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THE DRAFTING PROCESS FOR A HAGUE CONVENTION ON JURISDICTION
AND JUDGMENTS WITH SPECIAL CONSIDERATION OF INTELLECTUAL
PROPERTY AND E – COMMERCE

by

KNUT WOESTEHOF

(Under the Direction of Professor Gabriel Wilner)

ABSTRACT

This thesis is a study of the drafting process for the Hague Convention on Jurisdiction and Judgments. It will be demonstrated why the original goal of a broad treaty was given up in favor of a draft convention that only applies in international cases to exclusive choice of court agreements concluded in civil and commercial matters in the business-to-business setting. The reader will get an understanding of how the participating nations and interest groups influenced the negotiations and modified the outcome of the discussions. Special consideration was given to the matters of intellectual property and e-commerce, which were nearly completely excluded from the scope of the present draft. The thesis concludes that the project can only succeed if it includes business-to-consumer e-commerce transaction issues and intellectual property rights. Without the inclusion of these matters into the scope of the Hague Convention, it will lose further importance and face the danger of becoming obsolete.

INDEX WORDS: Hague Conference, Hague Convention on Jurisdiction and Judgments, Drafting Process, Intellectual Property, E-Commerce, Choice of Court Agreements

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KNUT WOESTEHOFF

J.D., University of Goettingen, Germany, 2002

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Fulfillment of the Requirements for the Degree

MASTER OF LAWS

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2005

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August 2005

DEDICATION

This thesis is dedicated to my mother, Ingrid, and my sister, Kati, for the many reasons they know. I want to thank them for the immeasurable support and love they have given me. I will never be able to pay my mother back for the sacrifices she has made to enable me to be where I am today.

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CHAPTER 1

INTRODUCTION

Imagine the following scenario which could have taken place a decade ago: Two scholars of Private International Law have a discussion about the biggest challenge this field of law has to face in the future. There could have been a lot of different issues both scholars would have come up with. Even though it is difficult and highly speculative to guess which of the issues deserved the most attention, it can certainly be assumed that a convention on jurisdiction and foreign judgments, which is universally acceptable and applicable was at the top of their list. In 1994, the Hague Conference decided to take up this work in order to draft such a unifying treaty. The project was soon known as the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. This thesis will analyze this project. A future Hague Jurisdiction and Judgments Convention is a great opportunity to unify the law in a field which is not only of legal interest but has great ramifications on the legal systems and will affect individuals everywhere.

Although a final Hague Convention on this matter is not yet in force, the outcome seems to be foreseeable. The objective of this thesis is to connect the history of the negotiation process of the proposed Hague Convention with the discussion of its final content in order to provide an understanding of a future result. The thesis will analyze how the influence of the major negotiating parties, namely the United States and Europe, changed the scope of the Convention in the course of the negotiations. The thesis will

describe why, in the end, the United States only agreed to a convention that solely covered exclusive choice of court agreements in civil or commercial matters instead of adopting a treaty similar to the Brussels Regulation.

Special considerations will be given to matters of intellectual property and e-commerce. These two areas were chosen because they play a prominent role since the increasing use of the internet, as one example, has led to a heightened importance of intellectual property matters and e-commerce. This thesis will endeavor to explain whether and how the proposed convention covers these two issues. Each respective approach will be analyzed and compared with other possible approaches. The influence of the negotiating parties on the final outcome will also be analyzed in this context.

Following the introduction in Part I, Part II of this thesis will describe the history of the Hague Convention project. This will include a description of what the Hague Conference actually is, prior attempts by the Hague Conference on the same subject, and the existing framework regarding jurisdiction and judgments in Europe and in the United States. A detailed description of the history of the negotiations itself is also included. The different perspectives of the most important negotiating parties will try to give an understanding for the way the different delegations developed and influenced the discussions. Part III examines the structure and the scope of the Preliminary Draft Convention and the first complete draft on the subject issued by the Hague Conference. The structural portion concentrates on the question of what a mixed convention style is and which advantages such an approach has compared to single and double convention schemes. Next, the scope of the Preliminary Draft Convention will be examined chapter by chapter since this draft was the archetype for the following negotiation and discussion

processes. Part IV concentrates on the development of the project during and after the June 2001 Diplomatic Conference. Changes in the convention text, new approaches and the latest developments will be investigated. Part V deals with the preparations that were made for the June 2005 Diplomatic Conference. It provides a detailed description of the key provisions of the April 2004 Draft which is the most recent draft issued by the Hague Conference. Part VI deals with the special consideration of intellectual property and e-commerce issues in the discussion, which reiterates the importance of the negotiation process. However, this time it is looked upon from the viewpoint of intellectual property and e-commerce. The issue of consumer protection receives special consideration in the section on e-commerce since both fields are inseparably connected. A number of approaches in various countries as well as different positions in the negotiations will be described before a final conclusion is drawn in Part VII of the thesis.

The thesis will conclude that the negotiating parties are proceeding in the right direction by drafting, signing, and ratifying a treaty that only covers exclusive choice of court agreements in civil and commercial matters in the business-to-business setting if more controversial issue will be added later. The adding of the so-called second stage issues is of major importance for the success of the project in the long run.

CHAPTER 2

HISTORY OF THE PROJECT

A. The Hague Conference

On 12 September 1893, the Dutch government called a conference, with the intention of concentrating primarily on family law and succession,¹ and the unification of rules of private international law.² Thirteen states accepted the invitation and sent their government representatives to The Hague, not only in 1893 but also in 1894, 1900, and 1904.³ The loose structure of this conference was given a firm legal basis after World War II by an agreement made between 16 European states and Japan.⁴ In October 1951, these states affirmed the usage established by the Dutch government since 1893 and indicated permanent character of the conference by giving it the name: “The Hague Conference on Private International Law.”⁵ Currently, the Hague Conference is an intergovernmental organization with sixty two member states, which include all European Union member states and the United States.⁶ According to Article 1 of its

¹ See Kurt Lipstein, *One Hundred Years of Hague Conference on Private International Law*, 42 INT’L & COMP. L.Q. 553, 557 (1993).

² See Kurt H. Nadelmann, *The United States Joins the Hague Conference on Private International Law, A History with Comments*, 30 LAW & CONTEMP. PROBS. 291, 292 (1965).

³ See *supra* note 1.

⁴ See *id.* at 558.

⁵ *Id.* For a summary of the work of the Hague Conference, see *id.* at 553; for general information on The Hague Conference see <http://www.hcch.net>.

⁶ Membership as of January 21, 2005: Albania, Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Jordan, Republic of Korea, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Monaco, Morocco, Netherlands, New Zealand, Norway, Panama, Peru, Poland, Portugal, Romania, Russian Federation, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Suriname, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela; for a detailed list

Statute the Hague Conference is organized to promote “the progressive unification of the rules of private international law.”⁷ Conferences are called every four years, but extraordinary sessions are possible as well. In its history, the Hague Conference dealt with the topics of procedure, family matters, succession, commercial matters, torts and conflict of laws.⁸ The United States has been a member since 15 October 1964.⁹ The Hague Conference, with its member states on all continents, seems to offer a solid basis for conventions for the unification of law in certain fields not only regionally, but also worldwide. Thus, the interest in an instrument unifying the law with respect to jurisdiction and enforcement of judgments that would be universally acceptable brought the negotiating parties to The Hague. But is the goal of a universally applicable and workable convention in this field achievable and realistic? What would be an alternative to a Hague Conference Convention?

Negotiations within the Hague regime require multiple levels of compromise from its members. On the one hand is the U.S. and its abstinence from any treaty unifying rules of jurisdiction and enforcement. On the other hand are the nations which adhere to the Brussels and Lugano Conventions.¹⁰ In terms of experience, both sides have a long

of all 64 Member States *see* http://www.hcch.net/index_en.php?act=states.listing (last visited January 21, 2005).

⁷ The text of the Statute of the Hague Conference on Private International Law is available at http://www.hcch.net/index_en.php?act=conventions.pdf&cid=29 (last visited January 21, 2005).

⁸ *See supra* note 1 at 559.

⁹ *See* http://www.hcch.net/index_en.php?act=states.details&sid=76 (last visited January 21, 2005); for general information regarding the U.S. participation in the Hague Conference *see* Peter H. Pfund & Georg Taft, *Congress' Role in the International Unification of Private Law*, 16 GA. J. INT'L & COMP. L. 671 (1986). Peter H. Pfund, of the Office of the Legal Advisor at the Department of State, Office of Private International Law, has provided periodic reports on the work of that office. *See, e.g.,* Peter H. Pfund, *International Unification of Private Law: A Report on U.S. Participation 1987-88*, 22 INT'L LAW 1157 (1988); Peter H. Pfund, *Annual Report, International Unification of Private Law: A Report on United States Participation*, 20 INT'L LAW 623 (1986). For historical information *see* Elliott E. Cheatham & Harold G. Maier, *Private International Law and its Sources*, 22 VAND. L. REV. 27 (1968); Kurt H. Nadelmann, *supra* note 2.

¹⁰ *See infra* part II.B.2.

history of dealing with international civil procedure. But what about smaller nations with less experience in such matters? Negotiations within the limits of the Hague Conference would, undoubtedly, mean that such inexperienced nations would be involved in the process of finding an agreement. Some authors hold the view that their involvement would not only complicate such an agreement process, but would rather make the bargaining of a final text nearly impossible.¹¹ This thought led some academics to suggest that bilateral negotiations exclusively between the U.S. and Europe could achieve a reasonable result more efficiently, since they displayed common interests and similar social, political and economic cultures.¹² While this argument admittedly has substance, a very important question arises nonetheless. Should not the opportunity to involve more inexperienced nations be worth the associated risk of more complicated negotiations? In the opinion supported in this thesis, the answer to this question is a clear yes. The only situation in which the suggestion of bilateral discussions should be considered is if the current Hague project fails due to circumstances not involved with the differences between the US and European legal systems. In that case, such problems could not be resolved in a bilateral setting either.

B. Previous Attempts and Existing Framework

Before analyzing the new attempts regarding the unification of private international law, it seems useful to emphasize the existing framework.

¹¹ For such a pessimistic view see ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS, ESSAYS ON PRIVATE INTERNATIONAL LAW 109 (1996); see also Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT'L L. 111, 121 (1998).

¹² See, e.g., Juenger, *id* at 121.

1. Previous Attempts for Unification

Work on unifying the law regarding jurisdiction and enforcement of judgments is not a new matter for the Hague Conference. In 1969, the first attempts of unification were made by concluding both the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters¹³ and the Convention on the Recognition of Divorces and Legal Separations.¹⁴ The Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters came into effect on February 1, 1971. However, the treaty faced problems that made it impossible for this convention to survive. Only Cyprus, The Netherlands, Portugal and Kuwait became parties, but none of them ever deposited the bilateral agreements that were, according to the convention, necessary to make the treaty operable.¹⁵ The later convention, the Divorce Recognition Convention, turned out to be just as unsuccessful since only eighteen countries, mostly European, ratified or acceded to it.¹⁶ Even though these early attempts were not successful, it was clear that unification in the fields of jurisdiction and enforcement could offer great benefits in various ways. However, an agreement had yet to be achieved not only within Europe, but in other parts of the world. What followed were unification attempts between countries that had at least similar interests and legal backgrounds.

¹³ Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Hague Conference on Private International Law (Feb. 1, 1971), reprinted in 15 AM. J. COMP. L. 362 (1967), also available at http://www.hcch.net/index_en.php?act=conventions.pdf&cid=78 (last visited January 21, 2005).

¹⁴ Convention on the Recognition of Divorces and Legal Separations, Hague Conference on Private International Law (June 1, 1970), reprinted in 8 INT'L LEGAL MATERIALS 31 (1969), also available at http://www.hcch.net/index_en.php?act=conventions.text&cid=80 (last visited January 21, 2005).

¹⁵ Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, *supra* note 13, art. 28.

¹⁶ A list of all the countries that have ratified or acceded to the treaty is available at http://www.hcch.net/index_en.php?act=conventions.status&cid=80 (last visited January 21, 2005).

2. Unification in the EU

A close look at the various approaches of European countries regarding the jurisdiction issue is enough to understand why unification within the EU is more than reasonable and finds common interest. For example, in order to find jurisdiction over a non-resident, it is enough to base this solely on assets located in the forum according to Germany's Law of Civil Procedure.¹⁷ By contrast, the French Civil Code¹⁸ allows national courts to hear nearly any case where the plaintiff is French, regardless of whether the person in question is a resident or not.¹⁹ Moreover, a French defendant can insist on being sued in his own country, and French courts will not enforce a judgment against him provided he has not consented to a foreign jurisdiction.²⁰

In order to protect their citizens against extraterritorial reach and to achieve predictability, the six original member states of the European Economic Community (EEC) decided to unify their laws of jurisdiction and enforcement of judgments by adopting the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.²¹ The importance of the Brussels Convention is reflected in Article 63 of the Convention which requires that any state becoming a member of the European Community must become a party to the Brussels

¹⁷ § 23 Zivilprozessordnung (ZPO).

¹⁸ Code Civil.

¹⁹ C. civ. art. 14.

²⁰ *Id.* art. 15.

²¹ Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1998 O.J. (C 27) 1 (consolidated and updated version of the 1968 Convention and the Protocol of 1971, following the 1996 accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden) [hereinafter Brussels Convention], also available at http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/c_027/c_02719980126en00010033.pdf (last visited January 21, 2005).

Convention.²² Consequently, the Brussels Convention has also become effective in all member states that joined the European Union. The idea behind this convention was to take another step towards the unified market among the several European countries.²³

However, the Brussels Convention lost its importance on May 1, 1999, when the Amsterdam Treaty²⁴ became effective for the European Union member states. According to this treaty, the competence for coordination of internal rules on jurisdiction and recognition of judgments now lay with the Community institutions. The institutions acted on the new possibility immediately. The Council issued Council Regulation (EC) No. 44/2001,²⁵ a Community regulation that replaced the Brussels Convention. While the numbering of the articles has changed, the regulation contains rules that are substantially similar to the Brussels Convention, providing a comprehensive approach to jurisdiction and the recognition and enforcement of judgments. The general jurisdictional pillars can be summarized as follows: Both the convention and the regulation set forth that persons domiciled in a member state may be sued in the courts of another member state. As far as commercial contracts are concerned the proper forum can normally be found in the “place of performance of the obligation in question.”²⁶ In tort cases, “the place where the

²² Brussels Convention, *id.* art. 63. However, the rules set forth in the Brussels Convention were not codified directly into the member states statutory systems. Member states were required to enact laws that gave effect to the objective of the Brussels Convention.

²³ See Sean D. Murphy, *Negotiation of Convention on Jurisdiction and Enforcement of Judgments*, 95 AM. J. INT'L. L. 418, 419 (2001).

²⁴ Treaty of Amsterdam amending the Treaty on European Union, The Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997).

²⁵ Council Regulation (EC) No. 44/2001 of Dec. 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 [hereinafter Brussels Regulation or Council Regulation No. 44/2001], also available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_012/l_01220010116en00010023.pdf (last visited January 21, 2005). The Council Regulation No. 44/2001 was finalized on Dec. 22, 2000, and became effective on March 1, 2002. The Regulation does not apply in Denmark. Council Regulation No. 44/2001, pmbl. ¶21. However, Denmark continues to be subject to the Brussels Treaty vis-a-vis the other European Union member states. *Id.* at pmbl. ¶ 22.

²⁶ Brussels Convention, *supra* note 21, art. 5 (1); Brussels Regulation, *supra* note 25, art. 5 (1)(a).

harmful event occurred” determines the proper jurisdiction.²⁷ If a person is one among a bigger number of defendants he may sue “where any of them is domiciled.”²⁸ In a consumer contract setting, the consumer has the choice between an action in his domicile or in that of the supplier. The supplier on the other hand is only able to bring an action in the consumers domicile.²⁹

The European Union has also adopted the Lugano Convention,³⁰ which incorporates the ideas of the Brussels Convention and makes an effort to include non-member states into the common European Union jurisdiction and recognition practice. The EU stated that the convention was “open to accession by [...] other States which have been invited to accede upon a request made by one of the Contracting States to the depository State.”³¹ That no non-European state has requested accession so far is due to the fact that such a state may only adhere if the existing parties to the Lugano Convention unanimously agree to its participation.³² Such an agreement is difficult to obtain, however, since the approaches in terms of jurisdiction and recognition in most of the important non-European Union trading partners are quite different.³³

²⁷ Brussels Convention, *id.*, art. 5 (3); Brussels Regulation, *id.*, art. 5 (3).

²⁸ Brussels Convention, *id.*, art. 6(1); Brussels Regulation, *id.*, art. 6(1).

²⁹ Brussels Convention, *id.*, art. 14; Brussels Regulation, *id.*, art. 16(1) and (2). Art. 13 of the Brussels Convention and Art. 15 of the Brussels Regulation determine which contracts qualify as consumer contracts. Brussels Convention, *id.*, art. 13; Brussels Regulation, *id.*, art. 15.

³⁰ Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1989 O.J. (L 319) 9 reprinted in 28 INT'L LEGAL MATERIALS 620 (1989) [hereinafter Lugano Convention].

³¹ *Id.* art. 62(1)(b).

³² *Id.*

³³ Apart from that there is a limited significance of the Lugano Convention since recent accession by most of the EFTA states to the EU will bring them within the scope of the Brussels Convention or the Council Regulation No. 44/2001.

3. United States

The United States neither ratified the conventions prepared by the Hague Conference³⁴ nor is it a party to any treaty on the recognition of judgments.³⁵ Despite this, there have been some attempts by the United States to unify the law in this field. An earlier effort in the 1970s to negotiate a judgments convention between the United States and the United Kingdom failed, partially, because of the British government opposition to recognize U.S. antitrust judgments³⁶ and because of opposition by the U.K. insurance industry.³⁷ The British insurance companies were afraid of the enforcement of extensive U.S. jury verdicts, punitive damage awards, and antitrust remedies against them in the U.K.³⁸ Against this background, the importance of successful negotiations of a Hague Jurisdiction and Judgments Convention becomes obvious: such a convention would be the first one with the United States as a party.

C. The History of the Negotiations

1. Different Starting Points

First, the problems that the delegations faced and the background for the negotiations will be discussed before dealing with the actual negotiations. The European countries entered the negotiations with a great advantage. There was no doubt among academics and practitioners that the Brussels Convention worked so well that the adoption of the parallel

³⁴ See *supra* part II.B.1.

³⁵ See Ronald A. Brand, *Intellectual Property, Electronic Commerce and the Preliminary Hague Jurisdiction and Judgments Convention*, 62 U. PITT L. REV. 581, 582 (2001); see also Murphy, *supra* note 23 at 419.

³⁶ See P.M. North, *The Draft U.K./U.S. Judgments Convention: A British Viewpoint*, 1 NW. J. INT'L L. & BUS. 219, 231 (1979).

³⁷ See Murphy, *supra* note 23 at 419.

³⁸ See Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141, 174 (2001); see also Juenger, *supra* note 11 at 113.

Lugano Convention by the remaining European Free Trade Association nations was an expected consequence.³⁹ The fact that this treaty is a well – functioning arrangement on a day – to – day basis, since neither linguistic nor legal barriers can bar the relatively low priced enforcement of domestic judgments in other member state countries,⁴⁰ puts into question whether there was a need for a broader convention for these countries.

Important in this context is the fact that the European Court of Justice has rendered about 90 decisions that dealt with problems how to interpret the Brussels Convention.⁴¹ These decisions are a further contribution to the clarification of the Brussels Convention regime and make it more dependable, workable and fully developed. These facts are a strong bargaining tool for the European countries. It is probable and thoroughly understandable that they will not be willing to give away much of their well – functioning system, since most of their major trading partners are already included in the existing recognition regime.

By contrast, the U.S. starting point for negotiations on a future Hague Convention is somewhat different. In the United States system there is no clear and rational catalog of jurisdictional bases. Regardless of the fact that civil law and even most of the common law countries can show a catalog of jurisdictional bases,⁴² the United States system has to

³⁹ See Juenger, *supra* note 11 at 116 (conferring to the Brussels Convention as the “the single most important private international law treaty in history”).

⁴⁰ Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1038 (1995) (stating that the practice under the Brussels Convention is even “smoother, more efficient, and more satisfactory” than American interstate recognition and enforcement).

⁴¹ See Paul R. Beaumont, *A United Kingdom Perspective on the Proposed Hague Judgments Convention*, 24 BROOK. J. INT’L L. 75, 89 (1998). For brief commentary on all those cases see Appendix 2 to ALEXANDER E. ANTON & PAUL R. BEAUMONT, CIVIL JURISDICTION IN SCOTLAND: BRUSSELS AND LUGANO CONVENTIONS 429-592 (2d. ed. 1995).

⁴² See, e.g., Order 11 of the Rules of the Supreme Court (England); Supreme Court Rules 1970, part 10 (N.S.W., Australia).

rely on state long arm statutes and Supreme Court case law that is often incoherent.⁴³ The landmark court case on this issue is *International Shoe Co. v. Washington*,⁴⁴ which sets forth the basic principles regarding jurisdiction over legal persons in the U.S. system. Even over 50 years after this important decision, it is still not totally clear what are the correct guidelines for determining general jurisdiction in the United States.⁴⁵ Even the Supreme Court has difficulty figuring out a terminology looking at prior Supreme Court decisions if one compares decisions made by same justices in different cases.⁴⁶ Because of all these reasons, the American jurisdictional law has been referred to as “not fit for export.”⁴⁷

Under normal circumstances, these facts suggest that the negotiating power of the U.S. is not very strong since the U.S. delegation would not have much to contribute. The U.S. delegation has made clear on several occasions that negotiations about their present system of jurisdictional law is nearly impossible for them. Their hands are tied, so the U.S. delegation states, since the case law established by the U.S. Supreme Court is non-negotiable. The Supreme Court Justices have imposed their mandates as a matter of constitutional law. Although one author describes the position to be “regrettable,”⁴⁸ there is a reason for the U.S. delegation taking such a position. Ever since 1877 with the case of *Pennoyer v. Neff*,⁴⁹ the Supreme Court has set clear that all its disclosures are

⁴³ Juenger, *supra* note 11 at 117.

⁴⁴ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁴⁵ See, e.g., *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). For a critical view on the American jurisdictional concept, see *Symposium, Fifty Years of International Shoe: The Past and Future of Personal Jurisdiction*, 23 U.C. DAVIS L. REV. 513 (1995).

⁴⁶ Compare, e.g., *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 note 10 (1982) (White, J.) (discussing minimum contacts analysis), with *Worldwide Volkswagen v. Woodson*, 444 U.S. 286, 294 (1980) (White, J.) (discussing also minimum contacts analysis).

⁴⁷ Juenger, *supra*, note 40 at 1038.

⁴⁸ See *id.* at 1037.

⁴⁹ *Pennoyer v. Neff*, 95 U.S. 714 (1877).

controlled by the Due Process Clause of the Fourteenth Amendment.⁵⁰ The Due Process Clause puts certain limits on the extension of jurisdiction over defendants that have no substantial link to the forum. Therefore, it seems difficult for the United States to accept certain grounds of jurisdiction without conflicting with the rules in the U.S. Constitution. Tort jurisdiction based solely on the place of the injury are as hard to imagine as contract jurisdiction based solely on the place of performance. But these bases of jurisdiction are exactly what the nations applying the Brussels or Lugano Convention rely on.

Despite the US's supposedly inflexible position at the beginning of the negotiations, it was still untimely to predict whether or not the US would compromise on any of its established rules or approaches. If the U.S. delegation showed some willingness to shorten but in no case to lengthen the domestic long arm, or if it failed to recognize foreign judgments that did not fit within the limits of the Due Process jurisprudence established by the U.S. Supreme Court, they are disregarding the concerns of their negotiating partners in civil law countries. Jurisdiction based on doing business or minimum contacts, which in Europe are often considered vague and unpredictable, are at least as unfamiliar to Brussels Convention members as their jurisdictional rules are for the U.S. This and the fact that the European countries already have a well functioning jurisdiction and recognition system also makes it difficult for them to accommodate their rules and policies to any changes. Whether this led the delegations of the European countries to the conclusion that their "hands are bound" as well is not clear. Thus, the starting point for the negotiations seemed to be the following one: both major negotiating parties would not be willing to lose large parts of their systems. The European Union

⁵⁰ *Id.* at 733.

applying a functioning system appeared to have more to offer and was unlikely to change a substantial number of their rules. On the other hand, the U.S. could not present a system that would work both among the several states within in the U.S. and also among the U.S. and other nations. However, the U.S. would still control or at least influence the negotiations at least as much as the European delegations. What they had to offer was apparent – without the participation of the economically powerful U.S. there will not be a Hague Convention on Jurisdiction and Enforcement of Judgments, since the goal of the Hague Conference was to construct a universally acceptable treaty.

2. The Negotiations Prior to the 2001 Draft

In May 1992, Edwin Williamson, then Legal Adviser at the U.S. Department of State took the step that would be referred to as the original source of all the subsequent negotiations to the project here discussed. He wrote the Secretary General of the Hague Conference on Private International Law proposing that the Conference take up the negotiation of a convention that regulates recognition and enforcement of judgments on a multinational basis.⁵¹ The first response to this letter came in May 1993 when the Seventeenth Session of the Hague Conference convened to discuss Mr. Williamson's proposition further through a session of a Special Commission.⁵² The Special Commission of the Hague Conference met in June of 1994, and determined that it would be "advantageous to draw up a convention on jurisdiction, recognition and enforcement

⁵¹ Letter from Edwin D. Williamson, Legal Advisor , U.S. Department of State, to Georges Droz, Secretary General, Hague Conference of Private International Law (May 5, 1992) (distributed with Hague Conference document L.c. ON No.2 (93), at 3 (Jan. 4, 1993)).

⁵² Hague Conference on Private International Law, Proceedings of the Seventeenth Session 10 to 29 May 1993, Final Act of the Seventeenth Session, First Part, Miscellaneous Matters, at 43 (1995).

of foreign judgments in civil and commercial matters.”⁵³ It was further recommended that this issue be included in the agenda for the eighteenth session of the Hague Conference in order to consider it for the future work of the Conference.⁵⁴ In June of 1995 another very similar recommendation was made by the Special Commission on General Affairs and Policy of the Conference. It also suggested that the proposals for a judgments convention should be adopted as one of the agenda items for the Eighteenth Session of the Hague Conference.⁵⁵ At its Eighteenth Session, which was held from September 30 to October 19, 1996, the Hague Conference followed these suggestions. As part of the Final Act of the Eighteenth Session, the represented nations voted 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.”⁵⁶

After all that work it was time for the first formal negotiations and the beginning of the preparatory work on a convention on international jurisdiction and the effects of foreign judgments in civil and commercial matters at a two week meeting of the Special Commission in June 1997.⁵⁷ In March 1998, the following session of the Special Commission was held, but no official document containing draft language was issued

⁵³ Conclusion of the Special Commission of June 1994 on the Question of the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Hague Conference on Private International Law, available at http://www.state.gov/www/global/legal_affairs/judgments_94.html (last visited January 21, 2005). Prel. Doc. No.1 (Jan.4, 1994).

⁵⁴ *Id.*

⁵⁵ Conclusions of the Special Commission of June 1995 on General Affairs and Policy of the Conference, Hague Conference on Private International Law, Prel. Doc. No.9, at 31 (Dec. 1995).

⁵⁶ Eighteenth Session Final Act, Hague Conference on Private International Law, October 19, 1996, at 21; Hague Conference on Private International Law, Proceedings of the Eighteenth Session 30 September to 19 October 1996, Final Act of the Eighteenth Session, First Part, Miscellaneous Matters, at 47 (1999).

⁵⁷ See Catherine Kessedjian, Synthesis of the Work of the Special Commission of June 1997 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters, Preliminary Document No. 8 (November 1997), available at http://www.hcch.net/upload/wop/jdgm_pd8.pdf (last visited January 21, 2005).

during and after this session. However, after a meeting from November 10 to November 20, 1998, the Drafting Committee presented the first document that contained draft language.⁵⁸ The first draft provisions dealt with various issues such as the scope of the convention, the required bases of jurisdiction, provisional and protective matters, prohibited grounds of jurisdiction, *lis pendens*, declining jurisdiction (*forum non conveniens*), rules of recognition, legal aid, and damages.⁵⁹ The Conference worked on this Committee Draft for two weeks in June 1999 and one week in October of 1999. At the meeting in October 1999, after five sessions, consisting of eighty-six meetings,⁶⁰ the Special Commission adopted a Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, and released the text to the public.⁶¹

The Nineteenth Session of the Hague Conference was scheduled for the fall of 2000.⁶² The plan was to discuss the Preliminary Draft Convention at this Diplomatic Conference.⁶³ In the weeks following the fifth and final session of the Special Commission in October 1999, however, doubts arose as to whether one year was enough time to consider the Special Commission's draft.⁶⁴ Apart from that objection, the draft was faced with widespread, virulent criticism. In the eyes of the critics, the Preliminary

⁵⁸ Special Commission on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters, Hague Conference on Private International Law, Work. Doc. No. 144 E (November 20, 1998) [hereinafter Committee Draft].

⁵⁹ *Id.*

⁶⁰ See Arthur T. Von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191, 191 (2001). As already mentioned two week sessions took place in June 1997, June 1998, November 1998, and June 1999; the final session in October 1999, lasted ten days.

⁶¹ Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Oct. 30, 1999, 15 U.S.T. 2228, available at http://www.hcch.net/upload/wop/jdgm_drafte.pdf (last visited January 21, 2005) [hereinafter Preliminary Draft Convention or Preliminary Draft]; for detailed information see *infra* part III.

⁶² See Brand, *supra* note 35 at 586.

⁶³ See *supra* note 60 at 191.

⁶⁴ *Id.*

Draft Convention failed to address whether, and in what manner intellectual property rights and electronic commerce should be covered by the convention.⁶⁵

Moreover, another concern was raised by different delegations. The Diplomatic Session procedures were criticized for not being suitable for negotiating a convention that could be universally accepted.⁶⁶ The procedural rules for the Diplomatic Sessions set forth a majoritarian principle, which did not encourage the reaching of consensus through compromise.⁶⁷ These problems prompted Jeffrey Kovar, Assistant Legal Adviser for Private International Law at the U.S. State Department and Head of the U.S. Delegation, to write to J. Hans A. van Loon, Secretary General of the Hague Conference.⁶⁸ In his letter, dated February 22, 2000, Kovar addressed the concerns of the U.S. Delegation by stating that the Preliminary Draft Convention “stands no chance of being accepted in the United States.”⁶⁹ Therefore, he proposed (1) changes in the normal scheduling policy regarding the Diplomatic Conferences in order to get “a much more open-ended schedule of work” and (2) a change regarding the procedural negotiation rules with the aim of achieving “more consensus-based negotiating methods.”⁷⁰ This letter was a very important turning point for the further development of the negotiation process. The Hague Conference, aware of the importance of the project, decided to reschedule the

⁶⁵ *See id.* at 192.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Letter from Jeffrey D. Kovar, Asst. Legal Advisor for Private International Law, U.S. State Dept., to Hans A. Van Loon (Feb. 22, 2000), available at <http://www.cptech.org/ecom/hague/kovar2loon22022000.pdf> (last visited January 21, 2005).

⁶⁹ “[T]he project as currently embodied in the October 1999 preliminary draft convention stands no chance of being accepted in the United States. Moreover, our assessment is that the negotiating process so far demonstrates no foreseeable possibility for correcting what for us are fatal defects in the approach, structure, and details of the text. In our view there has not been adequate progress toward creation of a draft convention that would represent a worldwide compromise among extremely different legal systems.”

⁷⁰ *See supra* note 68.

Diplomatic Conference and adjusted the procedural rules under which the Preliminary Draft Convention would be considered.⁷¹ In May 2000, the Special Commission on General Affairs and Policy decided to split the Diplomatic Conference into two parts, the first being scheduled in June 2001, and the second at a later date to be announced.⁷² Furthermore, a consensus, rather than a majority negotiation process was to be applied at these and all subsequent meetings.⁷³ In addition it was decided to schedule informal sessions between May 2000 and June 2001 to guarantee a reasonable basis and support for the work of the Diplomatic Conference.⁷⁴

A worldwide effort had begun to work on the Preliminary Draft Convention almost immediately after its release.⁷⁵ The drafters and other experts alike were aiming to improve the text.⁷⁶

3. The Role of the U.S. in the Negotiations

While the different starting points prior to the negotiations of the Hague project were described earlier, this part of the thesis addresses the role that the U.S. played in the negotiations and the reasons for the actions that it took.

As mentioned above, it was the initiative of the United States Department of State, represented by Legal Advisor Edwin Williamson, that set the stage for the negotiations and the later draft. The U.S. also urged more discussions on the Preliminary

⁷¹ See Brand *supra* note 35 at 586.

⁷² The relevant part of the May 2000 decision is repeated in The Hague Conference on Private International Law, Informational note on the work of the informal meetings held since October 1999 to consider and develop drafts on outstanding items, Preliminary Document No. 15 (May 2001) at 1, available at ftp://ftp.hcch.net/doc/jdgm_pd15e.doc.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See Marc E. Hankin, *Comment: Now that We Know "The Way Forward", Let Us Stay the Course*, 77 CHI.-KENT L. REV. 1295, 1297 (2002).

⁷⁶ See *id.*

Draft Convention and thus broadened the entire negotiation process. Considering that the U.S. is not a party to any convention or other agreement on the recognition and enforcement of foreign judgments and against the background that the U.S. delegation regarded their “hands to be bound” prior to the negotiation phase, this initiative seems surprising. Was this only a simple wish to be a party of the convention in order to achieve further unification and fully integrated markets, or can more specific reasons be found?

To answer this question, it is helpful to look at the U.S. Constitution. The Full Faith and Credit Clause in the U.S. Constitution⁷⁷ ensures that judgments from one state are enforceable in every other state. The idea expressed by this rule has long been referred to as the basic requirement towards fully integrated markets within the United States.⁷⁸ Although the U.S. is not a party to any of the conventions in the field, it has made efforts to enforce foreign country judgments. Over 100 years ago in *Hilton v. Guyot*,⁷⁹ the U.S. Supreme Court decided that foreign country judgments that are considered to have a reliable legal system should be enforceable both in federal and in state courts under the common law.⁸⁰ The Uniform Foreign Money Judgments Recognition Act⁸¹ subsequently strengthened this position. As a result foreign country money judgments are often enforced in the United States.⁸²

This fact alone does not help to answer the original question. It may help to take a look at the situation U.S. judgment holders are faced with when trying to enforce their

⁷⁷ U.S. CONST. art. IV, § 1.

⁷⁸ Murphy, *supra* note 23 at 418.

⁷⁹ 159 U.S. 113 (1895).

⁸⁰ *See id.*; *see also* Murphy, *supra* note 23 at 419.

⁸¹ The Uniform Foreign Money Judgments Recognition Act, 13 U.L.A. 263 (1986 & 2000 Supp.). Whereas the court in *Hilton* suggested the requirement of reciprocity in the judgment rendering country, this requirement is not longer a part of most state law.

⁸² *See* Patrick J. Borchers, *A Few Little Issues for the Hague Judgments Negotiations*, 24 BROOK. J. INT'L LAW 157, 157 (1998); *see also* Juenger, *supra* note 11 at 113-114.

judgments abroad. The fact that even countries that are not a party to any enforcement and recognition treaty usually enforce foreign judgments with the exception of those rendered in the U.S.⁸³ is alarming for U.S. judgment holders. In the eyes of the foreign countries reasons for not doing so are excessive jury awards, the reach of United States long – arm jurisdiction, and punitive damages.⁸⁴ This perspective allows a better understanding of the interest of the United States in creating a Hague Convention on Jurisdiction and Judgments. From the American perspective the idea is to give U.S. litigants the same benefit foreign litigants enjoy, namely the enforcement of domestic judgments abroad in foreign jurisdictions.

⁸³ See Murphy, *supra* note 23 at 419.

⁸⁴ See Juenger, *supra* note 11 at 114-115; see also Schaack, *supra* note 38 at 175.

CHAPTER 3

THE PRELIMINARY DRAFT CONVENTION

When the first complete draft was issued in October 1999,⁸⁵ not everyone expected that another period of further negotiations lay before the Hague Conference and the various delegations. To understand the dispute and the subsequent process of negotiation, the following comments will introduce the first draft, which was used as the fundamental basis of drafts to follow.

A. The Structure of the Preliminary Draft Convention

The drafting of a universal convention on the subject jurisdiction and enforcement of judgments was difficult, as was proved by the first disputes that occurred regarding basic issues like the scope of a future convention. Different opinions also arose on whether the text should be drafted in the style of a double or a mixed convention.⁸⁶

1. Single and Double Conventions

A single convention format only regulates indirect jurisdiction and implies a weak sense of interdependence.⁸⁷ Therefore, the single convention idea is best applicable in settings that lack strong political and economical commitments.⁸⁸ Both the earlier conventions

⁸⁵ See *supra* part II.C.

⁸⁶ For general information regarding the design of recognition conventions see Arthur T. Von Mehren, *Enforcing Judgments Abroad: Reflections On The Design Of Recognition Conventions*, 24 BROOK. J. INT'L. L. 17 (1998).

⁸⁷ See Von Mehren, *supra* note 60 at 197.

⁸⁸ See *id.* at 198.

prepared by the Hague Conference on the subject⁸⁹ were set forth in a single convention style.

In the negotiations for the present Hague project the majority of the European states favored the approach of a double convention.⁹⁰ Such an approach would regulate both direct and indirect jurisdiction.⁹¹ This type of convention creates uniform rules regarding the required and prohibited bases of jurisdiction that the national courts in the different countries may exercise.⁹² In other words, it sets forth which claims must and must not be granted.⁹³ The required bases of jurisdiction become rules of national law as a result of the particular convention and must be available to parties from other contracting states. Conversely, the provision containing the prohibited bases of jurisdiction prevents the use of only these bases when the defendant is from another contracting state. In a pure double convention, all jurisdictional bases not required are prohibited.⁹⁴ The best examples for international double conventions in this context are the Brussels⁹⁵ and the Lugano Conventions, despite differing opinions of some academics who do not refer to them as pure double conventions.⁹⁶

⁸⁹ *Supra* notes 13 and 14.

⁹⁰ *See* Murphy, *supra* note 23 at 418.

⁹¹ *See* Von Mehren, *supra* note 60 at 197.

⁹² Murphy, *supra* note 23 at 418; *see also id.*

⁹³ Von Mehren, *supra* note 60 at 197.

⁹⁴ *See* Von Mehren, *supra* note 86 at 19.

⁹⁵ Article 3 paragraph 1 of the Brussels Convention illustrates its character as a double convention: "Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Section 2 to 6 of this Title [II, Jurisdiction]." *Supra* note 21 art. 3 (1).

⁹⁶ Von Mehren, *supra* note 86 at 20 ff. These academics hold the view that the discussed conventions would be purely double in character had they regulated directly not only the assumption of adjudicatory authority over defendants domiciled in a Contracting State but also over those not so domiciled. Since Article 4 (1) provides that "[i]f the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16 [providing for exclusive jurisdiction], be determined by the law of that State," and not by the convention Brussels and Lugano represent a radical form of the single convention structure.

2. Mixed Conventions

A double convention in contrast to a single convention structure is only appropriate where the countries involved have relatively common legal traditions and cultures, and where a neutral institution⁹⁷ assures that all member states act according to their obligations.⁹⁸ A mixed convention structure, on the other hand, better matches situations where these requirements are lacking. It comes into consideration where there is neither a sufficiently compelling sense of interdependence nor a supranational institution that serves as a legal guard.⁹⁹ Aside from the rules regarding the required and prohibited bases of jurisdiction, a mixed convention is different from a double convention in that the former also allows bases of jurisdiction that fall outside of the convention.¹⁰⁰ This group of bases of jurisdiction is often referred to as the category of permitted jurisdiction.¹⁰¹ The mixed convention approach was clearly favored by the United States delegation in looking for an appropriate structure for the Preliminary Draft Convention,¹⁰² and the Preliminary Draft Convention was created according to this structure.

Articles 3-16 of the Preliminary Draft Convention contain a list of bases in which the courts of signatory nations will be required to take personal jurisdiction. Furthermore,

⁹⁷ In the case of the Brussels Convention this neutral institution is the European Court of Justice. However, when the Brussels Convention was signed in 1968, the European Court of Justice did not have the power to review jurisdictional issues. In 1971, a protocol was adopted that gave the European Court of Justice the power to be the last instance in terms of interpretation of the convention.

⁹⁸ Von Mehren, *supra* note 60 at 198.

⁹⁹ *Id.*

¹⁰⁰ See von Mehren, *supra* note 86 at 19.

¹⁰¹ See generally Peter Nygh & Fausto Pocar, Report of the Special Commission on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Preliminary Document No.11 (2000), available at <ftp://ftp.hcch.net/doc/jdgmpl11.doc> (last visited January 22, 2004).

¹⁰² See Eric B. Fastiff, *The Proposed Hague Convention On The Recognition And Enforcement Of Civil And Commercial Judgments: A Solution To Butch Reynold's Jurisdiction And Enforcement Problems*, 28 CORNELL INT'L L.J. 469, 479 (1995); Brandon B. Danford, *The Enforcement Of Foreign Money Judgments In The United States And Europe: How Can We Achieve A Comprehensive Treaty?*, 23 REV. LITIG. 381, 403 (2004).

it sets forth in Article 18 of the draft a list of bases which the courts of signatory nations will be prohibited from using for the purpose of asserting personal jurisdiction. But Article 17 sets forth a list that allows signatory states to assert personal jurisdiction on bases that are neither prohibited nor required which makes the difference to a double convention structure. Therefore, Contracting States are able to apply rules of jurisdiction under their national law as long as these grounds of jurisdiction are not prohibited by the convention. According to Article 24 of the Preliminary Draft Convention, however, other signatory nations would not be required to recognize or enforce judgments that have been rendered based on these national jurisdictional rules. As previously addressed, these bases of jurisdiction are often referred to as permitted bases of jurisdiction: contracting states may retain these “national” bases of jurisdiction, but their application and any question of recognition and enforcement are not governed by the Convention.¹⁰³

3. The Hague Convention Draft Approach

In 1992, a Working Group at The Hague Conference had recommended that the negotiation concentrate on a draft in a mixed convention style.¹⁰⁴ But it took some time until the mixed convention structure was adopted and accepted as the final approach. While there was some resistance against the mixed convention structure in earlier drafts, which is proven by the fact that the convention was originally drafted as a double convention,¹⁰⁵ the October 1999 Preliminary Draft Convention as well as the later 2001 Draft were designed in the mixed convention style providing ‘permitted bases of

¹⁰³ See, e.g., Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?*, 52 DEPAUL L. REV. 319, 324 f. (2002).

¹⁰⁴ Conclusions of the Working Group Meeting on Enforcement of Judgments, Hague Conference on Private International Law Doc. L.c. ON No. 2 (93), at 3 (Jan. 4, 1993).

¹⁰⁵ See Silberman, *supra* note 103 at 324; see also Von Mehren, *supra* note 60 at 199.

jurisdiction.’ The attempt to answer the question of why the recommendation of a mixed convention was finally followed, immediately leads to the issue of the large number of potential contracting states. The double convention structure, which only provides two categories of bases of jurisdiction is not the ideal choice in conventions seeking to be universally acceptable. Considering the many different legal systems the convention had to integrate into the negotiating process, it seems nearly impossible to reach an agreement about what should be assigned to the group of the required bases of jurisdiction and what to the group of prohibited jurisdiction. As a result, the double convention structure would be too inflexible for the large number of different countries that are participated in the negotiation process. The mixed convention structure seems to be the better choice in the effort to reach agreement on the proposed Hague Convention. It provides some kind of a “loophole” by creating a more flexible system not only in terms of the later outcome of the convention language, but also in terms of the flexibility in the negotiation process as a whole.

B. The Scope of the Preliminary Draft Convention

Chapter I of the Preliminary Draft Convention regulates the scope of the convention. Whereas Article 1¹⁰⁶ contains the rules for the substantive scope, Article 2 regulates the territorial scope.

The language in Article 1 (1) of the Preliminary Draft Convention limits its scope to “civil and commercial matters.”¹⁰⁷ This very general provision is put into perspective

¹⁰⁶ All articles without specification of source that are mentioned under III.B.-E. refer to the Preliminary Draft Convention unless indicated otherwise.

¹⁰⁷ See Preliminary Draft Convention, *supra* note 61, art. 1 (1).

by the exclusion of “revenue, customs, [and] administrative matters.”¹⁰⁸ Article 1 (2) explains in detail what is meant by this.¹⁰⁹ Like the Brussels and Lugano Convention, Article 2 of the Preliminary Draft Convention not only provides for the enforcement of foreign judgments, but it also sets forth rules for the exercise of personal jurisdiction by the courts of one signatory country over habitual residents of another.¹¹⁰ However, the jurisdictional rules in Chapter II of the Preliminary Draft Convention are not applicable if both parties are habitually resident in the same state.¹¹¹

C. Jurisdiction

1. The General Rule of Jurisdiction

Two different approaches are used in other conventions when determining general jurisdiction. On one hand, the defendant’s domicile determines where a suit can be brought. This approach is, for example, used in the Brussels and Lugano Convention.¹¹² The problem with this approach is the fact that ‘domicile’ is subject to various legal definitions in the different countries. Due to the high number of expected contracting countries for a future Hague Convention, a more factual approach is preferred. Existing Hague Conference conventions often faced the same problem of defining certain terms

¹⁰⁸ *Id.*

¹⁰⁹ According to Article 1 (1) of the Preliminary Draft Convention the excluded matters are the following: a) the status and legal capacity of natural persons; b) maintenance obligations; c) matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships; d) wills and succession; e) insolvency, composition or analogous proceedings; f) social security; g) arbitration and proceedings related thereto; h) admiralty or maritime matters. *Id.* art. 1 (1).

¹¹⁰ See Preliminary Draft Convention, *supra* note 61, art. 2. Article 2 reads in part: “The provisions of Chapter II shall apply in the courts of a Contracting State unless all the parties are habitually resident in that State [...]”

¹¹¹ *Id.*

¹¹² Brussels Convention, *supra* note 21, art. 2; Lugano Convention, *supra* note 30, art. 2.

and thus focus on the defendant's habitual residence.¹¹³ Since the habitual residence approach is much more factually oriented, it is subject to more uniform interpretation and would be more useful for the Hague Conference project. According to this Hague Conference tradition Article 3 (1) adopted the habitual resident approach.¹¹⁴ A similar approach is applicable to legal persons. Article 3 (2) states that the rule for general jurisdiction over legal persons is that they are considered to be habitually resident in the state of statutory seat, the state of incorporation, the state of central management, or the state of the corporation's principle place of business.¹¹⁵

2. Choice of Court Clauses

The normal presumption in the United States regarding choice of court clauses is that such clauses are not exclusive unless the parties specifically provide for exclusivity.¹¹⁶ In contrast, E.U. Council Regulation No. 44/2001 provides that a court chosen by the parties "shall have jurisdiction" and that this jurisdiction "shall be exclusive unless the parties have agreed otherwise."¹¹⁷ By stating that a court chosen by the parties "shall have jurisdiction, and that jurisdiction shall be exclusive unless the parties have agreed

¹¹³ See Convention on the Recognition of Divorces and Legal Separations, *supra* note 14, art. 2 (1) and art. 3; see also Brand, *supra* note 35 at 590.

¹¹⁴ See Preliminary Draft Convention, *supra* note 61, art. 3. Article 3 reads: „[...] a natural person may be sued for any claim in the courts [of the Contracting State] [of the place] where the person is habitually resident [...].”

¹¹⁵ See *id.*, art. 3 (2).

¹¹⁶ See Brand, *supra* note 35 at 591.

¹¹⁷ Council Regulation No. 44/2001, *supra* note 25, art. 23 (1). Article 23 (1) reads as follows: "If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. [...]"

otherwise,” Article 4 of the Preliminary Draft Convention¹¹⁸ uses nearly the same exact wording as that contained in the Council Regulation.

Besides the issue of the choice of law clauses, Article 4 also provides language addressing validity in terms of form. Aside from the fact that a choice of law agreement can be in writing,¹¹⁹ it may also be made “by any other means of communication which renders information accessible so as to be usable for subsequent reference,” or “in accordance with a usage which is regularly observed by the parties,” or also “in accordance with a usage of which the parties were or ought to have been aware and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.”¹²⁰

3. Special Appearances

In Article 5 it becomes clear that there is an opportunity in the Preliminary Draft to enter a special appearance contesting jurisdiction without submitting to jurisdiction on the merits. It provides that a defendant who appears in court to defend on the merits has to keep in mind that there is an assumption that he will be treated as if he has consented to jurisdiction, unless objection is raised prior to the first defense on the merits.¹²¹

4. Specific Bases of Jurisdiction

Apart from the rule of jurisdiction in Article 3, which provides for general jurisdiction over a defendant for any claims, the Preliminary Draft Convention text contains a number

¹¹⁸ Preliminary Draft Convention, *supra* note 61, art. 4.

¹¹⁹ *Id.* art. 4 (2)(a).

¹²⁰ *Id.* art. 4 (2) (b) – (d).

¹²¹ *Id.* art. 5.

of other provisions that make it possible to provide further fora for the plaintiff in a court that is located in a state that is not the habitual residence of the defendant. These specific provisions include rules in contract¹²² and tort¹²³ cases. Furthermore, there are specific provisions for consumers and employees.¹²⁴ The Preliminary Draft Convention also sets forth rules for jurisdiction over claims related to the activity of the defendant through a branch, agency or establishment in the Contracting State.¹²⁵ Exclusive jurisdiction is given to cases involving trusts.¹²⁶ Article 12 provides more rules creating exclusive jurisdiction, and it contains a provision that is of special interest in this context. Cases involving the registration of intellectual property rights get special treatment since they are expressly mentioned in the provision.¹²⁷ In addition to these specific bases of jurisdiction, additional jurisdictional provisions dealing with jurisdiction for personal relief and with multiple-party actions can be found in Articles 13-16.

5. Permitted and Prohibited Bases of Jurisdiction

As discussed above, the Preliminary Draft Convention is written in a mixed convention style since it is divided into required, prohibited and permitted bases of jurisdiction.¹²⁸ The required bases of jurisdiction are contained in Articles 3-16 of the draft and were

¹²² Preliminary Draft Convention, *supra* note 61, art. 6.

¹²³ *Id.* art. 10.

¹²⁴ *Id.* art. 7 and 8

¹²⁵ *Id.* art. 9.

¹²⁶ *Id.* art. 11.

¹²⁷ *Id.* art. 12 (4). This article reads as follows: “In proceedings which have as their object the registration, validity, [or] nullity [, or revocation or infringement,] of patents, trade marks, designs or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or, under the terms of an international convention, is deemed to have taken place, have exclusive jurisdiction. This shall not apply to copyright or any neighboring rights, even though registration or deposit of such rights is possible.”

¹²⁸ While the list of required bases of jurisdiction is often described as “white” list, the list of the prohibited and permitted bases of jurisdiction are conferred to as “black” and “grey” list.

previously described in detail. The language of Article 17 makes the difference in comparison to a double convention structure. It sets forth that states may exercise jurisdiction “under national law” in the absence of exclusive jurisdiction, a choice of forum clause under Article 4, or other bases of preferred jurisdiction when the certain bases of jurisdiction are neither required in earlier articles nor prohibited in Article 18.¹²⁹ In Article 18, another list of different bases of jurisdiction can be found. The use of these bases of jurisdiction is prohibited when the defendant is from another contracting state. In Article 18 (1), the Preliminary Draft Convention describes the list of the prohibited bases of jurisdiction as follows: “Where the defendant is habitually resident in a Contracting State, the application of a rule of jurisdiction provided for under the national law of a Contracting State is prohibited if there is no substantial connection between the State and the dispute.”¹³⁰ In paragraph 2 of Article 18, the draft provides a list of examples in which such a substantial connection between the particular state and the dispute cannot be assumed: the domicile, habitual or temporary residence, or presence of the plaintiff in the specific state,¹³¹ or the nationality of the plaintiff or of the defendant.¹³²

With Article 18 (2)(e) and (2)(f), two other examples should receive special consideration since these provisions are of particular interest for the United States. Most state long – arm statutes and also the Due Process clause of the Fifth and the Fourteenth Amendments to the Constitution of the United States commonly allow general “doing

¹²⁹ Preliminary Draft Convention, *supra* note 61, art. 17. This article reads as follows: “Subject to Articles 4, 5, 7, 8, 12 and 13, the Convention does not prevent the application by Contracting States of rules of jurisdiction under national law, provided that this is not prohibited under Article 18.”

¹³⁰ *Id.* art. 18 (1).

¹³¹ *Id.* art. 18 (2)(d).

¹³² *Id.* art. 18 (2)(b), (c).

business” jurisdiction.¹³³ Article 18 (2)(e) was created to forbid exactly this general “doing business” jurisdiction by stating that jurisdiction based on “the carrying on of commercial or other activities by the defendant in [the] state” shall be prohibited.¹³⁴ An exception is made for situations “where the dispute is directly related to those activities.”¹³⁵ Article 18 (2)(f),¹³⁶ on the other hand, was set forth to prohibit another jurisdictional institution that is also typical of the United States legal system. It prohibits the United States’ “tag” jurisdiction. This kind of jurisdiction is purely based on the service of process on the defendant while temporarily present in the state.¹³⁷ Article 18 (2) lists further examples that will not be described in detail here.¹³⁸

Article 18 (3) deals with the exceptions to the general rules contained in the first two paragraphs and is indicated in bracketed language. It is intended that if the case is brought for human rights violations under international law, any of the normally prohibited bases of jurisdiction are continued to be allowed as permitted bases of jurisdiction.¹³⁹ The pressure of concerned groups and individuals that formed the Human Rights Coalition with the intention to participate in the negotiations led to the inclusion of this provision in Article 18.¹⁴⁰ The reason for including this provision was the fear of the Human Rights Coalition that a new convention without an exception would frustrate

¹³³ See Brand, *supra* note 35 at 592.

¹³⁴ Preliminary Draft Convention, *supra* note 61, art. 18 (2)(e).

¹³⁵ *Id.*

¹³⁶ Preliminary Draft Convention, *supra* note 61, art. 18 (2)(f).

¹³⁷ See Brand, *supra* note 35 at 592.

¹³⁸ Further examples listed in Article 18 (2) are the following: a) the presence or the seizure in the particular state of property belonging to the defendant (with an exception if the dispute is directly related to the property in discussion; h) proceeding in the state in question for declaration of enforceability or registration or for the enforcement of a judgment (with an exception where the dispute is directly related to the listed proceedings); i) the temporary residence or presence of the defendant in the particular state; j) the pure signing in the specific state of the contract from which the dispute arises.

¹³⁹ See Murphy, *supra* note 23 at 420, 421. For a general discussion of this human rights exception, see Schaack, *supra* note 38 at 141.

¹⁴⁰ See Schaack, *id.* at 184 ff.

developing methods for bringing suits against former state officials who have engaged in wrongful conduct.¹⁴¹ Special consideration in this context was given to cases that were, or are brought under the United States “tag” jurisdiction.¹⁴²

6. Lis Pendens and Forum Non Conveniens

Article 21 and 22 of the Preliminary Draft Convention determine what happens when more than one jurisdiction is available in cases connected to more than one legal system and more than one court was seized of the case. To understand these provisions, their background in the different legal systems involved in the negotiation process shall be described first.

Having its first roots in the year 1801 in *Willendson v. Forsoket*,¹⁴³ the concept of forum non conveniens in the United States is described as a doctrine that gives the court substantial discretion when more than one forum is available for the trial of an action.¹⁴⁴ However, this doctrine presupposes at least one alternative forum in which the suit can be prosecuted.¹⁴⁵ It does not, however, provide a catalogue of circumstances that would lead to the assumption that the court either has or does not have jurisdiction.¹⁴⁶ Rather, the doctrine trusts in the discretion of the court¹⁴⁷ as mentioned above. Thus, this concept

¹⁴¹ See Brand, *supra* note 35 at 592 f.; see also Schaack, *id.* at 142 f.

¹⁴² See Brand, *id.*

¹⁴³ *Willendson v. Forsoket*, 29 F. Cas. 1283, 1284 (D. Pa. 1801) (No. 17,682).

¹⁴⁴ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 ff. (1947).

¹⁴⁵ JACK H. FRIEDENTHAL, *CIVIL PROCEDURE* 87-88 (2d ed. 1993).

¹⁴⁶ See Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT'L L.J. 467, 476 (2002).

¹⁴⁷ *Gulf Oil Corp. v. Gilbert*, *supra* note 144 at 508.

places the focus on the appropriateness of one forum in comparison to others that would be available as well.¹⁴⁸

The forum non conveniens approach, which is typical in common law countries, has no direct equivalent in the civil law system. For example, there is no express provision of German law that would allow for a forum non convenience doctrine.¹⁴⁹ However, there is a counterpart that comes into play in civil law countries in situations where the forum non conveniens doctrine applies in the common law systems. Although the Lugano¹⁵⁰ and Brussels Convention¹⁵¹ and the Brussels Regulation¹⁵² replacing the latter do not contain any direct provision for the doctrine of forum non conveniens,¹⁵³ the Regulation does apply a combination of contractual choice of court clauses¹⁵⁴ and a strict rule of lis pendens¹⁵⁵ in order to establish jurisdiction. Although this creates certainty, predictability, and neutrality it has to be pointed out that the European approach creates what is usually refer to as a “race to the courthouse.”¹⁵⁶

Considering the differences between the common law forum non conveniens and the civil law lis pendens approach, it seems surprising that this matter was precisely one

¹⁴⁸ See Brand, *supra* note 146 at 468.

¹⁴⁹ For a general comparative overview regarding this matter see Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, 16 LOY. L.A. INT'L & COMP. L. REV. 455 (1994).

¹⁵⁰ *Supra* note 30.

¹⁵¹ *Supra* note 21.

¹⁵² *Supra* note 25.

¹⁵³ The fact that there is not such a provision can be interpreted as a general prohibition of the application of the forum non convenience principle within the European Union, see Brand, *supra* note 146 at 489.

¹⁵⁴ Brussels Regulation, *supra* note 25, art. 23.

¹⁵⁵ Brussels Regulation, *supra* note 25, art. 27. This Article reads as follows: “1. Where proceeding involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. 2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.”

¹⁵⁶ See, e.g., Anna Gardella & Radicati di Brozolo, *Civil Law, Common Law And Market Integration: The EC Approach To Conflicts Of Jurisdiction*, 51 AM. J. COMP. L. 611 (2003).

of the areas of early agreement and compromise in the negotiations of the Hague Convention. The Preliminary Draft Convention sets forth a combination of the *lis pendens* rule in Article 21 and a modified *forum non conveniens* approach in Article 22¹⁵⁷ which is insofar unusual as the latter was always considered to be only available in common law systems.¹⁵⁸ Article 21, which adopts the Brussels Convention-style *lis pendens* approach, provides that “the court second seized shall suspend the proceedings if the court first seized has jurisdiction”¹⁵⁹ and that this court “shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seized.”¹⁶⁰ However, the court second seized does not have to suspend the proceedings if it has exclusive jurisdiction either under Article 4 (choice of court) or under Article 12 (verification of jurisdiction).¹⁶¹ Thus, as indicated above, the approach in the Brussels Regulation is the first element of the compromise. By stating that the *lis pendens* rule shall not apply if the court first seized “determines that the court second seized is clearly more appropriate to resolve the dispute” Article 21, paragraph 7, ties the language in Article 21 to Article 22 of the Preliminary Convention text according to which such a determination is possible.¹⁶²

Article 22 represents the second part of the compromise, since it incorporates a modification of the doctrine of *forum non conveniens* as applied in the common law system.¹⁶³ The *forum non conveniens* rule of the Preliminary Draft Convention provides

¹⁵⁷ Preliminary Draft Convention, *supra* note 61, art. 21 and 22.

¹⁵⁸ See Brand, *supra* note 35 at 593.

¹⁵⁹ Preliminary Draft Convention, *supra* note 61, art. 21 (1).

¹⁶⁰ *Id.* art. 21 (2).

¹⁶¹ *Id.* art. 21 (1).

¹⁶² *Id.* art. 21 (7).

¹⁶³ Preliminary Draft Convention, art. 22 (1) provides that the court first seized, if it should not have exclusive jurisdiction under the provisions of the convention, may “[i]n exceptional circumstances [...]”

four requirements. Firstly, the court must not have exclusive jurisdiction. Secondly, “exceptional circumstances” must be involved in the case and the court that was seized must be a forum that is considered to be “clearly inappropriate.” The last of the four requirements is that “a clearly more appropriate” forum must be provided by another state also having jurisdiction. To give the court an idea of what can be an appropriate forum, Article 22 (2) sets forth four factors that are not exclusive, though.¹⁶⁴

D. Recognition and Enforcement

Chapter III of the Preliminary Draft Convention (Articles 23 to 36) deals with the matter of recognition and enforcement of foreign judgments. Within this chapter, the distinction between required, prohibited, and permitted bases of jurisdiction must be taken into account again. The principles regarding the recognition and enforcement of judgments completes the idea of a mixed convention style. The general concept of this chapter is that the judgments based on required bases of jurisdiction “shall be recognized or enforced.”¹⁶⁵ However, not recognized or enforced are those judgments that are based on prohibited bases of jurisdiction under Article 18.¹⁶⁶ The same is true for judgments that are based on grounds of jurisdiction conflicting with either a choice of court clause or exclusive bases of jurisdiction, as provided by the Preliminary Draft Convention.¹⁶⁷ As far as permitted bases of jurisdiction are concerned, the convention rules on recognition

on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another state has jurisdiction and is clearly more appropriate to resolve the dispute.” *Id.* art. 22 (1).

¹⁶⁴ These factors provided by Art. 22 (2) are: “a) any inconvenience to the parties in view of their habitual residence; b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence; c) applicable limitation or prescription periods; d) the possibility of obtaining recognition and enforcement of any decision on the merits.”

¹⁶⁵ Preliminary Draft Convention, *supra* note 61, art. 25 (1).

¹⁶⁶ *Id.* art. 26.

¹⁶⁷ *Id.*

and enforcement of judgments shall not apply.¹⁶⁸ Instead, these judgments are to be treated under national law.¹⁶⁹

Article 33 makes clear that the recognition may include a limitation on damages in the recognizing court. This limitation regards the concerns that were raised among others by the European members of the Hague Conference about punitive damage awards and compensatory awards rendered in U.S. courts that are considered “excessive” in the eyes of European judicial systems, for example.¹⁷⁰ According to Article 33, courts do not have to recognize and enforce punitive and multiple damage awards unless “similar or comparable damages could have been awarded” in their own state.¹⁷¹ As far as “excessive” compensatory damage awards are concerned Article 33 (2) states that if “grossly excessive damages” are awarded in a judgment the recognition may be limited to less than the full amount.¹⁷²

E. Other General Provisions

It is not a secret that the European Union with its many institutions is a good place if one is an interpreter looking for employment. The interpretation of the legal language of the instruments issued by the European Union is one of the major problems its member states have to face. Therefore, it is not very difficult to imagine that a future Hague Convention would have to face similar if not bigger problems, since there are considerably more members in the Hague Conference than there are in the European Union. Another problem would be the cultural, legal, and social diversity among the several member

¹⁶⁸ *Id.* art. 24.

¹⁶⁹ *Id.*; see also Brand, *supra* note 35 at 593.

¹⁷⁰ See Brand, *supra* note 35 at 593.

¹⁷¹ Preliminary Draft Convention, *supra* note 61, art. 33 (1).

¹⁷² *Id.* art. 33 (2)(a).

states that could obstruct the interpretation process and bear the risk of conflicting interpretations. Article 38 of the Preliminary Convention text tries to resolve this problem by advising the courts to interpret the convention with “regard [...] to [...] its international character and the need to promote uniformity in its application.” Articles 39 and 40¹⁷³ try to constitute a system which has three major goals. Firstly, significant convention decisions from all contracting states would be collected. Besides this, a periodic review of the operation of the convention by a Special Commission was planned. If there were to be problems in a dispute that is attributed to the interpretation of the convention, a committee of experts was intended to assist parties and courts that have problems by providing those with recommendations.¹⁷⁴

Aside from the heading in Article 41, “Federal Clause,” no further substantial language indicates that the drafters of the Preliminary Draft Convention intended to include provisions on how the convention would operate within a federal system.¹⁷⁵ Furthermore, up to this point in the negotiations there was also no complete provision on the relationship of the Hague Convention to other treaties.¹⁷⁶

¹⁷³ It is important to point out that these provisions were set forth in brackets.

¹⁷⁴ Preliminary Draft Convention, *supra* note 61, art. 40 (1).

¹⁷⁵ Brand, *supra* note 35 at 594.

¹⁷⁶ *Id.*

CHAPTER 4

DEVELOPMENTS IN AND AFTER THE JUNE 2001 DIPLOMATIC CONFERENCE

Between February 2000 and June 2001, informal sessions for the Hague project were held in Washington, Basle, Geneva, Ottawa, and Edinburgh in order to improve the Preliminary Draft Convention.¹⁷⁷ The June 2001 Diplomatic Conference was another milestone in the negotiation process because the Preliminary Draft was further developed. The result of the first part of the Diplomatic Conference in June 2001 was a text full of alternatives, variations, and bracketed language.¹⁷⁸ These circumstances indicated that there was no agreement on many specific matters and that much work was left to be done.

A. Changes in the Convention Text

It is important to point out which changes in comparison with the Preliminary Draft Convention were made in detail in the Interim Text. While no changes were made to the convention structure,¹⁷⁹ the scope of the convention was subject to a few changes. Antitrust claims and nuclear liability matters were added to Article 1 Interim Text.¹⁸⁰ The fact that these two points were added in brackets indicates that a final agreement on this

¹⁷⁷ See Brand, *supra* note 35 at 598.

¹⁷⁸ This document can be found in the revised text of the Preliminary Draft Convention, found in the Interim Text of the Diplomatic Conference: Hague Conference on Private International Law, Commission II, Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Nineteenth Session; Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6 – 20 June 2001 [hereinafter Interim Text], available at ftp://hcch.net/doc/jdgm2001draft_e.doc (last visited Jan. 22, 2004).

¹⁷⁹ See Brand, *supra* note 35 at 598.

¹⁸⁰ Interim Text, *supra* note 178, art. 1. All articles without specification of source that are mentioned under IV.A. refer to the Interim Text unless indicated otherwise.

issue has not yet been made. This is also true for Alternative B of Article 1, which suggests the exclusion of rights in immovable property and claims related to the validity, nullity, or dissolution of a legal person.¹⁸¹ The entire Interim Text is full of bracketed language and footnotes trying to bring light into the darkness of the jungle of alternatives.

Regarding the issue of jurisdiction in Article 3, there was an agreement that the defendant's forum should serve as the forum of general jurisdiction.¹⁸² But another change was made: The "habitual residence" requirement was set in brackets left behind only "residence." This change was due to the problem that natural persons can have multiple residences.¹⁸³ In case of a multiple residence situation the focus was to be on the principle of residence.¹⁸⁴ No major changes were undertaken in the rule for choice of forum clauses, but bracketed language again indicates the need for further discussions on this issue.¹⁸⁵

As far as special appearance under the convention regulated in Article 5 is concerned the text has both changed and remained unchanged. While the presumption that a defendant appearing on the merits has consented to jurisdiction under the convention had been deleted, the general concept of special appearance was retained.¹⁸⁶ The defendant, furthermore, had the right to contest jurisdiction until the time of the first actual defense on the merits.¹⁸⁷

¹⁸¹ *Id.*, art. 1, alternative B note 11.

¹⁸² *Id.*, art. 3 note 16.

¹⁸³ *See* Brand, *supra* note 35 at 599.

¹⁸⁴ *Id.*

¹⁸⁵ Interim Text, *supra* note 178, art. 4.

¹⁸⁶ *Compare* Preliminary Draft Convention, *supra* note 61, art. 5, *with* Interim Text, *id.*, art. 5. The change is also indicated by the change in the name of the article from "Appearance by the defendant" to "Defendant's right to contest jurisdiction."

¹⁸⁷ *See* Interim Text, *supra* note 178, art. 5.

While the general jurisdiction rule was left nearly unchanged, the discussions about the specific bases of jurisdiction were more controversial. In the informal meetings and the Diplomatic Conference, much time was spent on Articles 6 and 10, which assess contract and tort respectively.¹⁸⁸ Hardly discussed was Article 12 which deals with the rules of exclusive jurisdiction.¹⁸⁹ The majority of discussions were focused on the provisions that have an impact on electronic commerce and intellectual property rights. The gap between the negotiating parties in these matters was so significant that the two issues were given their own chapters.¹⁹⁰ The changes on these parts of the convention will be discussed later.

The additional bases of jurisdiction were subject to changes as well. Article 14 of the Preliminary Draft Convention would have authorized jurisdiction over multiple defendants in cases where jurisdiction existed over only one of them.¹⁹¹ This Article was deleted in the Interim Text.¹⁹² The same happened to Article 16 of the Preliminary Draft Convention,¹⁹³ which contained a similar rule for third party claims.¹⁹⁴

Similar controversial discussions were held on the matter of the permitted and prohibited bases of jurisdiction. The especially difficult question remained as to what to include in the list of the prohibited bases of jurisdiction. The problem was to find a healthy balance between the matters on this list and the inclusion of related matters on the list that represents the required bases of jurisdiction.¹⁹⁵ This explains why Article 18 of

¹⁸⁸ See Brand, *supra* note 35 at 599.

¹⁸⁹ *Id.*

¹⁹⁰ See *infra* part VI.A. and VI.B.

¹⁹¹ See Preliminary Draft Convention, *supra* note 61, art. 14.

¹⁹² Interim Text, *supra* note 178, comment to art. 14.

¹⁹³ *Id.*, comment to art. 16.

¹⁹⁴ See Preliminary Draft Convention, *supra* note 61, art. 16.

¹⁹⁵ See Brand, *supra* note 35 at 600.

the Interim Text remained largely in brackets¹⁹⁶ indicating that further discussion was necessary.

As addressed earlier, the wording in Articles 21 and 22 was an area of early compromise although no one would have expected that, considering the differences between the *lis pendence* and the *forum non conveniens* approach.¹⁹⁷ Thus, these provisions remained relatively unchanged even after the 2001 Diplomatic Conference.¹⁹⁸ The provisions dealing with the problems on recognition and enforcement of judgments remained unchanged for the most part.¹⁹⁹ That indicated consensus between the negotiating parties in this context as well.

B. Developments and Different Perspectives

1. Beginning Anew

After the June 2001 Diplomatic Conference the negotiations had come to a standstill since it had ended in disagreement, as demonstrated by the bracketed Interim Text. After reaching this impasse, the negotiations were suspended until a three day meeting from April 22 to 24 of the Hague Conference's Commission I on General Affairs and Policy of the Nineteenth Diplomatic Session of the Hague Conference in The Hague. Officials from different delegations met to discuss whether there was a chance for the Hague

¹⁹⁶ Interim Text, *supra* note 178, art. 18.

¹⁹⁷ See *supra* part III.C.6.

¹⁹⁸ Compare Preliminary Draft Convention, *supra* note 61, art. 21, 22, with Interim Text, *supra* note 178, art. 21, 22.

¹⁹⁹ Compare Preliminary Draft Convention, *supra* note 61, Chapter III, with Interim Text, *supra* note 178, Chapter III.

Convention project to be continued, and if so, how it would continue.²⁰⁰ Already before the meeting in April problems with the further negotiations became apparent: The United States was in favor of moving forward in negotiating the provisions that are subject to little controversy. This implied the dropping of the controversial issues and the wish to develop a narrower treaty.²⁰¹ Other states like Australia, Japan, Canada, and also the European Union proposed a return to the Preliminary Draft Convention and therefore favored comprehensive treaty negotiations.²⁰² At the meeting itself it turned out immediately that there was a common will to continue with the negotiations. It was agreed to set up a new drafting committee with the intention to begin the drafting process anew, avoiding and dropping the most controversial matters and concentrating on the relatively non-controversial issues.²⁰³ This outcome and especially the creation of an informal working group on the judgments project, however, was not expected by everyone after the Australian and the Japanese delegation released a letter that proposed the basis for the negotiations to be the 1999 Preliminary Draft Convention.²⁰⁴ The problem with this suggestion was that the alternative to go back to the Preliminary Draft level had long ago been deemed as unworkable by U.S. official and business interests.²⁰⁵

²⁰⁰ William New, E – Commerce: U.S. May Face Opposition On Narrow Jurisdiction Treaty, April 17, 2002, available at <http://www.cptech.org/ecom/jurisdiction/techapril02.html> (last visited January 21, 2005).

²⁰¹ State Department lawyer Jeffrey Kovar, the head of the United States delegation in the negotiations stated: “We would like the other member states of the Hague Conference to focus on those elements of the comprehensive draft that are achievable now and forgo those other elements until the time is right to address them.” *See id.*

²⁰² New, *supra* note 200.

²⁰³ Anandashankar Mazumdar, Hague Convention Negotiations Continue; Delegations Appear Ready to Begin Anew, in: BNA, May 2, 2002, available at <http://www.cptech.org/ecom/jurisdiction/bnamay2.html> (last visited January 21, 2005).

²⁰⁴ *See id.*

²⁰⁵ *See id.*

However, a new working group was created to negotiate a new draft. This working group, containing less than 20 members, was smaller than past negotiating groups.²⁰⁶ With the small size of the group it was intended to make the agreement process more effective, to let aside political influences, and to concentrate technical skills.²⁰⁷ The working group planned to meet two or three times in 2002 and aimed to come up with a new draft for the Convention in early 2003.²⁰⁸ The official conclusion of the treaty was projected for a final Diplomatic Conference dealing with the judgment and enforcement topic before the end of 2003,²⁰⁹ even though there were many doubts that the negotiation process would move quickly enough to hold a Diplomatic Conference at the scheduled time.²¹⁰ However, the head of the coordinating body for the negotiations was convinced that a limited treaty could emerge in late 2003.²¹¹ The standpoint of the Hague Conference after the April 2002 meeting is well demonstrated by a statement of Hans Vaan Loon, then secretary general of the Hague Conference on Private International Law, who stated that too much pressure to expand the scope of the Hague Convention during the negotiations would make the project ultimately fail.²¹²

²⁰⁶ *See id.*

²⁰⁷ *See id.*

²⁰⁸ Andrea Schultz, Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Preliminary Document No. 19 of August 2002, page 5, available at ftp://hcch.net/doc/jdgm2001draft_e.doc (last visited Jan. 22, 2005) [hereinafter Preliminary Document No. 19].

²⁰⁹ *Id.*; *see also* Tery Rucker & William New, E – Commerce: Hague Treaty Talks On Long Track Again, in: Techdaily Story, May 5, 2002, available at <http://www.cptech.org/ecom/jurisdiction/techmay602.html> (last visited January 21, 2005).

²¹⁰ *See* Mazumdar, *supra* note 203.

²¹¹ William New, E – Commerce: Hague Leader Foresees Limited Treaty for Online Disputes, in: National Journal's Technology Daily, May 08, 2002, available at <http://www.cptech.org/ecom/jurisdiction/techmay802.html> (last visited January 21, 2005).

²¹² *Id.*

It was decided to take “the core area and possible additions” as a basis for further negotiations.²¹³ Keeping this in mind two stages of negotiations were designed. The goal of the first stage, as mentioned above, was to concentrate on the core of the convention and, therefore, to negotiate on more or less non-controversial subjects like choice of court, jurisdiction in the domicile of the defendant, jurisdiction with respect to branches of companies, appearance, physical torts, trusts, and counterclaims.²¹⁴ The second stage was designed to discuss whether and how more controversial matters could be included after consensus was reached on the basic provisions discussed in the first stage. Therefore, it was intended to broaden the convention at a later point in time.²¹⁵ The most important issues in this context involve jurisdiction to hear e-commerce and other internet related disputes as well as disputes involving intellectual property rights.²¹⁶ Nonetheless topics like jurisdiction based on activity, consumer and employment contracts, the relationship of the proposed Hague Convention to regional regulations on jurisdiction, and bilateralisation were on the list of topics that seemed to bar the negotiation process.²¹⁷

2. First Meeting on the Judgment Project

The first meeting of the Informal Working Group on the Judgments Project, which was held in The Hague from October 22 to 25, 2002, was prepared by a paper that

²¹³ Preliminary Document No. 19, *supra* note 208 at 5.

²¹⁴ Tanguy van Overstraeten & Sylvie Rousseau, Drafters Revive Convention on Jurisdiction and Foreign Judgments, in: World Ebusiness Law Report, July 18, 2002, available at <http://lists.essential.org/pipermail/hague-jur-commercial-law/2002-July/000657.html> (last visited January 21, 2005).

²¹⁵ *Id.*

²¹⁶ *Id.*; see also Mazumdar, *supra* note 203.

²¹⁷ See Anandashankar Mazumdar, New Hague Group Presented With Litany of Jurisdictional Issues for Narrower Treaty, September 6, 2002, available at <http://lists.essential.org/pipermail/hague-jur-commercial-law/2002-September/000679.html> (last visited January 21, 2005).

summarized and outlined the major issues that had to be discussed leading to a treaty with a limited scope.²¹⁸ This paper was issued by First Secretary Andrea Schulz, a member of the Hague Conference staff heading up the working group.²¹⁹ The main concern of this paper was to address the question of whether it would be reasonable to limit a later Hague Convention to choice of court clauses in business-to-business cases.²²⁰ This was a concern because the choice of court agreements in business-to-business cases were identified as one of the “core areas” besides the provisions on recognition and enforcement in both the Preliminary Draft Convention and the Interim Text.²²¹ Furthermore, it has to be pointed out that contracts between businesses typically specify which country’s court system will be used if a dispute arises over the transaction, hence such clauses merit special consideration.

During the meeting, the members of the new working group focused almost entirely on exclusive choice of court clauses in business-to-business cases. The discussion in this context concentrated on possible convention requirements on formal and substantive validity of such choice of court clauses, the possible scope of a rule on choice of court clauses, the issues in the relationship with other conventions, bilateralisation, and the applicability or non-applicability of national and or convention rules on *lis pendens* and *forum non conveniens*. It also focused on the problem of personal versus subject matter jurisdiction and the question of interim relief.²²²

²¹⁸ Preliminary Document No. 19, *supra* note 208.

²¹⁹ Andrea Schultz was formerly a member of the German delegation to the Hague Conference and is now on the Hague Conference’s staff.

²²⁰ See Preliminary Document No. 19, *supra* note 208 at 7 ff.

²²¹ *Id.* at 6.

²²² *Id.* at 4.

Another matter discussed was a possible exclusion of patents and trademarks, both registered and unregistered, which would leave only copyrights covered by the scope of the treaty.²²³ The outcome of the discussion was the decision to seek feedback in the different countries about this plan.²²⁴ The next meeting was planned to take place in early January 2003, and two others were to follow in March and May 2003.

3. Second Meeting on the Judgment Project

The Informal Working Group on the Judgments Project gathered a second time in The Hague from January 6 to 9, 2003.²²⁵ At this meeting, the discussion from the first meeting on the Judgment Project were continued, and questions that had remained open were revisited. The meeting mainly focused on the exclusive choice of court clauses, specifically concentrating on the definition of “exclusive” to determine where to draw the line between exclusive and non-exclusive choice of court clauses.²²⁶ Other issues discussed during the meeting were linked to the limitation of the scope of the treaty. The group primarily discussed whether a case involving a choice of court clause should be required to have some international element in order to be covered by the scope of the convention.²²⁷ Other topics discussed included whether some kind of objective link with the chosen forum was necessary,²²⁸ and whether there should be a general escape clause

²²³ *Id.* at 12.

²²⁴ *Id.*

²²⁵ For the outcome of this meeting *see* Andrea Schultz, Report on the Second Meeting of the Informal Working Group on the Judgments Project – January 6-9, 2003, Preliminary Document No. 21 available at ftp://ftp.hcch.net/doc/jdgm_pd21e.pdf [hereinafter Preliminary Document No. 21].

²²⁶ *Id.* at 5 ff.

²²⁷ *Id.* at 7 f.

²²⁸ *Id.* at 8 f.

including a public policy provision.²²⁹ There were also further discussions regarding intellectual property issues.²³⁰ Moreover, the group addressed whether it would still be possible to add further bases of jurisdiction to the reduced convention scope and which bases should be considered.²³¹ In this context consent / waiver / submission, counter-claims, and defendant's forum were taken into consideration.²³²

a. A New Draft

The discussions were interesting generally. The most interesting issue at the second meeting, however, was due to the consequence of a requirement places on the group in this meeting by the Commission on General Affairs in April 2002. The meeting was obliged to come up with a first draft of a possible convention based on the result of the discussions that had thus far taken place.

The informal working group fulfilled this obligation by issuing first draft language. The member states of the Hague Conference as well as other interested parties were provided not only with some new draft language but with a completely new draft. More than 10 years after the birth of the project of the Hague Conference a new draft appeared that was to decide whether the undertaking would have a promising future or whether it would be forgotten after little more than a decade. The new draft was issued in the annex of the official report of the second meeting of the informal working group.²³³ The word draft can be understood literally since the issued language only included what the parties had agreed upon up to that point.

²²⁹ *Id.* at 9 ff.

²³⁰ *Id.* at 11 f.

²³¹ *Id.* at 12 ff.

²³² *Id.*

²³³ See Preliminary Document No. 21, *supra* note 225, annex.

b. Content of the New Draft

Chapter I of the new draft dealt with the scope of a possible new convention. Article 1 (substantive scope) provided that the convention applies to “agreements on the Choice of Court concluded in civil or commercial matters.”²³⁴ However, the absence of text under sub-section b and sub-section c indicated that this is not the final word on this issue. The provision also included language that gave an idea on what the convention would not apply to. Consumer contracts²³⁵ as well as individual contracts of employment²³⁶ were expressly excluded from the scope of the convention. Chapter II of the new approach included the jurisdictional rules, which provided a court of a contracting state with jurisdiction when that had been agreed upon in a choice of court agreement between the parties.²³⁷ Chapter III was intended to regulate recognition and enforcement issues. However, the informal working group had not prepared language for this part of a new approach. Chapter IV was reserved for final clauses covering issues like the limitation of jurisdiction and the relationship to other international instruments.

²³⁴ *Id.* art. 1 (1) lit. a. Article 3 provides a definition on the choice of court agreement issue. According to Art. 3 (1) a choice of court agreement “is an agreement whereby two or more parties designate, for the purpose of deciding disputes which have arisen or may arise between them in connection with a particular legal relationship, the courts of one country or one specific court to the exclusion of the jurisdiction of any other courts[or the courts of a certain number of countries or certain specific courts to the exclusion of the jurisdiction of any other courts].” Art. 3 (2) furthermore provides that “an agreement whereby parties have designated a court to decide disputes between them as provided in paragraph 1 shall be deemed to exclude the jurisdiction of any other courts unless the parties have otherwise agreed.”

²³⁵ *Id.* art. 1 (2) lit. a. The working group issued the draft with a concrete definition of consumer contracts. According to Art. 1 (2) lit. a “a consumer contract is an agreement between a natural person acting preliminary for personal, family or household purposes (the consumer) and another party acting for the purpose of its trade or profession, or between two consumers.”

²³⁶ *Id.* art. 1 (2) lit b.

²³⁷ *Id.* art. 1 (1).

c. Comments

Even though the outcome of the second meeting was not more than a fraction of a draft this fraction marked a turning point in the development of the entire Hague Convention project. The scope of the convention was reduced to choice of court agreements in business-to-business relationships. Consumer contracts were expressly excluded. These key features determined all the subsequent negotiations.

4. Third Meeting on the Judgments Project

The next meeting was held from 25 to 28 March in 2003 in The Hague, which was immediately before the meeting of Commission I on General Affairs and Policy of the Hague Conference from 1 to 3 April 2003. The main purpose of setting up a working group was to prepare a text on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters. This text was 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 third meeting on the judgments project fulfilled the first part of the requirements set forth in 2002 by issuing a nearly complete draft, the Preliminary Result of the Working Group (Preliminary Result).²³⁸ The document issued includes draft language that continues the work done in the previous two meetings.

²³⁸ See Preliminary Result of the Work of the Informal Working Group on the Judgments Project, Preliminary Document No 8 of March 2003 (corrected version) for the attention of the Special Commission of April 2003 on General Affairs and Policy of the Conference, available at ftp://ftp.hcch.net/doc/genaff_pd08e.pdf [hereinafter: Preliminary Result]

a. The Preliminary Result of the Working Group

Chapter I dealing with the scope of the convention does not contain modifications compared to the draft issued after the second meeting of the working group. However, besides the exclusions already mentioned above further language excluding several matters was included. For example, Article 1 (3) Preliminary Result states that the convention shall not apply to proceedings related to the status and legal capacity of natural persons and maintenance obligations. The list provided in this part of the draft basically equals the list that was included in Article 1 of the Preliminary Draft Convention.²³⁹ One important change, however, must be pointed out. The Preliminary Result sets forth that the convention shall not apply to proceedings related to the “validity of patents, trademarks and [other intellectual property rights – to be defined].”²⁴⁰ Article 2 of the Preliminary Result provides definitions that clarify the language of the convention, and Article 3 of the Preliminary Result²⁴¹ sets forth the requirements for the formal validity.²⁴²

No changes were made to the draft that was issued after the second meeting of the working group with respect to the general jurisdictional rule. Thus, the rule continued to be that the court chosen in the agreement to settle all the disputes in the legal relationship between the parties had jurisdiction.²⁴³ However, that provision did not apply when all the parties involved are habitually resident in the state where the chosen court is

²³⁹ Compare Preliminary Result, *id.* art. 1 (3) with Preliminary Draft Convention, *supra* note 61 art. 1 (1).

²⁴⁰ Preliminary Result, *supra* note 238, art. 1 (3) lit. k. For the discussion addressing the problem connected with this part of the provision *see infra* part VI.A.

²⁴¹ All articles without specification of source that are mentioned under IV.B.4 a. and b. refer to the Preliminary Result unless indicated otherwise.

²⁴² *Id.* art. 2 and 3.

²⁴³ *Id.* art. 4 (1).

situated.²⁴⁴ That part of Article 4 provided that an international element is required in order to make the convention applicable. In other words, the convention would not be applicable in what are considered to be domestic cases.

That the chosen court enjoys priority status is shown in Article 5, which states that courts in a contracting state other than the chosen court “shall decline jurisdiction or suspend proceedings.”²⁴⁵ Exceptions to this rule are first made in cases where the agreement is void, inoperative, or incapable of being performed in the eyes of the court that was not chosen, and second if the chosen court declines jurisdiction.²⁴⁶ A third exception again addresses the problem regarding the international element by stating that a court in a contracting state does not have to decline jurisdiction if all elements except the choice of court agreements itself are connected only to that contracting state.²⁴⁷

While the draft issued after the second meeting of the informal working group lacked language regarding recognition and enforcement, the Preliminary Result draft provided new provisions in this field. The general rule of Article 7 provides that the judgment of the court that was chosen must be recognized and enforced in other contracting states unless the catalogue of exceptions that make a refusal of the recognition and enforcement possible applies.²⁴⁸ Procedural rules in Articles 8 – 10 and

²⁴⁴ *Id.* art. 4 (2).

²⁴⁵ *Id.* art. 5.

²⁴⁶ *Id.* art. 5 lit. a, c.

²⁴⁷ *Id.* art. 5 lit. c.

²⁴⁸ *Id.* art. 7 (1). The possibilities to refuse recognition and enforcement are set forth in art. 7 (1) lit. a-e and art. 7 (2) lit. a, b. These provisions read as follows: “1. A judgment given by a court of a Contracting State designated in a choice of court agreement shall be recognized or enforced, as the case may be, in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only if - a) the court addressed finds that the choice of court agreement was null and void; b) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence; c) the judgment was obtained by fraud in connection with a matter of procedure; [d) the judgment results from proceedings incompatible with fundamental principles of

language regarding the award of non-compensatory damages,²⁴⁹ which is similar to the approach in the Preliminary Draft Convention,²⁵⁰ as well as provisions that regard severability and the recognition and enforcement of settlements to which the chosen court has given its authority²⁵¹ complete Chapter III.

Chapter IV of the draft contains general provisions regarding limitation of jurisdiction and recognition and enforcement as well as provisions that shall provide a uniform interpretation of the convention.²⁵² Among other matters, Chapter V deals with the problem of signature, ratification and entry into force.²⁵³

b. Comments

The draft text on choice of court agreements issued after the third meeting of the Informal Working Group on the Judgments Project is the outcome of the new focus of the negotiations. While the language issued in former texts applied the convention to civil and commercial matters in general, the new approach narrowed this field of application drastically, covering only a small portion of what was originally planned to be covered. It remains to be seen whether this approach can make the entire project succeed and whether there is a chance of adding second stage issues.

procedure of the State addressed;] or e) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed. 2. In addition, recognition or enforcement of a judgment given by a court of a Contracting State designated in a choice of court agreement other than an exclusive choice of court agreement may be refused if - a) proceedings between the same parties and having the same subject matter are pending before a court that was seized prior to the court of origin, either in the State addressed or in another State, provided that in the latter case the court is expected to render a judgment capable of being recognized or enforced in the State addressed; or b) the judgment is inconsistent with a judgment rendered, either in the State addressed or in another State, provided that in the latter case the judgment is capable of being recognized or enforced in the State addressed."

²⁴⁹ *Id.* art. 11.

²⁵⁰ Preliminary Draft Convention, *supra* note 61, art. 33.

²⁵¹ Preliminary Result, *supra* note 238, art. 12 and 13.

²⁵² *Id.* Chapter IV.

²⁵³ *Id.* Chapter V.

5. Special Commission Meeting in December 2003

a. The Road to the Meeting

Although of a very limited scope, the new draft brought an unforeseen level of agreement between the parties. At the meeting of the Commission I on General Affairs and Policy of the Hague Conference that met from 1 to 3 April 2003 it was decided that the negotiation parties should review the draft.²⁵⁴ The different governments were asked to deliver their official views and opinions to the Hague Conference by July 2003. The main question to be answered was whether the new draft could be the basis for the further negotiations on the convention. It was intended to have intense negotiations in December 2003 if the response to the new draft was positive.²⁵⁵

The new draft was discussed in industry as well as in consumer groups. Business groups expressed their general agreement with the draft. Much of the software industry's sales, for example, are business-to-business transaction in an international setting. Therefore, the new draft would be, in the eyes of the business environment, a perfect tool to provide more predictability in jurisdiction and enforcement of judgement in this field.²⁵⁶ Consumer groups, on the other hand, raised concerns that the new approach could be an inflexible framework that is difficult to change.²⁵⁷ This is especially important keeping in mind that there are many second stage issues left to be addressed.

²⁵⁴ Conclusions of the Special Commission held from 1 – 3 April 2003 on General Affairs and Policy of the Conference (April 2003) at 11, available at http://hcch.e-vision.nl/upload/wop/genaff_concl2003.pdf (last visited January 21, 2005).

²⁵⁵ *Id.*

²⁵⁶ William New, E – Commerce: Vote Nears On Global Treaty With E – Commerce Impact, in: National Journal's Technological Daily, June 16, 2003, available at <http://www.cptech.org/ecom/jurisdiction/haguejune1603.htm> (last visited January 21, 2005).

²⁵⁷ *Id.*

Another concern, already stressed above, was that firms could “forum shop” and force weaker parties to accept their provisions.

After Hans Van Loon, the secretary general of the Hague Conference, reviewed the opinions of the draft that were sent in by almost 30 countries, he concluded that the parties wanted to move forward with the negotiations based on the limited version of the convention. Although further clarification and improvement was suggested, “all replies concur in the view that the draft text should be put forward as the basis for the work.”²⁵⁸ Therefore, the road was clear for a Special Commission to discuss the topic at a meeting in The Hague, Netherlands from 1 to 9 December 2003.

b. The December 2003 Draft

There were two main messages the Special Commission meeting delivered. First, there was the confirmation by all the members of the negotiations that there would be a convention on choice of court and enforcement of judgments. This is especially important because many negotiators doubted that all the discussions would lead to a result in the end. After the December 2003 meeting the Hague Convention seemed to have become a shared project. The second outcome is of substantive nature to emphasize this intention of new negotiations. A complete draft, the December 2003 Draft on Exclusive Choice of Court Agreements was proposed.²⁵⁹ Although nearly identical with the Preliminary

²⁵⁸ William New, Nations Give Go-Ahead to Limited Treaty on Disputes, in: National Journal's Technology Daily, August 21, 2003, available at <http://lists.essential.org/pipermail/hague-jur-commercial-law/2003-August/000816.html> (last visited January 21, 2005).

²⁵⁹ Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (1 to 9 December), Draft on Exclusive Choice of Court Agreements, Hague Conference on Private International Law, Work. Doc. No 49E (December 2003), available at <http://www.abanet.org/intlaw/hubs/programs/Spring0409.01-09.03.pdf> [hereinafter: December 2003 Draft on Exclusive Choice of Court Agreements or December 2003 Draft]. All articles without

Result, this time official conventional language was distributed to the general public by the drafting committee and not only by the working group. It demonstrates and manifests the will of the negotiating parties to move forward as they had decided months before.

Like the Preliminary Result, the proposal by the drafting committee was limited to enforcing choice of court clauses within business-to-business contracts which identified which court would have exclusive jurisdiction if a dispute arises. Therefore, clauses that would give jurisdiction to more than one court would not be recognized by the draft. The draft would also enforce judgments made by those courts. However, there are some differences between the two latest drafts. Article 1 (4) sets forth that the proceedings which were excluded from the scope of the convention in Article 1 (3) remain covered by the convention if one of the matters referred to in this Article arises merely as an incidental question. That will especially become important in connection with claims involving intellectual property. Another point of discussion is that the European Union had favored language that would allow the Brussels Regulation to override the Hague Convention. Therefore, if an Italian business sues a German company under a contract containing a choice of court clause which makes a French court the chosen court, the Brussels Regulation and not a later Hague Convention would be applicable according to the will of the European Union. This could also be a major problem in finding later agreement on a final convention since there are situations that raise doubts on whether such a provision is workable. The following example is only one of these situations: a U.S. company that has a Finish branch office enters into a contract with an Austrian company containing a choice of court clause selecting U.S. courts. Would the European

specification of source that are mentioned under IV.B.5.b. refer to the December 2003 Draft unless indicated otherwise.

Union be able to claim that, because the Finish office is essentially involved in the contract, the case has to be heard in an EU court instead of an U.S. court even though the choice of court clause provides for the latter? This example demonstrates the potential for controversy that the European Union proposal causes.

Changes were also made in Article 3 of the new draft. E-commerce companies and internet service providers complained about Article 3 of the Preliminary Result draft. Language in the draft could make it possible to subject not only traditional internet providers but also libraries and universities, which transmit and store lots of digital information for third parties, to extensive liability in foreign courts under choice of court agreements they have never seen nor assented to. The language about usage that the parties “knew or ought to have known” in Article 3 (d) of the Preliminary Result draft was replaced by requirements for an exclusive choice of court agreement. Such an agreement must be entered into or evidenced either in writing or “by any other means of communication which renders information accessible so as to be usable for subsequent reference.”²⁶⁰ Internet providers in the U.S. have pointed out that the phrase “any other means” remains unacceptable for them.²⁶¹

²⁶⁰ December 2003 Draft, *see id.*, Art. 2 (3) (a) and (b).

²⁶¹ Dugie Standeford, E – Commerce Disputes, Talks on Intellectual Property Issues To Resume Next Year, in: Warren’s Washington Internet Daily, December 10, 2003, available at <http://lists.essential.org/pipermail/hague-jur-commercial-law/2003-December/000847.html> (last visited January 21, 2005).

C. Comments

The December 2003 Draft on Exclusive Choice of Court Agreements was accompanied by a draft report in March 2004.²⁶² This report was drawn up for the attention of the Special Commission meeting in April 2004. It was by far the most detailed report to a draft that was ever released by the Hague Conference. It is a symbol for the confidence of the Conference and the negotiating parties that a future Convention is in sight. The report gives a detailed explanation to each Article of the draft that was released in December 2003.

The introduction to the report summarizes the changes that have been made with respect to the judgments project since the parties had decided to start over in their efforts to negotiate a future Hague Convention. It has become clear that the scope of the judgments project has changed from a convention that includes a wide range of rules on jurisdiction, enforcement, and recognition to a convention which has a far more modest objective. According to the draft report, the objective of the convention is “to make exclusive choice of court agreements as effective as possible in the context of international business.”²⁶³ The report expresses the hope that a future Hague Convention will have the same impact on choice of court agreements as the New York Convention of 1958²⁶⁴ has had on arbitration agreements.²⁶⁵

²⁶² Masato Dogauchi & Trevor C. Hartley, Preliminary Draft Convention on Exclusive Choice of Court Agreements, Draft Report, Preliminary Document No 25 of March 2004 drawn up for the attention of the Special Commission of April 2004 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, available at http://www.hcch.net/upload/wop/jdgm_pd25e.pdf (last visited January 21, 2005) [hereinafter: March 2004 Draft Report].

²⁶³ *Id.* at 6.

²⁶⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

²⁶⁵ March 2004 Draft Report, *supra* note 262 at 6.

In order to achieve this goal, three obligations are identified²⁶⁶ that have been pillars of the new approaches since the negotiators decided to start over in their effort to draft a convention. (1) The courts of the member states are obliged to hear the dispute. The key provision for this obligation is Article 4 of the December 2003 Draft on Exclusive Choice of Court Agreements. It sets forth that the chosen court has jurisdiction and must exercise it. (2) All other courts must decline jurisdiction. While Article 4 of the December 2003 Draft is addressed to the chosen court, Article 5 of the December 2003 Draft is addressed to all other courts. Those must suspend or dismiss the proceedings before them if they concern the same claim. (3) The judgments rendered by the court must be recognized and enforced by the courts in other countries. Article 7 of the December 2003 Draft addresses the courts in which recognition for the judgment that was given by the chosen member state court is sought. Those courts must recognize and enforce the judgments that were given by the member state court that was designated in an exclusive choice of court agreement.

This framework makes clear what is left from the original project of a mixed convention. The present draft provides for only exclusive choice of court agreements. Therefore, it covers only one of the original jurisdictional grounds that were included in the so called “white list” of the early drafts which contained the required bases of jurisdiction. A court is only required to exercise jurisdiction if it is selected in a choice of court agreement and other courts are only required to recognize and enforce judgments that were rendered by these courts. This fact demonstrates again that the scope of the new draft is very narrow. In contrast with the mixed convention, there is no “black list” with

²⁶⁶ *Id.*

prohibited bases of jurisdiction. Due to the fact that only the chosen member state court can exercise jurisdiction, however, all other courts are prohibited from deciding a case that is covered by the agreement.²⁶⁷ Therefore, the member state courts must refrain from exercising jurisdiction only in case the parties made an exclusive choice of a court to resolve disputes under the contract.

Since the required and the prohibited bases of jurisdiction were reduced to one base of jurisdiction each, the list of permitted bases of jurisdiction under the old draft, the so called “grey list,” is very wide. It includes all cases that are not covered by an exclusive choice of court agreement.²⁶⁸ In these cases, the courts in the Contracting States can choose whether they wish to exercise jurisdiction. If they do, the courts in the other member states are free to enforce and recognize the rendered judgments. This even applies to some cases with exclusive choice of court agreements since consumer contracts and employment contracts are not included in the scope of the December 2003 Draft on Exclusive Choice of Court Agreements.

²⁶⁷ *Id.* at 7.

²⁶⁸ *Id.*

CHAPTER 5

PREPARATIONS FOR THE JUNE 2005 DIPLOMATIC CONFERENCE

The Convention project received expedited status in 2005 and therefore enjoys priority among the Hague Conference projects.²⁶⁹ Whether the year 2005 is going to be “The Year of the Hague Convention on Exclusive Choice of Court Agreements” will probably be decided by the outcome of the June 2005 Diplomatic Conference. It was scheduled for June 14 to 30, 2005.²⁷⁰

A. The April 2004 Special Commission Meeting

During a Special Commission meeting on the judgment project from 21 to 27 April 2004, the Hague Conference reconsidered the December 2003 Draft Convention on Exclusive Choice of Court Agreements and the March 2004 Draft Report that had been drawn up for the attention of this Special Commission. The various delegations tried to improve the draft and dealt with the remaining issues. The outcome of this meeting was the April 2004 Draft on Exclusive Choice of Court Agreements,²⁷¹ which was issued in May 2004. Much of the draft is identical with that of December 2003. It does include some important changes and additions. Like most of the drafts issued by the Hague Conference in the

²⁶⁹ William New, Expediting Global E-Commerce Talks, January 05, 2005, available at <http://lists.essential.org/pipermail/hague-jur-commercial-law/2005-January/000944.html> (last visited January 21, 2005).

²⁷⁰ This late date was due to a request by the United States. However, a reason for the requested delay was not given.

²⁷¹ Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (21 to 27 April 2004), Draft on Exclusive Choice of Court Agreements, Hague Conference on Private International Law, Work. Doc. No 110E (April 2004), available at http://www.hcch.net/upload/wop/jdgm_wd110_e.pdf (last visited January 21, 2005) [hereinafter: April 2004 Draft]. The full text of the April 2004 Draft can also be found in the annex to this thesis.

past, the April 2004 Draft also included a text with some alternatives. However, it is important to point out that there was far less bracketed language in this draft than in past drafts. The draft consisted of thirty one Articles which are analyzed by the December 2004 Draft Report.²⁷² The Diplomatic Conference in June 2005 will discuss the April 2004 Draft in light of the December 2004 Draft Report. The report will itself be the main basis for all of the discussions at the Conference. While the April 2004 Draft is fourteen pages long, the accompanying report is sixty pages long and is extremely detailed. It reads like a detailed commentary to the draft. The December 2004 Draft Report is an edited and improved version of the March 2004 Draft Report, which is why both reports are very similar. Reading the report seems to leave no doubt that the negotiating parties are serious about adopting a final convention in June 2005. However, hundreds of footnotes demonstrate that there was and is going to be much discussion in detailed areas between the negotiating parties and that there are still areas of disagreement.

B. The April 2004 Draft Convention on the Exclusive Choice of Court Agreements

1. Scope

The scope of the convention is framed by three limitations. According to Article 1 of the April 2004 Draft, the convention is only applicable in international cases that include a choice of court agreement regarding a civil or commercial matter.²⁷³ This positive definition of the convention scope is accompanied by a negative one in Article 2 of the

²⁷² Masato Dogauchi & Trevor C. Hartley, Preliminary Draft Convention on Exclusive Choice of Court Agreements, Draft Report, Preliminary Document No 26 of December 2004 drawn up for the attention of the Twentieth Diplomatic Session on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, available at http://www.hcch.net/upload/wop/jdgm_pd26e.pdf (last visited January 21, 2005) [hereinafter: December 2004 Draft Report].

²⁷³ April 2004 Draft, *supra* note 271, art. 1 (1).

April 2004 Draft which excludes consumer and employment contracts from the scope of the convention.²⁷⁴

Article 1²⁷⁵ gives two definitions for what is regarded as an international case. While Article 1 (2) defines “international” for the purpose of the rules on jurisdiction in Chapter II of the draft, Article 1 (3) gives a definition regarding the rules on recognition and enforcement in Chapter III. A case is regarded international in the first context if at least one of the involved parties is not a resident in the state of the court seized, or if another element that is in some kind related to the dispute²⁷⁶ has a connection to another state. That means a case is international with regard to jurisdiction unless the parties are both resident in the Contracting State of the court seized and the relationship of the parties and all other relevant elements are connected only with this particular state.²⁷⁷ In determining whether the requirements for an application of the convention are met, the perspective of the seized court is decisive. If two parties resident in Sweden enter into a contract with an exclusive choice of court agreement that provides a French court with exclusive jurisdiction over the case which regards a civil matter and one of the parties sues in a Swedish court, this court does not have to apply the convention since both parties are resident in the Contracting state of the court seized.²⁷⁸ However, if a party sues in France the French court will determine whether the convention is applicable. From the French court’s perspective the case would be international since none of the parties is resident in France. Therefore, the French court would be required by Article 5 of the

²⁷⁴ *Id.*, art. 2.

²⁷⁵ All articles without specification of source that are mentioned under V.B. refer to the April 2004 Draft unless indicated otherwise.

²⁷⁶ The mere location of the chosen court does not qualify as one of those elements.

²⁷⁷ April 2004 Draft, *supra* note 271, art. 1 (2).

²⁷⁸ That presupposes that all other elements are connected with Sweden only.

April 2004 draft to hear the case. The December 2004 Draft Report remarks that such a setting could lead to a judgment that is inconsistent with the situation in which two parties that are resident in the same state would expect from a court in that state.²⁷⁹ The report draws into doubt whether this is the result that the negotiating states intended. These apprehensions are hard to understand, however, since contracting parties will usually have a specific reason for choosing a court in another state. The choice of a “neutral” court without researching the consequences of this choice seems especially unlikely considering that the convention is applicable in the business-to-business relationship only. In such a relationship the typical “take it or leave it” contract that is often found in a business-to-consumer setting is less likely to occur. However, it is not said that such settings would never occur. In the world of e-commerce, a small family business doing business with a big corporation over the internet could easily be in a position similar to that of a consumer.

Article 1 (3) sets forth that a case is regarded international for purposes of Chapter III (recognition and enforcement) if the judgment that is sought to be recognized and enforced is foreign. This definition makes it possible that even cases which were not considered international under the Article 1 (2) definition can be considered international under this definition. If the Swedish parties in the example above choose a court in Sweden in their agreement, according to Article 1 (2) the case is not considered international. However, if one of the parties tries to enforce the Swedish judgment in the Netherlands, the case would become international for the Dutch court, for example. The

²⁷⁹ See December 2004 Draft Report, *supra* note 272 at paragraph 12.

Dutch court would have to enforce and recognize the judgment given the case that none of the exceptions in Article 9 apply.

Article 1 also requires that a case including an exclusive choice of court agreement concerns a civil or commercial matter. The latter is a standard in many international conventions. The limitation to civil and commercial matters necessarily excludes criminal and public law matters from the convention's scope.²⁸⁰ The reasons for choosing an exclusive choice of court agreement instead of a non-exclusive one become clear in the following example. Assuming one of the Swedish parties in the original example above (French court was chosen in the agreement) sue in an Italian court. For the Italian court, the case is international since none of the parties is resident in Italy. If Article 1 would not require an exclusive choice of court agreement, then the Italian court would be entitled to hear the case even if the case was brought to a French court later. The December 2004 Draft Report states that a non-exclusive choice of court agreement would raise issues of *lis pendens* that would be difficult to resolve.²⁸¹ It was pointed out above, however, that this matter was an area of early agreement in the first draft ever issued on the matter.²⁸² Therefore, the report should not use the *lis pendens* issue as a reason for narrowing the scope of the convention. The convention as it stands right now could not work with non exclusive choice of court agreements. Article 5 and Article 7 would not make sense in such a case.

Article 3 sets forth a detailed definition of what is considered an “exclusive choice of court agreement.” There are five requirements to the definition: (1) agreement

²⁸⁰ *Id.* at paragraph 15.

²⁸¹ *Id.* at paragraph 14.

²⁸² *See supra* part III.C.6.

between the parties, (2) proper form, (3) exclusivity, (4) reciprocity, and (5) the designation must be “for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship.”

Whether there is an agreement between the parties is determined by the law of the State of the chosen court. No express language is provided, which shows that such an approach is favored to an approach applying autonomous rules like those laid down by the European Court of Justice for the Brussels Convention.²⁸³ However, references in other Articles of the April 2004 Draft to the application of State law strongly suggest such a result.²⁸⁴ The requirements for a proper form of an exclusive choice of court agreement are laid down in Article 3 (c). In the words of Article 3 (b) a choice is exclusive if the agreement “designates the courts of one Contracting State or one or more specific courts in one Contracting State unless the parties have expressly provided otherwise.” Therefore, many different ways of choosing a court can be exclusive with respect to Article 3 (b). The parties can choose the “courts of Germany.”²⁸⁵ They can also choose a specific court like the “Amtsgericht Hamburg.” It would also be an exclusive choice if the parties determine that either the “Amtsgericht Hamburg” or the “Amtsgericht Rostock” should hear the case. The parties can choose as many specific courts as they want as long as all those courts are in the same member state. It would also be exclusive if the parties agree that party A may sue party B only in the “Amtsgericht Hamburg” and party B may sue party A only in the “Amtsgericht Rostock” as long as both courts are in the same state. The convention always speaks of states and never

²⁸³ See, e.g., *Estasis Salotti and Colzani v. RÜWA*, Case 24/76, [1976] ECR 1831; [1977] 1 CMLR 345.

²⁸⁴ References to the application of State law can be found in Articles 5(1), 7(a), 7(b), 9(1)(a), and 9(1)(b).

²⁸⁵ In this case German law would decide which court will hear the dispute.

makes a distinction between states and nations for example. Referring to a state, however, is not very specific when it comes to non-unified legal systems. For those federal states, Article 22 of the draft sets forth that the term “State” can refer to the state as a whole or to one of the territorial units within the state. Therefore, it would be an exclusive choice of court agreement if the Swedish parties in the example above designate “the courts of Canada” or “the courts of British Columbia.” A clause that designates “the state courts of California or the federal courts located in that state” would also be regarded as exclusive.²⁸⁶

The last two requirements of the definition are less complex. Reciprocity just means that the convention only applies to exclusive choice of court agreements that designate courts in a Contracting State, making it impossible for the convention to apply if the parties chose a court of a state that has not signed and ratified the convention. The last requirement (designation for the purpose of deciding disputes that have arisen or may arise in connection with a particular legal relationship) makes clear that the choice of court clause can include disputes that have already arisen and also covers future disputes. Furthermore, this requirement can restrict the choice of court clause to past or future disputes.²⁸⁷

Article 2 excludes certain matters from the scope of the convention. The most important matters in this context are consumer contracts and contracts of employment. The reasons for these exclusions were already discussed above. Besides those matters, Article 2 expressly provides an entire laundry list of excluded matters,²⁸⁸ which are

²⁸⁶ See December 2004 Draft Report, *supra* note 272 at paragraph 72.

²⁸⁷ See *id.* at paragraph 67.

²⁸⁸ The most important of these matters is the exclusion of some intellectual property rights which will be discussed later.

mainly excluded because they touch third party or public interests. As soon as such are involved it is not reasonable for the contracting parties to dispose of the particular matter between themselves.²⁸⁹ However, the matters in Article 1 (2) are only excluded if they do not arise merely as an incidental question.²⁹⁰ Incidental questions are such that a court has to decide in order to render a judgment.²⁹¹

2. Article 5

The rules with regard to jurisdiction can be found in Article 5 (1) of the April 2004 Draft. This provision sets forth that the designated court “shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.” Whether an agreement is null and void has to be determined by the law of the State of the chosen court and refers primarily to grounds like fraud, mistake, misrepresentation, duress, and lack of capacity. Article 5 (1) not only provides a court with jurisdiction but also requires it to hear the case. In Article 5 (2) the draft clarifies that the designated court cannot decline jurisdiction on the ground that the dispute should be decided in a court of another state. Since this rule does not apply with respect to a court in the same state, special questions arise with respect to non-unified legal systems in this context as well.²⁹² Furthermore, it is important to point out that the doctrines of *lis pendens* and *forum non conveniens* addressed above cannot serve as a ground for rejecting the jurisdiction of a court in another state. Article 3 (3) provides

²⁸⁹ See December 2004 Report, *supra* note 272 at paragraph 20.

²⁹⁰ April 2004 Draft, *supra* note 271, art. 2 (3).

²⁹¹ See December 2004 Report, *supra* note 272 at paragraph 55.

²⁹² For questions that arise in this context see December 2004 Report, *supra* note 272 at paragraphs 95 ff.

rules for the internal allocation of jurisdiction among the courts of a contracting state and makes clear that the first two paragraphs do not have any affect on it.²⁹³

3. Article 7 and 9

Assume one of the Swedish parties in the example above brings an action that is covered by the choice of court agreement between them in a court in Belgium even though the agreement provides a court in France with jurisdiction. This situation is typical for the cases to which Article 7 of the April 2004 Draft applies.²⁹⁴ Article 7 addresses all the courts that were not designated in the agreement and requires them to “suspend or dismiss the proceedings” even if their national law would provide them with jurisdiction. Without a provision like this, an exclusive choice of court agreement would be worthless. Even though the draft does not expressly explain what it means by “proceedings” it is clear that this term covers all proceedings that are inconsistent with the choice of court agreement.²⁹⁵ There are five exceptions in Article 7 a) to e) providing cases in which the provision does not apply. According to the first exception, Article 7 does not apply if the agreement between the parties is void under the law that the chosen court applies. In this case the court not chosen must apply the law of the chosen court and not its own. Therefore the court in Belgium would have to apply French law in order to determine whether the agreement is null and void. The second exception makes Article 7 not applicable if a party lacked capacity to enter into an agreement. This exception has to be determined by the law of the state of the court that was seized and not by the chosen

²⁹³ *Id.* at paragraphs 101 ff.

²⁹⁴ Article 11 of the April 2004 Draft makes sure that Article 7 April 2004 Draft also precludes the recognition or the enforcement of a judgment that is rendered in contravention of an exclusive choice of court agreement.

²⁹⁵ See December 2004 Report, *supra* note 272 at paragraph 119.

court. In this case the Belgian court would have to apply its own rules including its own choice-of-law rules. There is also a connection between the two exceptions since lack of capacity would make the agreement null and void in the sense of the first exception. Therefore, capacity has to be determined by the law of the court seized and by the court that was chosen in the agreement.²⁹⁶

While the first two exceptions to Article 7 are of general nature and can be found in other conventions, exceptions three and four are special. These exceptions cover cases of serious injustice, violations of the public policy of the court seized of the matter, and situations when the agreement cannot be performed because of exceptional reasons.²⁹⁷ All of those exceptions must be construed narrowly since they would otherwise undermine the object and purpose of the convention. The fact that the last of the alternatives only comes into play in cases of war in the chosen state for example demonstrates how narrow these exceptions are to be construed.²⁹⁸ The last of the five exceptions allows the seized court to exercise jurisdiction despite Article 7 if the chosen court has decided not to hear the case.

Article 5, 7, and 9 of the April 2004 Draft are the three pillars of the “new style” of the Hague Convention project. The third of these pillars, Article 9, simply states that a judgment that was rendered by a court designated in an exclusive choice of court agreement between two parties must be recognized and enforced in the courts of all other member states. Article 9 includes six exceptions which, if they apply, give the court the choice whether to recognize and enforce the particular judgment or not.²⁹⁹ This is due to

²⁹⁶ *Id.* at paragraph 125.

²⁹⁷ For a detailed explanation of these exceptions *see id.* paragraphs 126 ff.

²⁹⁸ *Id.* at paragraph 129.

²⁹⁹ For a detailed discussion of the six exceptions *see id.* at paragraph 136 ff.

the language chosen by the drafters (“[...] may be refused [...]”). In the context of recognition and enforcement it is important to point out that a future Hague Convention would not require a member state to grant a remedy that is not available under its law.³⁰⁰ However, it requires them to recognize and enforce the given judgment in a way that gives the best possible effect under the rules available.³⁰¹ This fact will become important especially with respect to the enforcement of punitive damages in countries that do not provide such a remedy in their legal system.

C. Comments

The June 2005 Diplomatic Conference may well result in the adoption of a Hague Convention that is ready for signature and ratification. Sometimes one step back can mean two steps forward. The atmosphere during and after the Special Commission meeting in December 2003 shows that all sides were trying to push the Hague project forward. It seems that the fear of making all the work pointless by not drafting a final convention encouraged the participating parties to proceed.

³⁰⁰ *Id.* at paragraph 50.

³⁰¹ *Id.*

CHAPTER 6

SPECIAL CONSIDERATION OF IP-RIGHTS AND E-COMMERCE

More than a decade had passed since the beginnings of drafting a Hague Convention on judgments in 1992. This is not a long period if one keeps in mind the relatively slow development of the law in general and the difficulty of the matter to be addressed in the proposed convention. There are fields of law, however, where ten years can seem an eternity. In the context of intellectual property³⁰² rights, the internet is a challenge that forces both lawmakers and practitioners to manage a rapid and continuing process of adaptation and adjustment. Moreover, the internet has an even bigger impact in e-commerce. In 1992, e-commerce was an expression only a few could understand since the internet was not readily available even in developed countries. Thus, questions of intellectual property and e-commerce were not really considered to be a major factor in the Hague Convention negotiation process.³⁰³ Both issues, however, had a very important impact on the negotiations and were often fields of major controversy.

A. Intellectual Property Rights

1. Article 12 Preliminary Draft Convention

In the Preliminary Draft Convention, intellectual property rights were addressed in Article 12, which provided exclusive bases of jurisdiction for intellectual property

³⁰² Hereinafter: IP.

³⁰³ Some commentators even stated that “it seemed that the drafters had ignored completely that new-fangled thing called the Internet,” *see* Hankin, *supra* note 75 at 1297.

matters.³⁰⁴ Article 12 (4) of the Preliminary Draft Convention sets forth language³⁰⁵ that was strongly criticized³⁰⁶ and often described as “completely unworkable.”³⁰⁷ This paragraph clarifies that both types of intellectual property rights, registered and not registered rights, were intended to be separated and that Article 12 (4) of the Preliminary Draft Convention only covers registered rights.³⁰⁸ As a consequence patents and trademarks are addressed by Article 12 (4) Preliminary Draft Convention. Copyright infringements, however, are treated as torts according to Article 10 of the Preliminary Draft Convention. To the United States delegation, this result was not very reasonable since copyrights may be registered in the United States and are often registered. As far as the concept of “unregistered” or “common law” trademarks is concerned, it is important to point out that the Draft Convention does not make a distinction between the aforementioned trademarks and registered trademarks. Trademarks are expressly mentioned in the text of Article 12 (4) Preliminary Draft Convention.³⁰⁹

By distinguishing between the different types of action that are related to intellectual property problems, this provision makes another separation worth mentioning. According to the language in the provision, the Convention would apply to questions regarding validity but not apply to problems related to infringement or

³⁰⁴ Preliminary Draft Convention, *supra* note 61, art. 12.

³⁰⁵ See *id.*, paragraph 4. This paragraph reads as follows: “In proceedings which have as their object the registration, validity, [or] nullity [, or revocation or infringement,] of patents, trade marks, designs or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or, under the terms of an international convention, is deemed to have taken place, have exclusive jurisdiction. This shall not apply to copyright or any neighbouring rights, even though registration or deposit of such rights is possible.”

³⁰⁶ See, e.g., Kyle Grimshaw, *International Upheaval: Patent Independence Protectionists and the Hague Conference*, 2001 DUKE L. & TECH. REV. 20, 13 ff. (2001).

³⁰⁷ See, e.g., Hankin, *supra* note 75 at 1297.

³⁰⁸ See Preliminary Draft Convention, *supra* note 61, art. 12 (4).

³⁰⁹ See Brand, *supra* note 35, footnote 19.

revocation, since these problems are still in bracketed text.³¹⁰ In other words the question of whether infringement actions should also be brought exclusively in the state of registration was left open.³¹¹

The reactions to Article 12 of the Preliminary Draft convention were negative. As addressed above it was described as unworkable and faced a wide front of opposition, and in particular, criticism in the United States. The United States Patent and Trademark Office made an attempt to get a general public response to the discussed approach by publishing a note in the Federal Register.³¹² The consensus of the replies³¹³ can be summarized in the conclusion that the approach in the Draft Convention is not a “model of clarity.”³¹⁴ While some industry spokesmen agreed that questions of validity rather than questions of infringement should be entitled to exclusive jurisdiction,³¹⁵ others believed that not even questions of validity should receive exclusive jurisdiction.³¹⁶ Although many experts agreed with the content of Article 12 (4) Preliminary Draft Convention in general or at least held the opinion that it was a good basis, many questions were left unanswered.³¹⁷ Article 12 Preliminary Draft Convention also did not deal with differences in systems of intellectual property rights protection in a satisfactory way.³¹⁸

³¹⁰ *Id.*

³¹¹ See Brand, *supra* note 35 at 596.

³¹² 65 Fed. Reg. 61, 306 (Oct. 17, 2000).

³¹³ The public responses to the request of the United States Patent and Trademark Office are collected on its website, <http://www.uspto.gov/web/offices/dcom/olia/tmcybpiracy/haguecomments.pdf> (last visited January 21, 2005) [hereinafter Public Responses].

³¹⁴ Letter from Kimbley L. Muller, President, International Trade Mark Association, to Q. Todd Dickinson (Dec. 1, 2000). Public Responses, *id.* at 36.

³¹⁵ See, e.g., “Comments of the Software & Information Industry Association“, Public Responses, *supra* note 313 at 85-96.

³¹⁶ See, e.g., “Response to Federal Register Notice“, Public Responses, *supra* note 313 at 100.

³¹⁷ For a summary of the most important questions see Brand, *supra* note 35 at 596 f.

³¹⁸ *Id.* at 596.

2. The June 2001 Diplomatic Conference and its Aftermath

a. The Conference

After several expert meetings on intellectual property the discussions during the June 2001 Diplomatic Conference focused on the different types of intellectual property rights. These rights and the legal systems created to promote and protect them were analyzed in order to find a compromise that could satisfy all the participating delegations.³¹⁹ As addressed above, the Interim Text draft does contain bracketed language and many alternatives indicating further need for discussion. This is especially true for Article 12 Interim Text regarding the intellectual property matter.³²⁰ Although the bracketed language might be confusing, the message of the drafters of the Interim Text is clear: The main issue addressed by the delegation members was whether proceedings for the infringement of patents, marks, and such other rights that might be covered by Article 12 Interim Text should fall within the exclusive jurisdiction or not.³²¹

Due to all of the bracketed language, this approach created more problems than it resolved. In comparison to the approach in the Preliminary Draft Convention, even more questions remained unanswered. Should problems regarding patents and marks be treated differently than problems dealing with copyright issues, as done in the Interim Text? If there were exclusive jurisdiction for patent and trademark issues, should these issues only apply to questions of validity³²² or also to questions of infringement?³²³ However, one question seemed key not only to the further development in the negotiations of the

³¹⁹ *Id.* at 600.

³²⁰ Three different proposals have been made with respect to the treatment of intellectual property in the Interim Text. *See* Interim Text, *supra* note 178, art. 12.

³²¹ *Id.* footnote 81.

³²² This would correspond with the approach in the Brussels Convention.

³²³ For other important questions in the same context, *see* Brand, *supra* note 35 at 601.

intellectual property matters but also the negotiation of the proposed Hague Convention as a whole. The question was whether it is better that intellectual property rights be excluded from the scope of the convention. The answer to this question will be discussed later in this thesis. In sum, the issue remained whether intellectual property right problems would be too connected with other subjects like tort and contract issues, making separate treatment undesirable.

b. Alternative Proposals

While the original Hague Convention was intended to be broad and inclusive in order to cover most civil and commercial litigation, an alternative proposal dealt exclusively with issues of intellectual property. This proposal was suggested by the American law Professors Dreyfuss and Ginsburg is appropriately named the “2001 Dreyfuss-Ginsburg-Proposal.”³²⁴ This proposal addressed two questions. Firstly, the drafters of this proposal intended to make the U.S. Intellectual Property Bar reflect on the possibility of creating a regime for international enforcement of intellectual property law judgments in the event that the Hague Conference project failed or did not cover rules for the solution of disputes in the field of intellectual property law.³²⁵ Secondly, the proposal raises the question of whether a convention which focused exclusively on intellectual property matters and which raised questions in this unique context would have advantages over the Hague Convention solution.³²⁶ One of the main reasons for providing an alternative

³²⁴ The text of the proposed convention and explanations to the single articles can be found in Rochelle C. Dreyfuss & Jane C. Ginsburg, *Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters*, 77 CHI.-KENT L. REV. 1065 (2002) [hereinafter Dreyfuss – Ginsburg – Proposal].

³²⁵ *Id.* at 1065.

³²⁶ *Id.*

approach was the creation of efficiency in international intellectual property disputes³²⁷ and the new challenges that are posed by the new cyber world realities.³²⁸

The Dreyfuss-Ginsburg-Proposal, which is also designed in a mixed convention style,³²⁹ was adapted from the Preliminary Draft Convention,³³⁰ though significant changes were made. First, the scope of the proposal was limited to countries that are members of the World Trade Organization (WTO) and the “Agreement on Trade – Related Aspects of Intellectual Property Rights,”³³¹ the so called “TRIPs – Agreement.”³³² Thus, the proposal basically covered the same rights that are covered by the intellectual property portion of TRIPs, with the addition of three extensions and one exception to the rights included by the TRIPs – Agreement.³³³ The main idea behind the use of established TRIPs rules is easily identifiable: Countries joining the TRIPs – Agreement have agreed to enforce intellectual property laws and have worked out special dispute resolution proceedings which they can apply if the enforcement process should fail.³³⁴ Forum shopping to undermine or weaken the several approaches of the different nations to govern the relationship between users and owners of intellectual property is meant to be outweighed by this scope limitation.³³⁵ Because of its general and broader

³²⁷ *Id.* at 1066.

³²⁸ See Kimberly A. Moore & Francesco Parisi, *Rethinking Forum Shopping*, 77 CHI.-KENT L. REV. 1325, 1326 (2002).

³²⁹ See Dreyfuss & Ginsburg, *supra* note 324 at 1069.

³³⁰ *Supra* note 61.

³³¹ Agreement on Trade – Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Result of the Uruguay Round vol. 31 (1994), 33 INT’L LEGAL MATERIALS 81 (1994) [hereinafter TRIPs – Agreement].

³³² Dreyfuss – Ginsburg – Proposal, *supra* note 324, art. 2.

³³³ Dreyfuss and Ginsburg add sound recordings, disputes over domain names, and rights specified in the Paris Convention to the scope of their proposal. The mentioned exception in comparison with the scope of the TRIPs – Agreement is the exclusion of patent litigation from the scope of the Dreyfuss – Ginsburg – Proposal. Dreyfuss and Ginsburg, *supra* note 324 at 1068 f.

³³⁴ *Id.* at 1067.

³³⁵ See *id.*

scope, the Proposed Hague Convention was often confronted with this forum shopping argument.³³⁶

Of special importance was the exception mentioned above that excluded patent litigation from the scope of the Dreyfuss-Ginsburg-Proposal.³³⁷ The proposal focused on copyrights with the intention of addressing disputes regarding copyright protected material and therefore dealt with concerns raised by copyright owners.³³⁸ The Dreyfuss-Ginsburg-Proposal also differed in other area from the Preliminary Draft Convention. Changes were made, or additional provisions were provided regarding jurisdictional rules,³³⁹ contract disputes, infringement actions, consolidation, remedies, and choice of law.³⁴⁰

c. Aftermath of the 2001 Conference

As the many alternatives in the Interim Text indicated, there was still a need for further discussion on the matter of intellectual property rights in the Convention. During the first meeting of the Informal Working Group on the Judgments Project there was discussion on whether it would be reasonable to exclude some intellectual property rights from the treaty. Patents and trademarks were intended to be excluded from the treaty while copyrights were to be covered. The delegations gathered again at the second meeting of

³³⁶ See *id.* Although an inclusion of patent litigation is not intended, bracketed language demonstrates how patents could be treated in the Dreyfuss – Ginsburg – Proposal.

³³⁷ *Id.*, art. 1(1).

³³⁸ See Roberta J. Morris, *International Jurisdiction and Enforcement of Judgments in the Era of Global Networks: Irrelevance of, Goals for, and Comments on the Current Proposals*, 77 CHI.-KENT L. REV. 1213, 1217 f. (2002).

³³⁹ While the Brussels Convention uses personal jurisdiction to identify a single most appropriate forum for a dispute resolution the Dreyfuss – Ginsburg – Proposal identified a set of fora with adjudicatory authority over the parties. This approach also differed from the rules set forth in the Preliminary Draft Convention, which uses personal jurisdiction as a tool to create a narrow range of choices that are appropriate.

³⁴⁰ For the changes in detail see Dreyfuss & Ginsburg, *supra* note 324 at 1069 ff.

the Informal Working Group on the Judgments Project. One state came up with the suggestion to include all intellectual property rights into the scope of the convention if the convention were to be limited to choice of court clauses,³⁴¹ which was the current approach in the negotiations of the Hague Convention at that time. The idea behind this suggestion was to protect commercial parties, which usually include choice of court clauses in their licensing agreements. Such a convention was considered to be the ideal tool to intensify and protect such decisions by the parties involved.³⁴² The reason for the protection was respect of the parties' choice. If they agreed on a court to settle their disputes, this court should be able to decide all issues, and therefore, all intellectual property matters and not only some.

An objection one could raise could be the infringement case problem that was already identified earlier in the 2001 negotiations. In these infringement cases the validity would be raised by the infringer as a defense in order to get exclusive jurisdiction since validity was subject to exclusive jurisdiction under the convention.³⁴³ Pure infringement cases between parties that were not bound by any contractual relationship and that had no other relationship of any kind would be subject to another exclusive jurisdiction besides the exclusive tort jurisdiction. But the fact that the substantive scope of the treaty was narrowed to choice of court clauses makes the difference in comparison with the negotiations in 2001 and before. With the new approach it became very unlikely that such a setting could lead to an exclusive jurisdiction that is unjustified since the infringing person could now only be one of the parties. Thus, the problems identified during the

³⁴¹ See Preliminary Document No. 21, *supra* note 225 at 11.

³⁴² *Id.* The result of the application of a convention taking all this in account should, according to this position, apply only inter partes.

³⁴³ *Id.*

negotiations in 2001 would seem to be solved since they will not arise in the contract-license-litigation.³⁴⁴ To meet some concerns it was suggested that express language be included providing that any judgment rendered on the basis of a choice of court clause would neither have any effect on registration authorities nor on the validity of a trademark.³⁴⁵ Other participants indicated agreement with the inclusion of all intellectual property rights as long as the modifications described above are explicitly mentioned in the convention.³⁴⁶

There was much interest in how the third meeting of the Working Group on the Judgments Project would deal with the intellectual property issue in the newly edited draft that was announced for this meeting. When the text of the treaty was first shown, the intellectual property issue that was earlier identified as one of the most controversial matters was set aside and made part of the second stage issues. However, at the beginning of the new drafting process it was pointed out that the intellectual property issue could reappear on the agenda of matters that were likely to be included within the scope of the Hague Convention later on. One main reason for the confidence expressed in the reappearance of intellectual property rights in the text was the fact that Andrea Schultz, first secretary of the Informal Working Group on the Judgments Project was an expert in intellectual property law.³⁴⁷

The early hopes of an inclusion of intellectual property matters in the Convention probably disappeared, since the Preliminary Result draft of the Working Group in form of a new draft, which was released at the third meeting of the Working Group, declared that

³⁴⁴ *See also id.*

³⁴⁵ *Id.* at 11f.

³⁴⁶ *Id.* at 12.

³⁴⁷ *See Anandashankar Mazumdar, supra note 203.*

the convention would not apply to proceedings related to the “validity of patents, trademarks and [other intellectual property rights – to be defined].”³⁴⁸ The drafters thus excluded the issue of validity of patents and trademarks from the scope of the convention and indicated by the bracketed language provided above that exclusion of other intellectual property rights could be possible.

The December 2003 Draft on Exclusive Choice of Court Agreement, did not lead to a conclusion regarding the intellectual property issue either. Proceedings involving the validity of patents and trademarks as well as other intellectual property rights whose validity arises from their registration were still not included in the convention.³⁴⁹ As mentioned above, however, Article 1 (4) of the December 2003 Draft made it possible to cover those matters if they arise merely as an incidental question. The inclusion of this provision rendered an old questions but this time in a new context: should a particular country’s court be able to hear a case involving an incidental question related to a patent or trademark when the patent or trademark had not been granted in that country? A separate discussion of this matter is not necessary, since the main problem remains the same in the sense that it involves a decision by a court in a case involving intellectual property rights whose validity arises from their registration in another country.

3. The April 2004 Draft

The intellectual property provisions in the April 2004 draft have been reformulated. However, despite of the different wording in Article 2 (2)(k) of the April 2004 Draft there is no indication that a change in policy was intended. The fact that the entire Article 2

³⁴⁸ Preliminary Result, *supra* note 238, art. 1 (3) lit. k.

³⁴⁹ *Id.* art. 1 (3) (k)(1).

(2)(k) of the April 2004 Draft is set forth in bracketed language is a sign of the lack of agreement on the intellectual property issues. According to the latest draft language, copyrights and related rights³⁵⁰ are still fully covered by the convention whereas all other intellectual property rights are excluded from the scope, “except in proceedings pursuant to a contract which licenses or assigns such intellectual property rights.”³⁵¹ This wording is more confusing than the one chosen in the December 2003 Draft, and it is not entirely clear at first glance what the drafters intended to express with this language. However, comparing the December 2003 approach and the present one makes clear that they both basically come to the same policy result: copyrights and related rights are fully included in the scope of the convention and questions with respect to the validity of all other intellectual property rights, like patents and trademarks for example, are not included. The discussions below will demonstrate how the wording in the April 2004 Draft reaches this policy result.

The complicated wording in Article 2 (2)(k) April 2004 Draft was due to the fact that the negotiators did not want the validity of patents and trademarks, for example, to be covered by the convention. However, they tried to include disputes over licenses in other countries into the scope of the convention. The problem with this intention was that all a violator of a license would have to do in order to prevent the application of the convention is to argue that the particular intellectual property right is not valid.³⁵² The

³⁵⁰ If the convention speaks of copyright “related rights” it refers to the specific use of an already existing work by someone else than the author of this work. Broadcasters, record producers, and actors are examples for subjects that would benefit under this part of the provision. See December 2004 Report, *supra* note 272 at paragraph 38.

³⁵¹ April 2004 Draft, *supra* note 271, art. 2 (2)(k).

³⁵² See William New, Negotiators See Progress on International Jurisdiction Treaty, in: Techdaily, December 16, 2003, available at <http://lists.essential.org/pipermail/hague-jur-commercial-law/2003-December/000854.html> (visited January 21, 2005).

wording in Article 2 (2)(k) April 2004 Draft was set forth to avoid such scenarios. “Proceedings pursuant to a contract” does not mean anything else than proceedings to enforce substantive rights under a contract, to obtain damages for the breach of such rights, to obtain payment of royalties under the contract, to interpret a contract, to set it aside, to declare that it never existed, or to obtain a declaration of non-liability under it.³⁵³ All those proceedings concern either the transfer or the use of intellectual property rights other than copyrights and related rights. Therefore, questions regarding the validity of such intellectual property rights cannot be considered “proceedings pursuant to a contract” which means that they are not covered by the convention if they arise as an principal issue.³⁵⁴ However, if they arise merely as an incidental question, they are covered according to Article 2 (3) of the April 2004 Draft.

Even in this case, though, rulings on these questions would not be subject to recognition and enforcement according to Article 10 (2) of the April 2004 Draft. Therefore, if the violator of a patent license agreement raises the invalidity of the patent as a defense to a claim that is covered by the convention, the court can decide on the validity issue as an incidental question. Despite the defense and the court ruling on it, the proceedings would still be within the scope of the convention as a consequence of Article 2 (3) April 2004 Draft. The ruling on the validity issue, however, is not enforceable under the convention due to Article 10 (2) April 2004 Draft.³⁵⁵

After this clarification it remains to be pointed out that negotiating parties intended to cover a wide range of contracts that deal with the transfer and use of

³⁵³ See December 2004 Draft Report, *supra* note 272 at paragraph 40.

³⁵⁴ See April 2004 Draft, *supra* note 271, art. 2 (2) (k) footnote 1.

³⁵⁵ Article 10 (2) of the April 2004 Draft is set forth in brackets.

intellectual property rights other than copyrights and related rights. Examples are license agreements, agreements to assign an intellectual property right, and distribution contracts if they involve intellectual property.³⁵⁶ Infringement proceedings were also intended to be included in the convention. Therefore, the convention could apply in cases where the scope of an intellectual property right other than a copyright or copyright related right is in question. The bracketed language in sub – paragraph k) would only clarify this intent. The brackets are due to the fact that the negotiating parties could not agree on whether clarifying words with respect to this matter are necessary.³⁵⁷

4. Comments

All of these facts, various approaches, suggestions, and thoughts raise multiple questions. Is it reasonable to exclude intellectual property matters completely from the scope of the proposed Hague Convention? Is an inclusion in part reasonable or does a later Hague Convention only make sense if all intellectual property rights are included in the framework of such a treaty? That this question cannot be answered in a way that provides an approach that is both clear in its application and accepted by all the different parties seems to be evident considering the controversial discussions up to this point. When the first draft of the Hague Convention, the Preliminary Draft Convention, was issued to the public, only copyrights were intended to be excluded from its scope. Now, after years of discussion copyrights are the only intellectual property rights that are still included in the most recent edition of the draft.

³⁵⁶ See December 2004 Draft Report, *supra* note 272 at paragraph 41.

³⁵⁷ *Id.* at paragraph 42.

In sum, two questions have to be answered. Does the Hague Convention really need intellectual property rights within its scope in order to be successful and meaningful? If yes, what types of intellectual property rights should be included? Professor Dreyfuss and Professor Ginsburg might be right in remarking that the application of intellectual property rights would be much easier if they are included in a convention that only covers intellectual property rights. However, they forget a very important point. Only the Hague Conference can offer the appropriate legal environment to draft a convention unifying law that is applicable and accepted worldwide. Universal application is exactly what judicial decisions on intellectual property need in order to achieve final and foreseeable outcomes. Intellectual property is one of the fields of law that does not take into consideration legal borders. Drafting a convention that is the perfect approach for only some delegations does not make sense in the long term. Therefore, the treatment of intellectual property rights has to be regulated under the umbrella of a regime that allows the participation of as many countries as possible. The Hague Conference can offer the negotiating environment that is necessary to draft such a convention. However, is it necessary to do so within the Hague Convention project? The recent stage of the negotiations have shown that the project has lost much of its importance in view of the exclusion of certain important issues. Although there were reasons for these exclusions, every effort should be made to re-insert these pertinent issues. It is possible that at least some intellectual property matters will get included in a later convention. However, bracketed language in the April 2004 Draft still leaves doubts about this inclusion. Allowing the opportunity of including intellectual property matters to pass is unreasonable especially after the reduction of the scope of the convention to

choice of court clauses. Therefore, inclusion of intellectual property seems not only a reasonable consideration with respect to the unification of the law on choice of court clauses in intellectual property, but seems also to be of at least some importance for the overall recognition of the Hague Convention.

Even after the reduction of the scope to choice of forum clauses, critics of the convention made remarks that demonstrated once more a completely wrong attitude towards the project. Some stated that even after the narrowing of the proposed convention there is still the likelihood that some troublesome issues will not disappear.³⁵⁸ Such statements demonstrate what was wrong with the project. Instead of trying to resolve troublesome issues and matters, some interest groups appeared to wish to avoid confrontation and consequently lost sight of the ultimate goal of the project and the “big picture.” The new narrow treaty can provide a proficient tool to establish reasonable intellectual property litigation. The approach that was initially suggested in the outcome of the second meeting of the Informal Working Group³⁵⁹ could be the proper way to solve the problem. The reduction to choice of court clauses opens the way to implement all intellectual property rights in a way that minimizes the danger of misuse of this inclusion. Concerns regarding the complete inclusion of intellectual property matters could be countered by excluding questions of validity from the scope of the convention. The latest draft has done that by including language that expressly states that any judgments rendered on the basis of a choice of court clause would not have any effect on the validity of certain intellectual property rights.

³⁵⁸ This statement was made by Judith Sapp representing the International Trademark Association. See Anandashankar Mazumdar, *supra* note 203.

³⁵⁹ See *supra* part IV.B.3.

Concerns were explicitly brought up with respect to trademarks. The International Trademark Organization believed that under the drafts that did not address the issue of the validity of trademarks, there was a danger that foreign courts that may not have any expertise in trademark matter could hear such matters: “What we would like and what we believe is essential for trademark owners is that only courts or agencies of a government in which the trademark arose should be able to determine whether a mark is entitled to registration there and whether a mark there has been infringed.”³⁶⁰ The idea that trademark law deserves more protection since it is territorial might be right, but to deny courts in other countries the ability to apply foreign rules to a given problem, or to investigate foreign rules seems unreasonable. Due to the highly connected markets today, applying foreign law in one’s own country is not unusual. The April 2004 Draft addresses these concerns and resolves the issue by including the described language with respect to the validity of trademarks among other intellectual property rights. Trademark law can now stay territorial and the danger of infringing persons using the issue of validity to obtain jurisdiction no longer exists since the scope of the convention was limited to choice of court agreements.

There is one more open question with respect to the intellectual property issue. Should the scope of the Convention also cover matters regarding the validity of intellectual property rights other than copyrights and related rights if those are not raised as merely incidental questions? The main argument against an inclusion of proceedings to revoke an intellectual property right other than copyright and related rights would be similar to the one voiced by the International Trademark Organization: courts should not

³⁶⁰ See Sapp, *supra* note 358.

be able to decide about intellectual property rights that arose in another country. However, denying a court's ability to resolve a case applying foreign law is not reasonable in the time of globalization. Furthermore, why does the draft convention imply that foreign courts are capable to decide on questions of validity if they arise as incidental questions but denies them this capability if the question would be the subject of the proceedings. If a court finds a patent to be invalid in an incidental question and renders a judgment on this ground, it does not make sense to give effect to the enforcement and recognition of this judgment without doing the same with respect to the incidental question as a separate or independent issues since the decision on the issue as an incidental question most likely influenced the outcome of the judgment. This example demonstrates that there is still much to discuss about regarding the inclusion of intellectual property in the Convention. It also demonstrates that a complete inclusion of all intellectual property matters is not as unlikely as many negotiators portray. However, as of the present situation a full inclusion of all intellectual property matters including questions of validity of patents and trademarks is not likely. Even if the June 2005 Diplomatic Conference will not reach this result it will hopefully adopt standard set forth by the April 2004 Draft.

B. E-Commerce

The e-commerce issue was not expected to determine the negotiation process when the idea of negotiating a new Hague Convention arose. However, it soon became a significant issue. E-commerce took up a large portion of the time available for the negotiations, since the increasing importance of the internet and the rapidly advancing

technology could not be ignored.³⁶¹ Transactions concluded over the internet were not an unusual phenomenon. In fact, everyone who is able to use the internet is able to participate in such transactions. This undoubtedly led to an increasing number of disputes arising out of transactions concluded over the internet. Against this background the drafters of the new convention realized that they have to address the e-commerce issue in order to keep the negotiations and their possible outcome up-to-date.³⁶² This part of the thesis addresses the e-commerce issue by providing important information regarding the history and development of the negotiation process after reviewing the background of the rise of electronic commerce. The main focus will be on the e-commerce issue as it relates to consumer transactions.

1. What is E-Commerce?

The rise of e-commerce is due to the fact that the internet is accessible for nearly everyone for relatively little money. A person can access a world market in no time while sitting in an armchair in his living room. This has not only changed the way consumers think, behave and interact but it also modified the way business is conducted and changed how our society functions.³⁶³ One does not have to refer to statistics to realize the impact that the internet and e-commerce has had in recent years.³⁶⁴ In the 1990s under President

³⁶¹ See Mary Shannon Martin, *Keep it Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E – Commerce*, 20 B.U. INT'L L.J. 125, 127 (2002).

³⁶² See Paul Hofheinz, *Birth Pangs for Web Treaty Seem Endless*, WALL ST. J., Aug. 16, 2001, at A11. "Around the time the treaty writers sat down to work, the e-commerce sector took off. Suddenly, they found themselves trying to set global rules on how to regulate a new form of commerce that hardly recognized borders." *Id.*

³⁶³ See generally THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (1999). See also Martin, *supra* note 361 at 128.

³⁶⁴ If one wants to call in statistics he would find out that the number of merchants on the internet covering sales ranging from \$100,000 to \$10 million was expected to increase from 17,500 in 1999 to 2.6 million

Clinton, for instance, the United States strongly encouraged the development and expansion of e-commerce.³⁶⁵ A concrete result of the new attention given to this matter was the “Electronic Signatures in Global and National Commerce Act” signed by President Clinton in 2000.³⁶⁶ The new statute does not only recognize the validity of electronic contracts, electronic signatures, notices, and other electronic records, but also allows the involved parties to choose the technology they want to use for authenticating their transactions without any involvement by the government.³⁶⁷ This is only one example of modernization in this particular area in the United States.³⁶⁸

There are two different types of e-commerce contracts or transactions that are important in the context discussed here, the so called business-to-business contracts and business-to-consumer contracts. Business-to-consumer e-commerce is “commerce using the internet to conduct business with consumers” which results in internet consumers buying or accessing information via the internet from business entities.³⁶⁹ Business-to-consumer e-commerce contracts are concluded over the internet rather than by using the traditional face-to-face approach or mail media.³⁷⁰ Likewise, a business-to-business e-

in 2004. Keenan Vision, The Keenan Report: The E – Merchant Opportunity of 1999 (Oct. 1, 1999), at http://www.keenanvision.com/doc/em-update/e-merchant_update.asp (last visited Jan. 22, 2004) [hereinafter: Keenan Report] Another source comes to the conclusion that the number of small- and medium-sized business on the internet has increased by 78% from 1999 to 2000 alone. eMarketer, The eGlobal Report 65 (2001), at <http://www.ifc.org/sme/acrobat/eGlobal.pdf> (last visited January 21, 2005).

³⁶⁵ See William J. Clinton & Albert Gore, Jr., A Framework for Global Electronic Commerce, Presidential Message to Internet Users (July 1, 1997), available at <http://clinton4.nara.gov/WH/New/Commerce/message.html> (last visited Jan. 21, 2005).

³⁶⁶ Electronic Signatures in Global and National Commerce Act of 2000, Pub. L. No. 106-229, 114 Stat. 464 (codified at 15 U.S.C. §§ 7001). This Act was signed into law on June 30, 2000. Its provisions took effect on October 1, 2000.

³⁶⁷ See *id.*

³⁶⁸ For a summary of further developments in the U.S. law and politics see Martin, *supra* note 361 at 131 f.

³⁶⁹ Daniel C. Eidsmoe, *Online Dispute Resolution*, 30 ILL. INST. FOR CONTINUING LEGAL EDUC. 1, 3 (Aug. 2001).

³⁷⁰ *Id.*

commerce contract is a contract between two business entities concluded over the internet, for example.

2. Existing Approaches to Consumer Contracts

The following remarks give a short overview of the consumer protection provisions in Europe and in the USA. Pure consumer protection provisions will be described as well as such provisions that were exclusively made for the protection of consumers involved in e-commerce on the internet.

a. The European Union

Consumer protection rules in Europe relevant for e-commerce can be found in conventions and regulations as well as in specific directions on the matter.

i. Conventions

Consumer protection has played a big role in the law of different countries in Europe³⁷¹ and in the European Union.³⁷² As mentioned above, the European Union adopted the 1968 Brussels Convention. The provisions of the Brussels Convention require physical presence in order to determine which court has jurisdiction. Only those claims that arise from that presence can be brought. It should be noted that the Rome

³⁷¹ In Italy, for example, a choice of a forum other than the domicile of the consumer is assumed to be unfair and therefore unenforceable unless the seller presents evidence of an agreement with the consumer regarding this choice of forum. *See* Emilio Tosi, Consumer Protection under Italian Law, Chicago-Kent College of Law (Nov. 30, 1999), available at <http://www.kentlaw.edu/cyberlaw/docs/foreign/Italy-Tosi.html> (last visited January 21, 2005).

³⁷² For example, with respect to consumer privacy the European Union follows a much more strict standard than the United States with its industry self regulation preference. *See* Council Directive 95/46/EC, 1995 O.J. (L 281) 31.

Convention on the Law Applicable to Contractual Obligations³⁷³ also includes provisions on cross-border conflicts that are relevant to electronic contracting by consumers.

ii. EU Regulations

The European Union member states soon realized that e-commerce was going to become more and more important not only for the industry but also for daily life. Therefore, in an attempt to support e-commerce in Europe the European Union's Council of Ministers included some language regarding consumer contracts in the Brussels Regulation (Council Regulation No. 44/2001)³⁷⁴ which became effective in March 2002. According to this regulation the country in which the consumer resides will have jurisdiction over the dispute when a merchant "pursues commercial or professional activities in the member state of the consumer's domicile, or by any means, directs such activities to that Member State."³⁷⁵ In other words, consumers under the Brussels Regulation are now permitted to sue foreign operators of internet sites that market directly to the home country of the consumer in the consumer's own courts. The consumer may choose where to sue his opponent while the consumer can only be sued at his domicile. A prior selection of a forum which is conflicting with these rules is not possible.³⁷⁶ The consequences are significant for sellers who want to sell their products online. They have to comply with the laws in all EU-member states in order to avoid suits

³⁷³ 1998 O.J. (C 27) 34 (consolidated version).

³⁷⁴ See *supra* note 25 art. 15-17.

³⁷⁵ See *id.* art. 15 (1) lit. c.

³⁷⁶ See Norbert Reich & Axel Halfmeier, *Consumer Protection in the Global Village: Recent Developments in German and European Law*, 106 DICK. L. REV. 111, 120 (2001).

by consumers.³⁷⁷ The difference between provisions in the new regulation and the Brussels Convention is found in the reach of consumer protection. While the Brussels Convention system was designed for the passive consumer, the new regulatory framework protects every consumer who enters in contractual contact with a supplier who is active in the consumer's state of domicile. With respect to e-commerce it is therefore sufficient if there is an offer of goods or services contained on a web site that can be downloaded by the consumer on his computer.³⁷⁸ The level of protection offered to the consumer by this regulatory language is high, since all litigation in connection with consumer contracts that were entered into by means of e-commerce will take place in the consumer's country of residence.³⁷⁹ An exception to this general principle can only be made if the consumer had chosen to do so by expressly stating that he preferred to litigate abroad.³⁸⁰ It seems important to point out, however, that these remarks are not relevant in a situation where the European consumer, living in a member country of the European Union, enters in contractual contact with suppliers from a non EU country like the United States, unless this supplier is acting through a European branch office or subsidiary.³⁸¹

³⁷⁷ This burden on e-commerce retailers will be eased by the establishment of a system of alternative dispute resolution procedures that was envisioned by the European Union. See Paul Meller, *Buyers Gain Online Rights in Europe*, N.Y. TIMES, April 27, 2001, at W1. See also Nicole Goldstein, *Brussels I: A Race to the Top*, 2 CHI. J. INT'L LAW 521, 523 (2001).

³⁷⁸ See Reich & Halfmeier, *supra* note 376 at 120.

³⁷⁹ See *id.*

³⁸⁰ See *id.*

³⁸¹ In this setting the consumer cannot profit from the protection normally offered to him by either the Brussels Convention or the Brussels Regulation. Rather, his domestic jurisdictional rules govern the legal relationship between him and his non EU contract partner. Taking a German consumer as an example, his or her domestic jurisdictional rules, included in the German Code of Civil Procedure (ZPO), would require certain special grounds for jurisdiction like the holding of assets of the U.S. defendant in Germany (§ 23 ZPO). This example demonstrates how weak the protection of the consumer can become: even if the German law would be applicable to the contract between the EU buyer and the non EU seller, § 29 ZPO would see the place of performance of the sellers obligation at his seat of business. That would lead to the application of the law of the country where the seller resides.

The Brussels Regulation was passed in the middle of the negotiations for the new Hague Convention. Instead of waiting for the outcome of the negotiations the European Union went ahead³⁸² and thereby sent a message to the other delegations and to the United States in particular.³⁸³ Although the negotiations for the Hague Convention were not free of problems prior to the enactment of the Brussels Regulation they became more difficult thereafter.³⁸⁴ In the debate after the release of the Preliminary Draft Convention, which will be discussed later, the European Union often pointed out that they were not willing to change their existing approach to the consumer protection rules unless the change would include alternative dispute resolution mechanisms specifically online dispute resolution methods.³⁸⁵

iii. EU – Directives

Some EU directives are directly related to e-commerce consumer protection and will be described here to provide a more complete picture of the European approach to consumer protection. The first directive to be discussed is the Distance Selling Directive,³⁸⁶ which deals mainly with contracting through the World Wide Web or through e-mail.³⁸⁷ The limitation of this directive is that it does not apply to the area of financial services. However, this legal gap was closed by the Distance Marketing

³⁸² The main reason for passing the regulation was, as indicated above, the new competence given to the European Union institutions by Art. 65 of the Amsterdam Treaty, *supra* note 24.

³⁸³ See Martin, *supra* note 361 at 143.

³⁸⁴ See Paul Meller, *Europe Passes Stiff E – Commerce Law*, THE STANDARD, Dec. 1, 2000.

³⁸⁵ See Martin, *supra* note 361 at 143.

³⁸⁶ Council Directive 97/7/EC, 1997 O.J. (L 144) 19 [hereinafter: Distance Selling Directive]. One example for the implementation of the directive in the different member states of the European Union is the German “Fernabsatzgesetz” which contains specific provisions regarding information obligations, withdrawal and performance with respect to contracts that were concluded at a distance. See Fernabsatzgesetz, 2000 Bundesgesetzblatt (Federal Gazette, BGBl.) I 897. See also Reich & Halfmeier, *supra* note 376 at 114.

³⁸⁷ See J. DICKIE, INTERNET AND ELECTRONIC COMMERCE LAW IN THE EU 91 – 100 (1999).

Directive³⁸⁸ which was adopted by the European Parliament and the European Council on September 23, 2002 almost four years after it was initially proposed.³⁸⁹ Another directive that is related to the e-commerce protection matter is Directive 2000/31/EC on “Certain Legal Aspects of Information Society Services in the Internal Market,” usually referred to as “Directive on Electronic Commerce.”³⁹⁰ This directive addresses internal market aspects and is therefore not as concerned with consumer protection.³⁹¹

b. United States

While there are a number of e-consumer protection provisions in the European legal system, the U.S. is often referred to as less advanced in this area.³⁹² Because of a lack of consumer protection provisions, the Federal Trade Commission (FTC) along with various other trade agencies apply traditional law to the current problems of the internet.³⁹³

In U.S. law one has to look at state statutes and case law when searching for provisions regarding e-commerce transactions. While state enactments of the Uniform Commercial Code (UCC) apply to transactions involving goods, services are governed by the common law of the various states. Transactions involving digital information, on the other hand, are governed by state enactments of the Uniform Computer Information Transaction Act (UCITA).³⁹⁴ The UCITA is a draft model law applying to computer

³⁸⁸ Council Directive 2002/65/EC, 2002 O.J. (L 271) 16-24.

³⁸⁹ See 1998 O.J. (C 385) 10. See also Reich & Halfmeier, *supra* note 376 at 130.

³⁹⁰ Council Directive 2000/31/EC, 2000 O.J. (L 178) 1.

³⁹¹ In detail the Directive on e – commerce regulates, besides other issues, the free access of EU-based providers to e-commerce, it includes provisions regarding the conclusion of electronic contracts and commercial communications. For more information regarding this directive see Reich & Halfmeier, *supra* note 376 at 130 ff.

³⁹² See, e.g., Michael Cordera, *E – Consumer Protection: A Comparative Analysis of EU and US Consumer Protection on the Internet*, 27 RUTGERS COMPUTER & TECH. L.J. 231, 251 (2001).

³⁹³ *Id.* at 252.

³⁹⁴ See *id.*

information transactions, which is highly controversial because of its unifying provisions.³⁹⁵ It was approved and recommended for state adoption by the National Conference of Commissioners on Uniform State Laws in July 1999. In particular, the UCITA regulates agreements to create, modify, transfer or distribute computer software, computer data and databases as well as internet and online information.³⁹⁶ This law is controversial and has only been enacted in two states thus far.³⁹⁷ Further enactments by other states is unforeseeable at this point.³⁹⁸ The controversy exists because there is no agreement on whether the UCITA actually increases consumer protection. While some academics hold the view that there is a lack of appropriate consumer protection provisions in the UCITA,³⁹⁹ others refer to it as expanding consumer protection in the United States.⁴⁰⁰

If a state has not adopted the UCITA rules, most of the transactions involving any kind of digital information are covered by the UCC as transactions involving goods.⁴⁰¹ Despite the fact that parties contract entirely over the internet, they do not lose protection by the UCC since §§ 2-204 and 2-206 do not require formal rules for offer and acceptance.⁴⁰² In addition, the Statute of Frauds and the Parole Evidence Rule are also applicable to sales conducted on the internet.⁴⁰³

³⁹⁵ See Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Computer Information Transactions Act (July 23-30, 1999), available at <http://www.law.upenn.edu/bll/ulc/ucita/cita10st.htm> (last visited January 21, 2005).

³⁹⁶ See Raymond T. Nimmer, *Contract Law in Electronic Commerce*, 587 PRAC. L. INST. 1127, 1133 ff. (2000).

³⁹⁷ These two states are Maryland and Virginia.

³⁹⁸ See generally Brian D. McDonald, *The Uniform Computer Information Transaction Act*, 16 BERKELEY TECH. L.J. 461 (2001).

³⁹⁹ See *id.* at 462.

⁴⁰⁰ See Nimmer, *supra* note 396.

⁴⁰¹ *Id.* at 1133 ff.

⁴⁰² See GEORGE B. DELTA & JEFFREY H. MATSUDA, *LAW OF THE INTERNET* § 9.02 [c], at 9-31 (1998).

⁴⁰³ See *id.* at § 9 at 3-46.

3. Article 7, Preliminary Draft Convention

The drafters of the first Preliminary Draft Convention of 1999⁴⁰⁴ could not avoid including a provision involving language resolving problems related to e-commerce. What Article 12 of the Preliminary Draft Convention was for intellectual property, Article 7 of the Preliminary Draft Convention was for the e-commerce.⁴⁰⁵ This provision covers contracts concluded by consumers and therefore raised obvious questions regarding e-commerce.⁴⁰⁶ Paragraph 3 of the provision, which basically stated that a forum selection clause conflicting with the language in Article 7 of the Preliminary Draft Convention would not be valid was the subject of much discussion. First, it was claimed that Article 7, paragraph 3 could lead to a lack of predictability in connection with electronic consumer contracts since it does not recognize choice of court clauses that are entered into prior to a dispute.⁴⁰⁷ However, this is the same in the Council Regulation No. 44/2001.⁴⁰⁸ The problems did not lay in the details of paragraph 3. Rather, the whole provision received harsh criticism from some delegations at the negotiations. Once again, the United States Department of State objected to the approach in Article 7 Preliminary

⁴⁰⁴ See *supra* note 61.

⁴⁰⁵ See *id.* art. 7.

⁴⁰⁶ Article 7 of the Preliminary Draft Convention (“Contracts Concluded by Consumers”) reads as follows: “1. A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the courts of the State in which it is habitually resident, if a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and b) the consumer has taken the steps necessary for the conclusion of the contract in that State. 2. A claim against the consumer may only be brought by a person who entered into the contract in the course of its trade or profession before the courts of the State of the habitual residence of the consumer. 3. The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court a) if such agreement is entered into after the dispute has arisen, or b) to the extent only that it allows the consumer to bring proceedings in another court.”

⁴⁰⁷ See Brand, *supra* note 35 at 597.

⁴⁰⁸ See Council Regulation No. 44/2001, *supra* note 25.

Draft Convention and made this clear in a letter to the Hague Conference.⁴⁰⁹ In this letter Jeffrey Kovar, then the head of the American delegation, claimed that Article 7 of the Preliminary Draft Convention “raised a storm of controversy in the electronic commerce world.”⁴¹⁰ The e-commerce and internet communities in the U.S. expressed concerns over the approach included in the draft and publicly announced their disagreements with the draft Convention’s jurisdictional framework in articles of major U.S. newspapers and other magazines.⁴¹¹ Why this storm of controversy broke out in the United States is not clear to everyone.⁴¹² One of the main concerns expressed was the fear that the Hague Convention would allow copyright owners to look for courts abroad whose judgments would satisfy their needs and then return to the United States to seek enforcement of these judgments where a different approach to the same laws might exist.⁴¹³

The fear of the e-commerce world in the U.S. can be barely understood. Even without the Hague Convention, American e-commerce suppliers already have to deal with cases in where they are sued by customers from around the world. Local procedural rules make this possible. Only one example is the decision by a French Court which imposed criminal liability against Yahoo! and Yahoo! France.⁴¹⁴ Yahoo! had sold Nazi material to French citizens, and although the material in question was available only for auction on Yahoo!’s auction sites in the United States the French court declared that it

⁴⁰⁹ See *supra* note 68.

⁴¹⁰ *Id.*

⁴¹¹ See, e.g., Christopher Stern, *Copyright Holders vs. Telecoms; Interests Clash in Debate on Regulating Global Commerce*, WASH. POST, May 16, 2001; see also *Tied Up in Knots*, ECONOMIST, June 9, 2001.

⁴¹² See, e.g., Reich & Halfmeier, *supra* note 376 at 122.

⁴¹³ See Stern, *supra* note 411.

⁴¹⁴ See Mahasti Razavi & Thaima Samman, *Yahoo! And Limitations of the Global Village*, 19 SPG. COMM. LAW 27, 27 (2001); see also Eric T. Eberwine, *Sound And Fury Signifying Nothing?: Jürgen Büssow’s Battle Against Hate – Speech On The Internet*, 1 N.Y.L. SCH. L. REV. 353, 370 ff. (2004-2005).

had jurisdiction.⁴¹⁵ It has become clear for internet and e-commerce companies in general and for American internet and e-commerce companies in particular that there may no longer be protection against liability abroad for actions that were legally taken at home.⁴¹⁶

Since American e-commerce suppliers are already subject to suits filed abroad, a future Hague Convention covering e-commerce would not increase the threat for U.S. e-commerce. On the contrary, it would help to harmonize the law in this particular field because the U.S. e-commerce industry is not the only industry already confronted with suits brought elsewhere. European e-commerce suppliers face the same problem. Long-arm statutes and the so called “minimum contracts doctrine” make them subjects to suits initiated in the United States.

The general statement by the United States delegation was that it would be impossible for the U.S. to adopt rules, in the context of Article 7 of the Preliminary Draft Convention, which would require businesses to be subject to suit in the courts of a consumer’s country of residence. In particular, the United States had problems with the way the text of the Convention addressed choice of forum clauses. Stating that Article 7 of the proposed Convention would “create an absolute rule against choice of forum clauses in consumer contracts” they made clear what their position was and also gave the reason for why they opposed the approach in Article 7 Preliminary Draft Convention.⁴¹⁷ In contending that it was not possible for the U.S. to agree to a choice of an exclusive in the draft convention, the United States delegation furthermore emphasized that such a

⁴¹⁵ Yahoo! was ordered to restrict the availability of the Nazi material by French citizens. A \$12,000 fine per day was issued for the case that Yahoo! refused to comply with the French court’s order. *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ E-mail from Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, U.S. Dep’t of State, to James Love, Consumer Project on Technology (Oct. 26, 2000), available at <http://lists.essential.org/pipermail/random-bits/2000-October/000450.html> (last visited January 22, 2005).

provision contradicted domestic U.S. law since the choice of law approach in the UCITA was the complete opposite to Article 7 Preliminary Draft Convention.⁴¹⁸

In recent domestic cases, U.S. courts pointed out that if a company does business via its web site in a consumer's home state it should expect to be sued in that state. These courts thus made web site owners subject to suit in consumer home states in the event of an alleged breach of contract.⁴¹⁹ Why then does the U.S. Supreme Court decline to subject web site owners to suits in other countries when the same owners could be sued in many other different states within the U.S.?⁴²⁰ Not considering differences in judicial systems, is there a difference between the distance between a consumer on the west coast and a website owner on the east coast in the U.S. and the distance between a web site owner in Vancouver, Canada and a consumer living in Seattle? Against the background of these considerations the point of view of the U.S. delegation in the Hague negotiations appears to contradict the recent trend by U.S. courts.⁴²¹

There are further arguments that do not support the position of the U.S. delegation. One can argue about the reasonableness of expecting a U.S. plaintiff, who is a consumer in the state of Washington to travel across the country to sue a supplier situated in Florida.⁴²² However, one can normally not expect a consumer to go to another country

⁴¹⁸ *Id.*

⁴¹⁹ *See, e.g.,* Tech Heads, Inc. v. Desktop Serv. Ctr., 105 F. Supp. 2d 1142 (D. Or. 2000); Sports Authority Michigan, Inc. v. Justballs, Inc., 97 F. Supp. 2d 806 (E.D. Mich. 2000); Colt Studio, Inc. v. Badpuppy Enterprise, 75 F. Supp. 2d 1104 (C.D. Cal. 1999).

⁴²⁰ *See* Martin, *supra* note 361 at 146.

⁴²¹ *See* Barnett v. Network Solutions, Inc., 38 S.W.3d 200, 204-05 (Tex. App. 2001); America Online, Inc. v. Booker, 781 So. 2d 423 (Fla. Dist. Ct. App. 2001); Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 532 (N.J. Super. Ct. App. Div. 1999); Decker v. Circus Circus Hotel, 49 F. Supp. 2d 743, 748 (D.N.J. 1999); Groff v. America Online, Inc., No. PC 97-0331, 1998 WL 307001 (R.I. Super. Ct. May 27, 1998).

⁴²² *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

in order to sue the supplier.⁴²³ The international setting is not only special because of the problem with long distances. Other problems like language, increased costs for suits, and less knowledge about the foreign legal system come in on the consumer side. These problems may also appear on the supplier's side. However, apart from one-man businesses the supplier side of the contractual relationship seems to have the greater financial ability to face the problems of litigating abroad.

4. The June 2001 Diplomatic Conference

The drafters of the Preliminary Draft Convention knew that the approach with respect to e-commerce was not good enough to cover all the problems this issue would bring about. Proof for this is a solitary footnote to the Preliminary Draft Convention, which announced an upcoming meeting by a group of specialists in early 2000.⁴²⁴ The Hague Conference realized that there was plenty to do before the June 2001 Diplomatic Conference. The first meeting on the issue was held from February 28 to March 1 in 2000 in Ottawa, Canada. The summary of the outcome of the Ottawa Meeting was simple and obvious. The experts stated that Article 7 of the Preliminary Draft Convention was not appropriate for application to business-to-consumer contracts since it "[...] was prepared without taking account of the issues relating to electronic commerce."⁴²⁵ The problems in the business-to-consumer setting became the essential point of the entire negotiation process. This fact is the main reason why the e-commerce issue became so important.

⁴²³ See SCOLES & HAY, CONFLICT OF LAWS 369 (2d ed., 1992).

⁴²⁴ Preliminary Draft Convention, *supra* note 61 at n.1.

⁴²⁵ Catherine Kessedjian, Electronic Commerce and International Jurisdiction, Preliminary Document No. 12 of August 2000 at 6, available at <ftp://ftp.hcch.net/doc/jdgmpl12.doc> (last visited Jan. 22, 2004) [hereinafter: Preliminary Document No. 12].

However, the internet made e-commerce and the business-to-consumer relationships inseparable.

Although the experts detected weak points in the Preliminary Draft Convention with respect to e-commerce, they expressly pointed out in the conclusion of their report that there was no suggestion of excluding e-commerce from the scope of a later treaty.⁴²⁶ On the contrary, many experts held the opinion that every necessary measure should be taken to “adapt the convention to the needs of e-commerce”⁴²⁷ in a way that guarantees certainty and predictability.⁴²⁸ The participants of the Ottawa meeting acknowledged a series of problems they had with the draft. Two issues they had with Article 7 of the Preliminary Draft Convention are summarized below.

The report expressly pointed out disagreement with the approach in Article 7 (1) of the Preliminary Draft Convention dealing with the requirements for the consumer to institute proceedings in the courts of his habitual residence. While the first condition in subparagraph a) will always be met in an e-commerce setting, the second condition in subparagraph b) causes more trouble. In order to use the courts of his habitual residence for the settlement of conflicts with the other contract party, the consumer “must have taken the necessary steps to conclude the contract in his state of residence.”⁴²⁹ However, modern means of telecommunication make it possible for its users to access it nearly everywhere in the world. Contracts can be concluded in a place different from the habitual residence of the user who is usually a consumer.⁴³⁰ This fact, however, carries no

⁴²⁶ *Id.* at 11.

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ Preliminary Draft Convention, *supra* note 61, art. 7 (1) (b).

⁴³⁰ Preliminary Document No. 12, *supra* note 425 at 6.

“special implication for the purpose of deciding which courts have jurisdiction.”⁴³¹ But what does it mean to “conclude a contract in another place”? Is the contract really concluded in the place where the consumer uses the facilities to go on the internet? Is it not rather concluded on the internet itself? But what is the internet? Is it what everybody usually confers to as Cyberspace? But what is cyberspace and is there a justification to speak of a jurisdiction that is unique for the cyberspace that can be separated from other types of jurisdiction?⁴³²

The next important problem the participants of the Ottawa meeting had with the draft was the language of Article 7 (3) Preliminary Draft Convention creating a conservative approach to choice of court clauses. It was pointed out that previous discussions of the Special Commission suggested “that a consumer who is fully informed of his rights could decide to forgo the protection available under Article 7 and opt instead for a choice of court clause.”⁴³³ Regarding the validity of such choice of court clauses the report of the Ottawa meeting followed the initiative of the American Bar Association⁴³⁴ and picked up the approach of the Geneva Round Table⁴³⁵ on the same issue. This round table suggested to accept pre-dispute choice of court clauses as valid if the law of the consumer’s habitual residence treated them as valid.⁴³⁶ Even though there was no

⁴³¹ *Id.*

⁴³² See generally Juliet M. Oberding & Terje Norderhaug, *A Separate Jurisdiction for Cyberspace?*, 2 J. OF COMPUTER – MEDIATED COMM. 1 (June, 1996), available at <http://www.ascusc.org/jcmc/vol2/issue1/juris.html> (last visited January 22, 2005) (arguing that cyberspace is some kind of community that is capable of its own community norms and is currently forming them).

⁴³³ Preliminary Document No. 12, *supra* note 425 at 7.

⁴³⁴ See Martin, *supra* note 361 at 139.

⁴³⁵ Catherine Kessedjian, International Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Preliminary Document No. 7 of April 1997, available at ftp://ftp.hcch.net/doc/jdgm_pd7.doc [hereinafter: Preliminary Document No. 7].

⁴³⁶ *Id.*

consensus regarding this issue, the door for the enforcement of pre-dispute choice of court clauses seemed to be left open.⁴³⁷

These problems and all other open questions in connection with them demonstrate only a small portion of the difficulties that the discussions regarding Article 7 of the Preliminary Draft Convention in the e-commerce context had to face during the Ottawa meeting.⁴³⁸ Another meeting on the same issue had been held from February 26 to March 1 in 2001. The outcome of both meetings resulted in a new approach to Article 7, which was negotiated at the June 2001 Diplomatic Conference.⁴³⁹ The lack of consensus among the different delegations is illustrated in the number of alternatives in Article 7 of the Interim Text. Each of the four alternatives would lead in a different direction. The number of alternatives proliferated to such an extent, that even the exclusion of e-commerce was suggested.⁴⁴⁰

5. Later Discussions and Developments

After the June 2001 Diplomatic Conference the negotiating parties realized that they had to begin anew in order to succeed in adopting a final convention, and thus, focused on choice of court agreements in business-to-business contracts as addressed above. Due to the highly controversial discussion about consumer contracts related to e-commerce, contracts involving at least one consumer were excluded from the scope of the treaty, and the issue of jurisdiction to hear e-commerce and other internet related disputes were moved to the so called second stage of the negotiations. “Second stage issues” are to be

⁴³⁷ See Martin, *supra* note 361 at 139.

⁴³⁸ For a complete summary of all the remarks to Article 7 that were made in the report *see supra* note 425 at 6 ff.

⁴³⁹ Interim Text, *supra* note 178, art. 7.

⁴⁴⁰ *Id.* at footnote 43.

on the agenda for negotiations after a final Hague Convention is adopted. The current April 2004 Draft excludes consumer contracts from its scope, and thus does not offer any changes for consumers. Therefore, contracts involving consumers will continue to be treated in Europe and the United States as has been described above.⁴⁴¹

One of the tasks of this thesis has been to analyze whether an exclusion of business-to-consumer contracts from the scope of the Convention is reasonable, and what impact the inclusion or exclusion would have on consumer protection. In discussing these problems two different questions have to be distinguished. Firstly, is it reasonable to completely exclude consumer contracts from the scope of the Convention? Secondly, is the current style of the convention which focuses on choice of court agreements suitable for the consumer issue?

As far as the first question is concerned, the essential point seems to be that even if the Convention does not include consumer contracts and business-to-consumer e-commerce transactions, such a treaty would nonetheless be a great step toward unification in the field of law discussed here.⁴⁴² However, the appropriateness of such a step may be doubted. Examples already given above demonstrate that in some parts of the world, consumer protection in the e-commerce sector is not well-developed. The United States is a good example to demonstrate that this is not only true for less developed countries, but also for those regions of the world where consumer protection and e-consumer transaction protection are being discussed.

Furthermore, even regions with high consumer protection standards face uncertainty and unpredictability in the age of the internet. Since the internet connects

⁴⁴¹ See *supra* part VI.B.2.a. and b.

⁴⁴² See, e.g., Martin, *supra* note 361 at 159.

individuals, businesses, and markets all over the world, the consumer protection in these particular regions reaches its limits. For instance, if a consumer in Sienna, Italy buys a new camera via the internet from a supplier in the U.S. and has problems with the product later, the Brussels Regulation does not help him if he wants to sue the supplier. In the long term, situations like this will put off consumers from contracting via the internet since they face uncertainties that do not exist in situations where the product is bought in a retail store. It is clear that such a scenario would not even be in the interest of the delegations that oppose the inclusion of business-to-consumer contracts into the Hague Convention. Even though choice of court clauses in business-to-business contracts is an important matter, they have not been the principle concern of the Hague drafters.

In 2004, 10% of the United States economy was represented by transactions by small businesses using e-merchant technology.⁴⁴³ This underlines the importance of the language in the April 2004 Draft. There can be no doubt that the convention in its current version would do a great deal in terms of predictability and uniformity with respect to choice of court clauses in e-commerce transactions in the business-to-business setting. On the other hand, it must be clear that at least most of the small business transactions in some way involve transactions with consumers. Most of these businesses completely depend on the relationship to consumers to whom they offer goods and services. Concentrating on regional markets within the various nations is one way to look at the problem. Another way is to face the problem with eyes looking through international glasses. From the American perspective, pan-European and international networks are evolving and provide new grounds for e-merchant services that would create new jobs

⁴⁴³ Keenan Report, *supra* note 364.

and other opportunities for the American market. Therefore, growing consumer interest and good regulatory control can only be in the best interest of the U.S. This is one reason why the consumer issue should have been included in the scope of the contract. As the discussions above have shown, the gap between the different points of views would not be so great if the influence from factors outside the legal field did not receive too much consideration. It seems that industry interests often play a role that is not balanced by a lobby representing consumers. The United States clearly highly influential in the negotiations. While there had been extensive business sector involvement in the negotiations of the Hague Convention,⁴⁴⁴ consumer advocacy groups were only briefed on the draft Convention one week before the February 2000 Ottawa meeting.⁴⁴⁵ Furthermore, America's most influential consumer group, The Consumer Project on Technology (CPTech)⁴⁴⁶ was not allowed to attend the Hague negotiations as a part of the American delegation.⁴⁴⁷ Even though this situation has changed somewhat in the recent history of the negotiations, one could argue that had there been more involvement by consumer groups from the beginning the exclusion of consumer contracts from the scope of the convention would have been prevented.

Assuming that the negotiators try to add consumer contracts to the scope of the convention, the issue then becomes how this can be done under a convention that focuses

⁴⁴⁴ See James Love, Meeting in Ottawa on the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Consumer Project on Technology, available at <http://www.cptech.org/ecom/hague-march-2000.html> (last visited January 22, 2005).

⁴⁴⁵ *Id.*

⁴⁴⁶ The Consumer Project on Technology (CPTech) is a U.S. consumer advocacy group formed by Ralph Nader. This group actively participates in the discussions regarding the Hague Convention. CPTech has always opposed notions that would take away the consumers right to bring legal action in their own country. General information about the work of this group regarding the Hague Convention and other projects can be found at <http://www.cptech.org>.

⁴⁴⁷ See Love, *supra* note 444 at 1. It was pointed out that while CPTech as a representative of consumers was not a part of the U.S. delegation an employee from Disney was.

on choice of court agreements. While the supporter of the consumer side do not favor choice of law provisions in consumer contracts, the business lobby would do everything to include them in the convention. The reasons for these opposing viewpoints are clarified through the following example. In dealing with the public, the Microsoft Corporation established a practice that faced the consumers with ‘take it or leave it contracts.’ According to this policy, consumers must either accept King County, Washington, the seat of the Microsoft Corporation, as the place whose courts will resolve all the disputes regarding the contract between the parties, or decline the contractual relation with Microsoft.⁴⁴⁸ The establishment of a regime that enforces choice of court clauses in consumer contracts would not only give “big players” in the business sector the opportunity to put pressure on consumers. If consumers are not automatically able to bring suit in the courts of their home countries, choice of court clauses will become a tool for medium and smaller businesses where they can take away the protection consumers need due to their weaker position.

A reasonable approach seems to be the one of the Brussels Regulation. It states that the consumer may choose where to sue the opposing party while the consumer can only be sued at his or her domicile. It also forbids a prior selection of a forum which conflicts with these rules. This could be the biggest problem considering the limitation of the present draft to choice of court agreements. However, it is important to establish such or similar approaches in e-commerce consumer transaction cases. In these cases, the already weak position of the consumer is weakened even further since the e-commerce consumer bears the additional risk of the pre-payment requirement that is typical for a

⁴⁴⁸ See *id.* at 2.

setting such as this one. The most influential international consumer group called the Trans Atlantic Consumer Dialogue (TACD)⁴⁴⁹ points out this fact. It also adds that this fact is only one reason why the seller or supplier will normally have little reason to sue the consumer.⁴⁵⁰ Therefore, not permitting consumers to bring suit in the courts of their home countries would mean “denying them their right to redress.”⁴⁵¹ TACD further argues that a choice of forum clause in a consumer contract should not be enforceable, and that the Hague Convention must include language that creates the right for the consumer to sue the business in the courts of the consumer’s home country.⁴⁵²

Only a Hague Convention that includes consumer contracts in general and guarantees the possibility for the consumer to sue in the courts of his home country will in the long term provide the right background not only for regular consumer transactions but also for e-commerce consumer transactions. The adoption of a Brussels Regulation style approach in a Hague Convention would surely lead to great opposition. However, most of the arguments against the inclusion of language that is similar to that in the Brussels Regulation is unfounded as addressed above and often bases on the influence of different interest groups. Against the background that most of the e-commerce transactions are typically of small monetary value, the additional establishment of alternative dispute resolution schemes would also be a reasonable addition to the

⁴⁴⁹ The Trans Atlantic Consumer Dialogue issued a paper in February 2000 titled “Jurisdiction in Cross – Border Consumer Contracts,” *see* Trans Atlantic Consumer Dialogue, Jurisdiction on Cross – Border Consumer Contracts, Doc. No. Ecom-15-00 (Feb. 2000), available at <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=44> (last visited January 22, 2005).

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.*

convention.⁴⁵³ Major changes would be necessary in order to include consumer contracts in the way proposed above. Since the negotiating parties already have problems adopting a convention with a very limited scope, one can have doubts whether the goal of including consumer contracts will be reached in the negotiations of second stage issues if there should be such negotiations later.

⁴⁵³ This issue is heatedly discussed among scholars, practitioners, and different groups like the TACD. Many writers come to the conclusion that a Hague Convention without alternative dispute resolution schemes would not succeed in practice. *See, e.g.*, Trans Atlantic Consumer Dialogue, Resolution on the Proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Doc. No. Ecom 22-01 May 2001), available at <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=94> (last visited January 22, 2005).

CHAPTER 7

CONCLUSION

The Hague Convention Project is over a decade old, while the idea of drafting a convention with such content is even older. There are not many existing legal projects that have such a long history and that have changed their content so often and so dramatically. The reason for such extensive modifications is that all participating nations and interest groups have had much influence on the project. The drafting process is not yet over. Thus, drawing a conclusion seems premature. It is important, however, to summarize what has been done so far and what should be done in the future.

The thesis made clear that the drafting process started out with an approach that was very similar to the Brussels Convention and the Brussels Regulation (Council Regulation No. 44/2001). However, the U.S. especially opposed such an approach for the Hague Convention Project even though it was working well among the European states for decades and provided a functioning system with respect to consumer protection. The result of the unwillingness of the U.S. to adopt a Convention with a broad scope is a draft that only applies in international cases to exclusive choice of court agreements concluded in civil and commercial matters in the business-to-business setting. A narrow choice of court convention in the business-to-business setting is a good start, but it disregards the original goal of the Hague Conference. As described above, the proposed Convention neither covers intellectual property matters nor e-commerce.

The short-term goal of the negotiations of the Hague Convention is clear. In June 2005 the delegations will gather for a Diplomatic Conference. The result of this Diplomatic Conference could be a Hague Convention that is ready to be signed and ratified by the member states. Even if the negotiations last longer there is little danger that the project will fail. The first step of drafting any convention, even a very narrow one is the most important one. It will be the basis for further fine-tuning with respect to second stage matters. If the negotiating parties subsequently broaden the convention, they will have taken a desirable direction by starting small.

With respect to the second stage, it is evident that drafting a convention that is intended to be accepted universally is not an easy task. However, this fact should not be an excuse for excluding matters where regulation is not only important for the legal field but also in the daily lives of the people. Progress with respect to the technical matters that concern our daily activities has to be framed by laws and regulations that can face the challenges of the twenty-first century without being outdated and impractical. The Hague Conference could both be a tool to obtain proper jurisdiction by assigning disputes to the right court and a means of making sure that judicial decisions are subject to recognition and enforcement elsewhere. These objections are especially important in the two areas that were subject to detailed discussion in this paper, namely intellectual property and e-commerce.

There can only be unification with respect to the intellectual property area if it is included in a treaty on jurisdiction and enforcement that provides for as many nations as possible to participate. While some could argue whether a separate convention on the matter is more reasonable, the answer to this problem is clear. The Hague Convention is

the ideal tool to unify the rules regarding jurisdiction, recognition, and enforcement in the intellectual property arena. Only the inclusion of all intellectual property rights in the convention including questions of validity will provide certainty in the application and use of this area of law. Intellectual property rights are closely connected with contractual matters, for example. Therefore, a common treatment in one convention regulating jurisdiction and recognition of judgments is not only reasonable but necessary.

In summary of the remarks regarding the e-commerce matter, it must be pointed out that while a great deal has been done regarding business-to-business transactions the additional inclusion of business-to-consumer relationships must be a major goal in the second stage negotiations. The importance of the Hague Convention project will diminish considerably if the business-to-consumer transactions are not included in its scope. If the Hague Convention project wants to have a long lasting impact, it must include business-to-consumer contracts in the scope of the convention. Without this step, consumers all over the world will become increasingly unprotected in a society of proliferating e-commerce. The only possibility to react is once more the Hague Convention. In facing the challenges that new technologies create, countries should subordinate their national interests under the broader idea of a regime that can lead to predictability, certainty, and protection for weaker parties worldwide.

Without the inclusion of intellectual property rights and business-to-consumer e-commerce transaction issues into its scope, the Hague Convention, which is already weakened by the narration of the treaty to choice of court clauses, will lose further importance in the long run and face the danger of becoming meaningless. However, it is not too late and the negotiations in the proposed second stage should make use of the

foundation that will hopefully be created by the adoption of a new Hague Jurisdiction and Judgments Convention after the June 2005 Diplomatic Conference. The second stage negotiations will decide whether the project remains to be a small fish in the legal aquarium or whether it grows to be one of the most important and biggest projects in years. It is certainly possible to achieve the later alternative and to create a Hague Convention that is acceptable worldwide. The adoption of a convention that is similar to the April 2004 Draft after the June 2005 Diplomatic Conference would be a big step towards a later Hague Convention with a wider scope. The drafting of such a wide convention that includes all the approaches suggested in this thesis will depend on whether the negotiating parties gather again to discuss the inclusion of second stage issues after the adoption of a Convention in the April 2004 Draft style in June 2005. Whether such negotiations will take place in the near future, however, can be drawn into doubt since the parties had severe problems to even agree on a Convention in the present form. The history of the negotiations behind the creation of the April 2004 Draft makes this approach to an inflexible framework that is difficult to change. Hopefully, the delegations did not miss the historic chance for drafting a broad treaty by favoring the present approach. However, the present draft can be a good starting point for something bigger, if delegations work together in a serious attempt to face the legal challenges that are caused by our modern times.

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APPENDIX

Hague Conference on Private International Law

Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments
in Civil and Commercial Matters (21 to 27 April 2004)

DRAFT ON EXCLUSIVE CHOICE OF COURT AGREEMENTS
WORK. DOC. No 110 E

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

WORK. DOC. No 110 E

Revised*

Commission spéciale sur la compétence,
la reconnaissance et l'exécution des jugements
étrangers en matière civile et commerciale
(du 21 au 27 avril 2004)
Special Commission on Jurisdiction,
Recognition and Enforcement of Foreign Judgments
in Civil and Commercial Matters
(21 to 27 April 2004)

Distribution: May 2004

Proposal by the Drafting Committee
DRAFT ON EXCLUSIVE CHOICE OF COURT AGREEMENTS

The States signatory to the present Convention,

Desiring to promote international trade and investment through enhanced judicial cooperation,

Believing that such enhanced cooperation requires a secure international legal regime that ensures the effectiveness of exclusive choice of court agreements by parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements,

Have resolved to conclude the following *Convention on Exclusive Choice of Court Agreements* and have agreed upon the following provisions -

CHAPTER I SCOPE AND DEFINITIONS*Article 1 Scope*

1. The present Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters.
2. For the purposes of Chapter II, a case is international unless[at the time the agreement is concluded][and][at the time of commencement of the proceedings] the parties are resident in the Contracting State of the court seised and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State.
3. For the purposes of Chapter III, a case is international where recognition or enforcement of a foreign judgment is sought.

* This document reflects the changes made by the Drafting Committee at its meeting on 27 April 2004. Moreover, upon request of the Special Commission, the Permanent Bureau has aligned the English and French versions of this Document with the terminology traditionally used in Hague Conventions. Changes were made in agreement with the Chairman of the Drafting Committee.

Article 2 Exclusions from scope

1. The Convention shall not apply to exclusive choice of court agreements -
 - a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party; or
 - b) relating to contracts of employment, including collective agreements.
2. The Convention shall not apply to the following matters -
 - a) the status and legal capacity of natural persons;
 - b) maintenance obligations;
 - c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
 - d) wills and succession;
 - e) insolvency, composition and analogous matters;
 - f) contracts for the carriage of passengers or goods by sea[, and other admiralty or maritime matters];
 - g) anti-trust (competition) matters;
 - h) liability for nuclear damage;
 - i) rights *in rem* in immovable property[and tenancies of immovable property];
 - j) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
 - k) [intellectual property rights other than copyright or related rights, except in proceedings pursuant to a contract which licenses or assigns such intellectual property rights[including proceedings for infringement of the right to which the contract relates]];¹ or
 - l) the validity of entries in public registers.
3. Notwithstanding paragraph 2, proceedings are not excluded from the scope of the Convention where a matter referred to in that paragraph arises merely as an incidental question and not as an object of the proceedings.
4. The Convention shall not apply to arbitration and related proceedings.
5. Proceedings are not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any person acting for a State is a party thereto.
6. Nothing in this Convention affects the privileges and immunities of sovereign States or of entities of sovereign States, or of international organisations.

Article 3 Exclusive choice of court agreements

For the purposes of this Convention,

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

¹ According to this draft, validity as a principal issue is excluded from the scope of the Convention.

- b) 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;
- c) an exclusive choice of court agreement must be entered into or evidenced –
 - i) in writing; or
 - ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;
- d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

Article 4 Other definitions

1. In this Convention “judgment” means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that such determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.
2. For the purposes of this Convention, an entity or person other than a natural person shall be considered to be resident in the State –
 - a) where it has its statutory seat;
 - b) under whose law it was incorporated or formed;
 - c) where it has its central administration; or
 - d) where it has its principal place of business.

CHAPTER II JURISDICTION

Article 5 Jurisdiction of the chosen court

1. The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.
2. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.
3. The preceding paragraphs shall not affect rules –
 - a) on jurisdiction related to subject matter or to the value of the claim; or
 - b) on the internal allocation of jurisdiction among the courts of a Contracting State[unless the parties designated a specific court].²

² If the bracketed language in Article 5, paragraph 3 b) is not retained, the question of whether Articles 7 and 9 should apply where a case has been transferred by the chosen court to another court in the same Contracting State remains to be considered. See the bracketed language in Articles 7 e) and 9, paragraph 1 *bis*.

[Article 6 Stay of proceedings in the chosen court]

Nothing in this Convention shall prevent the chosen court from suspending or dismissing the proceedings before it, in particular in order to allow the courts of the State under the law of which an intellectual property right arose, to give a judgment on its validity, provided that such dismissal does not prevent the proceedings from being recommenced.]

Article 7 Obligations of a court not chosen

If the parties have entered into an exclusive choice of court agreement, any court in a Contracting State other than that of the chosen court shall suspend or dismiss the proceedings unless –

- a) the agreement is null and void under the law of the State of the chosen court;³
- b) a party lacked the capacity to enter into the agreement under the law of the State of the court seised;
- c) giving effect to the agreement would lead to a very serious injustice or would be manifestly contrary to fundamental principles of public policy of the State of the court seised;⁴
- d) for exceptional reasons, the agreement cannot reasonably be performed;⁵ or
- e) the chosen court has decided not to hear the case[, except where it has transferred the case to another court of the same State as permitted by Article 5, paragraph 3 b)]⁶.

Article 8 Interim measures of protection

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

CHAPTER III RECOGNITION AND ENFORCEMENT

Article 9 Recognition and enforcement

1. A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the following grounds⁷ –

³ The policy issues related to this matter need further consideration. It has been proposed to delete the words "under the law of the State of the chosen court". It has also been proposed to add the words "on any ground, including incapacity".

⁴ The policy issues related to this matter need further consideration. The various options proposed are reflected in the following proposals:

- i) giving effect to the agreement would lead to a very [delete: very] serious injustice or would[otherwise] be manifestly contrary to fundamental principles of public policy of the State of the court seised;
- ii) under the mandatory rules on jurisdiction of the State of the court seised, the parties were unable to agree to exclude the jurisdiction of the courts of this State;
- iii) giving effect to the agreement would be manifestly contrary to public policy of the State of the court seised.

⁵ It has been proposed to delete this provision; a decision on this proposal is linked to the final wording of paragraph (c).

⁶ This provision is linked to the policy decision to be taken on the bracketed part of Article 5, paragraph 3 and to the language in square brackets in Article 9, paragraph 1 *bis*.

⁷ Further consideration is required as to whether the matters covered by Article 7 c) and d) are adequately reflected in this paragraph.

- a) the agreement was null and void under the law of the State of the chosen court⁸, unless the chosen court has determined that the agreement is valid;
- b) a party lacked the capacity to enter into the agreement under the law of the requested State;
- c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,
 - i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested, or
 - ii) was notified to the defendant in the requested State in a manner that violated the public policy of that State;
- d) the judgment was obtained by fraud in connection with a matter of procedure;
- e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State; or
- f) the judgment is inconsistent with a judgment given in a dispute between the same parties in the requested State, or it is inconsistent with an earlier judgment given in another State between the same parties and involving the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State[under an international agreement], and provided that the inconsistent judgment was not given in contravention of this Convention.

[1bis.Paragraph 1 shall also apply to a judgment given by a court of a Contracting State pursuant to a transfer of the case from the chosen court in that Contracting State as permitted by Article 5, paragraph 3 b).]⁹

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

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

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

Article 10 Incidental questions¹⁰

1. Where a matter referred to in Article 2, paragraph 2, arose as an incidental question, the ruling on that question shall not be recognised and enforced under this Convention.

⁸ It has been proposed to add the words "on any ground, including incapacity".

⁹ This provision is linked to the policy decision to be taken on the bracketed part of Article 5, paragraph 3 and to the language in square brackets in Article 7 e).

¹⁰ It was proposed to add a new paragraph 4 as follows: "The preceding paragraphs 2 and 3 shall apply *mutatis mutandis* to the matters provided for in Article 2, paragraph 2 to the extent that a judgment on such matters has effect not only as between the parties but also as regards all other persons."

[2. Where an incidental ruling on the validity of an intellectual property right other than copyright or related rights was necessary for the judgment of the court of origin, recognition or enforcement of the judgment may be refused to the extent that it is inconsistent with a judgment¹¹ on the validity of the intellectual property right rendered in the State under the law of which the intellectual property right arose.¹²]

[3. Where an incidental ruling on the validity of an intellectual property right other than copyright or related rights was necessary for the judgment of the court of origin, recognition or enforcement of the judgment may be postponed or refused at the request of one of the parties if proceedings on validity are pending in the State under the law of which the intellectual property right arose. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.]

[Article 11 Judgments in contravention of exclusive choice of court agreements]

The provisions of Article 7 shall also apply to proceedings for recognition or enforcement of a judgment rendered in contravention of an exclusive choice of court agreement.¹³

Article 12 Settlements

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

Article 13 Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce -
 - a) a complete and certified copy of the judgment;
 - b) the exclusive choice of court agreement, or evidence of its existence;
 - c) if the judgment was rendered by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
 - d) all documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;
 - e) in the case referred to in Article 12, a certificate of the court of origin that the settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.
2. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require any necessary documents.
3. An application for recognition or enforcement may be accompanied by a form recommended and published by the Hague Conference on Private International Law.
4. The court addressed may require a translation of any document referred to in this Article.

¹¹ It is recalled that the definition of "judgment" in Article 4, paragraph 1 includes a decision of a patent office or other authority exercising functions of a court.

¹² The relationship of this provision with Article 9, paragraph 1 f) requires further consideration.

¹³ The intention of this provision is to prevent recognition or enforcement of judgments given in either Contracting or non-Contracting States in contravention of an exclusive choice of court agreement, save where the exceptions in Article 7 apply. The policy and the drafting require further consideration.

Article 14 Procedure

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

Article 15 Damages

1. A judgment which awards non-compensatory damages, including exemplary or punitive damages, shall be recognised and enforced to the extent that a court in the requested State could have awarded similar or comparable damages. Nothing in this paragraph shall preclude the court addressed from recognising and enforcing the judgment under its law for an amount up to the full amount of the damages awarded by the court of origin.
2.
 - a) Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, recognition and enforcement may be limited to a lesser amount.
 - b) In no event shall the court addressed recognise or enforce the judgment for an amount less than that which could have been awarded in the requested State in the same circumstances, including those existing in the State of origin.¹⁴
3. In applying the preceding paragraphs, the court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 16 Severability

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

CHAPTER IV GENERAL CLAUSES

Article 17 No legalisation

All documents forwarded or delivered under this Convention shall be exempt from legalisation[or *apostille*][or any analogous formality].

Article 18 Limitation of jurisdiction

Upon ratification, acceptance, approval or accession, a State may declare that its courts may refuse to determine disputes covered by an exclusive choice of court agreement if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.

¹⁴ It was proposed that paragraph 2 be deleted.

Article 19 Limitation of recognition and enforcement

Upon ratification, acceptance, approval or accession, a State may declare that its courts may refuse to recognise or enforce a judgment of a court in another Contracting State if the parties are resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, are connected only with the requested State, at the time the agreement is concluded.

Article 20 Limitation with respect to asbestos related matters

Upon ratification, acceptance, approval or accession, a State may declare that it will not apply the provisions of the Convention to exclusive choice of court agreements in asbestos related matters.¹⁵

Article 21 Uniform interpretation

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

Article 22 Non-unified legal system

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

- a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;
- b) any reference to residence in a State shall be construed as referring, where appropriate, to residence in the relevant territorial unit;
- c) any reference to the court or courts of a State shall be construed as referring, where appropriate, to the court or courts in the relevant territorial unit;
- d) any reference to a connection with a State shall be construed as referring, where appropriate, to a connection with the relevant territorial unit.

2. Notwithstanding the preceding paragraph, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which, including the location of the chosen court,¹⁶ involve solely such different territorial units.

3. A court in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a judgment from another Contracting State solely because the judgment has been recognised or enforced by a court in another territorial unit of the same Contracting State under this Convention.

¹⁵ Some delegations have proposed that further specific subject matters should be referred to in this provision, such as natural resources and joint ventures. These proposals are linked to issues that arise in relation to Articles 7 and 9.

¹⁶ Where the chosen court is located in another Contracting State, Article 19 applies.

Article 23 Relationship with other international instruments

1. For the purposes of this Article, "international instrument" means an international treaty or rules made by an international organisation under an international treaty.
2. Subject to paragraphs 4 and 5, this Convention does not affect any international instrument to which Contracting States are parties and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by the Contracting States bound by such instrument.
3. This Convention does not affect the ability of one or more Contracting States to enter into international instruments which contain provisions on matters governed by this Convention, provided that these instruments do not affect, in the relationship of such Contracting States with other Contracting States, the application of the provisions of this Convention.
4. Where a Contracting State is also a party to an international instrument which contains provisions on matters governed by this Convention, this Convention shall prevail in matters relating to jurisdiction except where -
 - a) the chosen court is situated in a State in which the instrument is applicable; and
 - b) all the parties are resident[only] either in a State in which the instrument is applicable or in a non-Contracting State.¹⁷
5. This Convention shall not restrict the application of an international instrument in force between the State of origin and the requested State for the purposes of obtaining recognition or enforcement of a judgment. [However the judgment shall not be recognised or enforced to a lesser extent than under this Convention.]
6. [Notwithstanding] [Subject to] paragraphs 4 and 5, this Convention does not affect the ability of one or more Contracting States to continue to apply or to enter into international instruments which, in relation to specific subject matters, govern jurisdiction or the recognition or enforcement of judgments, even if all States concerned are parties to this Convention.

CHAPTER V FINAL CLAUSES

Article 24 Signature, ratification, acceptance, approval or accession

1. The Convention is open for signature by all States.
2. The Convention is subject to ratification, acceptance or approval by the signatory States.
3. The Convention is open for accession by all States which are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

¹⁷ The policy and drafting of this paragraph requires further discussion. One result of the present draft is that the Convention prevails where the chosen court is in a Contracting State in which the instrument is applicable, one party is resident in a Contracting State in which the instrument is not applicable, and the other party is resident in a non-Contracting State in which the instrument is applicable. It was proposed that the Convention should not seek to prevail over other instruments binding a Contracting State in its relations with non-Contracting States. An alternative approach would be to replace paragraph 4 b) with the following: "b) a party is resident in a non-Contracting State in which the instrument is applicable, or there is some other relevant connection between the parties or the dispute and such a State."

Article 25 Non-unified legal system

1. If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.
2. Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.
3. If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

Article 26 Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over some or all of the matters governed by this Convention may equally sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.
2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.
3. For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted as additional to any instruments deposited by its Member States.
4. At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare that its Member States, by virtue of the law of the Organisation, are bound by this Convention. In this case, a reference to a Contracting State includes, where appropriate, a reference to the Member States of the Organisation[in accordance with Article 22].
5. A reference to a Contracting State in this Convention includes, where appropriate, a reference to a Regional Economic Integration Organisation that is a party to this Convention, with all necessary modifications. In particular, references to a Contracting State in Articles 1, paragraph 2, 18 and 19 shall be read as references to the Regional Economic Integration Organisation.
6. Article 9 shall not apply to the recognition and enforcement of judgments in cases where the State of origin and the requested State are Member States of a Regional Economic Integration Organisation that is a party to this Convention and has made a declaration under paragraph 4. [However the judgment shall not be recognised or enforced to a lesser extent than under this Convention.]

Article 27 Entry into force

1. This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the [third]¹⁸ instrument of ratification, acceptance, approval or accession referred to in Article 24.

2. Thereafter this Convention shall enter into force –

- a) for each State or Regional Economic Integration Organisation referred to in Article 26 subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;
- b) for a territorial unit to which this Convention has been extended in accordance with Article 25, paragraph 1, on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 28 Reservations

Article 29 Declarations

Article 30 Denunciation

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

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

Article 31 Notifications by the depositary

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 24 and 26, of the following –

- a) the signatures and ratifications, acceptances, approvals and accessions referred to in Articles 24 and 26;
- b) the date on which this Convention enters into force in accordance with Article 27;
- c) the notifications, declarations and withdrawals of declarations referred to in Articles 18, 19, 20, 23, paragraph 2, 25, paragraph 1, and 26, paragraphs 2 and 4;
- d) the denunciations referred to in Article 30.

¹⁸ The required number of instruments deposited remains to be discussed, in particular with regard to Regional Economic Integration Organisations and their Member States.