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**DOCUMENT DE REFLEXION POUR AIDER A LA PREPARATION
D'UNE CONVENTION SUR LA COMPETENCE ET LA RECONNAISSANCE ET
L'EXECUTION DES JUGEMENTS ETRANGERS EN MATIERE CIVILE ET COMMERCIALE**

*préparé par Andrea Schulz
Premier Secrétaire*

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**REFLECTION PAPER TO ASSIST IN THE PREPARATION OF A CONVENTION
ON JURISDICTION AND RECOGNITION AND ENFORCEMENT OF
FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS**

*prepared by Andrea Schulz
First Secretary*

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TABLE OF CONTENTS

A	Introductory remarks	5
	I Procedure	5
	II Substance	6
B	The core jurisdiction area as identified by Commission I - Policy choices to be made, issues to resolve and some effects on the structure of the Convention	7
	I What if the Convention were limited to choice of court clauses in B2B cases?	7
	1 Issues	7
	a) Formal and substantive validity.....	7
	aa) Formal validity.....	7
	bb) Substantive validity.....	7
	cc) Which court shall decide?.....	11
	b) Scope of the Convention	12
	aa) Substantive scope	12
	bb) Territorial scope	13
	c) Personal versus subject matter jurisdiction	14
	d) Interim relief	14
	2 Structure.....	15
	a) White / grey / black	15
	b) <i>Forum non conveniens</i> , declining jurisdiction and related issues	15
	aa) Discretion of the chosen court?.....	16
	(1) Exclusive choice of court clause.....	16
	(2) Non-exclusive choice of court clause	17
	bb) Obligation of any court seized in a Contracting State to dismiss the case for lack of jurisdiction or to suspend proceedings if the parties had chosen the courts of another State	17
	(1) Exclusive choice of court clause.....	17
	(2) Non-exclusive choice of court clause	18
	cc) Possible interference of a court of a Contracting State other than the court exclusively chosen by the parties	19
	dd) Conclusion	19
	(1) Discretion of the chosen court	19
	(2) Obligations of the court seized but not chosen	19

	(3) Obligation of any court not chosen not to interfere with proceedings before the chosen court.....	20
	c) <i>Lis pendens</i>	20
	aa) Exclusive choice of court clause	20
	bb) Non-exclusive choice of court clause	20
	d) Bilateralisation	21
	e) Disconnection	21
II	What if we added a rule on consent/waiver/submission?	22
1	Issues	22
2	Structure.....	23
	a) White/grey/black and <i>lis pendens</i> /declining jurisdiction.....	23
	b) Bilateralisation	23
	c) Disconnection	23
III	What if we added a rule on the defendant's forum ([habitual residence])?	24
1	Issues	24
2	Structure.....	25
	a) Scope	25
	b) Further general questions	25
	c) Bilateralisation	26
	d) Opt in/opt out.....	26
	e) Disconnection	26
IV	What if we added a rule on counter-claims?.....	26
1	Issues	26
2	Structure.....	27
	a) General	27
	b) Bilateralisation	28
	c) Opt in/opt out.....	28
	d) Disconnection	28
C	Organisational issues.....	28

A Introductory remarks

I Procedure

From April 22 to 24, 2002, Commission I on General Affairs and Policy of the Nineteenth Diplomatic Session of the Hague Conference met in The Hague in order to decide, *inter alia*, about the future direction of the Conference's work on a global Convention on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (the Judgments Project).

In this respect, the Commission adopted the following conclusions:

"Commission I of the Nineteenth Diplomatic Session, having reconvened at The Hague from 22-24 April 2002 with a view to deciding, in particular, on the negotiations on a worldwide convention on jurisdiction and recognition and enforcement of judgments in civil and commercial matters,

Having regard to the 'Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001', prepared by the Permanent Bureau and the Co-Reporters ('the Interim Text'),

Mindful of its decisions taken at its first meeting on 21-22 June 2001,

Having regard to the state of the current work of the Conference on the various topics of its agenda,

1 Jurisdiction and recognition and enforcement of foreign judgments in civil and commercial matters

The Commission unanimously reconfirms the great importance it attaches to harmonising the rules on jurisdiction and recognition and enforcement of judgments in civil and commercial matters on a worldwide basis. The Commission feels that the efforts to find common solutions for these issues in the area of private international law should be pursued by the Conference because the global need for such common solutions will only increase.

Assisted by an informal working group the Permanent Bureau will facilitate and conduct an informal working process with a view to preparing a text to be submitted to a special commission during the first half of 2003 followed by a Diplomatic Conference to be held, if possible, at the end of 2003. The starting point for this informal process will be the core area and possible additions identified by Commission I.

(...)"

Moreover, it was decided to devote the Second Part of the Nineteenth Diplomatic Session to the adoption of a Draft Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, to be held, if possible, before the end of 2002, thereby concluding the Nineteenth Session. A First Part of the Nineteenth Diplomatic Session which had taken place in June 2001 had been dedicated to the Judgments Project. However, in April 2002, Commission I decided that Commission II which had been dealing with the preparation of the Judgments Project during the Nineteenth Session should not reconvene during this Session, and that the Second Part of the Diplomatic Conference would not be devoted to the Judgments Project. It was the wish of the Member States to move to an interim informal process, exploring new ways of negotiating while revisiting the jurisdiction rules of both the 1999 Draft and the 2001 Interim Text before possibly convening a Special Commission, and a subsequent meeting of a diplomatic character during the Twentieth Session, to be held, if possible, before the end of 2003.

II Substance

As to substance, it emerges from the minutes of Commission I's meeting in April 2002 that, in addition to the provisions on recognition and enforcement as contained in both the Interim Text and the 1999 Draft, "the core area and possible additions identified by Commission I" might include choice of court agreements in B2B cases, submission, defendant's forum, counter-claims, trusts, branches, and physical torts.¹

With a view to facilitating the work of the informal group, the Permanent Bureau was asked to draw up a "What if"² paper outlining this step-by-step approach, the *issues* to be resolved and the consequences that the various possible additions in the chapter on jurisdiction would have on the *structure* and scope of the Convention as a whole. Therefore, this paper will first discuss the unresolved issues and the structural consequences with regard to a Convention containing only a single rule on jurisdiction, namely a provision on choice of forum clauses. Secondly, this paper will discuss some of the possible additional jurisdiction rules as tentatively identified by Commission I (*i.e.* submission, defendant's forum, and counter-claims). As such, these grounds of jurisdiction do not relate to specific subject matters.

For each possible addition of a white list ground of jurisdiction, both unresolved issues and possible effects on the structure of the Convention will be identified. For the sake of simplification, Articles are being referred to according to their numbering in the Interim Text produced in 2001 (by number alone) or in the 1999 Draft (by number, followed by '(1999)').

In order not to overburden this paper and the first meeting of the informal group, the possible addition of rules on jurisdiction for certain specific subject matters³ such as trusts and physical torts will be reserved for a second paper. That paper will also deal with the possible inclusion of branches. Although this is a basis of jurisdiction which, like those in the first group, is unrelated to any specific subject matter, the addition of a branch jurisdiction may partly depend on the decision taken on the inclusion of a general defendant's forum. Moreover, some further research will be carried out by the Permanent Bureau in this respect.

It has to be recalled that Commission I's decision was to take the "core area and possible additions" as a starting point. Should the informal group's work on the jurisdiction rules identified by Commission I and the subsequent consultations within Member States give reason to believe that common ground could be reached on a wider range of jurisdiction rules, further papers would be submitted by the Permanent Bureau to prepare and facilitate the work of the group accordingly.

This paper is neither intended to be a scientific paper – the outstanding issues probably having been sufficiently defined and supplemented by research in previous documents –

¹ The concept of "physical torts" was used during the meeting in order to distinguish the infringement of intellectual property rights, the so-called "speech torts" (e.g. defamation, libel, slander) and pure economic loss from torts involving damage to the person or to tangible property. In the French version of the present document, the expression « dommage matériel » will be used to express this same idea.

² This expression was coined by the late Peter Nygh during the meeting of Commission I in April 2002.

³ The question of whether specific rules of jurisdiction for certain subject matters (contracts, torts, trusts etc.) should be included, must be carefully distinguished from the question of the substantive scope of the Convention. It is quite conceivable to draw up a convention with a limited number of grounds of jurisdiction but a wide substantive scope, thereby covering a wide range of cases. However, the issues are interrelated because additional bases of jurisdiction may require a restriction in scope in order to carve out certain problems which may arise from the addition of such bases of jurisdiction.

nor a policy paper. It does not discuss the pros and cons of including any additional rule on jurisdiction because this would not be for the informal group to decide.⁴

Whenever it is stated that there does not seem to be a need for further discussion of a certain issue this is due to the fact that there seems to have been consensus on that issue, either in 1999 and upheld in 2001, or solely and finally in 2001. Moreover, whenever structure is discussed, it is assumed for the time being that both the rules on recognition and enforcement and the rules on *lis pendens*/declining jurisdiction will in general be retained. Where changes in the chapter on jurisdiction would require any amendments of the provisions on *lis pendens*/declining jurisdiction, this will be noted because these issues are closely interrelated with jurisdiction. Consequential changes in the chapter on recognition and enforcement, however, will not be discussed because the primary task which was given to the informal group was to examine possible bases of jurisdiction as a starting point.

B The core jurisdiction area as identified by Commission I - Policy choices to be made, issues to resolve and some effects on the structure of the Convention

I What if the Convention were limited to choice of court clauses in B2B cases?

1 Issues

a) Formal and substantive validity

aa) Formal validity

Article 4(2) which contains the conventional requirements for formal validity of a choice of forum clause was accepted by agreement in June 2001.⁵ The conditions set out there are, in alternatives, both minimum and maximum requirements and thus exclude⁶ the application of national law on the subject.⁷ If any additional work were required here it would be with regard to the question of where to draw the line between form and substance. The answer to this question is closely related to the treatment given to substantive validity as explained in the following paragraphs.

bb) Substantive validity

The 1999 Draft did not contain any provisions on substantive validity of a choice of forum clause. According to the Nygh Pocar Report this was to be left to the law of the forum seized, including its rules of private international law.⁸ In 2001 this was made explicit in Article 4(4). However, this proposal did not receive consensus. Another suggestion to achieve a similar goal was to add a new sentence at the end of Article 4(1) which subjected *consent and capacity* to the national law including the private international law rules of the forum seized. This proposal did not receive consensus either.

⁴ Therefore the group might suggest different alternatives for consultation without taking a position on their preference.

⁵ See footnote 25 of the Interim Text.

⁶ To the extent that national law establishes stricter standards, these may no longer be applied. To the extent that national law is less strict than the Convention's minimum standard, a choice of court clause which complies with national law but not with Convention standards would create grey area jurisdiction only, the judgment thus not being entitled to recognition and enforcement under the Convention.

⁷ See the Report on the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters by Peter Nygh and Fausto Pocar, Preliminary Document No 11 of August 2000, also available at the Hague Conference's website at www.hcch.net (hereinafter Nygh Pocar Report).

⁸ Nygh Pocar Report, p. 42.

The two approaches have more in common than one might think at first sight. There is common ground between them in that the issues of consent and capacity should depend on the law of the forum, including its private international law rules.

The difference between the two proposals appears to be that the approach suggested in Article 4(1) at the end seems to limit this rule to consent and capacity while the other approach as suggested in Article 4(4) extends it to anything not related to form – thus possibly also covering issues related to the *lawfulness*⁹ of a choice of court clause.

However, keeping in mind that Article 4(4) reflects almost word by word what, in 1999, was only set out in the report, and the fact that the structure of the Convention in the Interim Text had remained more or less the same as in the 1999 Draft, one may assume that the meaning of these words was also intended to remain the same. Therefore the additional words in the Nygh Pocar Report which relate to the question of lawfulness would still apply. The Report stated on this issue in the 1999 Draft that there was no room for national laws imposing conditions on the lawfulness of the forum choice. This was deduced from:

- the explicit provisions in the 1999 Draft prohibiting choice of forum clauses in consumer and employment contracts and trust instruments which were not in line with the (substantive) requirements of the Convention and on subject matters covered by exclusive jurisdiction under the Convention,
- the fact that Article 17 only permitted the application of national law rules on jurisdiction “subject to Article 4”, and
- the absence of a public policy reservation in the chapter on jurisdiction.

Stating that the Convention therefore established its own standards as to lawfulness, the reporters concluded that this excluded the application of further requirements as might be contained in national law.

This means that under the 1999 Draft – and therefore probably¹⁰ also in the suggested Article 4(4) of the Interim Text 2001 – the two sub-groups of substantive validity issues were treated differently: While the *lawfulness* of a choice of court clause was to be governed by autonomous rules set out in the Convention without leaving room for any national law, a national law as designated by the conflict of laws rules of the forum was to govern the questions of *capacity and consent*.

This distinction gives rise to three questions:

- (1) Are there good reasons which justify maintaining a different treatment of the two sub-groups of substantive validity?

⁹ In some legal systems, there are explicit provisions restricting or excluding the possibility to enter into choice of court agreements for certain types of contracts (e.g. consumer contracts, employment contracts, insurance contracts, franchise agreements).

These are listed here by way of example in order to illustrate the legal concept. However, as will be shown later, some of them will be without relevance for the Judgments Project if certain areas were excluded from the scope of the jurisdiction rule on choice of court clauses or, in case of a Convention containing more than one white list jurisdiction, from the scope of the Convention as a whole (e.g. in case of a limitation to B2B cases).

Alternatively or in addition, some legal systems might subject a choice of court clause to a general public policy control or a reasonableness test, thus making any clause which is contrary to these requirements unlawful. Furthermore, there may be tests which are applied to any kind of agreement including choice of court agreements (public policy/*ordre public/bona fide/buon costume/gute Sitten/Treu und Glauben* etc.).

¹⁰ If this interpretation of Article 4(4) were not commonly shared, this would all the more demonstrate the need for further clarification.

- (2) If this is the case, how are the two sub-groups of substantive validity issues to be delineated?

Fraud, for instance, may lead to an unreasonable clause as well as to a lack of consent, and it may also give rise to public policy considerations. The question whether a choice of court clause in a non-negotiated contract/contract of adhesion has become part of the agreement may relate to consent as well as to lawfulness/reasonableness. A similar problem may arise concerning age requirements established by national law which may at the same time be considered as an aspect of lawfulness and of capacity.

- (3) Finally, what should be the standard (autonomous rules/law designated by conflict of laws rules of the forum seized/other)?

(1) Until now, the answer to the first question seemed to be positive. The reason is that there has been a common understanding that the Convention should only touch upon issues going beyond jurisdiction, recognition and enforcement, namely conflict of laws rules or even substantive principles, where this was absolutely necessary in order to achieve the purposes of the Convention. At present and following a preliminary study carried out by the Permanent Bureau, this does not seem to be the case with regard to capacity and consent. On the other hand, the existing variety of national criteria with regard to lawfulness¹¹ and the ongoing legislative activities at national, supranational¹² and international level addressing, in particular, issues raised by the Internet, seem to plead in favour of common autonomous standards as regards substantive validity (with the exception of consent and capacity) to be established in the Convention.

(2) In case of a different treatment of various aspects of validity, the Convention itself would have to provide criteria to delineate them.

- Should issues like *fraud or duress* be treated as belonging to "consent", thereby leaving room for national law standards as identified by the conflict of laws rules of the forum, or do they fall into the category of lawfulness, thus requiring an explicit (and exhaustive) substantive autonomous rule in the Convention?
- Moreover, not only the delimitation of different aspects of substantive validity is difficult. Also the qualification¹³ as substantive or formal varies from country to country. If only these terms were used, therefore, by simply establishing a rule like the proposed Article 4(4), uncertainty would remain.¹⁴

(3) If one were to give up the different treatment of the two sub-categories of substantive validity, one could either:

- establish autonomous standards for all of these issues in the Convention,
- leave all of them to the law (including the private international law) of the forum actually seized, or

¹¹ See, for instance, the examples given on p. 42 of the Nygh Pocar Report (listing public policy and explicit legal prohibitions for choice of court agreements in certain bills of lading) and on p. 11 *et seq.* of Prel. Doc. No 18 (including footnote 49), listing, *inter alia*, reasonableness, unfairness or laws invalidating jurisdiction clauses in particular types of contracts.

¹² This refers in particular to the European Community.

¹³ The term "qualification" in the English version – the term used by Continental-European writers – is also referred to in English as "classification" or "characterisation".

¹⁴ This is illustrated by the case-law of the European Court of Justice concerning Article 17 of the Brussels Convention which follows more or less this approach without making it explicit. The delimitation between form and substance used to be a question which repeatedly caused courts to submit the question to the ECJ whether a certain limitation established by national law as to the validity of a choice of court clause was to be qualified as formal (and therefore not applicable within the scope of the convention) or substantive (and therefore applicable).

- include a conflict of laws rule which subjects all these issues to the law (including the private international law) of the chosen forum, no matter which court is actually seized with the case.

If, on the other hand, one were to treat the two categories differently, the following options exist:

- Consent and capacity could depend on national law as determined by the conflict of laws rules of the forum actually seized.
- Alternatively, a choice of law rule designating the law of the chosen forum, including its private international law rules, would be another option.
- For the other group, the Convention could contain autonomous rules, thereby excluding¹⁵ the further application of any national law on substantive validity except for rules on consent and capacity.

When drafting autonomous rules on substantive validity, one would have to consider how to deal with *specific* rules existing in many national laws which *restrict* the freedom to conclude choice of court clauses in certain areas?

- Such limitations may consist in rules on *exclusive jurisdiction* for certain issues from which the parties may not deviate (e.g. for actions concerning rights *in rem* in immovable property, or for certain disputes with regard to intellectual property rights).
- Another example are areas where a limited choice between a number of fora might still exist in many national laws, but it is considered undesirable to give the parties full freedom to enter into choice of court agreements because of an assumed disparity in their bargaining power (e.g. consumer contracts, employment contracts, franchise agreements, insurance contracts, agency contracts or other).

Each subject matter could either be excluded from scope,¹⁶ or, where it is decided to keep it in the Convention,¹⁷ the restrictions regarded as indispensable would have to be incorporated in Article 4.¹⁸

- A different solution would however have to be found for the *general* checks and conditions established by many national laws with regard to choice of court clauses. Given the variety of concepts underlying terms such as reasonableness, fairness, public policy etc. in the various Member States, a mere reference to one or more of these terms in Article 4 would not create a sufficiently uniform application in

¹⁵ A possible exception to this rule is mentioned on the following page.

¹⁶ If the scope of the Convention as such were limited to B2B contracts, this would already exclude consumer and employment contracts, thus making an explicit reference in Article 4 superfluous. It has to be kept in mind, though, that such an exclusion might not be so simple. Examples how to exclude consumer contracts can be found in Article 2 c) of the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods* as well as in Article 2 a) of the *1980 United Nations Convention on Contracts for the International Sale of Goods*.

However, in order to facilitate the work of the group and taking into account that it is not the task of the group to take policy decisions but only to prepare them, the following methodology is suggested: When looking at each of the possible white grounds of jurisdiction, the group should limit itself to making a suggestion in substance as to whether any area or subject matter (e.g. consumer contracts, employment contracts etc., moreover issues covered by exclusive jurisdiction in some countries like the validity of patents, rights *in rem* relating to immovable property etc.) should be excluded from the application of this specific provision. If, following this process of examining various bases of jurisdiction and after consultation, it emerges that there is a common wish to exclude certain areas from *all* white grounds, as a drafting matter the exclusion could then be moved to the scope provision. See further *infra*, p. 12.

¹⁷ A possible justification for this could be a common interest in harmonising such restrictions for a certain area.

¹⁸ This could be the case in areas of unequal bargaining power even in B2B cases (e.g. contracts involving small and medium enterprises (SMEs), franchise agreements, non-negotiated contracts/contracts of adhesion in general, etc). The 1999 and 2001 texts both contain limitations established by other white list jurisdictions for consumer contracts (Article 7), employment contracts (Article 8) and for the issues listed in Article 12 which are covered by exclusive white list jurisdiction (see Article 4(5)).

different Contracting States. If the distinction between “lawfulness” and “consent and capacity” were upheld and both groups subjected to different legal regimes – the former to an autonomous Convention standard and the latter to the national law identified by the choice of law rules of the forum –, any general lawfulness test such as reasonableness, fairness, or public policy control may therefore have to be defined directly and autonomously in the Convention in terms which try to ensure uniform interpretation as much as possible.¹⁹

- Another option would be not to have any general criterion of this kind in the Convention and at the same time prohibit the use of any such criterion established by national law.²⁰
- It may be considered to distinguish between general criteria which apply to choice of court clauses only, and general tests contained in national law which apply to all kinds of agreements including choice of court clauses (public policy/*bona fide/Treu und Glauben/buon costume/gute Sitten* etc.).
- Moreover, whatever the decision on including one or more general criteria on substantive validity, in order to avoid any misunderstanding, it might be desirable to make it explicit in the Convention to which extent any (further) general lawfulness criteria as may be contained in national law shall remain applicable within the scope of the Convention, e.g. any further requirement of a connection between the dispute or the defendant and the chosen court in addition to the choice of court clause itself.²¹

cc) Which court shall decide?

With regard to every aspect set out above, this could in theory be decided by either:

- the chosen court only, or by
- any court actually seized.

Both the 1999 Draft and the Interim Text leave it to any court to decide.

- Should this be changed in favour of the chosen court only?

The basic assumption is that such a change would be justified if it were otherwise expected that courts in different countries would most likely come to different results when assessing the validity of a particular choice of court clause. In that case it may be considered whether the Convention should permit only one – namely the chosen – court to exercise such control, or whether there are other ways to achieve a sufficiently uniform application.

¹⁹ Article V (1) (a) of the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 1958 New York Convention on Arbitral Awards), instead of proposing substantive harmonisation, provides, *inter alia*, for a conflict of laws rule (as an indirect condition for substantive validity, contained in the section on recognition and enforcement). Uncertainty concerning the law applicable would thereby be removed. Moreover, the 1985 UNCITRAL Model Law on International Commercial Arbitration that is being implemented in many States provides for substantive harmonisation of the validity of arbitration agreements. However, given the absence of similar harmonisation in the area of choice of court clauses and the wide variety of existing concepts of substantive validity of such clauses, it is doubtful whether such a rule would be sufficient in the Judgments Project.

²⁰ If this cannot be achieved, it may be considered to soften this strict rule by permitting a public policy clause to cover exceptional cases. This could apply, in particular, to a set of general standards which most States seem to apply to contracts in general, *i.e.* standards which are not specifically directed at choice of court clauses.

²¹ See further on this issue Prel. Doc. No. 18, p. 5 *et seq.*

The following arguments may be taken into consideration when answering this question:

(1) As to formal validity, the rules in the Convention are exhaustive and conclusive, not permitting the application of further requirements on form as might be contained in national law. Therefore it is likely that the application of the Convention rules will lead to the same results, regardless of the State which applies them.

(2) As far as rules on substantive validity were included in the Convention, the same would apply, thus creating no specific²² need to leave the application of these rules to the chosen court only.

(3) For every issue which is to be determined by the law of the court seized (including its choice of law rules) the results of such examination of substantive validity may vary from one Contracting State to the other.

- For these issues only, it would have to be decided whether this is acceptable or whether the chosen court only should be entitled to decide these issues.
- Leaving the decision exclusively to the court chosen may also give parties the opportunity to “evade” the rules of the system in which they are in fact contracting, e.g. in a case where capacity is in issue. Is this desirable?

However, given the procedural complications the latter option would involve,²³ the need for leaving such a decision to the chosen court only would have to be demonstrated.

- Is there, for instance, a wide discrepancy among fora in decisions relating to consent and capacity?²⁴

A less far-reaching solution achieving some similar degree of harmonisation may be to allow any court seized to decide these issues but to include a choice of law rule pointing to the law of the chosen court, including its private international law rules.

b) Scope of the Convention

aa) Substantive scope

As mentioned above,²⁵ with regard to choice of court clauses this issue is closely related to substantive validity. Where party autonomy involving choice of court clauses is deemed undesirable, this could be dealt with either by excluding the respective subject matter from the scope of the Convention as a whole or from Article 4.

If the scope of the Convention as such were limited to B2B contracts, this would already exclude consumer and employment contracts, thus making an explicit reference in Article 4 superfluous.

²² The general risk of divergent interpretation of an autonomous Convention concept where there is no binding authority to interpret it is not being discussed here.

²³ If a court actually seized but not chosen is not entitled to decide the issue, a rule on a stay of proceedings would be required, making proceedings more lengthy and costly.

²⁴ This may be the case where the issue of unequal bargaining power is considered to belong to the category of consent. Again, this relates to the question of delineating the two groups sufficiently clearly in the Convention. If this cannot be achieved, this may speak in favour of not treating the various issues separately.

²⁵ See *supra*, p. 10.

- However, an appropriate definition of B2B contracts – or a negative definition listing the areas not covered – would have to be found.²⁶
- If the Convention itself does not contain any rules on exclusive jurisdiction, what should the relationship to national rules establishing exclusive jurisdiction for certain areas be?²⁷
- In particular, what should be done about IP litigation? With variations in detail, in many States some or more aspects of this area fall under national rules on exclusive jurisdiction.²⁸ However, a general exclusion of any kind of IP-related litigation from scope would reduce the applicability of the Convention enormously because the large area of IP licensing litigation would be excluded. This is an area where choice of court clauses are particularly common, and therefore it would be a huge benefit if the Convention rules on choice of court clauses were applicable. On the other hand, licensing can be very closely related to infringement. An infringement of an IP right may occur in a situation of 'sheer piracy' where there is no contractual relation between the parties at all, but it could also be created by non-compliance with a license agreement by exploiting the IP right beyond the terms of the license. If it were decided to include IP license litigation but to exclude other IP-related issues such as validity or non-physical torts, this distinction would require a very carefully drafted delimitation clause.
- If the Convention were limited to choice of court clauses, should we consider (re-)including contracts for the carriage of goods by sea which traditionally include choice of court clauses?²⁹
- Should other items currently excluded from scope under Article 1(2) be revisited?³⁰

bb) Territorial scope

If a rule on choice of court clauses were the only basis of jurisdiction explicitly provided by the Convention, one question would still have to be resolved with regard to the territorial scope of that rule:

- Is an international element – other than the fact that the choice of court clause points to a court in another State - required to make the Convention applicable?

²⁶ Again, reference is made to the examples provided by Article 2 c) of the Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods and by Article 2 a) of the 1980 United Nations Convention on Contracts for the International Sale of Goods.

²⁷ This issue has already been discussed *supra*, p. 10, in relation to substantive validity of a choice of court clause. If the Convention were limited to choice of court clauses, the answer would probably be that national rules on exclusive jurisdiction would either have to be incorporated into the Convention as restrictions on substantive validity, or they would not be of relevance. Were the Convention to contain further bases of jurisdiction, it would have to be discussed whether existing national rules on exclusive jurisdiction require certain carve-outs from the scope of the Convention as such or from the respective rule on jurisdiction (see *infra*, pp. 23, 25, 27).

²⁸ This applies in particular to the validity of registered industrial property rights, to a lesser extent to the infringement of those rights and to a minor extent to copyright. Litigation related to IP licensing, however, is generally not covered by exclusivity.

²⁹ In the 1999 Draft and the Interim Text, admiralty or maritime matters are excluded from scope under Article 1(2) h). This was closely related to the presence of a provision on employment contracts at that time. Without such a provision, re-inclusion of the aspect of maritime matters mentioned here may perhaps be considered.

³⁰ This is mentioned here for the sake of completeness. However, as to the working method regarding exclusions and inclusions, it is suggested to follow the approach proposed *supra*, in footnote 16 by considering the question with regard to each white list ground of jurisdiction separately.

The issue was identified in the bracketed part of Article 2(1) a) of the Interim Text but there has been no consensus yet on this question.³¹

- If an international element were required for a Convention on choice of court clauses to apply, would this “international element” have to be defined?
- If this is the case, can a positive definition be achieved, or would a negative description like the one used in Article 3(3) of the Rome Convention³² be sufficient?

If no international element is required and at the same time it is decided that some issues with regard to the substantive validity of a choice of court clause may only be decided by the chosen court, the right place to state this would be in Article 4 itself. This would ensure that, through the reference in Article 2(1) a), this rule would also have to be observed by a court seized but not chosen if all the parties are habitually resident in the State of the court seized.

c) Personal versus subject matter jurisdiction

In June 2001, some participants wanted to ensure that a chosen court would not be obliged by Article 4 to hear a case if it lacked subject matter jurisdiction. This concern led to the addition of the bracketed parts in Article 4(1), except for the last sentence.

Since the concern was well-received but the proposals to meet it were not considered satisfactory by the meeting as a whole, another way to deal with the issue could be to include a further paragraph or article³³ as follows:

“Nothing in this Convention shall affect subject matter jurisdiction.”

d) Interim relief

The present situation is – very simply speaking - as follows: A number of Commonwealth jurisdictions do not provide for interim relief unless the proceedings on the merits are also pending there. In other States, it is common practice to request interim relief in the State where it is supposed to be enforced, independent of proceedings on the merits which are pending or will have to be brought elsewhere. In addition, the Conventions of Brussels³⁴ and Lugano³⁵ as well as the Brussels Regulation³⁶ provide for recognition and enforcement of interim measures in other Contracting States, provided that certain conditions are fulfilled.

If the Judgments Project now were to establish certain rules on choice of court clauses, in particular where they are exclusive, the following questions would have to be answered:

- Should it be possible to obtain interim relief from a court other than the chosen court?

³¹ See footnote 15 of the Interim Text for the different proposals on this issue.

³² Article 3(3) of the *Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations* (O. J. L 266, 09.10.1980, p. 1) implies that the Convention is also applicable in cases where the parties have chosen a foreign law but “all the other elements relevant to the situation at the time of the choice are connected with one country only”.

³³ To make it a separate general article would facilitate drafting if further white list bases were added later because the article would then equally cover these additional bases.

³⁴ O. J. C 27, 26.01.1998, p. 1.

³⁵ O. J. L 319, 25.11.1988, p. 9.

³⁶ O. J. L 12, 16.01.2001, p. 1.

- If the answer to the first question in principle is positive, should there be a distinction between exclusive and non-exclusive choice of court clauses?
- If the answer to the first question in principle is positive, should there be a distinction between different types of interim measures?³⁷
- Would it be necessary to make the decision (whether positive or negative) explicit?

At this stage, the question is not yet whether there should be a basis of jurisdiction in the Convention to issue interim measures or whether such measures should be recognised and enforced under the Convention – an issue which used to be controversial in past discussions. The question is whether we want to say explicitly that only the chosen court may issue such interim relief, or whether we want to say that, notwithstanding a(n) (non-)exclusive choice of court clause, the Convention does not want to create an obstacle for interim relief being obtained from courts other than the chosen court.

If one were to restrict the possibility of granting interim relief to the chosen court only, one would later probably need to discuss recognition and enforcement of such interim measures in other Contracting States in order to make sure that the assets located there can be exploited by the plaintiff. Otherwise the rule could amount to a denial of justice.

If, on the other hand, the answers to the first, second and fourth question were in the affirmative, thus allowing courts other than the exclusively chosen courts to grant interim relief, it would be necessary to expand further on this.

2 Structure

a) White/grey/black

A Convention on choice of court clauses in B2B cases would include only one white rule on jurisdiction, plus rules on recognition and enforcement of decisions based on that provision. This necessarily implies that the rules on jurisdiction under national laws continue to apply in each State Party, thus retaining the status quo in form of a large grey area.

However, although not strictly required for the functioning of the aforementioned rules which are essential for such a “minimum convention”, the addition of a black list is theoretically possible already at this stage of a very restricted Convention. With regard to its necessity, desirability and possible content, however, Member States might wish to strike a balance between white and black according to policy considerations and in the light of previous discussions.

b) *Forum non conveniens*, declining jurisdiction and related issues

The major added value of a Convention on choice of court clauses as identified by Preliminary Document No 18 is legal certainty. Parties could thereby be certain that (aa) the court (exclusively?) chosen and actually seized will have no discretion to decline jurisdiction for reasons of inconvenience. Moreover, parties could be certain that (bb) any court of a Contracting State would dismiss the case for lack of jurisdiction or suspend

³⁷ One could, for instance, discuss a distinction between (1) freezing orders taken in a Contracting State other than the Contracting State of the chosen court in order to protect assets in support of proceedings on the merits before the chosen court, (2) interim payment orders and other orders ordering specific performance; (3) measures restraining conduct which is allegedly unlawful or which is causing/likely to cause current or imminent future harm.

proceedings if the parties had exclusively chosen the courts of another (Contracting?) State. Thirdly, parties could be certain that (cc) any court of a Contracting State other than the court exclusively chosen would not interfere in any other way with the exclusive jurisdiction of the chosen court.

- A policy choice will therefore have to be made as to whether States are prepared to adopt these three goals of a rule on choice of court clauses in the Convention.
- In case of an affirmative answer, it will then have to be decided whether any rules governing discretion to decline jurisdiction would be necessary in the Convention.
- Moreover, it will have to be decided whether any rule is required to prevent courts other than the court exclusively chosen from interfering with the chosen court's hearing the case.

The following paragraphs will demonstrate that, in order to achieve these goals, rules along the lines of those contained presently in Articles 21 and 22 of the Interim Text may also be necessary in a Convention limited to one white list jurisdiction on choice of court clauses. Moreover, it will be demonstrated where decisions on substance would be necessary and where slight amendments may be required due to the limitation of such a Convention to one white list jurisdiction only. As a starting point, it is assumed that the consensus achieved on the policy goals underlying Articles 21 and 22 still stands.

aa) Discretion of the chosen court?

If nothing were said in the Convention, this is likely to give rise to different opinions on whether any existing national doctrines and rules of the court seized providing for discretion to decline jurisdiction would continue to apply. Courts in common law States familiar with the doctrine of *forum non conveniens* might continue to exercise discretion offered by national law as to whether to dismiss the case. This would seriously hamper achieving the aim of the Convention.

- A simple way to remedy this would be to include a prohibition on application of the doctrine of *forum non conveniens* or any similar rule for declining jurisdiction, following the example of Article 22(7) of the Interim Text.
- This would require a decision whether the application of any national doctrine of *forum non conveniens* or similar should be barred for the chosen court only in cases of an *exclusive* choice of court clause or also if the clause were *non-exclusive*.

In order to make clear why it is essential to answer this second question, it might help to take a look at the present solution in Article 22 of the Interim Text which does distinguish³⁸ between exclusive and non-exclusive choice of court clauses:

(1) Exclusive choice of court clause

Article 22, according to its paragraph 1, only applies when the jurisdiction of the court seized is not founded on an *exclusive* choice of court agreement valid under Article 4. The underlying idea was to give the court chosen in a non-exclusive choice of court clause a limited autonomous discretion under the Convention, and, more importantly, to *exclude* even such limited discretion to decline jurisdiction for the court exclusively chosen in favour of foreseeability. This exclusion would be even more necessary with regard to the –

³⁸ Article 4(1), first sentence, establishes the presumption that the choice of court clause is exclusive unless the parties have agreed otherwise.

generally wider – discretion offered by national doctrines of *forum non conveniens*, in particular where such foreseeability is the major purpose in having a Convention on choice of court clauses.

Although the Interim Text demonstrates that there was no consensus on a rule proposed in Article 22(7) which would prohibit any court having white-list jurisdiction to apply the national doctrine of *forum non conveniens*, this may be due to the large number of white list grounds which were contained in that provision. The assessment might be different if such a clause were limited to the chosen court only.

- Is there consensus that a court seized on the basis of an *exclusive* choice of court clause may not apply any national doctrine of *forum non conveniens* which might be known in its State?

If this is the case, no autonomous rule on declining jurisdiction would be required in the Convention. However, a prohibition with regard to the application of national rules in this area, as mentioned above, would be necessary.

(2) Non-exclusive choice of court clause

Where the choice of court clause is *not exclusive*, the present Article 22(1) *does* allow the court chosen and actually seized to decline jurisdiction in accordance with Article 22.

- Is there consensus that a court seized on the basis of a *non-exclusive* choice of court clause may exercise discretion to decline jurisdiction according to Article 22 but may not apply any national doctrine of *forum non conveniens* which might be known in its State?

If it were decided that national doctrines and rules may continue to apply, no rule in the Convention would be necessary. If, on the contrary, it were decided that national doctrines and rules should not be applied by the chosen court, an autonomous rule in the Convention such as the one presently suggested in Article 22 would be required. For the sake of clarity, it may have to be complemented by a prohibition to apply these national doctrines and rules.

bb) Obligation of any court seized in a Contracting State to dismiss the case for lack of jurisdiction or to suspend proceedings if the parties had chosen the courts of another State

(1) Exclusive choice of court clause

If the choice of court clause were *exclusive*, any court in any Contracting State other than the State of the chosen court would be obliged to dismiss the case for lack of jurisdiction unless it is entitled by the Convention to invalidate and disregard a choice of court clause pointing to another State. This obligation is at present only partly expressed in Article 4 itself: Article 4(1), second sentence, obliges courts of Contracting States to “decline”³⁹

³⁹ It has to be pointed out that the expression “to decline jurisdiction” in the English version of Article 4(1), second sentence (“*se déclarer incompétents*” in the French version), does not have the same meaning as the same expression used in the English version of Article 22 (“*refuser d’exercer la compétence*” in the French version). In Article 4, this means that the court lacks jurisdiction under the Convention. Article 22, on the other hand, is based on the assumption that the court does have jurisdiction (either white list jurisdiction or perhaps, as suggested in the bracketed part of Article 22(6), a grey area jurisdiction consistent with the white list). Article 22 then gives this court a limited discretion to decline the exercise of this existing jurisdiction. In order to avoid confusion, in this paper the expression “to decline jurisdiction/*refuser d’exercer la compétence*” is therefore limited to Article 22. In spite of the words used in the English version of Article 4(1), whenever the obligations of a court *not* having jurisdiction are being discussed, the words “to dismiss the case for lack of jurisdiction/*rejeter l’affaire pour incompétence*” are used.

jurisdiction or to suspend proceedings in favour of a chosen court in a *non-Contracting* State. If the chosen court is located in a *Contracting* State, the same obligation to dismiss the case for lack of jurisdiction flows indirectly from the introductory words to Article 17 that allow the courts of Contracting States to make use of jurisdiction rules provided by national law only "subject to Article 4".

- If the Convention were to contain only one basis of jurisdiction along the lines of Article 4, it would be necessary to make it explicit⁴⁰ that where there is an exclusive choice of court agreement, any court in a Contracting State other than the chosen court must (suspend proceedings or)⁴¹ dismiss the case for lack of jurisdiction although there might exist jurisdiction under national law.

It is to be expected that courts might make more use of a suspension, at least as long as it is not clear whether the chosen court will consider the choice of court clause to be valid.

- If the chosen court holds the clause to be valid, the (non-chosen) court first seized shall dismiss the case.
- If the chosen court holds the clause to be invalid and does not assume jurisdiction under its national law but dismisses the case, the proceedings before the (non-chosen) court first seized may be resumed.
- If the chosen court holds the clause to be invalid and would nevertheless wish to assume jurisdiction under its national law, it will have to be examined whether this should be dealt with by Articles 21/22 in order to avoid parallel proceedings in the two States having both grey area jurisdiction, or whether two grey bases were such a weak connection to the Convention that the question of *lis pendens/forum non conveniens* should be left to national law.
- Would it be necessary to treat choice of court agreements in favour of courts in other Contracting States differently from those in favour of courts of non-Contracting States?⁴²

(2) Non-exclusive choice of court clause

Although under the Convention, no competing white bases of jurisdiction would be available, in case of a *non-exclusive* choice of court clause it is conceivable that courts in two different Contracting States are being lawfully seized – one under the Convention, relying on the choice of court clause (white ground), and the other one under national law (grey area) by a plaintiff not relying on the choice of court clause.

- If, in a Convention on choice of court clauses only, the present Article 17 were lacking, it would have to be made explicit elsewhere that, in cases where there is no exclusive choice of court clause pointing to another State, the jurisdiction rules under national law are in principle still available.

⁴⁰ This could be dealt with either in Article 4 or in an article along the lines of the present Article 17, delineating the Convention from national law.

⁴¹ The decision whether the court shall be obliged to dismiss the case for lack of jurisdiction or only to suspend proceedings is related to whether one wants to reserve the determination of (some or all elements of) validity to the chosen court only, or whether any court seized may decide this.

⁴² One possible distinction could be to explicitly oblige the non-chosen court of a Contracting State to dismiss the case for lack of jurisdiction immediately if the court chosen is in another Contracting State. If it is in a non-Contracting State, the Convention could provide for suspension first and, as soon as it is clear that the chosen court accepts jurisdiction, a subsequent dismissal by the non-chosen court.

In general, it will have to be discussed whether choice of court clauses in favour of non-Contracting States shall be honoured under the Convention. It may well be that a plaintiff seizes the court of a Contracting State which is not chosen because the decision will need to be enforced in that State and it is clear that a judgment rendered by the chosen court in a non-Contracting State would not be enforced in that Contracting State.

Therefore, there is no *obligation* of the court seized but not chosen to dismiss the case.

- But is there a *discretion* to decline jurisdiction?

At present, the Convention's autonomous rule on declining jurisdiction does not apply if the court seized only has grey area jurisdiction (Article 22(6)). Therefore, national rules, where they do exist, would apply. Courts in Common law States might thus have wide discretion to decline jurisdiction under national law in favour of the chosen court while courts in civil law countries may not have this discretion. A rule in the Convention is not required if the policy choices made in the current Article 22 are to be maintained. If, on the other hand, it is considered desirable to establish a common standard, Article 22(6) would have to be amended.

cc) Possible interference of a court of a Contracting State other than the court exclusively chosen by the parties

This relates to the issue of anti-suit injunctions in the following case: The courts of one Contracting State were designated by an exclusive choice of court clause, and proceedings are actually brought there. However, the defendant in those proceedings then goes to the court of another Contracting State and asks for an anti-suit injunction ordering the plaintiff of the first proceedings to refrain from continuing the suit. This could happen, for example, in a case where the person requesting an anti-suit injunction wants to recover an indemnity from a third party if the requesting person is held liable in the first proceedings before the chosen court, and the third party is not subject to the chosen court's jurisdiction. It could also arise where other issues of efficiency of justice are concerned, e.g. a case with multiple defendants where only one out of a large number of defendants were subject to the jurisdiction of the chosen court.

- Should the Convention contain a rule prohibiting the courts of Contracting States from issuing anti-suit injunctions with regard to proceedings before the court in another Contracting State which was designated by an exclusive choice of court clause?

dd) Conclusion

(1) Discretion of the chosen court

- In case of a court chosen in an *exclusive* choice of court clause, an autonomous rule in the Convention is required in order to *exclude* any discretion to decline jurisdiction for reasons of inconvenience which that court may have under its national law. To achieve this purpose, a simple *prohibition* along the lines of Article 22(7) might be sufficient.
- In case of a *non-exclusive* choice of court clause, however, an autonomous rule in the Convention setting up a *full mechanism*, i.e. something along the lines of Article 22 of the Interim text, is required in order to *replace* the chosen court's discretion which may exist under national law to decline jurisdiction for reasons of inconvenience.

(2) Obligations of the court seized but not chosen

With regard to any court seized which is *not* the chosen court, it would have to be said that:

- In case of a non-exclusive choice of court clause, a provision like Article 17 may be needed to make clear that national bases of jurisdiction may still be used.

- In case of an exclusive choice of court clause, a duty of the court seized but not chosen to dismiss the case for lack of jurisdiction (or to suspend proceedings?) would have to be made explicit.
- It may be considered to distinguish between choice of court clauses in favour of courts in Contracting States and in non-Contracting States.

(3) Obligation of any court not chosen not to interfere with proceedings before the chosen court

- It may have to be discussed whether a rule prohibiting anti-suit injunctions to the detriment of proceedings brought before the exclusively chosen court of a Contracting State might be necessary.

c) *Lis pendens*

Where the court first seized is not the chosen court, it has to be determined whether rules on *lis pendens* are necessary.

aa) Exclusive choice of court clause

Where the court first seized has jurisdiction under its national law but is not located in the State chosen in an exclusive choice of court clause, Article 4 would oblige that court to enforce the clause and dismiss the case for lack of jurisdiction.

Article 21 contains rules addressed to the court second seized. Article 21 currently states that the court second seized does not have to suspend proceedings under Article 21 if it has jurisdiction under an exclusive choice of court clause. Therefore the exclusive choice of court clause prevails over priority in time in relation to a grey jurisdiction.

- Do we need a rule like Article 21(1) *in fine* which makes it clear that the court second seized⁴³ (but which was the one exclusively chosen) does not have to suspend proceedings or dismiss the case immediately, *i.e.* during the period where the court first seized has not yet dismissed?

If we did not include an autonomous rule on this in the Convention, it would be left to the national law of the court second seized to decide what to do with the proceedings before it while the court first seized has not yet dismissed. To achieve uniformity and avoid an unnecessary dismissal by court II, followed by new proceedings being brought later after dismissal by court I, an autonomous rule may be desirable.

bb) Non-exclusive choice of court clause

Where the court first seized has grey jurisdiction but is not in the State chosen in a non-exclusive choice of court clause, Article 4 would not oblige the court first seized to enforce the clause and dismiss the case for lack of jurisdiction.

Assuming that the court second seized is the court chosen in the non-exclusive clause,⁴⁴ Article 21(1) in its present version does not oblige this court second seized to dismiss the

⁴³ The obligation of the court first seized which is not the court exclusively chosen was discussed *supra*, pp. 17 *et seq.*

⁴⁴ At present it has not been decided in general whether article 21 (the Convention's autonomous solution on *lis pendens*) obliges the non-exclusively chosen court second seized to suspend proceedings in favour of a court first seized that only has (some specific sort of) grey jurisdiction (see the second set of square brackets in Article 21(1)). The grey bases of jurisdiction privileged in the Interim Text by the words between square brackets, however, would only be those grey jurisdictions consistent with other white list bases in the Convention. In a Convention having only one white list jurisdiction based on choice of court, this is not conceivable.

case in favour of a mere grey area jurisdiction of the court first seized.

This seems to suggest that the Convention does not provide any tool to enable one of the two courts seized to dismiss the case.

However, there may be a partial overlap with Article 22. Therefore the problem described here could in part be dealt with by Article 22. This Article gives a court (here: the court second seized) the possibility to decline jurisdiction also in favour of a grey area jurisdiction in another Contracting State.⁴⁵

The reverse situation, however, is not being remedied by Article 22: If the court first seized wished to decline jurisdiction in favour of the court second seized which was designated in a non-exclusive choice of court clause, Article 22 would not apply: Article 22(7) explicitly refers to national law if the court first seized only has grey area jurisdiction.

If the court second seized which was designated in a non-exclusive choice of court clause considered itself to be the more appropriate forum and would therefore not exercise the discretion mentioned in the preceding paragraph, this would result in proceedings pending in two States without a remedy provided by the Convention.

It could be concluded from the lack of a rule for this case in the Convention that this may leave room for national law to apply. Common law courts may tend to apply rules on declining jurisdiction as permitted by Article 22(7). However, courts in Civil law countries following the strict *lis pendens* approach would not have the option to refuse to exercise grey area jurisdiction in favour of a court of another Contracting State which was designated in a non-exclusive choice of court clause and seized secondly.

If this were considered undesirable, Article 21 would have to be amended.

d) Bilateralisation

The question of a possible bilateralisation of the Convention (in whole or in part) has never been thoroughly discussed. At the Edinburgh meeting in April 2001, and again during the First Part of the Diplomatic Conference in June 2001, a proposal⁴⁶ was submitted with regard to this issue.

However, it may be assumed that with this one white jurisdiction only, based on the agreement of the parties, plus a grey area preserving the national status quo, there is no need for a clause providing for bilateralisation.

e) Disconnection

The issue of disconnection has not yet been discussed in detail with regard to specific jurisdiction rules. However, a number of proposals were submitted which are contained in Annex I to the Interim Text. In the year 2000, the Permanent Bureau presented an analysis of possible conflicts between the Judgments Project and existing instruments.⁴⁷

Moreover, Member States were asked to provide lists and, if possible, texts of those international instruments binding them which would have to be taken into account when drafting a disconnection clause.

⁴⁵ See in particular Article 22(4), second sentence.

⁴⁶ Working Document No 48.

⁴⁷ Note on the relationship between the future Hague Judgments Convention and regional arrangements, in particular the Brussels and Lugano instruments, distributed as Annex II – Ottawa II and Annex Q – Edinburgh. In order to avoid repetition, reference is made to this document.

In the first half of the year 2001, the European Union and its Member States submitted a list including, *inter alia*, the Convention of Brussels⁴⁸ and Lugano. Since 1 March 2002, the Brussels Convention has been 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 for 14⁴⁹ of the 15 EU Member States. In the following paragraphs, these three instruments will be referred to as “the European instruments”.

For the sake of clarity, it will be demonstrated below how the proposals contained in Annex I to the Interim Text would affect the disconnection between the white list rule on choice of court clauses in the Judgments Project and the corresponding rule in the European instruments.⁵⁰ This illustration may help to decide whether further disconnection rules are needed.

Proposal 3 deals with the disconnection of the Chapter on recognition and enforcement and is therefore not discussed here.

While both Proposal 1 and 4 are generally-phrased catch-all clauses, Proposal 4 only disconnects the jurisdiction rules of the Judgments Project from the law applicable within the territory of a regional economic integration organisation, in particular the European Community.

Proposal 2, on the other hand, specifically and exclusively addresses the disconnection of the Conventions of Brussels and Lugano and the Brussels Regulation from the Judgments Project. If Proposal 2 were adopted, this means therefore that an additional clause disconnecting any other international instrument (along the lines of Proposal 1?) would be necessary.

If, on the other hand, instead of Proposal 2 the decision were in favour of Proposal 4, this would again require an additional general disconnection clause (along the lines of Proposal 1?), this time covering any other international instrument including the Lugano Convention.

- Under Proposal 1, the Judgments Project would prevail unless a contrary declaration is made by the States Parties to the European instruments.
- Under Proposal 2, before the courts of an EU Member State or a State Party to the Lugano Convention (European instrument States), the European instruments would prevail in two cases: where the chosen court is in a European instrument State and either the plaintiff or the defendant is domiciled in such a State. If the court chosen is not in a European instrument State, Article 4 of the Judgments Project prevails even if both parties are domiciled in the EU.
- Proposal 4 would lead to the same result in this case with regard to EU Member States.

II What if we added a rule on consent/waiver/submission?

1 Issues

This question is being dealt with immediately after the provision on choice of court clauses because, in 2001, it was decided to delete what had been Article 5 (submission) in the 1999 Draft and to include what is now Article 4(3) in the Interim Text, thereby making this issue part of what has just been discussed.

⁴⁸ This Convention is still in force between the 14 EU Member States now bound by the Regulation (EC) No. 44/2001 (EC) and Denmark.

⁴⁹ With the exception of Denmark.

⁵⁰ It is assumed that in Proposal 1, the expression “international instrument” would include European Community instruments such as regulations.

Given the possible structure of a mixed convention that necessarily contains at least one white list ground and a grey area (supplemented perhaps by a black list), the problem identified in June 2001 which led to the deletion of the previous Article 5 (submission) continues to exist. Even if there is jurisdiction of the court seized under national law (but not under the Convention), a defendant would be obliged to plead lack of jurisdiction in order to avoid the 'whitewashing' of this grey basis of jurisdiction which would otherwise lead to recognition and enforcement under the Convention. This led to the deletion of Article 5 as contained in the 1999 Draft and to the inclusion of what is now Article 4(3) in the Interim Text. This provision, the idea of which received consensus,⁵¹ increases the requirements of submission from the mere lack of contestation to express acceptance of the jurisdiction by the defendant before a court of a Contracting State, complemented by some formal requirements.

Taking into account this limited scope of the provision and its present incorporation into Article 4, it is unlikely that this addition would either give rise to a re-examination of the substantive scope of the Convention or to any other issue to be re-assessed.

2 Structure

a) White/grey/black and *lis pendens*/declining jurisdiction

If this rather limited form of submission as defined in Article 4(3) of the Interim Text were to be included, it may be assumed that this would not yet give rise to a different assessment of two of the issues addressed above, namely white/grey/black and *lis pendens*/declining jurisdiction.

b) Bilateralisation

- Does the introduction of this second white list jurisdiction already create a need for a bilateralisation clause? *I.e.* would Contracting States like to create the possibility of excluding the application of certain parts of the Convention with regard to certain States?

If this were the case, those *States* to which such a bilateralisation might apply would have to be defined:

- Non-Member States acceding to the Convention?
- Any State that is not a Member of the Hague Conference at the time of the adoption of the Draft Convention?
- Any State?

Moreover, it would then have to be decided which would be the *rule and* which the *exception* (*i.e.* application unless there is a declaration to the contrary or application only in case of positive acceptance).

c) Disconnection

The following considerations are, for the reasons set out above, again limited to the European instruments.

The rule on submission contained in the European instruments 1(Article 18 of the Brussels and Lugano Conventions; Article 24 of Regulation (EC) 44/2001) is wider than Article 4(3); white list jurisdiction is thus established more easily under the European instruments. To

⁵¹ As to drafting, the view was expressed that the reference to 'writing' should be aligned with Article 4(2), see footnote 26 of the Interim Text.

the extent that it is wider than under the Judgments Project, such jurisdiction would, in the context of the Judgments Project, be a grey jurisdiction.

With regard to the European instruments, it will therefore have to be decided when jurisdiction of a court of a State bound by a European instrument over a person would follow the rules established in the Judgments Project, and when jurisdiction would follow the European instruments.⁵²

Below, the proposals for a disconnection clause as set out in Annex I to the Interim Text are being examined as to their effects on submission. Since some of these proposals were drafted under the 1999 Draft where there still was a wide submission rule in Article 5, the following considerations are based on the assumption that any rule on submission in the Judgments Project would fall under these disconnection provisions. If, on the other hand, in the light of the restriction undertaken in the 2001 Interim Text and of the subsequent similarities to choice of court clauses, it now seems more appropriate to disconnect these rules in the same way as the choice of court provision, the arguments developed above under B. I. 2. e) would apply here, thus replacing the considerations set out below.

- Under Proposal 1, the Judgments Project would prevail unless a contrary declaration is made by the States to which the European instruments apply.
- Under Proposal 2, before the courts of an EU Member State or a State Party to the Lugano Convention, the defendant's domicile would be decisive: The Hague rule on submission would prevail if the defendant is not domiciled in a European instrument State.

This means that for a defendant domiciled in an EU Member State or a State Party to the Lugano Convention, the European instruments would prevail before the courts of those States. The latter would therefore exercise a grey jurisdiction created by submission under the European instruments even in cases where there is an exclusive choice of court clause pointing to a State Party to the future global Hague Convention (the Judgments Project) other than the States to which the European instruments apply.

- Proposal 4 in this case gives more preference to the Judgments Project: The latter prevails over the Brussels Convention and Regulation before any court in an EU Member State if any one party (and not only the defendant) is habitually resident outside the EU.

III What if we added a rule on the defendant's forum ([habitual] residence)?

1 Issues

In June 2001, there was agreement on the defendant's forum as a forum of general jurisdiction.

- However, there was no consensus on whether "habitual residence" or "residence" should be this general forum for natural persons.

⁵² This is complicated by the fact that there are different opinions as to the scope of application of Article 18 of the Brussels and Lugano Conventions and Article 24 of the Brussels Regulation. While some say that these provisions only require a court in a European instrument State to be seized, others read further conditions into them, deriving from the structure of the instrument as a whole. Some conclude that at least one party must be domiciled in a European instrument State; others would require the defendant to do so. So one condition for successful disconnection – the identification of possible conflicts – is lacking.

- It was suggested by some delegations that there be a definition of “habitual residence”. While this was not widely supported, the need for a definition was voiced by a large number of delegations with regard to the concept of “residence”.⁵³
- Once this decision has been taken, the drafting of Article 3(3), dealing with the general forum for entities or persons other than natural persons, would have to be adapted accordingly.
- Like for Article 4, it would have to be examined for the defendant’s forum whether certain areas should be excluded from the application of this Article.
 - This may apply to certain areas which are covered by *exclusive jurisdiction* in some or most national laws (such as certain aspects of IP litigation; litigation relating to rights *in rem* in immovable property, etc.).
 - On the other hand, where *no exclusive jurisdiction* exists, the defendant’s forum is frequently being used for consolidation (e.g. in defamation cases, environmental liability, copyright infringement and other cases where there are effects in more than one State). There may be some areas where it is not desired to let such judgments benefit from the Convention’s rules on recognition and enforcement. If one were to tackle this at the level of jurisdiction, this would require further carve-outs from this Article.

2 Structure

a) Scope

- If, after having discussed and included more than one white list ground, in the end it becomes clear that there is the desire to exclude a certain subject matter from the application of every one of these white list grounds of jurisdiction, the rule on exclusion can be moved to the general provision on the substantive scope of the Convention.
- If, on the other hand, a certain subject matter is only excluded from some white grounds, leaving at least one white ground available, the Convention rules on *lis pendens*/declining jurisdiction and on recognition and enforcement would remain available for cases covering this subject matter by not excluding it from scope.

b) Further general questions

This addition should not necessarily require fundamental changes to the structure because:

- rules on *lis pendens*/declining jurisdiction would, as we have seen, probably already be required for the above-mentioned ‘minimum convention’
- the same would apply to the opening clause for a grey area, and
- for the rules on recognition and enforcement.⁵⁴

⁵³ See Article 3(2) and footnote 17 of the Interim Text. Independent of whether there is to be a black list, it will have to be defined which extent of presence is necessary to provide a sufficient connection (compare with the “temporary residence or presence of the defendant” which was black-listed under Article 18(2) (i) of the Interim Text).

⁵⁴ This paper does however not examine in detail whether minor amendments, not affecting the fundamental structure, might be required in the chapter on recognition and enforcement.

Again, a possible change created by any addition of a further white list ground of jurisdiction might be that the balance concerning the need for/desirability of a possible black list and its contents may have to be struck differently.

c) Bilateralisation

- If the previous addition of submission to the white list did not yet give rise to a need for bilateralisation this would again have to be addressed here.
- In case of a positive answer, in addition to the questions listed above under B. II. 2. b) it would have to be decided whether such bilateralisation should apply to the Convention as a whole or only to this provision.

d) Opt in/opt out

Either as an alternative or as a complement to (partial) bilateralisation, an opt in- or opt out-provision could be discussed.

- Bilateralisation focuses more on giving States which are or wish to become Parties to the Convention the opportunity not to be automatically bound in relation to every other State already being or later becoming a Party. The other State affected by this decision would not have any power to influence it.
- An opt out-clause would have a more general effect for the State Party making use of it because the jurisdiction rules affected by the opt out-clause would not apply to that State in general (and not only in relation to certain other States Parties).

e) Disconnection

Again, the relationship to other existing international instruments would have to be determined. In relation to the European instruments it will have to be taken into account that these instruments rely on domicile as the general defendant's forum while the Judgments Project is based on [habitual] residence.

As far as proceedings brought before courts of European instrument States are concerned, the various proposals on disconnection set out in Annex I to the Interim Text would lead to the following results:

- Under Proposal 1, the Hague rule would prevail unless a contrary declaration is made by the States Parties to the European instruments.
- Under Proposal 2, the Hague rule would prevail in any case.
- Under Proposal 4, the Hague rule would only prevail if not all the parties are habitually resident in the EU. The Lugano Convention would yet have to be disconnected.

IV What if we added a rule on counter-claims?

1 Issues

- The inclusion of a rule creating jurisdiction for counter-claims (and thereby according the privilege of recognition and enforcement under the Convention to the judgment given on the counter-claim) for a court that has white list jurisdiction under some other Convention ground can help to counterbalance discrepancies created by national laws. While some defenses in some countries may have to be

raised as defenses in the main proceedings, thereby falling under the white list jurisdiction of that court existing for the initial claim, in other countries national procedural law may require that such defenses be brought before the court by a counter-claim. Where no other white list ground under this Convention applies, the part of the decision which covers the counter-claim would in these cases not be covered by the Convention's rules on recognition and enforcement.

An identical treatment of these two groups would moreover make the distinction between counter-claims and defenses such as set-off less important. However, it seems that the distinction referred to by the co-reporters on page 73 of Preliminary Document No 11 was so far considered satisfactory.

In June 2001, there was agreement that there should be provision for a jurisdiction based on a counter-claim and that this jurisdiction should be one that is entitled to recognition and enforcement under Chapter III.⁵⁵

- In June 2001, two different additions to Article 15 were suggested in order to make clear that this Article would not create subject matter jurisdiction concerning the counter-claim if the latter otherwise would not fall under that court's subject matter jurisdiction. There was no consensus on the need for making this explicit. However, if it were decided to do so, it might be advisable to do this in a general provision in the beginning of the Convention because the same issue arises under the choice of court provision.⁵⁶
- Given the fact that the Convention so far does not contain any rules establishing exclusive jurisdiction, it would have to be decided how to deal with issues covered by exclusive jurisdiction under certain national laws in areas not excluded from the scope of the Convention. This would arise in particular if any kind of intellectual property litigation were included into the scope because in infringement⁵⁷ cases, invalidity is a common defense which, depending on the rules of procedure of the State concerned, would either have to be raised as a defense in the original proceedings, or brought as a counter-claim.

2 Structure

a) General

This addition should not necessarily require fundamental changes to the structure because:

- rules on *lis pendens*/declining jurisdiction would already be required for the above-mentioned rules on jurisdiction,
- the same would apply to the opening clause for a grey area, and
- for the rules on recognition and enforcement.⁵⁸

⁵⁵ See footnote 98 of the Interim Text.

⁵⁶ See *supra*, p. 14.

⁵⁷ As stated above, if it were decided to exclude IP infringement litigation but to include IP licensing litigation, the distinction will be difficult to make.

⁵⁸ This paper does however not examine in detail whether minor amendments, not affecting the fundamental structure, might be required in the chapter on recognition and enforcement.

As a minor drafting issue, however, Article 25 may have to be adapted by including a specific reference also to the white jurisdiction rule on counter-claims.⁵⁹

Moreover, it would have to be examined whether this addition of a further white list ground of jurisdiction already requires that the balance concerning the need for/desirability of a possible black list and its contents be struck differently.

b) Bilateralisation

If the previous additions of submission and defendant's forum to the white list did not yet give rise to a need for bilateralisation, the question would again have to be addressed here. In case of a positive answer, like for the defendant's forum it would have to be decided in addition to the questions listed above under B. II. 2. b) whether such bilateralisation should apply to the Convention as a whole or only to this provision. When answering this question, the answer given to the same question with regard to the defendant's forum should be taken into account.

c) Opt in/opt out

Either as an alternative or as a complement to (partial) bilateralisation, an opt in- or opt out-provision could again be discussed.

d) Disconnection

Again, the relationship to other existing international instruments would have to be determined. In relation to the European instruments it will have to be taken into account that the rule on counter-claim jurisdiction contained in those instruments requires a closer connection between the two claims than the Judgments Project.⁶⁰

As far as proceedings brought before courts of European instrument States are concerned, the various proposals on disconnection set out in Annex I to the Interim Text would lead to the following results:

- Under Proposal 1, the Hague rule would prevail unless a contrary declaration is made by the States Parties to the European instruments.
- Under Proposal 2, the Hague rule would prevail if the defendant to the counter-claim is not domiciled in a European instrument State.
- Under Proposal 4, the Hague rule would prevail if one of the parties is not habitually resident in the European Union.

C Organisational issues

It is envisaged to hold a first meeting of the informal group at the Permanent Bureau in The Hague from 22-25 October 2002. Time, length and place of future meetings will be agreed upon during that meeting, depending on the progress made at that meeting and the availability of those concerned.

This paper will be placed on the Hague Conference's website. Comments are welcome and may be submitted to the Permanent Bureau, preferably in electronic form (to: secretariat@hcch.net; cc to: as@hcch.nl). They will be made available to the members of the informal group.

⁵⁹ In June 2001, this desire was expressed; see footnote 98 of the Interim Text and p. 95 of Prel. Doc. No 11.

⁶⁰ See the comments of the co-reporters on p. 73, footnote 117 of Prel. Doc. No. 11.