationship, and once this has come to an end only the employee's habitual residence can be taken into consideration as a connecting factor. In any

⁷⁰ This difficulty does not arise with the comparable rule in Article 5 of the Brussels and Lugano Conventions, because in these the connections to the place where the work is done and the business which engaged the employee are clearly stated as being features of the place where the contractual obligation in question is performed, and in any event they are not presented as alternatives to it.

⁷¹ But not the forum of the place of the business which engaged the employee, which is open only to the employee. Thus the chosen solution is the same as in the Brussels Convention, whereas the Lugano Convention provides that the forum of the place of the business is open to both parties to the employment relationship. Moreover, the working group responsible for revising the two Conventions opted for the employer to have only the general forum of the worker's habitual residence.

event, while the employment relationship is ongoing, the place where the work is habitually done will be the same as the employee's habitual residence.

Sub-paragraph *b)* is framed to prevent any overlap between this clause and the other fora available under the Convention. On the one hand, the defendant's general forum is incorporated in the framework of the clause; on the other hand, the protective purpose of the rule means that it should be interpreted as not adding any new grounds of jurisdiction for the employer to those which already exist, and instead as derogating from these.

Paragraph 2

The aim of this paragraph is to limit the freedom of the parties to select, under Article 4, the court with competence to deal with disputes which have arisen or may arise between them, in order to protect the weaker party from abuses by the stronger. The text is worded similarly to paragraph 3 of Article 7, which meets the same need for protection for consumer contracts, although it specifies that the reference to "other" courts means courts other than those indicated in either Article 8 or Article 3.⁷² Reference should be made to the commentaries made for Article 7 above.

Article 9 - Branches [and regular commercial activity]

Jurisdiction based on "branch, agency or other establishment"

Article 9 confers jurisdiction over the defendant in respect of disputes relating to the activities of a branch, agency or other establishment of the defendant within the jurisdiction. The action may be based on contract or tort or any other basis, such as unjust enrichment. The action must be brought within the Contracting State where the relevant branch, agency or other establishment is situated. It is not necessary that the activity out of which the dispute arose occurred in that State. The words "is situated" refer to the time when the plaintiff brings the action. If the branch, agency or establishment is closed during the proceedings, jurisdiction is not lost thereby.

The concept of "branch, agency or other establishment" is not defined. However, the notion of a "branch jurisdiction" has significance in several legal systems. The exact term occurs in Article 5(5) of the Brussels Convention and was in turn taken from existing bilateral treaties between the original Contracting States.⁷³ Other systems know the concept and tend to give it a similar content.⁷⁴ An essential aspect of the concept is that the branch, agency or other establishment either be an integral part of the parent organisation, such as a branch owned and run by the parent, or be under its immediate control and engaged in its business.⁷⁵ In each case the

⁷² To these provisions must be added Article 9. It would in any case be desirable to standardise the provisions of Article 7, paragraph 3, and Article 8, paragraph 2.

⁷³ See, Report on the Convention on jurisdiction and enforcement of judgments in civil and commercial matters by P. JENARD, *OJ* C59 5.3.79 p. 26.

⁷⁴ The 1971 Convention in Article 10(2) refers to an "establishment" or "branch" of the defendant. See also *Foreign Judgments (Reciprocal Enforcement) Act* 1933 (UK) s. 5(2)(a)(v) ("office or place of business"); *Uniform Foreign Money-Judgments Recognition Act* 1962 (US) § 5(5) ("business office").

⁷⁵ See, in respect of the Brussels Convention: *De Bloos v. Bouyer* [1976] *ECR* 1497; *Blanckaert and Williams v. Trost* [1981] *ECR* 819; in relation to Anglo-Commonwealth law outside the Brussels Convention: *Adams v. Cape Industries Plc* [1992] Ch. 433 at 523-531

dependent body must operate from an office, that is to say, a fixed place of business.

A subsidiary, even one that is wholly owned by the parent, will not by that fact alone be regarded as falling within the definition of “branch, agency or other establishment” as long as it is maintained as a separate and distinct entity.⁷⁶ A subsidiary, like any other body or person who is not an integral part of the defendant’s organisation, may attract jurisdiction over the defendant by acting as an agent of the defendant. However, there may be situations where the subsidiary is not maintained as a distinct and separate agency because the parent disregards the corporate boundaries (the “alter ego” or “fictitious” corporation), or a subsidiary or other body is held out to be an agent of the defendant.⁷⁷

Jurisdiction based on “regular commercial activity”

The Special Commission agreed to place within brackets the words “or where the defendant has carried on regular commercial activity by other means” as part of Article 9. The provision is inserted as part of Article 9, and not as previously proposed, as a separate article which would replace or supersede the provisions of Articles 6 and 10, in order to indicate that it is primarily aimed at a broadening of the words “branch, agency or establishment” to include situations whereby the defendant conducts commercial activities within the State concerned by other, but analogous, means. It is therefore narrower in scope than the permitted national jurisdiction preserved in Article 18(2)(e).

The “other means” may be a body which does not qualify as a “branch, agency or other establishment” as explained above. It may be a wholly owned subsidiary of the defendant or even a body which is in different ownership, but is used by the defendant as its vehicle to conduct its commercial activities in a particular State, or it may consist of activities by the defendant itself within that State, such as attending at trade fairs and soliciting orders, without operating from the fixed base which would have the status of a “branch”. Indeed, it is not the degree of ownership or formal control of the vehicle used by the defendant which is relevant, but the manner in which that vehicle, be it wholly owned or independent, is used to further the commercial activities of the defendant in the State concerned. The basic principle is that a party which seeks to derive gain from commercial activities in a particular State should be subject to the jurisdiction of that State in respect of claims arising out of those activities, notwithstanding the formal means employed for conducting those commercial activities. The provision, if accepted, will look to reality, not form. On the other hand, the words “branch, agency or other establishment” as explained above, depend primarily on the formal legal relationship between the subordinate entity and the defendant. The advantage of such a formal approach is that one can arrange one’s affairs to avoid jurisdiction without losing commercial advantage in the State where the activity takes place. The disadvantage to consumers and other claimants in that State is obvious.

What amounts to “regular commercial activity”? In its context the word “regular” must mean “with regularity”, that is to say, the commercial activity must be more

⁷⁶ See for the US: *Restatement (Second) Conflict of Laws* § 52, comment b (1971) based on *Cannon Mfg Co. v. Cudahy Packing Co.* 267 US 33 (1925); for Anglo-Commonwealth jurisdictions: *Adams v. Cape Industries Plc* [1992] Ch. 433 at 523 - 531. See also KROPHOLLER, *op. cit.* at p. 138, No 88.

⁷⁷ See, for example, *SAR Schotte GmbH v. Parfums Rothschild SARL* (218/86) [1987] ECR 4905.

than a single event, or even a series of isolated transactions, but must re-occur with a certain pattern over a period of time.⁷⁸ What amounts to “regular commercial activity” will depend on the facts and circumstances of each case. Both the quantity and the substantive effect of the activity will be relevant.

The reference is to the State *in which* such activity is carried on. This is in contrast to Article 7(1)(a) where the words “activities that the defendant has engaged in or directed to that State” are used. That is, of course, a much broader formulation than the one used here. Merely directing advertising by traditional or electronic means at residents of a particular State from outside that State could not be described as carrying on commercial activity in that State, unless it is accompanied by more active solicitation or a reference to a local address or telephone number where orders can be placed. The questions raised by e-commerce have been considered by a meeting of experts in early 2000 and will be on the agenda of further meetings to be held before the Diplomatic Conference.

Directly relating to that branch or that activity

The dispute must relate directly to the activity of that branch, agency or establishment, or, if the words in brackets are accepted, to that regular commercial activity. In common law countries the presence of a branch within the jurisdiction founds a general jurisdiction which is not restricted to any activities of the branch within the forum.⁷⁹ Such a general jurisdiction is inconsistent with the Convention, as indicated by Article 18(2)(e). It cannot even be maintained as national law under Article 17.

The requirement that the dispute must directly relate to the activity of the branch, agency or other establishment (or to that regular commercial activity) has to be determined as a question of fact in the circumstances of each case, particularly where, as may happen, the dispute arises in part out of activities of the branch and in part out of the activities of the principal office.⁸⁰ The word “directly” should not be read as “solely”, it merely indicates that the connection should not be remote or incidental. It may not say much more than what is provided in Article 18(1). The dispute may arise out of the internal management of the branch, from its external commercial relations or from conduct in the course of its operations which incurs non-contractual liability.⁸¹ The same can be said about regular commercial activity.

Article 10 - Torts or delicts

This article defines a special jurisdiction for torts and delicts. The need for a forum for these was obvious to the Special Commission, since the courts of the defendant's

⁷⁸ But it need not go so far as the test of “continuous and systematic general business contacts” laid down by the US Supreme Court in *Helicopteros Nacionales de Colombia v. Hall* 466 US 408 (1984) for the exercise of general jurisdiction based on “doing business” within the forum.

⁷⁹ See, *Frummer v. Hilton Hotels International* 281 NYS 2d 41 (1967).

⁸⁰ See, by way of example, *Saab v. Saudi American Bank* [1999] 1 WLR 1861 (English Court of Appeal).

⁸¹ Compare the ruling given in paragraph 3 of the judgment of the ECJ in *Somafer v. Saar Ferngas* (33/78) [1978] ECR 2183.

forum are not always the best placed to ensure the sound administration of justice by comparison with the courts of the place where the tort or delict was committed. It should be added that in this field, the use of choice of court agreements is much less common than in matters of contract, so that the court chosen is not a real alternative to the defendant's forum. As the Special Commission dispensed with the option of providing for jurisdiction based on the activity, as pointed out in the commentary to Article 6, it was necessary to have jurisdiction for torts and delicts despite the difficulties involved in defining this subject area, as compared with contracts. In any event, it does not seem possible to give a separate definition of torts and delicts within the framework of the Convention.⁸² Although the definition may result in varying solutions, it can only be made by a court seised under its own law or the law designated by its conflict of laws rules. However, the court seised to order enforcement of the decision may be asked not to characterise a new legal relationship when appraising the competence of the court of origin.⁸³

As with contracts, the alternative which is offered for torts and delicts consists of deciding whether it is preferable to adopt a single rule, or rules specific to each tort or delict. Having considered several of these (road accidents, product liability, environment, competition, defamation), the Special Commission felt that a single rule could be adopted, as long as it took sufficient account of the range of situations which may arise in practice.

It should also be pointed out that the grounds of jurisdiction in Article 10 are extra alternatives to those offered in the Convention, such as the defendant's forum (Article 3), choice of court (Article 4) and the forum of the branch (Article 9), as well as any grounds of jurisdiction which may be available under national law if permitted by Article 17.

Paragraph 1

This paragraph states the general rule in matters of tort. As is usual in national legal systems and in international Conventions, the place where the wrongful act was committed is the one which has to be taken into account.⁸⁴ However, instead of referring to this place in general terms and thus compelling the court to define it afterwards in order to take account of the concurring factors which identify it⁸⁵ - the act or omission and its effects -, the Convention reflects the more modern tendency to give the injured party a choice between the forum of the place of the act, and that of the place where its effects are felt, and directly states these options in the text of the clause. It is also clear that this distinction only gives the plaintiff a choice if the tort has been committed "at a distance" and its injurious effects are experienced in a country other than the one in which the act or omission was found to have taken place. Even if Article 10 does not directly deal with a situation in which all the elements of a tort or delict are present in the same State, it goes without saying that whichever of the two options the plaintiff chooses in that case, the same courts will have jurisdiction.

⁸² In particular, the Convention cannot offer a separate negative definition by comparison with matters of contract, as has been done in Article 5(3) of the Brussels Convention (see *Kalfelis* judgment), if only because the actual notion of a contract is not defined in it.

⁸³ See the commentary to Article 27.

⁸⁴ See *POCAR F.*, *Le lieu du fait illicite dans les conflits de lois et de juridictions*, *Travaux Comité français dip*, 1985-86, pp. 71-80.

⁸⁵ In this connection we refer to Article 5(3) of the Brussels Convention. This contains a generic reference to the court of the place where the injury occurred. The European Court of Justice has several times given a ruling on the definition of this place, since the judgment in the case of *Bier v. Mines de Potasse d'Alsace*, 30 November 1976, 21/76.

As for the option available in matters of tort where the elements are present in several different countries, this is justified by the advisability of choosing the court which is best placed in each specific case to deal with the issues arising from the wrongful act, but also of giving preference, in balancing the interests involved, to the position of the victim as compared with that of the party whose conduct was responsible for the injury. Nor must it be forgotten that this solution has an indirect impact on the question of the applicable law, in so far as it enables the plaintiff also to make a choice of court in the light of the law which the court will apply to his case.

a) Place of the act or omission

The first option open to the plaintiff is to bring his action to the courts of the State in which the act or omission which caused the injury occurred. This is a meaningful connection, because it emphasises the proximity of the court to the cause of the injury, and reflects the fact that to establish liability it is necessary to ascertain the existence of a causal link between the conduct or omission and the injury. Moreover, it is at the site of the act or omission that the lawfulness of the defendant's conduct and the seriousness of his fault or negligence must be judged. In any case, in torts which take place at a distance, especially those related to the environment and to product liability, this connection will often overlap with the place of residence of the party responsible for the act or omission, and will not be a genuine alternative to the defendant's forum.

The Convention does not offer any criterion for deciding the place of the act or omission. Accordingly, this can only be decided by the court on the basis of its national law, or the law applicable to the wrongful act which is submitted to it by virtue of its system of private international law. This is an especially delicate issue in matters of product liability, where the concept of an act or omission may be related to the manufacture of the product or to its sale or consumption.⁸⁶ Jurisdiction will be defined differently, depending on whether one or other of these aspects is brought in. For example, in courts following the English tradition of the common law, failure to give notice that a product is dangerous is deemed to occur at the time when it is finally sold to the consumer.⁸⁷ In other jurisdictions, it may be identified at the moment when the product is placed on the market, or even at the time of manufacture, thus adding to the number of fora available to the plaintiff.

b) Place where the injury arose

The second option open to the plaintiff is that of the place where the injury has arisen. This too is a meaningful connection, since it emphasises both that a tort is a complex fact which is complete only when its effects are produced, and that in order to balance the interests of the parties, account must be taken of the position of the party which has suffered the injury. Moreover, in most cases this connection will provide an alternative to the defendant's forum, since it frequently happens that the place of the injury coincides with the domicile of the plaintiff, and thus represents an additional protective factor for him.

Defining the place of the injury has proved to be highly problematic when the direct effects of the act or omission and its indirect effects occur in different places.⁸⁸ In such a case the occurrence of the ultimate injury is only feebly linked to the act or omission. This is why the Commission mentions the place "in which the injury arose",

⁸⁶ See *Prel. Doc. No 8*, pp. 54-55.

⁸⁷ See Privy Council, in *Distillers Co. v. Thompson* (1971) AC 458.

⁸⁸ See, for example, European Court of Justice, *Dumez France v. Helaba*, 11 January 1990, C-220/83, *Recueil*, I. 49.

to indicate that it is the place where the direct effects of the act occurred which must have priority, and that indirect harm is not a sufficient connecting factor.⁸⁹

Although limited in the manner just described, the connection to the place of the injury was regarded by the Special Commission as being too severe on the person who is alleged to be responsible, because it may cover any direct injury which occurs in any State, and it will be beyond the power of the person responsible for the act or omission to control its effects. The clause therefore introduces the concept of predictability of the effects of the wrongful act, and establishes that jurisdiction will only lie at the place of the injury if the person alleged to be responsible could reasonably have foreseen injurious consequences from his act or omission in that place. From this point of view, the injury to be taken into consideration is of the same kind as that complained of by the plaintiff; this makes it possible to refer specifically to the subject of the dispute, which will probably bear upon the predictability of the injury. For this purpose, in order not to complicate the plaintiff's situation in the proceedings, the burden of proving that the injury was not predictable falls on the defendant, who will normally be the person who is alleged to be responsible.

Paragraph 2

This paragraph aims to exclude any reference to the place where the injury arose when the injury in question arises from practices contrary to the antitrust rules, whether these are practices arising from abuse of a dominant position or from conspiracy to inflict economic loss. This clause was adopted almost without debate by the Special Commission. It seems to meet the concern to avoid, in matters of competition, the possibility of a number of different actions relating to the same wrongful conduct, in the event that the tort has given rise to injury in several States, and to concentrate actions based on tort in the State in which the act causing the injury took place, thus ensuring that it coincides with the market whose rules have been breached by the person who is alleged to be responsible. However, this provision is not in line with the effect theory generally accepted in competition matters.

Paragraph 3

The aim of this paragraph is to establish jurisdiction of a preventive kind, to prevent either the act or omission, or the occurrence of injury. This ground of jurisdiction is established under the same conditions as those required for an action for injury which has already occurred. It should be noted, however, that when the plaintiff seeks to rely on the connecting factor of the possible occurrence of injury, he will have to prove that this is a possibility; it is not for the defendant to prove that the occurrence of the injury would not be predictable if the act or omission took place. It should also be observed that this action does not necessarily coincide with a request for interim measures on the same subject-matter. Although the coincidence may be found in practice to be present, the action dealt with in paragraph 3 is intended to result in a final decision, not merely a provisional or interim measure. Different consequences might also arise at the stage when the decision is recognised.

Paragraph 4

The aim of this paragraph is to regulate the situation which arises if the same act or omission causes injury in several different States. In such a case, there is no doubt that the court which has jurisdiction according to paragraph 1 a), namely the court of the place where the act or omission occurred, would be competent to rule on the whole of the situation, and thus on the whole of the injury. It is a different matter

⁸⁹ This is the solution proposed by the European Court of Justice in its judgment in *Marinari v. Lloyds Bank*, 19 September 1995, C-364/93, *Recueil*, I. 2719.

when the court is seised only because of the connecting factor in paragraph 1 *b*), namely the connection to the place where the injury originated. In this case, it is doubtful whether the courts of the place where part of the injury occurred could also have jurisdiction to decide on injury which occurred in the other countries. This solution would result in the plaintiff having a number of different options, and could even enable him to bring an action before the courts of the place where only a small part of the injury occurred, and lodge a claim there for the whole of the damage. This would be an inequitable outcome for the author of the injury; having caused only minimal damage in one country, he could be taken to court in that country and have to answer there for damage which has occurred elsewhere.

To avoid these consequences, jurisdiction for the whole of the damage could be given only to the courts of the place where the greater part of the damage has occurred; but the difficulty with this solution is how to determine from the outset the amount of the damage, something which cannot in principle be quantified until the application has been heard on its merits. One could also adopt the proposal to limit the competence of each jurisdiction to the damage which has occurred in that place.⁹⁰ However, this solution amounts to imposing on the injured party the obligation to bring a series of parallel actions in order to win damages, which might be too expensive, or to have recourse to forum of the act or omission. This solution would ultimately deprive the plaintiff of the option of the place of the injury.

The Special Commission has chosen a different solution, in order to take account of the interests involved. Thus paragraph 4 states the principle that the courts of the State of the injury have jurisdiction only for an injury which occurred or may occur in that State, but with one restriction. If the injured party has his habitual residence in the country where damages are claimed, the court seised will be competent to rule on the whole of the damage. In other words, in order to confer this enlarged jurisdiction on the courts of the place of the injury, another connecting factor is required, namely the habitual residence of the injured party. This solution avoids a plurality of different fora, while retaining the option for the plaintiff provided in paragraph 1.

Article 11 - Trusts

The meaning of "trust"

The term "trust" is not defined in the Convention. It is essentially a common law concept and may not be known in other legal systems. However, it is defined in Article 2 of the *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* (the "Trusts Convention") for the purposes of that Convention.⁹¹ Since that definition recites the attributes of a trust according to existing common law concepts, reference to that definition will be instructive should any question of definition arise.

Paragraph 1

The words in the first sub-sentence of paragraph 1 should be read as governing both paragraphs in Article 11. In other words, they define the type of proceedings and type of trust to which Article 11 as a whole applies. The reference in paragraph 2 to the absence of a designation of the forum refers to the absence of such designation

⁹⁰ This is the solution adopted by the European Court of Justice in the judgment *Shevill v. Press Alliance*, 7 March 1995, C-68/93, in a case concerning press defamation, *Recueil*, I. 450.

⁹¹ The Convention has been ratified so far by: Australia, Bulgaria, China (for the Hong Kong SAR only), Italy, the Netherlands and the United Kingdom. Malta has acceded. It has been signed by Cyprus, France, Luxembourg and the United States.

in the relevant document and does not cover the situation where there is no such document. Similarly, the proceedings that may be brought under paragraph 2 are the type of proceedings described in paragraph 1.

The article applies to proceedings concerning the validity, construction, effects, administration or variation of a trust. According to Article 8 of the Trusts Convention which on this point reflects established common law doctrine, these matters are determined by the law governing the trust. Unless provision is made to the contrary, that law is likely to coincide with that of the expressly designated forum. The jurisdiction is confined to disputes which are internal to the trust, that is to say, which arise between the trustee or settlor and the beneficiaries of the trust. Jurisdiction in respect of disputes between the parties to the trust and third parties must be established under other provisions of the Convention.

The article applies to a trust created voluntarily and evidenced in writing whether between living persons or by testament.⁹² It does not include situations whereby at common law a resulting or constructive trust is imposed by law. Although the trust must be created voluntarily it need not be the product of an agreement: it can be created unilaterally by a trust deed or in a testamentary instrument. Even where it is created by agreement it falls outside the scope of Article 4(1) and (2). It follows that the choice of forum is binding on persons who are beneficiaries under the trust even though they have never given their consent or ratification to that choice. The exclusion of wills and succession from the substantive scope of the Convention does not conflict with the express inclusion of testamentary trusts in Article 11. The exclusion means that preliminary issues, such as questions as to the validity of the will and its interpretation even in so far as they relate to the validity and meaning of the trust, are excluded. But other issues arising in the course of administration of a testamentary trust which has been validly created are covered by Article 11.⁹³

If the instrument designates the courts of a Contracting State as the forum for proceedings of the type to which the article applies, the courts of that State shall have exclusive jurisdiction whether or not the jurisdiction is expressed to be exclusive. Although the provision in the first sentence refers to "the courts of a Contracting State", the instrument may designate either a specific court within a Contracting State or the courts of a Contracting State generally.⁹⁴ The second sentence refers more correctly to "a court or courts of a non-Contracting State" and it cannot be assumed that those categories, at least in this respect, are to be treated differently.

The second sentence deals with the designation of a court or courts of a non-Contracting State. In that case the Convention cannot, of course, confer jurisdiction, but provides merely that courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction. The choice of dismissing the proceedings or suspending them until the other court has had the opportunity of determining whether it will take jurisdiction is for the court seised to make. It can be expected that the court seised will not normally decline jurisdiction unless it is satisfied that the other court has jurisdiction.

⁹² This is also the limit of application of the Trusts Convention, see Trusts Convention Article 3.

⁹³ See, for a similar exclusion, the Trusts Convention Article 4.

⁹⁴ See, the comments on Article 4 above, for some of the problems that may arise out of a general designation of a multi-jurisdictional State.

Since Article 17 is not expressed to be subject to Article 11(1) it could be argued that a derogated court can assume jurisdiction under national law despite the exclusive jurisdiction of the court designated in the trust instrument. This may not be intended. The type of exclusive jurisdiction referred to in Article 11(1) is similar to that arising out of a choice of court agreement under Article 4 which does prevail over Article 17. Furthermore, the restraints imposed by Articles 7, 8 and 12 are also applicable to choice of court stipulations under Article 11(1). Like the exclusive jurisdiction under Article 4, the exclusive jurisdiction of the designated court under Article 11(1) can be displaced under Article 5 if the defendant proceeds on the merits in another court without contesting jurisdiction.

Paragraph 2

Paragraph 2 deals with the situation, likely to be more common, where the trust instrument does not designate a court or courts. In that case the proceedings relating to the matters described in paragraph 1 may be brought in a number of fora, in so far as they differ, at the option of the plaintiff without any specific hierarchy. They are:

a) - The State in which is situated the principal place of administration of the trust

This place may be designated by the settlor in the trust instrument. If not, the answer will depend on where the trustees habitually reside, where they meet and whether the day to day administration of the trust is in the hands of another body.

b) - The State the law of which is the law applicable to the trust

Once again the trust instrument may nominate what shall be the law applicable to the trust. If not, for those States who are parties to the Trusts Convention, the trust will be governed under Article 7 of that Convention by "the law with which it is most closely connected", taking account of the factors set out in that article, such as: the place of administration of the trust designated by the settlor, the situs of the assets of the trust, the place of residence and business of the trustee, and the objects of the trust and the places where they are to be fulfilled. Common law countries which are not parties to the Trusts Convention are likely to follow these rules also since they reflect the common law.

c) - The State with which the trust has the closest connection for the purpose of the proceedings

Normally this will coincide with the place indicated under sub-paragraphs *a)* or *b)* above. However, since *c)* refers to a link with the State and *b)* by inference to a link with the law of closest connection, it is possible that they may differ.

Article 12 - Exclusive jurisdiction

This article provides for a number of grounds of exclusive jurisdiction, to apply irrespective of the habitual residence of the parties, and even if all the parties are habitually resident in the State of the court seised (Article 2, 1, *b*). It excludes any choice of court (Articles 4 and 5) and does not allow *lis alibi pendens* or declining jurisdiction (Articles 21 and 22). Although the preliminary draft Convention does not say so, the exclusive nature of these grounds of jurisdiction will also imply that if other courts are seised nonetheless they must automatically rule that they lack jurisdiction. There were lengthy debates in the Special Commission on whether it is desirable to provide for exclusive grounds of jurisdiction in the Convention. Although it is true that most national legal systems have such grounds of jurisdiction, and they

are also found in regional Conventions,⁹⁵ it is far from certain that they ought to be included in an international Convention, as in this context it might be argued that there is little practical value in arranging too rigid a distribution of State jurisdiction. For this reason, the Convention has limited the number and extent of the categories of exclusive jurisdiction, confining them to instances where they are found to be useful.

In providing for exclusive grounds of jurisdiction, the preliminary draft Convention confers them on the "courts of the Contracting State" in which is found the connecting factor underlying the exclusive jurisdiction. It does not determine what the outcome will be if the same connecting factor is found in a non-Contracting State. It therefore remains to be seen whether and how far Contracting States are bound to respect the other grounds of jurisdiction provided in the Convention if there is, in a non-Contracting State, one of the connecting factors deemed in this article to be exclusive. Since there is no express indication in the Convention, and as it is understood that the Convention cannot confer jurisdiction on the courts of non-Contracting States, the problem can only be solved according to the national law of each Contracting State, which will have to specify to what extent the exclusiveness may act in favour of a non-Contracting State.⁹⁶

Paragraph 1

This paragraph establishes exclusive jurisdiction in matters to do with immovable property, depending on the connection with the State in which the immovable is situated. This jurisdiction covers two kinds of proceedings: those concerning rights *in rem*, and those concerning tenancies of immovable property.

The exclusive jurisdiction of the courts of the State in which the immovable is situated where rights *in rem* are concerned is warranted by the fact that proceedings in this area usually involve findings of fact, investigations and verifications on the spot, which may be easier to carry out at the place where the immovable is situated. Moreover, such proceedings often involve the alteration of registers or other kinds of public document.⁹⁷ The concept of proceedings concerning rights *in rem* may be open to differing interpretations in different legal systems. In view of the Special Commission's intention that exclusive jurisdiction should be limited in its reach, this concept should be interpreted as relating only to proceedings concerning ownership or possession of or rights *in rem* to the immovable, not proceedings about immovables which do not have as their object a right *in rem*.⁹⁸ In other words, the action must be based on real rather than personal rights⁹⁹ or, if one may use this term, it must be aiming for recognition of a right "as against the world".¹⁰⁰

⁹⁵ For example, Article 16 of the Brussels and Lugano Conventions.

⁹⁶ For a discussion of this issue, in the light of the Brussels Convention, which also omits to mention the subject, see DROZ G., *Compétence judiciaire et effets des jugements*, No 164 *et seq*; KROPHOLLER J., *Europäisches Zivilprozessrecht*, p. 101 *et seq*.

⁹⁷ For these arguments in favour of the forum of the immovable, see JENARD, Report, *sub Art.* 16 (1).

⁹⁸ The question when a right *in rem* is involved, in the strict sense of the term, has to be judged in the light of the various national systems. For instance, in the common law systems "equitable interests" to which claims can be laid against third parties may be regarded as akin to rights *in rem*. For the comparable rule in Article 16(1) of the Brussels Convention, see SCHLOSSER P., Report *op. cit.*, No 167.

⁹⁹ In this connection, see *Webb v. Webb*, European Court of Justice, 17 May 1994, C-294/92. This judgment finds that there is no real property aspect to an action seeking to establish that a person was holding an immovable as a trustee, and to order him to draw up the necessary documents to enable the applicant to acquire legal ownership. See also the critical observations by BERAUDO J.P., *Revue critique*, 1995, p. 130 *et seq*.

¹⁰⁰ See COLLINS L., *The Civil Jurisdiction and Judgments Act 1982*, London 1983, p. 79: see also KROPHOLLER J., *Europäisches Zivilprozessrecht*, p. 104.

The reasons for having exclusive jurisdiction for rights *in rem* apply only in part where tenancies of immovable property are concerned. In this area the need for on-site findings does not always exist. But the tenancy contract will often be subject to a complex special regime, sometimes of a binding nature, which prompts the consideration that the task of applying these rules should be entrusted exclusively to the courts of the State in which the rules are in force.

For these reasons, the preliminary draft Convention provides that the Contracting State in which the property is situated will have exclusive jurisdiction for tenancies of immovable property.¹⁰¹ This form of jurisdiction is quite separate from that relating to rights *in rem*, as it is exercised exclusively for proceedings in which ownership or other real property rights are not in issue.

In any event, exclusive jurisdiction in this field must necessarily be limited to situations in which the above justifications apply. The precedent of the Brussels Convention, in which the original text did not set any limit to this exclusive jurisdiction, is enlightening. The difficulties encountered in practice in applying Article 16(1) of the Convention, which are borne out in the case law of the European Court of Justice,¹⁰² have resulted in the clause being revised to restrict its scope, excluding tenancies entered into for a short period for temporary personal use, on condition the tenant is a natural person and that both the tenant and the owner are domiciled in the same Contracting State.¹⁰³

From the same point of view, the preliminary draft Convention removes from the exclusive jurisdiction of the State where the immovable is situated tenancies of immovables in which the tenant habitually resides outside that State. It should be noted that the scope of this exception is much wider than in the Brussels Convention, because it is not conditional upon the duration and use made of the tenancy or the status of the parties involved, nor is it subject to their being resident in the same State. It must also be pointed out that unlike the Brussels Convention, which leaves untouched the jurisdiction, albeit non-exclusive, of the courts of the State where the immovable is situated, the clause in the preliminary draft Convention implies that when the tenant is not habitually resident in that State, its courts will not have jurisdiction of any kind, even non-exclusive, under the Convention.

Proceedings concerning tenancies of immovables in that situation are governed as to jurisdiction by the other provisions in the Convention (defendant's forum, contract forum, choice of court, etc.) where these apply in a particular case, or by the national law of the State of the court seised. In that respect, it is also possible for the State in which the immovable is situated to make provision in its national law, under Article 17, for its courts to have jurisdiction in these cases.

Paragraph 2

This paragraph provides exclusive jurisdiction for proceedings concerning the validity, nullity or dissolution of legal persons, and the validity or nullity of decisions of their organs. The provision for exclusive jurisdiction for these is derived from the similar provision in the Brussels and Lugano Conventions, but its scope is more

¹⁰¹ The preliminary draft Convention adopts the same solution for all tenancies of immovable property, whether commercial or other premises, although it may be asked whether uniform treatment is desirable in view of the considerations prompting exclusive jurisdiction.

¹⁰² *Rösler v. Rottwinkel*, European Court of Justice, 15 January 1985, 241/83.

¹⁰³ See the text of the most recent proposed revision of the Brussels Convention, based on the Commission's proposal to the Council on 14 July 1999, doc. COM (1999) 348 final.

restricted,

since it relates only to legal persons; accordingly, unregistered companies and associations without legal personality are outside its reach.¹⁰⁴ It should also be pointed out that although there were no serious problems in conferring exclusive jurisdiction for proceedings relating to the legal person itself, the Special Commission was very hesitant to provide exclusive jurisdiction for proceedings relating to the organs of the legal person. It was finally decided that it was best to opt for exclusive jurisdiction, in order to avoid a plurality of fora in this field and to achieve greater legal security, on the understanding however that the rule is to be interpreted strictly, to ensure that the rule is not applied to proceedings relating to the consequences of a decision made by the legal person.

It can be problematic to decide which connecting factor should be chosen as the basis for this exclusive jurisdiction, because of the difficulty of determining which is the closest link between a legal person and a State, and because of the different ways in which this problem is resolved in comparative law. Having decided against a reference to the statutory seat, which is not a regular feature in all legal systems, and finding itself unable to adopt the solution of the defendant's general forum - which would have resulted in a plurality of fora¹⁰⁵ -, the Special Commission adopted the criterion of a connection to the State whose law governs the legal person. This solution has the disadvantage that jurisdiction depends on the application of a conflict of laws rule,¹⁰⁶ however it seeks to ensure that there will be a significant link between the legal person and the State whose courts are exercising jurisdiction. Moreover, in many cases this will be the law under which the legal person was incorporated, although the possibility of concurrent exclusive jurisdiction in this field cannot be excluded, being an inevitable consequence of having recourse to private international law of Contracting States.¹⁰⁷

Paragraph 3

The Special Commission had no difficulty in making provision in this paragraph for exclusive jurisdiction for the courts of the Contracting State in which a register is kept, in the case of proceedings concerning the validity or nullity of entries in the register. This is a traditional form of jurisdiction which is found in the national law of several States, and in other international Conventions.¹⁰⁸ It should be made clear¹⁰⁹ that this jurisdiction covers only the validity of entries in registers and does not extend to the legal effects of the entries.¹¹⁰

Paragraph 4

This paragraph establishes exclusive jurisdiction in intellectual property matters, as regards patents, trade marks, designs and models, and other similar rights which have to be deposited or registered. Jurisdiction is conferred on the courts of the Contracting State in which the deposit or registration has been applied for or has taken place or, where appropriate, on the courts of the Contracting State in which

¹⁰⁴ Article 16(2) of the Brussels and Lugano Conventions, on the other hand, refers to "a company or legal person", and includes entities without legal personality.

¹⁰⁵ See the commentary to Article 3.

¹⁰⁶ In the Brussels Convention there is also a solution based on private international law, although it operates through the concept of the seat or headquarters of the company or legal person.

¹⁰⁷ On this point, for the Brussels Convention see GAUDEMET-TALLON H., *Les Conventions de Bruxelles et de Lugano*, 2nd ed., 1996, No 93.

¹⁰⁸ See especially Article 16(3) of the Brussels and Lugano Conventions.

¹⁰⁹ JENARD, Report, *op. cit.*, sub Art. 16 (3) expresses a different view.

¹¹⁰ See VON HOFFMANN, *AWD*, 1973, p. 62.

according to an international Convention the deposit or registration is deemed to have taken place. This formula is modelled on the one in the Brussels Convention, which takes account of the particular features of national legal systems and of the system laid down in the 1891 Madrid system and the 1925 Hague Convention, which is based on the fiction that a deposit with the International Bureau in Berne by the administration of origin has the same value as if the trade marks, designs and models had been deposited directly in each Contracting State.¹¹¹ Hence the aim of the reference to international Conventions is to incorporate into the Convention a system which is familiar and in regular use.

The intellectual property rights covered by this clause specifically exclude copyright and neighbouring rights. Since these rights are not always subject to a deposit or registration procedure, the Special Commission decided it would be preferable not to include them in a rule providing for exclusive jurisdiction; to do so would have led to difficulties when applying the rule.

The most troublesome question considered by the Special Commission was how to define the proceedings concerning intellectual property rights which are to be taken into consideration. The desirability of exclusive jurisdiction for proceedings relating to the validity of the rights is beyond debate, but it is not certain that it is equally desirable for proceedings concerning infringement of these rights.¹¹² There is no doubt that proceedings for infringement of an industrial property right will often involve an interlocutory decision on the validity of the right in question, but this does not necessarily mean that contentious cases in this field must invariably be focused in the State of the deposit or registration. It may also be thought that exclusive jurisdiction is only advisable where the courts of the latter State are making a decision on the validity of the right as the main issue in the case, and when this decision will take effect *erga omnes*. This advantage is not present where the court, in infringement proceedings, has to decide on validity as an incidental question, the effect of the decision being limited to the resolution of the case between the parties. A decision on jurisdiction in this instance could be left to the ordinary rules of the Convention (defendant's forum, forum of the tort, etc.). The Special Commission did not take a decision on this; it mentioned the question of revocation or infringement of industrial property rights in square brackets, leaving this for the attention of the Diplomatic Conference. The solution to this question is also bound up with the possible inclusion of the rule proposed in paragraph 5, and with the more general issue of the applicability of the exclusive jurisdiction in Article 12 when the court is seised for an incidental question, as explained in paragraph 6 below.

Paragraph 5

This paragraph relates to the latter problem, considered above under paragraph 4. It could be adopted if the scope of the exclusive jurisdiction of the State of the deposit or registration were to encompass proceedings for infringement of an industrial property right. It provides that in proceedings for the infringement of patents, the jurisdiction of the State of deposit or registration will not be exclusive, but concurrent with the other fora provided by the Convention or established under national law, with due regard of course to Article 17. This paragraph would restrict the scope of paragraph 4, which in proceedings for patent infringement would merely add non-exclusive jurisdiction to the grounds of jurisdiction normally available under the

¹¹¹ See JENARD, Report, *op. cit.*, sub Art. 16 (4).

¹¹² Proceedings for infringement are not mentioned in Article 16(4) of the Brussels and Lugano Conventions, which states that exclusive jurisdiction applies "in matters involving the validity of patents". This rule must be, and has been, interpreted restrictively; see JENARD, Report *op. cit.*, sub Art. 16 (4); GAUDEMET-TALLON, *op. cit.*, No 97; BARIATTI, *Riv. dir. int. priv. proc.*, 1982, p. 501.

Convention. The text is bracketed with a view to more detailed discussion of this question during the Diplomatic Conference.

Paragraph 6

The last paragraph of the article on exclusive jurisdiction deals with the problem of its extent according to the manner in which the court is seised of a question covered by exclusive jurisdiction. The proposed text of paragraph 6 aims to restrict the scope of exclusive jurisdiction by limiting it to cases where the court is seised of the question as a principal issue. Matters raised as incidental questions would therefore remain subject to the ordinary rules of jurisdiction. The question to be considered is whether it is necessary, or at least desirable, to focus the questions covered in the previous paragraphs on the courts of a single State, even when the court is not being asked to resolve them with general effect, *erga omnes*, but solely to make a ruling the effect of which will be limited to the ongoing proceedings, for the purpose of deciding another issue which has come before the court as a principal issue. Since the incidental decision has no effect for third parties and does not foreclose the possibility that the court which has exclusive jurisdiction for the principal issue may reach a different conclusion, it may be seriously doubted whether it is desirable to confer exclusive jurisdiction, especially since this would compel the parties to a dispute relating mainly to an issue other than the one for which exclusive jurisdiction is established to take action in two different courts in order to settle their case. It is interesting to note that the Brussels Convention opts, in principle, for the latter solution; Article 19, by establishing that a court must automatically find itself lacking competence when seised of a case for which the courts in another Contracting State have jurisdiction under Article 16, refers only to instances where the seisin is for a "principal action". However, it remains to be seen whether a court seised of an incidental question is bound to find that it lacks jurisdiction where the defendant objects.¹¹³ However the Special Commission, in limiting the exclusive character of the jurisdiction provided in Article 12 to cases in which the court is seised of a principal question, preferred to place this wording in brackets pending more detailed discussion of the problem at the Diplomatic Conference.

Article 13 - Provisional and protective measures

Definition of provisional and protective measures

The Convention does not define what is meant by the term "provisional and protective measures", except to a limited extent for the purposes of paragraph 3. Essentially it is a matter for the law of the court seised to determine what measures are available in that court.¹¹⁴ However, provisional and protective measures perform two principal purposes:

- a) providing a preliminary means of securing assets out of which an ultimate judgment may be satisfied; or
- b) maintaining the status quo pending determination of the issues at trial.¹¹⁵

¹¹³ This question could be left to national law or to the discretion of the court seised. For the role of national law in the regime of the objection to jurisdiction, see DROZ G., *op. cit.*, No 243 *et seq.*

¹¹⁴ For a survey of the relevant law in Anglo-Commonwealth countries, the United States, France, Germany, the Netherlands, Switzerland and the European Union, see KESSEDJIAN C., Note on Provisional and Protective Measures in Private International Law and Comparative Law, *Prel. Doc. No 10*. As to Japan, see: TAKAHASHI K., Jurisdiction to Grant an Interim Freezing Order, (1999) 48 *ICLQ* 431.

¹¹⁵ See, ILA, Report of the 67th Conference, Helsinki, 1996 at p. 202, clause 1. A French translation of the original English will be found in KESSEDJIAN C., JDI 1997, p. 110. The definition is derived from that put forward by COLLINS L. in Provisional and Protective Measures in International Litigation, in *Essays in International Litigation and the Conflict of Laws*, OUP 1994, at pp. 11-12. See also, MAHER G. AND

Generally, the measure ordered will be of a temporary nature subject to review before or at the trial of the substantive issue. However, this need not always be the case. Thus, a measure ordered after trial to prevent the removal of assets from the jurisdiction out of which the judgment can be satisfied will also meet the description. Although an exhaustive definition is not feasible, it is possible to clarify what remedies do not serve those purposes. In the first place, remedies whose main purpose is to obtain evidence for use in the trial do not fall within the scope of provisional and protective measures.¹¹⁶ A proposal to extend the definition of provisional and protective measures to measures designed to discover or preserve evidence was not accepted by the Special Commission. Secondly, an anti-suit injunction is concerned with jurisdiction, and not with the maintenance of the status quo of the subject matter of the litigation.

It is for the national law of the court seised, including, as the case may be, its choice of law rules, to determine what provisional and protective measures are available, in what circumstances and under what conditions an order for such a measure will be made, and in what circumstances any measure already ordered will be discharged.

Paragraph 1

The first paragraph provides that a court having jurisdiction under Articles 3 to 12 to determine the merits of the case has jurisdiction to order any provisional or protective measures. Those measures may relate to property wherever situated, or to the person or conduct of the defendant or other person, wherever that person may be. The reference to "the merits of the case" is a reference to the substantive dispute between the parties in respect of which the provisional or protective measures are sought. That dispute must be one which falls within the scope of the Convention as defined in Chapter I for otherwise the question of jurisdiction under Articles 3 to 12 does not arise. Thus, matters which are not of a civil or commercial nature or are excluded by Article 1(2) such as measures sought in relation to arbitral proceedings, are excluded.

The reference is to the merits of *the* case, that is to say, the actual dispute between the parties. Hence if the jurisdiction of a particular court in respect of that dispute is excluded by reason of a choice of court agreement under Article 4, the provisions of Articles 7, 8 or 11(1), or the provisions for exclusive jurisdiction under Article 12, that court is precluded from exercising jurisdiction under Article 13, paragraph 1, even though in an abstract sense it might have had jurisdiction over a dispute of that kind. But that court may be able to exercise jurisdiction under paragraphs 2 or 3, see below.

Apart from this, it is not necessary for the court exercising jurisdiction under paragraph 1 to be seised or about to be seised of the substantive dispute. A proposal to limit the operation of the paragraph to that effect was not accepted by the Special Commission. The result is that there need not be in existence at the time of application any substantive proceedings pending anywhere in a Contracting State. However, the reference to "the merits of the case" indicates that there must be a dispute and, at least, a substantial likelihood of litigation in the near future. Since national law will determine the conditions (other than jurisdictional) under which relief will be granted, it is difficult to see how an applicant will obtain relief unless the

¹¹⁶ See, *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, Art. 1.

granting court is satisfied that substantive litigation is either pending or imminent. Furthermore, if no litigation on the merits is initiated within a reasonable time either in the court which granted the provisional or protective measures, or in another court, it is equally difficult to see how under national law the continuation of those measures could be sustained.

The fact that substantive proceedings are pending in another Contracting State will not prevent a court from exercising jurisdiction under paragraph 1. Article 21 dealing with *lis pendens* will not apply because, as Article 21(3) indicates, that provision is designed to avoid conflicting decisions on the merits of the claim. In any case, most provisional and protective measures cannot acquire the status of *res judicata* and therefore are not "capable of being recognised under the Convention" as required by Article 21(1). For the same reason, it is no objection to the exercise of jurisdiction that proceedings for provisional and protective measures are pending in another Contracting State. Indeed the structure of Article 13, and especially, paragraphs 2 and 3, indicates that relief may be sought in more than one State simultaneously. Decisions given in pursuance of Article 13(2) and (3) do not qualify as "judgments" under Article 23 and hence do not qualify under Article 21(1) for priority in any event.

In contrast to the succeeding two paragraphs, the jurisdiction conferred by paragraph 1 is not limited to the territory of the State of the court seised. It is therefore possible to make an order which purports to have extra-territorial effect under this paragraph. By reason of the definition of "judgment" in Article 23 such an order qualifies as a judgment which in principle is entitled to recognition under Chapter III. But this is subject to the conditions set out in Articles 25 and 28. Provisional and protective orders do not normally have the effect of *res judicata* and will, therefore, not be entitled to recognition under Article 25(2). However, they may be entitled to enforcement under Article 25(3). Furthermore, many provisional and protective orders are granted *ex parte*, as is permitted under most legal systems. In that case, recognition or enforcement of the order may be refused by virtue of Article 28(1)(d), because obviously the document which instituted the proceedings was not notified to the respondent to the proceedings at all thereby denying the respondent the opportunity to arrange for his defence. This means that in most cases the measure, even if made under paragraph 1, will still be effective only within the State of the court which granted it. However, if the order is confirmed after the respondent to the proceedings has been served with the order and been given the opportunity to appear and seek its discharge in due time, it may be entitled to enforcement under Chapter III.

Since jurisdiction under paragraph 1 is based on the court having jurisdiction under Articles 3 to 12, jurisdiction under national law in so far as it has been preserved by Article 17, will not suffice. Since Article 17 is expressed to be subject to Article 13, the restrictions imposed by Article 13 cannot be overridden by reference to national law. Thus a court of a Contracting State can only order a "worldwide Mareva injunction" if the conditions of either paragraph 1 or 3 are satisfied, unless all parties are habitually resident in the one State.

Paragraph 2

This paragraph confers jurisdiction on the court of a State where property is located to order provisional or protective measures in respect of that property. By reference to Article 2 that court must be the court of a Contracting State. This jurisdiction is conferred on such a court even though it has no jurisdiction to determine the merits of the case under Articles 3 to 12. This means that jurisdiction under paragraph 2 can be exercised even though jurisdiction over the substantive dispute is precluded

by a choice of court agreement under Article 4, or by reason of Articles 7, 8 or 11, or by reason of exclusive jurisdiction under Article 12. However, jurisdiction under paragraph 2 can only be exercised "with respect to that property". In other words, the jurisdiction is limited (i) to measures taken in respect of property (as opposed to persons and conduct) and (ii) to property situated in the territory of the Contracting State where the court exercises jurisdiction. Since an order made in pursuance of jurisdiction under paragraph 2 does not have the status of a "judgment" under Article 23, it will not come within the scope of Chapter III. Hence for practical purposes, the enforcement of such an order is limited to the territory of the Contracting State to which the issuing court belongs.

As with paragraph 1 there is no requirement that proceedings on the merits be pending or about to be pending. However, as remarked earlier, it is unlikely that a court would order or continue measures for long, if no substantive proceedings were imminent or pending. This is, of course, a matter for national law. By definition, the court exercising jurisdiction under paragraph 2 will not have jurisdiction under Articles 3 to 12 to deal with the merits of the dispute. But it may possibly have jurisdiction under Article 17 or it may act in aid of another court although this is not an essential requirement.

The mere fact that property within the jurisdiction is seised or otherwise dealt with under provisional and protective measures, does not invest that court with jurisdiction under Articles 3 to 12 to determine any rights in that property. However, Article 18(2)(a) does allow a court to exercise jurisdiction under national law as permitted by Article 17 in respect of a dispute which is directly related to that property. Hence, if ownership of the property which is the subject of the provisional or protective measures is disputed between the parties, the court exercising jurisdiction under paragraph 2 could determine that issue, if its national law permitted this.

Paragraph 3

Paragraph 3 also permits a court of a Contracting State which does not have jurisdiction under Articles 3 to 12 to deal with the merits of the case to order provisional or protective measures. As mentioned before, paragraph 1 of Article 13 is limited as to the courts which can exercise jurisdiction, but not limited as regards the property, persons or conduct to be affected. Paragraph 2 is limited to orders in respect of property situated within the jurisdiction, but does not require that the court have jurisdiction on any other basis. Paragraph 3 is not limited as to any jurisdiction or as to who or what may be affected, but a measure taken pursuant to it is territorially limited in its effect. Hence it authorises measures affecting persons or conduct within the territory of the Contracting State of which the issuing court is part. Under paragraph 3 the court could make an order regulating the conduct of a person who is within the jurisdiction, even if that conduct relates to matters outside the jurisdiction, such as an order to return assets removed from the jurisdiction or to render an account as to their extent and whereabouts, as long as it can enforce compliance within its territory against the person or the assets of the person bound by the measure.

The exercise of jurisdiction under paragraph 3 is subject to two conditions which do not apply to paragraphs 1 and 2. In the first place, the enforcement of the measures is limited to the territory of the Contracting State of which the issuing court forms part. As mentioned before, extraterritorial enforcement of orders made under paragraph 2 is similarly precluded by depriving those orders of an entitlement to recognition under the Convention. The second condition is that the purpose of the

measures is to protect on an interim basis a claim on the merits which is pending or to be brought by the requesting party.

The second condition has in effect two further requirements. The first relates to the nature of the measures. The definition given for the purposes of paragraph 3 is narrower than the scope of the measures to which paragraphs 1 and 2 apply. In the case of paragraph 3 it is a requirement that the measure ordered be of a provisional nature made pending the hearing of the substantive dispute. The requirement that its purpose be protection "on an interim basis" of the claim on the merits excludes measures taken after judgment and methods which exist in some countries whereby a judgment can be obtained summarily if the defendant cannot seriously contest the existence of the obligation on which the claim is based.

The second requirement is that the claim on the merits is either pending or to be brought by the requesting party. As shown, this requirement is lacking in paragraphs 1 and 2, although for practical purposes the distinction may not be profound. The proceedings for a decision on the merits must be pending or to be brought in the court in which provisional and protective measures are sought or in any other court regardless of whether it has jurisdiction under Articles 3 to 12 of the Convention, or is the court of a Contracting State.

Article 14 - Multiple defendants

Paragraph 1

Article 14 permits a plaintiff to sue two or more co-defendants in the same Contracting State even if some of the co-defendants are not habitually resident in that State or indeed in any Contracting State and required jurisdiction in respect of those co-defendants is otherwise lacking under Chapter II. The purpose of the provision is to avoid a serious risk of inconsistent judgments which might result if the plaintiff had to sue the defendants separately in different jurisdictions. However, in order to avoid manipulation of jurisdictional requirements by the plaintiff, such as bringing suit against an unrelated defendant in order to gain jurisdiction in a favourable forum, a number of conditions are imposed.

In the first place, the jurisdiction can only be founded in a Contracting State where at least one of the defendants is habitually resident. In the case of an entity other than a physical person, this is the habitual residence as defined in Article 3(2). In other words, the plaintiff cannot join co-defendants when the jurisdiction in respect of the primary defendant is founded on, say, Article 6 or 10.

Secondly, the claims against the defendant habitually resident in the State where the action is brought and the other defendants must be so closely connected that they should be adjudicated together in order to avoid a serious risk of inconsistent judgments. Judgments are inconsistent when the findings of fact or conclusions of law in relation to the same issues on which they are based, are mutually exclusive. In the English version the word "inconsistent" was preferred to "irreconcilable" as a counterpart to the French "inconciliable", since a judgment that co-defendant A is liable to the plaintiff can be reconciled with a judgment that co-defendant B is not, but the judgments are inconsistent if the first judgment is based on a finding that the events alleged by the plaintiff did occur and the other is based on a finding that they

did not. The risk must be “serious” which means that it must not be merely speculative.

Thirdly, as to each defendant there must exist a substantial connection between the State in which the action is brought and the dispute involving that defendant. The onus of establishing that connection rests upon the party seeking to rely on it. This language repeats the words used in Article 18(1) dealing with prohibited jurisdiction. The link need not be such as to constitute a ground of jurisdiction under Articles 3 to 12 or even under national law permitted under Article 17, but it must be such as to satisfy the court that the co-defendant is not being brought before a clearly inappropriate forum. A similar restriction applies to Article 16 which is discussed below.

Paragraph 2

Even if these conditions are fulfilled, the plaintiff cannot bring a co-defendant before a court having jurisdiction under Article 14, if the co-defendant seeks to rely on an agreement for exclusive jurisdiction made in favour of another court, whether that of a Contracting State or not, which was made in accordance with Article 4. Of course, if the co-defendant does not object to the jurisdiction of the court seeking to exercise jurisdiction under Article 14 within the time prescribed by Article 5(2), that court will have jurisdiction notwithstanding the choice of court clause.

Article 15 - Counterclaims

Article 15 permits a counterclaim to be brought by the defendant against the plaintiff in the same court that the plaintiff has chosen under the Convention. A counterclaim is an independent, but related, cause of action by the defendant against the plaintiff. It must be distinguished from a defence whereby the defendant relies upon the existence of a debt owed by the plaintiff to the defendant to extinguish or reduce the debt claimed by the plaintiff. This is a defence known as “set-off” in English law and “*compensation*” in French (*Aufrechnung* in German). The admissibility of such a defence in the proceedings is governed by the national law applicable under the choice of law rules of the court seised of the original claim.¹¹⁷

The counterclaim must arise out of the transaction or occurrence on which the original claim is based. The English word “transaction” has been used as the counterpart of the French “*relation contractuelle*” because it has a wider scope than “contractual relationship”. In other words, the counterclaim need not arise out of the actual contract on which the original claim is based: it may arise out of another collateral contract which forms part of the wider transaction between the parties. Similarly, the English word “occurrence” has been used to represent the French “*des faits*” in order to stress that the facts on which the counterclaim is based need not be identical, but may arise out of a broader, but related, set of circumstances.¹¹⁸

¹¹⁷ See for an explanation of the difference in the various legal systems, the decision of the ECJ in *Danvaern Production A/S v. Schuhfabriken Otterbeck GmbH & Co.* (C-341/93) [1995] ECR I-2053.

¹¹⁸ Contrast the narrower formulation of Article 6(3) of the Brussels Convention which speaks of “the same contract or facts on which the original claim was based”.

Article 16 - Third party claims

Paragraphs 1 and 2

This article establishes a subordinate form of jurisdiction, in the event of third party claims, whereby a third party becomes a party to the proceedings, so that all the issues connected with the same factual situation can be dealt with in the same proceedings. Under this provision, a court which has jurisdiction under any of the Convention's provisions may also exercise jurisdiction for a third party claim. There is some difficulty in adopting a treaty rule on this subject, as this form of jurisdiction is recognised by some legal systems, but not by others. To avoid the need for special rules for Contracting States which do not recognise it,¹¹⁹ the preliminary draft Convention provides that this form of jurisdiction will exist only if permitted by national law. It is also necessary to ensure that it cannot be abused by removing the person summonsed in the proceedings from the court which would normally be competent to judge a case concerning him. For this purpose, jurisdiction is made subject to a positive condition: there must be a substantial connection between the State of the court seised of the original claim and the third party, which implies that proof of this link must be furnished by the party making the third party claim.¹²⁰ It is also obvious that the link in question must not be such as to form an independent basis for jurisdiction for the claim, while demonstrating a sufficient connection between the principal claim and the third party claim to convince the court seised that the claim has not been made solely in order to bring the person summonsed before the court on the basis of exorbitant jurisdiction.

The second paragraph seeks to limit the subordinate jurisdiction for third party claims where there is a choice of court clause agreed with the defendant. It would be contrary to the principle of the freedom of the parties to agree on a competent court, and the principle of good faith, to allow a party claiming the benefit of a warranty to bring the party who gave it before the court which has jurisdiction for the original claim, in breach of an agreement conferring jurisdiction on another court,¹²¹ provided that the choice of court agreement was exclusive and complies with the conditions laid down in Article 4 of the Convention.

Article 17 - Jurisdiction based on national law

The Convention does not regulate exhaustively the jurisdiction of the courts of the Contracting States; it merely defines, in Articles 3 to 13, a series of criteria for international jurisdiction which must be put into place by the Contracting States and their courts.

This implies, on the one hand, that the Contracting States are bound to make provision for such jurisdiction and make it available to parties wishing to use it. On the other hand, it means that when a claimant brings suit before the courts of a State on which the Convention confers jurisdiction under these articles, the court

¹¹⁹ This is done in the Brussels Convention (Article V of the Protocol) and the Lugano Convention (Article 5(1) of the Protocol).

¹²⁰ The Brussels Convention has a negative condition: it specifies that jurisdiction for the original claim will extend to a third party claim "unless the suit was brought solely in order to remove the person from the court otherwise having jurisdiction" ; this wording has resulted in the text being interpreted to mean that a plaintiff once summonsed who contests jurisdiction has to prove that there is a misuse of the forum (see GAUDEMET-TALLON H., *op. cit.*, No 226).

¹²¹ On this point see JENARD, Report *op. cit.*, sub Art. 6(1), although there is no express provision in the Brussels Convention.

seised cannot refuse to deal with the case, unless the Convention itself permits it to do so or compels it to decline jurisdiction in favour of another court situated in another Contracting State or in a third country. The combined effects of exclusive jurisdiction (Article 12) and protective jurisdiction (Articles 7 and 8), and the role assigned by the Convention to the will of the parties in deciding which is the competent forum (Articles 4 and 5), or again, the requirement for courts which are equally competent to co-ordinate their responses (Articles 21 and 22) mean that certain grounds of jurisdiction which are available in theory will not be available in a specific case.

Although Contracting States assume, by virtue of the Convention, an obligation to make available to the parties the grounds of jurisdiction which are expressly provided and regulated in it, they are by no means bound not to retain in their national law other grounds of jurisdiction for the topics covered by the Convention, where such jurisdiction is not incompatible with jurisdiction expressly provided in or not forbidden by the Convention itself.

Article 17 explains in this regard the limits of the obligation assumed by Contracting States, by stating that the Convention does not inhibit the application of rules of jurisdiction under national law, subject to the treaty rules for jurisdiction based on party autonomy (Articles 4 and 5), or a protective purpose (Articles 7 and 8) or which is exclusive by nature (Article 12), and by adding the condition that the jurisdiction in question must not fall into a prohibited category (Article 18). The margin for manoeuvre which States possess in allotting a role to their national law for matters of jurisdiction is therefore limited by the grounds of jurisdiction expressly provided, on the one hand, and by the prohibited grounds of jurisdiction, on the other. Within these limits, Contracting States are free to establish such jurisdictional rules as they deem most appropriate, in any field, including those fields - contracts, torts, branches - for which the Convention has specific rules of jurisdiction.

Article 18 - Prohibited grounds of jurisdiction

This article defines the grounds of jurisdiction which must be regarded as prohibited by the Convention. The definition is made by stating a principle, followed by examples and guidelines for putting it into practice.

Paragraph 1

This paragraph states the principle that grounds of jurisdiction provided by the national law of a Contracting State are admissible only if they are based on a substantial connection between the dispute and the State concerned. This principle builds upon the condition laid down in the last part of Article 17, which governs recourse to national rules of jurisdiction. In stating this principle, the Convention does not enact any precise rules for applying it, so that it is left to the court which has to apply it in each specific case to decide whether or not there is a substantial connection underlying each rule of jurisdiction. Moreover, since Contracting States are bound not to apply their national law when there is no substantial connection between the dispute and the State, the application of the rule amounts to giving the courts of each State the discretion to decide whether their national rules of jurisdiction are compatible with the principle laid down in Article 18. If the substantial connection cannot be established in a particular case, the court seised will be bound, under the Convention, to find that it lacks jurisdiction. It will of course depend on the procedures put in place by each Contracting State for implementing the Convention to ensure that adequate means exist to exercise the power of review thus conferred on the court.

However, the prohibition against using connecting factors which do not indicate a substantial connection between the State of the court seised and the dispute exists only when the defendant is habitually resident in a Contracting State. As regards defendants with their habitual residence on the territory of a non-Contracting State, each State remains free to regulate the extent of its judicial competence in whatever manner it deems appropriate, including the use of exorbitant connections, and defendants situated in a non-Contracting State will not therefore have any protection against such use. Thus the Convention, which in principle does not make the defendant's residence in a Contracting State a criterion for applying treaty rules of jurisdiction,¹²² does in fact use it as a criterion for delimiting the margin of manoeuvre open to States for relying on national law to define the extent of their jurisdictional competence.

Paragraph 2

In order to facilitate the application of the principle enshrined in the first paragraph, the Convention here gives a series of examples of factors which do not indicate any substantial connection between a State and a dispute. National rules based on the criteria indicated in paragraph 2 are not open to appraisal by a court seised which is seeking to ascertain whether a substantial connection exists; they must automatically be disregarded, as the inadequacy of the connection on which they are based is affirmed in the Convention. Faced with national rules based on the criteria set out in paragraph 2, the court seised must therefore find that it lacks jurisdiction.

The grounds of jurisdiction expressly prohibited by the Convention are as follows:

a) - The presence or seizure of property belonging to the defendant

This ground of jurisdiction would enable the defendant to be arraigned before the courts of a State on the basis that he possesses property on its territory. Since it could be used to found an action of any kind, even if the application to the court has no connection with the property situated in the State concerned, this forum must be regarded as exceptional and cannot be accepted. Following the example of the Brussels Convention, which disbarred the use of section 23 of the German *Zivilprozessordnung* as a ground of jurisdiction *in personam* irrespective of the merits of the application,¹²³ and the 1971 Protocol, the Special Commission had no difficulty in including this ground of jurisdiction among the prohibited grounds. The same is true when a general ground of jurisdiction is based on the seizure in the State of property belonging to the defendant, as happens for instance in Scotland.¹²⁴

The prohibition against founding jurisdiction on the presence or seizure of property belonging to the defendant only concerns this criterion, as mentioned above, as the basis for general jurisdiction over the defendant. This does not occur with the exercise of special jurisdiction, when the dispute is directly connected with property of the defendant which is situated or has been seised in the State. In this case, it cannot be said that the connecting factor does not indicate a substantial link between the dispute and the State. Hence the Convention does not forbid its use as the basis for a special ground of jurisdiction, if national law makes provision for this.¹²⁵

¹²² See above, the commentary on Article 2.

¹²³ Cf. WESER M., *Convention communautaire sur la compétence judiciaire et l'exécution des décisions*, 1975, p. 110.

¹²⁴ See SCHLOSSER, Report *op. cit.*, No 86.

¹²⁵ It will be noted that jurisdiction for the place where the property is situated is provided in the *Unidroit Convention on the international return of cultural goods which have been stolen or unlawfully exported*, Rome, 24 June 1995.

b) - The nationality of the plaintiff

This ground of jurisdiction enables the plaintiff to bring suit against the defendant in the courts of the State whose nationality he possesses, regardless of the nature of the claim and in the absence of any other connection with that State. This is the case in Article 14 of the French and Luxembourg Civil Codes, which the Brussels Convention defines as exorbitant. Here again, the Special Commission had no hesitation in prohibiting a ground of jurisdiction which, in the substantive field of the Convention, cannot constitute a sufficient connection between the dispute and the State of the court seised.

c) - The nationality of the defendant

It was also decided, without much discussion, that it was desirable to prohibit jurisdiction based on the nationality of the defendant, as is provided for instance in Article 15 of the French, Luxembourg and Belgian Civil Codes, and admitted in the past in Italian jurisprudence.¹²⁶ This ground of jurisdiction is hardly warranted in a Convention with the substantive scope of the present one, and its application could lead to jurisdiction being claimed in situations without any genuine link with the State of the court seised.

d) - The domicile, habitual or temporary residence, or presence of the plaintiff

Although they may be regarded as indicating a closer connection than the nationality of the plaintiff, other situations relating to the status of the defendant, such as his domicile, habitual or temporary residence, or his mere presence in the State of the court seised, do not evince a sufficient connection with it to provide a general ground of jurisdiction for the court seised.¹²⁷ These situations reflect a connection with the defendant which is capable of its nature of playing a role in the field to which the Convention pertains, but they indicate a connection of only one of the parties concerned, and give rise to the same difficulties as the forum of the defendant's nationality if they are used as the only grounds of jurisdiction. The Special Commission was in agreement that they should be excluded.¹²⁸

e) - The carrying on of commercial or other activities by the defendant

This ground of jurisdiction gave rise to considerable discussion within the Special Commission, partly because of the difficulty of deciding exactly how far such a flexible connection, one which has to be appraised by the court in each particular case, can be said to extend. The prohibition covers jurisdiction based on the fact that the defendant carries on a regular activity of some significance in the State, regardless of the manner in which it is organised, and thus without regard to the existence of another link with the State, such as the presence of property or an establishment, principal or secondary, in the State itself. This connection, better known in the United States under the heading of "doing business" makes it possible in some situations to bring a suit against the defendant even when the claim has no specific relationship with the activity carried on by the defendant in the State of the court seised. This therefore is a ground of jurisdiction which is general in scope, despite the absence of any focal point for the defendant's activities in the State. Moreover, there is a significant margin of uncertainty in applying it, because of the difficulty of determining the quality and quantity of activity which is needed in order to found jurisdiction; this again has to be left to the court seised to decide. Its presence in the Convention, which is intended to provide a reliable instrument for

¹²⁶ Cf. WESER M., *op. cit.*, p. 104. This ground of jurisdiction has not been admissible in Italy since the entry into force in 1995 of the new law on private international law.

¹²⁷ However, these situations may have a role in founding special jurisdiction: see for instance Article 7, on contracts with consumers.

¹²⁸ This ground of jurisdiction was already among those not admitted by the 1971 Hague Protocol.

use in practice, would involve the risk of encouraging a dispute between the parties at the stage when the jurisdiction of the court seised is being determined. The Special Commission was therefore in favour of excluding it.¹²⁹

It should be explained that the connection to the defendant's activity in the State is prohibited only for the purpose of founding a general jurisdiction, which could then be exercised for any case quite unrelated to the activity in question. The prohibition would not be justified if the dispute is related to that activity or is directly connected to it. Jurisdiction would not in fact be based on "doing business", but rather on "transacting business", which may reflect a sufficient link between the dispute and the State in which the activity is carried on. Although, as already explained, the possibility of the defendant's activity being taken into account to found special jurisdiction under the Convention has been foreclosed, this does not prevent its constituting the basis for special jurisdiction under national law.

f) - The service of a writ upon the defendant

In the law of some States, especially common law States¹³⁰ there is a ground of jurisdiction based solely on the fact that a writ has been served on the defendant on the territory of the State of the court seised. Although this ground of jurisdiction was originally justified by the finding that the court only has jurisdiction if the writ has been properly served on the defendant, it is undisputed that service of the writ is not in itself sufficient to establish a significant connection with the State of the court in all circumstances. Here again, in the light of the 1971 Hague Protocol, the Special Commission did not hesitate to include this ground of jurisdiction among the list of prohibited fora.

g) - The unilateral designation of the forum by the plaintiff

This provision is for cases where the statement that a particular court has jurisdiction was not a joint expression of intent by the parties, but can only be traced to one of them. In this case, there is no choice of court as in Article 4, which is based on the consent of the parties according to one of the forms admitted in paragraph 2 of that article; the practice which has developed with respect to the choice of court in applying other international Conventions clearly shows that the unilateral designation of the competent court (for instance on an invoice)¹³¹ is not equivalent to such consent. Nor is this the same situation as in Article 5, which presupposes that the unilateral choice of court made by the plaintiff in submitting his application to a court which does not otherwise have jurisdiction is confirmed by the conduct of the defendant, who then defends the case on the merits without contesting jurisdiction. Because of the role assigned to party autonomy in the Convention, it is clear that unilateral designation of a court by only one of the parties cannot represent a sufficient connection with it.

h) - Proceedings for a declaration of enforceability, registration or enforcement of a judgment

The aim of this clause is to ensure that proceedings to obtain execution of a foreign judgment - either at the stage of a declaration of enforceability, or at the registration stage, or at the enforcement stage - in a particular State do not become a ground of jurisdiction enabling the courts of that State to entertain other applications unconnected with those proceedings. General jurisdiction of this kind is evidently unwarranted from the viewpoint of the link between the dispute and the court

¹²⁹ See also the 1971 Hague Protocol (Article 4(d)).

¹³⁰ For the United Kingdom and Ireland, see the commentaries in the Schlosser Report on the 1978 Brussels Convention, Nos 85 and 86.

¹³¹ This situation is also covered by the 1971 Hague Protocol (Article 4(f)).

seised, as it could be used to bring before the courts of a State a case which has no connection with that State.

As with connections with the presence of property and activities by the defendant in a State, the Special Commission has taken the view that jurisdiction based on the existence of proceedings to execute a foreign decision should be prohibited only in the form of a general jurisdiction. Consequently, Contracting States remain free to make provision in their national law for special jurisdiction where the dispute is directly associated with proceedings of this kind. However, it should be emphasised that this ground of jurisdiction is to be interpreted restrictively, and that it will only be justified in so far as it does not form a barrier to the obligation to recognise and enforce a foreign judgment which a State has assumed under the Convention.

i) - Temporary residence or presence of the defendant

While the habitual residence of the defendant in a State is the basic criterion for the courts of that State to have (general) jurisdiction (see Article 3), his mere temporary residence or presence are not in themselves a sufficient connection to warrant such jurisdiction. Whether the residence is temporary in nature must be decided on a case-by-case basis, taking account of the factors which go to make up habitual residence.

j) - The place of signature of the contract from which the dispute arises

The exclusion of this ground of jurisdiction is based on the consideration that the place where a contract is signed may be of a purely accidental nature, and if there are no other connecting factors it will not be a sufficient connection on which to base a contract forum.

As already explained, the list of prohibited grounds in paragraph 2 is not exhaustive. These are merely examples of grounds of jurisdiction provided by national legal systems, and others may be added. The *chapeau* of the paragraph makes this clear, with the word "*notamment*" which precedes the list in the French version but is omitted inexplicably in the English version. The aim of a non-exhaustive list is not merely to avoid the risk of forgetting a particular exorbitant ground of jurisdiction which may exist in legislation somewhere, but also to ensure that fresh exorbitant fora grounds cannot be introduced, in breach of the principle laid down in paragraph 1.

It must also be pointed out that the connecting factors mentioned in the list fall within the Article 18 prohibition if they form the basis for general as well as special jurisdiction, except for the connecting factors listed in sub-paragraphs *a)*, *e)* and *h)*, for which the possibility of special jurisdiction is expressly admitted. In respect of the latter, it should also be remembered that this paragraph, which permits the exercise of special grounds of jurisdiction based on some of the criteria included in the list, does not confer any jurisdiction in this sense on Contracting States. It merely allows the exercise of the special jurisdiction mentioned, provided these grounds are specified in the national law of the State of the court seised, in accordance with Article 17.

Paragraph 2 also makes clear that the criteria mentioned in the list cannot be taken as a basis for jurisdiction for the courts of a State not solely when they are considered separately, but also when several criteria are present simultaneously. In other words, the existence at one and the same time of two or more exorbitant fora in the same State is not sufficient to create a substantial connection between the dispute and that State, since each of these fora is exorbitant. On the other hand, the conjunction of an exorbitant forum and other criteria than the ones included in the list implies that the question of whether a substantial connection exists must be decided by the court seised, in accordance with paragraph 1. This conclusion follows from the text of paragraph 2, which does not prohibit the connecting factors indicated in the list except where they are the only basis of jurisdiction for the court seised.

Paragraph 3

This paragraph deals with an issue which has been debated at length by the Special Commission. It has to do with the impact of the Convention on civil actions to obtain relief or damages following a serious violation of fundamental human rights, as recognised in the general international and treaty law on human rights. There is a well known tendency with these international crimes to assign universal jurisdiction to States, to enable them to exercise criminal jurisdiction even when there is no clear connection between the crime and the State of the court seised. Even the Statute of the International Criminal Court, adopted in Rome on 17 July 1998, is framed in this sense. It provides that States are bound to prosecute these crimes, and the International Court will have jurisdiction if States fail to do so. Thus it is only to be expected that criminal proceedings may be accompanied by civil proceedings instituted by victims to obtain relief from the person responsible for the violation. In this regard, it should also be noted that a civil action of this kind may be taken in the context of the criminal action itself, if national law permits this and if the plaintiff wishes it; otherwise, an action may be instituted independently in a civil court. There is a problem in deciding which rules should govern international civil jurisdiction in this field, having regard to the obligations which arise for States from general and international treaty law.

In this context it should be noted that the chief aim of the Convention is not to regulate civil actions of this kind, but rather to define the rules of jurisdiction for civil and commercial relations among individuals within an international setting. The Convention does not therefore need to include jurisdictional rules for proceedings based on an infringement of fundamental human rights, but merely to leave Contracting States entirely free to adopt national rules in this field, and ensure that the Convention does not prevent them from doing so. From this point of view, the most radical solution would have been to exclude this category of proceedings from the substantive scope of the Convention. The Special Commission rejected this solution, as the consequence would have been that these proceedings, and the judgments handed down as a result, could not have been covered by the Convention's rules of recognition and enforcement although they would have been based on a rule of jurisdiction admitted by the Convention itself.

The solution adopted was therefore to leave Contracting States free to define the extent of their competence in this field while providing an exception to the prohibition against using certain fora in the context of national law. Thus Article 18, paragraph 3, states that this article does not prevent a court of a Contracting State from exercising its jurisdiction under national law when a plaintiff applies to it for relief or damages for an infringement of his fundamental rights. By this means, grounds of jurisdiction which would have to be excluded from national law because they do not represent a substantial connection between the State and the dispute can be used, in the framework of national law, if States consider them necessary in order to meet the needs of protection of victims of infringements of fundamental human rights.

However, it was not possible during the ongoing work of the Special Commission to develop all the implications of this principle. No agreement has yet been reached as to the circumstances warranting a waiver of the prohibition against using certain exceptional connecting factors in order to found jurisdictional competence in this field. This is why the preliminary draft Convention offers two alternative variants, reflecting the main approaches favoured within the Special Commission in this respect.

The first variant lists in detail the violations which warrant the use of exceptional fora for the exercise of jurisdiction in civil matters. These violations comprise, on the one hand, genocide, crimes against humanity and war crimes, as defined in the Statute

of the International Criminal Court; on the other hand, serious crimes against a natural person, and grave violations of fundamental rights established under international law (torture, slavery, forced labour and disappearances). With the first category of violations, the exception in paragraph 3 operates without restriction; with the second category, it operates only if there is a risk for the plaintiff that justice may be denied, because it is impossible or difficult to bring proceedings in another State.

Under the second variant, on the other hand, the exception to Article 18 is much more restricted. It only covers situations in which the conduct in breach of a fundamental right is a crime under international law; other violations are disregarded. Moreover, the use of exorbitant jurisdiction is permitted only the State using it also exercises its criminal jurisdiction over this crime under an international treaty, and if the damages sought are for death or serious bodily injury arising from the crime. The risk of justice being denied elsewhere plays no role at all.

The scope of these two variants, and their relationship to State jurisdiction in criminal matters, will have to be examined in greater detail, and all their implications discussed, in order to arrive at a satisfactory solution which will make it possible to safeguard the issue of protecting human rights, without upsetting the structural balance of the Convention.

Article 19 - Authority of the court seised

This article defines the circumstances in which a court of a Contracting State which is seised of a dispute falling within the substantive scope of the Convention is bound to verify that it has jurisdiction. The main aim of this clause is to ensure that the court seised does not proceed on the basis of one of the grounds of jurisdiction prohibited under Article 18 if the defendant fails to appear. If the defendant does appear, it will be for him to raise an objection to the court's jurisdiction, not later than the time when he presents his initial defence on the merits, failing which the court's jurisdiction will be established under Article 5 of the Convention.

The Special Commission felt it could not lay down a general obligation for the court to verify compliance with Article 18 in all circumstances, partly because automatic verification of jurisdiction in default proceedings is not available in all legal systems, and for States which do not have it such an obligation would have necessitated significant changes to national procedural rules, as well as additional cost. It was thought desirable to safeguard the different approaches in national systems, while ensuring adequate protection for a non-appearing defendant, and this approach led to a set of conditions being identified which, if they are present, will compel the court seised to ascertain that its jurisdiction is not based on a connecting factor which is prohibited under Article 18.

- a) First, the court is obliged to verify its jurisdiction if national law so requires. The *renvoi* to national law corresponds to the requirement that States which have a general obligation to verify it, or in any case conditions other than those indicated in Article 19, should be able to continue applying these. When national law provides for circumstances which make the verification of jurisdiction compulsory, these circumstances will therefore be additional to those provided by the Convention.
- b) Secondly, jurisdiction must be verified if the plaintiff so requests. This provision takes account of the interest of the plaintiff, in doubtful cases, in having the jurisdiction of the court seised verified, since under Article 26 a judgment based on a prohibited ground of jurisdiction cannot be recognised or enforced in the other Contracting States.

- c) The third hypothesis seeks to protect the defendant, by enabling him to request verification of the court's jurisdiction even after judgment has been entered. The arrangements for making such a request are governed by procedures laid down for the purpose in national law, which may attach certain conditions. The Special Commission placed this clause in square brackets, with a view to further examination of its implications under national law.
- d) The last hypothesis is based on the idea that the court seised ought to verify its jurisdiction in a case where there is some doubt that the document instituting the proceedings reached the defendant in time for him to prepare his defence, so that there would be no reason for him to suffer the negative consequences of failing to appear. In the two alternative variants put forward, the text seeks to resolve the same problem as in the Brussels Convention, which solves it by reference to Article 15 of the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. It was decided not to refer to the Hague Convention, either because its Article 15 is not confined to a defendant who fails to appear, or because in any case this Convention is applicable as between States which are parties to it. It was decided instead to set down in principle a condition similar to that in Article 28, paragraph 1 (b), concerning the conditions for the recognition and enforcement of judgments. However, the final wording of this condition will require the attention of the Diplomatic Conference at a later stage, and is given in square brackets in the text of the preliminary draft Convention.

It should be pointed out that the conditions just discussed only relate to verification of the court's jurisdiction from the viewpoint of grounds of jurisdiction which are prohibited under Article 18. There is no mention in Article 19 of the exclusive grounds of jurisdiction in Article 12, for which there is a problem in verifying jurisdiction even when the defendant appears before the court seised, since these are grounds which are not freely available to the parties. There may also be a problem in future with the protective grounds of jurisdiction in Articles 7 and 8. Therefore, the question of verifying jurisdiction may perhaps merit reconsideration as a whole by the Diplomatic Conference.

Article 20

Article 20 requires the court which is requested to exercise a required jurisdiction under Chapter II to stay proceedings unless and until it is satisfied that the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence. The burden of satisfying the court rests upon the plaintiff. This provision has its counterpart in Article 28(1)(d) which permits (but does not compel) the court addressed to refuse recognition or enforcement if the document instituting proceedings was not notified to the defendant in sufficient time to enable the defendant to arrange for the defence. The defendant is thereby doubly protected.

Paragraph 1

There are however a number of issues arising from Article 20, paragraph 1:

In the first place, Article 20(1) imposes an obligation to verify timely notification of the claim even in the case where the defendant appears. Since its counterpart in Article 28(1)(d) was broadened deliberately beyond default judgments, it can be assumed that Article 20(1) also applies in the case where the defendant appears, and raises no objection to the method and timeliness of notification. In common law countries at least, an unprotesting appearance would be seen as making good any

deficiencies in service. However, Article 20 imposes on the plaintiff even in that case the burden of establishing that the document establishing the claim was notified to the defendant in sufficient time to enable the defendant to arrange for his defence - a matter which would appear to be exclusively within the knowledge of the defendant. If the defendant does not raise the issue, one may assume that the burden will be easily satisfied. But if the defendant does raise the issue, the burden on the plaintiff could become onerous and any doubt will have to be resolved in favour of the defendant. Even if the plaintiff satisfies that burden, the issue can be raised again by the defendant at the stage of recognition or enforcement under Article 28(1)(d). Since the provisions of Article 27(2) as to findings of fact only relate to findings as to jurisdictional facts, the court addressed will not be bound by any findings the original court made under Article 20 as to timely notification. The question arises whether the imposition of such a double burden on the plaintiff goes beyond the proper aim of protecting the defendant.

Secondly, there is uncertainty what is meant by the word "notified" in the English text. The French word "*notifié*" in its technical sense refers to the delivery of the document to the "*huissier*" ("court bailiff") for service.¹³² Such a process does not exist in the common law where the word "notified" has no technical meaning. Since the purpose of the provision is to give the defendant a realistic opportunity to defend the claim, the words "notified" and "*notifié*" must be given the factual meaning of "brought to the notice of" which can include methods which may not conform to proper service. This interpretation is supported by the words "and in such a way" which indicates that it is the fact of notification, rather than the method which is the more important.

Thirdly, the service must have been effected in sufficient time and in such a way as to enable the defendant to arrange his defence. The requirement of "sufficient time" already occurs in the 1965 Service Convention. The words "and in such a way" have been added in the preliminary draft Convention. The test is a factual one and it may not be sufficient for the plaintiff to show that the service complied with the procedural rules of either the State of issue or the State where service took place.

Finally, there is the meaning of the words "or that all necessary steps have been taken to that effect". From the discussion in the Special Commission it is clear that those words encompass the case of "substituted service", as known in the common law, whereby a court may order that service be effected other than by notification to the defendant personally. This may range from notification to a lawyer known to be acting for the defendant to an advertisement in a newspaper which the defendant may, or may not, read. In civil law systems it may suffice that the document has been delivered to the "*huissier*" ("*notification*") who may not have been able to actually serve it ("*signification*"). This again is a question which will have to be considered twice: firstly by the original court and secondly by the court addressed under Article 28(1)(d). It is to be hoped that this will be done with an understanding of the different methods employed to the same end by different legal systems.

¹³² See, Service Convention 1965, Article 5 chapeau where the French word "*notification*" is rendered in the English text as "arrange to have it served by an appropriate agency".

Paragraph 2

The second paragraph which is in brackets awaiting determination by the Diplomatic Conference preserves the priority of any international arrangement, whether bilateral or multilateral, for the service abroad of judicial and extrajudicial documents in civil or commercial matters. As the language indicates, the instrument the Special Commission had primarily in mind is the 1965 Service Convention. In that Convention Article 15 makes provision in relation to the matters provided for in Article 20 of the preliminary draft Convention. A number of important differences should, however, be noted.

Article 15 of the Service Convention only applies where the defendant has not appeared. Thus, as between States Parties to the 1965 Convention there will be no obligation to verify timely notification in cases where the defendant appears, although the defence available under Article 28(1)(d) will not be affected.

Article 15(1) of the Service Convention spells out in some detail how service (as opposed to "notification") may be effected either by reference to the internal law of the State addressed or by actual delivery to the defendant or his residence by another method prescribed by that Convention. In either case the service must have been effected in sufficient time to enable the defendant to defend. A certificate of service is issued pursuant to Article 6.

Article 15(2) of the Service Convention allows each Contracting State to make a declaration that, notwithstanding the provisions of Article 15(1), the judge may give judgment, notwithstanding the absence of a certificate of service or delivery, if certain conditions are met. Most States Parties to the Service Convention have made this declaration.

The Service Convention has been ratified or been acceded to by a large majority of States who are presently members of the Conference. However, a number of States, including Argentina, Australia, Austria, Croatia, Mexico and Morocco who have participated in the drafting of the preliminary draft Convention have not ratified or acceded to the Service Convention. For States Parties to the Service Convention paragraph 2, if accepted by the Diplomatic Conference, will represent a distinct advantage: their obligations as regards each other will be less onerous and more clear. For the others, the obvious option would be to accept the Service Convention. Even if paragraph 2 is not accepted, the Service Convention may still prevail depending on the content of Article 36 which is yet to be drafted. However, if the Diplomatic Conference were to decide that Article 20(1) is to prevail, it will in effect derogate from the Service Convention.

Paragraph 3

Paragraph 3 which also appears in brackets provides that paragraph 1 shall not apply, in case of urgency, to any provisional or protective measures. Since measures, such as the Mareva injunction, depend on speed and surprise for efficacy such a saving would be essential if Article 13 is to retain any utility. A similar provision appears in the final paragraph of Article 15 of the Service Convention of 1965. The acceptance of such an exception would not affect the bar to recognition or enforcement of *ex parte* orders found in Article 28(1)(d).

Article 21 - Lis pendens

The preliminary draft Convention will offer the plaintiff a choice of fora. For instance, as an alternative to the specific jurisdictions in Articles 6 (contract) and 10 (tort), there will be a general jurisdiction based on Article 3. As regards corporate defendants, there may be four alternative fora available under the definition given in Article 3(2). It is obvious that this may lead in some cases to a conflict of jurisdictions and in others to situations where a defendant may be sued in an inappropriate forum. Both the civil law and the common law have developed mechanisms to deal with this problem. In the civil law the mechanism is that of *lis pendens* which is based on the priority of the first action commenced.¹³³ It has the advantage of certainty, but the disadvantage of rigidity. It also can be abused by a defendant taking pre-emptive action in seeking a so-called "negative declaration" as to its liability. In the common law the mechanism is that of *forum non conveniens* which prefers the "natural" or "more appropriate" forum which need not be the forum which was seised first. It has the advantage of flexibility and adaptability to the circumstances of each case, but it lacks certainty and predictability. Needless to say, each side looked with some suspicion at a system with which it was unfamiliar.

After long debate the Special Commission has adopted a compromise solution whereby provision is made for both *lis pendens* and for declining jurisdiction in certain circumstances. However, the *lis pendens* provision in Article 21 is made more flexible and priority is denied to the "negative declaration". In return the power to decline jurisdiction in Article 22 is subjected to stringent conditions which emphasise its exceptional character.

Paragraph 1

For a situation of *lis pendens* to arise, the following conditions must exist:

- There must be an identity of parties and of cause of action. The English term "cause of action" can be interpreted narrowly as referring to a particular cause of action such as trespass or negligence. The French version, however, is broader and speaks of "*la même cause et le même objet*" which does not refer to the procedural peculiarities of the common law, but to the underlying cause and object of the litigation. This is further clarified by the use of the words "irrespective of the relief sought". The result is that the words "cause of action" in the English text should be broadly interpreted as referring to the subject matter of the litigation, such as a dispute arising out of a particular contract or incident, rather than to the particular form in which relief is sought. Thus, a claim by one party against the other for damages for breach of contract and a claim by the other party against the firstnamed that the contract in question was avoided for misrepresentation are based on the same cause of action.¹³⁴
- The competing proceedings must lie in courts of different Contracting States. Obviously, a conflict of litigation in the same State will be dealt with by the

¹³³ For its history in French law, see GAUDEMET-TALLON H., *La litispendence internationale dans la jurisprudence française, Melanges D. Holleaux*, 1990, 121.

¹³⁴ Compare *Gubisch Maschinenfabrik v. Palumbo* (C 144/86) [1987] ECR 4861.

internal law of that State. Similarly, a conflict of litigation between a Contracting and a non-Contracting State is a matter for the national law of the State concerned to resolve.

- The court first seised in order to gain priority must have a required jurisdiction under Chapter II. It need not specifically exercise that jurisdiction as such: it is possible that the action in the court first seised is between persons habitually resident there and thus outside Chapter II, but the jurisdiction it exercises must be consistent with a required ground under Chapter II which will obviously be the case when the defendant is habitually resident there.
- The court first seised must be expected to render a judgment which is capable of being recognised under Chapter III of the Convention. The decision must therefore fall within the definition of "judgment" in Article 23. A judgment given in the exercise of jurisdiction based on a required ground set out in Chapter II has that capacity by virtue of Article 25, provided it is capable of gaining the quality of *res judicata*. Thus no *lis pendens* can arise as between proceedings for provisional and protective measures brought in different States under Article 13. Judgments rendered in pursuance of Article 17 do not have the capacity of being recognised under Chapter III and hence proceedings based on a jurisdiction authorised by Article 17 do not have priority. But, by reason of Article 21(4), proceedings based on a jurisdiction authorised by Article 17 must give way to earlier proceedings based on a required jurisdiction. If both proceedings arise under Article 17 jurisdiction, the national law of the relevant court will be applied to resolve the issue.
- Finally, the court second seised must not have exclusive jurisdiction under Articles 4 or 12. If the court second seised has exclusive jurisdiction, the court first seised lacks jurisdiction and this is likely to be the case in relation to Article 11(1) even though that article is not specifically mentioned.

Once those conditions exist, the obligation on the court second seised to suspend proceedings arises even though no application is made to it to do so. In other words, the court second seised shall act, if need be, on its own motion.

Paragraph 2

If a situation of *lis pendens* is established, the court second seised is obliged to suspend proceedings in the first instance. It does not decline jurisdiction until it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under Chapter III. It must therefore be a "judgment" as defined in Article 23 which meets the requirements set out in Article 25. These have been discussed in the preceding section. It is obvious that the judgment must be one on the merits of the dispute between the same parties as in the court second seised.

If the plaintiff fails to bring the proceedings in the court first seised to a conclusion on the merits or that court does not render a decision within a reasonable time, the court second seised may pursuant to Article 21(3) on the application of a party, decide to proceed with the case. What amounts to a reasonable time is not defined and will depend on the assessment of the court second seised.

Paragraph 3

The mere fact that another court was seised first does not deprive the court second seised of jurisdiction. The court second seised is only obliged to decline jurisdiction when it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under Chapter III. In the meanwhile the exercise of its jurisdiction is merely suspended. Should the plaintiff fail to take the necessary steps to bring the proceedings to a decision in the court first seised or should that court fail to render a decision within a reasonable time, the court second seised may terminate the stay and proceed with the case.

Paragraph 4

As mentioned before, by reason of Article 21(4), proceedings based on a jurisdiction authorised by Article 17 must give way to earlier proceedings based on a required jurisdiction.

Paragraph 5

Paragraph 5 provides a common definition of the moment when a court shall be deemed to be seised. The absence of such a provision in Article 21 of the Brussels Convention, as originally drafted, led to the matter being referred to the national law of each court seised.¹³⁵ Unfortunately, even within the European Union, those laws differ: some regard a court to be seised only after the defendant has been served or after the necessary steps have been taken to notify the defendant; others regard a court as seised of a matter as soon as the initiating document has been filed in the court registry, or, where notification is required before filing, as soon as the documents are delivered to the person or authority responsible for service.¹³⁶ The former test favours the defendant in the first action who may be able to take pre-emptive action as soon as it becomes aware of the filing of the writ. The second test favours the plaintiff in the first action who may be able to take the defendant by surprise.

The Special Commission has decided to adopt the second option: a court is to be regarded as seised once the initiating document is lodged with the court or, if it is required to be served before lodgment under the law applicable in that court at the time when that document is received by the authority responsible for service (such as the "*huissier*" or "court bailiff") or when it is actually served on the defendant.

The provision referring to "universal time" as the ultimate measure of priority remains in brackets for decision by the Diplomatic Conference. This is a system of time measurement based on Greenwich Mean Time but counted from 0 hour which is equivalent to midnight Greenwich Mean Time.

Paragraph 6

Paragraph 6 deals with the problem of the so-called "negative declaration" whereby a party to a dispute seeks a declaration that it has no obligation to the other party to the dispute. Although such a procedure is known to both the common law and the

¹³⁵ See, *Zelger v. Salanitri* [1984] ECR 2397.

¹³⁶ See, MØLLER G., The Date upon which a Finnish and a Swedish Court Becomes Seised for the Purposes of the European Judgments Convention, in *E Pluribus Unum: Liber Amicorum Georges A.L. Droz* (1996) at pp. 219-233.

civil law and often serves a legitimate purpose, there is no doubt that the procedure has at times been used by a prospective defendant to pre-empt the choice of forum by a prospective plaintiff. As paragraph 1 is framed, a proceeding seeking a negative declaration if first instituted in time would prevail over a subsequent action commenced in another Contracting State seeking to enforce the substantive obligation.¹³⁷ The Special Commission wanted to avoid such an effect.

In the case of the first action being an action for a negative declaration and the action subsequent in time being one seeking substantive relief, the position provided for in paragraphs 1 to 5 is effectively reversed. It is the court first seised that must suspend the proceedings, if a party so requests, provided the court second seised is expected to render a decision capable of being recognised under Chapter III of the Convention. If no application to suspend proceedings is made to the court first seised or the court second seised is exercising jurisdiction under national law pursuant to Article 17, both actions can proceed since the obligation on the court second seised to suspend proceedings has been rendered inapplicable by sub-paragraph a).

Paragraph 7

Paragraph 7 provides that the court first seised may, on the application of a party, decline jurisdiction in favour of the court second seised, if it determines that the latter court is clearly more appropriate to resolve the dispute. Although the paragraph starts with the words "This article shall not apply", it is in fact by virtue of this paragraph and not by virtue of Article 22 that the jurisdiction is declined in such a case. For that purpose the concluding words of paragraph 7 import the conditions specified in Article 22, in so far as they are relevant, in particular paragraphs 2 and 3 of Article 22. There is, however, one omission which may not have been intended. Article 22 does not contain a provision similar to Article 21(3) dealing with the situation where the plaintiff fails to proceed in the transferee court or that court delays proceedings unreasonably. Paragraph 7 excludes the application of any paragraph of Article 21, except presumably itself.

There are, however, some differences between the scope of Article 21(7) and Article 22. In the first place, the court first seised can only decline in favour of the court second seised and not in favour of a third court, even though that court might be even more appropriate. Secondly, since a *lis pendens* can only arise between courts of Contracting States, the second court must be that of a Contracting State. Thirdly, since there is no *lis pendens* situation to which Article 21 applies, if the court first seised is exercising jurisdiction pursuant to Article 17, paragraph 7 is inapplicable, although it may be open to the court first seised to decline jurisdiction under its national law. However, since Article 21 does apply to the reverse situation, a court first seised exercising a required jurisdiction could decline jurisdiction in favour of a court exercising jurisdiction under Article 17.

Article 22 - Exceptional circumstances for declining jurisdiction

Under several legal systems it is possible for a court to decline a jurisdiction it might otherwise possess. This happens in common law countries under the doctrine of *forum non conveniens*, which term, however, does not have a uniform meaning in

¹³⁷ See, *The Tatry* [1994] ECR I-5431.

those countries.¹³⁸ Civil law systems, generally, do not know of the doctrine of *forum non conveniens*. But there are situations where a civil law court will, and sometimes must, decline jurisdiction by reason of an insufficient connection between the dispute and the forum.¹³⁹

Article 22 provides that a court in a Contracting State may, in exceptional circumstances, decline required jurisdiction under Chapter II which it otherwise possesses. It cannot, however, decline jurisdiction if it arises under Articles 4, 7, 8 or 12. No mention is made of jurisdiction under national law which can be invoked under Article 17. On a literal interpretation, Article 17 by referring to "rules of jurisdiction under national law" does not include rules for declining jurisdiction under national law. On that approach a court exercising jurisdiction under Article 17 can only decline that jurisdiction if the conditions laid down in Article 22 apply. However, it could be argued to the contrary that the scheme of Chapter II, as indicated by Article 21(4), indicates that, unless national jurisdiction under Article 17 is specifically included, it stands outside the provisions of Articles 21 and 22. This point will require clarification at the Diplomatic Conference.

The provisions of Article 22 must not be confused, however, with the doctrine of *forum non conveniens* as it has operated in common law countries. Article 22 is a provision whereby the forum may defer its jurisdiction in favour of that of a court of another State, but, with one exception, only if that other court actually assumes jurisdiction. It must also be noted that Article 22 applies to all Contracting States. Earlier proposals whereby acceptance of the provision for declining jurisdiction would be optional were not accepted by the Special Commission.

However, the Special Commission accepted the proposition that jurisdiction can be declined in favour of a court of a non-Contracting State under the same conditions as apply to a Contracting State.

Paragraph 1

The paragraph commences by making it clear that the power to decline jurisdiction can only be exercised in exceptional circumstances. The normal rule is that the plaintiff is entitled to be heard in the forum which the plaintiff has selected and which has required jurisdiction under Chapter II of the Convention. Before that basic rule can be departed from a number of conditions must be satisfied.

Firstly, the jurisdiction of the court must not be based on certain grounds. If the forum has been selected as the exclusive forum under a valid choice of jurisdiction clause pursuant to Article 4, it cannot decline to accept that jurisdiction as is currently possible under the laws of certain States.¹⁴⁰ Nor can a court which is asked to exercise jurisdiction by a plaintiff under the protective provisions of Articles 7 or 8 decline to do so. Finally, the exclusive jurisdictions under Article 12 by reason of the issues of public interest they seek to protect, cannot be declined. Although Article 5 is not specifically referred to, as a practical matter, a court which has jurisdiction by virtue of Article 5 based on the appearance of the defendant without contesting the jurisdiction must also accept that jurisdiction since by definition by the time the court gains jurisdiction under Article 5, the time for making a request to decline jurisdiction

¹³⁸ See, FAWCETT J.J., *Declining Jurisdiction in Private International Law*, OUP 1995, at pp. 14-16.

¹³⁹ For a general overview, see FAWCETT, *op. cit.*, especially at pp. 24-27.

¹⁴⁰ See, FAWCETT, *op. cit.* at pp. 57-58.

will have passed. No mention is made of the exclusive jurisdiction under Article 11(1) in relation to trusts and it may be possible for the selected court to decline jurisdiction in favour of a court of the State where the trusts are administered.

Secondly, the application that the court seised decline jurisdiction must be made by a party to the proceedings, almost always the defendant. The court cannot decline to exercise its jurisdiction on its own motion. The application must be made timely: not later than the time of the first defence on the merits. As to what is meant by that term, see the discussion in relation to Article 5, paragraph 2.

Thirdly the court must be satisfied that in the circumstances of that particular case:

- 1 it is clearly inappropriate for that court to exercise jurisdiction;
- 2 a court of another State has jurisdiction; and
- 3 that court is clearly more appropriate to resolve the dispute.

Each of these three conditions must be fulfilled. The Convention does not address the question of onus, but it would be logical for the party requesting that the court decline jurisdiction to bring forward the facts and reasons for such a decision. The three conditions must also be looked at separately. Thus, the fact that another forum may be "clearly more appropriate" does not necessarily mean that the forum seised is itself "clearly inappropriate". For example, a plaintiff may bring suit against a corporate defendant at its principal place of business in respect of injuries the plaintiff received while employed by that corporation in another country where the plaintiff was resident and was hired. It may be that the second country is the "clearly more appropriate" forum, but, if the major decisions, including those affecting safety of employees throughout its operations, were made at the principal place of business, it cannot be said that this place is a "clearly inappropriate" forum.¹⁴¹ On the other hand, if the only connection with the forum seised is the incorporation of the company within the jurisdiction, but the principal place of business as well as the residence of the plaintiffs and the subject matter of the dispute are all more closely connected with another country, it could be said that the forum seised is clearly inappropriate and the other forum clearly more appropriate.¹⁴² In each case it will depend on the facts and circumstances of the case. Finally, as the words "may" and "peut" indicate, the power is discretionary. Even if the conditions are satisfied, the court originally seised is not obliged to decline jurisdiction.

The court seised must also be satisfied that a court of another State has jurisdiction. That jurisdiction must exist not only as regards the parties but also with respect to the subject matter of the dispute. It cannot be said that the alternative court has jurisdiction if the claim raised by the plaintiff is unknown to its law and it cannot grant relief in respect of it. Since the other State need not be a Contracting State, it follows, a fortiori, that the other court may be a court of another Contracting State having jurisdiction by reference to its national law pursuant to Article 17. This conclusion is re-enforced by the second sentence in Article 22(4) which requires the defendant to lodge security if the alternative court's jurisdiction arises from Article 17. However, as indicated by Article 22(2)(d), the question of obtaining recognition and enforcement of any decision on the merits is an important factor. This makes it at least desirable that the alternative court have required jurisdiction

¹⁴¹ The example is based on the facts of the United Kingdom case of *Connelly v. RTZ Corp. Plc* [1997] 3 WLR 373.

¹⁴² The example is based on the facts of the United Kingdom case of *Re Harrods (Buenos Aires) Ltd* [1992] Ch. 72.

under Chapter II, unless adequate security can be obtained under Article 22(4). It is, of course, open to a defendant voluntarily to confer jurisdiction on the alternative forum either through Article 4 or through Article 5. That alternative jurisdiction must not only be available in the abstract sense, but, as paragraph 5 indicates, the alternative court, if approached by the plaintiff, must actually commence to exercise jurisdiction before the original court seised can decline jurisdiction. Until then, the original court seised can only suspend the exercise of jurisdiction.

Paragraph 2

This paragraph sets out the matters which the court shall take into account in determining whether the forum seised is clearly inappropriate and the alternative forum clearly more appropriate. The list is not exhaustive, as indicated by the words "in particular". Other factors, such as: the substantive law to be applied in resolving the dispute, the availability of legal aid or the extent of the relief which may be granted in each forum, may also be relevant. Nor should the list be read as indicating a hierarchy: which factor is the more important will depend on the circumstances of the case. None of the factors can be regarded as conclusive: although a court may hesitate to decline jurisdiction in favour of a court whose judgment on the merits is unlikely to be recognised, other factors may outweigh this consideration.

Sub-paragraph a)

This directs the court's attention to the relative inconvenience of the parties. This refers not merely to the distance to be travelled, but also to the inconvenience a party may suffer because of lack of familiarity with the law, procedure, access to lawyers and the language of the other forum.

Sub-paragraph b)

This directs the court's attention to the nature and location of the evidence, including documents and witnesses, and the procedure for obtaining such evidence. As regards the latter, there are notable differences under various legal systems about the collection of evidence. Frequently a plaintiff seeks out a particular forum for that reason.

Sub-paragraph c)

This directs the court's attention to the applicable limitation periods. In most common law countries limitation periods are characterised as procedural and hence governed by the law of the forum.¹⁴³ It has been said by the Supreme Court of the United States that a plaintiff is entitled to seek out the forum with the longest limitation period.¹⁴⁴ In most common law countries it is possible for a defendant to waive the benefit of a limitation period by agreeing not to plead it. Such an agreement may counteract consideration set out in sub-paragraph c).

Sub-paragraph d)

This factor directs the court's attention to the possibility of obtaining recognition and enforcement of any decision on the merits given either by itself or by the alternative

¹⁴³ But see, *Foreign Limitation Periods Act 1984* (UK).

¹⁴⁴ *Keeton v. Hustler Magazine Inc.* 465 US 770 (1984).

forum. In most cases this will involve an inquiry whether the forum will recognise any

decision given by the alternative forum and vice versa. Clearly, the question of whether the relevant courts will be able to exercise a jurisdiction which will be entitled to recognition and enforcement under Part III of the Convention will be most relevant. But there may be cases where the likelihood of recognition or enforcement in third States may have to be considered, for instance, a third State where the defendant has substantial assets out of which the judgment can be recovered.¹⁴⁵ The court may by making an order for security under Article 22(4) overcome possible problems of recognition.

Paragraph 3

This paragraph prohibits discrimination in making the decision to suspend the proceedings either on the basis of favouring a locally resident party or on the basis of giving less weight to the position of a party because it is foreign. A decision which gives less deference to the choice of forum by a foreign plaintiff solely because that plaintiff is foreign, is prohibited by this provision.¹⁴⁶ It makes no difference whether the plaintiff is habitually resident or has its seat in another Contracting State or in a non-Contracting State. This provision reinforces the basic rule that the plaintiff is entitled to choose a forum provided by the Convention. There is no conflict between this provision and the factor of inconvenience based on residence to be taken into account under Article 22(2)(a). Paragraph 3 prohibits discrimination against a party because that party is resident abroad. Sub-paragraph a) of paragraph 2 raises for consideration any inconvenience which may result to a party because of its residence. As long as those inconveniences are properly balanced and one party is not preferred merely because that party resides within the forum in question, no issue of discrimination arises.

Paragraph 4

This paragraph allows the court originally seised to order the defendant to lodge security sufficient to satisfy any decision on the merits which may be made by the alternative forum. Where the alternative court is a court of a Contracting State exercising required jurisdiction under Chapter II, the provision is discretionary; there is no obligation on the original court to make such an order. As remarked before, such an order may be appropriate where doubts exist as to the recognition and enforcement of any judgment to be made by the alternative court or there are fears that the defendant may use the delay caused by the suspension of proceedings pending the institution of fresh proceedings to dissipate its assets.

Where the jurisdiction of the alternative court arises under Article 17 the court is obliged to make an order for security if it decides to suspend proceedings under paragraph 1, unless the defendant establishes that sufficient assets exist in the State of the other court or in another State where the court's decision could be enforced. This latter provision raises some questions.

In the first place, no provision is made for the case of the alternative court being in a non-Contracting State. Jurisdiction under Article 17 can only arise in a Contracting

¹⁴⁵ See, for instance, the Australian case of *Henry v. Henry* (1996) 185 CLR 571, a family property dispute where the alternative fora were Australia and Monaco, but most of the assets were in Switzerland.

¹⁴⁶ Contrast: *Piper Aircraft Co. v. Reyno* 454 US 235 (1981).

State. Presumably, in the case of a non-Contracting State the power to order security is discretionary which does not seem logical.

Secondly, the existence of sufficient assets in the State of the other court at the time of the suspension of proceedings is hardly a guarantee that they will still be there when judgment is given. Presumably, even if such assets are shown to exist the original court will still have a discretion to order security; only the obligation to do so has gone.

Finally, the question of enforceability in another State which could be either a Contracting or non-Contracting State, will depend on the national law of that third State and not on the Convention. Such a possibility may be hard to assess.

Paragraph 5

As remarked earlier, the court originally seised cannot decline jurisdiction unless and until the alternative forum actually commences to exercise jurisdiction with respect to the parties and the substance of the claim. The only exception exists in the case where the plaintiff neglects to bring the proceedings afresh in the alternative forum within the time specified by the original court. Only in that case, by way of sanction against possible sabotage by the plaintiff, can the original court dismiss the proceedings without the proceedings in the alternative forum having commenced.

It is for the plaintiff to take action in the other court. There is no obligation under the Convention for the courts themselves to communicate with each other, although, if national law or practice permits this, it is not precluded either. Filing a document instituting proceedings would not be sufficient; the original court must be in a position to determine whether or not the other court has decided to exercise jurisdiction, before it can dismiss the proceedings before it.

If the other court decides not to exercise jurisdiction, the original court is under an obligation to terminate the suspension and proceed to adjudicate the case. The word "decides" implies a conscious decision. If the other court simply fails to take action or to proceed, a decision not to exercise jurisdiction may presumably be inferred from a long period of inaction.

CHAPTER III - RECOGNITION AND ENFORCEMENT

Article 23 - Definition of "judgment"

Article 23 defines the scope of Chapter III when read together with the provisions of Chapter I. It applies to any decision given by a court of a Contracting State whatever that decision may be called according to the law and practice of the State of origin. A number of consequences flow from this.

Sub-paragraph a)

In the first place Chapter III applies to decisions of any kind, such as orders for the payment of money,¹⁴⁷ orders for the transfer and delivery of property, orders which seek to regulate the conduct of the parties and orders declaring the rights and liabilities of the parties, including the so-called "negative declaration". The decision may have been made in the exercise of contentious or non-contentious jurisdiction. The decision may have been given after contested proceedings or be a judgment given in default of the appearance of the defendant. However, the decisions must

¹⁴⁷ A proposal that a distinction be drawn between the enforcement of money judgments and non-money judgments was rejected in the Special Commission by a large majority.

relate to a subject matter which falls within the scope of the Convention as set out in Article 1. Thus, divorce decrees and arbitral awards are not included. In view of the special provision made in sub-paragraph *b*), provisional and protective measures must be excluded from the definition in sub-paragraph *a*). Other interlocutory decisions of a procedural nature, such as decisions as to the collection and admission of evidence,¹⁴⁸ are also by implication excluded from the scope of "decision". The recognition of settlements which are approved by a court but do not have the effect of an order of the court are dealt with in Article 36.

Secondly, the decision must have been given by a court. This can be described as an authority which regularly exercises judicial functions.¹⁴⁹ This excludes bodies of an administrative or other non-judicial nature which may have authority to make decisions which are binding upon the parties and may, under the law of some States be enforced as if they were judgments. However, there is no restriction as to the type or level of court. It includes therefore a decision by a court of criminal jurisdiction granting compensation on a civil claim made by the victim or those acting on behalf of the victim of the crime. It is not necessary that the decision be given by a judge. Provided the person making the decision has the authority to do so on behalf of the court, it matters not whether he or she is a judge or other officer of the court.

Specific provision is made in relation to decisions in respect of the costs and expenses of the litigation. The words "as well as the determination of costs and expenses by an officer of the court" cover the situation where under the relevant court structure the determination of both the obligation to pay costs as well as their quantum is delegated to officers of that court. That decision can be made separately from the decision on the merits in the principal case.¹⁵⁰ Those words serve by way of expansion, not restriction. They do not preclude the recognition of costs awards made by the court itself, or of other decisions made by officers of the court provided those decisions have the status of a decision of the court.¹⁵¹ The proviso has been added to restrict the enforcement of costs orders to those given in relation to judgments which may be recognised or enforced under the Convention. Despite hesitations expressed in the Special Commission, a judgment which merely dismisses a claim made by the plaintiff is still a judgment that can be recognised (albeit not enforced) under the Convention.

Thirdly, the decision must have been rendered by a court of a Contracting State. This solution derives from Article 2(2). This means in the first place that the court must be a court established by, or under the auspices of, a Contracting State. Private tribunals are excluded from Chapter III. So are courts of non-Contracting States: the recognition and enforcement of their decisions in a Contracting State is governed by the national law of that State.

Sub-paragraph b)

Specific provision is made in sub-paragraph *b*) with respect to provisional and protective measures. That provision reflects the decision of the Special Commission to allow extra-territorial recognition and enforcement under the Convention of

¹⁴⁸ See, the *Hague Convention 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*.

¹⁴⁹ This definition has been adopted from the Report of CH.N. FRAGISTAS to the 1971 Hague Convention on the Recognition and Enforcement of Judgments, Article 2, *Acts and Documents of the Extraordinary Session (1966), Enforcement of judgments*, at p. 365.

¹⁵⁰ Depending on the ultimate content of Article 37 (Relationships with other conventions), there could be a possibility that as between States that are Parties to the *Hague Convention of 25 October 1980 on International Access to Justice*, the provisions of Articles 15, 16 and 17 of that Convention could be invoked as an alternative method of enforcement of costs orders.

¹⁵¹ See, FRAGISTAS, *op. cit.*, at p. 366.

provisional and protective measures ordered by a court having jurisdiction over the merits under the

Convention, but to exclude from recognition and enforcement measures ordered by a court lacking such jurisdiction. Sub-paragraph *b*) must therefore be read as not only specifically including provisional and protective measures made in pursuance of jurisdiction under Article 13(1), but also as excluding measures made in pursuance of Article 13(2) and (3), although the latter provision includes its own territorial limitation. It must be remembered, though, that provisional and protective measures which are included within the term “judgment” in Article 23(*b*) must also meet the requirements of the succeeding provisions, especially those in Article 25(2) and Article 28(1)(*c*) and (*d*) before they can be granted recognition or enforcement.

Article 24 - Judgments excluded from Chapter III

The aim of this clause is to exclude the application of the chapter on the recognition and enforcement to judgments rendered by a court whose jurisdiction was established only under its national law. From this it follows that under the Convention there is no obligation of recognition or non-recognition for Contracting States; therefore, each Contracting State remains free to recognise or not to recognise these judgments, according to the provisions of its own national law. Nor can the Convention be interpreted as being the necessary treaty authorisation for recognising or enforcing foreign judgments rendered on the basis of jurisdiction which has been established only under national law, when the national law of the State addressed requires a treaty for this purpose.

It should be noted that the exclusion in Chapter III only takes effect when the national law jurisdiction which is applied conforms to the requirements of Article 17 and matches the margin of freedom which this article confers on Contracting States. In particular, it must not conflict with the provisions reserved in Article 17, or be prohibited under Article 18, when the defendant is habitually resident in a Contracting State. A violation of Article 17 would prevent the judgment from being classed among those which are excluded by Chapter III, and would result in its inclusion. This would imply that Article 26 applies, thereby placing on Contracting States a duty of non-recognition and non-enforcement.

Article 25 - Judgments to be recognised or enforced

Paragraph 1

For the purposes of Chapter III there is only one type of jurisdiction which is entitled to recognition or enforcement under the Convention. This is the required jurisdiction under Chapter II provided for under Articles 3 to 13 and the associated jurisdictions provided for in Articles 14, 15 and 16. The jurisdiction must either be specifically based on that ground or, as in the case of a judgment given in a purely domestic case between parties habitually resident in the same State which is later sought to be enforced in another Contracting State, must be on its facts consistent with any such ground. This will always be the case if the defendant is habitually resident in the originating State even if jurisdiction was assumed on another basis. A judgment, as defined in Article 23, which is based on such a ground or is consistent therewith is entitled to recognition or enforcement under Article 25 provided it meets the conditions set out in paragraphs 2 and 3 for recognition and enforcement respectively, and does not conflict with Articles 4, 5, 7, 8 or 12. This is subject to the power to refuse recognition or enforcement in the circumstances defined in Article 28. Judgments given in the exercise of jurisdiction which is prohibited by Article 18 shall not be recognised or enforced (Article 26) and the recognition or

enforcement of judgments given in the exercise of jurisdiction based on national laws pursuant to Article 17 is excluded from Chapter III by Article 24.

Recognition and enforcement are dealt with separately in Article 25, paragraph 2 and 3, respectively. They serve different functions. Recognition is given to a judgment "when it is given the same effect that it has in the state where it was rendered with respect to the parties, the subject matter of the action and the issues involved".¹⁵² Its most obvious effect is when a foreign judgment is pleaded to prevent a party to the judgment from bringing a fresh action between the same parties on the same cause of action or to prevent that party from re-litigating in the forum a matter of fact or law necessarily decided between the same parties by a foreign court, even if the cause of action is different.¹⁵³ Enforcement occurs when a party to the judgment is given the affirmative relief to which that party is entitled under the judgment.¹⁵⁴ In some legal systems recognition is a prerequisite for enforcement. However, under Article 25 recognition and enforcement are separate and independent concepts. It is obvious that some judgments which are declaratory only can only be recognised. Likewise, as will be shown, it will be possible for some judgments which are not entitled to recognition to be enforceable.

In general the conditions for recognition and those for enforcement are the same. To both the requirements set out in Articles 26, 27 and 28 are applicable. For practical purposes, the effect of the requirements set out in paragraphs 2 and 3 of Article 25 will in most cases be the same: the effect of *res judicata* and enforceability will be gained at the same moment of time. But, in certain cases, it is possible that a judgment will have the effect of *res judicata* without being enforceable under the law of the original court. Conversely, it is possible for a judgment to be enforceable under that law without having the effect of *res judicata*.¹⁵⁵

Finally, as Professor Fragistas pointed out in relation to the 1971 Judgments Convention, there is a general principle, which also underlies this draft Convention, namely, that a decision cannot acquire a greater effect abroad than it has in its country of origin. This means that the decision must exist and be valid according to the law of the State of origin.¹⁵⁶

Paragraph 2 - Recognition

A judgment is entitled to recognition if it has the effect of *res judicata* (*autorité de chose jugée*) in the State of origin. The terms "*res judicata*" (also referred to as "final and conclusive") and "*autorité de chose jugée*"¹⁵⁷ have a similar meaning in both civil and common law systems. They refer to the conclusive effect which a final judgment already decided between the same parties acting in the same interest has preventing them from raising the issue as between them again.¹⁵⁸ A decision which is not final,

¹⁵² *Restatement (Second) Conflict of Laws*, 1971, Ch. 5, Topic 2, Introductory Note.

¹⁵³ See, *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No 2)* [1967] 1 AC 855 at 966.

¹⁵⁴ *Restatement (Second) Conflict of Laws*, 1971, Ch. 5, Topic 2, Introductory Note.

¹⁵⁵ See, for examples, FRAGISTAS, *op. cit.* § 5 II, at p. 370.

¹⁵⁶ FRAGISTAS, Report *op. cit.* p. 371 § 6 I.

¹⁵⁷ In German "*materielle Rechtskraft*", in Dutch "*gezag van gewijsde*". This must be distinguished from "*force de chose jugée*", "*formelle Rechtskraft*", "*kracht van gewijsde*" which refers to the situation when the judgment can no longer be impugned.

¹⁵⁸ See the definition of "*res judicata*" in BURKE (ed.), *Jowitt's Dictionary of English Law*, 2nd ed.; cpe "*Autorité de la chose jugée*", *Vocabulaire juridique Capitant*, 6e edn, 1996.

but provisional, such as most, if not all, provisional and protective measures, does not have the effect of *res judicata* or "*autorité de chose jugée*".¹⁵⁹ A default judgment is capable of acquiring under most systems the effect of *res judicata*.

There is, however, no uniformity as to the point in time when a decision acquires the effect of *res judicata* or "*autorité de chose jugée*". In the common law *res judicata* arises when a final judgment is given on the issues between the parties which cannot be reconsidered by the same court in ordinary proceedings,¹⁶⁰ even though the decision may potentially or actually be the subject of appeal to a higher court. An English or United States court will apply this definition not only to its own judgments, but also to foreign judgments whatever the effect of that judgment may be under its own law.¹⁶¹ In contrast, many, if not most, civil law systems take the view that a judgment does not have the status of *res judicata* or "*autorité de chose jugée*" until the decision is no longer subject to ordinary¹⁶² forms of review.

Geimer writes on this point:

The original State determines exclusively the point in time when the decision of the original State acquires the effect of *res judicata* (*materielle Rechtskraftwirkung*). Most procedural laws contain a rule which is similar to § 705 of the German Law of Civil Procedure whereby the decision only acquires the effect of *res judicata* after it gains "*formelle Rechtskraft*", that is to say, after it can no longer be impugned through ordinary methods of review. Different approaches are taken in France and in the Anglo-American common law region. In France the judgment acquires "*autorité de chose jugée*" as soon as it is pronounced. This effect, however, is suspended as soon as an ordinary method of review is instituted. Only when the decision can no longer be impugned does it acquire the full effect of *res judicata* (*force de la chose jugée*). This distinction has in particular effect on the application of the rule of *lis alibi pendens*. The defence based on *lis alibi pendens* is under French law only applicable as long as no judgment has been delivered, thus only during the proceedings at first instance. If judgment has already been delivered, the *autorité de chose jugée* of this judgment can be applied in fresh proceedings relating to the same subject matter.¹⁶³

The Special Commission did not accept the solution adopted in Article 4(2) of the 1971 Judgments Convention which requires that the foreign judgment "is no longer subject to ordinary forms of review" before it could be recognised. Nor did it accept a proposal that a foreign judgment be treated as conclusive "even though an appeal or other form of review is pending or still available". Hence the opportunity to adopt a uniform approach has been declined.

In the course of the second reading of the preliminary draft Convention a proposal was made to frame the requirement in paragraph 2 in terms that the judgment be

¹⁵⁹ See NCPC (France) Art. 488. In *Nouvion v. Freeman* (1889) 15 App. Cas. 1 the House of Lords refused recognition to a Spanish "remate" order because it was provisional and could, at least in theory, be reviewed at the hearing of the principal suit.

¹⁶⁰ This does not preclude the setting aside of the judgment in certain special circumstances, e.g. for extrinsic fraud or denial of natural justice.

¹⁶¹ *Nouvion v. Freeman* (1889) 15 App. Cas. 1; Uniform Foreign Money-Judgments Act 1962 (US) § 2.

¹⁶² What are "ordinary" forms of review also depends on the law of each country. It can range from appeals to the next intermediate court only to a definition which includes appeals to the highest court in the land: see SNIJDERS H.J. (ed.), *Toegang tot Buitenlands Burgerlijk Procesrecht*, 2de druk 1995, passim.

¹⁶³ GEIMER, *Internationales Zivilprozessrecht*, 3e Auflage, 1997, p. 701, Rz 2804 (translation by P.E. Nygh). See also as regards the Netherlands to the same effect: *Burgerlijke Rechtsvordering*, Kluwer Annotated Commentary, Art 67, note 4 (W.D.H. ASSER).

final in the State of origin. The difficulty is that the use of the word "final" in English as well as the term "*décision définitive*" in French will not necessarily bring clarity. Article 25(b) of the Swiss Private International Law Statute 1987 provides: "*la décision n'est pas susceptible de recours ordinaire ou si elle est définitive*" (in German "*endgültig*"). A comment on this provision explains that ordinarily the word "*endgültig*" would require that the decision have the quality of *res judicata*, but that the Swiss provision was intended to have a wider effect by including decisions, such as custody determinations in family law, which are always subject to variations.¹⁶⁴ In English the use of the word "final" would produce a similar ambiguity: the word can be used merely to distinguish decisions made on the substantive dispute as opposed to those made in interim or interlocutory matters, or it may be taken to mean "final and conclusive".

The solution adopted in paragraph 2 leaves the determination of when a judgment acquires the status of *res judicata* to the law of the State of the court of origin. The party seeking recognition of the judgment must provide documentation as to its status under that law pursuant to Article 29(1)(c). Consequently, a United States court cannot recognise a German judgment until that decision is no longer subject to ordinary forms of review under German law. Conversely, a German court must recognise an English judgment which is conclusive under English law even though it is still subject to ordinary forms of review. In the latter case, the German court may postpone recognition or enforcement of the judgment under paragraph 4 of Article 25. What neither court may do, however, is apply its own standards of what constitutes a judgment that is conclusive or has the "*autorité de chose jugée*" to a judgment of the other. On this basis the defensible position is reached that no foreign judgment should have a greater status abroad than it enjoys under its own law.

Paragraph 3 - Enforcement

A preliminary question arises whether the recognition of a judgment under paragraph 2 is a necessary prerequisite to enforcement. A proposal which made it clear that recognition was a pre-condition to enforcement, as is the case under common law systems, was not accepted by the Special Commission. Under Article 4 of the Hague Judgments Convention of 1971 the requirement of enforceability was "in addition to" the requirement of recognition. This is also the case in many common law and civil law systems.¹⁶⁵ Nevertheless, a system whereby foreign judgments without the status of *res judicata* are enforced, is not unthinkable.¹⁶⁶ Article 31 of the Brussels Convention does not require that the judgment sought to be enforced have the effect of *res judicata*, but merely that it be enforceable.¹⁶⁷

It is of course possible for a judgment to be enforceable although it lacks the effect of *res judicata* under the law from which it emanates. Reference has already been made to provisional and protective measures and the same can be said of other intermediate decisions which do not form part of the final judgment on the merits. Furthermore, under the civil law, it is possible for a court to grant leave to execute a

¹⁶⁴ IPRG Kommentar, Art. 25 III (Volken) nn. 20-22.

¹⁶⁵ See, *Restatement (Second), Conflict of Laws*, Ch. 5, Introduction to Topic 2; Swiss Private International Law Statute 1987, Art. 28. As to German law, see KROPHOLLER J., *Internationales Privatrecht*, 3rd ed., § 60 II.3.

¹⁶⁶ See, KROPHOLLER, *Internationales Privatrecht*, 3rd ed., § 60 II.3.

¹⁶⁷ See, the JENARD Report, OJ C59, 5.3.79, p. 43.

judgment in whole or in part while the ordinary forms of review have not yet been exhausted.¹⁶⁸

The structure of Article 25 proceeds on the basis that the conditions for recognition and enforcement are not dependent on each other. This is indicated by the consistent use of the disjunctive "or" instead of "and" and by the separate treatment in paragraphs 2 and 3 of recognition and enforcement respectively. Any other interpretation would render the provisions of Articles 13(1) and 23(b) largely devoid of meaning since most, if not all, provisional measures lack the status of *res judicata*. It would also prevent the enforcement of foreign judgments even though they had been made provisionally enforceable in the State of origin. Whether a judgment is enforceable must also be determined according to the law of the State of origin. The party seeking enforcement of the judgment must provide documentation as to its status under that law pursuant to Article 29(1)(c). In common law countries the judgment will generally be enforceable as soon as it is rendered, even when an appeal is lodged, unless a stay of execution is granted. In civil law countries the position is the reverse. However, in practice the decision to grant a stay or to allow provisional enforcement is likely to be influenced by similar considerations of the chances of success of the appeal and the bona fides of the appellant.

Obviously, a requirement that recognition be a prerequisite for enforcement will protect the judgment debtor who can be assured that no enforcement will take place until and unless the judgment is beyond challenge. On the other hand, it disadvantages the creditor who not only has to wait but may be hampered by frivolous appeals for the sole purpose of delaying enforcement. This is recognised by civil law countries which permit provisional enforcement in certain cases even though ordinary methods of review are not yet exhausted. If it is desired to make recognition a prerequisite for enforcement, consideration should be given to allowing certain provisionally enforceable decisions and provisional measures to be enforced despite the lack of *res judicata*.¹⁶⁹

Onus of proof

Since the conditions set out in Article 25 are essential preconditions to recognition or enforcement, the burden of establishing their existence rests upon the party seeking to rely on the judgment. This is further reinforced by the provisions found in Article 29(1)(c).

Article 26 - Judgments not to be recognised or enforced

This article requires Contracting States not to recognise or enforce a judgment rendered by a court which has founded its jurisdiction on a connecting factor which does not comply with the Convention's provisions on choice of court or the protection of the weaker party, or in breach of exclusive grounds of jurisdiction, or on a ground of jurisdiction which is prohibited by Article 18. This provision is the logical consequence of failure to respect the binding rules of jurisdiction laid down in the Convention, and the restrictions on the margin of freedom allowed to Contracting

¹⁶⁸ See NCPC (France) Art. 514 (provisional enforcement of "*référé*" orders by operation of law), Art. 515 (provisional enforcement may be ordered by a court in other cases).

¹⁶⁹ See, for an example, the Convention on Enforcement of Maintenance Obligations 1973, Article 4.

States to adopt, in their national law, other grounds of jurisdiction as well as those admitted by the Convention.

The obligation not to recognise or enforce certain judgments when these are based on grounds of jurisdiction not in conformity with the principles laid down in the Convention is also of crucial importance in the framework of a Convention which, although it cannot without a degree of latitude be called "double", does contain rules on the allocation of jurisdiction among the Contracting States. In a simple Convention it is sufficient, in order to ensure that the Convention will work properly, not to include an obligation to recognise a foreign judgment when the Convention's rules on jurisdiction have not been respected; but in a double or mixed Convention it is essential to include an obligation of non-recognition of such a judgment. In the absence of this obligation, if States remained free to recognise judgments based on prohibited grounds of jurisdiction, the Convention's allocation of jurisdiction would be brought into question, thus undermining the legal security and the protection which it aims to bring about.

Article 27 - Verification of jurisdiction

As mentioned before, under Article 25(1) a judgment which is based on a ground of jurisdiction provided for in Articles 3 to 13 or which is consistent with any such ground shall be recognised or enforced. Article 26 prohibits the recognition or enforcement of judgments based on grounds of jurisdiction which conflicts with Articles 4, 5, 7, 8 or 12 or which are prohibited by Article 18. A court of a Contracting State which purports to exercise jurisdiction in conflict with any of these provisions, lacks competence. Before the obligation under Article 25(1) can take effect, Article 27 requires that the exercise of jurisdiction by the court of origin be verified by the court addressed. That requires both a positive finding that the court of origin had jurisdiction under Articles 3 to 13 or its extensions in Articles 14, 15 and 16 of the Convention. and negatively that the jurisdiction exercised by that court did not conflict with Articles 4, 5, 7, 8 or 12 and was not prohibited by virtue of Article 18. The burden of satisfying the court of these matters will rest upon the party seeking enforcement. Since Chapter III only applies to judgments based on the exercise of a required jurisdiction rendered in another Contracting State, any obligation to verify a judgment rendered in another Contracting State pursuant to Article 17 or rendered in a non-Contracting State is a matter for the national law of the court addressed.

Paragraph 1

If the debtor appears in the proceedings for recognition or enforcement, the court addressed can normally expect that the debtor will raise any issue relating to lack of jurisdiction. However, even if the judgment debtor were to appear in the enforcement proceedings and fail to raise an objection to the jurisdiction of the original court, the court addressed may decide on its own motion that the original court lacked jurisdiction. If there is no appearance by or on behalf of the debtor, the court addressed cannot rely merely upon the absence of the judgment debtor as an implied concession that the original court had jurisdiction. Some material must be before the court addressed, such as the findings of the court of origin in contested proceedings or other evidence as to the relevant jurisdictional facts supplied by the applicant for recognition or enforcement from which it can be satisfied that the court of origin had jurisdiction. It will not be sufficient to rely on the production of the documents referred to in Article 29(1), unless there are explicit findings on the jurisdictional facts in the copy of the judgment produced and it is not a default judgment: see Article 27(2). The standard of information required and of proof will be a matter for

the law and practice of the court addressed. If the court addressed has insufficient evidence, it may under Article 29(3) require the production of any other necessary documents. The court addressed must be satisfied, according to its understanding of the Convention, that the original court had jurisdiction and, indeed, that the Convention is applicable to the judgment.

Paragraph 2

Paragraph 2 provides that the court addressed shall be bound by the findings of fact on which the original court based its jurisdiction unless the judgment was given by default. The wording of paragraph 2 is based upon Article 9 of the 1971 Judgments Convention.¹⁷⁰ The purpose of the provision is to prevent the judgment debtor from delaying enforcement by re-raising issues that were, or could have been, raised in the original proceedings.¹⁷¹ The provision binds the court addressed only as regards the findings of fact on which the conclusion as to jurisdiction is based; it is for the court addressed to determine what conclusions of law should follow from such findings. Thus, a French court may assume jurisdiction under Article 6 on the basis that the goods which were the subject of the contract were supplied in Muhlhouse, and not in Basel. In so far as that assumption of jurisdiction is based on a finding of fact that the goods which were carried by a third party physically reached the buyer in Muhlhouse, the court addressed would be bound. But, in so far as the matter raised the issue of where the supply took place as a matter of law, that is either at the place where the goods were delivered to the carrier for carriage to the buyer or at the place where they were ultimately delivered to the buyer, this would be a matter for the court addressed to determine. Since national laws on this point may differ, the court addressed may apply a different rule. Similar questions may arise in relation to habitual residence. A finding that a person has physically stayed at a particular place will be binding, but the deduction therefrom that this constitutes habitual residence will not.¹⁷² A search of reported decisions of similar provisions under previous Hague Conventions did not disclose any problems arising out of them.¹⁷³

The binding effect of a finding on jurisdictional facts does not apply to default judgments. Although the recognition of default judgments is covered by the Convention, a heavier burden rests upon the applicant for recognition or enforcement of such judgments. The applicant has to establish in accordance with Article 29(1)(b) that due notice of the commencement of the proceedings was given to the defendant and also has the burden of establishing the facts upon which the original court assumed jurisdiction. The term "default judgment" is not defined in the Convention

¹⁷⁰ See, Explanatory Report by FRAGISTAS, *Acts and Documents of the Extraordinary Session (1966), Enforcement of judgments*, p. 383. Similar provisions are found in Article 6 of the 1971 Judgments Convention, Article 9 of the 1973 Recognition of Maintenance Convention, Article 25 of the 1996 Child Protection Convention and Article 24 of the 1999 of the Convention on the International Protection of Adults. See also Brussels Convention Article 28, second paragraph.

¹⁷¹ For the history of the provision, see: Rapport de la Commission spéciale présenté par M. CH.N. FRAGISTAS, in *Acts and Documents of the Extraordinary Session (1966), Enforcement of judgments*, at p. 29. Unlike in 1964, there was no disagreement in the present Special Commission about the insertion of this provision.

¹⁷² Unless one considers habitual residence to be a purely factual concept: see CLIVE E., *The Concept of Habitual Residence*, *Juridical Review* (1997), 137; BEAUMONT P. and MCELEAVY P., *The Hague Convention on International Abduction*, OUP, 1999, pp. 88-80. See also Rapport explicatif de MM. PIERRE BELLET et BERTHOLD GOLDMAN, on the Convention on Recognition of Foreign Divorces and Legal Separations, *Acts and Documents of the Eleventh Session (1968)*, Tome II, *Divorce*, p. 217, paragraph 37.

¹⁷³ See, *Les nouvelles Conventions de La Haye*, Tomes II to V inclusive, where no reference to any reported case was found.

and there are considerable differences in national law and practice.¹⁷⁴ An autonomous definition is preferable to the vagaries of either the law of the court of origin¹⁷⁵ or of the court addressed. Having regard to the protective purposes of the provisions of the preliminary draft Convention, it can be said that for its purposes a default judgment is given in proceedings in which the defendant did not have the opportunity of defending himself before the court of origin.¹⁷⁶ A defendant who appeared only to contest the jurisdiction of the original court under Articles 3 to 13 of the Convention, lost on that issue and thereafter withdrew from the proceedings on the merits, cannot dispute the findings of jurisdictional facts on which the assumption of jurisdiction was based. Otherwise the very purpose of the provision would be defeated.

In some cases it will not be apparent from the terms of the judgment sought to be recognised or enforced on what basis that court assumed jurisdiction. It may have assumed jurisdiction in a dispute between parties habitually resident in the one Contracting State to which the Convention only became relevant when the judgment creditor sought to enforce it in another Contracting State because the defendant had assets there. Or the court of origin may out of ignorance have ignored the existence of the Convention. As indicated by the words used in Article 25(1) "or is consistent with any such ground", the absence of a specific finding under the terms of the Convention should not, by itself, disqualify the judgment from recognition under the Convention, provided the facts establish a ground of jurisdiction under the Convention. Some courts, particularly in internal judgments, may not make any finding as to jurisdiction at all. Again, provided facts can be established which would have justified taking jurisdiction under the Convention, the requirement of Article 27 will be satisfied.

Paragraph 3

Paragraph 3 provides that recognition or enforcement may not be refused on the ground that the court addressed considers that the court of origin should have declined jurisdiction under Article 22. Since Article 22 does not impose an obligation to decline jurisdiction but merely provides for a discretion to do so, one would have thought the point was obvious.

Article 28 - Grounds for refusal of recognition or enforcement

Article 28 defines the circumstances in which recognition or enforcement may be refused to judgments which satisfy the requirements of Article 25(1). They apply equally to recognition and enforcement. The list of grounds for refusal is exhaustive: other grounds not mentioned, such as the application by the court of origin of a law other than that which would have been applicable according to the private international law of the State addressed, are excluded. The court addressed is therefore obliged to recognise or enforce a judgment which meets the conditions in Article 25, recognition of which is not prohibited under Article 26 and against which none of the grounds in Article 28 can be established. But it is not bound in all

¹⁷⁴ Compare, for instance, the very restrictive definition under NCP (France) Art. 473 with the very broad approach under RSC (England) Orders 13 and 19.

¹⁷⁵ The solution advocated in relation to Article 27(2) of the Brussels Convention by Jacobs AG in *Sonntag v. Waidmann* (C-172/92) [1993] ECR I-1963 at 1987.

¹⁷⁶ Based on the interpretation given by the European Court of Justice to the words "in default of appearance" in *Hendrikman v. Magenta Druck und Verlag GmbH* [1997] 2 WLR 349. at 363, para. 15.

circumstances to deny recognition or enforcement to a judgment against which one or more of the grounds in Article 28 can be established. The words “may” and “peut” confer a discretion on the court addressed.

In principle, the onus of establishing one or more of the grounds set out in Article 28 rests upon the party opposing the recognition or enforcement of the judgment. A proposal that certain objections such as public policy be verified ex officio was not accepted by the Special Commission. To this there is one partial exception: in the case of a default judgment where the party seeking recognition has under Article 29(1)(b) the obligation to establish that the document instituting proceedings or an equivalent document was served on the defaulting party. However, any objection that this service was in insufficient time to prepare the defence should be brought forward by the debtor. Apart from this, if the debtor does not appear or does not raise an objection, the obligation under Article 25 to recognise or enforce the judgment applies.

Sub-paragraph a) - Lis alibi pendens

This provision allows the court which is first seised under the conditions set out in Article 21 to deny recognition or enforcement should the court second seised have proceeded to judgment before the proceedings in the court first seised have resulted in a judgment. There must have existed a situation in which the court second seised had to yield to the priority of the court first seised under Article 21. If those conditions are not satisfied, for example, in the case where the court first seised was exercising jurisdiction pursuant to Article 17 which is not entitled to priority or was seised only of proceedings for a negative declaration, it will not be entitled to refuse recognition or enforcement because the proceedings in the court first seised are still pending. If the condition of *res judicata* is fulfilled, the recognition of the judgment of the court second seised should then put an end to the litigation.

Of course, if the proceedings in the court first seised have resulted in a judgment, even if given in the exercise of a jurisdiction pursuant to Article 17 or in the form of a declaration that a party has no obligation to the other, sub-paragraph b) as discussed below, will apply.

Sub-paragraph b) - Inconsistent judgments

Sub-paragraph b) relieves the court addressed from the obligation to recognise a judgment which is inconsistent with a judgment of the State addressed or of another State, whether a Contracting State or not. Judgments are inconsistent when the findings of fact or conclusions of law in relation to the same issues on which they are based, are mutually exclusive.¹⁷⁷ In the English version the word “inconsistent” was preferred to “irreconcilable” as a counterpart to the French “inconciliable”. The quality of being inconsistent should not be confused with *lis alibi pendens*. A *lis pendens* situation can lead to compatible results; the main problem there is the duplication of time, effort and money. Inconsistent judgments, on the other hand, can result from causes of action in respect of subject matters which are different and may even arise when the parties are different as when one judgment condemns a guarantor to pay for a debt that as between the creditor and principal debtor has been annulled in another judgment. Nor is preference necessarily given to the inconsistent judgment which is prior in time or which results from proceedings which are instituted prior in time.

¹⁷⁷ Compare the definition of “irreconcilable” given by the ECJ in *Hoffmann v. Krieg* (145/1986) [1988] ECR 645 in relation to Art. 27(3) of the Brussels Convention: “legal consequences that are mutually exclusive”.

It is clear from the wording of the sub-paragraph that the court addressed may give preference to a local judgment even though the judgment of which recognition or enforcement is sought was earlier in time or resulted from proceedings instituted earlier in time. Although Articles 21 and 28(1)(a) are intended to prevent such a situation occurring, the limited scope of Article 21 will not prevent it happening. Thus, since negative declarations are excluded in Article 21(6) a negative declaration obtained in the State addressed to the effect that the defendant was not in breach of contract may prevent the recognition or enforcement of a judgment for damages for breach of contract. Although Article 28 only applies to judgments sought to be recognised or enforced which have been given in the exercise of jurisdiction assumed pursuant to Articles 3 to 13 of the Convention, it appears from the context that the other inconsistent judgment need not be a judgment to which Chapter III applies. It can be a judgment arising from proceedings between persons habitually resident in the State of origin to which Chapter II does not apply or one given in the exercise of jurisdiction under national law under Article 17. It cannot, of course, be a judgment given in a Contracting State and based on a jurisdiction prohibited under Article 18 since the court of origin in that case would lack competence. Furthermore, the local judgment need not be one which at the time recognition or enforcement is sought meets the requirements for recognition or enforcement under Article 25. It need not yet have the effect of *res judicata* or be enforceable.

The judgment sought to be recognised or enforced may be inconsistent with the judgment of another State that is capable of being recognised or enforced in the State addressed. The omission of a requirement that the "other State" be a Contracting State indicates that such recognition or enforcement is not confined to recognition under Chapter III. Thus the judgment may be entitled to recognition or enforcement under another Convention or under non-Conventional national law (*droit commun*). It is the potential of recognition or enforcement that is the relevant issue. If it has actually been recognised or enforced in the State addressed it obviously qualifies. If not, the foreign inconsistent judgment can be invoked, if at the time when recognition or enforcement of the judgment entitled to recognition or enforcement under Article 25 is sought in the State addressed, the first mentioned judgment could under the law of the State addressed be recognised or enforced. In this situation priority of the competing judgments in time may be a relevant consideration.¹⁷⁸

Sub-paragraph c) - Incompatibility with fundamental principles of procedure

This sub-paragraph permits the court addressed to refuse recognition or enforcement to a judgment that is incompatible with fundamental principles of procedure of the State addressed. This provision must obviously be interpreted restrictively. It cannot be a basis for refusal that the procedures followed in the original court differ from those of the State addressed.¹⁷⁹ The right to be heard by an independent and impartial court refers to such fundamental and generally accepted principles as the duty of the court to hear each party to the cause and the principle that nobody can judge in his or her own cause. The reference to this right is not intended to be exhaustive of the matters covered by the sub-paragraph, but it gives an indication of what is meant by "fundamental principles of procedure". The fact that in many countries certain judgments, especially default judgments and those given in a

¹⁷⁸ Compare, 1971 Judgments Convention Article 5(3) and FRAGISTAS, *op. cit.*, p. 382, § 8 IV.2.

¹⁷⁹ This was acknowledged in the US as early as 1895, see: *Hilton v. Guyot* 159 US 113 (1895).

summary procedure, are delivered without reasons should not by itself be a ground for refusal to recognise or enforce them, unless the absence of reasons prevents the court addressed from verifying the jurisdiction of the original court. In that case, the court addressed can require further information under Article 29(3).

The reference to an independent and impartial tribunal is derived from Article 14 of the *UN Covenant on Civil and Political Rights* 1966 which provides that "everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".¹⁸⁰

Sub-paragraph d) - Lack of notice

Sub-paragraph *d)* permits the court addressed to refuse recognition or enforcement if the document instituting proceedings was not notified to the defendant in sufficient time to enable the defendant to arrange for the defence. The provision was originally drafted so as to apply only to default judgments. However, the Special Commission by a narrow majority resolved to extend the scope of the provision to all judgments, including default judgments. A distinction remains by virtue of Article 29(1)(*b*): if the judgment was rendered by default, the party seeking to have it recognised or enforced carries the burden of proving that the document instituting proceedings was notified to the other party. Otherwise, the burden of establishing that either or both of the conditions of sub-paragraph *d)* were not fulfilled rests with the party opposing recognition or enforcement. The provision bears some likeness to that found in Article 6 of the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations*, but there are substantial differences. First and foremost amongst them that Article 6 and similar provisions¹⁸¹ all apply only to default judgments. The provision has its counterpart in Article 20 in Chapter II which imposes an obligation on the court of origin to verify that timely notification to the defendant has taken place. As pointed out in relation to that article, a finding by the court of origin that timely notification has taken place is not a jurisdictional finding to which Article 27(2) applies. Hence, the court addressed, must make its own investigation if the issue is raised again by the defendant.

The sub-paragraph contains two separate conditions. They are:

- notification of the document instituting proceedings to the defendant; and
- in sufficient time and in such a way as to enable the defendant to arrange for the defence.

If either of those conditions is not fulfilled, the judgment may be denied recognition or enforcement.

(i) Notification to the defendant

The sub-paragraph requires that the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, be notified to the defendant. It is of the essence of this provision that the defendant be notified not merely of the fact that the proceedings have been instituted but also of the essential elements of the claim made against the defendant. If this is not done, not only will

¹⁸⁰ See also, the European Convention on Human Rights, Article 6(1).

¹⁸¹ See, the *Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*, Article 6, and Brussels Convention Article 27(2).

the notification be insufficient but also the defendant will not be able to prepare a defence.

Unlike similar provisions in other conventions which refer to “service” of the documents upon the defendant or require that the defendant receive notice in accordance with the law of a State, the Special Commission deliberately used the English word “notified” which has no technical meaning in English in order to avoid references to national law. Accordingly the French word “*notifié*” which does have a technical legal meaning, should be read in its ordinary non-legal sense. This means that the condition raises a factual issue: was the defendant actually given notice of the institution of proceedings, including the essential elements of the claim, against him or her? Compliance or non-compliance with the rules for service, either pursuant to national law or the Hague Service Convention, is not the test. Thus, notional service pursuant to an order for substituted service or notification “*par remise au parquet*” will not suffice, even though it may be authorised under national law.¹⁸² The words “notified to” indicate that the defendant must have been placed in a position to inform him or herself of the claim; it does not require that the defendant actually becomes aware of the contents the documentation provided.¹⁸³ But, if the defendant is not given the opportunity of reading the documentation, even if this is due to his or her own refusal to accept the document, notification will not have taken place.¹⁸⁴ However, as has been pointed out above, the court addressed has a discretion to permit recognition or enforcement of the judgment despite the absence of timely notification.

(ii) *Notification in sufficient time*

The requirement that notification be effected in sufficient time to enable the defendant to defend is already found in Article 15 of the Hague Service Convention of 1965. The requirement is repeated in a number of other Conventions, most notably the Maintenance Enforcement Convention 1973 Article 6, and the Brussels Convention Article 27(2). The test of whether notification has been given in sufficient time is purely a question of fact which will depend on the circumstances of each case. Compliance or non-compliance with the procedural rules of the original court may afford guidance, but cannot be conclusive. Unfamiliarity with the local law and language and problems in finding a suitable lawyer may require a longer period than is prescribed under the law and practice of the original court. The notification must also be effected “in such a way” as to enable the defendant to arrange the defence. This may require that documents written in a language which the defendant is unlikely to understand will have to be accompanied by an accurate translation.¹⁸⁵

¹⁸² See by way of example, *Debaecker v. Bouwman* (49/84) [1985] ECR 1779.

¹⁸³ See decision of *Hof Amsterdam*, 20 July 1962, *NIPR* 1992 No 315; abstracted in *Les nouvelles Conventions de La Haye*, Tome V, p. 26.

¹⁸⁴ See Report FRAGISTAS, *op. cit.* § 10 III. 4(c) at p. 384. See also, the decision of Dutch *Hoge Raad*, 20 May 1994, *NIPR* 1994 No 356; *NJ* 1994 589; abstracted in *Les nouvelles Conventions de La Haye*, Tome V, p. 27. (defendant refuses to accept document from process server and the process server takes the document back with him. Held: no notification under Article 6 of the Maintenance Enforcement Convention).

¹⁸⁵ See, Tokyo Court, 26 March 1990; *Kinhan* No 857, 39; *JURI* No 980, 268; *JDI* 1995, 405; abstracted in *Les nouvelles Conventions de La Haye*, Tome V, p. 362 (US summons and complaint in English served on Japanese defendant pursuant to Service Convention without translation. Held: not sufficient to give defendant the opportunity to defend).

As mentioned before, sub-paragraph *d*) applies to a judgment which resulted from proceedings in which the defendant did participate. In principle the enforcement or recognition of a judgment could be opposed even though the defendant proceeded on the merits without contesting the jurisdiction under Article 5. It is clear that the burden upon the defendant to show that he or she lacked the opportunity to defend must be substantial, especially if the defendant participated in the proceedings without protest. Sub-paragraph *d*) cannot be read as an invitation to re-litigate in the court addressed the merits of the case before the original court. That would defeat the aims of the Convention to provide for an effective and certain method of enforcement of judgments. Thus the defendant would have to show not merely that notice was insufficient, but that this defect actually deprived him or her of a substantial defence or evidence which, as a matter of certainty and not merely of speculation, would have made a material difference to the outcome of the litigation. For, if this is not the case, it cannot be said that he or she was not enabled to arrange the defence.

Sub-paragraph e)

Sub-paragraph *e*) permits the court addressed to refuse recognition or enforcement if the judgment was obtained by fraud in connection with a matter of procedure. A similar provision is found in Article 5(2) of the 1971 Convention. This refers to a fraud committed in the course of the proceedings in which the judgment was obtained. It can be a fraud, which is sometimes collusive, as to the jurisdiction of the court. More often, it is a fraud practised by one party to the proceedings on the court or on the other party by producing false evidence or deliberately suppressing material evidence. Fraud involves a deliberate act; mere negligence does not suffice. The court addressed should also consider to what extent it was open to the party resisting enforcement to seek relief in the State of origin.

The provision does not resolve the difference of approach which has arisen between some common law countries as to whether the term "fraud" covers both "extraneous fraud", that is to say, a fraud which the complaining party only discovered after the original trial, and "intrinsic fraud", that is to say, any credible allegation of a fraud committed by the other party even if the complaining party was aware of it and raised it at the original trial.¹⁸⁶ However, an approach which in effect would permit the re-examination of matters already decided by the original court offends both against the general prohibition of a re-examination of the merits and the general trust which courts of Contracting States should have in each other. Furthermore, if the party opposing recognition or enforcement did in fact raise the issue of fraud in the State of the original court and this issue was decided against him or her, that decision itself may be entitled to recognition under the Convention.

Sub-paragraph f) - Public policy

Sub-paragraph *f*) permits a court to refuse recognition or enforcement of the judgment because such recognition or enforcement would be manifestly incompatible with the public policy of the State addressed. A few points should be made about this provision.

¹⁸⁶ The wider approach has been adopted in the United Kingdom: *Owens Bank Ltd v. Bracco* [1992] 2 AC 443, the narrower approach was adopted in Canada: *Jacobs v. Beaver* (1908) 17 OLR 496, and in Australia: *Keele v. Findley* (1991) 21 NSWLR 444.

In the first place, the Special Commission has decided to make specific provision in relation to procedural matters in sub-paragraphs *c)*, *d)* and *e)* which in the absence of those provisions could be considered as embraced within the category of public policy. Although the categories of public policy cannot be defined in advance, courts should be reluctant to admit other perceived procedural defects, such as substantial differences in the procedure followed by the original court, as offending against public policy.

Secondly, the preliminary draft Convention in Article 33 deals specifically with non-compensatory and excessive damages. The provisions of that article should be relied upon rather than the general public policy provision.

Thirdly, it is the effect of the recognition or enforcement of the judgment in the State requested which should be incompatible with its public policy rather than the law on which the judgment is based. This principle is known both to the common and the civil law.¹⁸⁷

Finally, recognition or enforcement must be, in the hallowed Hague words, "manifestly" incompatible with public policy. This indicates that the weapon of refusal must be rarely invoked and only as a last resort. The fact that the original court applied a law different to that which the court addressed might have applied should not suffice. Nor should the fact that the foreign court made a mistake as to the facts or of the law, unless induced by fraud, be a ground for refusal, even if it misapplied the law of the court addressed. These are all covered by the principle that there should not be a re-examination of the merits, as enunciated in Article 28(2).

Paragraph 2 - Review of the merits

Paragraph 2 provides as a general principle that there shall be no review of the merits. Despite the placing of this provision as part of Article 28, it is clear that it applies to the whole of Chapter III and consideration should be given to placing it in a more prominent position as a separate article. The principle is a fundamental one: there would be little purpose in the Convention if the court addressed could re-investigate the basis upon which the original court reached its decision. For that reason, the court addressed should not concern itself with the conclusions as to fact or law reached by the original court or the law applied by it.

The principle is qualified with the words "without prejudice to such review as is necessary for the purpose of application of this Chapter", that is to say, Chapter III. Under Chapter III there are a number of situations where the court addressed may, and even must, re-consider the decision of the original court.

In the first place, under Article 27 it must verify the jurisdiction of the original court. In relation to a judgment which is not a default judgment, that verification will be limited to a consideration of the conclusion of law as regards the jurisdiction of the original court, if that court has made findings as to the facts on which its jurisdiction is based. If the judgment sought to be enforced or recognised is a default judgment or no findings of jurisdictional facts were made by the original court, the verification also extends to the jurisdictional facts. In this instance review of those aspects of the foreign decision is mandatory.

¹⁸⁷ See, MAYER P., *Droit International Privé*, 6e edn, pp. 249-251. The same principle underlies the English decision in *Saxby v. Fulton* [1909] 2 KB 206 (judgment for a gambling debt incurred in Monaco was enforced in England even though gambling at that time was considered to be contrary to English public policy).

Secondly, the court addressed may have to review the merits of the decision of the original court for the purposes of Article 28(1), particularly sub-paragraphs *e)* and *f)*. As remarked earlier in relation to those provisions, care must be taken to confine the occasions for such a review lest the exceptions displace the general rule.

Finally, under Article 33(2) the court addressed may have to re-consider the damages awarded by the original court. Again this must be seen as an exceptional procedure which is not to be invoked merely because the court addressed considers the damages awarded to be high by its own domestic standards. Furthermore, the review under Article 33(2) does not extend to the facts on which the award of damages is based.

Article 29 - Documents to be produced

Paragraphs 1-3

This article describes the documents which the party seeking recognition or enforcement of a foreign judgment has to produce to the court seised. To a large extent, the list reproduces the one included in Article 13 of the *Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, with some changes to take account of the Special Commission's concern to reduce to a minimum the burden placed on the applicant.

- a) In the first place, the applicant has to produce a complete and certified copy of the judgment. This is a necessity, because it is the document on which the entitlement to recognition is based.
- b) The second document in the list is the one establishing that the summons, or an equivalent document, was served upon the defendant. It only has to be produced in the case of recognition or enforcement of a default judgment. This restriction may seem to conflict with the provision in Article 28, paragraph 1 (d), whereby failure to serve the summons on the defendant is a ground for refusing to recognise or enforce the judgment, even in a case where the decision was handed down following a hearing of both parties. However, the contradiction is no more than apparent, since it may be presumed, when it is not a default judgment, that the defendant has received the summons. It will be for the defendant to raise the question of service of the document, or for the court seised, where appropriate, to call for the document to be produced, in accordance with paragraph 3. It will be noted that the text does not use the word "duly" which appears in connection with service of the summons in Article 13 of the 1971 Convention; this considerably reduces the burden on the applicant, who only has to show that the document reached the defendant in such a way as to enable him to prepare his defence.¹⁸⁸
- c) The applicant must also produce all documents which are required to establish that the judgment is *res judicata* in the State of origin or, as the case may be, is enforceable in that State.¹⁸⁹

¹⁸⁸ See the comments above concerning Article 28, paragraph 1 (*d*).

¹⁸⁹ See the comments above concerning Article 25.

- d) The 1971 Convention stipulated the production of a translation of the documents mentioned in the list "unless the authority addressed otherwise requires". The new provision, by contrast, only stipulates this "if the court addressed so requires". A translation is not therefore compulsory and will be made only if the court addressed really needs one in order to understand the other documents submitted by the applicant. Moreover, when a translation is required it should be made simply by a person qualified to do so, and need not be certified by a diplomatic or consular agent or by a sworn translator.

In any event, according to paragraph 2 the production of the documents may not be made subject to legalisation or other similar formality. Here the preliminary draft Convention reflects a practice which is well established in the framework of the Hague Conventions.¹⁹⁰

According to paragraph 3, if the court addressed is unable to verify from the terms of the judgment that the conditions laid down in the chapter on recognition and enforcement have been met, it may require the production of any other necessary documents. Rather than add to the list of documents to be produced, thus compelling the applicant to produce documents which might be superfluous to the needs of the court addressed, the Special Commission preferred to limit the list to essential documents, and leave the court a margin of discretion to state which documents it really needs in order to make its decision.

Article 30 - Procedure

This provision subjects the procedure for obtaining recognition, a declaration of enforceability or registration for enforcement, as well as enforcement itself, to the national law of the State addressed. The *renvoi* to national law corresponds to the current practice of international Conventions on enforcement of judgments, and was unhesitatingly adopted by the Special Commission, which felt it would be difficult to devise a simplified uniform procedure for obtaining a declaration of enforceability¹⁹¹ in a worldwide Convention. The only common indicator is the requirement for the court addressed to act expeditiously. This obliges Contracting States to use, for the purposes of recognition, declarations of enforceability and enforcement, the most rapid procedure they possess in their national law and, where appropriate, to speed up existing procedures. It should perhaps be pointed out here that although the Special Commission was unable to adopt a treaty provision for this purpose,¹⁹² the *renvoi* to national procedures also implies that in States where no procedure is required for the recognition of foreign judgments,¹⁹³ it may take place automatically without intervention by a judicial or other authority.

¹⁹⁰ Since the *Convention du 15 avril 1958 concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants* (Article 9).

¹⁹¹ As in the example of the Brussels and Lugano Conventions.

¹⁹² See report on session No 69 of 17 June 1999, p. 2.

¹⁹³ For example Italy, under Article 64 of Law No 218 of 31 May 1995. See POCAR, *Il nuovo diritto internazionale privato italiano*, p. 74.

Article 31 - Costs of proceedings

This article governs the question of security which may be required in order to guarantee payment of the costs of proceedings. It reflects the traditional view¹⁹⁴ that no payment of this kind may be required from the applicant for the sole reason that he is a national of another Contracting State or has his habitual residence in another Contracting State. The possibility of a security payment being required is not therefore entirely removed, but it is limited to situations in which the applicant has no connection with a Contracting State. The clause applies to both natural and legal persons.

Article 32 - Legal aid

This text deals with the problem of access to legal aid for persons involved in proceedings for recognition or enforcement of a foreign judgment. This raises the issue of which law is applicable in deciding which individuals may benefit from legal aid, and what it should consist of.¹⁹⁵ The preliminary draft Convention places the responsibility for both issues on the State addressed, which is bound to apply to persons residing abroad the same conditions for access to legal aid as to persons habitually resident in the State addressed, provided their habitual residence is in a Contracting State.

Article 33 - Damages

The "nightmare" of having to enforce awards for excessive and punitive damages, especially those rendered by US civil juries, was raised at the outset of the discussions in the Special Commission convened in June 1994 to consider the feasibility of a Convention. Many experts, including those from other common law jurisdictions, expressed their concern about this issue. At that session the idea was suggested of formulating a ground for total or partial refusal of enforcement in respect of decisions awarding damages of a punitive character or of an excessive amount, rather than rely on the public policy exception.¹⁹⁶

The article contains two separate provisions: paragraph 1 deals with the recognition and enforcement of non-compensatory damages, while paragraph 2 deals with the recognition and enforcement of compensatory damages. Paragraph 3 applies to both preceding provisions. If Article 33 had not been inserted into the Convention, it might have been possible to invoke public policy to bar the recognition and enforcement of punitive and excessive damages. Since the Convention contains a specific provision on the issue which one may regard as an expression of public policy, the use of the public policy ground under Article 28(1)(f) to add to, or vary, the provisions of Article 33 is precluded. As explained below, Article 33 must also be read in the light of the general policy expressed in Article 28(2) that there should not be a review on the merits. In so far as review on the merits is necessary under Article 33 it should be treated as exceptional.

¹⁹⁴ This view was already present in the *Hague Convention of 1 March 1954 on Civil Procedure* (Article 17).

¹⁹⁵ See FRAGISTAS, Report, *op. cit.* p. 386.

¹⁹⁶ See, *Prel. Doc. No 2*, Conclusions of the Special Commission of June 1994 on the question of the recognition and enforcement of foreign judgments in civil and commercial matters, p. 23, para. 37.

Paragraph 1 - Non-compensatory damages

Paragraph 1 is expressed in positive terms. It imposes an obligation on courts of Contracting States to recognise awards for non-compensatory damages, including exemplary or punitive, damages at least to the extent that similar or comparable damages could have been awarded in the State addressed. This express provision therefore excludes reliance on any public policy objection that might exist against such damages under the national law of the State addressed. Furthermore, it precludes the court addressed from denying enforcement for the sole reason that punitive damages are unknown to the law of the State addressed. The court addressed must first make the comparison as required by paragraph 1. Only if its law does not know punitive damages or any practical equivalent thereof, is it not obliged to recognise such damages. But even if its law does know of equivalent damages, it need only recognise or enforce the foreign judgment to the extent that such damages could have been awarded in the State addressed.

Paragraph 1 refers to “non-compensatory damages”. The Special Commission deliberately chose to use a term which was descriptive, rather than a technical legal term tied to a particular legal system. Compensatory damages are designed to make good the losses which the victim has suffered or is likely to suffer in the future. Depending on national laws, they include: pecuniary loss, both as regards expenses already incurred and profits already suffered as well as future losses of profit and income. They also include in those legal systems where this is possible, compensation for pain and suffering already experienced and to be experienced in the future. Finally, in common law countries the category of compensatory damages includes “aggravated damages” to recompense the plaintiff for an injury that was particularly hurtful. This type of damage can for obvious reasons approximate the category of exemplary damages and is sometimes used to circumvent the prohibition on the award of punitive damages introduced in certain Commonwealth countries. The last two categories are in respect of injuries which cannot readily be measured in money and where the subjective evaluation of the judge or civil jury is dominant.

“Non-compensatory” damages go beyond the function of offering the victim compensation. They normally fulfil a deterrent or punitive function. Exemplary damages, sometimes called “punitive” or “vindictive” damages are a prime example. They are given “as a kind of punishment to the defendant, with the view of preventing similar wrongs in the future”.¹⁹⁷ Another form, known as “multiple damages” exists mainly in the United States where the prime example is treble damages awarded under s 4 of the Clayton Act 1914.¹⁹⁸ Again their function is to deter. Identification of the non-compensatory element in the damages awarded will not normally be a problem since the judge or jury will usually assess such damages separately.

¹⁹⁷ BURKE, J., *Jowitt's Dictionary of English Law*, 2nd ed., entry “damages”. The three terms “exemplary”, “punitive” and “vindictive” are synonyms. For a comparative survey, see STOLL, H., *Consequences of Liability: Remedies*, in *International Encyclopedia of Comparative Law*, XI Torts (1983) ch. 8 ss. 103-114.

¹⁹⁸ See for a discussion of multiple damages, STOLL H., *op. cit.* ch. 8 s. 115.

The court addressed is only obliged to recognise such damages to the extent that similar or comparable damages could have been awarded in the State addressed. Although the text only refers to “recognised”, this term must be read to include enforcement for otherwise the provision makes little sense. The reference to “similar or comparable damages” refers to any award of money that could have been made in the State addressed over and above compensatory damages which serve a similar function. It involves a comparison both as to kind and as to quantum. Those sums need not represent sums awarded with an intention to deter future conduct. The comparison should be functional. Thus, the award of punitive damages in the United States may in effect be intended to serve to cover the costs and expenses of the successful plaintiff which are not usually awarded as such by US courts. The effect of paragraph 3 is to make them relevant to the comparison in paragraph 1. The words “at least to the extent that” such damages could have been awarded, also refers to the quantum of the amount that could have been awarded in the State addressed. Thus, if courts in the State addressed do award punitive damages, but to a far more limited amount, that factor also would be relevant and enforcement could be limited to the extent to which such damages exist in the State addressed. In doing so, there would be no need to follow the procedure laid down in paragraph 2, since what is involved is not a re-assessment of the compensatory damages in the light of the needs of the plaintiff, but a measuring of the punitive damages by reference to the objective yardstick of the court addressed. Of course, as the words “at least” indicate, the court addressed is not obliged to observe its own limitations.

Paragraph 2

Paragraph 2 deals with the recognition of awards of compensatory damages which are found to be grossly excessive by the court addressed. Here again the word “recognition” must be taken to include enforcement. The use of the word “grossly” indicates that the power to reduce the enforcement of a judgment from a Contracting State should be exercised in exceptional circumstances. A mere disagreement as to quantum will not suffice; the provision is intended to deal with the type of award that sometimes is reported by the international media such as a woman who receives several millions of dollars for being scalded by hot coffee from a broken cup. Such verdicts are rare and are often rectified on appeal.¹⁹⁹ Furthermore, there are a number of safeguards to ensure that the legitimate interests of the creditor are preserved.

The paragraph does not address in express terms the question of recognition of compensatory damages in respect of which there exist national differences, in particular in relation to matters such as pain and suffering and future economic loss. However, it is implicit in Article 33 that the court addressed must enforce a judgment awarding compensatory damages, even though all or part of those damages have been assessed or awarded on a basis unknown to the law of that court, unless they are “grossly excessive” within the meaning of paragraph 2.

Sub-paragraph a)

This sub-paragraph sets out the conditions which must be satisfied before the court addressed can reduce the amount of the judgment sought to be enforced.

¹⁹⁹ See, *Prel. Doc. No 4*, Annex IV.

The application for a reduction in the amount to be enforced must be made by the debtor who bears the burden of satisfying the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded. The creditor must be given the opportunity to be heard on this issue.

Although the investigation required by paragraph 2 will involve to a certain extent a re-examination of the merits of the decision of the original court, this should be kept to a minimum. There should be no need to re-open any decision as to the facts or the law by the original court on issues of liability or the losses suffered or likely to be suffered by the victim. Nor should the court addressed reduce the amount of damages sought to be enforced solely because they compensate for matters which would not have been compensable under the law of the State addressed, such as damages for pain and suffering. The paragraph is solely concerned with the question of quantification of the damages. The reference to "the circumstances, including those existing in the State of origin" indicates that the issue must not be determined solely by reference to the standards which the court addressed would apply in a domestic suit based on similar circumstances. If in the State of origin the cost of living is higher, especially medical expenses, and access to social security is more limited than in the State addressed, the court addressed must take those factors into account, particularly if the creditor is likely to continue to reside in the State of origin and will have to meet those expenses. Further, under paragraph 3, the fact that the verdict may have been inflated in order to provide for the costs and expenses of the plaintiff will also be a relevant factor. 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". Certainly evidence that the sum awarded greatly exceeds what is the norm in similar cases in the State of origin will persuade the court addressed to intervene. On the other hand, evidence that the sum awarded greatly exceeds what is the norm in similar cases in the State addressed should not by itself suffice.

Sub-paragraph b)

If the court addressed is satisfied that the conditions set out in sub-paragraph *a)* have been met, it may reduce the amount to be enforced. The exact amount will depend on the view of the court addressed as to what is justified in the circumstances. However, sub-paragraph *b)* places a limit beyond which the amount of the judgment sought to be enforced cannot be reduced. This is the amount that a court of the State addressed could have awarded in the same circumstances, including those existing in the State of origin, that is to say, an amount which would not have been regarded as so unreasonable or unjustified, even after taking into account the higher living costs and expenses of the State of origin, that an appellate court in the State of origin would have set it aside or reduced it.

A concern was expressed by one delegation about the rights of a creditor whose judgment was only partially enforced in one Contracting State pursuant to Article 33 and who sought to recover the balance in another Contracting State whose policy was more expansive. A proposal was put forward whereby the creditor seeking to recover the balance had first to account for the sums received. This proposal was not accepted by the Special Commission which took the view that a creditor in such a position would be free to seek to recover the balance in a more favourable forum, but that under the national law of that forum it was unlikely that he would be granted a double recovery. See the discussion of Article 34 below.

Paragraph 3

This paragraph in its relevance to both paragraphs 1 and 2 has already been discussed.

Article 34 - Severability

Article 34 permits the court addressed to recognise or enforce some part or parts of a judgment rendered in a Contracting State by themselves, provided it or they are severable from the rest of the judgment. There are a number of instances where this may be useful. The most obvious example would be the case where some of the orders made were not capable of recognition or enforcement because they fall outside the scope of the Convention, are contrary to public policy, or because they are interim orders which do not have the effect of *res judicata* or are not as yet enforceable in the State of origin. It may also happen that only some elements of the judgment are relevant to the State addressed. Finally, a judgment which is not entitled to enforcement may still be pleaded by way of *res judicata*. As to whether the procedure should be by way of declaration or registration as to part, this is a matter for the national law of the court addressed, see Article 30.

In contrast to Article 42, second paragraph, of the Brussels and Lugano Conventions, there is no express provision for partial enforcement which may be useful and not merely in the case instanced above in relation to Article 33(2)(b). It does not readily come within Article 34 as presently drafted. Such an extension will permit the court addressed in the example given above to sever the portion of a judgment debt which has already been paid by, or recovered from, the debtor from the portion which remains unpaid.

The question of severability will normally depend on a practical test, namely, whether it is possible to enforce one part and not the other without substantively changing the obligations of the parties. In so far as this raises issues of law, they will have to be determined according to the law of the State addressed.

Article 35 - Authentic instruments

Paragraphs 1-3

The inclusion of authentic instruments in the Convention has raised a number of problems within the Special Commission. As the concept of an authentic instrument is not familiar to all legal systems, delegations were reluctant to adopt a common provision which might have caused difficulties of implementation, also bearing in mind that the conditions governing recognition of these instruments cannot be the same for all judgments. Despite these problems, the practical value for credit and business transactions of having a sum receivable recorded by means of an authentic instrument which can subsequently be enforced, and the fact that even if these instruments are unfamiliar to a particular legal system this does not necessarily prevent them from being recognised and enforced through that system,²⁰⁰ resulted in the inclusion of a clause on this subject, albeit with some limitations.

²⁰⁰ This is evident from the precedent of the Brussels and Lugano Conventions, which were concluded among States some of which do not have the concept of an authentic instrument, but this did not prevent them from accepting a treaty text containing a clause on this subject (Article 50).

In fact, according to paragraph 1 of Article 35, the Convention does not apply directly to the recognition and enforcement of authentic instruments received in other Contracting States. Whether it will apply depends on a declaration by each Contracting State that it will enforce them, subject to reciprocity. Consequently, the obligation to recognise and enforce them exists only for States which have made such a declaration. This solution may place a considerable restriction on the extent to which the Convention will apply in this area, but was felt to be preferable to excluding it completely from the scope of the Convention, since it makes it possible to define authentic instruments; this could also be important for States which are willing to recognise and enforce them although the legal concept is unfamiliar to them.

The second paragraph describes the essential features of an authentic instrument, stipulating that it must have been authenticated by a public authority or a delegate of a public authority. Moreover, it is not sufficient for the authentication to relate to the signature; for the instrument to be regarded as authentic, it must also relate to the content of the document.

The third paragraph concerns the conditions and procedure for recognition and enforcement. Instead of spelling these out in detail, it merely refers in general terms to the provisions in the Chapter on recognition and enforcement, declaring these applicable as appropriate. It will therefore be for the authorities responsible for recognition and enforcement to identify the rules on conditions and procedure which remain applicable to authentic instruments. However, the Special Commission reserved the question of a direct description of the conditions and procedures by retaining this paragraph within square brackets.

Article 36 - Settlements

The term "settlements" as used in this article is used as a counterpart to the French word "transaction". It is an institution well known in the civil law which does not have a direct counterpart in the common law. The "transaction judiciaire" has been defined as a contract concluded before a judge in which the parties settle their dispute through mutual concessions.²⁰¹ It must be distinguished on the one hand from the practice, used in common law countries for this purpose, of handing up to the court consent orders to be made by the court on the terms agreed by the parties. This results in a judgment as defined in Article 23. The force of the settlement derives from the agreement of the parties, not the authority of the court which does not rule on the points settled.²⁰² Yet, it is more than an "out-of-court" settlement of which the court is informed. It is an "in-court" settlement made before the judge who does not, as in consent orders, transform the contractual agreement into a decision which emanates directly from the authority of the court. As an essential part of civil law settlement procedure which fulfils in essence the function of the consent order, obviously provision must be made for the enforcement of such settlements. Since the settlement is essentially consensual, issues of jurisdiction under Chapter II will not arise. However, the obligation to recognise or enforce will only arise if the settlement is made before a court of a Contracting State.

²⁰¹ See GAUDEMET-TALLON, *Les Conventions de Bruxelles et de Lugano*, 2e edn, Ch 4, esp para. 417 at p. 308.

²⁰² See, *Solo Kleinmotoren GmbH v. Emilio Bach* C414/92 decision 2 June 1994 [1994] ECR I-2237.

The conditions laid down in paragraphs 2 and 3 of Article 25 do apply. If, as may be the case in some countries, a settlement does not have the force of *res judicata* in the State where it was entered into, it cannot be recognised in another Contracting State.²⁰³ If it does, it may be pleaded in opposition to a fresh action between the same parties on the same subject. Likewise, in order to be enforceable in the State addressed, the settlement must be enforceable in the State where it was entered into. The reference to “declared enforceable or recognised for enforcement” refer to the procedure whereby the settlement may be made enforceable in the State addressed pursuant to its national law as envisaged by Article 30.

CHAPTER IV - GENERAL PROVISIONS

Article 37 - Relationship with other Conventions

The Special Commission has not drafted a clause on the relationship between the Convention and other international Conventions, although various aspects of this problem were discussed during its sessions. There are numerous problematic angles to this question, not only because of the range and variety of multilateral and bilateral Conventions on the subject of recognition and enforcement of judgments, but also and mainly because of the fact that some of them, such as the Brussels Convention, are distinctive in character. The Brussels Convention is part of a regional integration process; this has the result of altering its structure and turning it into a European Community Act.²⁰⁴ This implies that the problem cannot be approached from the traditional angle of the classic relationship between Conventions; it calls for a new approach, to take account of the particular situation prevailing in the network of simple and double Conventions governing the recognition and enforcement of judgments. Proposals were submitted by delegations to the Special Commission, which could not deal with them in sufficient detail and therefore decided, without making any decision on them, to reproduce them in an annex to the preliminary draft Convention. No detailed presentation will be attempted here of the three proposals contained in the annex, as this can only be done by their authors, nor will there be any exhaustive discussion, which must be left to the Diplomatic Conference. However, the different approaches adopted in these proposals may be briefly described.

The first proposal is based on the principle that the other international instruments will take priority over the Convention, unless the States Parties to these instruments declare an intention to the contrary. However, the Convention will take priority over the other international instruments where the latter provide for exceptional fora not authorised by Article 18, which, for instance, would oblige States Parties to the Brussels and Lugano Conventions not to apply Article 4 of those Conventions to defendants domiciled in States Parties to the Hague Convention. The concept of international instruments would of course include instruments which are not international Conventions in the true sense, namely uniform laws adopted for the purposes of regional integration, or instruments adopted within a community of States.

²⁰³ See, as to Germany, GEIMER, *Internationales Zivilprozeßrecht*, 1997, Rz 2864, p. 715.

²⁰⁴ See the proposed regulation submitted by the Commission to the Council on 14 July 1999, doc. COM (1999) 348 final, which is currently under discussion.

The second proposal in the annex is based on the idea that to regulate this problem, two provisions are needed. One of these, the text of which is not yet available but will perhaps be drafted in Conventional terms, would govern all relations with the other international Conventions, in a general sense. The other, given here in detail, would govern relations with the European instruments, a term which would encompass the Brussels Convention, the European Community regulation and the Lugano Convention. A European instrument State would have to give priority to that instrument, and apply it, in the field in which it is applicable. However, when the defendant is not domiciled in a European instrument State, this priority for the European instruments would be absolute only as regards the provisions on exclusive jurisdiction, prorogation of jurisdiction, *lis pendens* and related actions, and protective jurisdiction. In all other instances, Articles 3, 5 to 11, 14 to 16 and 18 of the Hague Convention would apply. Finally, even when the defendant is domiciled in a European instrument State, the courts of that State would in any event have to apply: a) Article 4 of the Convention whenever the court chosen is a third State; b) Article 12 of the Convention if the court with exclusive jurisdiction under that provision is situated in a third State; and c) Articles 21 and 22 of the Convention if the court in whose favour the proceedings are stayed or jurisdiction is declined is situated in a third State. This proposal seeks to highlight in detail the aspects for which co-ordination is needed between the Convention and the European instruments, and to strike a balance between their respective requirements. By providing a detailed description of the criteria for co-ordination, the intention is also to give the authorities which will have to apply the Convention and the European instruments a simpler rule of thumb than they would gain from a clause worded in general terms.

The third proposal in the annex governs relationships between the Convention and other international instruments as regards the recognition and enforcement of judgments. It enshrines the principle that judgments rendered by courts in a Contracting State to the Convention which are based on jurisdiction granted under a different international Convention are to be recognised in the other Contracting States to the Convention which are also parties to the other instrument. This rule would not apply to States which had made a reservation that they would not be governed by the provision, either altogether or as to certain designated Conventions.

As explained above, the Special Commission has not taken any stance on these proposals. The decision has been left to the Diplomatic Conference, which will have to take account of the fact that the provision or provisions adopted must regulate the relationship between the Convention and other international instruments from the viewpoint both of direct international jurisdiction and of the recognition and enforcement of judgments.

Article 38 - Uniform interpretation

From the beginning of discussion about a possible Convention on Jurisdiction and Recognition of Foreign Judgments, it has been acknowledged that the uniform interpretation of the proposed Convention would be a matter of the utmost importance. Without such uniformity, the risk of divergent national applications will increase and the hoped for advantages of certainty and predictability will be lost. In Working Document No 94 the Co-Reporters presented a paper containing a number of proposals whereby a degree of uniformity could be achieved. Those proposals form the basis for Articles 38, 39 and 40.

Paragraph 1 of Article 38 is an uncontroversial provision which has appeared in other Hague Conventions, such as Article 16 of the *Hague Convention on the Law Applicable to Contracts for the International Sale of Goods* of 1986. A similar

provision is found in Article 7(1) of the 1980 *Vienna Convention on Contracts for the International Sale of Goods*. Such a provision is of a precatory nature and probably does not add much to the already existing obligation to interpret international Conventions in a consistent and uniform manner. However, it should encourage courts to adopt an autonomous interpretation of terms such as: "civil and commercial" and "habitual residence". It should also restrain the natural temptation to define categories such as "contractual" and "tortious" in purely domestic terms.

Paragraph 2 of Article 38 found its inspiration in the somewhat more verbose provision of Article 1 of the Second Protocol to the Lugano Convention whose Member States outside the European Union share with the potential members of the preliminary draft Convention the problem of not having a common court to interpret the Convention. Paragraph 2 imposes a more positive obligation to pay due account of the case law of other Contracting States. This will not oblige the courts of Contracting States to apply those decisions if they consider them to have been wrongly decided, but having regard to the provision in paragraph 2, it should make them at least hesitant to arrive at conclusions which were at odds with decisions in other Contracting States. It also compels them to consider those cases and not decide issues solely by reference to local jurisprudence.

Article 39

The whole of Article 39 still appears in brackets for consideration by the Diplomatic Conference, although paragraphs 1 and 2, at least, do not raise any new issues.

Paragraph 1 recognises the importance of an exchange of information about important court decisions and other relevant information. Without this information, Article 38 could not operate effectively and the aim of uniformity would become meaningless. The Permanent Bureau has for a long time collected information about case law in Contracting States, most notably in relation to the 1980 Child Abduction Convention. It is currently in the process of preparing a database of decisions under that Convention with the aid of generous donors. In order to reduce the burden on Contracting States, the obligation to supply information has been limited to the supply of copies of significant decisions. It certainly does not extend to all decisions which arise out of the Convention. With this qualification there did not appear to be any objection in the Special Commission to paragraph 1.

Paragraph 2 repeats a feature of most recent Hague Conventions. Special Commissions have been convened on several occasions to review Conventions such as the Child Abduction Convention and the Convention on Intercountry Adoption. No delegation in the Special Commission suggested that a periodic review of the Convention on Jurisdiction and Recognition of Foreign Judgments would not be necessary or desirable. Indeed, it will be vital.

Paragraph 3 meets the needs of a "continuing Convention" whose terms may have to be amended to address new circumstances, such as the emergence of new means of communication and of doing business which might not be foreseeable at present or might not yet be ripe for legislative action. It will also allow defects and omissions in the Convention to be rectified as they become apparent. The paragraph raised a mild controversy when an expert queried whether the Special Commission on such a

review would have the power to make recommendations and to propose modifications or revisions of the Convention. However, Article 7 of the Statute of the Conference is expressed in very wide terms allowing the convening of Special Commissions to prepare draft conventions and to study any question of private international law. Clearly as a result of such study it can make recommendations and even prepare draft amendments and protocols to conventions, as it has done in the past.

Article 40

Article 40 does raise a more substantive issue for the consideration of the Diplomatic Conference. The proposal that there be a Panel of Experts which would give interpretative and non-binding rulings at the request of the parties or of a court of a Contracting State was made early in the work of the Special Commission.²⁰⁵ The suggestion was further elaborated as Proposal B in the Paper prepared by the Co-Reporters already referred to. They strongly urged its consideration by the Special Commission as the best method for achieving uniformity. Unfortunately, there was not the time and opportunity to give the proposal the attention during the 1999 Sessions which the Co-Reporters had envisaged. Article 40 is therefore placed in brackets to raise the issue for consideration and discussion in consultations. If the proposal that there be a Panel of Experts finds approval and support, the inevitable delay between approving the Draft Convention at the Diplomatic Conference and the entry into operation of the Convention could be utilised to draw up an optional protocol.

There was no substantive discussion of the article at the Session in October 1999. One expert raised a strong objection to the article even going forth in brackets on the ground that the reference to a Panel of Experts outside the control of any national judiciary could amount to a contempt of court in his State and would offend against the principle of judicial independence enshrined in the Constitution of his State. It may well be that in some States a request by a court for the opinion of experts on the interpretation of the Convention will raise constitutional problems, even if that opinion is not binding on the requesting court. This is obviously an issue which needs further consideration. However, as paragraph 2 indicates, the proposal envisages an optional protocol. A State where there are constitutional problems in this regard would not be compelled to participate.

CHAPTER V - FINAL CLAUSES

Article 41 - Federal clause

The preliminary draft Convention does not contain a federal clause. This will have to be drafted at the Diplomatic Conference. The term "federal clause" is actually a misnomer since the issue of distribution of jurisdictional and legislative competence can arise in many States which do not have a federal structure. There are a number of issues that will have to be considered:

²⁰⁵ See, KESSEDJIAN C., *Prel. Doc. No 7*, para. 200.

1 *The form of the clause permitting ratification for some but not all of the territorial units constituting a particular State*

This clause traditionally is placed among the final clauses.

The Hague Conventions have since 1970 included an article whereby a State with two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the relevant Convention may declare that the Convention shall either extend to all its territorial units or only to one or more of them. Often the formula used has permitted a modification of the original declaration at a subsequent time.²⁰⁶ The operation of that clause is not confined to political federations: it can apply to States such as the United Kingdom and China which do not have a federal structure but do contain territorial units with different legal systems. A modified version of this traditional clause was put forward as Variant No One in Working Document No 312 at the session of the Special Commission in October 1999.

The opportunity to adopt a Convention for particular territories only is not often used. Most federations and multi-legal States prefer to ratify or accede for the whole of the State, no doubt after consultation with state or provincial authorities. But for those States that use it, it is an important facility and it has never been suggested that they should be denied it.

2 *A distributive clause*

Such a clause, if adopted, should be placed among the General Clauses.

Another clause which has appeared in Hague Conventions is a distributive clause whereby references to concepts such as "habitual residence in the Contracting State" are to be read as references to the territorial unit of that State in which the person in question is habitually resident. Thus, a reference to habitual residence in relation to the United States as a Contracting State should be read as referring to California only, if the person in question is habitually resident there. A very extensive form of distributive clause is found in Article 47 of the 1996 Convention on Protection of Children. A much simpler formula, admittedly relating to choice of law issues only, is found in Article 19 of the *Hague Convention of 14 March 1978 on the Law Applicable to Agency*.

There is undoubtedly a problem in relation to a State which contains several territorial units which have their own judicial systems. Can a plaintiff, for instance, who wishes to bring an action against a defendant habitually resident in California, bring action in New York, because the relevant unit under the Convention is the United States as a whole and not California? The answer must be in the negative since this would seriously disturb internal rules of jurisdiction which would make ratification of the Convention less attractive. However, the Special Commission rejected the proposition that references in the Convention should be to the "place" of habitual residence and other connecting factors and adopted a reference to the State instead.

One solution would be to adopt a distributive clause as mentioned above. This would, at least in relation to States with several judicial systems, constitute a retreat from the decision of the Special Commission. More importantly, it would create other problems since in most federal states federal judicial systems co-exist with state or provincial systems. For the federal courts a reference to territorial units would be inappropriate.

²⁰⁶ See, *Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*, Art. 23.

3 *A reference to the internal law of a Contracting State*

Such a clause, if adopted, should be placed among the General Clauses.

Even without such a clause, it is probable that a prospective plaintiff who wishes to bring an action against a defendant habitually resident in a multi-jurisdictional Contracting State or base jurisdiction on the occurrence of an event or the existence of a branch in such a State will have to conform with the internal rules for the distribution of jurisdiction within that State. As remarked before, the Convention cannot be taken to override the internal jurisdictional arrangements made in each State. Indeed, that was the very reason why the Special Commission preferred to refer to "State" rather than "place" since adoption of the latter term might have compelled some States to change those arrangements. Once the Convention refers to a court or courts of a particular State, the internal rules of that State determine which court has jurisdiction. The only possible exception is a selection pursuant to Article 4 of the courts generally of a Contracting State, see the discussion above.