
Purpose of the Convention

The purpose of the Convention is to improve the efficiency of exclusive choice of court agreements for parties engaged in international business, whether they are large or small and medium enterprises. Thus it appears as an important project for international business as most of companies’ international contracts contain provisions addressing dispute resolution. The aim of this Convention is therefore to improve legal certainty and predictability in the enforcement of decisions relating to international commerce.

The content and structure of the Convention seek to strike a balance between the freedom of choice by the parties (and expectation on predictability implied in the choice of court agreement) and the domestic policies (justified interests) of the (Contracting) States.

Main Features of the Convention

1. The Convention applies solely to exclusive choice of court agreements in favour of a court/courts of a Contracting State (“CS”) whether such agreements are specifically negotiated or included in standard forms of contract.

2. Within the area of civil and commercial matters the Convention applies to exclusive choice of court agreements made, in the most cases, for commercial purposes.

3. Rules of jurisdiction apply only to international cases (Article 1(2)).

4. The chosen court is, in principle, under an obligation to exercise its jurisdiction (Article 5).

5. Any court of a CS which was not chosen in an exclusive choice of court agreement is, in principle, under an obligation to decline exercising jurisdiction (Article 7).

6. Any CS is under an obligation to recognise and enforce the judgement given by the chosen court whether it was given in an international or a domestic case (Article 1(3) and 9); there are only limited specific grounds for non-recognition.

7. Even though the Convention does not regulate recognition and enforcement of foreign judgments not covered by the Convention coming from CSs or non-Contracting States, it
intends to prevent such recognition or enforcement (on the basis of national law or international agreements) where the foreign judgment was rendered in contravention of an exclusive choice of court agreement (Article 11).

This Convention seeks to achieve a balance between the need to guarantee to the parties that only the courts chosen by them will hear the case and that the resulting judgment will be recognised and enforced abroad, and the need to allow States to pursue some aspects of their public policy related in particular to the protection of weaker parties, protection against serious unfairness in particular situations and the guarantee to respect some grounds of exclusive jurisdiction of States. Relationship with other existing or future international instruments is also a matter of particular importance in this context.

The elements of this balance are spread all over the text of the draft Convention:

- the scope with the exclusion of consumers and employees (Article 2 (1));
- the scope with the exclusion of some particular matters (Article 2 (3)) and the regime applied to judgments where such matters arose only as incidental questions (Articles 2(3), 6, 7(f) and 10);
- certain parallel in approach between the rules of jurisdiction and the rules of recognition and enforcement (e.g. both apply only to “exclusive choice of court agreements”; rules of jurisdiction, however, apply only to international cases, whereas rules of recognition apply to purely domestic cases as well);
- the criteria for internationality which determine the application of the rules of jurisdiction contained in the Convention and the time factor related to the application of these criteria (Article 1(2));
- the balance between the obligation of any court not chosen to decline jurisdiction (Article 7(a)) and the possibility by that court to exercise jurisdiction in some specific cases (Article 7(c), in particular);
- the balance between the obligation to recognise and the grounds for refusal, which are not mandatory, but only discretionary for the court (Article 9);
- the limitation to recognition or enforcement of non-compensatory and/or grossly excessive damages (Article 15);
- the possibility of unilateral limitation of the Convention by declarations by the Contracting States (Articles 18, 19 and 20);
- the relationship with other international instruments and with specific regimes of Regional Economic Integration Organisations.
Consultation

One of the main challenges of this Convention is to find the proper balance between the different interests and, as regards the interest of the European Community, to achieve a Convention which will have a positive effect on our commercial relations with our partners without endangering the interests of our business community and the public policy of the Community.

This Consultation paper was prepared with the intention of seeking comments from persons interested in the draft Convention and giving them guidance in understanding the relevant policy issues involved in the negotiations of the text.

It does not represent the views of the Commission and does not in any way intend to replace the draft Explanatory Report to the draft Convention drawn up by Mr. Dogauchi and Mr. Hartley (Prel. Doc. 25) available at [The Hague Conference website](http://www.hague-conference.org) (Work in progress).

The document was prepared in English and is also available in an unofficial French translation. The text of the draft Convention [Working Document 110](http://www.hague-conference.org) is also available.

The Commission would like to receive replies to the questions, the full list of which is given at the end of the document, from all interested parties. Replies and other comments should be sent by **15 November 2004** to:

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Persons interested are requested to send their contribution in a single copy and by a single means of communication – post, e-mail or fax.

If requested in your contribution, we will contact you by phone to provide further explanation on the text. In such a case, please provide the name and contact details of the person to be contacted.

All answers will be kept confidential in order not to prejudice the negotiation position of the Community.

The Commission is planning to organise a public hearing sometime in the first half of January 2005. All respondents will be invited.
I- Scope of application of the Convention

Article 1

In principle, the Convention applies to exclusive choice of court agreements only in international cases.

However, the test of “internationality” is applied differently for the purposes of jurisdiction (Art. 1(2)) and recognition and enforcement (Art.1(3)).

The “internationality” of the case for the purposes of Chapter II is subject to a negative test: the case is not international if the parties are resident in the CS of the court seized and their relationship and all other elements to the dispute are connected to only that one CS (the chosen court, however, does not have to be in that same State for the case to qualify as “domestic”).

Consequently, the jurisdiction provisions (the obligation of the chosen court to exercise jurisdiction and of any court not chosen to decline it) do not apply if the case is not international in the above sense. Thus any court of a CS can exercise, or decline to exercise, jurisdiction on the basis of its national law.

The test of “internationality” is tied to a point in time. The draft presents the time factor in square brackets, as no consensus on the issue has been reached yet. 3 options are available.

These options are as follows:

Option 1

The above mentioned conditions for the test must be met only at the time of the agreement (any subsequent change from “domestic” to “international” or from “international” to “domestic” has no relevance).

a) If the case was domestic (State A) at the time of the agreement, but at the time of proceedings it is international (e.g. connected with States A, B and C), Chapter II of the Convention will not apply.
   - That means that even if the chosen court was in State A, such court will not be under an obligation to exercise jurisdiction. Any other court, e.g. in State B or State C, could exercise jurisdiction if seized.

b) If the case was international (e.g. connected with States A, B and C) at the time of the agreement, but at the time of proceedings it is domestic (connected only with State A), Chapter II will apply.
   - If the chosen court was in State A, such court will be obliged to exercise its jurisdiction under the Convention and not under national law, despite the fact that for that State the case has become purely domestic.
   - If the chosen court was in State B or State C, the courts of State A, if seized, will be under an obligation to decline jurisdiction under the Convention, despite the fact that the case has become purely domestic for State A.
Option 2

The above conditions for the test must be met only at the time of the proceedings ("domestic" or "international" character at the time of the agreement would be irrelevant). Chapter II will always be applicable.

a) If the case was domestic (State A) at the time of the agreement, but at the time of proceedings it is international (e.g. connected with States A, B and C), Chapter II of the Convention will apply.
   - If the chosen court was in State A, that court will be under an obligation to exercise jurisdiction under the Convention. Any other court, e.g. in State B or State C, will be under an obligation to decline jurisdiction if seized.
   - If the chosen court was in State B\(^1\), the courts of State A will be under an obligation to decline jurisdiction if seized. Any other court, e.g. in State C, will also have to decline jurisdiction if seized.

b) If the case was international (e.g. connected with States A, B and C) at the time of the agreement, but at the time of proceedings it is domestic (connected only with State A), Chapter II of the Convention may not apply.
   - If the chosen court was in State A, such court will not exercise jurisdiction under the Convention, but it will exercise jurisdiction under its national law, because it is a purely domestic case for that State and Chapter II will not apply.
   - If the chosen court was in State B, courts of State A, if seized, will not be under an obligation to decline jurisdiction under the Convention, because this is now a purely domestic case for them (Chapter II does not apply). The court in State B will, however, be under an obligation to exercise jurisdiction if seized, as well as any court of any other State, e.g. courts of State C, will have to decline jurisdiction, because to them the case will be international and they must apply Chapter II.

Option 3

The above conditions for the test must be met both at the time of the agreement and at the time of the commencement of the proceedings; this is the narrowest exception, since it excludes only cases which were “domestic” at the beginning and stayed “domestic” up until the actual proceedings. Consequently, any case which would be “international” at the time of an agreement and subsequently turned into “domestic” or which was “domestic” at the time of an agreement and subsequently turned into “international” would be covered by the scope of Chapter II.

Analysis:
The consequences resulting from the application of Option 1(a) do not seem desirable. Rules of jurisdiction are to be applied at the time of the proceedings; there are no reasons to refrain from applying them in cases which are international at such time (Option 2). The intention of the parties would also be respected, because if they have chosen a court in a purely domestic

\(^1\) Such court may be chosen by the parties in violation of the law of State A at the time of the agreement if the law of that State prohibits prorogation of jurisdiction in favour of foreign courts in purely domestic cases. If at the time of the proceedings, however, such case becomes international, such violation loses its relevance, because at that stage the parties would be allowed to enter into a valid choice of court agreement in favour of a foreign court.
situation, there is no reason to void that choice, only because the case has became international. Option 1 should thus be rejected.

Situations resulting from the application of Option 2(a) seem to be acceptable and suitable. As regards Option 3, the results of its application, as regards an international case, is the same as the result of application of Option 1(b).

If one wants to favour the internal jurisdiction of States in cases which are purely domestic for those States at the time of the proceedings, Option 2 should be favoured. If one wants to give absolute priority to the choice of the parties over the States’ jurisdiction, then Option 3 should be chosen.

**Question 1:**
(a) Do you agree with the analysis of Article 1?
(b) Which of the options would you favour?

For the purposes of recognition and enforcement (Chapter III), the cases become international solely by the mere fact of recognition and enforcement being sought in another CS than the State of origin (i.e. where the judgment was given).

As a consequence, even a judgement given in a purely “domestic” case, provided the parties made an exclusive choice of court agreement in favour of the court which gave the judgement, may by recognised and enforced in any other CS under the Convention.

The Convention applies to **civil and commercial matters** whereas the notion of “civil and commercial” is not defined by the Convention and is to be interpreted independently of any content given to this notion by the national law of the CSs or other international instruments.

**Article 2**

The implied intention of the Convention is to apply to exclusive choice of court agreements made in the context of **commercial (business-to-business) activities** (Art.2(1)). It is manifested through the exceptions in Article 2(1) whereby agreements contained in contracts where at least one party is a “consumer” (natural person acting primarily for personal, family or household purposes) or an employee (including collective contracts of employment) are excluded from the scope completely.

The present wording, however, leaves within the scope of the Convention also situations which, perhaps, were not intended to fall within its scope. It may not apply to a passenger on a plane travelling to his holiday destination (because he is a “consumer”), but will apply to a fellow passenger who flies to the same destination on an assignment from his employer (he would not qualify for an exemption either under the “consumer” or under the “employment” exceptions).

Similarly, non-profit organisations would fall within the scope of the Convention even though, by their nature, they are not commercial enterprises.

This scope seems to be too wide for some States or interest groups. There has been a suggestion that authors (Art. 2(k)) should be excluded from the scope altogether (because copyright as such is included in the scope of the Convention), which might be best achieved by the exclusion of all natural persons from the scope. That, however, would lead also to the
exclusion of “private entrepreneurs” (natural person carrying out commercial activities who, under the laws of certain States, are not considered “legal persons” or “entities”).

**Question 2:**
(a) Do you consider the current exclusions from the scope sufficient?
(b) Should all physical persons be excluded, irrespective of the character (purpose) of their activities?
(c) Should the scope be expressly limited only to “business-to-business” situations, thus excluding e.g. non-profit organisations?

In addition, certain matters, which otherwise might qualify as “civil and commercial” as well as made in the context of commercial activities, are excluded from the scope, but solely when they should be the subject of the proceedings (Art. 2(2)). The court seized on the basis of the Convention may, however, still consider them - unlike any consumer or employment contract - in the context of an incidental question (Art. 2(3)), i.e. there is no prohibition on applying the Convention (its Chapter II) in proceedings where the decision on the matter which is the subject of the proceedings depends on the assessment of a question falling within the matters excluded from the scope by virtue of Article 2(2). However, any such assessment (ruling) on incidental question is not subject to recognition or enforcement under the Convention (Art. 10 (1)).

The exclusions of Article 2(2) are based on a series of policy considerations. One being the exclusion of family and personal status related issues (e.g. lit.(a),(c)), another being the protection of bases of national (and international) exclusive jurisdictions (e.g. lit.(e), (g), (i), (j), (k) (l)) or observance of widely applied other international instruments (e.g. lit. (b),(f), (h)).

A particular point of discussions have been intellectual property rights in the context of the Convention. Whether or not intellectual property rights (i.e. industrial property rights, copyright and related rights) should be included in the scope of the Convention has been subject to intensive debate. It has, however, been pointed out that a complete exclusion would limit the utility of the Convention, and a clear majority of negotiating partners has voiced an interest to apply the Convention to proceedings in this field, in particular for claims under licence agreements.

Therefore, initially, the draft Convention had foreseen an inclusion of intellectual property rights except for the exclusion contained in Article 1(3) for proceedings that have as their object the validity of industrial property rights to protect the exclusive jurisdiction over the sovereign act of a State to grant such a right (Working Document NO. 49). Discussions on the list of industrial property rights concerned proved to be difficult. Moreover, the EU interests suggest not only the protection of exclusive jurisdiction for the decision on the validity of industrial property rights but in addition also of other subject matter for which exclusive jurisdiction is foreseen in EU legislation such as under the Community trade mark and the Community design regulation or in the case of the future Community Patent Court.

The present text of the draft Convention, at the initiative of the EU delegation, therefore further limits the scope of application of the Convention in the case of industrial property rights. In fact, Article 2(2)(k) now provides that industrial property rights are entirely excluded from the scope of the Convention except where claims pursuant to a contract which
licences or assigns such a right are concerned. Therefore, not only proceedings on the validity of industrial property rights but any other claims are excluded from the Convention with the exception of claims brought to enforce a licence or similar agreement.

Article 2(2)(k) of the draft Convention contains bracketed text at the end of the provision which was added at the request of the US delegation which expressed a strong wish for this addition. Where a licence or similar contract exists, not only the contractual claims but also the claims in tort should be within the scope of the Convention.

For the incidental examination of the validity of industrial property rights which remains possible under Article 2(3) of the draft Convention, see explanations to Articles 6 and 10.

As far as copyright and related rights are concerned, the approach of the draft Convention remains unchanged. Article 2(2)(k) provides that the Convention shall not apply to intellectual property rights “except copyright and related rights”. These rights are not covered by the exclusion from the Convention but remain entirely within scope. There have, however, been also suggestions to take into account the position of individual authors as the weaker to a contract which might require some appropriate safeguard.

**Question 3:**
(a) Are these exclusions for industrial property rights sufficient or on the contrary too broad, taking into account the underlying policy considerations, as well as the application of Articles 6 and 10 on incidental questions and Article 23?
(b) Is the inclusion within the scope for copyright and related rights acceptable and should the Convention take into account the position of individual authors as the weaker to a contract?

**Article 3 (former Article 2²)**

The Convention applies solely to exclusive choice of court agreements (as defined in Art. 3(a) and (b)) in favour of a court/courts of a Contracting State (irrespective of the fact whether the parties chose their “domestic” court or a foreign court).

Consequently, the Convention does not apply to choice of court agreements where the parties designate:
- a court (courts) of a non-Contracting State,
- courts of two and more Contracting States,
- one or more specific courts in two and more Contracting States, or

where the parties expressly agree that their choice of court(s) is not exclusive (Art. 3 (b)).

Therefore, in any of the above cases the courts in CSs are not bound, in particular, by Articles 5 and 7 of the Convention and the resulting judgements do not benefit from recognition and enforcement under the Convention. (See also Final Considerations.)

² The reference in brackets is to the numbering of Articles used in the previous draft contained in Working Document 49 Revised, which was utilised throughout the working documents during the last Special Commission, as well as in the Dogauchi/Hartley draft Explanatory Report (Prel.doc.25).
Article 4 (former Article 3)

The draft has abandoned the use of the term “habitual residence” due to various policy considerations and settled for the term “residence”. It defines, however, the content of this term only for persons other than natural persons (Art. 4(2)). The content of this term in respect of natural persons is left to be determined by individual national laws.

The consequence of both the multiple definition of the “residence” of a legal person as well as the non-definition of “residence” for natural persons produces effects in the context of the notion of “internationality” under Article 1(2). The current wording (“…a case is international unless……the parties are resident in the CS …”) results in the fact that a case would be considered “domestic” even if the parties had multiple residences (the limitation “only” is not attached to “residence”). For the purposes of this notion it is relevant that the person has residence in a State and not whether it has residence also in any other State. Thus the absence of definition of “residence” does not seem to have any relevant repercussions for the application of the Convention text.

II - Jurisdiction of the chosen court

Article 5 (former Article 4)

The chosen court is under an obligation to exercise its jurisdiction (Art. 5.2). Such obligation, however, is not given
i) if the agreement is null and void under the law of the CS of the chosen court (Art. 5(1));
ii) if the chosen court, under its domestic rules of procedure, does not have jurisdiction to hear the case as to the subject matter, the value of the claim or internal allocation (Art. 5(2)(a) and (b));
iii) if there is no connection between the CS of the forum and the parties or the dispute and that CS has made a declaration to this effect under Article 18.

Ad i) If an agreement is null and void, the chosen court may still exercise jurisdiction on the basis of national rules of jurisdiction. The resulting judgement would still be a “judgement given by a court of a CS designated in an exclusive choice of court agreement” (Art. 9(1)), thus qualifying for recognition under the Convention. But its recognition might (but would not have to) be refused in the State addressed under Article 9(1)(a).

Ad ii) The Convention accepts the fact that the choice of the parties should not, in principle, override any national rules which distribute the jurisdiction between different courts on the basis of the subject matter or the value of the claim. The consequence of this acceptance, however, is the fact that if the parties chose a “wrong” court (court lacking such jurisdiction under applicable national rules) their agreement would be void.

The consequence of having the words “unless the parties designated a specific court” included in the text of the Convention would be that such choice would be final and no national rules could be applied to transfer the case to another court within the same CS. Should those words not appear in the final text, the consequence would be that the choice of the parties would not necessarily be honoured, the case could be transferred to another court and, what is the most important aspect, the resulting judgement will be recognisable if the bracketed paragraph 1bis of Article 9 is accepted.
Example:
A. Parties choose “the Regional Court in Bratislava, Slovak Republic” as (the only) court to decide their disputes.
B. Parties choose “the Regional Court in Bratislava or the District Court in Bratislava” as the two specific courts of the same CS to decide their disputes.
C. Parties choose “the Regional Court in Bratislava or the Regional Court in Presov” as the two specific courts of the same CS to decide their disputes.
D. Parties choose “the courts of the Slovak Republic” to decide their disputes.

Analysis:
1. Lack of subject matter jurisdiction Art.5(3)(a):
   A. If the chosen court has no subject matter jurisdiction, the court is not under the obligation to exercise jurisdiction. The agreement would be null and void.

   B. If one of the courts lacked subject matter jurisdiction, the other one might still have it and, in that case, it would be under an obligation to exercise it and any other court would be bound by Article 7.

   C. If both have subject matter jurisdiction, the case would fall under Art. 5(3)(b). If none of them had subject matter jurisdiction, the resulting situation would be same as in point A above (agreement null and void).

   D. The situation should not create a problem, because the national rules of procedure of the Slovak republic will apply to determine which court has jurisdiction.

2. Internal allocation of jurisdiction rule with the qualifier “unless the parties designated a specific court”
   A. The Regional Court in Bratislava (provided it has subject matter jurisdiction) could not transfer the case to any other Regional Court in Slovakia and would have to exercise jurisdiction.

   B. If the wording “specific court” applies also to more specific courts chosen, then the effect would be same as in point A, i.e. none of the courts seized could transfer the case. If, however, the wording applied only to a single chosen court, in this scenario any of the two courts, when seized, could transfer the case to another “competent” court, because the exception of Art.5 (3)(b) would not apply.

   C. Same applies as in point B.

   D. If the parties have not chosen a specific court, the provision is not relevant, internal allocation of jurisdiction always prevails, because no “specific court” was chosen.

3. Internal allocation of jurisdiction rule without the qualifier “unless the parties designated a specific court”
   A.-D. In all cases the chosen court could transfer the case under internal allocation of jurisdiction rules to another court within the same CS.
**Question 4:**
(a) Do you agree with the policy that a court chosen could, by virtue of rules of internal allocation of jurisdiction, transfer the case to another court within the same CS against the original intention of the parties?
(b) Shall a judgement given by a court to which the case was transferred by the court chosen by virtue of the rules on internal allocation of jurisdiction qualify for recognition under the Convention?

In view of the fact that Article 5(1) creates an absolute obligation for the chosen court, if seized, to exercise its jurisdiction, there may be situations where a court in another CS is seized and exercises jurisdiction under any of the exceptions of Article 7 and the chosen court, if also seized, would not be in a position to decline jurisdiction.

A similar situation results from application of Article 5(1) obligation in respect of jurisdiction based on national law in purely domestic cases (Article 1(2)). A situation assessed by one CS as purely domestic (thus resulting in non-application of the Convention), may in the CS of the chosen court be considered international (resulting in application of the Convention) and such court could not decline to exercise its jurisdiction.

**Question 5:**
(a) Should the chosen court be allowed to decline exercising jurisdiction in certain cases where the court of another State was seized?
(b) If yes, in which cases?

**Article 6**

This provision does not introduce a mandatory rule. It simply emphasises the possibility of the chosen court to refer the question, which would otherwise - due to Art. 2(3) - be an incidental question in the proceedings, to the “proper” court. The provision stresses one particular area where this provision might be used, and that is the area of intellectual property rights. The court seized may chose to “refer” the issue of validity of an IP right to the court of the State under whose law the IP right arose.

The possibility for the chosen court to stay proceedings seems necessary in particular with a view Article 10 (2) and (3) which allows the requested State to refuse recognition and enforcement of a judgment to the extent that an incidental ruling on the validity of an industrial property right was inconsistent with a judgement on the validity rendered in the State under the law of which the right arose. If the chosen court incorrectly decided on the incidental validity question, the judgment of the agreed court would risk being of little use at the recognition and enforcement stage. Therefore, if the chosen court can stay proceedings in those cases where the validity is a difficult issue, it can wait for the decision on the validity by the competent court and then base its own decision upon it, avoiding difficulties at the recognition and enforcement stage.
But other situations may be envisaged as well where this provision may be used, for instance in a dispute where the issue of ownership of (title to) immovable property arises as an incidental question. Since rights in rem are excluded from the scope of the Convention, the court seized might stay the case to enable the court where the property is situated to settle the issue of ownership of the property.

III - Jurisdiction of the court not chosen

*Article 7 (former Article 5)*

Any court of a CS which was not chosen in an exclusive choice of court agreement is, in principle, under an obligation to **decline** exercising jurisdiction (“suspend or dismiss proceedings”), if the chosen court is in another CS.

Such obligation does not exist:

i) if the chosen court is in a **non-Contracting** State, because the Convention as a whole does not apply, or

ii) if any of the exemptions of Article 7 is given.

This provision is one of the main operative articles of the Convention on which the balance of the Convention is based. Its main goal is to make sure that the courts of any other CS than that of a chosen court decline jurisdiction.

At the same time, a need for an “escape” clause was felt necessary for various policy considerations: protection of weaker parties, fairness in a particular situation, exclusive jurisdiction of States and public policy grounds. These issues are reflected in the list of exemptions contained in Article 7(b) to (e) and the list still remains highly controversial.

**One important aspect of this provision** is also the fact that it **does not confer** jurisdiction on the seized court, i.e. if any of the conditions of this provision are fulfilled the court seized can exercise its jurisdiction if it **has** jurisdiction on the basis of its national law or an applicable international instrument. The differing national grounds of jurisdiction may lead to an imbalanced application of the Convention through its Article 7.

Consequently situations may arise where under application of Article 7 courts of some CSs will not be in a position to exercise jurisdiction when they are seized even if conditions of Article 7 are met, because they will lack jurisdiction under national law, whereas courts of other CSs will be in a position to exercise jurisdiction under their national law. The situation of the European Community is particularly weakened in this regard, because the Brussels I Regulation (Regulation n° 44/2001) only applies, in general, when the defendant is domiciled within the Community. It does not give any protection to a European company which needs to ascertain its claim against a foreign company.

*Example:*

*An agency contract between a US principal and a Slovak agent contains exclusive choice of court agreement in favour of the courts of State of New York.*

*If the agent wanted to sue before a Slovak court in an Article 7 situation (on the basis of Brussels I Regulation), the Slovak court might not have jurisdiction even if one of the*
conditions of this Article are met: it cannot base its jurisdiction neither on Article 2(1) of the Regulation (the defendant is not domiciled in a Member State), nor might it be able to base it on the residual jurisdiction of Article 4 of the Regulation (unless the principal has property in Slovakia, because that would be the only ground of jurisdiction available under Slovak national law).

In a reversed case (Slovak principal and US agent, choice of court agreement in favour of Slovak courts) the agent may very well be in a position to sue under Article 7 of the Convention before a US court on the basis of the “doing business” principle.3

The whole provision, however, needs to be seen and understood as a whole, each individual aspect completed by the others. None of the provision of letters (a) to (e) is, however, generally accepted by the States negotiating the Convention and a series of different proposals still exist as a possible addition/replacement for the provisions of the Article.

Article 7(a) - “the nullity of the agreement”. This is perhaps the most fundamental exception in the list.

There is a proposal to add “on any grounds, including incapacity”. Most delegations at the Special Commission were against this addition arguing that the present wording of letter (a) already covers incapacity.

Another proposal suggests deleting the words “under the law of the State of the chosen court”. Were these words to be deleted, it might lead to uncertainty as to the application of Article 5 which contains the most important jurisdiction rule of the Convention, i.e. while the chosen court is under an obligation to exercise its jurisdiction (Art.5), any other court of a CS, which was not chosen in an exclusive choice of court agreement, is, in principle, under an obligation to decline exercising jurisdiction (Art.7.). Indeed it would be left to the court seized (i.e. the national law of that CS) to decide which law shall govern the nullity and, in fact, to apply any law or rule it might consider appropriate to disregard the choice of court agreement. It would lead to the inherent danger that the court seized would always “find a way” how to set aside the application of the Convention. That might completely undermine the objectives of the Convention and probably change its nature into a “single Convention” only on recognition and enforcement of decisions.

**Question 6:**
(a) Could you accept the deletion of the words “under the law of the State of the chosen court” in Article 7(a)?
(b) If the present wording of Article 7(a) is retained, what other exception and to what extent are needed for this Article to achieve its needed flexibility?

3 The example of the contract of agency is not used haphazard. It is an area of law domain where there is specific Community Legislation (Council Directive 86/653/EEC) to protect the agent. The European Court of Justice held in Ingmar case (C-381/98 Ingmar GB Ltd v Eaton Leonard Technologies Inc.) that parties to an agency contract cannot set aside the applicable Community law by a choice of law agreement in favour of a third country if the agent carries out his activity in a Member State although the principal is established in a non-member country. Thus the Community law creates a mandatory rule in situations to which it applies.
**Article 7(b) - “the lack of capacity”**. There have been proposals to delete this provision altogether. The deletion would result in the fact that the issue of capacity would be assessed only under letter (a), i.e. under the law of the chosen court, but there would be no possibility to control capacity under the law of the court seized, unless, of course, that court would avail itself of the public policy exception in letter (c).

**Question 7:**
Do you consider the provision of Article 7(b) necessary?

**Article 7(c) - “the public policy”**. This is perhaps the most controversial provision of all in this Article. Most delegations agree on the need for a general public policy clause, yet it has proven so far impossible to find a wording acceptable to all.

Most delegation agree on the need for a narrow clause, yet the reference to “public policy” alone does not seem to be sufficient to some States, where the public policy exception tends to have a too much narrow interpretation.

Thus, one of the options still present (“giving effect to the agreement would be manifestly contrary to the public policy of the State of the court seized”) does not provide, by itself, a universally acceptable solution. The other options proposed and still available are “giving effect to the agreement would lead to a [very] serious injustice or would [otherwise] be manifestly contrary to fundamental principles of public policy of the State of the court seized” or “under the mandatory rules on jurisdiction of the State of the Court seized, the parties were unable to agree to exclude the jurisdiction of the courts of this State”. A combination of these options is also possible.

It might prove helpful to consider the consequence of the wording of this provision on several examples which may or may not be covered by the present (or suggested) drafting, with a view to ascertain whether such situations should or should not be covered by the public policy exception:

**Examples:**

A. An exclusive choice of court agreement included in standard terms of contract which is imposed on a “weaker” party to the contract and which makes it difficult for that party to participate in the proceedings before the chosen court (the location is too removed, the proceedings involve extensive financial burden caused by the necessity to engage a local lawyer, etc.)

Does the present wording enable, for instance, the court of the weaker party to be seized under Article 7(c)? Should the weaker party be protected at all by the public policy exception?

B. Under the law of the CS there is no party autonomy in certain matters (i.e. the law does not allow parties to enter into choice of court agreements). Would the court of that CS be able to exercise jurisdiction under Article 7(c)? If not, should it be able to exercise jurisdiction?

C. Under the law of the CS the courts of that CS have exclusive jurisdiction to decide disputes on certain matters (e.g. asbestos related disputes – see Article 20). If the parties have nevertheless chosen a court of another CS, would the court of the CS with exclusive...
jurisdiction be able to exercise its jurisdiction under Article 7(c) exception? Should it be allowed to do so?

D. If the parties chose a court outside of the EU which, under its conflict of law rules, is not bound to apply a mandatory Community instrument as the “law applicable” to the dispute, can the court in the Member State of EU exercise its jurisdiction on the basis of Article 7 (c)? Would a reference to “Community public policy” allow such exercise? Should the court in a Member State be able to exercise its jurisdiction if the outcome of the proceedings in the third State cannot guarantee the compliance with the mandatory Community instrument?

Question 8:
In view of the examples presented in application of Article 7(c), taking into account the different interests involved, which wording of this provision would, in your opinion, best achieve the proper balance between the various interests involved?

Article 7(d) - “the impossibility of performance”. There have been proposals to delete this provision. Any such decision depends on the outcome of the accepted wording for letter (c).

Question 9:
Is the provision of Article 7(d) still necessary if the exception of Article 7(c) exists?

Article 7(e) - “the non-exercise of jurisdiction”. This provision is closely linked with Article 5 under which the chosen court may refuse to hear the case under certain circumstances (see under Article 5).

The language in square brackets (added to the original wording at the last session of the Special Commission) introduces the notion that it should not be possible for a court in a CS other than that of the chosen court to exercise jurisdiction if the chosen court refuses to hear the case only due to the fact that under the national rules on allocation of jurisdiction a different court is competent to hear the case. This policy issue is strongly linked with the wording of Article 5(3), and in particular the policy issue in Article 9(1bis). If a judgement given by a court to which the case was transferred from the court chosen on the basis of “allocation” rules is recognisable under the Convention, then it seems fair to exclude the possibility of any other court to take jurisdiction in the same matter under Article 7(e).

There is, however, another problem with the present wording. Under Article 3(a) definition, there may be more than one chosen (specific) court or the parties can choose “courts” of a CS in general. In such circumstances the present wording may lead to the interpretation that if “one of the” chosen courts decides not to hear the case, the court not chosen may already step in. While this consequence may be alright when “courts” of a CS were chosen in general, it does not seem to be the case when two or more specific courts were chosen. Of course, it very much depends on the grounds for refusal to exercise jurisdiction: if the ground is Article 5(1) or Article 18, then it would seem to disqualify any other court of the same CS. If, however, one of the chosen courts refuses to exercise its jurisdiction, because is does not have, for

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4 The case is inspired by the ruling of the ECJ in Ingmar case (C-381/98 Ingmar GB Ltd v Eaton Leonard Technologies Inc.), see note 4 above.
instance, subject matter jurisdiction, but another of the chosen courts does, then it seems unfair to give the court not chosen “the right” to exercise its jurisdiction. In view of the fact that the underlying policy seems to be the limitation on the possibility of a court not chosen to exercise jurisdiction, the wording of this provision should be redrafted to avoid any possible misinterpretation. It depends, however, on the policy followed and it may very well be found acceptable that the refusal by one of the chosen courts should be enough to trigger the jurisdiction of the court not chosen.

Question 10:
(a) Should the court not chosen be allowed to exercise its jurisdiction as soon as any (one) of the chosen courts refuses to hear the case?
(b) If the final policy decision accepted at the Hague shall be that the judgement given by a court to which the case was transferred from the court chosen under Article 5(3)(b) shall be recognisable under the Convention, should the court not chosen be prohibited to exercise its jurisdiction in cases where the reason for the chosen court not to hear the case was the internal transfer?

IV - Relationship between the judgments given by the chosen court and the court not chosen.

In all cases when the court not chosen exercises jurisdiction, the resulting judgment does not qualify for recognition and enforcement under the Convention.

The possibility of recognition under national law remains, in principle, untouched by the Convention, yet there are provisions in the Convention (bracketed for the moment) which may have a bearing on the “freedom of recognition” under national law. One is included in Article 9(1)(f). The bracketed language seeks to limit recognition of a judgment coming from another State than the CS of origin (including judgment given in a CS under Article 7) solely to situations where such recognition is based on an international agreement. The other is the bracketed Article 11 which, however, should apply only if the judgment was given in contravention of the Convention (a judgment given on the basis of Article 7 cannot be considered as given in contravention of the Convention).

When recognition and enforcement of a judgment given by the chosen court is sought under the Convention in the CS whose court was not chosen, but seized, and this court gave a judgment - whether such court gave its judgement observing the limitations of Article 7 or whether it exercised its jurisdiction “ignoring” these limitations (i.e. it gives judgment in contravention of the Convention), the judgment of the requested CS is given “protection” (or priority) under Article 9(1)(f) over any “incoming” judgment, even against a judgement of the court chosen. Even though Article 9(1)(f) mentions “inconsistent judgement…” given in contravention of this Convention”, the wording clearly applies only to “incoming” judgement, not to the judgment of the requested CS (even if given “in contravention of the Convention”). The solution proposed in Article 11 (bracketed) applies only to proceedings for recognition and enforcement and thus clearly not to judgements given in the requested CS.

On one hand, this might be a problem, since it undermines the whole thrust and purpose of Article 7. But on the other hand, it seems equally (both legally and politically) problematic to give priority to an “incoming” judgment over a final domestic judgment (having res iudicata effects), even if that judgement was given in contravention of the Convention. Moreover, how
could the court before which the recognition is sought “control” the proper application of the Convention by another court of the same CS, maybe even of a court of higher rank? And why should the CSs trust more the court of recognition than the court of jurisdiction to ensure the good application of the Convention?

**Question 11:**

(a) Are the consequences of the present text of Article 7(f) acceptable?
(b) If not, what policy should be followed?

**Article 8 (former Article 6)**

This again is not a mandatory provision of the Convention. It simply confirms the status quo that national law of a CS applies to the question whether and which measures of protection can be taken. Such measures are also not subject to recognition under the Convention (Article 4(1)).

**V- Recognition and enforcement**

**Article 9 (former Article 7)**

Any CS is under a general obligation to recognise and enforce the judgement given by the chosen court (Art. 9(1)). Such recognition and enforcement may be refused solely on the basis of one or more of the limited specific grounds allowed by the Convention (Art. 9(1)(a)-(f); Art. 19). But the court in a CS is not under an obligation to refuse recognition and enforcement even if one or more of these grounds are given.

The list of grounds, however, is not final, since there are still considerations whether the list adequately reflects matters covered by Article 7(c) and (d), and potentially (in view of the comments on Article 7 above) also letter (e).

The philosophy of the grounds for refusal stems from the “usual” public policy considerations reflected in recognition policies. The letters (a) and (b) mirror provisions of Article 7(a) and (b) (policy being that the same reasons that may lead a court not chosen to take jurisdiction are acceptable also for non-recognition of a judgment).

Proposals have been made at various stages to delete letter (a), arguing that the State addressed should not review whether the agreement was valid under the law of the State of the chosen court (some of the reasons: such review amounts to the review of jurisdiction, it has to be done on the basis of foreign law and the State addressed may not assess that law properly, etc.). The concern which seems to lie at the basis of the retainer of the provision is the concern that the chosen court might exercise jurisdiction even if the choice of court agreement was null and void (on the basis of its domestic rules of jurisdiction or because the court simply did not deal with the issue of validity), in violation of Article 5(1) of the Convention, and the resulting judgment would still qualify as a judgment falling within the definition of Article 9(1) and thus be recognisable under the Convention (the grounds for refusal in letters (e) and (f) not being sufficient to refuse recognition).
**Question 12:**
(a) Shall the State addressed have the power to review whether the agreement was null and void under the law of the State of the chosen court?
(b) Shall the judgement given by the chosen court be recognisable under the Convention irrespective of the ground on which the chosen court based its jurisdiction?

Even though the policy consideration in Article 9(b) may be the same as in Article 7(b), the result is different since the courts applying the test of their own law to capacity are situated in different States (State of the court seized, State of the court addressed). Depending on the choice of law criterion applicable under the different laws, the outcome may differ as well.

**Question 13:**
Is it a desired outcome that the capacity is reviewed under different laws in the court seized and the court addressed for recognition and enforcement?

Letter (c) is the traditional “protection of the defendant” provision, though finding acceptable wording is being very difficult. The present wording is based on the notion of service (notification) of the document instituting the proceedings (or its equivalent). Consequently the question of service of any other document, including the resulting judgment itself, is not relevant (unless it is reintroduced by the defendant or the court under letter (e)).

The first tier of the provision (point i) deals with the issue of fairness (the defendant was able to present his defence or, if not, he did not object when appearing). It applies equally to situations when the defendant has appeared as well as when he was in default of appearance, though its application in the former situation is further dependant on the actions taken by the defendant. If the defendant chooses to appear and not to object against “bad” service, this ground of refusal cannot be used in his favour. That, however, does not apply when, under the law of the forum, there was no such possibility to object (i.e. such objection had no legal consequences).

The second tier (point ii) introduces the issue of public policy of the requested State. When service was effected in the requested State in a manner which violates the public policy of that State, the recognition and enforcement can be refused even if the service fulfils the requirements of point i).

**Question 14:**
(a) Is the protection accorded to the defendant by Article 9(c) sufficient?
(b) Or is the protection, on the contrary, too extensive?

Letter (d) introduces the concept of procedural fraud which can be perpetrated by either party or by the court.

**Question 15:**
(a) Is the ground for non-recognition included in Article 9(d) necessary?
(b) Is, in your opinion, the issue of procedural fraud not covered by the public policy exception under Article 9(e)?
Letter (e) is, in principle, the traditional “public policy” exception. Its formulation, however, was very difficult due to different concepts of the public policy exception in different legal systems. The resulting text makes it clear that this exception shall be applied in a very limited manner (“manifestly incompatible with public policy”) and also that public policy applies also to the procedural aspects (“proceedings….incompatible with fundamental principles of procedural fairness”).

**Question 16:**
Is the wording of the public policy exception satisfactory?

Letter (f) is the rule on incompatible judgments. The first tier of the exemption gives priority to the judgement given in the requested State. It does not require that such judgment be earlier, neither does it require that it be given in the same cause of action, only the identity of the parties is relevant. It is also irrelevant on what basis that judgement was given in the requested State (it could have been given also in contravention of the Convention, in particular its Article 7; see also comments under that Article above).

The second tier of the exemption tries to solve the incompatibility between a judgment from a CS based on the Convention and a judgment coming from another (third) State (CS or not). For the judgment of another State to have priority it is required that it must be earlier, it must be given between the same parties and in the same cause of action and it must be recognisable in the requested State (under national law in general or under an international agreement only – this issue is yet unresolved) and it must not have been given in contravention of the Convention.

**Question 17:**
(a) Is the solution of Article 9(1)(f) relating to the non-recognition of incompatible judgements satisfactory?
(b) Should the judgement of the requested State be always given priority over a judgement coming from another CS?
(c) Should the judgment of a third State be given priority over a judgment coming from another CS only if it is recognisable under an international agreement or also when it is recognisable under national law in general?

To avoid possible negative legal and/or financial consequences of recognition and enforcement of a judgement which is still potentially subject to an ordinary appeal in the CS of origin, paragraph 4 introduces the possibility to postpone, or to refuse without prejudice, recognition and enforcement of such a judgement. The provision is not mandatory,  

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5. Note that “international agreement” is used here and not “international instrument” as defined in Article 23 par. 1, thus limiting the scope to “agreements” only and not extending to all “instruments”. Is this desired or desirable?

6. See the bracketed language “under an international treaty” in the provision of Article 9(1) lit. (f).

7. There is an obvious mistake in the drafting of the last condition of the provision. It suggests that recognition and enforcement of a judgement may be refused only if the incompatible judgment (which is clearly the judgement whose recognition is sought under the Convention) was not given in contravention of the Convention. But should not any judgement given in contravention of the Convention be refused recognition, not only when there is incompatibility with a judgment coming from a third State? It is more likely that the reference is intended to the “earlier” judgment of the third State. This interpretation would be supported also by the policy underlying Article 11.
consequently the State addressed may still recognise or enforce a judgment even if it is subject to such an appeal. To be able to do that, the judgment must have (some) legal effect in the State of origin and, if it is to be enforced, it shall also be enforceable under the same law.

**Question 18:**
Is the extent of the possibility to postpone/refuse recognition or enforcement provided for in Article 9(4) sufficient?

Article 9 does not apply to recognition and enforcement of judgments in cases where the State of origin and the State addressed are Member States of a Regional Economic Integration Organisation (as defined in Article 26(1)).

**Article 10**

This Article regulates the consequences of Article 2(2) and (3) providing that a matter excluded from the scope of the Convention may still be considered in the course of the proceedings as an incidental question.

The policy in paragraph 1 needs to be distinguished from the policy expressed in paragraphs 2 and 3. According to paragraph 1, CSs, though obliged to recognize the judgment as such under the Convention, shall not recognize or enforce an incidental ruling under the Convention. This provision is not limited in its scope to any particular issue of Article 2(2), i.e. it applies to any of those issues, not only to the intellectual property rights.

Contrary to that, paragraphs 2 and 3 enable a CS to refuse recognition of the whole judgement and they are limited in their scope solely to the validity of intellectual property rights issues.

Paragraph 1 states the basic policy that a ruling on an incidental question, if any, shall not be recognised and enforced under the Convention (it can, however, be recognised under the national law). If a chosen court has incidentally examined such a question relating to excluded subject matter of Article 2(2), e.g. the validity of an industrial property right, the findings of the chosen court, e.g. whether a right is considered valid or invalid, are not recognised under the Convention in any other State addressed even where under the law of the State of origin incidental findings contained in the reasons of judgement are considered res judicata. This principle of paragraph 1 follows logically from the exclusion of the subject matters contained in Article 2(2) ensuring that no ruling on excluded subject matter benefits from the Convention.

Paragraph 2 allows to refuse recognition and enforcement of a judgement itself based on the incidental ruling on the validity of an IP right to the extent that it is inconsistent with a judgment on the validity of the right rendered in the State (does not have to be CS) under the law of which it arose. It does not, however, contain a prohibition of such recognition and enforcement.

Even though the validity of an industrial property right would be an excluded subject matter under Article 2(2)(k), the Convention would allow the incidental examination in this respect under Article 2(3), e.g. the consideration of the validity within a judgment ruling on damages. The present provision intends to protect exclusive jurisdiction over validity issues by
subjecting the recognition and enforcement of a judgment of the chosen court to its consistency with decisions on the validity of the right rendered by courts in the State where the right was granted. To this end, recognition and enforcement of a judgment from the chosen court may be refused to the extent that the judgment would be inconsistent with the decision on the validity.

Paragraph 3 regulates the possibility of postponement or refusal (without prejudice) of recognition or enforcement when proceedings on validity of an industrial property right are pending in the State under the law of which the IP right arose. This provision shall contribute to the protection of exclusive jurisdiction by the courts of the State where the right arose over the validity of industrial property rights. Paragraph 2 of this Article which allows to refuse recognition and enforcement of the judgment of the chosen court to the extent that it is inconsistent with a validity ruling by a court of the State where it was granted would be of reduced value if that latter judgment would already have to be given in order to allow such refusal. Therefore paragraph 3 provides for the possibility to wait for such a validity decision prior to recognition and enforcement.

With a view to not unduly delay recognition and enforcement procedures, the postponement of procedures can only be considered where proceedings on the validity of the right are already pending. It would not be sufficient if a party only claimed before the requested court that the incidental validity findings of the chosen court were incorrect and that it intends to initiate proceedings on the validity. In addition, the provision is worded as a possibility (“may be postponed”). Therefore the court of the requested State may in adequate cases proceed with recognition and enforcement procedures in spite of pending invalidity proceedings e.g. where it considers them to be manifestly ill founded.

**Question 19:**
(a) Is the limitation of recognition and enforcement as set out in Article 10(3) appropriate?
(b) Should Article 10(3) perhaps be extended to the situation where the defendant (one of the parties) objects and intends to commence validity proceedings in another State?
(c) Should Article 10(2) and (3) be extended to any incidental rulings, not only IP rights, as in Article 6?

**Article 11**

This Article in its present wording is not very clear, but its policy can be deduced from the footnote to this provision in the WD 110. The intention is to prohibit recognition of any judgment coming from a CS or a non-Contracting State which was given in breach of an exclusive choice of court agreement (in circumvention of the Convention and, in particular, its Article 7), whereas exercising jurisdiction in circumstances allowed by Article 7 (for a non-Contracting State: in circumstances which would fall under the Article 7 exceptions) should not be considered as contravention of the Convention.

Even this provision, however, does not solve the problem of a judgment given by contravention of the Convention in the State where recognition and enforcement is sought (see comments under Article 7).

This Article must be read in conjunction with Article 9(1)(f), as well as Article 23(4) and (5).
**Question 20:**
Should the policy of Article 11 be retained in the final Convention?

**Article 15** *(former Article 10)*

This provision tries to solve the difficulties of different States arising in particular from the US legal system and seeks to find a balanced solution which would not lead to an absolute refusal of recognition and enforcement of a judgment awarding non-compensatory damages (i.e. damages whose purpose, in principle, is to punish the wrongdoer) and/or grossly excessive damages (including compensatory damages), but would, under certain circumstances, allow the creditor to benefit from the judgment to a justified amount of compensation.

Paragraph 1 applies to non-compensatory damages and sets out the basic principle that only a CS which can award similar or comparable damages under its own law is under the obligation to recognise/enforce such judgment in full, but nothing prevents any other CS to do the same.

Paragraph 2 applies to grossly excessive damages (including compensatory damages). It sets out, as a minimum amount of damages, the amount which could have been awarded in the requested CS in the same circumstances under which the damages were assessed in the State of origin (paragraph 2(b)). Such limitation of the amount is subject to proceedings (their nature is left to national law to determine), involving the creditor, in which the debtor must prove that the damages awarded are “grossly excessive” even under the circumstances existing in the State of origin. This, however, might be a very high burden of proof for the debtor to carry, depending, of course, on what practice the courts of recognition might adopt to be “satisfied” that the damages are indeed “grossly excessive”.

Paragraph 3 recognises the fact that in some legal systems the non-compensatory and/or excessive compensatory damages might include sums to cover costs and expenses of the proceedings and it would be unfair if, for instance, the “lesser amount” awarded to the creditor in application of paragraph 2 of this Article did not take this into account.

The latest proposal by the US delegation (WD 95) made in The Hague was to simplify the wording of this provision and retain just the following:

“The portion of 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. 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.”

Unlike the existing wording, this would retain only the obligation to recognize non-compensatory damages for those CS which can award similar or comparable damages. Any other State might, but does not have to, recognize the judgment in full amount.

This wording, by deleting paragraph 2 completely, has also the consequence that there would be a mechanism to lower “grossly excessive” compensatory damages. That would result in a situation that the CS addressed would either have to refuse recognition of such a judgment in
full, if it can avail itself of the public policy exception for that purpose, or recognize such a judgment in full.

It would not allow lowering the amount and thus the creditor could be satisfied either fully or not at all.

**Question 21:**
If a specific provision regulating damages is not included (or if the US proposal is accepted) in the final text of the Convention, would in your opinion the public policy exception to recognition and enforcement of a judgment provide satisfactory solution to the issue of non-compensatory and/or excessive damages?

VI - Unilateral limitations

**Article 18 (former Article 14)**

This Article allows a declaration (which amounts to a reservation) by any CS to limit the application of the Convention in cases where there is no connection between the parties, the dispute and the CS of the chosen court (“foreign” cases). By its very nature this provision goes against the substance of the Convention, since the Convention is very much aimed at international cases and the freedom of choice by the parties which shall, in principle, guarantee an impartial and unbiased court.

On the other hand, the underlying policy of States wishing to avoid that their courts have to deal with cases which have no connection with that State, perhaps even to the detriment of other domestic cases (using public money and time of the court for “unrelated” cases), seems justified.

It needs to be pointed out that the scope of this Article implies that the lack of connection between the parties, the dispute and the court chosen must exist at the time of the proceedings. This would seem to support the logic of using the same time factor for the qualification of an international case for purposes of Article 1(2)

**Question 22:**
Should the Community avail itself of the possibility given in Article 18 and make a declaration in respect of courts within the Community?

**Article 19 (former Article 15)**

This Article respects the position of CSs who wish to have a possibility not to recognize/enforce a judgment if they consider the case in which it was given is a purely domestic case for them. It represents a counterpart to Article 1(2)

As a consequence, the same analysis applied to that Article can be applied to the question of time factor.
**Question 23:**
(a) Shall the same time factor be applied in Article 19 as in Article 1?
(b) If not, what would be the justification for using a different time factor in this Article?
(c) Should the Community avail itself of the possibility provided for by Article 19 and reserve the right not to recognize foreign judgments given in a “purely internal Community” cases?

**Article 20 (former Article 16)**

The provision allows the limitation of the scope of the Convention by a unilateral declaration of a CS. At present the article is limited to asbestos related matter, but the issue of its extension to cover other matters, e.g. natural resources or joint ventures, is still open.

The consequence of a CS making a declaration under this Article would be the following:
- the chosen court in the CS which made the declaration would not be under an obligation to exercise its jurisdiction under Article 5(2), if the agreement related to a matter covered by the Article (by the declaration);
- the court seized in the CS which made the declaration would not be bound by Article 7 to decline its jurisdiction despite the fact that parties chose a court in another CS;
- the CS which made the declaration would not be bound by the Convention to recognize/enforce a judgment given in another CS by the court chosen, if its jurisdiction was based on a choice of court agreement related to a matter covered by this Article (by the declaration);
- the judgment given by the court of the CS which made the declaration would not be considered given in contravention of the Convention for purposes of Article 9(1)(f) and Article 11.

**VII – Relationship with other international instruments**

**Article 23 (former Article 19)**

This provision contains the regulation of the relationship of this Convention with other international instruments, including Community instruments (paragraph 1). It must be stressed that the solution provided does not make a choice as to which instrument applies: the international instrument concerned or the Convention. In fact, all instruments shall apply to the extent they are applicable and to situations they are applicable to. The question only arises in case of a conflict: Article 23 establishes for such situations which instrument shall prevail over the other.

Paragraphs 4 and 5 are of a particular importance as regards the relationship between the Convention and the Community instruments (Brussels I Regulation), as well the Lugano Convention.

Paragraph 2 establishes priority of existing instruments (unless a contrary declaration is made by the CSs, Parties to such instrument), but subjects this principle to paragraphs 4 and 5. Consequently, despite the policy announced in the provision itself, a different outcome is achieved in practice: the Convention tends to prevails over any such instrument.
Paragraph 3 establishes that any new obligation undertaken by the CSs should be in conformity with the present Convention.

Paragraph 4 establishes the priority of the Convention over any other parallel instrument, except for two conditions which must be fulfilled cumulatively: the chosen court is in a CS which is also bound by the parallel instrument and all of the parties are resident either in a State bound by that instrument or in a non-Contracting State.

The intention of the policy underlying the provision was to give priority to the Convention when the chosen court was outside of the area of States bound by the parallel instrument or when the chosen court was in the area of States bound by the instrument, but none of the parties was resident there.

The provision gives priority to the Convention not only when the chosen court is not in a State bound by the instrument, irrespective of where the parties are resident, but also when the chosen court is in a State bound by the instrument if one or more parties are resident in a CS not bound by the instrument. Also, as the footnote 17 in WD 110 Revised stresses, the present wording leads also to the priority of the Convention in a situation where one of the parties is resident in a CS where the instrument is not in force and the other party is resident in a non-Contracting State where the instrument is in force.

The present wording does not, in fact, require that all Parties to the parallel instrument are also CSs to this Convention, contrary to what was the original proposal by the Community.

The present wording gives priority to the instrument always when the chosen court is in the “instrument territory” and:

i) when all parties are in the same State bound by the instrument;

ii) when one party is in one State bound by the instrument and the other party is in another State bound by the instrument;

iii) when one party is in a State bound by the instrument and the other party is in a non-Contracting State (either bound or not by the instrument), or

iv) when all parties are in a non-Contracting State (either bound or not by the instrument).

The consequences of this Article specifically for the CSs bound by Brussels I Regulation can be demonstrated on the following example:

*Parties resident in the US and Canada respectively choose in their exclusive choice of court agreement a court in London to settle their disputes. The Canadian party chooses, however, to sue the US party before a French court.*

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8 The qualification “only” in Art. 23(4)(b) is included in square brackets and is connected with the policy issue referred to under Article 4.
**Current situation:**

*Article 23(3) of Brussels I Regulation applies. The seized French court is prohibited to exercise jurisdiction.*

**Situation after the Convention:**

**a) If only EC is a CS to the Convention:** *The Brussels I Regulation prevails (point iv) above.*

**b) If EC and US or Canada or both are CSs:**

*The Convention prevails, the French court could, under Article 7 of the Convention, exercise jurisdiction, if under French national law the court would have jurisdiction against the US party and conditions of Article 7 are met.*

Paragraph 5 gives priority to the parallel instrument in matters of recognition and enforcement. It is, however, qualified by the language in brackets which shall guarantee that the judgment should not be recognized/enforced under the instrument to a lesser extent than under the Convention. This provision is linked with the provision of Article 26(6).

Paragraph 6 deals with the (future) possibility of CSs to negotiate instruments in “specific matters”. The provision is controversial which is demonstrated by the contradicting language in two square brackets at the beginning of the provision. One version (“subject to”) would subject this possibility only to situations envisaged by paragraphs 4 and 5, the other (“notwithstanding”) would see this as an “unlimited” option.

It is important to note that as a consequence of the provision of paragraph 2, in combination with paragraph 4, any bilateral or multilateral treaty of a CS with non-Contracting States which contains provisions on “matters governed by this Convention” might be affected. Thus not only treaties containing provisions on choice of court, but any treaty containing provisions on jurisdiction in matters covered by the Convention (Articles 1 and 2) might be influenced: if such treaty did not allow for choice of court and/or contained rules of exclusive jurisdiction, the Convention would prevail (under paragraph 4) and thus the parties could still chose a court (of another State) and such judgment would be recognizable under the Convention.

**Question 24:**

(a) Is it acceptable, as a matter of general policy, that the Convention would prevail over other previous international instruments, thus affecting the international obligations assumed prior to the ratification of this Convention?

(b) To be specific, what would be the practical consequence of the application of such a principle in respect of the bilateral or multilateral treaties existing between the Member States of the European Union and third States, if only some of the Parties to those existing treaties would become Parties to the Convention while others would not? Could this imply a violation of international obligations assumed by the Member States?

(c) To be specific, if the European Community shall become a Party to this Convention but some of the Lugano Convention Parties shall not, and vice versa, do you think that such situation could lead to incompatibility with the obligations assumed under the Lugano Convention and therefore imply a violation of the Lugano Convention?

(d) Is the phrase between square brackets in paragraph 5 of Article 23 acceptable?

(e) Is it acceptable that the Convention will prevent its Contracting Parties from becoming Parties to any future international instrument regulating a specific subject matter which
would contain rules affecting this Convention (e.g. rules on exclusive jurisdiction for certain matters)? This would be the case, should paragraph 6 be rejected or not be appropriately drafted.

**Article 26 (former Article 22)**

This article is intended to solve specific problems arising out of a situation where a Regional Economic Integration Organisation (such as EC) can become bound by the Convention in its own right.

Paragraphs 4 to 6 have a particular bearing on the Convention text itself. Under paragraph 4 any reference to a “CS” shall include where appropriate a reference to a Member State of the REIO. The reference to Article 22 (non-unified legal systems) would put the REIO Member State into a situation comparable with the territorial unit of a non-unified CS. This wording is, however, still not accepted unequivocally and is therefore in square brackets.

Paragraph 5 is opposite construct to paragraph 4 where the reference to a CS is to be understood to be a reference to REIO.

Paragraph 6 reproduces (text in square brackets included) the policy of Article 23(5). The difference here is that it applies only in a situation where the REIO would ratify the Convention for all its Member States and make a declaration under paragraph 4, whereas Art. 23(5) comes into application when the Member States would ratify the Convention by themselves.

**Question 25:**

Do you have any comment on the policy questions contained in article 26(4) and 26(5)?

**VIII - Final considerations:**

**Non-exclusive choice of court agreements**

It has been suggested previously that the Convention should not apply only to “exclusive” choice of court agreements, but could, at least in certain circumstances, apply also to non-exclusive choice of court agreements. Non-exclusive agreements (as a consequence of the present definition in Article 3 (a)) would be those where the parties designate:

- courts of two and more Contracting States, or
- specific courts in two or more Contracting States,

or where the parties expressly agree that their choice of court(s) is not exclusive.

There have been also arguments that such extension of the scope of the Convention would lead to the necessity of including some rules on *lis pendence*, whereas, based on the previous negotiating experience, the inclusion of such rules in the worldwide context seems very unlikely to succeed.
There has been a proposal which tries to solve the problem of *lis pendence* at the stage of recognition and enforcement which might provide a solution for having judgements given on the basis of a non-exclusive choice of court agreement recognized under the Convention:\(^9\):

“[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 seised 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 recognised 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 recognised or enforced in the State addressed.”.

The inclusion of non-exclusive choice of court agreements could extend the applicability of the Convention and consequently extend its utility for recognition and enforcement of judgements. It could also enhance the predictability of use for the parties in situations where, for whatever reason the (only) chosen court does not or cannot exercise its jurisdiction.

**Question 26:**
(a) Do you think that the Convention should allow the recognition and enforcement of judgments given on the basis of a non-exclusive choice of court agreement?
(b) If yes, what is your position on the adoption of a solution proposed in the text above?

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\(^9\) WD 92 presented by the US delegation on Article 10 (then Article 7), adding paragraph 1bis.
List of questions included in the document:

**Question 1:**
(a) Do you agree with the analysis of Article 1?
(b) Which of the options would you favour?

**Question 2:**
(a) Do you consider the current exclusions from the scope sufficient?
(b) Should *all* physical persons be excluded, irrespective of the character (purpose) of their activities?
(c) Should the scope be expressly limited only to “business-to-business” situations, thus excluding e.g. non-profit organisations?

**Question 3:**
(a) Are these exclusions for industrial property rights sufficient or on the contrary too broad, taking into account the underlying policy considerations, as well as the application of Articles 6 and 10 on incidental questions and Article 23?
(b) Is the inclusion within the scope for copyright and related rights acceptable and should the Convention take into account the position of individual authors as the weaker to a contract?

**Question 4:**
(a) Do you agree with the policy that a court chosen could, by virtue of rules of internal allocation of jurisdiction, transfer the case to another court within the same CS against the original intention of the parties?
(b) Shall a judgement given by a court to which the case was transferred by the court chosen by virtue of the rules on internal allocation of jurisdiction qualify for recognition under the Convention?

**Question 5:**
(a) Should the chosen court be allowed to decline exercising jurisdiction in certain cases where the court of another State was seized?
(b) If yes, in which cases?

**Question 6:**
(a) Could you accept the deletion of the words “under the law of the State of the chosen court” in Article 7(a)?
(b) If the present wording of Article 7(a) is retained, what other exception and to what extent are needed for this Article to achieve its needed flexibility?

**Question 7:**
Do you consider the provision of Article 7(b) necessary?

**Question 8:**
In view of the examples presented in application of Article 7(c), taking into account the different interests involved, which wording of this provision would, in your opinion, achieve best the proper balance between the various interests involved?

**Question 9:**
Is the provision of Article 7(d) still necessary if the exception of Article 7(c) exists?
Question 10:
(a) Should the court not chosen be allowed to exercise its jurisdiction as soon as any (one) of the chosen courts refuses to hear the case?
(b) If the final policy decision accepted at the Hague shall be that the judgement given by a court to which the case was transferred from the court chosen under Article 5(3)(b) shall be recognisable under the Convention, should the court not chosen be prohibited to exercise its jurisdiction in cases where the reason for the chosen court not to hear the case was the internal transfer?

Question 11:
(a) Are the consequences of the present text of Article 7(f) acceptable?
(b) If not, what policy should be followed?

Question 12:
(a) Shall the State addressed have the power to review whether the agreement was null and void under the law of the State of the chosen court?
(b) Shall the judgement given by the chosen court be recognisable under the Convention irrespective of the ground on which the chosen court based its jurisdiction?

Question 13:
Is it a desired outcome that the capacity is reviewed under different laws in the court seized and the court addressed for recognition and enforcement?

Question 14:
(a) Is the protection accorded to the defendant by Article 9(c) sufficient?
(b) Or is the protection, on the contrary, too extensive?

Question 15:
(a) Is the ground for non-recognition included in Article 9(d) necessary?
(b) Is, in your opinion, the issue of procedural fraud not covered by the public policy exception under Article 9(e)?

Question 16:
Is the wording of the public policy exception satisfactory?

Question 17:
(a) Is the solution of Article 9(1)(f) relating to the non-recognition of incompatible judgements satisfactory?
(b) Should the judgement of the requested State be always given priority over a judgement coming from another CS?
(c) Should the judgment of a third State be given priority over a judgment coming from another CS only if it is recognisable under an international agreement or also when it is recognisable under national law in general?

Question 18:
Is the extent of the possibility to postpone/refuse recognition or enforcement provided for in Article 9(4) sufficient?
Question 19:
(a) Is the limitation of recognition as set out in Article 10(3) sufficient?
(b) Should Article 10(3) perhaps be extended to the situation where the defendant (one of the parties) objects and intends to commence validity proceedings in another State?
(c) Should Article 10 (2) and (3) be extended to any incidental rulings, not only IP rights, as in Article 6?

Question 20:
Should the policy of Article 11 be retained in the final Convention?

Question 21:
If a specific provision regulating damages is not included (or if the US proposal is accepted) in the final text of the Convention, would in your opinion the public policy exception to recognition and enforcement of a judgment provide satisfactory solution to the issue of non-compensatory and/or excessive damages?

Question 22:
Should the Community avail itself of the possibility given in Article 18 and make a declaration in respect of courts within the Community?

Question 23:
(a) Shall the same time factor be applied in Article 19 as in Article 1?
(b) If not, what would be the justification for using a different time factor in this Article?
(c) Should the Community avail itself of the possibility provided for by Article 19 and reserve the right not to recognize foreign judgments given in a “purely internal Community” cases?

Question 24:
(a) Is it acceptable, as a matter of general policy, that the Convention would prevail over other previous international instruments, thus affecting the international obligations assumed prior to the ratification of this Convention?
(b) To be specific, what would be the practical consequence of the application of such a principle in respect of the bilateral or multilateral treaties existing between the Member States of the European Union and third States, if only some of the Parties to those existing treaties would become Parties to the Convention while others would not? Could this imply a violation of international obligations assumed by the Member States?
(c) To be specific, if the European Community shall become a Party to this Convention but some of the Lugano Convention Parties shall not, and vice versa, do you think that such situation could lead to incompatibility with the obligations assumed under the Lugano Convention and therefore imply a violation of the Lugano Convention?
(d) Is the phrase between square brackets in paragraph 5 of Article 23 acceptable?
(e) Is it acceptable that the Convention will prevent its Contracting Parties from becoming Parties to any future international instrument regulating a specific subject matter which would contain rules affecting this Convention (e.g. rules on exclusive jurisdiction for certain matters)? This would be the case, should paragraph 6 be rejected or not be appropriately drafted.

Question 25:
Do you have any comment on the policy questions contained in article 26(4) and 26(5)?
Question 26:
(a) Do you think that the Convention should allow the recognition and enforcement of judgments given on the basis of a non-exclusive choice of court agreement?
(b) If yes, what is your position on the adoption of a solution proposed in the text above?

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