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

Convention du 30 juin 2005 sur les accords d'élection de for

Convention of 30 June 2005 on Choice of Court Agreements

Texte adopté par la Vingtième session

Text adopted by the Twentieth Session

Rapport explicatif de
Explanatory Report by

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Édité par le Bureau Permanent de la Conférence

Edited by the Permanent Bureau of the Conference

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Convention

Extract from the Final Act
of the Twentieth Session
signed on 30rd of June 2005

CONVENTION ON CHOICE OF COURT AGREEMENTS

The States Parties to the present Convention,

Desiring to promote international trade and investment through enhanced judicial co-operation,

Believing that such co-operation can be enhanced by uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters,

Believing that such enhanced co-operation requires in particular an international legal regime that provides certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements,

Have resolved to conclude this Convention and have agreed upon the following provisions –

CHAPTER I – SCOPE AND DEFINITIONS

Article 1 Scope

1. This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters.

2. For the purposes of Chapter II, a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.

3. For the purposes of Chapter III, a case is international where recognition or enforcement of a foreign judgment is sought.

Article 2 Exclusions from scope

1. This Convention shall not apply to exclusive choice of court agreements –

a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party;

b) relating to contracts of employment, including collective agreements.

2. This Convention shall not apply to the following matters –

a) the status and legal capacity of natural persons;

b) maintenance obligations;

c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;

d) wills and succession;

e) insolvency, composition and analogous matters;

f) the carriage of passengers and goods;

g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;

h) anti-trust (competition) matters;

i) liability for nuclear damage;

j) claims for personal injury brought by or on behalf of natural persons;

k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship;

l) rights *in rem* in immovable property, and tenancies of immovable property;

m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;

n) the validity of intellectual property rights other than copyright and related rights;

o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;

p) the validity of entries in public registers.

3. Notwithstanding paragraph 2, proceedings are not excluded from the scope of this Convention where a matter excluded under that paragraph arises merely as a preliminary question and not as an object of the proceedings. In particular, the mere fact that a matter excluded under paragraph 2 arises by way of defence does not exclude proceedings from the Convention, if that matter is not an object of the proceedings.

4. This Convention shall not apply to arbitration and related proceedings.

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

6. Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3 Exclusive choice of court agreements

For the purposes of this Convention –

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

b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;

c) an exclusive choice of court agreement must be concluded or documented –

i) in writing; or

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

d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

Article 4 Other definitions

1. In this Convention, "judgment" means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

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

a) where it has its statutory seat;

b) under whose law it was incorporated or formed;

c) where it has its central administration; or

d) where it has its principal place of business.

CHAPTER II – JURISDICTION

Article 5 Jurisdiction of the chosen court

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

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

3. The preceding paragraphs shall not affect rules –

a) on jurisdiction related to subject matter or to the value of the claim;

b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

Article 6 Obligations of a court not chosen

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless –

a) the agreement is null and void under the law of the State of the chosen court;

b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;

c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;

d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or

e) the chosen court has decided not to hear the case.

Article 7 Interim measures of protection

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

CHAPTER III – RECOGNITION AND ENFORCEMENT

Article 8 Recognition and enforcement

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

2. Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.

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

4. Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.

5. This Article shall also apply to a judgment given by a court of a Contracting State pursuant to a transfer of the case from the chosen court in that Contracting State as permitted by Article 5, paragraph 3. However, where the chosen court had discretion as to whether to transfer the case to another court, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin.

Article 9 Refusal of recognition or enforcement

Recognition or enforcement may be refused if –

a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;

b) a party lacked the capacity to conclude the agreement under the law of the requested State;

c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim –

i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

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

e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;

f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or

g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

Article 10 Preliminary questions

1. Where a matter excluded under Article 2, paragraph 2, or under Article 21, arose as a preliminary question, the ruling on that question shall not be recognised or enforced under this Convention.

2. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded under Article 2, paragraph 2.

3. However, in the case of a ruling on the validity of an intellectual property right other than copyright or a related right, recognition or enforcement of a judgment may be refused or postponed under the preceding paragraph only where –

a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State under the law of which the intellectual property right arose; or

b) proceedings concerning the validity of the intellectual property right are pending in that State.

4. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded pursuant to a declaration made by the requested State under Article 21.

Article 11 Damages

1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.

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

Article 12 Judicial settlements (transactions judiciaires)

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

Article 13 Documents to be produced

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

a) a complete and certified copy of the judgment;

b) the exclusive choice of court agreement, a certified copy thereof, or other evidence of its existence;

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

d) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;

e) in the case referred to in Article 12, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.

2. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require any necessary documents.

3. An application for recognition or enforcement may be accompanied by a document, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.

4. If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 14 Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.

Article 15 Severability

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

CHAPTER IV – GENERAL CLAUSES

Article 16 Transitional provisions

1. This Convention shall apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court.

2. This Convention shall not apply to proceedings instituted before its entry into force for the State of the court seised.

Article 17 Contracts of insurance and reinsurance

1. Proceedings under a contract of insurance or reinsurance are not excluded from the scope of this Convention on the ground that the contract of insurance or reinsurance relates to a matter to which this Convention does not apply.

2. Recognition and enforcement of a judgment in respect of liability under the terms of a contract of insurance or reinsurance may not be limited or refused on the ground that the liability under that contract includes liability to indemnify the insured or reinsured in respect of –

a) a matter to which this Convention does not apply; or

b) an award of damages to which Article 11 might apply.

Article 18 No legalisation

All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality, including an Apostille.

Article 19 Declarations limiting jurisdiction

A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.

Article 20 Declarations limiting recognition and enforcement

A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State.

Article 21 Declarations with respect to specific matters

1. Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.

2. With regard to that matter, the Convention shall not apply –

a) in the Contracting State that made the declaration;

b) in other Contracting States, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration.

Article 22 Reciprocal declarations on non-exclusive choice of court agreements

1. A Contracting State may declare that its courts will recognise and enforce judgments given by courts of other Contracting States designated in a choice of court agreement concluded by two or more parties that meets the requirements of Article 3, paragraph *c)*, and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, a court or courts of one or more Contracting States (a non-exclusive choice of court agreement).

2. Where recognition or enforcement of a judgment given in a Contracting State that has made such a declaration is sought in another Contracting State that has made such a declaration, the judgment shall be recognised and enforced under this Convention, if –

a) the court of origin was designated in a non-exclusive choice of court agreement;

b) there exists neither a judgment given by any other court before which proceedings could be brought in accordance with the non-exclusive choice of court agreement, nor a proceeding pending between the same parties in any other such court on the same cause of action; and

c) the court of origin was the court first seised.

Article 23 Uniform interpretation

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

Article 24 Review of operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals make arrangements for –

a) review of the operation of this Convention, including any declarations; and

b) consideration of whether any amendments to this Convention are desirable.

Article 25 Non-unified legal systems

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

a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;

b) any reference to residence in a State shall be construed as referring, where appropriate, to residence in the relevant territorial unit;

c) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;

d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.

2. Notwithstanding the preceding paragraph, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

3. A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment

has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

4. This Article shall not apply to a Regional Economic Integration Organisation.

Article 26 Relationship with other international instruments

1. This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

2. This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, in cases where none of the parties is resident in a Contracting State that is not a Party to the treaty.

3. This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention entered into force for that Contracting State, if applying this Convention would be inconsistent with the obligations of that Contracting State to any non-Contracting State. This paragraph shall also apply to treaties that revise or replace a treaty concluded before this Convention entered into force for that Contracting State, except to the extent that the revision or replacement creates new inconsistencies with this Convention.

4. This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.

5. This Convention shall not affect the application by a Contracting State of a treaty which, in relation to a specific matter, governs jurisdiction or the recognition or enforcement of judgments, even if concluded after this Convention and even if all States concerned are Parties to this Convention. This paragraph shall apply only if the Contracting State has made a declaration in respect of the treaty under this paragraph. In the case of such a declaration, other Contracting States shall not be obliged to apply this Convention to that specific matter to the extent of any inconsistency, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the Contracting State that made the declaration.

6. This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention –

a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;

b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

CHAPTER V – FINAL CLAUSES

Article 27 Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States.

4. Instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

Article 28 Declarations with respect to non-unified legal systems

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

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

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

4. This Article shall not apply to a Regional Economic Integration Organisation.

Article 29 Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has

competence over matters governed by this Convention.

2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3. For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 30 that its Member States will not be Parties to this Convention.

4. Any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to a Regional Economic Integration Organisation that is a Party to it.

Article 30 Accession by a Regional Economic Integration Organisation without its Member States

1. At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

2. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention shall apply equally, where appropriate, to the Member States of the Organisation.

Article 31 Entry into force

1. This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 27.

2. Thereafter this Convention shall enter into force –

a) for each State or Regional Economic Integration Organisation subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

b) for a territorial unit to which this Convention has been extended in accordance with Article 28, paragraph 1, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 32 Declarations

1. Declarations referred to in Articles 19, 20, 21, 22 and 26 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2. Declarations, modifications and withdrawals shall be notified to the depositary.

3. A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.

5. A declaration under Articles 19, 20, 21 and 26 shall not apply to exclusive choice of court agreements concluded before it takes effect.

Article 33 Denunciation

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

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

Article 34 Notifications by the depositary

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 27, 29 and 30 of the following –

a) the signatures, ratifications, acceptances, approvals and accessions referred to in Articles 27, 29 and 30;

b) the date on which this Convention enters into force in accordance with Article 31;

c) the notifications, declarations, modifications and withdrawals of declarations referred to in Articles 19, 20, 21, 22, 26, 28, 29 and 30;

d) the denunciations referred to in Article 33.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on 30 June 2005, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Member States of the Hague Conference on Private International Law as of the date of its Twentieth Session and to each State which participated in that Session.

The Twentieth Session

Recommends to the States Parties to the *Convention on Choice of Court Agreements* to use the following form confirming the issuance and content of a judgment given by the court of origin for the purposes of recognition and enforcement under the Convention –

RECOMMENDED FORM
UNDER THE CONVENTION ON
CHOICE OF COURT AGREEMENTS
("THE CONVENTION")

(Sample form confirming the issuance and content of a judgment given by the court of origin for the purposes of recognition and enforcement under the Convention)

1. (THE COURT OF ORIGIN) .....

ADDRESS .....

TEL. .....

FAX .....

E-MAIL.....

2. CASE / DOCKET NUMBER .....

3. ..... (PLAINTIFF)

v.

..... (DEFENDANT)

4. (THE COURT OF ORIGIN) gave a judgment in the above-captioned matter on (DATE) in (CITY, STATE).

5. This court was designated in an exclusive choice of court agreement within the meaning of Article 3 of the Convention:

YES □ NO □

UNABLE TO CONFIRM □

6. If yes, the exclusive choice of court agreement was concluded or documented in the following manner:

7. This court awarded the following payment of money *(please indicate, where applicable, any relevant categories of damages included)*:

8. This court awarded interest as follows *(please specify the rate(s) of interest, the portion(s) of the award to which interest applies, the date from which interest is computed, and any further information regarding interest that would assist the court addressed)*:

9. This court included within the judgment the following costs and expenses relating to the proceedings *(please specify the amounts of any such awards, including, where applicable, any amount(s) within a monetary award intended to cover costs and expenses relating to the proceedings)*:

10. This court awarded the following non-monetary relief *(please describe the nature of such relief)*:

11. This judgment is enforceable in the State of origin:

YES □ NO □

UNABLE TO CONFIRM □

12. This judgment (or a part thereof) is currently the subject of review in the State of origin:

YES □ NO □

UNABLE TO CONFIRM □

If "yes" please specify the nature and status of such review:

13. Any other relevant information:

14. Attached to this form are the documents marked in the following list *(if available)*:

- ☐ a complete and certified copy of the judgment;
- ☐ the exclusive choice of court agreement, a certified copy thereof, or other evidence of its existence;
- ☐ if the judgment was given 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;
- ☐ any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;

(list if applicable):

- ☐ in the case referred to in Article 12 of the Convention, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin;
- ☐ other documents: .....

15. Dated this …….day of ……, 20… at …….

16. Signature and / or stamp by the court or officer of the court:

CONTACT PERSON:

TEL.:

FAX:

E-MAIL:

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PART I: PREFACE

Adoption of the Convention

The definitive text of the Convention was drawn up at the Twentieth Session of the Hague Conference on Private International Law by its Commission II on 14–30 June 2005. The Final Act was adopted by the Plenary Session on 30 June 2005 and the Convention was opened for signature on that date.

Origins of the Convention

The intellectual origins of the project that led eventually to the Convention may be traced to proposals put forward by the late Arthur T. von Mehren of Harvard Law School.[1] It was he who suggested that the United States of America should conclude judgment-recognition conventions with States, in particular, in Europe. After initial discussions, it was decided that a worldwide convention on jurisdiction and judgments, negotiated within the framework of the Hague Conference on Private International Law, was the best way forward. After preliminary studies beginning in 1994, the decision was taken in 1996 to start the project.[2]

The original project: a "mixed" convention. Professor von Mehren originally suggested that the project should take the form of a "mixed" convention.[3] This is a convention in which jurisdictional grounds are divided into three categories. There are lists of approved grounds of jurisdiction and of prohibited grounds of jurisdiction. All other grounds of jurisdiction fall into the so-called "grey area". The idea is that where the court has jurisdiction on an approved ground, it can hear the case, and the resulting judgment will be recognised and enforced in other Contracting States under the Convention (provided certain other requirements are satisfied). A court of a Contracting State is not permitted to take jurisdiction on prohibited grounds. Courts are permitted to take jurisdiction on the "grey area" grounds, but the provisions of the Convention relating to recognition and enforcement will not apply to the resulting judgment.[4]

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

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[1] Arthur von Mehren lived to see the completion of the project to which he had devoted so much energy, but died in January 2006.

[2] On the historical origins of the Convention, see the Nygh / Pocar Report (*infra*, note 11), pp. 25 *et seq.* For further details, see F. Pocar and C. Honorati (eds), *The Hague Preliminary Draft Convention on Jurisdiction and Judgments,* CEDAM, Milan, Italy, 2005. This latter work also contains the Nygh / Pocar Report.

[3] See A.T. von Mehren, "Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?", *Law & Contemporary Problems*, Vol. 57 at p. 271 (1994); *id.*, "The Case for a Convention-mixte Approach to Jurisdiction to Adjudicate and Recognition and Enforcement of Foreign Judgments", *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 61, No 1, at p. 86 (1997).

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

[5] See the "*Conclusions of the Working Group meeting on enforcement of judgments",* Prel. Doc. No 19 of November 1992, Proceedings of the Seventeenth Session, Tome I, p. 257 *et seq.*, para. 5 and 6.

After three meetings, the Informal Working Group proposed that the objective should be scaled down to a convention on choice of court agreements in commercial cases. In general, the Member States viewed this proposed Convention as achieving for such agreements and the resulting judgments what the 1958 New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* accomplishes for agreements to arbitrate and the resulting awards. After positive reactions from the Member States of the Hague Conference were received, a meeting of the Special Commission was held in December 2003 to discuss the draft that had been prepared by the Informal Working Group. This meeting of the Special Commission produced a draft text (*2003 draft Convention*) that was published as Working Document No 49 Revised. A further meeting was held in April 2004, which reconsidered this document and dealt with the remaining issues. The April 2004 meeting produced a revised draft (*2004 draft Convention*), published as Working Document No 110 Revised. This formed the basis of the text considered at the Diplomatic Conference in June 2005, which produced the final text of the Convention. The following documents constituted the most important milestones in the progress of the Convention:

1. A proposal by a special working group, in the form of a draft Convention ("Informal Working Group Draft"), published as Preliminary Document No 8 (March 2003);[6]

2. A draft Convention drawn up in 2003 ("*2003 draft Convention*"), which was based on the Informal Working Group Draft, published as Working Document No 49 Revised of December 2003*;*

3. A revised and completed version of the 2003 draft Convention, drawn up in 2004 ("*2004 draft Convention*"), published as Working Document No 110 Revised of April 2004*;* and

4. The final text, drawn up in 2005.

There are two Reports on earlier drafts of the Convention: one on the 2003 draft Convention and one on the 2004 draft Convention.

Officers

In the first phase (1997–2001), the following appointments were made:

Chairman:	Mr T. Bradbrooke Smith (Canada);
Vice-Chairmen:	Mr Andreas Bucher (Switzerland);
	Mr Masato Dogauchi (Japan);
	Mr Jeffrey D. Kovar (United States of America);
	Mr José Luis Siqueiros (Mexico);
Co-Reporters:	Mr Peter Nygh (Australia);[7]
	Mr Fausto Pocar (Italy);
Chairman of the Drafting Committee:	Mr Gustaf Möller (Finland).

Ms Catherine Kessedjian, then Deputy Secretary General, prepared several preliminary documents.

[6] "Preliminary result of the work of the Informal Working Group on the Judgments Project", Prel. Doc. No 8 of March 2003 for the attention of the Special Commission of April 2003 on General Affairs and Policy of the Conference.

[7] Sadly, Peter Nygh died in June 2002. His death was a tragic loss.

In the second phase (2002–2005), the following appointments were made:

Chairman:	Mr Allan Philip (Denmark) (2003–2004);[8]
	Mr Andreas Bucher (Switzerland) (2005);
Vice-Chairmen:	Mr David Goddard (New Zealand);
	Mr Jeffrey D. Kovar (United States of America);
	Mr Alexander Matveev (Russian Federation);
	Mrs Kathryn Sabo (Canada);
	Mr Jin Sun (China);
Co-Reporters:	Mr Trevor C. Hartley (United Kingdom);
	Mr Masato Dogauchi (Japan);
Chairman of the Drafting Committee:	Mr Gottfried Musger (Austria).

Ms Andrea Schulz, First Secretary, prepared several preliminary documents and undertook other work.

Documents

The following is a list of the most important documents mentioned during the negotiations and cited in this Report. They are set out in two categories: documents related to the first phase of the project and documents related to the second phase. They are referred to in the abbreviated form set out below.

The documents related to the second phase are the ones that concern the Convention most closely: they constitute essential background material. The documents related to the first phase are relevant only to the extent that provisions in the earlier versions of the Convention were carried forward into the final version.

(a) The first phase

"preliminary draft Convention 1999": Preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters of 1999. This was drawn up within the Hague Conference on Private International Law in 1999. It covered much the same ground as the Brussels[9] and Lugano Conventions.[10] Work on it was put on hold when it became apparent that it would be difficult to obtain global agreement at that time. Its text, together with a Report by the late Mr Peter Nygh and Mr Fausto Pocar, was published by the Permanent Bureau of the Hague Conference in August 2000.[11]

[8] Allan Philip died in September 2004, an occasion of great regret for all concerned with the Convention.

[9] The "Brussels Convention": *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* of 27 September 1968. A consolidated text may be found in the *Official Journal of the European Communities* ("OJ"), 1998, Volume 27 of the "C" series, p. 1. In 1999, it was largely superseded by the Brussels Regulation (see *infra*, note 50). Until then, it applied to the European Union Member States. The Report by Paul Jenard on the original Brussels Convention is published in OJ 1979 C 59, p. 1.

[10] The "Lugano Convention": *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* of 16 September 1988, OJ 1988 L 319, p. 9. It contains similar provisions to the Brussels Convention, but the two Conventions are not identical. The Contracting States to the Lugano Convention are the 15 "old" EU Member States and certain other States in Europe. At the time of writing, these are Iceland, Norway, Poland and Switzerland. The demarcation between the Brussels and Lugano Conventions is laid down in Art. 54B of the Lugano Convention. It is based on the principle that the Lugano Convention will not apply to relations among the 15 "old" EU Member States, but will apply where one of the other countries mentioned above (except Poland) is involved. The official Report is by Paul Jenard and Gustaf Möller; it is published in OJ 1990 C 189, p. 57.

[11] "Preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, adopted by the Special Commission and Report by Peter Nygh & Fausto Pocar", Prel. Doc. No 11 of August 2000 drawn up for the attention of the Nineteenth Session of June 2001. Unless explicitly stated otherwise, all preliminary documents referred to in this Report are available at < www.hcch.net > under "Conventions" – "No 37" – "Preliminary Documents".

"Nygh / Pocar Report": Report on the preliminary draft Convention 1999 (see note 11).

"Interim Text 2001": Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001.[12] The large number of square brackets in the text indicates that the delegates were unable to agree on many points.

(b) The second phase

"Informal Working Group Draft": Draft Convention drawn up by the Informal Working Group, published as Preliminary Document No 8 for the attention of the Special Commission on General Affairs and Policy of the Conference (March 2003).[13]

"First Schulz Report": Report by Ms Andrea Schulz on the Informal Working Group Draft, published in June 2003 as Preliminary Document No 22.[14]

"2003 draft Convention": Draft text of the Convention, drawn up by the Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters in December 2003 (Work. Doc. No 49 Revised). It was based on the Informal Working Group Draft.[15]

"First Report": The Report on the 2003 preliminary draft Convention, drawn up in the form of a commentary in March 2004, and published as Preliminary Document No 25.[16]

"2004 draft Convention": Preliminary draft Convention officially known as the Draft on Exclusive Choice of Court Agreements. It was a revised version of the 2003 draft Convention and was drawn up in April 2004. It was published as Working Document No 110 Revised.[17]

"Second Report": The Report on the 2004 preliminary draft Convention, drawn up in the form of a commentary in December 2004. It was published as Preliminary Document No 26.[18]

"April 2005 draft": Possible modifications to the 2004 draft Convention prepared by the Drafting Committee at its meeting on 18–20 April 2005. A text of the 2004 draft Convention, which incorporates the April 2005 draft, was published as Working Document No 1 of the Twentieth Session of the Conference.

"Second Schulz Report": "Report on the Meeting of the Drafting Committee of 18-20 April 2005 in Preparation for the Twentieth Session of June 2005". This comments on the April 2005 draft and was published in May 2005 as Preliminary Document No 28.[19]

Acknowledgements

The authors of the present Report would like to acknowledge their debt to the authors of these earlier reports, especially to the authors of the Nygh / Pocar Report, the late Mr Peter Nygh, and Mr Fausto Pocar.

They would like to thank the national delegations who commented on earlier drafts of the Report. These comments were of great assistance and have contributed significantly to the final version.

They would also like to acknowledge the assistance given by Ms Andrea Schulz of the Permanent Bureau and Mr Gottfried Musger, Chairman of the Drafting Committee. These two people have devoted a great deal of time to the Report. They have corrected many errors and suggested many improvements. Without their help, the Report would have suffered from serious shortcomings. We all owe them a considerable debt of gratitude.

[12] Available at < www.hcch.net >.
[13] Available at < www.hcch.net >.
[14] A. Schulz, "Report on the work of the Informal Working Group on the Judgments Project, in particular on the preliminary text achieved at its third meeting – 25–28 March 2003", Prel. Doc. No 22 of June 2003, available at < www.hcch.net >.
[15] Available at < www.hcch.net >.
[16] Available at < www.hcch.net >.
[17] Available at < www.hcch.net >.
[18] Available at < www.hcch.net >.
[19] Available at < www.hcch.net >.

Terminology

The following terminology is used in the Convention:

"court of origin": the court which granted the judgment;

"State of origin": the State in which the court of origin is situated;

"court addressed": the court which is asked to recognise or enforce the judgment;

"requested State": the State in which the court addressed is situated.[20]

In this Report:

"Party" (upper-case "P") means a Party to the Convention or, where appropriate, a State bound by the Convention under Article 30;

"party" (lower-case "p") means a party to a contract or a lawsuit;

"State" (upper-case "S") means a State in the international sense;

"state" (lower-case "s") means a territorial unit of a federal State (for example, a state in the United States of America).

Structure of this Report

The present Part of this Report (Part I) is followed by two other Parts. Part II ("Overview") is intended to explain the structure of the Convention. The emphasis is on the function of the different provisions and how they relate to each other. Part III ("Article-by-Article Commentary") analyses each individual Article in order to clarify its meaning.

Examples

In the examples given below, it is assumed (unless the contrary is stated) that the Convention is in force and that the States mentioned are Parties[21] to it.

[20] The preliminary draft Convention 1999 uses "State addressed" in the English version instead of "requested State" as used in this Report.
[21] For the meaning of "Party", see above.

PART II: OVERVIEW[22]

1. **The aim.** If the Convention is to attain its aim of making choice of court agreements as effective as possible, it has to ensure three things. Firstly, the chosen court must hear the case when proceedings are brought before it; secondly, any other court before which proceedings are brought must refuse to hear them; and thirdly, the judgment of the chosen court must be recognised and enforced. These three obligations have been incorporated into the Convention, where they constitute its key provisions. The hope is that the Convention will do for choice of court agreements what the New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* of 10 June 1958 has done for arbitration agreements.[23]

2. **Exceptions.** However, though these obligations are essential, they cannot be imposed in an absolute way. It is generally agreed that there could be situations, usually of an exceptional nature, in which the desirability of giving effect to a choice of court agreement might be overridden by other considerations. For this reason, the Convention provides exceptions to each of the three key obligations. If such exceptions were too wide and vague, however, the Convention would be of little value. Finding the right balance between flexibility and certainty was, therefore, one of the most important tasks of the Diplomatic Session that drew up the Convention.

3. **The chosen court must hear the case.** Article 5 requires a court designated in an exclusive choice of court agreement to hear the case when seised of a dispute.[24] It cannot refuse to hear it on the ground that a court of another State is more appropriate (*forum non conveniens*) or that such a court was seised first (*lis pendens*). The main exception in Article 5[25] is that the chosen court need not hear the case where the choice of court agreement is null and void under its law, including its choice-of-law rules.[26]

4. **Other courts are not permitted to hear the case.** Article 6 provides that a court in a Contracting State other than that of the chosen court must suspend or dismiss proceedings to which an exclusive choice of court agreement applies.[27] There are, however, five specific exceptions, set out in paragraphs *a)* to *e)* of Article 6. The first, set out in paragraph *a)*, is parallel to the exception to Article 5, namely that the choice of court agreement is null and void under the law of the chosen court, including its choice-of-law rules. Of the other four exceptions to Article 6, the most important is probably that in paragraph *c)*, which applies where giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised.[28] It is important to appreciate the difference in approach between these two exceptions in paragraphs *a)* and *c)*. Under paragraph *a)*, the (non-chosen) court before which proceedings are brought must apply the law of the State of the chosen court (including its choice-of-law rules); under paragraph *c)*, on the other hand, it applies its own concepts of "manifest injustice" and "public policy". In this respect, the Convention differs from the 1958 New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, which does not specify the law applicable in these circumstances.

5. **Recognition and enforcement.** The value of a choice of court agreement will be greater if the resulting judgment is recognised and enforced[29] in as many other States as

[22] The overview in this Part of the Report is intended to give a general picture of the Convention for the benefit of those who are not familiar with it. It is not a full statement of the terms of the Convention. Many Articles are not mentioned at all; others are discussed in part only; and qualifications and exceptions are not always mentioned. A full commentary is to be found in Part III of the Report.

[23] Of course, the Convention goes further than the New York Convention in various ways which will be discussed in more detail below in connection with the Articles concerned.

[24] For a detailed discussion, see para. 124 *et seq., infra.*

[25] For another possible exception, see Art. 19.

[26] Para. 3 of Art. 5 contains special provisions that permit the chosen court to apply its rules on subject-matter jurisdiction and on the allocation of jurisdiction among the courts of a Contracting State.

[27] For a detailed discussion, see para. 141 *et seq., infra.*

[28] The other exceptions are: *b)* a party lacked capacity to conclude the agreement under the law of the State of the court seised; *d)* for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; and *e)* the chosen court has decided not to hear the case.

[29] "Recognition", as understood by the Convention, means accepting the determination of the rights and obligations made by the court of origin. "Enforcement" means ensuring that the judgment-debtor obeys the order of the court of origin.

possible. Article 8(1) seeks to accomplish this objective.[30] Again, there are exceptions, most of which are set out in Article 9.[31] Some mirror those in Article 6 – for example, the exception applicable where the choice of court agreement is null and void under the law of the State of the chosen court, including its choice-of-law rules.[32] Recognition or enforcement may also be refused where they would be manifestly incompatible with the public policy of the requested State.[33] Further exceptions concern the service of the document which instituted the proceedings or an equivalent document,[34] and fraud in connection with a matter of procedure.[35]

6. **Conflicting judgments.** Article 9 also deals with the situation where there is a judgment between the same parties from another court (referred to below as a "conflicting judgment") that is inconsistent with the judgment of the chosen court. The Article gives separate treatment to the case where the conflicting judgment is from the *same State* as that in which proceedings are brought to enforce the judgment of the chosen court, and where the conflicting judgment is from *another State*. In the former case, the existence of a conflicting judgment as such constitutes a ground on which recognition of the judgment of the chosen court may be refused. In the latter case, the conflicting judgment must have been given before the judgment of the chosen court; it must also involve the same cause of action and fulfil the conditions required for its recognition in the requested State. In neither case, however, is the court *obliged* to recognise the conflicting judgment or to refuse recognition to the judgment of the chosen court.

7. **Damages.** A further exception is contained in Article 11. This provides that recognition and enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.[36]

8. **Other provisions.** The above key provisions are the core of the Convention. However, they constitute only a relatively small part of the total number of Articles. The remaining provisions are in some sense ancillary: some are concerned with the scope of the Convention; some lay down further exceptions and qualifications to the key provisions; and some contain rules of public international law concerning the operation of the Convention. We shall consider only the most important in this overview.

9. **What choice of court agreements are covered by the Convention?** Articles 1 and 3 explain what is meant by an exclusive choice of court agreement for the purposes of the Convention. It is only choice of court agreements that fall within these provisions that are covered by Chapter II of the Convention.[37]

10. **Article 1.** Article 1 limits the scope of the Convention in three basic ways. It first states that the Convention applies only in international cases. It then provides that it applies only to *exclusive* choice of court agreements. However, this limitation is subject to two qualifications: first, there is a rule, laid down in Article 3 *b)*, that choice of court agreements designating the courts of one Contracting State or one or more specific courts of one Contracting State are deemed to be exclusive unless the parties have expressly provided otherwise; secondly, Article 22 contains an opt-in provision extending the recognition and enforcement provisions of the Convention to judgments given by a court that was designated in a non-exclusive choice of court agreement. The third limitation in Article 1 is that the choice of court agreement must be concluded in a civil or commercial matter. However, Article 2(5) provides that proceedings are not excluded from the scope of the Convention by the mere fact that a State, including a government, a governmental agency or any person

[30] For a detailed discussion, see para. 164 *et seq.*, *infra*.
[31] For other possible exceptions, see Art. 10 and 20.
[32] Art. 6 *a)* is reflected in Art. 9 *a)*; Art. 6 *b)* is reflected in Art. 9 *b)*; and Art. 6 *c)* is reflected in Art. 9 *e)*.
[33] Art. 9 *e)*.
[34] Art. 9 *c)*.
[35] Art. 9 *d)*. Fraud as to the substance of the claim may be covered by other provisions, such as – in extreme circumstances – that concerning public policy.
[36] However, the court addressed must 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.
[37] Art. 22 makes it possible for Chapter III of the Convention to also apply to non-exclusive choice of court agreements in certain circumstances.

acting for a State, is a party to them.

11. **Meaning of "international".** Since the Convention applies only in international cases, a definition of "international" is necessary. This is given in paragraphs 2 and 3 of Article 1.[38] Paragraph 2 states that for jurisdictional purposes a case is international unless the parties are resident in the same Contracting State and all relevant elements other than the location of the chosen court are connected only with that State. In other words, if a case is otherwise wholly domestic, the choice of a foreign court does not make it international. A different definition applies for the purpose of recognition and enforcement (para. 3). Here, it is enough that the judgment was given by a foreign court. This means that a case that was non-international when the original judgment was given may become international if the question arises of recognising or enforcing the judgment in another State. (This is subject to the possibility of a declaration under Art. 20, which allows a State to declare that its courts may refuse to recognise or enforce a judgment given by the chosen court if the case is – except for the location of the chosen court – wholly domestic to the State where recognition and enforcement is sought.)[39]

12. **Definition of "exclusive choice of court agreement".** Article 3 lays down a definition of an exclusive choice of court agreement. This provides that the Convention applies only to choice of court agreements in favour of Contracting States. The choice of court agreement can apply to both past and future disputes. It can refer in general to the courts of a Contracting State ("the courts of France"); it can refer to a specific court in a Contracting State ("the Federal District Court for the Southern District of New York"); or it can refer to two or more specific courts in the same Contracting State ("either the District Court of Tokyo or the District Court of Kobe"). The jurisdiction of all other courts must be excluded; however, it is deemed to be excluded, unless the parties have expressly provided otherwise.

13. **Requirements as to form.** Article 3 *c)* lays down the formal requirements that a choice of court agreement must comply with in order to fall under the Convention. It must be concluded or documented either *i)* in writing or *ii)* by some other means of communication which renders information accessible so as to be usable for subsequent reference.[40] If it does not meet these requirements, it will not be covered by the Convention. However, the Convention does not preclude Contracting States from enforcing such an agreement or the resulting judgment under their own law.

14. **The meaning of "State".** Many provisions of the Convention refer to a "State" or to a "Contracting State". The meaning of these terms is not, however, a simple matter, as is shown by Articles 25, 28, 29 and 30.

15. **Non-unified legal systems.** Some States are made up of two or more units, each with its own legal system. This often occurs in the case of federations. For example, the United States is made up of states, and Canada is made up of provinces and territories. It can also occur in the case of certain non-federal States, such as China or the United Kingdom. The latter is made up of three units: England and Wales (one unit), Scotland and Northern Ireland. What Article 25(1) does is to provide that, in the case of such States, the word "State" in the Convention can apply, where appropriate, to either the larger entity – the United Kingdom, for example – or to a sub-unit of that entity – Scotland, for example.[41] What is appropriate will depend on a number of factors, including the relationship between the larger entity and the sub-units under the legal system of the State in question, as well as on the terms of the choice of court agreement. To show how Article 25(1) operates, we can take the example of Article 3, which refers, *inter alia*, to an agreement designating "the courts of one Contracting State". If the parties choose the courts of Alberta, "Contracting State" in Article 3 would mean Alberta; so the choice of court agreement would fall within the terms of the Convention. If, on the other hand, they designated the courts of Canada, "Contracting State" in Article 3 would refer to Canada; so again the choice of court

[38] See also Art. 25(2).
[39] See para. 231 to 233, *infra*.
[40] The wording of this provision was inspired by Art. 6(1) of the UNCITRAL Model Law on Electronic Commerce 1996.
[41] But Art. 25(2) provides that such a State is not required to apply the Convention between such sub-units.

agreement would be covered.

16. **Ratification or accession limited to certain units.** Article 28 also deals with States of the kind referred to in the previous paragraph. However, it has a different purpose. It permits such a State to declare that the Convention will apply to only some of its units. This would, for example, permit Canada to declare that the Convention will extend only to the province of Alberta. In such a case, a choice of court agreement designating the courts of another Canadian province would not be covered by the Convention.

17. **Regional Economic Integration Organisations.** Regional Economic Integration Organisations, such as the European Community, are dealt with in Articles 29 and 30.[42] Besides allowing such organisations to become Parties to the Convention in certain circumstances, Articles 29 and 30 also provide that any reference to "State" or "Contracting State" in the Convention applies equally to a Regional Economic Integration Organisation that is a Party to it, where appropriate.[43] This means that, depending on what is appropriate, "State" in the European context could mean either the European Community, or one of its Member States (for example, the United Kingdom) or a territorial unit of such a Member State (for example, Scotland). It follows from this that a choice of court agreement designating "the courts of the European Community" or referring specifically to "the Court of Justice of the European Communities (Court of First Instance)"[44] would be covered by the Convention.

18. **Exclusions from scope.** Article 2 deals with exclusions from the scope of the Convention. The Convention was designed to apply in the commercial area, and many exclusions give effect to this policy, though a few commercial matters are also excluded where special considerations apply. Paragraph 1 of Article 2 states that the Convention does not apply to consumer contracts or contracts of employment. Paragraph 2 provides that it does not apply to a number of specific matters listed in its sixteen sub-paragraphs. These cover various family-law matters, such as maintenance and matrimonial property, and a miscellaneous group of matters ranging from liability for nuclear damage to the validity of entries in public registers. Some of them will be discussed below, when particular branches of the law are considered.

19. **Preliminary rulings.** Article 2(3) lays down the important principle that proceedings on a matter within the scope of the Convention do not cease to be covered by it just because the court has to give a preliminary ruling on one of the excluded matters. However, Article 10(1) makes clear that the ruling on the excluded matter is not entitled to independent recognition and enforcement under the Convention. Moreover, Article 10(2) permits (but does not require) the court addressed to refuse to recognise or enforce the judgment itself, to the extent that it was based on the ruling. However, this power should not be exercised if the preliminary ruling would have been the same if it had been given by a court in the requested State.

20. **Preliminary rulings on intellectual property.** The application of Article 10(2) is subject to important restrictions when the preliminary ruling is on the validity of an

[42] The difference between Art. 29 and 30 is that the former is concerned with the situation where the Regional Economic Integration Organisation becomes a Party to the Convention *together* with its Member States, while the latter is concerned with the situation where it becomes a Party *without* its Member States. In the case of the European Community, this would depend on whether the Community had shared competence or exclusive competence. In this respect, see the Opinion of the Court of Justice of the European Communities of 7 February 2006 on the competence of the Community to conclude the new Lugano *Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (Opinion 01/03), available at < http://curia.europa.eu/ >.

[43] However, certain Articles – for example, Art. 28 – expressly state that they do not apply to Regional Economic Integration Organisations.

[44] Under Art. 238 of the *Treaty Establishing the European Community* (EC Treaty), the Court of Justice of the European Communities has jurisdiction pursuant to an "arbitration clause" (in reality, a choice of court clause) in a contract concluded by or on behalf of the Community. This jurisdiction is exercised by the Court of First Instance: Art. 225(1) EC Treaty. Thus, if the European Commission concluded a commercial contract with a company resident outside the European Community, a choice of court clause in such a contract in favour of the Court of Justice of the European Communities (Court of First Instance) would be covered by the Convention.

intellectual property right (Art. 10(3)). This is explained below, when intellectual property is discussed.

21. **Declarations with respect to specific matters.** Article 21 makes it possible for a Contracting State to extend the list of excluded matters by means of a declaration specifying the matter that it wants to exclude, provided it defines it clearly and precisely. Where this is done, the Convention will not apply with regard to that matter in the State making the declaration.[45]

22. **Transparency and non-retroactivity.** Article 21 exceptionally allows a Contracting State to specify certain matters to which it will not apply the Convention. However, under Article 32, any such declaration must be notified to the depositary (the Ministry of Foreign Affairs of the Netherlands), which will inform the other States (principle of transparency). It is also envisaged that declarations will be posted on the website of the Hague Conference on Private International Law.[46] If the declaration is made after the Convention comes into force for the State making it, it will not take effect for at least three months.[47] Since it will not apply to choice of court agreements concluded before it takes effect (principle of non-retroactivity),[48] it will be possible for the parties to know in advance whether their legal relationship will be affected.

23. **Reciprocity.** It is provided by Article 21(2) that, where a State makes such a declaration, other States will not be required to apply the Convention with regard to the matter in question where the chosen court is in the State making the declaration (principle of reciprocity).

24. **Judicial settlements (*transactions judiciaires*).** The enforcement of judicial settlements, known in French as "*transactions judiciaires*", is covered by the Convention, provided there is an appropriate choice of court agreement and the settlement is accompanied by a certificate of a court in the State of origin.[49] Judicial settlements in this sense are not known in the common law. They are not the same thing as out-of-court settlements; nor are they the same as consent judgments, though they fulfil the same function. Consent judgments are covered by the Convention in the same way as other judgments.

25. **Conflicts with other conventions.** This is one of the most difficult questions dealt with in the Convention. The starting point must be the normal rules of public international law, which are generally regarded as being reflected in Article 30 of the Vienna *Convention on the Law of Treaties*, 1969. Article 30(2) of the Vienna Convention provides that where a treaty states that it is subject to another treaty (whether earlier or later), that other treaty will prevail. Article 26 of the Hague Convention specifies four cases (para. 2 to 5 of Art. 26) in which another convention will prevail over it. Paragraph 6 of Article 26 deals with a slightly different question: conflicts between the Convention and the rules of a Regional Economic Integration Organisation that is a Party to the Convention.

26. **The Brussels Regulation.**[50] The rules laid down in Article 26 are too complex to discuss in full in this short outline. However, it might be of value to summarise their application with regard to the Brussels Regulation. If there is a conflict of rules with regard to jurisdiction, the Brussels Regulation will prevail over the Convention where none of the parties is resident in a Contracting State that is not a Member State of the European Community. Where one or more of the parties is resident in a Contracting State that is not a

[45] For the position where a matter subject to a declaration under Art. 21 arises as a preliminary issue, see Art. 10(4).
[46] This is < www.hcch.net >.
[47] Art. 32(4).
[48] Art. 32(5).
[49] Art. 12 and 13(1) *e)*.
[50] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ 2001 L 12, p. 1. It applies among all the EU Member States except Denmark and replaces the Brussels Convention in the mutual relations between those States to which it applies. The same provisions apply to Denmark by virtue of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2005 L 299, pp. 61 and 62. The agreement was signed in Brussels in 2005 and will come into force on 1 July 2007.

Member State of the European Community, the Convention will prevail.[51] Thus, for example,[52] if an American company and a German company choose the Rotterdam district court, the Convention will prevail; if, on the other hand, a Belgian company and a German company choose the Rotterdam court, the Brussels Regulation will prevail. In practice, conflicts of a jurisdictional nature between the two instruments are likely to be rare. The most important exception concerns the *lis pendens* rule, which prevails over a choice of court agreement under the Brussels Regulation[53] but does not do so under the Convention.

27. With regard to the recognition and enforcement of judgments, the Brussels Regulation will prevail where the court that granted the judgment and the court in which recognition is sought are both located in the European Community. This means that the generally more limited grounds for non-recognition laid down in Article 34 of the Brussels Regulation will apply in place of the wider grounds in Article 9 of the Convention; in particular, the court addressed may not normally consider whether the court of origin had jurisdiction. In most cases, this should make it easier to enforce the judgment.

28. **Non-exclusive choice of court agreements.** In general, the Convention applies only to exclusive choice of court agreements. However, Article 22 provides for a system of reciprocal declarations extending the recognition and enforcement provisions of the Convention to non-exclusive choice of court agreements. Judgments pursuant to such agreements will be recognised and enforced if both the State of origin and the requested State have made such a declaration, provided the conditions laid down in the second paragraph of Article 22 are met.

29. **Particular branches of the law.** It might be useful to conclude this outline by considering the effect of the Convention on certain particular branches of the law. Only a limited number will be considered.

30. **Shipping and transport.** Article 2(2) *f)* excludes carriage of passengers and goods from the scope of the Convention. This covers carriage by sea, as well as by land and air. Article 2(2) *g)* excludes marine pollution, limitation of liability for maritime claims, general average and emergency towage and salvage. Other areas of shipping law are covered.[54]

31. **Insurance.** Insurance (including marine insurance) is fully covered by the Convention. The Convention expressly states that a contract of insurance (or reinsurance) is not outside the scope of the Convention just because it relates to a matter that is excluded.[55] For example, though carriage of goods by sea is excluded, a contract to insure goods carried by sea is not excluded. It is also expressly provided[56] that recognition and enforcement of a judgment in respect of liability under the terms of a contract of insurance or reinsurance may not be limited or refused on the ground that the liability under that contract relates to a matter to which the Convention does not apply. Moreover, if the insurer agrees to indemnify the insured for liability to pay punitive damages, a judgment under the contract of insurance cannot be refused enforcement just because the award of punitive damages might not itself be enforced by virtue of Article 11.

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[51] Art. 4(2) of the Convention provides that a corporation is resident in each and all of the following: the State where it has its statutory seat; the State under whose law it was incorporated or formed; the State where it has its central administration; and the State where it has its principal place of business. It follows from this that a company could in theory be resident in four States. If any one of these is a Party to the Hague Convention but not a Member State of the European Community, the Hague Convention will prevail over the Brussels Regulation as far as jurisdiction is concerned.

[52] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.

[53] Under the Brussels Regulation, if a court of another European Community Member State is seised before the chosen court, the latter must stay the proceedings before it until the court first seised relinquishes jurisdiction: *Gasser* v. *MISAT*, Case C-116/02, Court of Justice of the European Communities, [2003] ECR I-14721, available at < http://curia.europa.eu/ >. Under the Convention, the opposite is the case. See *infra*, para. 295 to 301.

[54] See *infra*, para. 59.

[55] Art. 17(1).

[56] Art. 17(2).

32. **Banking and finance.** Banking and finance are fully within the scope of the Convention. International loan agreements are, however, often subject to a non-exclusive choice of court clause. In such a case, the Convention would not apply unless the States concerned had made a declaration under Article 22. An asymmetric choice of court agreement (a choice of court agreement under which one party may bring proceedings exclusively in the designated court, but the other party may sue in other courts as well) is not regarded as exclusive for the purposes of the Convention.

33. **Intellectual property.** The application of the Convention to intellectual property was subject to intense negotiation. The outcome was to make a distinction between copyright and related rights, on the one hand, and other intellectual property rights (such as patents, trade marks and designs), on the other hand. We shall treat these two classes of rights separately.

34. **Copyright and related rights.** Copyright and related rights (neighbouring rights) are fully covered by the Convention. This is the case even with regard to disputes as to validity. However, since a judgment is enforceable under the Convention only as against persons bound by the choice of court agreement, a judgment on validity can never have *in rem*[57] effect *under the Convention*; consequently, a judgment that a copyright is invalid is not, under the Convention, binding on third parties.[58]

35. **Intellectual property rights other than copyright and related rights.** Article 2(2) *n)* excludes the validity of intellectual property rights other than copyright and related rights from the scope of the Convention. Thus, proceedings for revocation or for a declaration of invalidity are not covered.

36. **Licensing agreements.** The Convention applies to licensing agreements and other contracts concerning intellectual property. If the agreement contains a choice of court clause, a judgment by the chosen court ordering payment of royalties will be enforceable under the Convention.

37. **Challenging validity as a defence.**[59] If the licensor sues the licensee for payment of royalties, the latter may respond by claiming that the intellectual property right is invalid. This might constitute a defence to the claim, unless the licensing agreement contains a clause that royalties are due regardless of any challenge to the validity of the intellectual property right (assuming such a clause is legal). If the obligation to pay royalties exists only if the right is valid, the court hearing the claim for payment of royalties will have to decide the validity issue. This does not mean that the claim for payment of royalties ceases to be covered by the Convention.[60] However, the preliminary ruling on validity is not entitled to recognition under the Convention.[61]

38. **Enforcement of a judgment based on a preliminary ruling.** If proceedings are brought to enforce the judgment for payment of royalties, and if that judgment was based on a preliminary ruling on the validity of the intellectual property right, the court addressed may refuse to enforce the judgment if the preliminary ruling is inconsistent with a judgment[62] on the validity of the intellectual property right given by the appropriate court in the State under the law of which the intellectual property right arose (usually the State of registration).[63] Moreover, if proceedings on the validity of the right are pending in that State, the court addressed may suspend the enforcement proceedings to await the outcome of the

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[57] *In rem* effect is sometimes also called "*erga omnes*" effect.
[58] This applies equally to other property rights. For example, a judgment on the ownership of goods cannot have *in rem* effect under the Convention. In all cases, however, the judgment may have *in rem* effect on some other basis.
[59] See para. 77, *infra.*
[60] Art. 2(3). The same would be true if the licensee counterclaims for revocation.
[61] Art. 10(1).
[62] This includes the decision of a patent office or other competent authority.
[63] Art. 10(3) *a)*. However, recognition and enforcement may be refused only *to the extent that* the judgment is based on the ruling on validity. This follows from the fact that Art. 10(3) does not create an independent ground of non-recognition, but merely qualifies the ground laid down in Art. 10(2). See further *infra*, para. 197 *et seq.*

proceedings on the validity. If it is not possible for it to suspend the proceedings, it may dismiss them, provided that new proceedings may be brought once the question of validity has been settled.[64]

39. **Infringement proceedings.** Article 2(2) *o)* excludes from the Convention proceedings for the infringement of intellectual property rights other than copyright and related rights. This, however, is subject to an important exception. Infringement proceedings that are brought, or could have been brought, for breach of a contract between the parties are not excluded from the scope of the Convention. This applies to proceedings following an alleged breach of a licensing agreement, though it is not limited to such agreements. If the licensing agreement permits the licensee to use the right in certain ways but not others, he will have committed a breach of contract if he uses the right in a way that is forbidden. However, since he would no longer be protected by the licence, he might also be guilty of infringement of the intellectual property right. The exception to Article 2(2) *o)* provides that such an action is covered by the Convention. This applies even if it is brought in tort, rather than in contract: infringement actions are covered, even if brought in tort, provided they *could have been* brought in contract.

[64] Art. 10(3) *b)*. The *chapeau* to Art. 10(3) refers to both refusal to recognise or enforce and postponement of recognition or enforcement. The former would normally be appropriate under sub-para. *a)* and the latter under sub-para. *b)*.

PART III: ARTICLE-BY-ARTICLE COMMENTARY

Article 1 Scope

40. **Three limitations.** The first paragraph of Article 1 makes clear that the scope of the Convention is limited in three ways: it applies only in international cases; it applies only to exclusive choice of court agreements (though this is subject to Art. 22); and it applies only in civil or commercial matters.

41. **Definition of "international" with regard to jurisdiction.** Article 1(2) defines "international" for the purposes of the rules on jurisdiction (found in Chapter II of the Convention). It states that a case is international unless both the following conditions are satisfied: first, the parties are resident[65] in the same Contracting State; and, secondly, the relationship of the parties and all other elements relevant to the dispute (regardless of the location of the chosen court) are connected only with that State. This means that the jurisdictional rules of the Convention will apply either if the parties are not resident in the same State, or if some other element relevant to the dispute (other than the location of the chosen court) has a connection with some other State.

42. The effect of this rule will be clearer if we give an example. Assume that the parties to the contract are both resident in Portugal.[66] The contract is made in Portugal and to be performed there. They choose a court in Japan. No relevant element (other than the location of the chosen court) relates to any State other than Portugal. Such a case will not be international for the purpose of the jurisdictional rules of the Convention. As a result, if one party to the contract sues the other in Portugal, the Convention will not require the Portuguese court to apply Article 6 (to establish whether it is allowed to proceed in the case). If proceedings are brought before the chosen court in Japan, the Japanese court will not be required to hear the case under the Convention.[67] (Of course, it is possible that both courts, applying their national laws, would reach a result similar to that which would have occurred under the Convention if it had been applicable.)

43. Another consequence of the same rule is that if the parties in a case that is purely domestic to Portugal had chosen a Portuguese court, and one of them had then sued in another Contracting State, the courts of that other State would not be obliged under the Convention to dismiss the proceedings. However, this situation is unlikely to occur, since it is improbable that any court other than a Portuguese court would have jurisdiction in such a case.

44. **Definition of "international" with regard to recognition and enforcement.** Article 1(3) defines "international" for the purposes of recognition and enforcement (Chapter III of the Convention). It states simply that a case is international for such purposes if the judgment to be recognised or enforced is foreign. As a result, a case that was not international under Article 1(2) when the original judgment was given becomes international if it is to be recognised or enforced in another Contracting State.

45. Thus, if, in the example in paragraph 42, the chosen court is located in Portugal, any judgment by it will be entitled to recognition and enforcement in other Contracting States, even if the situation is entirely internal to Portugal. This approach to defining "international" could prove important in practice, since the defendant might move his assets out of Portugal. It was to ensure this result that two different definitions of "international" were adopted.

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[65] The rules for determining the residence of an entity or person other than a natural person are set out in Art. 4(2).
[66] In all examples given in this Report, it is assumed that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra.*
[67] Since the case would not be covered by the Convention, it would not be necessary for Japan to have made a declaration under Art. 19. A declaration under Art. 19 would be necessary only where the case had a foreign element going beyond connections with Portugal, but where that foreign element was not connected with Japan (for example, the residence of a party in China). In such a case, the Convention would be applicable under Art. 1(2); the Japanese court would, therefore, be obliged to hear the case. Japan could avoid this obligation by making a declaration under Art. 19.

46. However, the rule will have other consequences. If (in a situation that is otherwise purely internal to Portugal) two residents of Portugal choose a Japanese court, and one of them sues the other there and obtains a judgment, the case will become international if proceedings are brought to enforce the judgment in another Contracting State. Portugal will be required by the Convention to enforce the Japanese judgment, unless a Portuguese court has given an inconsistent judgment in proceedings between the same parties,[68] or Portugal has made a declaration under Article 20.[69]

47. **Exclusive choice of court agreements.** A significant consideration in limiting the Convention to exclusive choice of court agreements was to avoid the problems that would otherwise arise with regard to *lis pendens.*

48. Article 5 (which requires the chosen court to hear the case) could not apply as it stands to non-exclusive choice of court agreements, since a court other than the chosen court might have been seised first, and it might also be entitled to hear the case if the choice of court agreement was not exclusive. This would raise issues of *lis pendens* and *forum non conveniens* that would have been difficult to resolve in an acceptable way. Moreover, Article 6 (which prohibits courts other than that chosen from hearing the case) could not apply if the choice of court agreement was not exclusive. These arguments do not apply to the same extent at the stage of recognition and enforcement. Consequently, Article 22 allows Contracting States to make reciprocal declarations extending the recognition and enforcement provisions of the Convention to non-exclusive choice of court agreements, provided certain conditions are met.[70]

49. **Civil or commercial matters.** Like other concepts used in the Convention, "civil or commercial matters" has an autonomous meaning: it does not entail a reference to national law or other instruments. The limitation to civil or commercial matters is common in international conventions of this kind. It is primarily intended to exclude public law and criminal law.[71] The reason for using the word "commercial" as well as "civil" is that in some legal systems "civil" and "commercial" are regarded as separate and mutually exclusive categories. The use of both terms is helpful for those legal systems. It does no harm with regard to systems in which commercial proceedings are a sub-category of civil proceedings.[72] However, certain matters that clearly fall within the class of civil or commercial matters are nevertheless excluded from the scope of the Convention under Article 2.[73]

Article 2 Exclusions from scope

50. **Consumer contracts.** Article 2(1) *a)* provides that the Convention does not apply to choice of court agreements to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party. This exclusion covers an agreement between a consumer and a non-consumer, as well as one between two consumers.[74]

51. **Employment contracts.** Article 2(1) *b)* excludes from the scope of the Convention choice of court agreements relating to individual or collective contracts of employment. An

[68] Art. 9 *f)*. The Portuguese judgment need not be given before the Japanese one.
[69] See para. 231 *et seq., infra.*
[70] See para. 240 *et seq., infra.*
[71] However, proceedings are not excluded from the scope of the Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party thereto: Art. 2(5), discussed at para. 85 and 86, *infra.*
[72] For further discussion of "civil or commercial matters", see pp. 29 to 31 of the Nygh / Pocar Report (*supra,* note 11).
[73] See para. 50 *et seq., infra.* Art. 1(1) of the preliminary draft Convention 1999 contained a further provision expressly stating that the Convention would not apply to revenue, customs or administrative matters. This provision was not included in later drafts because it was thought to be unnecessary: it was considered obvious that such matters could not be civil or commercial.
[74] Some agreements to which a natural person is a party are not excluded by Art. 2(1) *a)* – for example, commercial agreements where one party is a sole trader (an individual acting in the course of his business). Where the agreement is concluded by a legal person, it is not necessary for it to be acting in the course of business. Art. 2(1) *a)* would not exclude a choice of court agreement concluded by a government department or a charity.

individual contract of employment is one between an employer and an individual employee; a collective contract of employment is one between an employer or a group of employers and a group of employees or an organisation such as a trade union (labour union) representing them. The exclusion also applies to actions in tort arising out of the employment relationship – for example, if the employee suffers personal injury while at work.[75]

52. **Other excluded matters.** Article 2(2) states that the Convention does not apply to the matters listed in sub-paragraphs *a)* to *p).*[76] However, as is made clear by Article 2(3), this exclusion applies only where one of the matters referred to in paragraph 2 is an "object" (the subject or one of the subjects)[77] of the proceedings.[78] This means that proceedings are not excluded from the scope of the Convention if one of these matters arises as a preliminary question in proceedings that have some other matter as their object / subject.[79]

53. There are various reasons why the matters referred to in Article 2(2) are excluded. In some cases, the public interest, or that of third parties, is involved, so that the parties may not have the right to dispose of the matter between themselves. In such cases, a particular court will often have exclusive jurisdiction that cannot be ousted by means of a choice of court agreement. In other cases, other multilateral legal regimes apply; so the Convention is not needed, and it would sometimes also be difficult to decide which instrument prevails if the Convention were to cover such an area.[80]

54. **Status and capacity.** Sub-paragraph *a)* concerns the status and capacity of natural persons. This includes proceedings for divorce, annulment of marriage or the affiliation of children.

55. **Family law and succession.** Sub-paragraphs *b)* to *d)* concern family law and succession.[81] In sub-paragraph *b)*, "maintenance" includes child support. In sub-paragraph *c)*, "matrimonial property" includes the special rights that a spouse has to the matrimonial home in some jurisdictions; while "similar relationships" covers a relationship between unmarried couples, to the extent that it is given legal recognition.[82]

56. **Insolvency.** Sub-paragraph *e)* excludes insolvency, composition and analogous matters. The term "insolvency" covers the bankruptcy of individuals as well as the winding-up or liquidation of corporations that are insolvent, but does not cover the winding-up or liquidation of corporations for reasons other than insolvency, which is dealt with by sub-paragraph *m)*. The term "composition" refers to procedures whereby the debtor may enter into agreements with creditors in respect of a moratorium on the payment of debts or on the discharge of those debts. The term "analogous matters" covers a broad range of other methods whereby insolvent persons or entities can be assisted to regain solvency while continuing to trade, such as Chapter 11 of the United States Federal Bankruptcy Code.[83]

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[75] Such proceedings would also be outside the scope of the Convention by virtue of Art. 2(2) *j)*. In some States, the law permits an employee to bring a direct action against the employer's insurer with regard to personal injury claims where the employer is insolvent. In those States, the Convention would also not apply to the employee's direct claim against the employer's insurer even if there was an exclusive choice of court agreement between the employer and the employee. Art. 17 would not apply here, since the proceedings would not be "under" the contract of insurance. However, Art. 2(1) *b)* and Art. 2(2) *j)* would not affect the relationship between the employer and the insurer: see Art. 17.

[76] In the preliminary draft Convention 1999, some of these matters are referred to in Art. 12; however, in that draft they were not excluded from the scope of the Convention, but were subject to rules of exclusive jurisdiction. Nevertheless, some of the comments on Art. 12 in the Nygh / Pocar Report are helpful in understanding the final text of the Convention.

[77] Like the French text ("*objet*"), the English text uses the word "object", the word previously used in some conventions of this kind (*cf.* Art. 16 of the Brussels Convention in English), but it might just as well have said "subject" as perhaps more commonly used in common law systems. It is intended to mean a matter with which the proceedings are directly concerned.

[78] For an example see *infra*, para. 75 and 77.

[79] However, the ruling on the preliminary question is not itself subject to recognition or enforcement under the Convention: Art. 10(1).

[80] For some examples see *infra*, para. 58 and 64.

[81] Some of these matters are dealt with in other Hague Conventions.

[82] These provisions are largely taken from sub-para. *a)* to *d)* of Art. 1(2) of the preliminary draft Convention 1999, and their scope is further examined at pp. 32 to 34 of the Nygh / Pocar Report.

[83] There is an identical provision in Art. 1(2) *e)* of the preliminary draft Convention 1999, and its scope is further examined at pp. 34 to 35 of the Nygh / Pocar Report.

57. Proceedings are excluded from the scope of the Convention under sub-paragraph *e)* if they directly concern insolvency. Assume, for example, that A (resident in State X) and B (resident in State Y) enter into a contract, under which B owes A a sum of money.[84] The contract contains a choice of court agreement in favour of the courts of State Z. A is then declared bankrupt as a result of proceedings in State X. The Convention would apply to any proceedings against B to recover the debt, even if they were brought by the person appointed to administer A's bankrupt estate: provided that the appointment under the insolvency law of State X is recognised in State Z, that person would be standing in the shoes of A and would be bound by the choice of court agreement. However, the Convention would not apply to questions concerning the administration of the bankrupt estate – for example, the ranking of different creditors.

58. **Carriage of passengers or goods.** Sub-paragraph *f)* excludes contracts for the national and international carriage of passengers or goods.[85] This includes carriage by sea, land and air, or any combination of the three. The international carriage of persons or goods is subject to a number of other conventions, for example the Hague Rules on Bills of Lading.[86] By excluding these matters, the possibility of a conflict of conventions is avoided.

59. **Maritime matters.** Sub-paragraph *g)* excludes five maritime matters: marine pollution; limitation of liability for maritime claims; general average; emergency towage; and emergency salvage. The application of choice of court agreements to these matters would cause problems for some States. Other maritime (shipping) matters, for example, marine insurance, non-emergency towage and salvage, shipbuilding, ship mortgages and liens, are included.[87]

60. **Anti-trust / competition.** Anti-trust / competition matters are excluded by sub-paragraph *h)*. The exclusion is phrased as "anti-trust / competition" because different terms are used in different countries and legal systems for rules of similar (although not necessarily identical) substantive content. The standard term in the United States is "anti-trust law"; in Europe it is "competition law". Therefore, both terms are used in the Convention. Sub-paragraph *h)* does not cover what is sometimes called "unfair competition" (in French, *concurrence déloyale*) – for example, misleading advertising or passing one's goods off as those of a competitor.[88]

61. Criminal anti-trust / competition proceedings are not civil or commercial matters; therefore, they are outside the scope of the Convention by virtue of Article 1(1).[89]

62. However, anti-trust / competition matters can form the subject of private-law proceedings. Such actions can arise from a contractual relationship – *e.g.* when a plaintiff who is a party to an anti-competitive agreement invokes the nullity of the agreement, or when a buyer seeks repayment of excessively high prices paid to his seller as a result of the latter having engaged in a price-fixing arrangement or abused its dominant position.[90] An action in tort for damages for breach of anti-trust / competition law, possible both in the United States and in the European Union, as well as in some other countries, is a prime example. These actions, even if brought under a choice of court agreement, are excluded by

[84] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.
[85] Here "goods" includes passengers' luggage.
[86] They were adopted in 1924 and were amended by the Brussels Protocol of 1968. They are sometimes called the "Hague–Visby Rules".
[87] See para. 30, *supra*.
[88] Minutes of the Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (1 to 9 December 2003), Minutes No 13, p. 2 (statement by the Chairman of the Drafting Committee, introducing Working Document No 39 of 2003, Art. 1(3) *g)* of which was the equivalent of Art. 2(2) *h)* of the final text of the Convention); see further Minutes No 1, p. 9 (First Secretary); p. 10 (expert from the United States of America); Minutes No 4, p. 1 (expert from New Zealand); and p. 2 (expert from Switzerland). Thus, the English text was intended to mean the same as the French text, which uses the phrase "*les entraves à la concurrence*", a phrase that does not cover unfair competition.
[89] This applies also to the quasi-criminal proceedings under Art. 81 and 82 of the *Treaty establishing the European Community* 2002.
[90] See L. Radicati di Brozolo, "Antitrust Claims: Why exclude them from the Hague Jurisdiction and Judgments Convention", *European Competition Law Review* 2004, Vol. 25, No 12, p. 780, at 782.

Article 2(2) *h)*, even though they are between private parties.

63. On the other hand, if a person sues someone under a contract, and the defendant claims that the contract is void because it infringes anti-trust / competition law, the proceedings are *not* outside the scope of the Convention, since anti-trust / competition matters are not the object / subject of the proceedings, but arise merely as a preliminary question.[91] The object / subject of the proceedings is the claim under the contract: the principal issue before the court is whether judgment should be given against the defendant because he or she has committed a breach of contract.

64. **Nuclear liability.** Sub-paragraph *i)* excludes liability for nuclear damage. This is the subject of various international conventions, which provide that the State where the nuclear accident takes place has exclusive jurisdiction over actions for damages for liability resulting from the accident.[92] In some cases, Article 26 might give those conventions priority over this Convention. However, there are some States with nuclear power plants that are not parties to any of the nuclear-liability conventions.[93] Such States would be reluctant to allow legal proceedings to be brought in another State by virtue of a choice of court agreement, since, where the operators of the nuclear power plants benefit from limited liability under the law of the State in question, or where compensation for damage is paid out of public funds, a single collective procedure in that State under its internal law would be necessary in order to have a uniform solution in respect of liability and an equitable distribution of a limited fund among the victims.

65. **Personal injury.** Sub-paragraph *j)* excludes claims for personal injury brought by or on behalf of natural persons. Choice of court agreements are likely to be rare in such cases. The view was presented to the Diplomatic Session that "personal injury" includes nervous shock (even if not accompanied by physical injury) – for example, from witnessing the death of a member of one's family – but not humiliation or hurt feelings – for example, for an invasion of privacy or for defamation.[94]

66. **Damage to tangible property.** Sub-paragraph *k)* excludes claims in tort or delict[95] for damage to tangible property that do not arise from a contractual relationship. This exclusion does not apply to contractual claims (in any situation); nor does it apply to claims in tort or delict that arise from a contractual relationship. So it will have only limited effect in practice.

67. **Immovable property.** Sub-paragraph *l)* excludes rights *in rem* in immovable property and tenancies in immovable property. The reference to rights *in rem* should be interpreted as relating only to proceedings concerning ownership of, or other rights *in rem* in, the immovable, not proceedings about immovables which do not have as their object / subject a right *in rem*. Thus it would not cover proceedings for damage to an immovable (though such proceedings might be excluded under sub-paragraph *k)*), nor would it cover a claim for

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[91] See Art. 2(3).

[92] The Paris *Convention on Third Party Liability in the Field of Nuclear Energy* 1960, and its 2004 amendment; the *Convention Supplementary to the Paris Convention* 1963, and its 2004 amendment; the Vienna *Convention on Civil Liability for Nuclear Damage* 1963, and its 1997 amendment; the *Convention on Supplementary Compensation for Nuclear Damage* 1997; the *Joint Protocol relating to the Application of the Vienna Convention and the Paris Convention* 1988.

[93] For example, Canada, China, Japan, Korea and the United States of America.

[94] See Minutes of the Twentieth Session, Commission II: Minutes No 20, para. 3 to 7 and Minutes No 24, para. 16 to 18. The Diplomatic Session was aware that the phrase in the French text ("*les dommages corporels et moraux y afférents*") might seem narrower in that it covers nervous shock only where it is accompanied by physical injury. It was not possible for the Diplomatic Session to find a French term expressing more clearly that the exclusion in sub-para. *j)* covers nervous shock even where this is the only injury suffered, without also covering hurt feelings or damage to one's reputation (for example, defamation), as the term "*dommages moraux*" used alone would have done. Therefore it was requested that the Report should clearly state the intention of the Session, rather than broadening the exclusion in French beyond what is excluded by the English text.

[95] Delict is the civil-law concept analogous to "tort" in common law legal systems.

damages for breach of a contract for the sale of land.[96]

68. Tenancies in immovable property are excluded for several reasons. First, in some countries, they are subject to special legislation designed to protect the tenant. To the extent that this legislation applies to private homes, the tenant would constitute a consumer under Article 2(1) *a)* and the agreement would be excluded under that provision. However, the legislation may apply in other situations as well. Secondly, during the discussions at the Diplomatic Session it became clear that in some jurisdictions some tenancies are considered as rights *in rem* and would therefore be excluded from the scope of the Convention by the first part of sub-paragraph *l)*. It was considered desirable to treat all tenancies the same way under the Convention, regardless of their legal characterisation in internal law.[97]

69. Proceedings would not be excluded from the Convention where they concern the immovable only indirectly – for example, proceedings concerning the rights and obligations of the seller and buyer under a contract for the sale of a business, even if it includes an undertaking to transfer the lease of the premises. On the other hand, proceedings between a landlord and tenant on the terms of the lease would be excluded.

70. **Legal persons.** Sub-paragraph *m)* excludes the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs.[98] It was considered undesirable that such matters, which often involve the rights of third parties, should be removed from the jurisdiction of the courts that would otherwise have jurisdiction over them, especially since that jurisdiction is often exclusive.

71. **Intellectual property.** Sub-paragraphs *n)* and *o)* apply to intellectual property. They both draw a distinction between copyright and related rights, on the one hand, and all other intellectual property rights, on the other hand. These will be discussed separately.

72. **Copyright and related rights.** Copyright and related rights are fully covered by the Convention. This includes proceedings concerning the validity or infringement of such rights. However, since a judgment can be recognised or enforced under the Convention only against persons bound by the choice of court agreement, a judgment on validity cannot have *in rem* effect under the Convention.[99]

73. **Related rights.** Related rights are sometimes also called neighbouring rights. Examples of related rights include:[100] rights of performers (such as actors and musicians) in their performances, rights of producers of sound recordings (for example, cassette recordings and CDs) in their recordings, and rights of broadcasting organisations in their radio and television broadcasts.[101]

74. **Other intellectual property rights.**[102] Sub-paragraphs *n)* and *o)* apply only to intellectual property rights other than copyright and related rights. Sub-paragraph *n)* excludes the validity of such rights from the scope of the Convention. Sub-paragraph *o)* excludes the infringement of such rights, though it is subject to an important exception. These two issues will be discussed separately.

75. **Validity.** Proceedings that concern the validity of an intellectual property right other than copyright or related rights are excluded from the Convention. Thus proceedings for the

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[96] The fact that the court might have to decide a preliminary question concerning title to the land would not affect this: see Art. 2(3).

[97] See Minutes No 13 of the Twentieth Session, Commission II, para. 46 to 87, in particular para. 56, 76, 84 and 86.

[98] This same phrase appears (with purely verbal differences) in Art. 12(2) of the preliminary draft Convention 1999. The commentary on it in the Nygh / Pocar Report is at pp. 65 and 66.

[99] *In rem* effect is sometimes also called "*erga omnes*" effect.

[100] See the *Agreement on Trade-Related Aspects of Industrial Property Rights* (TRIPs) 1994, Part II Section 1, as well as the WIPO *Performances and Phonograms Treaty* (WPPT) 1996; the *Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms* (Geneva 1971); and the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (Rome 1961).

[101] See TRIPs, Art. 14.

[102] The following paragraphs of this Report deal only with intellectual property rights other than copyright and related rights.

revocation of such a right or for a declaration of validity or invalidity of such a right are outside the scope of the Convention. However, Article 2(3) makes clear that proceedings on a matter covered by the Convention are not excluded just because the validity of an intellectual property right arises as a preliminary question. As a result, proceedings to enforce a licensing agreement for an intellectual property right are not excluded just because the defendant raises the invalidity of the right as a defence. However, Article 10(1) provides that the ruling on the preliminary validity issue is not entitled to independent recognition in other Contracting States.[103] On the other hand, the final order[104] of the court in the proceedings under the choice of court agreement relating to the licensing agreement – for example, to pay a sum of money – *can* be recognised and enforced under the Convention.[105]

76. **Intellectual property contracts.** The Convention applies to contracts dealing with intellectual property rights, such as licensing agreements, distribution agreements, joint venture agreements, agency agreements and agreements for the development of an intellectual property right. Proceedings brought under such contracts – for example, proceedings for payment of royalties under a licensing agreement – are covered by the Convention.

77. **Invalidity as a defence.**[106] In proceedings under a contract, the defendant may claim that the intellectual property right is invalid. If the plaintiff's right under the contract – for example, the right to have royalties paid – depends on the validity of the intellectual property right, the court will have to decide validity as a preliminary question before it can decide the main issue. As was explained above, this does not mean that the proceedings are no longer covered by the Convention. Article 10(3) lays down special rules concerning the recognition and enforcement of the judgment.[107]

78. **Counterclaim for revocation.** Instead of raising invalidity as a defence, the defendant may counterclaim for revocation of the intellectual property right. Such a claim would be outside the scope of the Convention, because its object would be the validity of the right. However, the fact that it was brought would not mean that the claim under the contract would cease to be covered by the Convention.

79. **Infringement.** Infringement proceedings (for intellectual property rights other than copyright and related rights) are excluded except where they are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract.[108] This means that, first of all, there must be a contract between the parties relating to the right. Normally, the choice of court agreement would be contained in that contract. Secondly, the proceedings must either be for breach of that contract or they must be proceedings which, even if brought in tort, could have been brought for breach of the contract.[109]

80. **Example.** The best example is a licensing agreement. Assume that the agreement permits the licensee to use the intellectual property right in particular ways but not in others. If he uses the right in a way forbidden by the agreement, he will be guilty of a breach of contract. If the licensor sues him for breach of contract, the proceedings will be covered by the Convention. However, if the licensor prefers to sue in tort, the proceedings will also

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[103] See para. 194 to 196, *infra.*
[104] For the distinction between the "final order" and rulings on preliminary questions, see para. 194 and 195, *infra.*
[105] But see also Art. 10(3), discussed *infra*, para. 197 to 201.
[106] See also *supra*, para. 37.
[107] See para. 197 *et seq., infra.*
[108] Infringement proceedings in the sense of Art. 2(2) *o)* include proceedings brought for compensation for acts taking place between the publication of the application and the publication of the registration of an intellectual property right, actions brought for a declaration of non-infringement as well as actions brought with a view to establishing or confirming a prior user's right to use an invention. See Minutes No 7 of the Twentieth Session, Commission II, para. 39 and 40.
[109] The only situations in which sub-para. *o)* excludes a matter that would otherwise be covered are where the choice of court agreement applies to infringements that do not constitute a breach of the contract in which it is contained or of any other contract between the parties, or where the parties concluded a choice of court agreement relating to an infringement that had already arisen and that was not related to any contract between the parties. Such agreements will be rare.

be within the scope of the Convention: they could have been brought for breach of contract.

81. This rule is important for a number of reasons. In some countries, the parties are only required to plead the facts: it is for the court to determine the appropriate legal characterisation. Whether the court chooses contract or tort may depend on which is easier to establish. In other countries, the parties themselves decide whether to sue in contract or tort. They may have good reasons (such as the opportunity to obtain higher damages) for choosing one or the other. It should not depend on these accidental considerations whether or not a case is covered by the Convention.

82. **Public registers.** Sub-paragraph *p)* excludes the validity of entries in public registers.[110] Some people might not regard this as a civil or commercial matter. However, as some international instruments[111] provide for exclusive jurisdiction over proceedings that have the validity of such entries as their object, it was thought better to exclude them explicitly in order to avoid any doubts.

83. **Insurance.** Contracts of insurance (or reinsurance) are not outside the scope of the Convention just because they relate to one of the matters referred to in paragraph 2. The fact that the risk covered is outside the scope of the Convention does not mean that the contract of insurance is outside the scope of the Convention. Thus, insurance of cargo carried by sea is not excluded by virtue of Article 2(2) *f)* and insurance against liability for nuclear damage is not excluded by virtue of Article 2(2) *i).* This is made clear by Article 17.[112]

84. **Arbitration.** Paragraph 4 excludes arbitration and proceedings relating thereto.[113] This should be interpreted widely and covers any proceedings in which the court gives assistance to the arbitral process – for example, deciding whether an arbitration agreement is valid or not; ordering parties to proceed to arbitration or to discontinue arbitration proceedings; revoking, amending, recognising or enforcing arbitral awards; appointing or dismissing arbitrators; fixing the place of arbitration; or extending the time-limit for making awards. The purpose of this provision is to ensure that the present Convention does not interfere with existing instruments on arbitration.[114]

85. **Governments.** Article 2(5) provides that proceedings are not excluded from the scope of the Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party thereto.[115] The proceedings will fall outside the scope of the Convention, however, if they arise from a choice of court agreement concluded in a matter which is not civil or commercial.[116] Thus, a public authority is entitled to the benefits of the Convention, and assumes its burdens, when engaging in commercial transactions but not when acting in its sovereign capacity.[117] As a general rule, one can say that if a public authority is doing something that an ordinary citizen could do, the case probably involves a civil or commercial matter. If, on the other hand, it is exercising governmental powers that are not enjoyed by ordinary citizens, the case will probably not be civil or commercial.

86. Two examples may make this clearer. If a government department (ministry) calls for

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[110] This same phrase appears (with purely verbal differences) in Art. 12(3) of the preliminary draft Convention 1999. The commentary on it in the Nygh / Pocar Report is at p. 66.
[111] For instance, Art. 22(3) of the Brussels Regulation.
[112] See para. 221 to 227, *infra.*
[113] An identical provision is found in Art. 1(2) *g)* of the preliminary draft Convention 1999. The relevant passage in the Nygh / Pocar Report is at p. 35.
[114] For a discussion of the relationship between some treaties governing arbitration, and the *Convention on Choice of Court Agreements*, see A. Schulz, "The Future Hague Convention on Exclusive Choice of Court Agreements and Arbitration", Prel. Doc. No 32 of June 2005 for the attention of the Twentieth Session of June 2005.
[115] This provision is taken (with only verbal differences) from Art. 1(3) of the preliminary draft Convention 1999. The commentary on it in the Nygh / Pocar Report is at pp. 35 and 36.
[116] See Art. 1(1) and the discussion in para. 49, *supra.*
[117] See Minutes No 15 of the Twentieth Session, Commission II, para. 58.

tenders for the supply of paper for printing documents, and a foreign company is awarded the contract (which includes a choice of court agreement), proceedings under that contract will almost certainly be covered by the Convention. On the other hand, if a foreigner, on entering the country, signs a contract (containing a choice of court agreement) under which he agrees to pay any fines (criminal penalties) that he may incur as a result of his activities there, proceedings under that contract would almost certainly be outside the scope of the Convention.[118]

87. **Immunities of States.** Article 2(6) provides that nothing in the Convention affects the privileges and immunities of States, or of international organisations, in respect of themselves or their property.[119] The reason this provision was inserted into the Convention was that some delegates thought that Article 2(5) might be misinterpreted as affecting these matters: Article 2(6) was intended to make clear that it does not.[120]

88. **Procedural law.** It was not intended that the Convention would affect the procedural law of Contracting States, except where specifically provided. Outside these areas, internal procedural law applies as before, even in proceedings under the Convention.[121] Examples are given in the following paragraphs, though these are far from exhaustive.

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

90. Time limits within which proceedings must be brought or other steps taken under internal law remain unaffected by the Convention. Proceedings under a choice of court agreement, or proceedings to enforce a judgment under such an agreement, must be brought within the time limits laid down by internal law. This is true whether time limits are characterised as matters of substance or matters of procedure.

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

92. National law decides whether, and in what circumstances, appeals and similar remedies exist. Examples include: appeals to a higher court in the same State; references to the Court of Justice of the European Communities to interpret provisions of Community law, including conventions to which the Community is a Party; references to a special court to decide constitutional issues; and references to a patent office or other authority to decide the validity of a patent. National rules of evidence apply, even for proving the existence of a choice of court agreement and proving whether the Convention's requirements as to form have been met.

Article 3 Exclusive choice of court agreements

93. **Definition: five requirements.** Except where a State has declared otherwise under Article 22,[122] the Convention applies only to exclusive choice of court agreements. Article 3 *a)* gives a definition of such an agreement. The definition contains the following

[118] In considering questions such as these, it must be remembered that, as used in the Convention, "civil or commercial matters" is an autonomous concept that does not depend for its meaning on national law or other conventions.
[119] This provision is taken from Art. 1(4) of the preliminary draft Convention 1999. The commentary on it in the Nygh / Pocar Report is at p. 36.
[120] *Ibid.*
[121] In the case of recognition and enforcement, this is made clear by Art. 14, which provides that the procedure for the recognition and enforcement of the judgment is governed by the law of the requested State.
[122] Art. 22 allows a State, by way of a declaration, to extend on a reciprocal basis the application of the Chapter on recognition and enforcement to judgments given by a court that was designated in a non-exclusive choice of court agreement. See further *infra*, para. 240 *et seq.*

requirements: firstly, there must be an agreement between two or more parties; secondly, the formal requirements of paragraph *c)* must be satisfied; thirdly, the agreement must designate the courts of one State, or one or more specific courts in one State, to the exclusion of all other courts; fourthly, the designated court or courts must be in a Contracting State; and finally, the designation must be for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship.[123]

94. **The first requirement.** A choice of court agreement cannot be established unilaterally: there must be agreement. Whether there is consent is normally decided by the law of the State of the chosen court, including its rules of choice of law,[124] though in some circumstances capacity is also determined by other systems of law.[125]

95. However, the Convention as a whole comes into operation only if there is a choice of court agreement, and this assumes that the basic factual requirements of consent exist. If, by any normal standards, these do not exist, a court would be entitled to assume that the Convention is not applicable, without having to consider foreign law.

96. The following is an example.[126] X, who is resident in Panama, sends an unsolicited e-mail to Y, who is resident in Mexico, making an offer on terms that are extremely unfavourable to Y. The offer contains a choice of court clause in favour of the courts of Ruritania (an imaginary State), and concludes: "If you have not replied within seven days, you will be deemed to have accepted this offer." The e-mail is deleted by Y's anti-spam software and he never reads it. After seven days, X claims that there is a contract with a choice of court agreement, and brings proceedings in the courts of Ruritania. If, unlike the law of every other State in the world, the law of Ruritania considered that a contract existed and the choice of court "agreement" was valid, other States, including Mexico, would nevertheless be entitled to treat the choice of court agreement as non-existent.

97. Provided the original parties consent to the choice of court agreement, the agreement may bind third parties who did not expressly consent to it, if their standing to bring the proceedings depends on their taking over the rights and obligations of one of the original parties. Whether this is the case will depend on national law.[127]

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

99. **The third requirement.** This requires the choice to be exclusive: the choice of court agreement must designate[128] the courts of one State or one or more specific courts in one State as having *exclusive* jurisdiction. This will be discussed below in connection with paragraph *b)*, according to which a choice of court agreement is deemed to be exclusive unless the parties have expressly provided otherwise.[129]

100. **The fourth requirement.** The Convention applies only to choice of court agreements in favour of the courts of a Contracting State: agreements designating the courts (or one or more specific courts) of a non-Contracting State are not covered. For example,[130] assume that a choice of court agreement designating the courts of State X, a non-Contracting State, is concluded between a party resident in Peru and a party resident in Venezuela. If the Peruvian sues the Venezuelan in Venezuela, the Venezuelan court will not be required to

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[123] The choice of court agreement must of course be valid and applicable at the relevant time. If it is no longer in force – for example, because the parties have agreed to terminate it – it is no longer a choice of court agreement for the purpose of the Convention.
[124] Art. 5(1), 6 *a)* and 9 *a)*.
[125] In Art. 6 *b)* there is a reference to the law of the State of the court seised, and in Art. 9 *b)* to the law of the requested State. Capacity is, therefore, subject to two laws: see para. 150.
[126] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.
[127] See Minutes No 2 of the Twentieth Session, Commission II, para. 2 to 10. See para. 142, *infra*.
[128] Merely defending a case on the merits without objecting to jurisdiction would not itself give the court jurisdiction under the Convention, since this would not *designate* that court in terms of Art. 3.
[129] See para. 102 to 104, *infra*.
[130] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.

apply Article 6 (which might require it to suspend or dismiss the proceedings).[131] If proceedings are brought before the chosen court in State X, courts in Peru or Venezuela will not be required by the Convention to recognise the resulting judgment.[132]

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

102. **Agreements deemed exclusive.** Article 3 *b)* lays down the important rule (foreshadowed by the third requirement in paragraph *a)*) that a choice of court agreement which designates the courts of one Contracting State or one or more specific courts in one Contracting State will be deemed to be exclusive unless the parties have expressly provided otherwise.[133]

103. The first element of this is that the choice of court agreement may refer either to the courts of a Contracting State in general, or to one or more specific courts in one Contracting State. Thus an agreement designating "the courts of France" is regarded as exclusive for the purposes of the Convention, even though it does not specify *which* court in France will hear the proceedings and even though it does not explicitly exclude the jurisdiction of courts of other States. In such a case, French law will be entitled to decide in which court or courts the action may be brought.[134] Subject to any such rule, the plaintiff may choose any court in France.

104. An agreement referring to a particular court in France – for example, the Commercial Court of Paris – would also be exclusive.[135] The same is true of an agreement that designates two or more specific courts in the same Contracting State – for example, "either the Commercial Court of Paris or the Commercial Court of Lyons". This too would be an exclusive choice of court agreement. An agreement stating that A may sue B only in the Commercial Court of Paris, and that B may sue A only in the Commercial Court of Lyons, would also be an exclusive choice of court agreement under the Convention because it excludes the courts of all other States. The agreement would not, however, be considered exclusive under the Convention if the two courts were in different States.

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

106. It was agreed by the Diplomatic Session that, in order to be covered by the Convention, the agreement must be exclusive irrespective of the party bringing the proceedings. So agreements of the kind referred to in the previous paragraph are not exclusive choice of court agreements for the purposes of the Convention.[136] However, they may be subject to the rules of the Convention on recognition and enforcement if the States

[131] However, it may suspend or dismiss the proceedings under national law.
[132] However, they may do so under national law.
[133] For what appears to be the first reference to the Convention in any decided case, see *The Hongkong and Shanghai Banking Corporation Limited* v. *Yusuf Suveyke,* 392 F. Supp. 2d 489 (EDNY 2005).
[134] See Art. 5(3) *b).*
[135] The problems that arise where the chosen court cannot hear the case under internal law are discussed *infra*: see para. 135 *et seq.*
[136] See Minutes No 3 of the Twentieth Session, Commission II, para. 2 to 11.

in question have made declarations under Article 22.[137]

107. **Meaning of "State" in the case of a non-unified legal system.** The word "State" can have different meanings in relation to a Contracting State in which two or more systems of law apply in different territorial units with regard to a matter dealt with by the Convention – for example, Canada, China, the United Kingdom or the United States. According to Article 25, it can refer, as appropriate, either to the State as a whole – for example, Canada, China, the United Kingdom or the United States – or to a territorial unit within that State – for example, Ontario, Hong Kong, Scotland or New Jersey. Consequently, both a clause designating "the courts of the United States" and a clause designating "the courts of New Jersey" are exclusive choice of court agreements under the Convention.[138]

108. **Examples of exclusive agreements.** Article 3 *b)* provides that an agreement which designates the courts of one Contracting State or one or more specific courts in one Contracting State is deemed to be exclusive unless the parties expressly provide otherwise. As a result, the following must be regarded as exclusive choice of court agreements:[139]

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

109. **Examples of non-exclusive agreements.** The following would not be exclusive:[140]

- "The courts of State X shall have non-exclusive jurisdiction to hear proceedings under this contract."
- "Proceedings under this contract may be brought before the courts of State X, but this shall not preclude proceedings before the courts of any other State having jurisdiction under its law."
- "Proceedings under this contract may be brought before court A in State X or court B in State Y, to the exclusion of all other courts."
- "Proceedings against A may be brought exclusively at A's residence in State A; proceedings against B may be brought exclusively at B's residence in State B."

110. **Formal requirements.** Paragraph *c)* deals with formal requirements. These are both necessary and sufficient under the Convention: a choice of court agreement is not covered by the Convention if it does not comply with them,[141] but, if it does, no further requirements of a formal nature may be imposed under national law. Thus, for example, a court of a Contracting State cannot refuse to give effect to a choice of court agreement because:

- it is written in a foreign language;[142]
- it is not in special bold type;

[137] See para. 240 *et seq.* For examples of other agreements that would not be exclusive for the purposes of the Convention, see para. 109.
[138] A clause designating "the state courts of the state of New Jersey or the federal courts located in that state" would also be an exclusive choice of court agreement.
[139] This list is not exhaustive. For examples of non-exclusive agreements see *supra,* para. 104 (last sentence), para. 105, 106 and 109.
[140] This list is not exhaustive.
[141] In some Contracting States, the law may lay down less rigid formal requirements for choice of court agreements. It may even lay down no formal requirements at all. The Convention does not preclude a court in such a State from giving effect to choice of court agreements that are valid under its law, even if they do not meet the requirements of Art. 3 *c).* For example, if the choice of court agreement is valid under the national law of the chosen court, that court may hear the case even if the formal requirements of Art. 3 *c)* are not satisfied. However, the courts of other Contracting States would not be required under Art. 6 of the Convention to refrain from hearing proceedings covered by such a choice of court agreement, nor would they be obliged under Art. 8 of the Convention to recognise and enforce the judgment.
[142] Provided there is still consent.

- it is in small type; or
- it is not signed by the parties separately from the main agreement.[143]

111. Paragraph *c)* provides that the choice of court agreement must be concluded or documented either *i)* "in writing" or *ii)* "by any other means of communication which renders information accessible so as to be usable for subsequent reference".

112. Where the agreement is in writing, its formal validity is not dependent on its being signed, though the lack of a signature might make it more difficult to prove the existence of the agreement. The other possible form is intended to cover electronic means of data transmission or storage. This includes all normal possibilities, provided that the data is retrievable so that it can be referred to and understood on future occasions. It covers, for example, e-mail and fax.[144]

113. The agreement must either be concluded in one or other of these forms or it must be *documented* in them. The Conference rejected the phrase "evidenced in writing" in the English text in favour of "documented in writing" on the ground that "evidenced in writing" might give the impression that Article 3 *c)* constituted a rule of evidence. In parallel, the Conference rejected the phrase "*confirmé par écrit*" in the French text in favour of "*documenté par écrit*" on the ground that "*confirmé par écrit*" might give the impression that the rule referred to an element of intention.

114. If the agreement was oral and one party put it into writing, it does not matter if he was the one who benefited from it – for example, because the chosen court was in his State. In all cases, however, there must have been consent by both parties to the original oral agreement.

115. Article 3 *d)* provides that an exclusive choice of court agreement that forms part of a contract must be treated as an agreement independent of the other terms of the contract. Accordingly, the validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract of which it forms part is not valid: the validity of the choice of court agreement must be determined independently, according to the criteria set out in the Convention.[145] Thus, it is possible for the designated court to hold the contract invalid without depriving the choice of court agreement of validity. On the other hand, of course, it is also possible for the ground on which the contract is invalid to apply equally to the choice of court agreement: it all depends on the circumstances and the applicable law.

Article 4 Other definitions

116. **"Judgment".** Article 4 contains two further definitions. The first, in Article 4(1), is of "judgment". This is widely defined so as to cover any decision on the merits, regardless of what it is called, including a default judgment.[146] It excludes a procedural ruling, but covers an order as to costs or expenses (even if given by an officer of the court, rather than by a judge) provided it relates to a judgment that may be recognised or enforced under the Convention. It does not cover a decision to grant interim relief (provisional and protective measures), as this is not a decision on the merits.[147]

117. **"Residence".** Article 4(2) defines "residence" with regard to an entity or person other than a natural person. The definition is primarily intended to apply to corporations and will be explained on this basis.[148]

118. The concept of residence plays a role in Article 1(2) (definition of an "international" case for the purpose of jurisdiction), Article 20 (certain exceptions to recognition and enforcement) and Article 26 (relationship with other international instruments). It might also have a role to play under Article 19.

[143] In some legal systems, these might be requirements of internal law.
[144] The wording of this provision was inspired by Art. 6(1) of the UNCITRAL Model Law on Electronic Commerce 1996.
[145] See Art. 5(1), 6 and 9.
[146] It would cover a decision by a patent office exercising quasi-judicial functions.
[147] On interim relief, see Art. 7.
[148] A State or a public authority of a State would be resident only in the territory of that State.

119. The problem faced by the Diplomatic Session in defining the residence of entities other than natural persons was to reconcile the different conceptions of the common law and civil law countries, as well as those within the civil law countries.[149]

120. In the common law, the law of the place of incorporation is traditionally regarded as important for deciding issues relating to the internal affairs of the corporation.[150] It is the legal system that gives birth to it and endows it with legal personality. For jurisdictional purposes, however, the principal place of business and the place of its central management are also important.[151] The latter is the administrative centre of the corporation, the place where the most important decisions are taken. The principal place of business is the centre of its economic activities. Though normally in the same place, these two could be different. For example, a mining company with its headquarters in London (central administration) might carry on its mining activity in Namibia (principal place of business). Since all three concepts are important in the common law, the Convention provides that a corporation is resident in all three places.

121. Although some civil law systems also look to the law of the place of incorporation as the personal law of the company,[152] the dominant view favours the law of the "corporate seat" (*siège social*). The place of the corporate seat is also regarded as the domicile of the corporation. However, there are two views as to how the corporate seat is to be determined. According to the first view, one looks to the legal document under which the corporation was constituted (the *statut* of the corporation). This will state where the corporate seat is. The corporate seat thus determined is called the *siège statutaire*.

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

123. To cover all points of view, it was thus necessary to include the *siège statutaire*, which is translated into English as "statutory seat". However, this term does not refer to the corporation's seat as laid down by some statute (legislation)[153] but as laid down by the *statut*, the document containing the constitution of the company – for example, the articles of association. In the common law, the nearest equivalent is "registered office".[154] In practice, the State where the corporation has its statutory seat will almost always be the State under whose law it was incorporated or formed; while the State where it has its central administration will usually be that in which it has its principal place of business. On the other hand, it is not uncommon for a company to be incorporated in one State – for example, Panama – and to have its central administration and principal place of business in another.

Article 5 Jurisdiction of the chosen court

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

[149] For a comparative discussion of these matters, see S. Rammeloo, *Corporations in Private International Law,* Oxford University Press 2001, Chapters 4 and 5.
[150] For England, see A. Dicey, J. Morris & L. Collins, *The Conflict of Laws*, 14th ed., by L. Collins & specialist editors, Sweet and Maxwell, London 2006, Rules 160(1) and 161 (pp. 1335–1344); for the United States of America, see *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621; 103 S. Ct. 2591; 77 L. Ed. 2d 46 (1983).
[151] For English law, see A. Dicey, J. Morris & L. Collins, *The Conflict of Laws*, 14th ed., by L. Collins & specialist editors, Sweet and Maxwell, London 2006, Rule 160(2) (p. 1336).
[152] For example, Japan and the Netherlands.
[153] The French for "statute" is "*loi*".
[154] For the United Kingdom and Ireland, see the Brussels Regulation, Art. 60(2).

exercise jurisdiction on the ground that the dispute should be decided by a court[155] in another State.[156]

125. **Null and void.** The "null and void" provision is the only generally applicable exception to the rule that the chosen court must hear the case.[157] The question whether the agreement is null and void is decided according to the law of the State of the chosen court. The phrase "law of the State" includes the choice-of-law rules of that State.[158] Thus, if the chosen court considers that the law of another State should be applied under its choice-of-law rules, it will apply that law. This could occur, for example, where under the choice-of-law rules of the chosen court, the validity of the choice of court agreement is decided by the law governing the contract as a whole – for example, the law designated by the parties in a choice-of-law clause.

126. The "null and void" provision applies only to substantive (not formal) grounds of invalidity. It is intended to refer primarily to generally recognised grounds like fraud, mistake, misrepresentation, duress and lack of capacity.[159] It does not qualify, or detract from, the form requirements in Article 3 *c)*, which define the choice of court agreements covered by the Convention and leave no room for national law as far as form is concerned.

127. **Declining jurisdiction.** Article 5(2) provides that the chosen court is not permitted to decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State. This provision reinforces the obligation laid down in Article 5(1). However, Article 5(2) applies only with regard to a court in another State, not to a court in the same State.[160]

128. **Meaning of "State" under Article 5(2).** What is meant by "State" in this context? In the case of a State containing a single law-district, there is no problem. Where, on the other hand, the State contains a number of territories subject to different systems of law, such as the United States of America, Canada or the United Kingdom, the answer is less obvious. Under Article 25(1) *c)* of the Convention, a reference to "the court or courts of a State" means, where appropriate, the court or courts in the relevant territorial unit.[161] From this, it follows that the reference in Article 5(2) to "a court of another State" may be understood as referring to a court of another territorial unit where this is appropriate.

129. When is it appropriate to refer to a territorial unit within a State? This could depend on various factors, including the relationship between the larger entity (for example, the United Kingdom) and the sub-units (for example, England and Scotland) under the law of the State in question, but in the context of Article 5, the most important is probably the choice of court agreement. If it refers to "the courts of England", England would probably be the relevant territorial unit, and Article 5(2) would preclude the English court from declining jurisdiction in favour of a court in Scotland: Scotland would be another "State" for this purpose. If, on the other hand, the choice of court agreement referred to "the courts of the United Kingdom", "State" would probably mean the United Kingdom, and a court in England would not be precluded by Article 5(2) from declining jurisdiction in favour of a court in Scotland.

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[155] The requirement to hear the case will not be violated where a court declines jurisdiction on the ground that the dispute should be decided by an arbitrator.

[156] In earlier drafts of the Convention, in particular that contained in Work. Doc. No 1 of 2005, it was stated, in what was then Art. 6, that, if its internal law so provided, the chosen court was permitted (but not obliged) to suspend or dismiss the proceedings before it in order to obtain a ruling on the validity of an intellectual property right from the court of the State of registration. (The provision was more complicated than this and came in various versions, but this conveys the gist of it.) It was deleted because it was regarded as unnecessary, not because of any change of policy. The Diplomatic Session requested that this should be clarified in the Explanatory Report: see Minutes of the Twentieth Session, Commission II: Minutes No 20, para. 29 and 30, Minutes No 24, para. 19, 21 *et seq*.

[157] For another exception that applies in special cases, see Art. 19.

[158] If this had not been the intention, the text would have used the phrase "internal law of the State".

[159] Capacity may include the capacity of public bodies to enter into choice of court agreements. In Art. 6 *b)* and 9 *b)*, lack of capacity is dealt with separately because it was thought desirable that *both* the law of the court seised *and* the law of the chosen court should be applied: see para. 150. In Art. 5, on the other hand, the court seised *is* the chosen court; so there is no need to deal separately with it.

[160] On the transfer of cases between courts in the same State, see Art. 5(3) *b)*, discussed in para. 139, *infra*.

[161] For the position with regard to Regional Economic Integration Organisations, such as the European Community, see Art. 29(4).

130. In the case of the United States of America, the position could depend on whether the chosen court was a state[162] court or a federal court. If the choice of court agreement designated "the courts of the state of New York", the word "State" in Article 5(2) would probably refer to the state of New York, not to the United States of America, in which case the New York court would be precluded under Article 5(2) from declining jurisdiction in favour of a court in, say, New Jersey.

131. If the reference was to "the courts of the United States", Article 5(2) would not preclude a transfer to a federal court in a different state of the United States, since "State" would probably mean the United States of America.[163] The same would apply if the reference was to a specific federal court – for example, "the Federal District Court for the Southern District of New York". Here too, "State" would mean the United States of America; consequently, Article 5(2) would not preclude a transfer to a federal court in a different state of the United States of America.[164]

132. ***Forum non conveniens.*** There are two legal doctrines on the basis of which a court might consider that the dispute should be decided in a court of another State. The first is *forum non conveniens.*[165] This is a doctrine mainly applied by common law countries.[166] Its precise formulation varies from country to country, but in general one can say that it permits a court having jurisdiction to stay (suspend) or dismiss the proceedings if it considers that another court would be a more appropriate forum.[167] The granting of a stay or dismissal is discretionary and involves weighing up all relevant factors in the particular case. It applies irrespective of whether or not proceedings have been commenced in the other court (though this is a factor that may be taken into account).

133. ***Lis pendens.*** The second doctrine is that of *lis pendens*. This is applied mainly by civil law countries. It requires a court to stay (suspend) or dismiss proceedings if another court has been seised first in proceedings involving the same cause of action between the same parties.[168] It is not discretionary, does not involve the weighing up of relevant factors to determine the more appropriate court and applies only when proceedings have already been commenced in the other court.

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

135. **Subject-matter jurisdiction.** Article 5(3) *a)* provides that Article 5 does not affect internal rules on subject-matter jurisdiction or jurisdictional rules based on the value of the claim. The phrase "subject-matter jurisdiction" can have a variety of meanings. Here it refers to the division of jurisdiction among different courts in the same State on the basis of the subject matter of the dispute. It is not concerned with determining which State's courts will

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[162] It should be remembered that in the Convention and in this Report, "state" with a lower-case "s" refers to a territorial unit of a federal State (for example, a state in the United States of America); "State" with an upper-case "S" refers to a State in the international sense.

[163] The resulting judgment would be entitled to recognition and enforcement under the Convention, since it would be a judgment given by a court designated in the choice of court agreement: see Art. 8(1).

[164] However, "due consideration" would have to be given to the choice of the parties: see Art. 5(3) *b).* As to whether the resulting judgment would be entitled to recognition under the Convention, see Art. 8(5).

[165] See J. Fawcett (ed.), *Declining Jurisdiction in Private International Law*, Clarendon Press, Oxford 1995.

[166] It actually originated in Scotland, a mixed common / civil law country. It still applies in Scotland today and has also been adopted in civil law jurisdictions such as Quebec. For the application of this doctrine and other statutory substitutes in the context of choice of court clauses, see A. Schulz, "Mechanisms for the Transfer of Cases within Federal Systems", Prel. Doc. No 23 of October 2003 for the attention of the Special Commission of December 2003.

[167] For the formulation in English law, see A. Dicey, J. Morris & L. Collins, *The Conflict of Laws*, 14th ed., by L. Collins & specialist editors, Sweet and Maxwell, London 2006, Rule 31(2) (p. 461); for the formulation in the United States of America, see The American Law Institute, *Second Restatement on Conflict of Laws*, The American Law Institute Publishers, St Paul, Minn. 1971, § 84. For further discussion of *forum non conveniens*, with special reference to its effect on choice of court agreements, see R. Brand, "Forum Selection and Forum Rejection in US Courts: One Rationale for a Global Choice of Court Convention", in J. Fawcett (ed.), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North*, Oxford University Press 2002, p. 51.

[168] See, for example, Art. 27 of the Brussels Regulation, which requires any court other than the court first seised to stay its proceedings of its own motion and to decline jurisdiction if the jurisdiction of the court first seised is established.

hear the case but with the question what kind of court *within* a State will hear it. For example, specialised courts may exist for matters such as divorce, tax or patents. Thus, a specialised tax court would lack subject-matter jurisdiction to hear an action for breach of contract. So even if the parties concluded an exclusive choice of court agreement designating such a court, it would not be obliged under the Convention to hear the case.

136. In some federated States such as Australia, Canada and the United States of America, subject-matter jurisdiction can also refer to the allocation of jurisdiction between state and federal courts.[169] As a general rule, one can say that state courts have subject-matter jurisdiction in all cases unless there is a specific rule depriving them of jurisdiction. Federal courts, on the other hand, have jurisdiction only if a specific rule grants them jurisdiction. The parties cannot waive these rules. If subject-matter jurisdiction does not exist, a federal court cannot hear the case, even if the parties submit to its jurisdiction.

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

138. **Internal procedural rules.** As was said above,[170] it was not intended that the Convention should affect rules of internal procedure (including court-made rules) that are not related to international jurisdiction or the recognition or enforcement of foreign judgments. Some of these rules may preclude a court from hearing cases in certain circumstances. Rules on subject-matter jurisdiction are just one example. Other examples are: rules precluding certain parties (such as enemy aliens in time of war) from bringing proceedings; rules precluding proceedings being brought against certain parties (for example, rules on State / sovereign immunity[171]); rules precluding courts from hearing certain disputes (for example, the act of state doctrine, as applied in the United States of America); rules requiring cases to be brought within a given period of time (whether procedural or substantive); and rules on capacity to sue or be sued (for example, rules that an entity lacking legal personality cannot bring legal proceedings). Some of these matters are expressly mentioned in the Convention;[172] others are not. However, even if they are not expressly mentioned – it is impossible to cover everything – it was not intended that these other rules of procedure should be affected by Article 5.

139. **Internal allocation of jurisdiction.** Article 5(3) *b)* provides that paragraphs 1 and 2 of Article 5 do not "affect the internal allocation of jurisdiction among the courts of a Contracting State."[173] If no specific court is designated by the parties – if, for example, the choice of court agreement refers merely to "the courts of the Netherlands" or "the courts of the state of New Jersey" – there is no reason why the normal rules on the internal allocation of jurisdiction should not apply.[174]

140. **A specific court.** Even if the parties designate a specific court – for example, the Federal District Court for the Southern District of New York[175] or the Tokyo District Court –,

[169] For a detailed discussion of federal and state jurisdiction in Australia, Canada and the United States of America, see A. Schulz, "Mechanisms for the Transfer of Cases within Federal Systems", Prel. Doc. No 23 of October 2003.
[170] Para. 88 to 92.
[171] See Art. 2(6).
[172] See, for example, Art. 2(6).
[173] It goes without saying that Art. 5(3) *b)* also applies where a case is transferred from a court sitting in one place to the *same* court sitting in another place. This can occur in certain countries – for example, Canada and Australia.
[174] For the effect of an exclusive choice of court agreement on removal from a state court to a federal court in diversity cases under United States law prior to the Convention, see *Dixon* v. *TSE International Inc.*, 330 F. 3d 396 (5th Cir. 2003); *Roberts & Schaefer Co.* v. *Merit Contracting, Inc.*, 99 F. 3d 248 (7th Cir. 1996).
[175] See *supra,* para. 136.

national rules on the internal allocation of jurisdiction still apply. However, this is subject to the last sentence in sub-paragraph *b)*, which applies where the court has discretion as to whether or not it should make the transfer.[176] That provision requires the chosen court to give due consideration to the choice of the parties: where the parties have chosen a specific court, the court should not lightly override their choice.[177]

Article 6 Obligations of a court not chosen

141. Article 6 is the second "key provision" of the Convention. Like other provisions, it applies only if the choice of court agreement is exclusive and only if the chosen court is in a Contracting State.[178] It is addressed to courts in Contracting States other than that of the chosen court, and requires them (except in certain specified circumstances) not to hear the case, *i.e.* to suspend or dismiss the proceedings, even if they have jurisdiction under their national law. This obligation is essential if the exclusive character of the choice of court agreement is to be respected.

142. Article 6 applies only if the parties to the proceedings are bound by the choice of court agreement. Normally they must be parties to the agreement, though, as we saw above,[179] there are circumstances in which someone who is not a party to the agreement will nevertheless be bound by it.

143. The following example[180] illustrates how the Convention can work in multi-party cases. Assume that A, who is resident in Germany, sells goods to B, who is resident in Quebec (Canada). The contract contains a choice of court clause in favour of the courts of Germany. The goods are delivered in Quebec, and B sells them to C, who is also resident in Quebec. The contract between B and C contains no choice of court clause. If C claims that the goods are defective, he can sue B in Quebec. He could also sue A (in tort) in Quebec (if the courts of Quebec have jurisdiction under their law), since the choice of court agreement would not be binding between A and C. However, if C sues only B in Quebec, and B then wishes to join A as a third party, B will be unable to do so: the choice of court agreement is binding between A and B. Under Article 6 of the Convention, the court in Quebec will be required to suspend or dismiss any proceedings that B brings against A.[181] The Convention would thus override domestic-law provisions that might, in the absence of the Convention, allow joinder of A in Quebec or permit the court to exercise jurisdiction over the claim against A.

144. Article 6 requires the court to suspend or dismiss "proceedings to which an exclusive choice of court agreement applies". To determine whether the proceedings are subject to such an agreement, the court must interpret it. Under Article 3 *a)* of the Convention, the agreement applies to disputes "which have arisen or may arise in connection with a particular legal relationship". In interpreting the agreement, the court must decide what that relationship is, and which disputes the agreement applies to. It must decide, for example, whether a choice of court clause in a loan agreement applies to a tort action by the borrower against the lender for enforcing the agreement in an allegedly abusive manner.

145. If the proceedings are covered by an exclusive choice of court agreement, the court must either suspend or dismiss them, unless one of the exceptions applies.

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[176] As used in Art. 5(3) and 8(5), "transfer" has a general meaning: it does not reflect the terminology in use in any national system of law. It applies whenever a case that is begun in one court is moved to another. This can occur following an order by the court first seised (for example, "transfer" in the terminology of United States federal procedure) or following an order by the court to which the case is moved (for example, "removal" in the terminology of United States federal procedure).

[177] The effects of a transfer on the application of Art. 6 and 8 are considered below; see para. 156 to 158 and 175 to 181, *infra*.

[178] This follows from the definition of "exclusive choice of court agreement" in Art. 3 *a)*.

[179] Para. 97.

[180] It will be remembered that in all examples given in this Report, unless explicitly stated otherwise, it is assumed that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.

[181] See Minutes No 2 of the Twentieth Session, Commission II, para. 11 and 12.

146. **Five exceptions.** Article 6 lays down five exceptions to the rule that the proceedings must be suspended or dismissed. Where one of the exceptions applies, the prohibition against hearing the case is lifted. The Convention does not then prevent the court from exercising such jurisdiction as it may have under its own law. Article 6 does not, however, create a Convention-based ground of jurisdiction, nor does it *require* the court seised to exercise any jurisdiction that exists under its law: the law of the court seised determines whether or not it has jurisdiction[182] and whether or not it can exercise that jurisdiction.[183]

147. Paragraphs *a)* and *b)* of Article 6 correspond to the "null and void" provision in Article II(3) of the 1958 New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, while paragraphs *d)* and *e)* cover the same ground as "inoperative or incapable of being performed" in the same provision of the New York Convention. Paragraph *c)* of Article 6 was necessary because, under the Convention, the court seised but not chosen will not normally be able to apply its own law to determine the validity of the choice of court agreement; an exception therefore had to be made for the case where giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised. These exceptions may seem more complex than those in the New York Convention, but on closer examination it will be seen that they are similar to, and no wider than, those in the New York Convention. This was also the clear intent of the Diplomatic Session. The apparent complexity of the provisions is due to the fact that the Diplomatic Session was aiming for greater clarity and precision than that found in the rather skeletal provisions of Article II(3) of the New York Convention. Nevertheless, case law under the New York Convention could furnish a valuable guide to the interpretation of the Convention.

148. The first two exceptions – in sub-paragraphs *a)* and *b)* – are fairly standard, but the third and fourth – in sub-paragraphs *c)* and *d)* – are intended to apply only in the most exceptional circumstances. If these latter two exceptions were applied too widely, the whole purpose of the Convention would be undermined.

149. **The first exception: null and void.** The first exception is where the agreement is null and void on any ground including incapacity under the law of the State of the chosen court.[184] This is the counterpart of the provision in Article 5(1).[185] However, while under Article 5(1) the court seised will be the chosen court under the parties' agreement and will apply its own law, under Article 6 *a)* the court seised (but not chosen) will not be applying its own law.[186] This is different from the 1958 New York Convention, which does not specify what law must be applied to determine the validity of an arbitration agreement.[187] By specifying the applicable law, Article 6 *a)* of the Convention helps to ensure that the court seised and the chosen court give consistent judgments on the validity of the choice of court agreement.

150. **The second exception: incapacity.** The second exception is where a party lacked capacity to enter into the agreement under the law of the State of the court seised.[188] Here again "law" includes the choice-of-law rules of that State.[189] In deciding whether the choice of court agreement is null and void, the law of the chosen court must be applied by courts in all the Contracting States under Articles 5, 6 and 9. In the case of capacity, however, it was considered too ambitious to lay down a uniform choice-of-law rule for all the Contracting States; accordingly, under Article 6 *b)* the court seised will in addition apply the law designated by its own choice-of-law rules to the issue of capacity.[190] Since lack of

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[182] If the court would in any event have no jurisdiction under its own law, it does not have to consider whether any of the exceptions under Art. 6 applies.

[183] For example, according to the law applied by the court, it may be prevented from exercising jurisdiction due to a *lis pendens* rule.

[184] It must be remembered that "the law of the State of the chosen court" includes the choice-of-law rules of that State.

[185] Discussed above at para. 125 *et seq.*

[186] See note 159, *supra.*

[187] See Art. II(3).

[188] In Art. 6 *b)* and 9 *b),* "party" refers to one of the original parties to the choice of court agreement, not to some other person who is a party to proceedings.

[189] See para. 125, *supra.*

[190] In recognition or enforcement proceedings, the court addressed will also apply its own choice-of-law rules when deciding questions of capacity under Art. 9 *b)*: see *infra,* para. 184.

capacity would also render the agreement null and void in terms of Article 6 *a)*, this means that capacity is determined *both* by the law of the chosen court *and* by the law of the court seised.[191] If, under either law, a party lacked the capacity to conclude the agreement, the court seised will not be required to suspend or dismiss the proceedings.

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

152. The phrase "manifest injustice" could cover the exceptional case where one of the parties would not get a fair trial in the foreign State, perhaps because of bias or corruption, or where there were other reasons specific to that party that would preclude him or her from bringing or defending proceedings in the chosen court. It might also relate to the particular circumstances in which the agreement was concluded – for example, if it was the result of fraud. The standard is intended to be high: the provision does not permit a court to disregard a choice of court agreement simply because it would not be binding under domestic law.

153. **The third exception (second limb): public policy.** The phrase "manifestly contrary to the public policy of the State of the court seised" is intended to set a high threshold. It refers to basic norms or principles of that State; it does not permit the court seised to hear the case simply because the chosen court might violate, in some technical way, a mandatory rule of the State of the court seised.[192] As in the case of manifest injustice, the standard is intended to be high: the provision does not permit a court to disregard a choice of court agreement simply because it would not be binding under domestic law.

154. **The fourth exception: incapable of performance.** The fourth exception is where for exceptional reasons beyond the control of the parties the agreement cannot reasonably be performed. This is intended to apply to cases where it would not be possible to bring proceedings before the chosen court. It need not be absolutely impossible, but the situation must be exceptional. One example would be where there is a war in the State concerned and its courts are not functioning. Another example would be where the chosen court no longer exists, or has changed to such a fundamental degree that it could no longer be regarded as the same court. This exception could be regarded as an application of the doctrine of frustration (or similar doctrines), under which a contract is discharged if, due to an unanticipated and fundamental change of circumstances after its conclusion, it is no longer possible to carry it out.[193]

155. **The fifth exception: case not heard.** The fifth exception is where the chosen court has decided not to hear the case. This could be regarded as covered by the fourth exception, but it is sufficiently different to deserve separate treatment. Its purpose is to avoid a denial of justice: it must be possible for *some* court to hear the case.

156. **Transfer of the case.** It was explained above[194] that Article 5 does not affect rules on the internal allocation of jurisdiction among the courts of a Contracting State. Thus, under Article 5(3) *b)* the courts of a Contracting State can transfer the case from the court in which it was brought to another court in the same Contracting State. If the choice of court

[191] See Minutes No 8 of the Twentieth Session, Commission II, para. 50 to 59.
[192] Here "public policy" includes the international public policy of the State concerned: see Minutes No 9 of the Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (21 to 27 April 2004), pp. 1 to 3.
[193] Under German law, for example, it could be covered by the doctrine of *Wegfall der Geschäftsgrundlage*.
[194] See *supra*, para. 139 *et seq.*

agreement referred in general to the courts of the State in question (for example, "the courts of Sweden"), a transfer to another court in that State would have no consequences with regard to Article 6. The judgment would still be given by the chosen court; so Article 6 *e)* would not apply. If, on the other hand, the choice of court agreement referred to a specific court in that State (for example, "the Stockholm district court"), a transfer to another court in the same State would trigger the application of Article 6 *e)*, since the chosen court (the Stockholm district court) would have decided not to hear the case.

157. **First example.** This distinction is made clearer if we give two examples.[195] In the first, the parties choose "the courts of Sweden". One party brings proceedings before the Stockholm district court, and that court transfers the case to the Göteborg district court. Since the latter is also a court of Sweden, it counts as the chosen court. Consequently, one cannot say that the chosen court has decided not to hear the case. Article 6 *e)* does not apply. Therefore, if one party then brings the same case before a court in Russia, the Russian court would be required by Article 6 to suspend or dismiss the proceedings.

158. **Second example.** If, on the other hand, the parties had chosen "the Stockholm district court" and, when proceedings were brought before that court, it had transferred the case to the Göteborg district court, the chosen court would have decided not to hear the case. Article 6 *e)* would apply: the Göteborg district court would not be the chosen court. Therefore, if one of the parties were to commence proceedings in Russia, the Russian court would not be precluded by Article 6 from hearing the case.[196]

159. Where the court to which the case has been transferred has given judgment, Articles 8 and 9 determine whether that judgment must be recognised and enforced in other Contracting States. Where a court is entitled by virtue of the second sentence of Article 8(5) to refuse recognition or enforcement to the judgment of a court to which the case was transferred by the chosen court, it will not be precluded by Article 6 from itself hearing the proceedings if Article 6 *e)* applies.

Article 7 Interim measures of protection

160. Article 7 states that interim measures of protection are not governed by the Convention. It neither requires nor precludes the grant, refusal or termination of such measures by a court of a Contracting State, nor does it affect the right of a party to request such measures. This refers primarily to interim (temporary) measures to protect the position of one of the parties, pending judgment by the chosen court,[197] though it could also cover measures granted after judgment that are intended to facilitate its enforcement. An order freezing the defendant's assets is an obvious example. Another example is an interim injunction preventing the defendant from doing something that is alleged to be an infringement of the plaintiff's rights. A third example would be an order for the production of evidence for use in proceedings before the chosen court. All these measures are intended to support the choice of court agreement by making it more effective. They thus help to achieve the objective of the Convention. Nevertheless, they remain outside its scope.

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

162. It goes without saying that the court designated in the choice of court agreement can grant any interim measure it thinks appropriate. If an interim measure – for example, an injunction – granted by that court is subsequently made permanent, it will be enforceable under the Convention in other Contracting States.[198] If it is merely temporary, it will not

[195] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.
[196] It may decide that its own law requires it to decline jurisdiction (*lis pendens* doctrine).
[197] The measure might be granted either before, or after, proceedings are commenced in the chosen court.
[198] Art. 8.

constitute a "judgment" as defined by Article 4(1).[199] In such a case, courts in other Contracting States could enforce it under their national law, but would not be obliged to do so under the Convention.

163. If, after the chosen court has given judgment,[200] proceedings are brought to recognise and enforce that judgment in a Contracting State in which interim measures were granted, the requested State would be required under Article 8 to rescind the interim measures (if they were still in force) to the extent that they were inconsistent with the obligations of the requested State under the Convention. For example, if a court other than that chosen grants an asset-freezing order to protect a right claimed by the plaintiff but the chosen court rules that the plaintiff has no such right, the court that granted the asset-freezing order must lift it where the judgment of the chosen court is subject to recognition under the Convention and the court that granted the asset-freezing order is requested to recognise it.

Article 8 Recognition and enforcement

164. Article 8 is the third "key provision" in the Convention. It states that a judgment given by a court in a Contracting State designated in an exclusive choice of court agreement must be recognised and enforced in other Contracting States.[201] The first and most important condition for recognition and enforcement is, therefore, the existence of an exclusive choice of court agreement designating the court of origin, which must be in a Contracting State.[202] It is not necessary that the court actually based its jurisdiction on the agreement. Article 8 also covers situations where the court of origin, though designated in an exclusive choice of court agreement, based its jurisdiction on some other ground, such as the domicile of the defendant.

165. ***Révision au fond.*** Article 8(2) prohibits review as to the merits of the judgment (though it permits such limited review as is necessary to apply the provisions of Chapter III of the Convention). This is a standard provision in conventions of this kind. Without it, foreign judgments might in some countries be reviewed by the court addressed as if it were an appellate court hearing an appeal from the court of origin.

166. **Findings of fact.** The second sentence of Article 8(2) provides that the court addressed is bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default. In this provision, "jurisdiction" means jurisdiction under the Convention; therefore, Article 8(2) does not apply where the court of origin based its jurisdiction on some ground other than the choice of court agreement. Where, on the other hand, the court of origin based its jurisdiction on the choice of court agreement, the provision applies to findings of fact that relate to the formal or substantive validity of the agreement, including the capacity of the parties to conclude it. Thus, when the court addressed is applying, *e.g.*, Article 8(1) and has to determine whether the court of origin was "designated in an exclusive choice of court agreement", it will have to accept findings of fact made by the court of origin. It will not, however, have to accept its legal evaluation of those facts. For example, if the court of origin found that the choice of court agreement was concluded by electronic means that satisfy the requirements of Article 3 *c) ii)*, the court addressed is bound by the finding that the agreement was concluded by electronic means. However, it may, nevertheless, decide that Article 3 *c) ii)* was not satisfied because the degree of accessibility was not sufficient to meet the requirements of Article 3 *c) ii)*. The same rule would apply to the question of capacity under Article 9 *b)*: the court addressed would be bound by the findings of fact which the court of origin made on this issue, but it would evaluate these facts under its own law.[203]

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[199] See para. 116, *supra*.
[200] It must be remembered that, under Art. 4(1) of the Convention, "judgment" means a decision on the merits.
[201] However, it was understood by the Diplomatic Session that a Contracting State is not obliged to enforce a judgment for a non-monetary remedy if this is not possible under its legal system. Nevertheless, it should give the foreign judgment the maximum effect that is possible under its internal law. See para. 89, *supra*.
[202] The position where the chosen court transfers the case to another court in the same Contracting State is dealt with by Art. 8(5).
[203] When applying Art. 9 *a)*, however, the court addressed would not only be bound by the findings of fact under Art. 8(2) but also by the (positive) legal evaluation of the court of origin as to the validity of the choice of court agreement, see *infra*, para. 182.

167. The position is different with regard to the grounds of non-recognition laid down in sub-paragraphs *c)*, *d)* and *e)* of Article 9. These are not concerned with jurisdiction under the Convention, but with public policy and procedural fairness. Thus, the court addressed must be able to decide for itself, in accordance with these sub-paragraphs, whether the defendant was notified; whether there was fraud; or whether there was a fair trial: a finding by the judge of origin that he did not take a bribe, for example, cannot be binding on the court addressed.[204]

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

169. The result is as follows: rulings by the court of origin on the merits of the case cannot be reviewed by the court addressed, irrespective of whether they relate to questions of fact or law; rulings by the court of origin on the validity and scope of the choice of court agreement cannot be reviewed in so far as they relate to questions of fact;[205] rulings by the court of origin on the grounds for refusal under sub-paragraphs *c)*, *d)* and *e)* are not binding on the court addressed, irrespective of whether they relate to fact or law.

170. **"Recognition" and "enforcement".** Article 8(3) provides that a judgment will be recognised only if it has effect in the State of origin, and will be enforced only if it is enforceable in the State of origin. This raises the distinction between recognition and enforcement. Recognition means that the court addressed gives effect to the determination of the legal rights and obligations made by the court of origin. For example, if the court of origin held that the plaintiff had, or did not have, a given right, the court addressed accepts that this is the case.[206] Enforcement means the application of the legal procedures of the court addressed to ensure that the defendant obeys the judgment given by the court of origin. Thus, if the court of origin rules that the defendant must pay the plaintiff 1000 euros, the court addressed will ensure that the money is handed over to the plaintiff. Since this would be legally indefensible if the defendant did not owe 1000 euros to the plaintiff, a decision to enforce the judgment must logically be preceded or accompanied by the recognition of the judgment. In contrast, recognition need not be accompanied or followed by enforcement. For example, if the court of origin held that the defendant did not owe any money to the plaintiff, the court addressed may simply recognise this finding. Therefore, if the plaintiff sues the defendant again on the same claim before the court addressed, the recognition of the foreign judgment will be enough to dispose of the case.

171. In the light of this distinction, it is easy to see why Article 8(3) says that a judgment will be recognised only if it has effect in the State of origin. Having effect means that it is legally valid and operative. If it does not have effect, it will not constitute a valid determination of the parties' rights and obligations. Thus, if it does not have effect in the State of origin, it should not be recognised under the Convention in any other Contracting State. Moreover, if it ceases to have effect in the State of origin, the judgment should not thereafter be recognised under the Convention in other Contracting States.[207]

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[204] The same applies to a finding by an appeal court that the first instance judge was not guilty of corruption.

[205] When applying Art. 9 *a)*, however, the court addressed would not only be bound by the findings of fact under Art. 8(2) but also by the (positive) legal evaluation of the court of origin as to the validity of the choice of court agreement, see *infra*, para. 182.

[206] If the court of origin rendered a declaratory judgment on the existence or non-existence of a particular legal relationship between the parties, the court addressed accepts that judgment as determining the issues before it.

[207] At the Nineteenth Diplomatic Session held in June 2001, the following text was inserted, in square brackets, into Art. 25 of the preliminary draft Convention 1999: "A judgment referred to in paragraph 1 shall be recognised from the time, and for as long as, it produces its effects in the State of origin." The current text was intended by the Twentieth Diplomatic Session held in June 2005 to have the same meaning.

172. Likewise, if the judgment is not enforceable in the State of origin, it should not be enforced elsewhere under the Convention. It is of course possible that the judgment will be effective in the State of origin without being enforceable there. Enforceability may be suspended pending an appeal (either automatically or because the court so ordered). In such a case, enforcement will not be possible in other Contracting States until the matter is resolved in the State of origin. Moreover, if the judgment ceases to be enforceable in the State of origin, it should not thereafter be enforced in another Contracting State under the Convention.[208]

173. **Judgments subject to review.** Article 8(4) provides that recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review[209] has not expired.[210] This means that the court addressed may postpone or refuse recognition or enforcement if, and as long as, the judgment might be set aside or amended by another court in the State of origin. It is not, however, obliged to do this.[211] Some courts might prefer to enforce the judgment.[212] If it is subsequently set aside in the State of origin, the court addressed will rescind the enforcement. The judgment-creditor may be required to provide security to ensure that the judgment-debtor is not prejudiced.

174. Article 8(4) gives the court addressed the option of either suspending the enforcement process or refusing to enforce the judgment. It goes on to provide, however, that if the court addressed chooses the latter option, that will not prevent a new application for enforcement once the situation in the State of origin is clarified. Here, therefore, refusal means dismissal without prejudice.

175. **Proceedings transferred.** Article 8(1) provides that the judgment must have been given by a court designated in an exclusive choice of court agreement. It will be remembered that Article 5(3) *b)* permits a case to be transferred from the court in which the proceedings were brought to another court in the same Contracting State. As was explained above,[213] this causes no problem if the choice of court agreement designated the courts of a Contracting State in general (for example, "the courts of Sweden"). However, if it designated a particular court (for example, "the Stockholm district court"), and that court transfers the case to another court (for example, the Göteborg district court), a judgment by the latter will not be a judgment given by the designated court: it will not come within the terms of Article 8(1).

176. Article 8(5), however, provides that Article 8 also applies to a judgment given by a court of a Contracting State pursuant to a transfer[214] of the case as permitted by Article 5(3). The application of Article 8 is thus extended to cover such cases. However, Article 8(5) goes on to say that, where the chosen court had discretion to transfer the case, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin. Where this proviso applies, the

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[208] At the Nineteenth Diplomatic Session held in June 2001, the following text was inserted, in square brackets, into Art. 25 of the preliminary draft Convention 1999: "A judgment referred to in the preceding paragraphs shall be enforceable from the time, and for as long as, it is enforceable in the State of origin." The current text was intended by the Twentieth Diplomatic Session held in June 2005 to have the same meaning.

[209] "Ordinary review" is not a concept known to most common law systems. It covers all ordinary forms of appeal. For a discussion, see the Report by Peter Schlosser on the *Convention of Accession of 9 October 1978 of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters*, OJ 1979 C 59, p. 71, at para. 195 to 204.

[210] In enforcement cases, this rule will be applied only if enforcement of the judgment has not been suspended in the State of origin by reason of the appeal. If it has been suspended, the rule in Art. 8(3) will be applicable: see para. 171, *supra.* On recognition see para. 171, *supra.*

[211] This is indicated by the use of "may" instead of "shall" in Art. 8(4). In some legal systems, this will be sufficient to enable courts to exercise their discretion whether or not to postpone or refuse recognition. In legal systems where this is not the case, legislation could be adopted to permit courts to exercise discretion in this regard. The discretion permitted under Art. 8(4) could also be exercised by the legislator, in which case the legislation itself would specify whether and, if so, in what circumstances, courts would postpone or refuse recognition.

[212] This assumes that the judgment is still enforceable in the State of origin.

[213] Para. 156 to 158.

[214] As used in Art. 5 and Art. 8, "transfer" is a general term and does not refer to the terminology of any national system of law. It applies whenever a case that is begun in one court is moved to another. This can occur following an order by the court first seised (for example, "transfer" in the terminology of United States federal procedure) or following an order by the court to which the case is moved (for example, "removal" in the terminology of United States federal procedure).

extension of Article 8 no longer operates.

177. The proviso applies only where the chosen court had discretion to make the transfer. In some countries, a transfer must be made in certain circumstances, and the court concerned has no discretion. The proviso will not apply in such cases. In other countries, however, the court before which the proceedings are brought has discretion as to whether or not the transfer should be made. Often it is done for the convenience of parties and witnesses, in the interests of justice.[215] In such cases, the parties normally have the right to object to the transfer, and courts in other Contracting States are not required to recognise or enforce the judgment against a party who made an objection at the appropriate time.[216] On the other hand, of course, the Convention does not require other Contracting States to refuse recognition or enforcement.

178. **First example.** The plaintiff sues in the chosen court and the defendant requests transfer to a court that has not been chosen. The plaintiff objects, but the transfer is made. The court to which the case is transferred finds for the defendant and awards costs against the plaintiff. Such an order does not have to be recognised or enforced against the plaintiff under the Convention.

179. **Second example.** The plaintiff sues in the chosen court and the defendant requests transfer to a court that has not been chosen. The plaintiff objects, but the transfer is made. The court to which the case is transferred finds for the plaintiff and awards him damages. The judgment is subject to recognition and enforcement under the Convention.

180. **Third example.** The plaintiff sues in the chosen court and the court transfers the case of its own motion to a court that has not been chosen. The defendant objects, but the plaintiff does not. The court to which the case is transferred finds for the plaintiff and awards him damages. The judgment does not have to be recognised or enforced against the defendant under the Convention.

181. It should finally be emphasised that the proviso in Article 8(5) applies only where the judgment was not given by the designated court. If the court to which the case was transferred also counts as the designated court – for example, where the choice of court agreement designated the courts of the State of origin in general ("the courts of Sweden"), without specifying a particular court – Article 8(5) will not come into operation: the judgment will have been given by the designated court and the case will fall under Article 8(1). In such a case, there can be no question of not recognising or enforcing the judgment on the ground that the case was transferred.

Article 9 Refusal of recognition or enforcement

182. **Seven exceptions.** While Article 8 lays down the principle of recognition and enforcement, Article 9 sets out exceptions to it. There are seven of these, in sub-paragraphs *a)* to *f)*.[217] Where they apply, the Convention does not require the court addressed to recognise or enforce the judgment, though it does not preclude it from doing so.[218]

[215] See, for example, the provision allowing transfer of a case from one federal district court to another in the United States: 28 United States Code § 1404(a).

[216] If one party objected and the other did not, the judgment would not have to be recognised and enforced against the former but would have to be against the latter. So everything might depend on whether it was the successful or the unsuccessful party that objected. It was agreed by the Diplomatic Session that, if the effect of the judgment to be recognised or enforced cannot be divided into one against party A (being the party objecting to the transfer and requesting recognition and enforcement) and one against party B (being the party not objecting to the transfer and against whom recognition and enforcement is sought) in accordance with the laws of some countries, the judgment as a whole can be recognised or enforced under Art. 8(5).

[217] For other exceptions, see Art. 8(5), 10 and 11; see also Art. 20.

[218] This is indicated by the use of "may", rather than "shall", in the *chapeau* to Art. 9. In some legal systems, this would be sufficient to enable courts to exercise their discretion whether or not to refuse recognition. Where this is not the case, the State concerned might adopt legislation laying down rules as to whether and, if so, in what circumstances, such judgments should be recognised and enforced – of course, within the limits permitted by Art. 9. In the discussion on Art. 9, it should be remembered that this Report is concerned only with recognition and enforcement under the Convention, not with recognition or enforcement under internal law.

183. **The first exception: null and void.** The first two exceptions mirror those in Article 6 *a)* and *b)*. Sub-paragraph *a)* states that recognition or enforcement may be refused if the agreement was null and void on any ground including incapacity under the law of the State of the chosen court.[219] However, it adds, "unless the chosen court has determined that the agreement is valid", thus indicating that the court addressed may not substitute its judgment for that of the chosen court.[220] The purpose of this is to avoid conflicting rulings on the validity of the agreement among different Contracting States: they are all required to apply the law of the State of the chosen court, and they must respect any ruling on the point by that court.

184. **The second exception: incapacity.** The second exception, set out in sub-paragraph *b)*, follows the wording of Article 6 *b)*. In both Article 9 *b)* and Article 6 *b)*, capacity is determined by the law of the forum (including its choice-of-law rules). However, the forum is different in the two cases: in Article 6 *b)* it is a court before which proceedings inconsistent with the agreement are brought; in Article 9 *b)* it is the court asked to recognise or enforce the judgment of the chosen court. As mentioned previously, it was thought too ambitious to attempt to unify choice-of-law rules on capacity. The point made in paragraph 150, above, applies here too: since lack of capacity would also make the agreement null and void in terms of Article 9 *a)*, capacity is determined both by the law of the chosen court and by the law of the court seised: the choice of court agreement is null and void if a party[221] lacked capacity under either law.[222]

185. **The third exception: notification.** The third exception, set out in sub-paragraph *c)*, permits non-recognition if the defendant was not properly notified.[223] Two rules are involved: the first, laid down in sub-paragraph *c) i)*, is concerned with the interests of the defendant; the second, laid down in sub-paragraph *c) ii)*, is concerned with the interests of the State of notification.[224]

186. **Protection of the defendant.** Sub-paragraph *c) i)* lays down a purely factual test[225] to ensure that the defendant was properly notified. It states that the court addressed may refuse to recognise or enforce the judgment if the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence. However, because of the clause beginning "unless" in Article 9 *c) i)*, this rule does not apply if the defendant entered an appearance and presented his case without contesting notification, even if he had insufficient time to prepare his case properly. This is to stop the defendant raising issues at the enforcement stage that he could have raised in the original proceedings. In such a situation, the obvious remedy would be for him to seek an adjournment. If he fails to do this, he should not be entitled to put forward the lack of proper notification as a ground for non-recognition of the judgment.[226]

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

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[219] The law of the State of the chosen court includes the choice-of-law rules of that State: see para. 125, *supra*.
[220] The fact that the court of origin gave judgment does not necessarily mean that it considered the choice of court agreement to be valid: it may have taken jurisdiction on some other ground permitted by its internal law.
[221] In Art. 6 *b)* and 9 *b)*, "party" refers to one of the original parties to the choice of court agreement, not to some other person who is a party to the proceedings.
[222] See Minutes No 8 of the Twentieth Session, Commission II, para. 50 to 59.
[223] The concept of "notification" as used in Art. 9 *c)* is of a general, factual nature. It is not a technical, legal concept.
[224] Art. 9 *c)* is concerned solely with whether or not the *court addressed* may refuse to recognise or enforce the judgment. The court of origin will apply its own procedural law, including international conventions on the service of documents which are in force for the State in question and are applicable on the facts of the case. These rules, which might require service to be effected in conformity with the law of the State in which it takes place, are not affected by Art. 9 *c)*. However, except to the limited extent provided in Art. 9 *c) ii)*, the court addressed may not refuse to recognise or enforce the judgment on the ground that service did not comply with the law of the State in which it took place, with the law of the State of origin or with international conventions on the service of documents.
[225] See Minutes of the Twentieth Session, Commission II: Minutes No 9, para. 98, Minutes No 11, para. 27 and Minutes No 24, para. 28.
[226] This rule does not apply if it was not possible to contest notification in the court of origin.

a taxi to the defendant's home, knock on the door and give it to him. He will have done nothing wrong. Some countries take a different view. They consider the service of a writ to be a sovereign act (official act) and they consider that it infringes their sovereignty for a foreign writ to be served on their territory without their permission. Permission would normally be given through an international agreement laying down the procedure to be followed.[227] Such States would be unwilling to recognise a foreign judgment if the writ was served in a way that they regarded as an infringement of their sovereignty. Sub-paragraph *c) ii)* takes account of this point of view by providing that the court addressed may refuse to recognise or enforce the judgment if the writ was notified to the defendant in the requested State in a manner that was incompatible with fundamental principles of that State concerning service of documents. Unlike the other grounds of non-recognition, sub-paragraph *c) ii)* applies only to recognition or enforcement in the State in which service took place.

188. **The fourth exception: fraud.** The fourth exception, set out in sub-paragraph *d)*, is that the judgment was obtained by fraud in connection with a matter of procedure.[228] Fraud is deliberate dishonesty or deliberate wrongdoing. Examples would be where the plaintiff deliberately serves the writ, or causes it to be served, on the wrong address; where the plaintiff deliberately gives the defendant wrong information as to the time and place of the hearing; or where either party seeks to corrupt a judge, juror or witness, or deliberately conceals key evidence.

189. **The fifth exception: public policy.** The fifth exception, set out in sub-paragraph *e)*, is that recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State. The first part of this provision is intended to set a high standard in accordance with the provisions of Article 6. The second part is intended to focus attention on serious procedural failings in the particular case at hand.[229]

190. It will be seen that there is considerable overlap among the last three exceptions, since they all relate, partly or wholly, to procedural fairness. Thus, for example, if, owing to the plaintiff's fraud, the writ was not served on the defendant and (s)he was unaware of the proceedings, the exceptions set out in sub-paragraphs *c)*, *d)* and *e)* would all be potentially applicable. The reason for this emphasis on procedural fairness is that in some countries fundamental principles of procedural fairness (also known as due process of law, natural justice or the right to a fair trial) are constitutionally mandated.[230] In such countries, it might be unconstitutional to recognise a foreign judgment obtained in proceedings in which a fundamental breach of these principles occurred.

191. **The sixth exception: inconsistent judgments.** Sub-paragraphs *f)* and *g)* deal with the situation in which there is a conflict between the judgment for which recognition and enforcement are sought under the Convention and another judgment given between the same parties. They apply where the two judgments are inconsistent. However, there is a difference in the way that sub-paragraphs *f)* and *g)* operate.

192. Sub-paragraph *f)* is concerned with the case where the inconsistent judgment was granted by a court in the requested State. In such a situation, that judgment prevails, irrespective of whether it was given first: the court addressed is permitted to give preference

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

[228] Fraud as to the substance could fall under the public policy exception in Art. 9 *e)*. The Convention deals with procedural fraud as a separate ground of non-recognition because there may be some legal systems in which public policy cannot be used with regard to procedural fraud.

[229] The second part is not intended to limit the first part: public policy as understood in the Convention is not limited to procedural matters. However, the issues at stake must be of fundamental importance to the requested State.

[230] For Europe, see Art. 6 of the European Convention on Human Rights; for the United States of America, see the Fifth and Fourteenth Amendments to the United States Constitution. Many other countries have similar provisions.

to a judgment from a court in its own State, even if that judgment was given after the judgment under the choice of court agreement. For this provision to apply, the parties must be the same, but it is not necessary for the cause of action to be the same.

193. Sub-paragraph *g)* is concerned with the situation in which both judgments were given by foreign courts. Here, the judgment given under the choice of court agreement may be refused recognition and enforcement only if the following requirements are satisfied: first, the judgment under the choice of court agreement must have been given after the conflicting judgment; secondly, the parties must be the same;[231] thirdly, the cause of action must be the same; and fourthly, the conflicting judgment must fulfil the conditions necessary for its recognition in the requested State.

Article 10 Preliminary questions

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

195. In civil-law States, a judgment normally has effect only as regards the final order – the *dispositif* in France and its equivalents in other legal systems, for example, the *Tenor* or *Spruch* in Germany and Austria. In the common-law world, on the other hand, the doctrine known variously as issue estoppel,[232] collateral estoppel or issue preclusion[233] requires a court in certain circumstances to recognise rulings on preliminary questions given in an earlier judgment. This can apply both where the original judgment was given by a court in the same State and where it was given by a court in another State.[234] However, the Convention never requires the recognition or enforcement of such rulings, though it does not preclude Contracting States from recognising them under their own law.

196. **Rulings on preliminary questions.** Article 10 is concerned with matters decided as preliminary questions.[235] The first paragraph states that where a matter referred to in Article 2(2) or Article 21 arose as a preliminary question, the ruling on that question will not be recognised or enforced under the Convention. In view of what was said in the previous paragraph, this provision may be unnecessary; however, in the case of rulings on matters outside the scope of the Convention – in particular, the validity of certain intellectual property rights – the question is so important that it was thought desirable to have an express provision. Article 10(1) thus complements Article 2(3), which provides that proceedings are not excluded from the Convention just because the court gives a ruling on an excluded matter which arose as a preliminary question.

197. **Judgments based on a preliminary question.** Article 10(2) is not concerned with the non-recognition of rulings on preliminary questions, but with the non-recognition of certain judgments or parts thereof which are based on such rulings. What it does is to lay down another ground of non-recognition, in addition to those set out in Article 9. It provides that recognition or enforcement of a judgment may be refused if, *and to the extent that*, the judgment was based on a matter excluded under Article 2(2).[236] This exception should of

[231] This also applies under sub-para. *f)*. The requirement that the parties must be the same will be satisfied if the parties bound by the judgments are the same even if the parties to the proceedings are different, for example where one judgment is against a particular person and the other judgment is against the successor to that person.
[232] British and common-law Commonwealth terminology.
[233] These latter two expressions are both United States terminology.
[234] On the latter, see P. Barnett, *Res Judicata, Estoppel and Foreign Judgments*, Oxford University Press 2001.
[235] On what is meant by a preliminary question, see para. 194 to 195, *supra*; see also note 77, *supra*.
[236] For the position where the judgment was based on a matter excluded under Art. 21, see Art. 10(4) and *infra*, para. 202.

course be used only where the court addressed would decide the preliminary question in a different way. Even with this restriction, it seems like a sweeping exception; however, in the area in which it is most likely to apply – intellectual property – it is subject to an important qualification, set out in paragraph 3.

198. **Preliminary rulings on the validity of intellectual property rights.** Without the special rules in Article 10(3), Article 10(2) alone would apply where the judgment of the court of origin was based on a preliminary ruling on validity. However, following a request by the intellectual property stakeholders for the utmost clarity and because the question of inconsistency can be clearly defined with regard to intellectual property, the Diplomatic Session decided to deal with this particular issue in a separate paragraph. Consequently, where a judgment is based on a preliminary ruling on the validity of an intellectual property right other than copyright or a related right, Article 10(2) is further qualified by Article 10(3). Apart from the grounds listed in Articles 9 and 11, recognition or enforcement of such a judgment may be refused or postponed under Article 10(2) only where the conditions of Article 10(3) are met.

199. **Sub-paragraph *a).*** Under Article 10(3) *a)*, recognition or enforcement of the judgment may be refused if, and to the extent that, the ruling on the validity of the intellectual property right is inconsistent with a judgment (or a decision of a competent authority, such as a patent office) given in the State under the law of which the intellectual property right arose.[237] This recognises the pre-eminence of the courts (or other authorities) of that State, which might be the requested State or a third State. It is only if the preliminary ruling by the court of origin conflicts with a judgment or decision of that State that other States are entitled to refuse to recognise or enforce the judgment under Article 10(2).

200. The operation of Article 10(3) *a)* is easier to understand if we take an example.[238] Assume that A sues B in State X, seeking to have B ordered to pay royalties under a patent-licensing agreement that contains an exclusive choice of court clause granting jurisdiction to the courts of State X. B responds by arguing that the patent is invalid. If we assume that A is entitled to claim the royalties only if the patent is valid, B's assertion would be a good defence if he could substantiate it; so the court must decide the validity of the patent as a preliminary question. Let us assume it does so, and holds the patent valid. It gives judgment in favour of A for 1 million dollars. A then brings proceedings under the Convention to enforce this judgment in State Y. Now, if there was a judgment from the State of registration of the patent (which may be either State Y or a third State, State Z), holding it invalid, this judgment would conflict not with the actual judgment in the case under the Convention – this merely says that B must pay A 1 million dollars – but with the preliminary ruling that the patent was valid. However, since this preliminary ruling provides the logical premise on which the judgment was based, there would be an inconsistency between the two judgments, though an inconsistency of a secondary nature. The purpose of Article 10(3) is to permit (but not oblige) the courts of State Y to refuse to recognise or enforce the judgment under the Convention in these circumstances.

201. **Sub-paragraph *b).*** Under Article 10(3) *b)*, recognition or enforcement of the judgment may be postponed[239] if proceedings concerning the validity of the intellectual property right are pending in the State under the law of which the intellectual property right arose.[240] This gives the court addressed the power to stay (suspend) the proceedings for recognition or enforcement to await the outcome of the proceedings on validity. If the judgment on validity

[237] In the case of a registered right, this would be the State of registration or the State in which registration is deemed to have taken place under the terms of an international convention.
[238] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.
[239] The *chapeau* to Art. 10(3) refers to both refusal and postponement. The former would normally apply under sub-para. *a)* and the latter under sub-para. *b)*. Even under sub-para. *b)*, however, the court addressed could dismiss the proceedings if it had no power to suspend them, provided the judgment-creditor could bring new proceedings once the issue of validity had been decided.
[240] They may be pending either in the appropriate court or in a patent office or similar authority.

is consistent with that of the court of origin, recognition or enforcement may not be refused under Article 10; if it is inconsistent, Article 10(3) *a)* will apply.

202. **Preliminary rulings on a matter excluded under Article 21.** Paragraph 4 is exactly the same as paragraph 2, except that it relates to a judgment based on a ruling on a matter excluded by a declaration made by the requested State under Article 21. However, it is not subject to the qualification laid down in paragraph 3: there is no special rule with regard to preliminary rulings on the validity of an intellectual property right.

Article 11 Damages

203. Article 11 is concerned with damages. It permits the court addressed to refuse recognition or enforcement of a judgment if, and to the extent that, the award of damages does not compensate the plaintiff for actual loss or harm suffered. The equivalent provision in the 2004 draft Convention was Article 15, a more detailed and complex formulation.[241] At the 2005 Diplomatic Session it was agreed to delete this provision and replace it with the simpler provisions of Article 11. The reasons are explained below in the statement agreed by the Working Group which drafted it.

204. Article 11 refers to exemplary and punitive damages. These two terms mean the same thing: they refer to damages that are intended to punish the defendant and to deter him and others from doing something similar in the future. They may be contrasted with compensatory damages, which are intended to compensate the plaintiff for the loss he has suffered, that is to say, to put him in the position in which he would have been if the wrongful act had not occurred.

205. At the 2005 Diplomatic Session, the following statement was agreed by the members of the Working Group which drew up Article 11 and was adopted by the Session:[242]

> "(a) Let us start *with a basic and never disputed principle*: judgments awarding damages are within the scope of the Convention. So a judgment given by a court designated in an exclusive choice of court agreement which, in whole or in part, awards damages to the plaintiff, will be recognised and enforced in all Contracting States under the Convention. As such judgments are not different from other decisions falling within the scope of the Convention, Article 8 applies without restriction. This means *both* the obligation to recognise and enforce *and* all the grounds for refusal.
>
> (b) During the negotiations, it has become obvious that some delegations have problems with judgments awarding *damages that go far beyond the actual loss of*

[241] Art. 15 of the 2004 draft Convention, which is referred to in para. 205, *infra*, reads as follows:

> "*Article 15 Damages*
>
> 1. A judgment which awards non-compensatory damages, including exemplary or punitive damages, shall be recognised and enforced to the extent that a court in the requested State could have awarded similar or comparable damages. Nothing in this paragraph shall preclude the court addressed from recognising and enforcing the judgment under its law for an amount up to the full amount of the damages awarded by the court of origin.
>
> 2. *a)* Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, recognition and enforcement may be limited to a lesser amount.
>
> *b)* In no event shall the court addressed recognise or enforce the judgment for an amount less than that which could have been awarded in the requested State in the same circumstances, including those existing in the State of origin.
>
> 3. In applying the preceding paragraphs, the court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings."

[242] See Minutes No 19 of the Twentieth Session, Commission II, para. 13 and 14. The members of the Working Group were delegates and representatives of: Australia, Austria, Canada, China, the European Community, Germany, Japan, New Zealand, the Russian Federation, Switzerland, the United Kingdom and the United States of America. The Chairman was Mr Gottfried Musger (Austria). In the text that follows references to individual Articles (which were originally based on the 2004 draft of the Convention) have been changed to conform to the numbering adopted in the final text.

the plaintiff. Punitive or exemplary damages are an important example. Some delegations thought that the public policy exception in Article 9 *e)* could solve those problems, but others made it clear that this was not possible under their limited concept of public policy. Therefore it was agreed that there should be an *additional ground for refusal for judgments on damages*. This is the *new Article 11*. As in the case of all other grounds for refusal, this provision should be interpreted and applied in as restrictive a way as possible.

(c) Article 11 is based on the *undisputed primary function of damages*: they should compensate for the actual loss. Therefore the new Article 11(1) says that recognition and enforcement of a judgment may be refused if, and to the extent that, *the damages do not compensate a party for actual loss or harm suffered*. It should be mentioned that the English word 'actual' has a different meaning from the French '*actuel*' (which is not used in the French text); so future losses are covered as well.

(d) This does *not* mean that the court addressed is allowed to examine whether it could have awarded the same amount of damages or not. *The threshold is much higher.* Article 11 only operates when it is *obvious* from the judgment that the award appears to go beyond the actual loss or harm suffered. In particular, this applies to punitive or exemplary damages. These types of damages are therefore explicitly mentioned. But in exceptional cases, damages which are characterised as compensatory by the court of origin could also fall under this provision.

(e) This provision also treats as compensation for actual loss or harm damages that are awarded on the basis of a party agreement (liquidated damages) or of a statute (statutory damages). With regard to such damages, the court addressed could refuse recognition and enforcement only if and to the extent that those damages are intended to punish the defendant rather than to provide for a fair estimate of an appropriate level of compensation.

(f) It would be wrong to ask whether the court addressed has to apply the law of the State of origin or the law of the requested State. Article 11 contains an autonomous concept. It is of course the court *addressed* which *applies* this provision, but this application does *not* lead to a simple application of the law of the requested State concerning damages.

(g) Recognition and enforcement may only be refused *to the extent* that the judgment goes beyond the actual loss or harm suffered. For most delegations, this might already be a logical consequence of the limited purpose of this provision. However, it is useful to state this expressly. This avoids a possible 'all or nothing approach' some legal systems apply to the public policy exception.

(h) Both paragraph 1 and paragraph 2 of the old Article 15 contained very *sophisticated rules* on how much of the damages awarded by the court of origin had to be recognised and enforced *in any case*. The Working Group felt that this might be understood as giving the wrong message. Article 11 only provides for a review whether the judgment awards damages not compensating for actual loss; it does not allow any other review as to the merits of the case. Like all other grounds of refusal, it will only apply in exceptional cases. Any over-drafting with respect to those cases would have given them too much political weight.

(i) Article 11 does not *oblige* the court to refuse recognition and enforcement. This is obvious from its wording – the court *may refuse* – and it is consistent with the general approach in Article 9. So the provision in no way limits recognition and enforcement of damages under national law or other international instruments,

and it allows (but does not require) recognition and enforcement under the Convention. Once again, the Working Group felt that an express provision would have been an over-drafting giving too much weight to the issue of damages.

(j) Article 11(2) is the old Article 15(3). Under Article 11(1), it could be argued that damages intended to cover the costs of proceedings were not compensating for an actual loss. This would of course be wrong from a comparative perspective. But it is nevertheless reasonable to have an express reference to this problem within the provision. This reference does not contain a hard rule; the fact that damages are intended to cover costs and expenses is only to be taken into account.

(k) To sum up: the new Article 11 is shorter than the old Article 15, it is more in line with the general drafting of the Convention, and it addresses the real issues without adding complex and sophisticated rules which might be understood in the wrong way. Therefore the Working Group proposes that this provision be adopted."

*Article 12 Judicial settlements (*transactions judiciaires*)*

206. Article 12 provides that settlements which, in the course of proceedings, are approved by, or concluded before, a court of a Contracting State designated in an exclusive choice of court agreement, and which are enforceable in the same manner as a judgment in that State, must be enforced in other Contracting States in the same manner as a judgment.[243] When enforcement proceedings are brought, the person bringing the proceedings must produce the documents necessary to establish that the judicial settlement is enforceable in the State of origin in the same manner as a judgment.[244]

207. Such a settlement is sometimes called a "judicial settlement", a translation of the French "*transaction judiciaire*". In the sense in which the term is used here, judicial settlements are unknown in the common-law world.[245] In France and other civil law countries, they are contracts concluded before a judge by which the parties put an end to litigation, usually by making mutual concessions. Parties submit their agreement to the judge, who records it in an official document. Such agreements usually have some, or even all, of the effects of a final judgment. A judicial settlement is different from a consent order in the common-law sense (an order made by the court with the consent of both parties), since a consent order is a judgment and may be recognised and enforced as such under Article 8 of the Convention. On the other hand, a judicial settlement is different from an out-of-court settlement, since it is made before a judge, puts an end to the proceedings and is usually enforceable in the same manner as a judgment. For these reasons, a special provision is devoted to it in the Convention.

208. Article 12 does not provide for the recognition of judicial settlements, but only for their enforcement.[246] The significance of this is best explained by an example.[247] Assume that A and B conclude a contract with an exclusive choice of court clause in favour of the courts of State X. Subsequently, A sues B before a court in that State for 1000 euros, a sum which he claims is due under the contract. The parties then enter into a judicial settlement under which B agrees to pay A 800 euros, State X being a State where this may be done.

209. If B fails to pay, A may bring proceedings to enforce the settlement in State Y, another Contracting State. Such proceedings will be covered by Article 12 of the Convention. Assume, however, that B pays the money in compliance with the settlement without any need for enforcement proceedings. If A nevertheless brings a new action for the remaining

[243] The equivalent provision in the preliminary draft Convention 1999 is Art. 36. The commentary in the Nygh / Pocar Report is at pp. 116 and 117. See also the Hague *Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Art. 19.
[244] Art. 13(1) *e)*.
[245] As used in Art. 12, "settlement" does not refer to a settlement in the common-law sense.
[246] On the distinction between recognition and enforcement, see para. 170, *supra*.
[247] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.

200 euros before the courts of State Y, B cannot ask the court to recognise the settlement under the Convention as a procedural defence to the claim (which would make the claim inadmissible in some legal systems). The Convention does not provide for this, mainly because the effects of settlements are so different in different legal systems. However, the Convention does not preclude a court from treating the settlement as a contractual defence to the claim on the merits.

Article 13 Documents to be produced

210. Article 13(1) lists the documents to be produced by the party seeking recognition or enforcement of a judgment under the Convention.[248] The fact that recognition is mentioned in the *chapeau* to Article 13 does not mean that there has to be any special procedure.[249] However, even in legal systems in which there is no special procedure, the party requesting recognition must produce the documents required by Article 13 if the other party disputes the recognition of the judgment.

211. Article 13(1) *a)* requires the production of a complete and certified copy of the judgment. This refers to the whole judgment (including, where applicable, the court's reasoning) and not just to the final order (*dispositif*). Article 13(1) *b)* requires the production of the exclusive choice of court agreement, a certified copy thereof, or other evidence of its existence. The words "or evidence of its existence" were inserted mainly to provide for agreements concluded electronically. In the case of such agreements, it is not usually possible to produce "the agreement" itself. Article 13(1) *c)* requires documentary evidence that the defendant was notified, but this applies only in the case of a default judgment. In other cases, it is assumed that the defendant was notified unless he or she produces evidence to the contrary. The law of the requested State determines the consequences of failure to produce the required documents. Excessive formalism should, however, be avoided: if the judgment-debtor was not prejudiced, the judgment-creditor should be allowed to rectify omissions.

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

213. Article 13(3) allows a person seeking recognition or enforcement of a judgment under the Convention to use a form recommended and published by the Hague Conference on Private International Law. The form is set out in an annex to the Convention. It may be changed by a Special Commission of the Hague Conference.[250] The use of the form is not obligatory. Information contained in it may be relied on by the court addressed in the absence of challenge. Even if there is no challenge, however, the information is not conclusive: the court addressed can decide the matter in the light of all the evidence before it.

214. Article 13(4) provides that if the documents referred to in Article 13 are not in an official language of the requested State, they must be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise. States may, therefore, provide in their implementing legislation or in their law of procedure that a translation is not necessary at all, or that an informal translation is sufficient, even if it is not certified.

Article 14 Procedure[251]

215. Article 14 provides that the procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment are governed by the law of the requested State unless the Convention provides otherwise.[252] Where the law of the

[248] This provision is similar to sub-para. *a)* to *c)* of Art. 29(1) in the preliminary draft Convention 1999. The commentary on the latter in the Nygh / Pocar Report is at pp. 109 and 110.
[249] See para. 215, *infra*.
[250] See also Art. 24 and the comments in para. 257, *infra*.
[251] With regard to other procedural matters, see para. 88 to 92 and 138.
[252] Except for purely verbal alterations, this is the same as Art. 30 of the preliminary draft Convention 1999. The commentary on this Article is at p. 100 of the Nygh / Pocar Report.

requested State makes no provision for any special procedure for the recognition (as distinct from enforcement) of a foreign judgment, a judgment will be recognised automatically by operation of law, based on Article 8 of the Convention. National procedural law does not of course cover the grounds on which recognition or enforcement may be refused. These are governed exclusively by the Convention: see Article 8(1) (second sentence).

216. In all proceedings covered by Article 14, the court addressed must act expeditiously. This means that the court must use the most expeditious procedure available to it. Contracting States should consider ways in which provision can be made to ensure that unnecessary delays are avoided.

Article 15 Severability

217. Article 15 provides for the recognition and enforcement of a severable part of a judgment where this is applied for, or where only part of the judgment is capable of being recognised or enforced under the Convention.[253] For example, if an award of punitive damages is not enforced by reason of Article 11, the remainder of the award must be enforced if it satisfies the requirements of Article 8. In order to be severable, the part in question must be capable of standing alone: this would normally depend on whether enforcing only that part of the judgment would significantly change the obligations of the parties.[254] In so far as this depends on a rule of law, the law of the court addressed must be applied.[255]

Article 16 Transitional provisions

218. **Basic rule.** Article 16 contains transitional provisions.[256] The basic rule, laid down in Article 16(1), is that the Convention will apply to exclusive choice of court agreements concluded after the Convention came into force for the State of the chosen court. Under this rule, the date when the proceedings are commenced is irrelevant.

219. **Additional rule.** Where the proceedings are in the State of the chosen court, the basic rule of Article 16(1) is the only rule applicable. However, where the proceedings are in another State (pursuant to Art. 6 or to the provisions on recognition and enforcement found in Chapter III), an additional rule, laid down in Article 16(2), must also be satisfied. Under this rule, the Convention will still not apply if the proceedings were instituted before the entry into force of the Convention for the State of the court seised. This means that, where proceedings are brought in a court other than the chosen court, the Convention will not apply unless *both* (a) the choice of court agreement was concluded after the Convention entered into force for the State of the chosen court *and* (b) the proceedings were instituted after the Convention entered into force for the State in which proceedings were brought.

220. The effect of these two rules may be illustrated by the following examples. In them, we assume that the Convention enters into force for State P on 1 January 2008 and for State R on 1 July 2008. X and Y enter into an exclusive choice of court agreement designating the courts of State P.

- **Example 1.** The choice of court agreement is concluded on 1 December 2007 and X brings proceedings in the courts of State P on 1 July 2008. The Convention will not apply, since the choice of court agreement was concluded before the Convention entered into force for State P, the State of the chosen court, even though the proceedings were commenced after that date. The courts of State P will not be obliged under Article 5 to hear the case.
- **Example 2.** The choice of court agreement is concluded on 15 January 2008. On 1 March 2008, Y brings proceedings to which the agreement applies in the courts of State P. On 1 April 2008, the court gives a default judgment which becomes enforceable in State P. On 1 August 2008, Y brings enforcement

[253] The equivalent provision in the preliminary draft Convention 1999 is Art. 34. The commentary on this provision is at p. 115 of the Nygh / Pocar Report.
[254] Nygh / Pocar Report, p. 115.
[255] *Ibid.*
[256] The rules in Art. 16 do not apply to declarations concerning non-exclusive choice of court agreements under Art. 22: see para. 253 and 254, *infra*.

proceedings in State R. Since the choice of court agreement was concluded after the Convention came into force for State P (State of the chosen court) and the Convention is in force for State R (requested State) when the enforcement proceedings are initiated, enforcement will be covered by the Convention.

- **Example 3.** The choice of court agreement is concluded on 15 January 2008. On 1 June 2008, Y brings proceedings to which the agreement applies in the courts of State R. Even if the Convention enters into force for State R on 1 July 2008, Article 6 of the Convention does not preclude the courts of State R from hearing the case, since the proceedings were brought before the Convention came into force for State R, even though the agreement was concluded after the Convention came into force for State P, the State of the chosen court.

Article 17 Contracts of insurance and reinsurance[257]

221. Insurance is not one of the matters excluded from the scope of the Convention under Article 2: it is fully covered by the Convention.[258] This is so even if the risk insured against relates to a matter that is itself outside the scope of the Convention, either because it is excluded by virtue of Article 2 or because of a declaration made under Article 21. Article 17(1) makes this clear. It provides that proceedings under a contract of insurance or reinsurance are not excluded from the scope of the Convention just because the contract of insurance or reinsurance relates to a matter to which the Convention does not apply.[259] Thus, for example, even though carriage of goods by sea is outside the scope of the Convention,[260] a contract for the insurance of goods to be carried by sea is within its scope.

222. **Example.**[261] Assume that an insurance company resident in France concludes a contract of insurance with Y, a company resident in Canada, under which the insurance company will indemnify Y for any damage to its goods which might arise during their carriage from Rotterdam to New York. The insurance contract contains a choice of court agreement giving exclusive jurisdiction to the courts of France. The goods are damaged while in transit; however, the insurance company refuses to pay. Any proceedings brought by Y (the insured) against the insurance company under the contract of insurance will be subject to the exclusive jurisdiction of the courts of France. Although carriage of goods is excluded from the scope of the Convention under Article 2(2) *f)*, proceedings under a contract of insurance for such goods are not excluded: Article 17(1).

223. The second paragraph of Article 17 is concerned with the recognition and enforcement of judgments establishing liability, or the absence of liability, under insurance or reinsurance contracts. It provides that recognition or enforcement of a judgment in respect of liability under a contract of insurance or reinsurance may not be limited or refused on the ground that the liability includes liability to indemnify the insured or reinsured in respect of (a) a matter to which the Convention does not apply; or (b) an award of damages to which Article 11 might apply.

224. Article 17(2) *a)* would cover situations where the insurance contract relates to a risk that is itself outside the scope of the Convention, either because it is excluded by virtue of Article 2 or because of a declaration made under Article 21. It therefore more or less reiterates the rule of paragraph 1.

225. Article 17(2) *b)* relates to judgments concerning the obligation of the insurance company to indemnify the insured or reinsured in respect of an award for damages to which Article 11 might apply. As explained above,[262] Article 11 is concerned with the recognition or

[257] In para. 221 to 227, references to insurance include reinsurance.
[258] For a minor exception, see note 75, *supra* (direct action by injured employee against employer's insurer).
[259] On the other hand, the Convention would not apply to proceedings under a contract of insurance if an Art. 21 declaration made by the State concerned were to exclude "insurance matters" from the Convention.
[260] Art. 2(2) *f)*.
[261] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.
[262] See *supra*, para. 203 to 205.

enforcement of a judgment for non-compensatory damages; it permits the court addressed to refuse recognition or enforcement of part or all of any non-compensatory portion of such a judgment in certain circumstances. Such a judgment must be distinguished from a judgment concerning a contract of insurance under which the insurance company undertakes to indemnify the insured against liability to pay non-compensatory damages. The fact that a judgment for damages given in proceedings between a third party and the insured might not be recognised (in whole or in part) under Article 11 (because the damages are non-compensatory) does not mean that recognition may be refused to a judgment given in proceedings between the insured and his insurance company under which the insurance company is required to indemnify the insured against payment of such damages.

226. **Example.**[263] Assume that an insurance company resident in Canada concludes a contract of insurance with a person resident in England ("the insured"), under which the insurance company will indemnify the insured for third-party liability for personal injury, including liability to pay punitive damages.[264] The contract contains a choice of court clause in favour of the courts of England. Then a third party sues the insured for personal injury in England and the court awards the third party 1 million pounds compensatory damages plus 1 million pounds punitive damages. The insurance company refuses to indemnify the insured. The insured sues the insurance company in England, relying on the choice of court clause. The court gives judgment against the insurance company for 2 million pounds. The insured is entitled to enforce this judgment against the insurance company for the full amount in Canada. It is not relevant that, under Article 2(2) *j)*, claims for personal injury brought by or on behalf of natural persons are excluded from the scope of the Convention (Art. 17(2) *a)*), or that, under Article 11, a court in Canada might not have been obliged to enforce the punitive element in the judgment between the third party and the insured (if the court had taken jurisdiction under a choice of court agreement) (Art. 17(2) *b)*).

227. **Punitive damages awarded against insurer.** If, however, in the proceedings in England between the insured and the insurance company in the above example, the court had not only ordered the insurance company to pay the insured 2 million pounds, but had awarded the insured an additional 1 million pounds punitive damages (because the insurance company had failed without justification to pay the insured on demand), this additional 1 million pounds would not fall under Article 17(2) *b)*. If the requirements of Article 11 were satisfied, the courts of Canada would not be obliged to enforce the additional award under the Convention.

Article 18 No legalisation

228. Article 18 provides that all documents forwarded or delivered under the Convention must be exempt from legalisation or any analogous formality, including an *Apostille*.[265]

Article 19 Declarations limiting jurisdiction

229. It is the policy of the Convention to exclude wholly domestic situations from its scope. Effect is given to this policy by Article 1. Article 19 pursues the opposite policy: it permits a State to make a declaration that its courts will not apply Article 5 of the Convention to cases that are wholly *foreign*. It provides that a State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.[266]

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[263] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.
[264] Whether the policy covers such damages would depend on its terms, as interpreted by the law governing it.
[265] This is equivalent to Art. 29(2) of the preliminary draft Convention 1999. The commentary on that provision in the Nygh / Pocar Report is at p. 110, where it is stated that this is a practice that is well established in the context of the Hague conventions.
[266] Since the Convention uses the words "may refuse", the courts of a State that made such a declaration would have discretion whether or not to exercise jurisdiction. This will cause no difficulty in legal systems where courts generally enjoy a certain degree of discretion in deciding whether or not to exercise jurisdiction. In legal systems where this is not the case, legislation could be adopted to permit courts to exercise discretion under Art. 19. The discretion permitted under Art. 19 could also be exercised by the legislator, in which case the legislation itself would specify under what circumstances courts would refuse to hear the case.

230. In practice, parties sometimes choose the courts of a State with which neither they nor the facts of the case have any connection. The reason is that neither party wants to go before the courts of the other party's State; so they agree to choose the courts of a neutral State. Some countries welcome this.[267] Others feel that it imposes an undue burden on their judicial systems. The purpose of Article 19 is to accommodate States in the latter category.

Article 20 Declarations limiting recognition and enforcement

231. Article 20 provides that a State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State.[268] This provision pursues the policy, discussed above, of excluding wholly domestic situations from the scope of the Convention.

232. To understand the purpose of Article 20, one must remember that the Convention applies only in international cases.[269] However, the definition of "international" for this purpose varies, depending on whether one is considering jurisdiction,[270] or the recognition and enforcement of a judgment.[271] For the purpose of jurisdiction, a case is not international if the parties are resident in the same Contracting State, and if all other elements relevant to the dispute (regardless of the location of the chosen court) are connected only with that State. However, for the purpose of recognition and enforcement, a case is always international if the judgment was given by a court in a State other than that in which recognition or enforcement is sought. That means that a case that is domestic when it is heard becomes international if proceedings are brought to enforce the judgment in another State. The purpose of Article 20 is to permit a Contracting State to declare that it will not recognise or enforce such a judgment if the case would have been wholly domestic to it, if the original proceedings had been brought in its courts.

233. **Example.**[272] Assume that the parties are resident in State A and all other relevant elements are connected only with that State. They agree that a court in State B will have exclusive jurisdiction. If one of them brings proceedings before a court in State A, that court would not be obliged to decline jurisdiction under Article 6: the Convention would not be applicable because the case would not be international under Article 1(2). However, if proceedings were brought in State B, State A would be required by Article 8 to recognise the resulting judgment: the case would have become international in terms of Article 1(3). What Article 20 does is to make it possible for States to change this by entering an appropriate declaration. If it did that, State A would not be required to recognise the judgment.

Article 21 Declarations with respect to specific matters

234. It will be remembered that Article 2(2) excludes certain matters from the scope of the Convention. Article 21 permits individual Contracting States to extend this list, as far as they are concerned, by making a declaration. It provides that where a State has a strong

[267] For example, English courts have for many years been willing to hear such cases, and in 1984 New York adopted special provisions to facilitate them, where the transaction covers at least 1 million US dollars: see New York Civil Practice Law and Rules, Rule 327(b) and New York General Obligations Law § 5-1402.
[268] Since the Convention uses the words "may refuse", the courts of a State that made such a declaration would have discretion whether or not to recognise and enforce such judgments under the Convention. However, implementing legislation could introduce an obligation not to recognise or enforce foreign judgments in such circumstances.
[269] Art. 1(1).
[270] Art. 1(2).
[271] Art. 1(3).
[272] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.

interest in not applying the Convention to a specific matter, it may declare that it will not apply the Convention to that matter.[273] When making a declaration, it must ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.[274] Where such a declaration is made, the Convention will not apply with regard to that matter in the Contracting State that made the declaration.

235. It was intended by the Diplomatic Session that this provision should apply only to discrete areas of the law of the kind excluded by Article 2(2). The declaration cannot use any criterion other than subject matter. It could, for example, exclude "contracts of marine insurance", but not "contracts of marine insurance where the chosen court is situated in another State".

236. **Safeguards.** If such opt-outs were not possible, some States might not be able to become Parties to the Convention. However, a State should not make a declaration without compelling reasons. The interests of the parties must also be safeguarded. To achieve these objectives, the Convention applies three principles: transparency, non-retroactivity and reciprocity.

237. **Transparency and non-retroactivity.** Under Article 32, any declaration made under Article 21 must be notified to the depositary (the Ministry of Foreign Affairs of the Netherlands), which will inform the other States. This ensures transparency. It is also envisaged that declarations will be posted on the website of the Hague Conference on Private International Law.[275] If the declaration is made after the Convention comes into force for the State making it, it will not take effect for at least three months.[276] Since it will not apply retroactively to contracts concluded before it takes effect,[277] it will be possible for the parties to know, when they conclude a contract, whether it will be affected. This protects legal security.

238. **Reciprocity.** Article 21(2) provides that, where a State makes such a declaration, other States will not be required to apply the Convention with regard to the matter in question where the chosen court is in the State making the declaration. This means that if a Contracting State is not prepared to grant the benefits of the Convention to other Contracting States, it cannot expect to benefit from the Convention itself.

239. **Review of declarations.** It is envisaged that the operation of declarations under Article 21 may be considered from time to time, either at review meetings to be convened by the Secretary General of the Hague Conference under Article 24, or, as a preparatory step, at meetings on General Affairs and Policy of the Conference.[278]

Article 22 Reciprocal declarations on non-exclusive choice of court agreements

240. Under Article 1(1), the Convention applies only to exclusive choice of court agreements. However, non-exclusive agreements are quite common, especially in international banking. Article 22, therefore, opens up the possibility for Contracting States to extend the scope of the Convention to cover such agreements. This, however, applies only to the provisions of the Convention in Chapter III concerning the recognition and enforcement of judgments (Art. 8–15).[279] Other provisions, in particular, Articles 5 and 6, do not apply to such agreements.

241. For Article 22 to operate, the State of origin and the State in which recognition or enforcement is sought must both be Contracting States and they must both have made a declaration under Article 22. In addition, the following requirements must be satisfied:

- the court of origin must have been designated in a non-exclusive choice of court

[273] Such a declaration may even be made with regard to matters excluded from the exclusionary provisions in Art. 2(2) – for example, "copyright and related rights" in Art. 2(2) *n)*.
[274] Where the Contracting State making the declaration so wished, the declaration could first be sent in draft to the Secretary General of the Hague Conference for circulation to the other Contracting States for their comments.
[275] This is < www.hcch.net >.
[276] Art. 32(4).
[277] Art. 32(5).
[278] See *infra*, para. 257.
[279] This includes the grounds on which recognition or enforcement may be refused – for example, under Art. 9.

agreement;

- there must be no judgment between the same parties on the same cause of action given by another court before which proceedings could have been brought in accordance with the non-exclusive choice of court agreement;[280]
- there must be no proceedings pending between the same parties on the same cause of action in any other such court;
- the court of origin must have been the court first seised.

242. To constitute a non-exclusive choice of court agreement for the purpose of Article 22, the agreement must satisfy the following conditions:[281]

- it must be in the form laid down by Article 3 *c)*;[282]
- the parties must have consented to it;[283]
- the chosen court must be designated for the purpose of deciding disputes that have arisen or may arise in connection with a particular legal relationship;[284]
- the agreement must designate a court or the courts of one or more Contracting States.

243. **Scope.** Except for the fact that it applies to non-exclusive agreements, the scope of Article 22 is exactly the same as that of the Convention as a whole: subject to this one exception, it does not apply to any choice of court agreement that would not be covered by the other provisions of the Convention. Thus the restrictions laid down by Article 2 and Article 21 would also operate under Article 22.

244. Except to the extent that it establishes reciprocity, a declaration under Article 22 cannot affect any State other than the State that makes it.

245. **Article 22(2) *b).*** Article 22(2) *b)* modifies the requirement of recognition and enforcement of a judgment by stating that such recognition or enforcement is not mandatory when there exists a judgment given by any other court before which proceedings could be brought in accordance with the non-exclusive choice of court agreement or where there exists a proceeding pending between the same parties in any other such court on the same cause of action, regardless of whether such proceedings were commenced before or after those before the chosen court or whether such judgment was given before or after that of the chosen court. To understand the operation of this provision it is necessary to consider when proceedings can be brought in a court other than the chosen court in accordance with a non-exclusive choice of court agreement. This depends on whether the choice of court agreement is non-exclusive without limitation or non-exclusive with limitation.

246. **Agreements that are non-exclusive without limitation.**[285] If the agreement is non-exclusive without limitation, it imposes no restrictions on the courts before which proceedings may be brought. It simply designates a court or the courts of one or more Contracting States on a non-exclusive basis – for example, "proceedings under this contract may be brought in the courts of Korea, but this shall not preclude the bringing of proceedings in any other court that has jurisdiction under the law of the State in which it is located". Where the choice of court agreement is in this form, proceedings in *any* court – even if it is not in Korea – would be in accordance with the choice of court agreement and thus provide a reason under Article 22(2) *b)* not to recognise the judgment of a Korean court under the Convention.

247. **Agreements that are non-exclusive with limitation.**[286] The position is different in the case of an agreement that is non-exclusive with limitation. Such an agreement imposes

[280] This could be any court that is not excluded by the agreement; see *infra*, para. 245 *et seq.*
[281] In effect, all the requirements laid down in Art. 3 must be satisfied except that of exclusivity. These requirements are listed in para. 93, *supra.*
[282] See para. 110 to 114, *supra.*
[283] See para. 94 to 97, *supra.*
[284] See para. 101, *supra.*
[285] In this paragraph, it is assumed that all States mentioned are Parties to the Convention and that they have made a declaration under Art. 22.
[286] In this paragraph, it is assumed that all States mentioned are Parties to the Convention and that they have made a declaration under Art. 22.

restrictions on the courts before which proceedings may be brought but nevertheless does not constitute an exclusive choice of court agreement as defined in Article 3 of the Convention. One form would be an agreement that designates a court or the courts of two or more Contracting States *to the exclusion of all others* – for example, "proceedings under this contract may be brought only in the courts of Korea or the courts of China" or "proceedings under this contract may be brought only in the District Court of Seoul or the District Court of Beijing". An agreement in this form both grants jurisdiction to the courts specified and precludes other courts from taking it: such an agreement would constitute an exclusive choice of court agreement under Article 3 of the Convention were it not for the fact that the designated courts are in different Contracting States. If A now sues B in Seoul and obtains a judgment, any proceedings on the same cause of action brought by B in Beijing (or a judgment obtained there) would be an obstacle in the sense of Article 22(2) *b)* to the recognition and enforcement of the judgment from Seoul.

248. In another example[287] the fora available to the parties are even more limited but the effect would be the same: where A and B have concluded an agreement under which A may sue B *only* in the District Court of Seoul, and B may sue A only in the District Court of Beijing, each party has only one forum available and not two as in the previous example. If A now sues B in Seoul and obtains a judgment, any proceedings on the same cause of action brought by B in Beijing (or a judgment obtained there) would be an obstacle in the sense of Article 22(2) *b)* to the recognition and enforcement under the Convention of the judgment from Seoul.[288]

249. **Asymmetric agreements.** Asymmetric agreements were discussed above.[289] They are agreements under which one party may bring proceedings only in the chosen court but the other party may bring proceedings in other courts as well. Such agreements count as non-exclusive agreements for the purpose of the Convention because they exclude the possibility of initiating proceedings in other courts for only one of the parties.

250. **Example.**[290] Assume that a lender and a borrower enter into a loan agreement. The agreement contains a choice of court clause that provides, "Proceedings by the borrower against the lender may be brought only in the District Court of Seoul, but proceedings by the lender against the borrower may be brought either in that court or in any other court having jurisdiction under the law of the State in which it is located". The District Court of Seoul grants a judgment and proceedings are brought to enforce it in China, both States having made declarations under Article 22. Proceedings under the loan agreement are also pending before a court in Australia. If the latter proceedings were brought by the lender against the borrower, they would preclude enforcement of the Korean judgment in China under Article 22, since they were in accordance with the non-exclusive choice of court agreement.[291] If, on the other hand, they had been brought by the borrower against the lender, this would not be the case; consequently, they would not preclude enforcement of the Korean judgment in China.[292]

251. **Article 22(2) *c).*** This provision was intended to apply where there were proceedings before the other court but they did not result in a final judgment and are not still pending – for example, where they were dismissed under the doctrine of *forum non conveniens.* If they did result in a final judgment or if they are still pending, Article 22(2) *b)* would apply. If this is not the case, Article 22(2) *c)* further requires that the court of origin must have been first seised. If another court not excluded by the choice of court agreement was seised first in proceedings between the same parties on the same cause of action, the judgment cannot be

[287] In this paragraph, it is assumed that all States mentioned are Parties to the Convention and that they have made a declaration under Art. 22.
[288] See para. 104, *supra.*
[289] See para. 105, *supra.*
[290] In this paragraph, it is assumed that all States mentioned are Parties to the Convention and that they have made a declaration under Art. 22.
[291] This would be the case even if they were commenced after the commencement of the proceedings in Korea and China.
[292] However, if the Australian judgment were given first, the Chinese court might be entitled to refuse to enforce the Korean judgment under Art. 9 *g).*

recognised or enforced under the Convention.[293]

252. It was the intention of the Diplomatic Session that Article 22(2) *c)* should not apply where the court first seised took jurisdiction contrary to the terms of the choice of court agreement. In other words, Article 22(2) *c)* is subject to the same restriction in this respect as Article 22(2) *b)*, and the mere fact that a court not permitted by the agreement was seised first will not exclude recognition and enforcement under the declaration system.

253. **Entry into force.** The entry into force of declarations under Article 22 is governed by Article 32(3) and (4). Entry into force will also be relevant with regard to when a declaration has been "made" in terms of Article 22. A declaration which has not entered into force cannot have legal effects.

254. The transitional provisions laid down in Article 16 do not apply to declarations under Article 22. It was the understanding of the Diplomatic Session that the Contracting State making the declaration can specify in the declaration to what extent (if any) the declaration has retroactive effect.[294] The State making the declaration may thus determine whether it covers choice of court agreements concluded, proceedings commenced, or judgments given in the State of origin before the declaration enters into force for the requested State. In the absence of such a statement, proceedings for the recognition or enforcement of a judgment could be brought in the requested State as soon as the declaration took effect for that State. Recognition or enforcement could then be granted under Article 22, even if the choice of court agreement was concluded, the proceedings in the court of origin commenced, or the original judgment given, before that date.

255. **Reciprocity.** Even if there is a declaration in force in the State of recognition that applies to the judgment in question, a declaration must also be in force in the State of origin. Both declarations must be in force when recognition is sought; otherwise there is no reciprocity. There is no explicit statement in either Article 22 or Article 32 as to whether the declaration in force in the State of origin must be such that it would have applied to a judgment from the State of recognition given on the same date as the judgment in question. To ensure clarity on this matter, a State making a declaration under Article 22 could specify whether or not there must also be what may be called "reciprocity as to time" under Article 22.

Article 23 Uniform interpretation

256. Article 23 states that in the interpretation of the Convention regard must be had to its international character and to the need to promote uniformity in its application. This provision is addressed to courts applying the Convention. It requires them to interpret it in an international spirit so as to promote uniformity of application. Where reasonably possible, therefore, foreign decisions and writings should be taken into account. It should also be kept in mind that concepts and principles that are regarded as axiomatic in one legal system may be unknown or rejected in another. The objectives of the Convention can be attained only if all courts apply it in an open-minded way.[295]

Article 24 Review of the operation of the Convention

257. Article 24 requires the Secretary General of the Hague Conference on Private International Law to make arrangements at regular intervals for the review of the operation of the Convention, including any declarations made under it, and for the consideration of the question whether any amendments to it are desirable. One of the major purposes of such review meetings would be to examine the operation of declarations under Article 21 and to consider whether each of them was still required.

[293] The Convention does not preclude its recognition or enforcement under national law.
[294] See Minutes of the Twentieth Session, Commission II: Minutes No 24, para. 56 to 63; Minutes No 22, para. 74 to 97.
[295] The equivalent provision in the preliminary draft Convention 1999 is Art. 38(1). The commentary on this in the Nygh / Pocar Report is at pp. 118 and 119.

Article 25 Non-unified legal systems

258. Article 25 is concerned with the problems that result from the fact that some States are composed of two or more territorial units, each with its own judicial system. It occurs most often in the case of federations – for example, Canada or the United States of America – but can also occur in other States as well – for example, China or the United Kingdom. This can create a problem because one has to decide in any particular case whether the reference is to the State as a whole ("State" in the international sense) or whether it is to a particular territorial unit within that State.

259. Article 25(1) solves this problem by providing that, where different systems of law apply in the territorial units with regard to any matter dealt with in the Convention,[296] the Convention is to be construed as applying either to the State in the international sense or to the relevant territorial unit, whichever is appropriate.

260. The most important situations in which the question arises are in connection with the definition of an exclusive choice of court agreement (Art. 3) and the obligation of the chosen court to hear the case (Art. 5). The way in which Article 25 applies in these situations has already been discussed.[297]

261. Article 25(2) gives further effect to the policy of not applying the Convention to wholly domestic situations. It states that, notwithstanding the provisions of Article 25(1), a Contracting State with two or more territorial units in which different systems of law are applied is not bound to apply the Convention to situations involving solely such different territorial units. For this provision to apply, the chosen court must also be located in the State in question; if it is located in another Contracting State, Article 20 would apply (if there is an appropriate declaration).

262. Article 25(2) means that if, for example, the chosen court is in England and the situation is entirely internal to the United Kingdom, the United Kingdom is not required to apply the Convention by virtue of the fact that one of the parties is resident in Scotland.

263. Article 25(3) provides that a court in a territorial unit of a Contracting State is not bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced under the Convention by a court in another territorial unit of the first Contracting State. This means, for example, that a court in Beijing is not bound under the Convention to recognise a judgment from Japan solely because a court in Hong Kong has done so.[298] The Beijing court must decide for itself whether the conditions for recognition or enforcement under the Convention are fulfilled.

264. It is expressly stated in paragraph 4 that Article 25 does not apply to Regional Economic Integration Organisations. In other words, it is concerned only with States (in the international sense) and territorial units within a State in which different systems of law apply.[299]

Article 26 Relationship with other international instruments

265. Article 26 is concerned with the relationship between the Convention and other international instruments that relate to jurisdiction, and the recognition and enforcement of judgments. Instruments of this kind include the Brussels Convention,[300] the Lugano Convention,[301] the Brussels Regulation,[302] the Minsk Convention[303] and various

[296] The fact that some or all of the relevant territorial units in a Contracting State apply the common law does not necessarily mean that they do not apply different systems of law. They will do so if they have different legislation – for example, in the case of Australian states or the common law Canadian provinces.
[297] See para. 107 and 128 to 131, *supra.*
[298] It may of course recognise it under its domestic law.
[299] Regional Economic Integration Organisations are governed by Art. 29.
[300] *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* of 27 September 1968, OJ 1998 C 27, p. 1 (see *supra*, note 9).
[301] *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* of 16 September 1988, OJ 1988 L 319, p. 9 (see *supra,* note 10).
[302] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ 2001 L 12, p. 1 (see *supra*, note 50).
[303] The Minsk *Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases* of 1993. The current version as amended on 28 March 1997 can be found in an English and French translation in Annex II to Prel. Doc. No 27, "The Relationship between the Judgments Project and certain Regional Instruments in the Arena

instruments

of the Commonwealth of Independent States", prepared by E. Gerasimchuk for the Permanent Bureau, available at < www.hcch.net >.

in the Americas.[304]

266. Paragraphs 1 to 5 of Article 26 are concerned with conflicts between the Convention and other international agreements; paragraph 6 deals with conflicts between the Convention and the rules of a Regional Economic Integration Organisation. We shall consider the former question first.

267. The problem of conflicting treaties arises only if two conditions are fulfilled. The first is that there must be an actual incompatibility between the two treaties. In other words, the application of the two treaties must lead to different results in a concrete situation. Where this is not the case, both treaties can be applied. In some cases, an apparent incompatibility may be eliminated through interpretation. Where this is possible, the problem is solved. As we shall see, Article 26(1) tries to do this.

268. The second condition is that the State of the court seised must be a Party to both treaties. If that State is a Party to only one, the courts in it will simply apply that one. Article 26 is, therefore, addressed to States that are Parties to both the Convention and to another treaty that conflicts with it.

269. **The Vienna Convention.** Articles 30 and 41 of the *Vienna Convention on the Law of Treaties*, 1969, codify the rules of public international law with regard to treaties relating to the same subject matter.[305] The rules in Article 26 of the Convention must be read against this background.[306] The Convention cannot make itself override other instruments to a greater extent than that permitted by international law. However, international law does permit a treaty to provide that another treaty will prevail over it. The purpose of Article 26, therefore, is to provide that, in the cases specified, the Convention will give way to the other instrument, in so far as the two conflict. Where none of these "give-way" rules applies, the Convention has effect to the fullest extent permitted by international law.

270. **Interpretation.** The first paragraph of Article 26 contains a rule of interpretation. It provides that the Convention must be interpreted, as far as possible, to be compatible with other treaties in force for Contracting States. This applies irrespective of whether or not the other treaty was concluded before or after the Convention. Thus, where a provision in the Convention is reasonably capable of two meanings, the meaning that is most compatible with the other treaty should be preferred. This does not, however, mean that a strained interpretation should be adopted in order to achieve compatibility.

271. **First "give-way" rule.** Paragraph 2 of Article 26 contains the first "give-way" rule. It applies irrespective of whether or not the treaty was concluded before or after the Convention. It provides that the conflicting treaty will prevail where none of the parties is resident in a Contracting State that is not a Party to the conflicting treaty. This rule will not apply if any of the parties is resident in a State that is a Party to the Convention but not to the conflicting treaty.

272. Where a party is resident in more than one State (see Art. 4(2)), the Convention will give way to the other treaty (to the extent of the incompatibility) if all the parties are resident *solely* in States that are Parties to the conflicting treaty or in non-Contracting States.

273. The idea behind this rule is that the Convention should not prevail in a given case if

[304] See A. Schulz, A. Muriá Tuñón and R. Villanueva Meza, "The American instruments on private international law. A paper on their relation to a future Hague Convention on Exclusive Choice of Court Agreements", Prel. Doc. No 31 of June 2005 for the attention of the Twentieth Session of June 2005, available at < www.hcch.net >.
[305] Art. 30 and 41 are generally regarded as stating the rules of customary international law on the point; so even those States that are not Parties to the Vienna Convention accept them as accurately setting out the legal position.
[306] For a full discussion, see A. Schulz, "The Relationship between the Judgments Project and other International Instruments", Prel. Doc. No 24 of December 2003 for the attention of the Special Commission of December 2003, available at < www.hcch.net >.

none of the States that are Parties to it "has an interest"[307] in its prevailing. It is assumed that if a State is a Party to both the Convention and to the treaty, it will have no objection if the latter prevails. If a State is not a Party to the Convention, it does not have an "interest" that the Convention should prevail. Consequently, Article 26(2) assumes that only those States that are Parties to the Convention and not to the treaty have an "interest" in having the Convention prevail. If no such State is involved in a given case, there is no reason why the Convention should prevail in that case.

274. The next question is: *when* does a State have an "interest" in a case? The answer given by the Convention is that it has an interest if, but only if, one of the parties is resident in its territory. If a party is resident both in its territory and in the territory of another State – for example, a corporation incorporated in one State with its principal place of business in another – it still has an interest. This is the reason why the rule applies only if all the parties are resident *solely* in States that are Parties to the conflicting treaty or in non-Contracting States.

275. **Parties.** Who counts as a "party" for the purpose of this rule? Since the purpose of the rule is to determine when a State has an interest in the case, "party" must mean a person who is a party to the choice of court agreement, or who is bound by it or entitled to invoke it.[308] Only such persons have an interest in the application of the Convention, and it is only with regard to such persons that a State has an interest in the case. In addition, the person must be a party to the proceedings, since someone who is not a party to the proceedings has no interest in whether the Convention is applied to them. A "party", therefore, is a party to the proceedings who is bound by the choice of court agreement or entitled to invoke it. On the other hand, it does not matter whether such a person was one of the original parties to the proceedings or was joined at a later stage.

276. We are now in a position to give some illustrations. We shall use the Lugano Convention as an example, though conflicts are likely to be rare in practice, since there are few incompatibilities between it and the Convention. The most important exceptions concern the *lis pendens* rule and insurance.[309] We shall use the former as an example.[310] The rule in the Lugano Convention is that the chosen court is not permitted to hear a case if a court in another Contracting State was seised first.[311] Under the Convention, on the other hand, the chosen court must hear the case even if another court was seised first.[312]

277. **First example.** A company resident in Norway concludes a contract with a company resident in Switzerland, both Norway and Switzerland being parties to the Lugano Convention and to the Hague Convention. The contract contains a choice of court clause in favour of the courts of Switzerland. The Norwegian company sues the Swiss company in Norway. Subsequently, the Swiss company sues the Norwegian company in Switzerland. Both the Swiss court and the Norwegian court will have to decide whether to apply the Hague Convention or the Lugano Convention. Since none of the parties is resident in a Contracting State that is not a Party to the Lugano Convention, the Lugano Convention prevails. The Swiss court cannot hear the case unless and until the Norwegian court decides that it has no jurisdiction.

278. **Second example.** A Canadian company concludes a contract with a Norwegian company. The contract contains a choice of court clause in favour of the courts of Switzerland. The Norwegian company sues the Canadian company in Norway. Subsequently, the Canadian company sues the Norwegian company in Switzerland. Again, both the Swiss court and the Norwegian court will have to decide whether to apply the

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[307] For the purposes of this Report, the word "interest" does not refer to any domestic legal concept such as "State interests" or "governmental interests" but is meant to refer to the reasonable expectation of a State Party that the Convention would prevail in a given factual situation. As explained in para. 274, the factor used by the Convention to make this determination is the residence of the parties.

[308] On the question of when a person who is not a party to a choice of court agreement is nevertheless bound by it, see para. 97, *supra.*

[309] Another exception is that, as it stands at present in its 1988 version, the Lugano Convention does not provide for electronic form.

[310] Insurance is discussed in para. 302 to 304, *infra*, in connection with the Brussels Regulation.

[311] This follows from the interpretation given by the Court of Justice of the European Communities to Art. 17 of the Brussels Convention in *Gasser* v. *MISAT,* Case C-116/02, [2003] ECR I-14721 (available at < http://curia.europa.eu/ >), an interpretation that would almost certainly apply to the Lugano Convention as well.

[312] Art. 5.

Hague Convention or the Lugano Convention. Since one of the parties (the Canadian company) is resident in a country that is a Party to the Hague Convention but not to the Lugano Convention, the Lugano Convention does not prevail on the basis of Article 26(2).[313] This means that the Swiss court has to hear the case (Art. 5); it is not possible for it to wait for a decision of the Norwegian court on its competence (which would be obligatory under Art. 21 of the Lugano Convention).

279. **Second "give-way" rule.** The second "give-way" rule is contained in the third paragraph of Article 26. It is intended to help States that are Parties to both the Convention and to an inconsistent treaty, where not all Parties to the latter join the Convention. It provides that the Convention will not affect the application by a Contracting State of a treaty that was concluded[314] before the Convention entered into force for that Contracting State, if applying the Convention would be inconsistent with the obligations of that Contracting State to any non-Contracting State. If this rule did not exist, some States might be unable to become Parties to the Convention.

280. The second "give-way" rule applies only to the extent that the application of the Convention would be inconsistent with the obligations of the State in question towards a non-Contracting State. This means that there must be at least one State that is a Party to the other treaty but not to the Convention. Moreover, the Convention gives way to that other treaty only if the State in question would otherwise be obliged to violate its obligations towards such a State.

281. The first "give-way" rule contains a test to determine when a State has an interest in a case so that it is entitled to insist on the application of the other treaty. The second "give-way" rule contains no such test. It is not, therefore, easy to say when the application of the Convention would be inconsistent with the obligations of a Contracting State towards a State that is a Party to the other treaty but not to the Convention. It would depend on the terms of the other treaty and on international law.

282. **Example.** Let us assume that Ruritania (an imaginary State) is a Party to the Lugano Convention but not to the Hague Convention. Switzerland is a Party to the Lugano Convention and becomes a Party to the Hague Convention. Canada is a Party to the Hague Convention. A Canadian company concludes a contract with a Ruritanian company. The contract contains a choice of court clause in favour of the courts of Switzerland. The Ruritanian company sues the Canadian company in Ruritania. Subsequently, the Canadian company sues the Ruritanian company in Switzerland. Since one of the parties (the Canadian company) is resident in a State that is a Party to the Hague Convention but not to the Lugano Convention, Article 26(2) would not apply. So the Convention would not give way to the Lugano Convention in Switzerland. This would mean that the Swiss court would have to apply the Hague Convention; therefore, it would not be possible for it to wait for a decision by the Ruritanian court on its competence. However, the Swiss court would be obliged to do this under Article 21 of the Lugano Convention. To solve this problem, Article 26(3) provides that the Convention will give way to the prior treaty obligation of Switzerland towards Ruritania.

283. **Prior treaties.** This second "give-way" rule applies only to conflicts with a *prior* treaty. The question of determining when one treaty is prior to another raises considerable difficulties in international law. The general view is that the time of conclusion of the treaties in question is decisive and not their entry into force.[315] However, Article 26(3) of the Convention applies a different rule which combines these two approaches: the second "give-way" rule is applicable if the other treaty was *concluded*[316] before the Convention *entered*

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[313] If Canada, Norway and Switzerland are all Parties to the Convention, there would appear to be no basis on which the Lugano Convention would prevail.

[314] See para. 283 to 285.

[315] I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., Manchester University Press 1984, p. 98; A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press 2000, p. 183; J.B. Mus, "Conflicts Between Treaties in International Law", 45 *Netherlands International Law Review* 1998, p. 208, at pp. 220 to 222. A different view is advanced in E.W. Vierdag, "The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions", 59 *British Yearbook of International Law* 1988, p. 75, but this seems to be incorrect for the reasons given by J.B. Mus, *supra*.

[316] Unless it provides otherwise, a bilateral treaty is generally regarded as having been concluded when it is signed; a multilateral treaty is generally regarded as having been concluded when the Final Act is signed (or it is otherwise adopted) or when it is opened for signature, whichever is the later. See A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press 2000, p. 74. In this context, it is worth mentioning that for the Hague Conference this

into force for the State in question. Moreover, if the other treaty complies with this rule, the second "give-way" rule will also apply to a new treaty that revises or replaces it, except to the extent that the revision or replacement creates new inconsistencies with the Convention.

284. **First example.** Assume that after the Convention is concluded, a group of States (some of which do not become Parties to the Convention) conclude another treaty on the same subject. Ruritania then ratifies the Convention and it enters into force for it. After this, it ratifies the other treaty and that also enters into force for it. Since the other treaty was concluded before the Convention entered into force for Ruritania, the Convention will give way to the other treaty to the extent that the application of the Convention would be inconsistent with the obligations of Ruritania towards a State that is a Party to the other treaty but not to the Convention.

285. **Second example.** Assume that Ruritania is a Party to the Lugano Convention but not to the Convention. Norway and Switzerland are Parties to both. The Convention enters into force for them after the Lugano Convention was concluded. Assume further that, after the Convention enters into force for them, the Lugano Convention is replaced by a new convention.[317] Article 26(3) would apply to that new convention to the extent that it retained the same inconsistencies with the Convention as the Lugano Convention, but would not apply with regard to any new inconsistencies introduced by it.

286. **Third "give-way" rule.** The third "give-way" rule (laid down by the fourth paragraph of Art. 26) is concerned only with treaties for the recognition and enforcement of judgments. It applies to such treaties irrespective of whether they were concluded before or after the Convention. Where a judgment granted by a State that is a Party to such a treaty is sought to be recognised or enforced in another such State, the Convention will not affect the application of that treaty, provided that the judgment is not recognised or enforced to a lesser extent than under the Convention.

287. This rule is of significance only when both States concerned are Parties to both the Convention and the other treaty: the Convention would not apply unless both States were Parties to it and the other treaty would not apply unless both were Parties to it. The purpose of the rule is to promote the recognition and enforcement of judgments. If the other treaty does this more efficiently, or to a greater extent, it would be better to allow its application. It is only where the judgment would be recognised or enforced to a lesser extent under the other treaty that the Convention should apply. Unless the law of the requested State provides otherwise, the judgment creditor can choose whether to enforce the judgment under the Convention or under the other treaty.

288. **Fourth "give-way" rule.** The fourth "give-way" rule (laid down by the fifth paragraph of Art. 26) is concerned with treaties dealing with jurisdiction, or the recognition or enforcement of a judgment, but only with regard to a "specific matter". By "specific matter" is meant a discrete area of the law of the kind referred to in Article 2(2) or Article 21. Examples of specific matters would include commercial agency, marine insurance or patent licensing. In the case of such treaties, the Convention gives way, to the extent of the inconsistency, irrespective of whether they are concluded before or after the Convention and irrespective of whether all the Parties to the treaty are also Parties to the Convention.

289. **Declaration.** There is, however, a condition. For this rule to apply, the Contracting State in question must have made a declaration in respect of the treaty under

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Convention has brought about a change: until now, a Hague Convention was deemed to be concluded at the date of the first signature, not at the date of its adoption (the signing of the Final Act at the closing ceremony of the Diplomatic Session) or the date it was opened for signature (which was normally on the same day). Until it received its first signature, it was referred to as a "draft Convention" without a date. The *Convention of 30 June 2005 on Choice of Court Agreements* is the first Hague Convention which follows the new rule that it is deemed to be concluded on the date of its adoption, when the Final Act is signed and the Convention is opened for signature, regardless of whether any State actually signs the Convention on that day.

[317] At the time of writing, work to conclude a revised Lugano Convention, bringing its content into line with the Brussels Regulation, is under way. Contracting Parties will be the European Community, Iceland, Norway and Switzerland.

Article 26(5).[318] Where such a declaration is made, other Contracting States are not obliged to apply the Convention, to the extent of the inconsistency, with regard to the matter referred to in the declaration if the chosen court is in the State that made the declaration. This means that if, as a result of making the declaration, the States making it are no longer subject to reciprocal obligations under the Convention, other Contracting States are not obliged to apply the Convention when the chosen court is in a State making the declaration.[319] However, this applies only "to the extent of any inconsistency"; in other words, it applies only in those circumstances in which reciprocity would not be guaranteed.[320]

290. **Example.** Assume that a group of States that have become Parties to the Convention (the "maritime lien" States) subsequently conclude a treaty on maritime liens (a matter that is also covered by the Convention) that has provisions on jurisdiction and the recognition and enforcement of judgments. If they make an appropriate declaration, their courts will be entitled to apply the new treaty, rather than the Convention, to the extent of any inconsistency. Assume that the treaty on maritime liens provides that choice of court agreements are invalid with regard to liens in category "A"; that they are valid with regard to liens in category "B" only if they are made before a notary; that they will be valid with regard to liens in category "C" only if the chosen court is in the State of registration of the vessel; and that they will be valid with regard to liens in category "D" only if the chosen court is in a "maritime lien" State. Where, in these circumstances, the chosen court is in a "maritime lien" State, "non-maritime lien" States[321] would not be obliged to apply the Convention in any cases involving liens in category "A" or category "D"; they would not be obliged to apply it in cases involving liens in category "B" if the choice of court agreement was not made before a notary; and they would not be obliged to apply it in cases involving liens in category "C" if the chosen court was not in the State of registration.

291. **Regional Economic Integration Organisations.** Article 26(6) deals with the situation where a Regional Economic Integration Organisation (REIO) becomes a Party to the Convention. If this occurs, it is possible that the rules (legislation) adopted by the Regional Economic Integration Organisation might conflict with the Convention. Article 26(6) contains two "give-way" rules that apply in such a situation. They apply irrespective of whether the rule of the Regional Economic Integration Organisation is adopted before or after the Convention. The underlying principle is that where a case is purely "regional" in terms of residence of the parties, the Convention gives way to the regional instrument.

292. **First REIO "give-way" rule.** The first "give-way" rule on conflicts with the legislation of a Regional Economic Integration Organisation mirrors the first "give-way" rule on conflicting treaties. It is contained in Article 26(6) *a)* and provides that where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation, the Convention will give way to the legislation of the Regional Economic Integration Organisation.

293. Where a party is resident in more than one State (see Art. 4(2)), the Convention will give way to the legislation of the Regional Economic Integration Organisation (to the extent of the incompatibility) if all the parties are resident *solely* in Member States of the Regional Economic Integration Organisation or in non-Contracting States.[322]

[318] Art. 32 will apply to such a declaration.
[319] This means that, in the example concerning maritime liens (para. 290, *infra*), if the chosen court is in a "maritime lien" State (a State that is a Party to the treaty on maritime liens), courts in "non-maritime lien" States (States that are not Parties to the treaty on maritime liens) would not be obliged to suspend or dismiss proceedings under Art. 6, nor would they be obliged to recognise or enforce judgments under Art. 8.
[320] A declaration under Art. 26(5) is different from a declaration under Art. 21 because, under the latter, the Convention would not apply to any proceedings involving the specific matter in question; under Art. 26(5), on the other hand, the Convention continues to apply where there is no inconsistency – in other words, in situations where those obligations under the Convention that still apply to the States making the declaration (because they are not inconsistent with the treaty) guarantee reciprocity.
[321] By "non-maritime lien" States is meant Contracting States that are not Parties to the treaty on maritime liens.
[322] This is based on the explanations given in para. 273 and 274, *supra*.

294. **Parties.** The word "party" has the same meaning in paragraph 6 of Article 26 as it does in the earlier paragraphs: it means a person who is a party to the choice of court agreement, or who is bound by it or entitled to invoke it.[323] In addition, the person must be a party to the proceedings. A "party", therefore, is a party to the proceedings who is bound by the choice of court agreement or entitled to invoke it.

295. **The European Community.** We are now in a position to give some illustrations. The European Community is a Regional Economic Integration Organisation. The Brussels Regulation is a piece of European Community legislation that covers much the same ground as the Convention. The most important conflicts that are likely to occur between the Brussels Regulation and the Convention concern the *lis pendens* rule and insurance. We shall use these differences to give examples of the operation of Article 26(6).

296. ***Lis pendens.*** Under the Brussels Regulation, a court of a Member State of the European Community cannot hear a case where a court of another Member State was seised first of proceedings involving the same cause of action and between the same parties (unless and until the other court declines jurisdiction). This applies even where the court seised second was designated in an exclusive choice of court agreement.[324] The first group of examples will be based on this point.

297. **First example.**[325] A company resident in Austria concludes a contract with a company resident in Finland. The contract contains a choice of court clause designating the Rotterdam District Court in the Netherlands. The Austrian company brings proceedings in Austria. The Finnish company then sues in Rotterdam. The Rotterdam court cannot hear the case unless and until the Austrian court gives up jurisdiction.[326] This is because none of the parties is resident in a Contracting State that is not a Member State of the European Community; therefore, pursuant to Article 26(6) *a)*, the rules of the European Community are not affected by the Convention.

298. **Second example.**[327] A company resident in Austria concludes a contract with a company resident in State X, a State that is not a Party to the Convention. The contract contains a choice of court clause designating the Rotterdam District Court. The Austrian company brings proceedings in Austria. The company from State X then sues in Rotterdam.[328] The Rotterdam court cannot hear the case unless and until the Austrian court gives up jurisdiction.[329] This is because none of the parties is resident in a Contracting State that is not a Member State of the European Community; therefore, pursuant to Article 26(6) *a)*, the rules of the European Community are not affected by the Convention.

299. **Third example.**[330] A company resident in Austria and a company resident in Brazil conclude a contract. The contract contains a choice of court clause designating the District Court of Rotterdam. The Austrian company sues the Brazilian company in Austria. The Brazilian company responds by bringing proceedings against the Austrian company before the Rotterdam court. The Rotterdam court must hear the case in accordance with Article 5

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[323] On the question when a person who is not a party to the choice of court agreement is nevertheless bound by it, see para. 97, *supra*.

[324] *Gasser* v. *MISAT*, Case C-116/02, [2003] ECR I-14721 (available at < http://curia.europa.eu/ >) (Court of Justice of the European Communities). This case was on the equivalent provision in the Brussels Convention, but would also apply under the Brussels Regulation.

[325] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.

[326] Art. 27 of the Brussels Regulation.

[327] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.

[328] Art. 23 of the Brussels Regulation (the Regulation's rule on choice of court agreements) also covers cases where only one of the parties is domiciled in a Member State of the European Community.

[329] Art. 27 of the Brussels Regulation.

[330] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.

of the Convention, since one of the parties (the Brazilian company) is resident in a Contracting State that is not a Member State of the European Community; therefore, Article 26(6) *a)* does not prevent the rules of the Community from being affected by the Convention. Consequently, the Rotterdam court is not permitted to apply the *lis pendens* rule in Article 27 of the Brussels Regulation. On the other hand, the Austrian court would be obliged to dismiss the case both under Article 23 of the Brussels Regulation and under Article 6 of the Convention.

300. **Fourth example.**[331] On the facts set out in the previous paragraph, assume that the Austrian court is not obliged to dismiss the case under Article 6 of the Convention because one of the exceptions to that provision applies. Assume, however, that the obligation to respect the choice of court agreement under Article 23 of the Brussels Regulation – and therefore to dismiss the case – still applies. In such a situation, the Austrian court would be obliged to dismiss the case under Article 23 of the Brussels Regulation. Article 26(6) of the Convention would not apply because there would be no inconsistency between the Convention and the Regulation: the exceptions to Article 6 of the Convention only *allow* the Austrian court to hear the case; they do not *oblige* it to do so. If one compares the third and the forth example it becomes clear that it makes no difference whether one of the grounds mentioned in Article 6 *a)* to *e)* applies; the court seised but not chosen (which was seised first) would always have to dismiss the case under Article 23 of the Brussels Regulation.

301. **Fifth example.**[332] A company resident in Austria and a company resident in Brazil conclude a contract. The contract contains a choice of court clause designating the District Court of Rotterdam. The Rotterdam court is seised first. Subsequently, the Austrian company sues the Brazilian company before a court in Austria. The Austrian court would be required to stay or dismiss[333] the proceedings under Article 27 of the Brussels Regulation (*lis pendens*).[334] It would not be required to consider whether one of the exceptions to Article 6 of the Convention applied because, even if it did, Article 6 would not *require* the Austrian court to hear the case.[335] Consequently, Article 26(6) *a)* of the Convention would not affect the application of the Brussels Regulation by the Austrian court.

302. **Insurance.** Articles 8 to 14 of the Brussels Regulation lay down rules on jurisdiction for proceedings relating to insurance. Article 13 forbids choice of court agreements that depart from these rules, except in certain limited situations.[336] The prohibition against choice of court agreements does not, however, apply to various kinds of marine and aviation insurance,[337] nor does it apply to "large risks" as defined by Community law.[338] Outside these exceptions, a choice of court agreement that departs from the jurisdictional rules on insurance is invalid under the Regulation. The Convention, on the other hand, applies to all kinds of insurance, except those to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party.[339] Between these two extremes, there are a number of insurance contracts that are covered by the Convention but to which the ban on choice of court agreements under the Regulation applies. It is in these cases that a

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[331] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.
[332] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.
[333] It would be required to stay the proceedings under Art. 27(1) until such time as the jurisdiction of the Rotterdam court was established; then it would be required to dismiss the proceedings under Art. 27(2).
[334] It would also be required to dismiss the proceedings under Art. 23 of the Brussels Regulation (choice of court agreements), unless the choice of court agreement did not comply with para. 1 of that provision.
[335] See para. 145, *supra*.
[336] The only choice of court agreements permitted are those that: (1) are entered into after the dispute has arisen; (2) allow the policyholder, the insured or a beneficiary (but not the insurer) to bring proceedings in courts other than those indicated by the Regulation; (3) are concluded between a policyholder and an insurer both of whom are domiciled or habitually resident in the same Member State and which confer jurisdiction on the courts of that State; (4) are concluded with a policyholder who is not domiciled in a Member State (except in so far as the insurance is compulsory or related to immovable property in a Member State) or (5) relate to insurance that covers one of the risks set out in Art. 14 of the Regulation.
[337] Art. 13(5) and para. 1 to 4 of Art. 14 of the Regulation.
[338] Art. 14(5) of the Regulation, and Art. 5 of Directive No 88/357, OJ 1988 L 172, p. 1, amending Art. 5 of Directive No 73/239, OJ 1973 L 228, p. 3.
[339] Art. 2(1) *a)* of the Convention.

conflict is possible.

303. **First example.**[340] A Dutch insurance company enters into a contract of commercial insurance with X, a company resident in Spain. The contract contains a choice of court clause specifying the Rotterdam District Court. The contract is covered by the prohibition on choice of court agreements in Article 13 of the Regulation. The insurance company sues X before the chosen court. The chosen court cannot hear the case: the Brussels Regulation overrides the Convention by virtue of Article 26(6) *a)* of the Convention.

304. **Second example.**[341] A Canadian insurance company establishes a branch office (not separately incorporated) in Spain.[342] It enters into a contract of commercial insurance with X, a company resident in Spain. The contract contains a choice of court clause specifying the Rotterdam District Court. The contract is covered by the prohibition on choice of court agreements in Article 13 of the Regulation. The insurance company sues X before the chosen court. Article 26(6) *a)* would not apply because one of the parties is resident in a Contracting State that is not a Member State of the European Community (Canada). The Rotterdam court must hear the case.

305. **Second REIO "give-way" rule.** The second "give-way" rule on conflicts with the legislation of a Regional Economic Integration Organisation is similar to the third "give-way" rule on conflicting treaties. It is contained in Article 26(6) *b)* and provides that the Convention will not affect the rules of a Regional Economic Integration Organisation concerning the recognition or enforcement of judgments between Member States of the Regional Economic Integration Organisation. There is, however, one important difference: there is no provision that the judgment may not be recognised or enforced to a lesser extent than under the Convention.

306. **The Brussels Regulation.** In general, the Brussels Regulation provides for a *greater* degree of recognition and enforcement than the Convention. To a large extent, recognition and enforcement are automatic under the Regulation. The grounds of refusal, set out in Articles 33 to 37 of the Regulation, are more restricted than the grounds of refusal under Article 9 of the Convention. So the absence of a provision that the judgment may not be recognised or enforced to a lesser extent than under the Convention is not of great importance in so far as the Brussels Regulation is concerned. Insurance is, however, an exception.

307. **Insurance.** Article 35(1) of the Regulation provides that a judgment will not be recognised if it conflicts with Section 3 of Chapter II. This Section contains Articles 8 to 14, which (as we have seen[343]) lay down rules on jurisdiction for proceedings relating to insurance. Article 13 of the Regulation forbids choice of court agreements that depart from these rules, except in certain limited cases.[344] Outside these limited exceptions, a choice of court agreement that departs from the jurisdictional rules on insurance is invalid under the Regulation.[345] This means that, where Articles 8 to 14 of the Regulation prevail over the Convention by reason of the first REIO "give-way" rule (Art. 26(6) *a)* of the Convention), a judgment given contrary to those provisions by a court in a Member State of the European Community would not be recognised or enforced in any other Member State of the European Community. In this one exceptional case, the Brussels Regulation is less favourable to recognition and enforcement than the Convention.

308. Where, on the other hand, the Convention prevails over the Regulation (because one of the parties is resident in a Contracting State outside the European Community), Articles 8

[340] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.
[341] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.
[342] Under Art. 9(2) of the Brussels Regulation, the insurance company would be deemed to be domiciled in Spain. However, under the Convention, it would be resident in Canada.
[343] Para. 302, *supra*.
[344] See note 336, *supra*.
[345] See para. 302, *supra*.

to 14 of the Regulation would not be applicable; so the rule in Article 35(1) of the Regulation would not apply. Consequently, the judgment would be recognised and enforced under the Regulation.[346]

309. **First example.**[347] A Dutch insurance company enters into a contract of commercial insurance with X, a company resident in Spain. The contract contains a choice of court clause specifying the Rotterdam District Court. The contract is covered by the prohibition on choice of court agreements in Article 13 of the Regulation. The insurance company sues X before the chosen court. The chosen court cannot hear the case: the Brussels Regulation overrides the Convention by virtue of Article 26(6) *a)* of the Convention. If the Rotterdam court nevertheless hears the case, its judgment will not be entitled to recognition or enforcement under the Convention in Spain. Under Article 26(6) *b)* of the Convention, the provisions of the Brussels Regulation prevail over those of the Convention, and, under Article 35(1) of the Regulation, the judgment will not be recognised, since it conflicts with Article 13 of the Regulation (contained in Section 3 of Chapter II).

310. **Second example.**[348] A Canadian insurance company establishes a branch office (not separately incorporated) in Spain.[349] It enters into a contract of commercial insurance with X, a company resident in Spain. The contract contains a choice of court clause specifying the Rotterdam District Court. The contract is covered by the prohibition on choice of court agreements in Article 13 of the Regulation. The insurance company sues X before the chosen court. Article 26(6) *a)* would not apply because one of the parties is resident in a Contracting State that is not a Member State of the European Community (Canada). The Rotterdam court must hear the case. Its judgment will be recognised and enforced in Spain under the Brussels Regulation. Article 35(1) of the Regulation will not apply, since the provisions forbidding choice of court agreements in insurance contracts contained in Article 13 of the Regulation would not be applicable to the case.

Article 27 Signature, ratification, acceptance, approval or accession

311. Article 27 is concerned with the ways in which a State may become a Party to the Convention. Any State may become a Party to it either by signature followed by ratification, acceptance or approval, or by accession. (In some other Hague conventions, an acceding State is in a less favourable position than a ratifying State, since accession to those conventions is subject to the agreement of the States that are already Parties. This is not the case with the Convention.) Whatever method is adopted by a State wishing to become a Party, the resulting status is the same. With a view to facilitating widespread adherence to the Convention, it is left to States to choose whichever method is most convenient for them. The relevant instruments are deposited with the Ministry of Foreign Affairs of the Netherlands, the depositary of the Convention.

Article 28 Declarations with respect to non-unified legal systems

312. Article 28 is concerned with States that consist of two or more territorial units.[350] It permits such a State to declare that the Convention will extend only to some of its territorial units. Thus, the United Kingdom could sign and ratify, or accede, for England only, and China for Hong Kong only. Such a declaration may be modified at any time. This provision is

[346] Any other solution would have the absurd result that the chosen court would be entitled and required to hear the case, but its judgment would not be recognised or enforced. Since no court other than the chosen court could hear the case, it would be impossible to obtain a judgment from a court in a Member State of the European Community that would be recognised and enforced in other Member States of the European Community. Insurers from outside the European Community would then be forced to designate a court outside the European Community in order to ensure that the resulting judgment would be recognised within the European Community.
[347] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.
[348] It will be remembered that in all examples given in this Report it is assumed, unless explicitly stated otherwise, that the Convention is in force and that the States mentioned are Parties to it: see the statement on p. 20, *supra*.
[349] Under Art. 9(2) of the Brussels Regulation, the insurance company would be deemed to be domiciled in Spain. However, under the Convention, it would be resident in Canada.
[350] This Article does not apply to Regional Economic Integration Organisations.

particularly important for States in which the legislation necessary to give effect to the Convention would have to be passed by the legislatures of the units (for example, by provincial and territorial legislatures in Canada).

Article 29 Regional Economic Integration Organisations

313. Articles 29 and 30 make provision for a Regional Economic Integration Organisation to become a Party to the Convention.[351] There are two possibilities. The first is where both the Regional Economic Integration Organisation and its Member States become Parties. This might occur if they enjoy concurrent external competence over the subject matter of the Convention (joint competence), or if some matters fall within the external competence of the Regional Economic Integration Organisation and others within that of the Member States (which would result in shared or mixed competence for the Convention as a whole). The second possibility is where the Regional Economic Integration Organisation alone becomes a Party. This might occur where it has exclusive external competence over the subject matter of the Convention. In such a case, the Member States would be bound by the Convention by virtue of the agreement of the Regional Economic Integration Organisation.

314. Article 29 is concerned with the first possibility. It permits Regional Economic Integration Organisations constituted solely by sovereign States to become Parties to the Convention if they possess external competence over some or all of the matters covered by it. To the extent that it has such external competence, the Regional Economic Integration Organisation has the same rights and obligations as a Contracting State. Where this is the case, it must notify the depositary of the matters for which it has external competence, and of any changes in this regard.[352]

Article 30 Accession by a Regional Economic Integration Organisation without its Member States

315. Article 30 is concerned with the second possibility, where the Regional Economic Integration Organisation alone becomes a Party. Where this occurs, the Regional Economic Integration Organisation may declare that its Member States are bound by the Convention.[353]

316. **Meaning of "State".** Where a Regional Economic Integration Organisation becomes a Party to the Convention – whether under Article 29 or under Article 30 – any reference in the Convention to "Contracting State" or to "State" applies equally, where appropriate, to the Regional Economic Integration Organisation. This provision parallels Article 25(1). Its effect has already been discussed.[354] It should be noted, however, that Article 26(6) is a *lex specialis* to Articles 29 and 30 as far as the application of legal instruments of a Regional Economic Integration Organisation is concerned. Where the Convention does not give way to such an instrument under Article 26(6), it is not possible to use Articles 29 or 30 to justify the application of the instrument instead of the Convention.

Article 31 Entry into force

317. Article 31 specifies when the Convention will enter into force. This will be on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession. Similar rules are laid down for when it comes into force for a given State or Regional Economic Integration Organisation that subsequently becomes a Party to it,[355] and for a territorial unit to which it has been extended under Article 28(1).[356]

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[351] It was agreed by the Diplomatic Session that "Regional Economic Integration Organisation" should have an autonomous meaning (not dependent on the law of any State) and that it should be interpreted flexibly to include sub-regional and trans-regional organisations as well as organisations whose mandate extends beyond economic matters: see Minutes No 21 of the Twentieth Session, Commission II, para. 49 to 61.
[352] Art. 29(2).
[353] Art. 29(4). This would be the case, for example, under Art. 300(7) of the *Treaty establishing the European Community*.
[354] See para. 258 to 260, 17, 107 and 128 to 131, *supra*.
[355] Art. 31(2) *a)*.
[356] Art. 31(2) *b)*.

Reservations

318. The Convention does not contain any provision prohibiting reservations. This means that reservations are permitted, subject to the normal rules of customary international law (as reflected in Art. 2(1) *d)* and Art. 19 to 23 of the *Vienna Convention on the Law of Treaties* 1969).

319. The following statement was, however, adopted by the Diplomatic Session:

> "It is the understanding of this Commission that no reservation should be encouraged in any way and that whenever a State wants to make a reservation – it should be made only if a State has a strong interest to do so; it should be no broader than necessary and be defined clearly and precisely; it should not deal with a specific matter that can be the object of a declaration; and it should not be detrimental to the object and purpose and to the coherence of the Convention.
>
> This position as expressed by this Commission has effects limited only to this Convention and it shall in no way be considered as related to any future Convention of the Hague Conference."[357]

Article 32 Declarations

320. The declarations referred to in Articles 19, 20, 21, 22 and 26 may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time. They are made to the depositary (the Ministry of Foreign Affairs of the Netherlands).

321. A declaration made at the time of signature, ratification, acceptance, approval or accession takes effect simultaneously with the entry into force of the Convention for the State concerned. A declaration made at a subsequent time, and any modification or withdrawal of a declaration, takes effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary. A declaration under Articles 19, 20, 21 and 26 does not apply to exclusive choice of court agreements concluded before it takes effect.[358]

Article 33 Denunciation

322. Article 33 provides that a Contracting State may denounce the Convention by a notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which the Convention applies. The denunciation takes effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 34 Notifications by the depositary

323. Article 34 requires the depositary to notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded to the Convention, of various matters relevant to the Convention, such as signatures, ratifications, entry into force, declarations and denunciations.

[357] See Minutes No 23 of the Twentieth Session, Commission II, para. 1 to 31, in particular para. 29 to 31.
[358] Art. 22 is not mentioned here; hence an Art. 22 declaration may also cover choice of court agreements concluded prior to the date on which the declaration took effect under Art. 32(3) or (4); see para. 253 *et seq.*, *supra.*