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Proposal for a

COUNCIL DECISION

**on the approval, on behalf of the European Union, of the Hague Convention of 30 June
2005 on Choice of Court Agreements**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. Purpose of the proposal

The Commission is proposing that the EU approves the 2005 Convention on Choice of Court Agreements. The Convention was signed by the Union on 1 April 2009 on the basis of the Council Decision 2009/397/EC¹.

The Action Plan implementing the Stockholm Programme announced the Commission's intention to propose approval of the Convention in 2012.

Having the EU approve the Convention would reduce legal uncertainty for EU companies trading outside the EU by ensuring that choice of court agreements included in their contracts are respected and that judgments issued by the courts designated in such agreements would be eligible for recognition and enforcement in the other Contracting Parties to the Convention.

Overall, approval of the Convention by the EU would complement the realisation of the aims underlying the EU rules on the prorogation of jurisdiction, by creating a harmonised set of rules within the EU in respect of third states which will become Contracting Parties to the Convention.

1.2. The Hague Convention of 30 June 2005 on Choice of Court Agreements

The Convention on Choice of Court Agreements was concluded on 30 June 2005 under the auspices of the Hague Conference on Private International Law. It is designed to offer greater legal certainty and predictability for parties involved in business-to-business agreements and international litigation by creating an optional worldwide judicial dispute resolution mechanism alternative to the existing arbitration system.

In particular, the objective of the Convention is to promote international trade and investment through enhanced judicial cooperation by introducing uniform rules on jurisdiction based on exclusive choice of court agreements and on the recognition and enforcement of judgments given by the chosen courts in its Contracting Parties.

The Convention seeks to achieve a balance between (i) the need to guarantee to the parties that only the courts chosen by them will hear the case and that the resulting judgment will be recognised and enforced abroad, and (ii) the need to allow States to pursue some aspects of their public policy, related in particular to the protection of weaker parties, protection against serious unfairness in particular situations and guaranteed respect for some grounds of exclusive jurisdiction of States.

1.3. How the Convention relates to the Brussels I Regulation

At EU level, international jurisdiction of the Union courts based on choice of court agreements is governed by the Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation)² (to be replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)³ as of 10 January 2015). The Brussels I Regulation does not however govern the enforcement in the Union of choice of court agreements in favor of third

¹ OJ L 133, 29.5.2009, p. 1.

² OJ L 12, 16.1.2001, p. 1.

³ OJ L 351, 20.12.2012, p. 1.

State courts⁴. This would be achieved once the Convention on Choice of Court Agreements is approved by the Union.

The recent amendments to the Brussels I Regulation (the Brussels I Regulation (recast)) have strengthened party autonomy by ensuring that choice of court agreements may not be circumvented by parties seizing other courts in violation of such agreements. At the same time, these amendments ensure that the approach to choice of court agreements for intra-EU situations is consistent with the one that would apply to extra-EU situations under the Convention, once approved by the Union. The Brussels I Regulation (recast) thus prepares the ground for the EU to proceed with the approval of the Convention.

The relationship between the rules contained in the Convention and the existing and future EU rules is set out in Article 26(6) of the Convention as follows:

‘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.’

Consequently, the Convention affects the application of the Brussels I Regulation if at least one of the parties is resident in a Contracting State to the Convention. The Convention will prevail over the jurisdiction rules of the Regulation except if both parties are EU residents or come from third states, not Contracting Parties to the Convention. With regard to the recognition and enforcement of judgments, the Regulation will prevail where the court that made the judgment and the court in which recognition and enforcement is sought are both located in the Union.

The Convention, once approved by the EU, will therefore reduce the scope of application of the the Brussels I Regulation. Nevertheless, this reduction of scope is acceptable in the light of the increase in the respect for party autonomy at international level and increased legal certainty for EU companies engaged in trade with third State parties.

1.4. Benefits for European business

A choice of court agreement is a significant element in the negotiation of international contracts, as it ensures legal predictability in the event of a dispute. It is therefore an important element in the risk assessment for companies when engaging in international trade. The figures collected in the course of preparing of the Commission’s proposal on signature of the Convention and on the Brussels I Regulation (recast)⁵ show the importance of choice of court agreements for EU business in their B2B relations.

The effectiveness of choice of court agreements within the EU is ensured through the Brussels I Regulation. Party autonomy needs to be ensured not only within the EU but also beyond the EU’s borders. The Convention will give EU business the necessary legal certainty that their

⁴ Enforcement in the Union of choice of court agreements in favour of Switzerland, Iceland and Norway courts is governed by the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁵ Commission staff working paper accompanying the proposal for a Council Decision on the signing by the European Community of the Convention on Choice of Court Agreements, SEC(2008) 2389 of 5 9 2008 and Impact Assessment accompanying the Commission’s proposal for the Brussels I Regulation (recast), SEC (2010) 1547 final of 14 12 2010.

choice of court agreements in favour of a court outside the EU are respected in the EU, and that agreements in favour of a court in the EU are respected in third States. It will also ensure that EU businesses can be confident that a judgment given by the chosen court in the EU is eligible for recognition and enforcement in third states, Contracting Parties to the Convention, and *vice versa*.

The Commission's impact assessment on conclusion of the Convention by the EU (SEC/2008/2389 final) concluded that approving the Convention could increase business's propensity to include choice of court agreements in international contracts, because of the greater legal certainty. Overall, it may act as a stimulus to international trade.

The benefits to EU business that emerge from approval by the EU of the Convention will increase with the number of ratifications of the Convention in particular by the Union's main commercial partners.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

Before proposing the Council decision on the signature of the Convention, the Commission carried out in 2008 an impact assessment on conclusion of the Convention by the EU⁶. It found that conclusion of the Convention would be beneficial in terms of promoting legal certainty and predictability for European businesses in respect of third States.

The impact assessment suggested that, when approving the Convention, the EU might consider making declarations under Article 21 of the Convention excluding from its scope copyright and related rights (where validity of these rights is linked to the Member States) and insurance contracts (where the policyholder is domiciled in the EU and the risk or insured event, item or property is related exclusively to the EU). Given the impact on both industries and the fact that the views of the stakeholders have in the past been divided, the Commission further considered the need to make such declarations. Notably, its decision to propose the approval of the Convention with a declaration on the scope of the Convention was preceded by consultations with the Member States in the Council Working Party on Civil Law Matters (General Questions) on 28 May 2013 (for further information see point 3.2 below).

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. Union competence with respect to the Convention

The Convention makes it possible for a Regional Economic Integration Organisation, depending on the scope of the competencies over the subject matter of the Convention, to conclude the Convention together with its Member States or alone, with the consequence of binding its Member States (Articles 29-30). The relevant declaration can be made at the time of signing, acceptance, approval or accession to the Convention.

When the EU signed the Convention, it declared in accordance with Article 30 of the Convention that it exercises competence over all the matters governed by the Convention and that its Member States will not be Contracting Parties to the Convention, but will be bound by it by virtue of its conclusion by the EU. Therefore, there is no need for the EU to make a further declaration under Article 30 when it approves the Convention.

⁶ Referred to in footnote 5.

3.2. Declarations under the Convention affecting its substantive scope

In the interests of flexibility and of maintaining its potentially broad appeal, the Convention makes it possible for the Contracting Parties to extend or reduce its substantive scope by making the relevant declarations (Articles 19-22). Declarations may be made upon signature or approval or at any time thereafter, and may be modified or withdrawn at any time. When signing the Convention, the Union made no declarations under these Articles. As mentioned above, the Commission carried out further consultations with the Member States in May-June 2013 on the need for such declarations. The results of the consultations are presented below.

3.2.1. Declarations under Articles 19, 20 and 22

Article 19 permits a State to make a declaration by virtue of which its courts may refuse to determine disputes to which an exclusive choice of court agreement applies in cases which show no other connection with their State except for the choice of court. Article 20 permits a State to make a declaration 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. Articles 19 and 20 thus permit to exclude from the scope of the Convention certain situations which, other than the choice of court, show no other international element.

Article 22 offers the possibility for a State to extend the scope of the Convention to cover non-exclusive choice of court agreements as far as the recognition and enforcement of judgments is concerned. Because of the reciprocity principle, the obligation to recognize and enforce judgments based on non-exclusive choice of court agreements extends only to judgments given by courts of other Contracting Parties that have themselves made Article 22 declarations.

With respect to Articles 19 and 20, it should be pointed out that Union law recognises choice of court agreements in situations where the choice of court is the only connection to the State of the chosen court. Union law does not require an additional connection to the chosen State besides the choice of court. There therefore seems no reason to exclude such situations from the scope of the Convention. This was confirmed in the consultations carried out by the Commission among Member States regarding possible declarations under Articles 19-20. The Commission therefore does not propose making declarations under these Articles.

With respect to Article 22, if the scope of the Convention were extended, the recognition and enforcement of judgments given on the basis of non-exclusive choice of court agreements would lead to the result that the courts of EU Member States in general could not take jurisdiction in situations where they would be seized by one of the parties after a judgment based on a non-exclusive choice of court agreement had already been given by the court of another Contracting Party which had made a declaration under Article 22. The Commission does not propose making the declaration under Article 22 when the Convention is approved. Given that the Article is based on reciprocity principle, the potential declaration could be possibly considered at a later stage once the interests of other Contracting Parties to the Convention in extending its scope under Article 22 have become evident. The views of the Member States which replied to the Commission's consultation support in principle the Commission's proposal to proceed without declaration at the moment.

3.2.2. *Declarations under Article 21*

3.2.2.1. The declarations in general

Article 2 of the Convention already provides for a number of exclusions from its scope. In addition, Article 21 allows the Contracting Party to extend the list of excluded matters by making a declaration specifying the matter that it intends to exclude. Consequently, the Convention would not apply with regard to that matter in the State making the declaration, and, because of reciprocity, other States would not apply the Convention to the matter in question where the chosen court is in the State which had made the declaration. Furthermore, the following conditions must be met for the declaration: there has to be a strong interest on the part of the declaring state in not applying the Convention to a specific matter; the declaration may not be broader than necessary and the specific matter excluded must be clearly and precisely defined⁷.

The Commission's impact assessment of 2008 suggested to give consideration to the Union making a declaration under Article 21 of the Convention and thereby exclude from its scope matters relating to insurance contracts - where the policyholder is domiciled in the EU and the risk or insured event, item or property is related exclusively to the EU – and to copyright and related rights where the validity of these rights is linked to a Member State. The aim of such declarations would be to protect the weaker party to an insurance contract (similar to the protection available under the Brussels I Regulation) and to a copyright contract from having to litigate in the chosen court which may have been imposed on them by a co-contractor in a stronger position, and, arguably, to ensure the application of certain standards on copyright and related rights established under EU law.

As mentioned earlier, the Commission has carried out further consultations with the Member States on the need for any declarations under Article 21, taking into account the policy with respect to choice of court agreements in Union law and bearing in mind that due to the reciprocity principle, the exclusion of a specific matter from the scope would mean that choice of court clauses in favor of Union courts which might benefit EU parties would not be enforced in third States Contracting Parties to the Convention. Taking into account the results of the consultation, the Commission proposes to limit the declaration under Article 21 to those matters where Union law equally limits party autonomy. This is the case, for matters falling within the scope of the Convention, only with respect to certain type of insurance contracts concluded for purposes which can be regarded as being within the trade or profession engaged in by the parties. Such a limited exclusion will ensure a coherent approach to choice of court within and outside the Union.

3.2.2.2. The proposed declaration on insurance contracts

The Brussels I Regulation (Section 3) provides for special protective jurisdiction in matters of insurance aimed at protecting the weaker party (the policyholder, the insured party or a beneficiary) and the economic interests of the general public of the place where the weaker party is located. The insured party, as plaintiff, therefore has a choice of suing the insurer at several places, including the place where the insured party is domiciled; the insurer, as plaintiff, can sue the insured party in principle only where the latter is domiciled. These protective jurisdiction rules are based on the premise that the insured party is always the weaker party, even if he acts as a commercial operator in B2B relations. There is no change to

⁷ As further explained in the Explanatory Report to the Convention: 'it was intended by the Diplomatic Session that this provision should apply only to discrete areas of 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'' (paragraph 235). Thus, the only criterion permitted is that of subject matter.

this presumption in the Brussels I Regulation (recast). For this reason, the possibility of the parties concluding the choice of court agreement has been limited (Article 13 of the Regulation). The protective jurisdiction rules in Section 3, in cases against the insurer, apply only if the latter is domiciled or deemed to be domiciled (via branch, agency or establishment) in the EU. There is no change to this protective policy in the Brussels I Regulation (recast).

The Convention on its part applies to insurance matters without limiting party autonomy to conclude choice of court agreements. The only substantive limitation results from Article 2(1)(a) of the Convention which excludes insurance contracts entered into by private persons as consumers. This is partially contrary to the regime established in the Brussels I Regulation insofar as, for instance, the Convention would apply to insurance contracts concluded by SMEs. Once the Convention is approved by the EU, certain insurance contracts which now fall under the Brussels I Regulation, e.g. contracts between an EU policyholder and the EU branch of an insurer with headquarters outside the EU (Article 9(2) of the Regulation) would fall within the scope of the Convention (Article 26(6), in conjunction with Article 4(2) of the Convention). Therefore, if the Convention were to be concluded without excluding insurance contracts, there would be a lack of parallelism with the protective policy established in the Brussels I Regulation which allows the insured party to sue an EU insurer (or a EU branch of third State insurer) in his own place of domicile irrespective of any other jurisdiction available under a choice of court agreement. The downside of the complete exclusion of insurance contracts, from the point of view of European insurers, is that choice of court clauses they have negotiated with non-European policyholders would not be recognised and enforced in third States which are Contracting Parties to the Convention. From the perspective of the European policyholders, these would lose the advantage of having the decisions of EU courts' (chosen by the parties) recognised and enforced outside the Union under the Convention. However, the advantages of having at external level the same regime protecting the interests of EU weaker parties as under EU internal legislation, out-weights these disadvantages.

The views of the Member States which replied to the Commission's consultation on this matter were mixed with an almost equal numbers for and against excluding insurance contracts from the scope of the Convention. The Commission therefore proposes, following the impact assessment and in order to ensure consistency with EU internal protective legislation, to exclude certain type of insurance matters from the scope of the Convention without further conditions. Article 21 of the Convention requires any declaration to be formulated by subject matter only. As a result, any declaration under Article 21 could not be formulated in such a way that it would benefit unilaterally EU parties.

Articles 13 and 14 of the Brussels I Regulation do not limit party autonomy in insurance contracts in all cases. There are a number of exceptions in which parties are allowed to designate the court competent to hear their disputes. The proposed declaration is formulated in a way so as to allow as much as possible those choice of court agreements which are recognised in Union law to be equally recognised at the international level through the Choice of Court Convention. Nevertheless, in light of the formulation of the exceptions under Union law, which are designed to protect EU policy holders only, and the requirement of the Convention that the declaration should refer to subject matter only, it does not seem possible to ensure complete coherence between the Convention on the one hand and Union law on the other hand. In particular, Article 13(4) of the Brussels I Regulation recognises and enforces choice of court agreements concluded with policy holders domiciled outside the EU, unless the insurance is compulsory or relates to immovable property in a Member State. As it is not possible, under the Convention, to distinguish between policy holders domiciled in and outside the Union, the Commission proposes not to mirror the exception of Article 13(4) in

the declaration. This would have the effect that insurance contracts concluded by policyholders domiciled outside the Union would not be governed by the Convention and would remain governed by internal Union law. As a result, European companies concluding agreements with non-EU policyholders would be ensured to see their choice of court agreement upheld by Union courts on the basis of Article 13(4); European policyholders concluding agreements with non-EU insurance providers would still have access to the EU courts on the basis of Section 3 of Chapter II of the Brussels I Regulation.

Overall, the proposed declaration aims to ensure that:

- the carve-out is as small as is needed to achieve the goal of protecting the interests of weaker parties in insurance contracts as reflected in the protective jurisdiction rules of the Brussels I Regulation. The courts of the EU Member States will be allowed (on the basis of EU or national law, when applicable) to hear the insurance dispute despite a choice of court agreement in favour of the courts of a third State which is a Contracting Party to the Convention;
- it is consistent with the Convention. The declaration is based solely on the subject matter and is neutral;
- there is a parallelism with the Brussels I Regulation which, in its Articles 13 and 14, defines the situations when choice of court agreements are allowed in insurance contracts;
- both the excluded subject matter – insurance contracts – and the situations when the carve-out does not apply are clearly and precisely defined.

Proposal for a

COUNCIL DECISION

on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 81(2), in conjunction with point (a) of the first subparagraph of Article 218(6) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament⁸,

Whereas:

- (1) The European Union is working towards the establishment of a common judicial area based on the principle of mutual recognition of judicial decisions.
- (2) The Convention on Choice of Court Agreements concluded on 30 June 2005 under the auspices of the Hague Conference on Private International Law (hereinafter referred to as the Convention) makes a valuable contribution to promoting party autonomy in international commercial transactions and increasing the predictability of judicial solutions in such transactions. In particular, the Convention ensures the necessary legal certainty for the parties that their choice of court agreement is respected and that a judgment given by the chosen court is eligible for recognition and enforcement in cross-border situations.
- (3) Article 29 of the Convention allows Regional Economic Organisations such as the European Union to sign, accept, approve or accede to the Convention. The Union signed the Convention on 1 April 2009, subject to the conclusion of the Convention at a later date, in accordance with Council Decision 2009/397/EC⁹.
- (4) The Convention affects Union secondary legislation on jurisdiction based on choice by the parties and the recognition and enforcement of the resulting judgments, in particular Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹⁰. Regulation (EC) No 44/2001 is to be replaced as of 10 January 2015 by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹¹.
- (5) Whereas Regulation (EU) No 1215/2012 prepared the ratification of the Convention by ensuring coherence between the Union rules on choice of court in civil and commercial matters and those of the Convention. It would therefore be appropriate for

⁸ OJ C , , p. .

⁹ OJ L 133, 29.5.2009, p. 1.

¹⁰ OJ L 12, 16.1.2001, p. 1.

¹¹ OJ L 351, 20.12.2012, p. 1.

the Convention to enter into force in the Union on the same date of the entry into application of Regulation (EU) No 1215/2012.

- (6) When signing the Convention, the Union declared under Article 30 of the Convention that it exercises competence over all the matters governed by the Convention. Consequently, the Member States should be bound by the Convention by virtue of its approval by the Union.
- (7) Moreover, the Union, should, when approving the Convention, make the declaration allowed under Article 21 excluding from the scope of the Convention insurance contracts in general, subject to defined exceptions. The purpose of the declaration is to preserve the protective jurisdictional rules available to the policyholder, the insured party or a beneficiary in insurance contracts under Section 3 of Regulation (EC) 44/2001. The exclusion should be limited to whatever is necessary to protect the interests of the weaker parties in insurance contracts.
- (8) The United Kingdom and Ireland are bound by Council Regulation (EC) No 44/2001 and are therefore taking part in the adoption of this Decision.
- (9) In accordance with Articles 1 and 2 of Protocol (No 22) on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this decision and is not bound by it or subject to its application,

HAS ADOPTED THIS DECISION:

Article 1

The Hague Convention of 30 June 2005 on Choice of Court Agreements (the Convention') is hereby approved on behalf of the European Union.

The text of the Convention is attached to this Decision as Annex I.

Article 2

The President of the Council shall designate the person empowered to proceed, on behalf of the European Union, to deposit the instrument referred to in Article 27(4) of the Convention in order to express the consent of the European Union to be bound by the Agreement.

Article 3

When depositing the instrument referred to in Article 27(4) of the Convention, the Union shall make the declaration provided in Article 21 concerning insurance contracts.

The text of that declaration is attached as Annex II.

Article 4

This Decision shall enter into force on the day of its adoption.

Done at Brussels,

*For the Council
The President*