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

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A. The Origins of the Convention and the History of the Negotiations

On 30 June 2005, the XX[th] Session of the Hague Conference on Private International Law unanimously adopted the Convention on Choice of Court Agreements. This concludes a long process of political and legal discussions with many ups and downs. While according to its Statute, the Hague Conference normally holds a Diplomatic Session every four years (see Article 3 of the Statute),[1] which adopts at least one Convention, the negotiations which eventually generated the Convention on Choice of Court Agreements lasted nine years at their formal stage which was preceded by a four-year phase of informal preparations.

I. The Preparatory Phase

Following a proposal put forward by the United States of America in 1992,[2] the XVII[th] Session of the Hague Conference on Private International Law decided – first tentatively at the Centenary of Hague Conference meetings in 1993, then definitely at the conclusion of the XVIII[th] Session in 1996, '... to include in the Agenda of the Nineteenth Session the question of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters'.[3] Some preparatory work was carried out between 1992 and 1996.

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1 Available at www.hcch.net under 'Conventions'.

2 By letter from the Legal Adviser of the Department of State to the Secretary General of the Hague Conference; *see* P. Pfund, *Contributing to Progressive Development of Private International Law: The International Process and the United States Approach*, 249 Recueil des Cours 13 at 83 (1994).

3 Final Act of the Eighteenth Session, Part B, No 1, Hague Conference on private international law, Actes & Documents / Proceedings of the Eighteenth Session, Tome I, 1999, at 47.

European Journal of Law Reform, Vol. VIII, no. 1, pp 77-92.

II. The Negotiations between 1997 and 2001

In 1997, in accordance with the decision taken in 1996, the Secretary General of the Hague Conference convened a Special Commission which held five meetings of one or more weeks between June 1997 and October 1999.[4] At the meeting in October 1999, which was supposed to be the last meeting of the Special Commission,[5] a 'preliminary draft Convention[6] on Jurisdiction and Foreign Judgments in Civil and Commercial Matters'[7] was adopted by vote. In its structure and content the text very much resembled the Brussels Convention of 27 September 1968[8] and the Lugano Convention of 16 September 1988,[9] both on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. It contained harmonised bases of jurisdiction which entitled the resulting judgment to benefit from the simplified recognition and enforcement regime of the Convention in other Contracting States. Furthermore, however, unlike the Conventions of Brussels and Lugano which are so-called double conventions, the 1999 Hague text allowed Contracting States to continue to use bases of jurisdiction contained

[4] For further details, *see* P. Nygh & F. Pocar, *Report on the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted by the Special Commission*, Hague Conference, Prel. Doc. No 11, at 25 *et seq.* All Preliminary Documents are available on the website of the Hague Conference at www.hcch.net under 'Conventions' – 'Convention No 37' – 'Preliminary Documents'.

[5] According to the working methods so far largely followed by the Hague Conference, the Diplomatic Sessions held every four years normally adopt (1) the main elements of the work programme for the four years to follow, in particular the next convention project, and (2) the text of a 'draft Convention' elaborated by a Special Commission during the four years since the last Diplomatic Session.

[6] The Special Commission constituted for each project will normally end its work about one to one and a half years before the envisaged date of the Diplomatic Session with the adoption of a 'preliminary draft Convention', thereby leaving time for consultations. The final text adopted during the Diplomatic Session, which is immediately opened for signature, was until 2002 called 'draft Convention' as long as it had not been signed by any State. At the XXth Diplomatic Session in 2005 it was decided that in the future, the Hague Conventions will bear the date of the day of the signing of the Final Act of the Session which adopted the Convention concerned, regardless of whether any State or other entity entitled to do so actually signed the Convention on that day. The Convention of 30 June 2005 on Choice of Court Agreements is the first one to fall under this new regime.

[7] The text of the preliminary draft Convention 1999 and its Explanatory Report by Nygh and Pocar have been published in Prel. Doc. No 11 (*see supra* note 4).

[8] OJ EC C 27/1998, at 1. On 1 March 2002, the Brussels Convention was replaced by Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 22 December 2000 (OJ EC L 12/2001, at 1; the 'Brussels I Regulation') for 14 of the then 15 EU Member States. Since 1 May 2004, the Regulation also binds the ten new Member States. The Convention is, however, still in force between Denmark, on the one hand, and the 14 'old' EU Member States Parties to it. It is envisaged to replace it by an agreement between the Community and Denmark along the lines of the Brussels I Regulation. In this paper, the Brussels and Lugano Conventions, together with the Brussels I Regulation, will be referred to as 'the European instruments'.

[9] OJ EC L 319/1988, at 9. The Lugano Convention applies between the 15 'old' Member States of the European Union and Iceland, Norway, Poland and Switzerland.

in their internal law, as long as they were not prohibited by a so-called black list in the Convention. These bases were called 'the grey area jurisdiction'. A judgment based on one of these national grounds which was neither explicitly echoed in nor prohibited by the Convention would not be entitled to recognition and enforcement under the Convention in other Contracting States. Recognition and enforcement under the internal law of the State concerned remained possible.

The consultations carried out in the Member States of the Hague Conference on the preliminary draft Convention adopted in October 1999 showed that the text did not meet global support. Moreover, in the late 1990s, the Internet and electronic commerce were becoming ever more important. Doubts were raised as to whether rules drafted in the 1960s (the Brussels Convention) and largely based on the localisation of the connecting factors such as the place of performance, the place of the injury, etc., could be applied to a digital environment where everything was ubiquitous. This was of particular importance for the area of torts committed over the Internet, e.g. defamation or the infringement of intellectual property rights. And there was a third party involved in addition to the alleged injurer and the injured person: the Internet service provider (ISP). In the substantive laws of the States negotiating in The Hague, the role of the ISP and its possible liability had not yet been defined or regulation was just under way, and among ISPs there was a fear of being held liable under highly different laws, depending on jurisdiction rules and the possibility for forum shopping. Also, the intellectual property community became finally aware[10] that the Hague treaty under negotiation could affect intellectual property rights.

For all these reasons, it was felt that more time and study was needed in order to appropriately deal with the factual changes brought about by the new digital media. The negotiating parties in The Hague therefore decided in April 2000 to suspend formal negotiations and conduct informal discussions on how to reach consensus on specific issues, including intellectual property and e-commerce. Informal meetings hosted by individual States were held in Canada, the Netherlands, Scotland, Switzerland and the United States of America in 2000 and 2001.[11] The Geneva meeting in January 2001 was the first meeting on the Judgments Project ever to focus exclusively on intellectual property issues.[12]

After this series of informal meetings, delegations felt sufficiently confident that they could now come to agreement when resuming formal negotiations. Moreover, it was agreed that the next step should not be based on voting but be consensus-based. Because it was felt that the latter might require more time, it was decided to split the Diplomatic Session (which was the only remaining 'formal' step because the Special Commission had terminated its work in October 1999) in two parts. The first part took place in June 2001 and produced a draft entitled 'Interim Text'.[13] Wherever it was impossible to reach unanimity – even

[10] *See, i.a.*, R. Dreyfuss, *An Alert to the Intellectual Property Bar: The Hague Judgments Convention*, 2001 University of Illinois Law Review 421.

[11] *See*, for a summary description of the informal meetings, the report produced by the Permanent Bureau of the Hague Conference (Prel. Doc. No 15) at www.hcch.net (*supra* note 4).

[12] A report (Prel. Doc. No 13) is available at www.hcch.net (*supra* note 4).

[13] Available at www.hcch.net (*supra* note 4).

in case of a single delegation opposing a proposal –, square brackets were added. The number of square brackets, options, variants and alternatives made the text very difficult to understand.

III. Change of Focus: the Informal Working Group 2002/2003 and Formal Negotiations on a Choice of Court Convention 2003-2005

In April 2002, the Special Commission on General Affairs and Policy of the Hague Conference[14] convened in order to decide how to proceed further. While some delegations still had a strong interest in a global instrument covering all kinds of civil and commercial cases, and containing specific bases of jurisdiction for all of them, others stressed that the meeting in 2001 had demonstrated that it would be impossible to reach unanimity on all these issues within a reasonable time. In light of the time and effort already spent on the project and in an attempt to reconcile both positions, it was therefore decided to change first of all the working method: The Permanent Bureau of the Hague Conference was requested to establish an informal working group, reflecting the legal traditions of the Member States of the Hague Conference, which should try to draft a text that could then serve as a basis for future work. The group was supposed to use a 'bottom-up-approach', starting from the basis of jurisdiction in previous drafts that seemed least controversial, namely choice of court clauses in business to business (B2B) cases. The group was supposed to subsequently examine other bases of jurisdiction on which consensus seemed possible. As possible 'candidates', the Commission on General Affairs listed general defendant's forum, submission, counter-claims, branches, trusts and physical torts.[15]

The informal working group was chaired by Professor Allan Philip from Denmark and included participants from Argentina, Brazil, China, Egypt, the European Commission, Germany, Italy, Japan, Mexico, New Zealand, the Russian Federation, South Africa, Spain, Switzerland, the United Kingdom and the United States of America. The Permanent Bureau prepared a paper to facilitate the discussions of the group. It dealt with choice of court clauses in B2B cases as well as with submission, counter-claims and the general defendant's forum.[16] During its three meetings held between October 2002 and March 2003,[17] the group drafted a text on choice of court clauses in B2B cases.[18] It was however not possible to reach consensus on other bases of jurisdiction.

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[14] This is a plenary meeting of Member State representatives which now meets annually and decides on the work programme of the Conference, within the four-year framework set up by the Diplomatic Session (*supra* note 5).

15 This last expression was used in order to exclude mere financial damage and damage to intangible rights (intellectual property, reputation). *See*, for the Conclusions of the Commission, www.hcch.net under 'General Affairs and Policy'.

[16] Prel. Doc. No 19, available at www.hcch.net (*supra* note 4).

[17] *See* the reports of the three meetings (Prel. Docs No 20, 21 and 22) at www.hcch.net (*supra* note 4).

[18] Prel. Doc. No 8 (General Affairs), available at www.hcch.net (*supra* note 4). The same draft

The draft was submitted to the Commission on General Affairs and Policy of the Conference at its meeting in April 2003. This meeting as well as further consultation subsequently carried out by the Secretary General of the Hague Conference in 2003 demonstrated that there was sufficient support for a Special Commission to be convened for further work, using the draft as a starting point. The Special Commission met in The Hague from 1 to 9 December 2003[19] and again from 21 to 27 April 2004.[20] The latter meeting was preceded by an informal meeting in the United States of America hosted by the Department of State and the US Patent and Trademark Office from 28 to 30 March 2004 which focused exclusively on intellectual property issues.

The preliminary draft Convention received wide support, and the few remaining open issues were clearly identified in the text and in the Explanatory Report prepared by Masato Dogauchi and Trevor Hartley. In order to facilitate discussions at the Diplomatic Session and to provide delegates with some options to choose from, the Drafting Committee met in January and April 2005. A Diplomatic Session was convened for June 2005. Following the sudden death of the Chairman of the Special Commission, Professor Allan Philip, the Session elected Professor Andreas Bucher from Switzerland as Chairman of Commission II, which was charged with the completion of the new Convention and successfully accomplished its task.

B. The Convention of 30 June 2005 on Choice of Court Agreements

I. Scope of the Convention

The Convention applies primarily to exclusive choice of court agreements in international B2B cases in civil or commercial matters (Article 1), with an optional extension, through reciprocal declarations, of the chapter on recognition and enforcement to judgments given by a court that was designated in a non-exclusive choice of court agreement (Article 22). It excludes consumer and employment contracts and certain subject matters (Article 2). The reason for some of the exclusions in Article 2(2) is the existence of other, more specific international instruments, or of national, regional or international rules on exclusive jurisdiction for some of these matters. This is true for: *e)* insolvency, composition and analogous matters; *f)* the carriage of passengers and goods; *g)*

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text, accompanied by a report with comments on the provisions, subsequently drawn up by the Permanent Bureau of the Hague Conference and reflecting the discussions in the informal working group (Prel. Doc. No 22), is available *id.*

[19] The text produced at the December 2003 Special Commission, together with an Explanatory Report drawn up by T. C. Hartley & M. D. Dogauchi (Prel. Doc. No 25) is available at www.hcch.net (*supra* note 4).

[20] The text produced at the April 2004 Special Commission, together with an Explanatory Report drawn up by T. C. Hartley & M. D. Dogauchi (Prel. Doc. No 26) is available at www.hcch.net (*supra* note 4).

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; *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; and *p)* the validity of entries in public registers. In a Convention with a wider scope, a clause on the relationship with other international instruments would have to be included in the final clauses to ensure the respect of rules in other Conventions that grant exclusive jurisdiction. For exclusive jurisdiction based on internal law, this would not be a solution. However, since this Convention only covers choice of court agreements and party autonomy, the easier way – which should also facilitate the application of the Convention in practice – is to exclude the matter concerned directly from the scope of the Convention. Therefore, although the list of exclusions looks longer than in some other Conventions on civil and commercial matters, this impression is not quite right.

Another list of exclusions concerns what is called 'family law and succession' in other Hague Conventions on civil and commercial 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 successions. Most of these are not 'civil or commercial matters' in the business-related sense; some are subject to specialised treaties, and internally, these matters are sometimes subject to special rules of procedure which differ from normal contentious litigation.

The Convention only applies in international cases. In order to obtain as wide a scope as possible for the Convention without interfering too much with internal law, the definition of what is an international case is different for the jurisdiction chapter, on the one hand, and for the chapter on recognition and enforcement, on the other hand. For the Convention's jurisdiction rules to apply, a case is international unless the parties are resident[21] 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 (Article 1(2)). An illustration of the effects of this rule will be given when discussing the operational rules of the Convention.

For the purposes of obtaining the recognition and enforcement of a judgment in a Contracting State, it is sufficient that the judgment presented is foreign (Article 1(3)) to make the case international. Further details will be discussed below.

[21] In this context it is worth mentioning that Article 4 contains a definition of the residence of an entity or a person other than a natural person: it 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.

II. Validity Requirements

The Convention defines the exclusive choice of court agreement to which it applies in paragraph *a)* of Article 3:

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

Paragraph *c)* contains the Convention's form requirement: The exclusive choice of court agreement must be 'entered into 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'. This text is drawn from the UNCITRAL Model Law on Electronic Commerce 1996. No additional form requirements may be established by internal law. Where internal law provides for less rigid form requirements, a choice of court agreement that meets those requirements but not the stricter requirements established by the Convention would still be valid under internal law. It would, however, not fall within the scope of the Convention.

III. Exclusivity

Article 3 *b)* contains an important rule that will change the legal situation in particular in the common law world, and will greatly expand the scope of the Convention: 'A choice of court agreement which designates the courts of one Contracting State or one or more specific courts in one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise.' This is the rule contained in the European instruments,[22] but the presumption under common law is normally the opposite. By establishing this rule, the Convention will therefore greatly increase respect for the choice of the parties.

IV. The Operative Rules of the Convention

The Convention contains three main rules addressed to different courts:

- The chosen court must hear the case if the choice of court agreement is valid according to the standards established by the Convention (Article 5).
- Any court seised which is located in a State other than that of the chosen court must dismiss the case unless the choice of court agreement may be disregarded under one of the exceptions established by the Convention (Article 6).
- Any judgment given by the court of a Contracting State which was designated in an exclusive choice of court agreement that is valid according to the standards established by the Convention must be recognised and enforced in

[22] *Supra* note 8.

other Contracting States (Article 8) unless one of the exceptions established by the Convention (Articles 9, 10(2)-(4), 11, 20) applies.

The first rule excludes in particular any discretion that the chosen court might have under its internal law, e.g. under the doctrine of *forum non conveniens,* to stay or dismiss the proceedings in favour of the courts of another State (Article 5(2)). Paragraph 3 clarifies that the Article does not affect internal rules on subject matter jurisdiction or venue. Where parties choose a court that lacks subject matter or territorial jurisdiction, the choice of court agreement will not create jurisdiction under the Convention. But even where the chosen court is a proper venue and does have subject matter jurisdiction, the chosen court retains any freedom that might exist under its internal law to transfer the case to another court in that same Contracting State. This is not an issue where the choice of court agreement only designated 'the courts of that State'. But even where parties chose one specific court within that State, the freedom remains. If the transfer is discretionary, however, the court, when deciding whether to transfer the case, shall give due consideration to the choice of the parties (Article 5(3)).[23]

At first sight the second rule only states the obvious, namely that a court which is seised but is located in a State other than that of the chosen court has to suspend or dismiss proceedings, provided that the choice of court agreement is valid. Article 6 *a)-e)* contain exceptions which allow a court seised but not chosen to take the case in spite of the choice of court agreement. Although the language looks somewhat different, these grounds basically echo the well-established exceptions contained in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[24] (hereinafter: the New York Convention): the agreement does not have to be respected where it is 'null and void, inoperative or incapable of being performed'. Paragraph *a)* echoes the 'null and void', paragraph *d)* echoes the inability to perform. The latter is qualified, however, in order to prevent abuse: The inability must be due to exceptional reasons beyond the control of the parties. Paragraph *c)* contains the public policy exception and, for those States that have a narrow concept of public policy which is limited to State or governmental interests, a related 'manifest injustice' exception. Paragraph *b)* echoes (and slightly modifies) the reference to a lack of capacity of a party in Article V *a)* of the New York Convention. Only paragraph *e)* adds a really new ground that does not exist in the New York Convention: where the chosen court has decided not to hear the case,[25] any other court seised is no longer bound to dismiss the case because of the choice of court agreement. This rule is necessary because of the States' duty to give access to justice. Where party autonomy no

[23] For the effect of such transfer on other courts, *see* Articles 6 *e)* and 8(5) which will be discussed below.

[24] Available on the UNCITRAL website at http://www.uncitral.org.

[25] This rule also applies where the parties have chosen one specific court in a Contracting State, and that court decides to transfer the case to a court not chosen which is located in the same Contracting State. It does not apply, on the other hand, where the parties chose 'the courts of State X'. If, in this case, the court initially seised in State X transfers the case to another court in the same State, that is still a 'chosen court' under the Convention.

longer requires the respect of the agreement because the court chosen has decided not to hear the case, the possibility for the parties to seek justice elsewhere has to be re-established in order to avoid a denial of justice.

While these provisions largely resemble those contained in the New York Convention, the 'null and void-exception' in Article 6 *a)* contains a change which constitutes a major achievement: It establishes that the validity of the choice of court agreement has to be examined 'under the law of the State of the chosen court'. This includes the choice of law rules of the State of the chosen court. Although this rule may be a bit more difficult to apply for the court seised than the rule in Article II(3) of the New York Convention, its benefits outweigh the difficulty: In a case where one party seises the chosen court and the other party seises a different court, both courts have to examine whether the choice of court agreement is valid. If they do this under their own choice of law rules and the substantive law designated by them, it can happen that the chosen court finds the agreement valid and continues to hear the case, while under a different law the court seised but not chosen finds the agreement invalid and also proceeds with the case. It could also happen that the chosen court finds the agreement invalid and dismisses the case, while under a different law the court seised but not chosen finds it valid and therefore also dismisses the case. Both parallel proceedings and a denial of justice are undesirable. To oblige both courts to apply the same law minimizes the risk of such a situation to occur. Of course there is always a risk that courts might make mistakes when applying foreign law but one should trust the courts and at least provide them with a rule that has the potential to avoid the situations described above. Lastly, it has to be kept in mind that Article 6 does not *confer* jurisdiction upon the court not chosen; it merely *permits* that court to exercise jurisdiction based on its internal law or another international instrument in cases where one of the exceptions applies.

The third rule, concerning the recognition and enforcement of a judgment given by the chosen court, is set out in Article 8. A judgment given by a court in a Contracting State which was designated in an exclusive choice of court agreement is entitled to recognition and enforcement in all other Contracting States (Article 8(1)).[26] There shall be no review of the merits, and 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. The judgment shall be enforced only if it is enforceable in the State of origin (Article 8(3)), and even if it is already enforceable, the court addressed may postpone or refuse recognition or enforcement where the judgment is the subject of review in the State of origin, or the time limit for seeking ordinary review has not yet expired (Article 8(4)). Article 8(5) clarifies that all this also applies 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(3) *b)*. However, where the chosen court had discretion as to whether to transfer the case to another court, recognition

[26] According to Article 12, judicial settlements (*transactions judiciaires*) approved by, or concluded before, a court designated in an exclusive choice of court agreement, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforceable in the same manner as a judgment.

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. This last sentence is intended to limit the number of cases where this ground for refusal will apply to the cases where this seems justified. Normally, a case is transferred either upon request of the defendant or on the court's own motion. It is obvious that it should not be possible for the defendant who requested the transfer, which was then granted, to later object to the enforcement of the judgment because of the transfer. But it seems also obvious that a plaintiff who brings proceedings before the chosen court and is then forced to litigate before a different court, because the case is transferred (on the court's own motion or upon request of the defendant), should not be punished twice – first by losing the agreed court against his or her will, and subsequently by being denied recognition and enforcement of the judgment given in his or her favour just because it was given by the transferee court. Article 8(5), second sentence, ensures this result.

Article 8(1), second sentence, explicitly states that recognition or enforcement may be refused only on the grounds specified in the Convention. As mentioned above, these grounds are listed in Articles 9 to 11. In addition to the traditional grounds such as public policy (Article 9 *d)* and *e)*), incompatible judgments (Article 9 *f)*) and *g)*) and a defective service of process (Article 9 *c)*), two grounds already mentioned in Article 6 which allow the court seised but not chosen to disregard the choice of court agreement are repeated here: the invalidity of the choice of court agreement under the law of the chosen court (Article 9 *a)*), and the lack of capacity of a party to conclude such an agreement under the law of the requested State (Article 9 *b)*). Like in Article 6, capacity is thus subject to double scrutiny under the law of the chosen court (which may make the agreement invalid under paragraph *a)*) and under the law of the court seised, or of the court addressed for recognition and enforcement, respectively. And like in Article 6, the enforcement court is also obliged under the Convention to examine the validity of the choice of court agreement under the law of the State of the chosen court, including its choice of law rules.

Another ground for refusal of recognition or enforcement is provided by Article 11 and concerns awards for damages. These awards are governed by the Convention provided that they are covered by the choice of court agreement between the parties. A judgment awarding damages is therefore entitled to recognition and enforcement in other Contracting States just like any other judgment. To the extent that the damages awarded are non-compensatory, however, recognition and enforcement *of the non-compensatory part* may be refused. This is an option, not an obligation for the requested State. 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 11(2)). This rule will help victims and protect debtors: Those States that already now recognise and enforce foreign damages awards, including punitive damages, to the full extent, may continue to do so. States that currently 'shave off' the punitive part (e.g. under the public policy exception) and enforce the compensatory part, may continue to do so. And those States that currently refuse recognition and enforcement of the judgment as a whole because the punitive part is incompatible

with their legal system and they lack a rule to divide the judgment, will in the future be obliged under the Convention to enforce the compensatory part but will be entitled (but not obliged) to enforce the non-compensatory part.

C. Particular Issues

I. Interim Measures of Protection

The Convention does not govern interim measures of protection (Article 7). In order to avoid any uncertainty that exists under the New York Convention, it does however state explicitly that the Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection ordered by a court of a Contracting State.

II. Intellectual Property Litigation

Article 2(2) *n)* and *o)* exclude certain types of intellectual property litigation from the scope of the Convention. Litigation concerning copyright and related rights is always within the scope, regardless of the object of the proceedings in question. For other intellectual property rights, validity is excluded from the scope of the Convention where it is the object of the proceedings. This flows from the fact that the grant of a patent or the registration of a trademark is a sovereign act. Revocation or nullification of such an act is usually within the exclusive jurisdiction of the State under the law of which the right was created and party autonomy is not admitted. For other relief sought, be it in tort or in contract, the situation is as follows: Cases of 'sheer piracy' are in most cases already outside the scope because there will normally be no contract between the rightholder and the alleged infringer. Contractual litigation (i.e. on the scope of a license or the payment of royalties) is covered by the Convention, as well as the contractual transfer of certain exploitation rights. Where proceedings are brought in tort and not in contract for procedural reasons, but could have been brought in contract because they relate to the scope of a license or its possible termination, or any other contract between the parties relating to intellectual property rights, these cases are within the scope of the Convention.

III. Flexibility

While it was acknowledged during the Diplomatic Session that State sovereignty and some other State interests may require a limitation of party autonomy, there was a common wish not to reduce the scope of the Convention more than necessary. Some States had a strong interest to exclude certain subject matters beyond those listed in Article 2 from this scope (because they do not recognise party autonomy for these matters and/or claim exclusive jurisdiction), but this was not shared by others. Under the New York Convention, the requested State could

hold the agreement to be invalid under its own law, but this option is precluded under the Hague Convention which obliges all courts involved at the jurisdiction and enforcement stage to apply the law of the chosen court (including its choice of law rules) to determine the validity of the agreement. In order to accommodate these conflicting interests and enable wide adherence to the Convention while maintaining as wide a scope as possible, Article 21 establishes a declaration system by which States can exclude a specific matter if this is required by a strong interest. This declaration will have reciprocal effect: in their relations with the State making the declaration, all other Contracting States are not obliged to apply the Convention with regard to the matter excluded where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration. They would therefore not be obliged to decline jurisdiction under Article 6, nor be obliged to recognise and enforce a judgment given by the chosen court in the State that made the declaration, on a matter which was excluded by it.

Article 19 allows a State to make a declaration that its courts, when chosen in an agreement under the Convention, will not be obliged to decide the dispute if the case has no other connection with that State except for the location of the chosen court. This declaration prevents two outside parties from contracting into the jurisdiction. Article 20 deals with the reverse situation where two parties residing in the same Contracting State want to contract out of a jurisdiction for a case that is purely internal to that State except for the location of the chosen court. At the jurisdiction stage, this is not an international case under Article 1(2). Should the chosen court give judgment nonetheless and one of the parties take this judgment back to the common State of residence of the parties, that State would normally be obliged by the Convention to recognise and enforce the judgment. For the chapter on recognition and enforcement to apply, it is enough that the judgment is foreign and was given by a court exclusively chosen and located in a Contracting State. Article 20 however allows the requested State to declare that it will not recognise such decisions.

IV. Preliminary Questions

Article 10 contains a number of rules, some of them declaratory and others regulatory in nature. They all refer to proceedings where a matter excluded under Article 2 or Article 21 arises as a preliminary question in the proceedings while the object of the proceedings falls within the scope of the Convention. To give an example: Proceedings which have the validity of a patent as their object are excluded from the scope of the Convention under Article 2(2) *n)*. Proceedings brought by the patent owner for payment of royalties due under a patent license agreement, however, are within its scope. If – as is usually the case – the licensee now raises the alleged invalidity of the patent as a defence, the money claim remains within the scope of the Convention. Article 2(3) explicitly states this. To continue with the same example: Article 10 sets out in detail which effects a judgment rendered in the proceedings just mentioned would have to be given under the Convention in other Contracting States. Paragraph 1 says that the (incidental

or preliminary) ruling on the validity of the patent will not be given any effect *under the Convention* in other Contracting States. Whether the internal law of the State concerned attributes any further effects such as collateral estoppel or issue estoppel to it is a matter for the internal law of the requested State. Paragraphs 2 and 4 state that even regarding the judgment as such (in our example the payment order), recognition or enforcement may be refused to the extent that it was based on a preliminary ruling on an excluded matter. What is not said here but what is implied is that this rule only applies where the courts of the requested State – or the courts of the State which in the view of the requested State would have (exclusive) jurisdiction over the excluded matter – would have come to a different result as concerns the preliminary question. In concrete terms: If, in our example, the patent had been granted in the State which was requested to enforce the judgments awarding royalties, and the authorities of the requested State had in the meantime found that the patent was invalid, they would not be obliged to enforce the foreign money judgment which was based on the assumption that the patent was valid. If there had been proceedings on the validity of the patent in the requested State which had affirmed the validity, why should recognition or enforcement of the royalties due under a licence be refused? If, at the time of the request for enforcement of the money judgment, proceedings on the validity of the patent are still pending in the State that granted the patent, the decision on recognition and enforcement may be postponed (Article 10(2)-(4)).

V. Non-Exclusive Choice of Court Agreements

Under Article 22, a Contracting State may declare that its courts will recognise and enforce judgments given by a court in another Contracting State that was designated in a choice of court agreement which meets all of the requirements established in Article 3 except for exclusivity. This declaration has reciprocal effect; a judgment given in one Contracting State that has made such a declaration shall be recognised and enforced in other Contracting States that have made such a declaration. In addition to the grounds for refusal listed in Articles 9, 10(2)-(4) and 11, Article 22 contains some additional grounds due to the fact that the agreement is not exclusive. Recognition will be refused where there exists either a judgment given by another court that was not explicitly excluded by the agreement, or proceedings are pending before such a court. In addition, the court of origin must have been the court first seised. This applies where there were such other proceedings earlier which have come to an end without resulting in a judgment.

VI. Relationship with Other International Instruments

Article 29 enables Regional Economic Integration Organisations to adhere to the Convention if the Member States of the Organisation have transferred their competence over some or all of the matters governed by the Convention to the organisation. The Article would apply where both the Organisation and its Member

States join the Hague Convention. In the case of the European Community it would be used if there were mixed or shared external competence between the EC and its Member States for the matters governed by the Hague Convention. Following the ECJ's opinion concerning the Lugano Convention,[27] however, it is more likely that the EC will claim exclusive Community competence. Article 30 of the 2005 Hague Convention provides that where only the organisation (and not also its Member States individually) join, the Organisation may declare that its Member States will be also bound by the adherence of the Organisation.

Article 26 contains rules on the relationship with other international instruments. In this paper, it is only possible to give a brief overview of the basic principles.[28]

The rules in Article 26 only apply in cases where both instruments, under their own terms, would 'want' to be applied and such application would lead to incompatible results. On matters of jurisdiction, this could be the case, e.g., where the other treaty contains rules on exclusive jurisdiction while the Hague Convention would recognise party autonomy over a certain matter within its scope. Here the Convention gives way to other general (earlier or later) treaties where none of the parties are resident in a Contracting State that is not a Party to the treaty (paragraph 2). In other words, where the case (in terms of residence of the parties) is purely internal to the other treaty, the Hague Convention gives way in case of conflict. In that case it does not matter whether the parties to the choice of court agreement all reside in States that are Party to both the Hague Convention and the other treaty, or in States Party to the other treaty only. To give an illustration: Assuming that all States Party to the Lugano Convention join the 2005 Hague Convention, the Lugano Convention would prevail in the courts of a State Party to both Conventions if all the parties are resident in a "Lugano State". It would also prevail in the courts of a State Party to both Conventions if one of the parties is resident in a State Party to both the Lugano and the Hague Convention and the other in a State that is neither Party to the Lugano Convention nor to the Hague Convention.

Where the case (in terms of residence of the parties) has an element external to the other treaty which is connected to the Hague Convention (because one of the parties resides in a State that is *only* Party to the Hague Convention but not to the other treaty), the Hague Convention prevails.[29] In our continuation of the example given above, this could be the case where one of the parties to the choice

[27] 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 www.curia.eu.int, accessed on 2 October 2006.

[28] A more detailed explanation and appropriate examples may be found in the Explanatory Report by Dogauchi and Hartley which is under preparation. As soon as it is ready, it will be made available on the Hague Conference's website at www.hcch.net.

[29] In this hypothesis the other party resides in a State Party to both the Hague Convention and the other treaty. Paragraph 3 ensures that the State Party to both Conventions is not obliged to breach its pre-existing obligations under the other treaty vis-à-vis any State Party to that other treaty but not to the Hague Convention. This will also apply to the revised Lugano Convention although that is a later treaty as compared to the Hague Convention (Article 26(3), 2nd sentence).

of court agreement is resident in a State Party to the Lugano Convention that is also Party to the Hague Convention and the other Party to the choice of court agreement is resident in a State Party to the Hague Convention only (*e.g.* the United States, assuming that they join the Hague Convention).

This seems a logical and politically well-balanced solution because in the relations between two States Party to the Hague Convention, this rule makes a treaty to which all States concerned by a particular case are Parties (the Hague Convention) prevail over another one which applies only to one of the States concerned.

An identical rule applies to Community instruments (*e.g.* the Brussels I Regulation) under paragraph 6. Again, it has to be recalled that these rules will only need to be applied where both instruments in question would claim application according to their own terms, and would moreover lead to incompatible results. Such conflicts between the Brussels Regulation and the 2005 Hague Convention are likely to be rare. The application of the *lis pendens* rule, which applies under the Brussels Regulation but not under the Hague Convention, is an important example. Even if another court is seised first, under the Hague Convention the chosen court (if second seised) has to proceed with the case while under the Brussels Regulation it has to wait until the court first seised has declared that it lacks jurisdiction.[30]

By accepting that the Hague Convention prevails if one of the parties is resident in the European Union and the other in a non-EU-State which is Party to the Hague Convention, the European Community slightly reduces the territorial scope of Article 23 of the Brussels Regulation which, according to its own terms, would already apply if one of the parties is domiciled in an EU Member State.[31] Moreover, the European States will no longer apply restrictions on choice of court agreements in B2B insurance cases where one of the parties is resident in a State Party to the Hague Convention which is not a Member State of the European Community. This compromise was agreed upon for the benefit of achieving a global instrument, and the impact on the Brussels Regulation is limited to a minimum: The Regulation remains unaffected where the other party is resident in a third State that is not Party to the Hague Convention because the latter has no interest to interfere here. But where the non-EU party is resident in a State Party to the Hague Convention, the latter prevails in case of conflict.

At the stage of recognition and enforcement, the Convention does not affect the application of other (earlier or later) treaties; however, the judgment shall not be recognised or enforced to a lesser extent than under the Hague Convention (Article 26(5)). This latter restriction does not apply to EC instruments, based on the assumption that those will normally be more generous as concerns recognition and enforcement.

Treaties on specific subject matters which also contain rules on jurisdiction and/or recognition and enforcement are treated in paragraph 5. No matter whether they are earlier or later than the Hague Convention, they remain unaffected – but only

[30] Case C-116/02 - Gasser *v.* MISAT, [2003] ECR I-14693 at para 54.

[31] Case C-412/98 - Group Josi Reinsurance Company *v.* Universal General Insurance Company, [2000] ECR I-5925 at paras 57, 61.

if the Contracting State concerned in the particular case has made a declaration in respect of the treaty under this paragraph. In that case, other Contracting States shall not be obliged to apply the 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.

D. Conclusion

It is hoped that the new Convention will do for choice of court agreements what the most successful 1958 New York Convention[32] does for arbitration agreements, namely to protect party autonomy and to provide predictability and legal certainty to business parties who want to make arrangements for the resolution of disputes that have arisen or may arise between them. The business world is highly supportive, and so are the legal professions. Informal consultations so far carried out by governments have been very positive. As soon as the Explanatory Report is available, formal consultations will start in many States. What initially seemed to be a small step as compared to the more ambitious general Convention may become a major milestone for the harmonisation of international civil procedure.

[32] As of 17 October 2006, the Convention has 137 Contracting States. *See* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.